

No. 63679-1-I

**COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON**

TESSA ENGLER,

Appellant

v.

CORP. OF THE ARCHBISHOP OF SEATTLE, d/b/a THE
ARCHDIOCESE OF SEATTLE,

Respondent

REPLY BRIEF OF APPELLANT

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FILED
 COURT OF APPEALS, DIVISION I
 2010 FEB -9 PM 3:25

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I. INTRODUCTION

Tessa Engler's claim for loss of parental consortium is well supported under Washington law. Respondent Diocese argues otherwise and urges that this case is one of first impression. It is no such thing. Were the Diocese correct, then a vast number of perfectly permissible consortium claims, recognized for years, never had merit. This is neither the law nor has it been for more than 25 years. The trial court erred. The case should be reinstated.

II. ARGUMENT

A. **Viable Loss of Consortium Claims Do Not Rest Upon a Direct Duty Being Owed by the Tortfeasor to the Loss of Consortium Claimant**

The Diocese contends that to state a claim Ms. Engler must show that the Diocese breached a duty owed directly to Ms. Engler. No Washington authority supports this argument. That Ms. Engler must show the existence of a special relationship between herself and the Diocese—rather than simply the existence of that relationship between Ms. Engler's father and the Diocese—is nonsense.

The law merely requires that a consortium claimant have a specific kind of relationship with the victim of the tortfeasor, since those in such relationships are foreseeably harmed when their spouse or parents are

harmed. Claims by children for loss of parental consortium were first recognized in *Ueland v. Reynolds Metal Co.*, 103 Wn.2d 131, 691 P.2d 190 (1984). There, Washington's common law was expanded to permit children of an injured parent to recover for damage to their parent/child relationship stemming from injury to their parent.

Nothing in *Ueland*, or in any case decided since *Ueland*, stands for the proposition that the tortfeasor must violate a duty owed directly to the consortium claimant. Were this true, it would stand existing Washington law on its head. It would gut the claims of many who suffer losses when those they are related to are directly harmed by a tortfeasor, e.g., the spouse of the person harmed by the negligent medical provider, or the child of the parent injured or killed by the errant driver. None of these consortium claimants have ever been required to show—nor could they show—a violation of duty to themselves. The spouse of the man injured during surgery is nowhere near the surgical suite at the time of injury. The child of the man killed in the car accident may be at home, or school, or 1000 miles away from the place of the accident. But each has a cognizable consortium claim. Recognizing the Diocese's argument would mean such claimants have no claims.

B. The Rules Are No Different When Injury to the Parent Comes from Sexual Abuse, and Not a Car Crash

Washington was a pioneer in protecting the rights of persons who, as adults, sought to sue for harm discovered by such adults which stemmed from years earlier sexual abuse of them. Following dismissal of such a claim by a granddaughter abused by her grandfather, in *Tyson v. Tyson*, 107 Wn.2d 72, 727 P.2d 226 (1986), the Washington legislature changed the law to protect and benefit childhood victims of sexual abuse. The legislature recognized that it was common for child abuse victims to only discover later that such abuse had produced real and enduring harm. It enacted the childhood sexual abuse statute of limitations, RCW 4.16.340, which preserved for such adults the ability to bring their claims as adults so long as criteria required by the statute were met.

As pleaded here by Ms. Engler, her father had and brought such a claim in 2005. The claim arose from abuse he suffered at the hands of Diocesan priests when he was a schoolboy. Appellant pleaded in her complaint that her father's claim was successfully prosecuted against the Diocese. It is no surprise, and certainly no unfairness, that he could succeed with such a claim. Others before him did likewise and his claim was no different than the claims brought by other adults who were sexually abused during childhood. *Cloud ex rel. Cloud v. Summers*, 98

Wn.App. 724, 991 P.2d 1169 (1999); *C.J.C. v. Corp. of Catholic Bishop of Yakima*, 138 Wn.2d 699, 985 P.2d 262 (1999); *Miller v. Campbell*, 137 Wn.App. 762, 766, 155 P.2d 154 (2007); *Hollmann v. Corcoran*, 89 Wn.App. 323, 334, 949 P.2d 386 (1997); *Oostra v. Holstine*, 86 Wn.App. 536, 543, 937 P.2d 195 (1997).

Against this background, the Diocese argues that whatever the merit of the claim brought by Ms. Engler's father, Ms. Engler cannot be 'born into' a claim. It argues that if Ms. Engler was unborn when her father—during his childhood—was sexually abused, she cannot assert a consortium claim. This derivation of the argument that a claimant cannot 'marry into' a claim has been soundly rejected by Washington's Supreme Court. Washington does not permit a tortfeasor to obtain protection from consortium claims merely because some part of the process which produced the claim happened prior to the plaintiff's marriage to a spouse or the plaintiff's parenting of a child. *Green v. A.P.C. et al.*, 136 Wn.2d 87, 960 P.2d 912 (1998).

In *Green*, a "DES daughter" discovered that her mother's many years earlier prenatal ingestion of diethylstilbestrol damaged her reproductive system. At the time they married, neither the daughter nor her husband knew she had such damage or that she would later make a claim against the DES manufacturer. Ms. Green was not aware until age

25 that she had a T-shaped uterus, a common occurrence in women exposed *in utero* to DES. She did not know what effect this would have upon her child bearing capability until she became pregnant at age 27, and experienced a difficult pregnancy and the premature birth of her son. She sued A.P.C., the drug manufacturer, and Mr. Green's consortium claim was included in the suit. The trial court dismissed Mr. Green's claim, erroneously believing that "(1) a person should not be permitted to marry a cause of action; (2) one assumes with a spouse the risk of deprivation of consortium arising from any prior injury; (3) as a matter of policy, tort liability should be limited." *Green*, 136 Wn.2d at 101 [citing *Stager v. Schneider*, 494 A.2d 1307, 1315 (D.C.App. 1985)]. The Supreme Court addressed in turn why each of the reasons supporting the trial court's action were unpersuasive:

[T]he listed three rationales for the majority rule ignore the circumstance in which the injury to the affected spouse is latent and unknown. Joshua Green could not have married a lawsuit in 1988 if Kathleen herself did not know then she had a T-shaped uterus that would cause her to have difficult pregnancies. The 'assumption of risk' rationale suffers from the same defect. One cannot assume a risk one does not and cannot know about. The third rationale is also weak; it is surely foreseeable that a future spouse or close relative might suffer loss of consortium damages. The class of potential plaintiffs is therefore quite limited, confined to those who might some day be in consortium with an injured party. Thus, allowing such claims does not expose a tortfeasor to unbounded liability.

Green, 136 Wn.2d at 101-102. The same reasoning applies here. Tessa Engler could not have been “born into” a lawsuit if, at the time of her birth, her father was unaware of the harm caused to him by Diocese priests. By the same logic, she could not assume the risk of harm done to her from harm her father had not even discovered yet. And, it is surely foreseeable that a victim of childhood sex abuse may later have a spouse or child who will suffer harm stemming from the changes wrought in the victim by the abuse experience.

C. Recognition of Consortium Claims Arising from Remote Asbestos Exposure Illustrate Why Tessa Engler Has A Viable Consortium Claim

It is now well known that much of the injury caused by exposure to asbestos manifests long after exposure. Indeed, the most serious asbestos related disease—mesothelioma—often first produces symptoms more than 30 years after exposure:

Mesothelioma is a type of cancer affecting primarily the lining of the lungs. It was relatively rare until the widespread use of asbestos. Mesothelioma becomes a serious problem 30 to 35 years after onset of exposure. Untreated cases almost always result in death within a year, and current conventional treatment has done little to alter the prognosis. The medical profession has produced strong evidence establishing a causal connection between mesothelioma and asbestos exposure.

White v. Johns-Manville Corp., 103 Wn.2d 344, 693 P.2d 687 (1985)
(citing Comment, *Manifestation: The Least Defensible Insurance*

Coverage Theory for Asbestos-Related Disease Suits, 7 U. PUGET SOUND L. REV. 167, 170 n. 9 1983). Asbestos claimants are permitted to sue asbestos manufacturers for illnesses caused by asbestos exposure experienced long before plaintiff's discovery of the harm caused by the remote asbestos exposure. In this setting, nothing impedes their spouses—and minor children—from bringing loss of consortium claims.

In *Hoglund v. Raymark Industries, Inc.*, 50 Wn.App. 360, 749 P.2d 164 (1987), a former shipyard worker was diagnosed with asbestosis in 1972, having worked in the shipyards for 34 years. He sued the asbestos manufacturers in 1981. His wife successfully made a claim for loss of consortium based upon his injuries, despite the fact that his asbestos exposure began prior to their marriage. If the Diocese's argument were right, Mr. Hoglund would have a claim, but the universe of children/spouses who did not occupy their legal status of wife or child at the time of asbestos exposure would be barred from making consortium claims. No Washington court has ever so held. The Diocese cites no authority for its position. No conceivable logic or policy supports discriminating between consortium claimants based upon their status at some remote prior time which preceded the time when the principal claim accrued.

D. Loss of Consortium is a Well-Established Cause of Action

Loss of consortium is a valid, important, and long-recognized form of claim in American jurisprudence. Marital loss of consortium has been recognized in Washington State since 1935. *Hinton v. Carmody*, 182 Wn. 123, 45 P.2d 32 (1935). *Hinton* only recognized loss of consortium to a husband for the loss of his wife's services. In 1980, Washington broadened its law and recognized that both husbands and wives may have claims for loss of spousal consortium. *Lungren v. Whitney's, Inc.*, 94 Wn.2d 91, 614 P.2d 1272 (1980). More recently, courts have recognized the importance of consortium between parents and children and the injuriousness of harm done to that relationship. Prior to its general recognition, Prosser criticized the unwillingness of courts to identify loss of parental consortium as a "genuine" and "serious" injury. W. Prosser, *Torts* § 125, p. 896 4th ed. 1971. And indeed, in first recognizing this cause of action, the *Ueland* court stated:

When justice requires, this court does not hesitate to expand the common law and recognize a cause of action . . . to defer to the Legislature in this instance would be to abdicate our responsibility to reform the common law to meet the evolving standards of justice.

Ueland, 103 Wn.2d at 136.

Without support of any kind, Respondent argues that Ms. Engler’s claim is for “less than ideal consortium,” rather than for loss thereof. The court in *Ueland* defined loss of parental consortium as “loss of companionship, advice, destruction of the parent-child relationship, and future support, and emotional injury.” *Ueland*, 103 Wn.2d at 134. The Diocese implies that since Mr. Engler suffered no “severe and permanent . . . physical disabilities” (Respondent’s Brief, page 9; citing *Ueland* at 132), Ms. Engler’s claim for loss of parental consortium should not stand. This attempted differentiation—between consortium claims for the spouse or children of physically injured plaintiffs and consortium claims for the spouse or children of psychologically injured parents—has no support. Indeed, direct Washington authority recognizes the very nature of the claim Ms. Engler asserted. *Burchfiel v. Boeing Corp.*, 149 Wn.App. 468, 495, 205 P.3d 145 (2009) (loss of consortium damages properly awarded where the injured spouse suffered “solely economic, emotional, or psychological injury;” Court refused to limit recovery for loss of consortium to cases involving bodily injury).

It is easy to conceive that children of psychologically injured parents can suffer more—loss of love, care, companionship and guidance—as a result of the parent’s injury than children of physically injured parents. Nowhere in the *Ueland* opinion does the court limit the

child's cause of action for loss of consortium to only those cases where a parent has been physically injured: "Surely the child's loss of the parent's love, care, companionship and guidance is nearly the same in both situations," that is, when a parent is killed versus merely injured. *Ueland*, 103 Wn.2d at 134. This reference arose during the Court's discussion of the contradiction between allowing consortium claims in the wrongful death setting but not in the injury alone setting. As Ms. Engler will demonstrate, a child can certainly suffer harm as a result of prior psychological trauma suffered by the child's parent.

The relevant concern here is whether Mr. Engler was the same parent having been a victim of childhood sexual abuse as he would have been had he not been molested and sodomized by the priests he trusted. The Diocese confuses whether Ms. Engler can *prove* that the parenting by her father suffered due to his sexual abuse history with whether there is a prohibition against such claims. Ms. Engler must still prove her claim. But she has a claim as a matter of law.

E. All Loss of Consortium Claims Are Fact Specific And Concern Whether the Injured Parent/Spouse Provided Less Due to Injury to Him or Her Than Would Otherwise Be the Case

Respondent goes on to argue that Ms. Engler may not sue for loss of consortium because "the law has not recognized a legal duty to insure

an idealized relationship with an imagined parent.” Respondent’s Brief, page 10. This is no different than a defendant—having tortiously broken the leg of the consortium claimant’s parent—contending that a child has no right to have a parent without a broken leg. This argument, too, has no legal support. To the contrary, the law has recognized a duty on the part of defendants who negligently injure parents to compensate children for the loss of what the parent would have provided to the children but for the injury. *Ueland*, 103 Wn.2d at 134. Prior to the recognition of a separate cause of action for loss of parental consortium, “the children’s loss was a proper item of damage in the father’s potential recovery [for his loss of their mother’s consortium].” *Ueland* at 132, citing *Erhardt v. Havens, Inc.*, 53 Wn.2d 103, 330 P.2d 1010 (1958). While claims for loss of parental consortium are certainly properly raised following the death of a spouse, parent or child, death or debilitating physical injury is not a required element of such claims. Ms. Engler need only assert that her father was negligently injured by the Diocese and that her own welfare was harmed by the injury to her father.

F. No Floodgates Will Open As a Result of Claims Like Ms. Engler’s Being Prosecuted

The Diocese asserts that recognition of Ms. Engler’s claim will lead to an unworkably ‘open-ended’ statute of limitations on similar

consortium claims. Respondent's Brief, page 9. This issue is not even within the province of Washington's courts. The legislature long ago decided that victims of childhood sexual abuse were different, were injured in more subtle and complex ways than others, and were deserving of special protection from the usual statute of limitations. That this inevitably breathed life into otherwise time barred claims was a decision the legislature made and to which all now adhere.

In advancing this argument, the Diocese misstates the nature of Ms. Engler's claim, and the law. Allowing Ms. Engler's claim would not drown the courts in suits brought by any child who feels that he has enjoyed "less than ideal consortium" with a parent. The universe of potential loss of consortium claimants is limited to spouses and children of abuse claimants—quite a limited number—and is not bounded instead by the whim of every adult who now wishes to claim that his or her upbringing was suboptimal.

The Diocese further argues that Mr. Engler "will have the opportunity to effectively relitigate his cause of action and assist a family member with seeking further damages." Respondent's Brief, page 14. (emphasis added). But, really, this too is an imaginary horrible. This case, and Ms. Engler, are unique. Ms. Engler's claim was not joined with her father's claim—which would be the typical presentation of such a

claim and which would ordinarily result in resolution of all principal and consortium claims in a single action—but she still must show that it was not feasible to join his claim when he brought it. *Ueland*, 103 Wn.2d at 194. That appellant and her father were long estranged at the time he brought his claim will demonstrate why appellant could not join her consortium claim with her father’s claim. The validity or lack of validity of any consortium claim is unaffected by when the claim is brought, absent a statute of limitations problem.

G. Ms. Engler’s Complaint Satisfied All Requirements of CR 12(b)(6)

In order to defeat dismissal, Ms. Engler need only demonstrate that hypothetical facts exist which would entitle her to relief. *Bravo v. Dolsen Companies*, 125 Wn.2d 745, 750, 888 P.2d 147 (1995). “In determining whether such facts exist, a court may consider a hypothetical situation asserted by the complaining party, not part of the formal record, *including facts alleged for the first time on appellate review* of a dismissal under [CR 12(b)(6)].” *Gorman v. Garlock, Inc.*, 155 Wn.2d 198, 214, 118 P.3d 311 (2005), *quoting Halvorsen v. Dahl*, 89 Wn.2d 673, 674, 574 P.2d 1190 (1978) (emphasis in original). As pleaded, Ms. Engler has stated the claim that the injury to her father—which was the fault of the Diocese—also produced injury to her father/daughter relationship. It is certainly a

psychological known that psychological damage done to a parent will affect that parent's subsequent relationship with his or her child. Using the 'hypothetical' standard, Ms. Engler has asserted sufficient facts to base a claim that her relationship with her father was damaged as a result of the damage done to her father. Further, it is no hypothetical stretch to claim that had Mr. Engler never suffered the abuse, he would have been better able to provide his daughter with a beneficial and stable parent/child relationship.

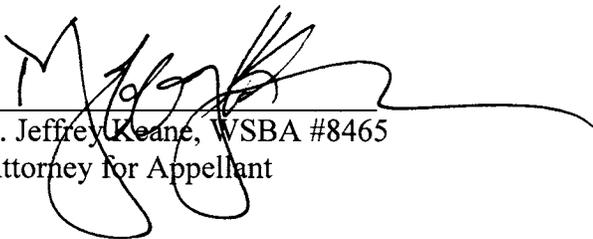
Finally, the Diocese argues that dismissal was appropriate because the abuse Mr. Engler suffered at the hands of Diocese priests was not the proximate cause of Ms. Engler's claim for loss of consortium. In the setting of a CR 12(b)(6) motion, Ms. Engler need only hypothetically make this showing. She was not required below to provide proof of a connection between the abuse visited upon Ms. Engler's father and the damage and injury suffered by Ms. Engler as a result. For pleading purposes, she made a sufficient showing.

III. CONCLUSION

In light of the foregoing, Ms. Engler respectfully requests that this Court reverse the order of dismissal and remand the case for further proceedings.

Respectfully submitted this 9 day of February, 2010.

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ARCHBISHOP OF SEATTLE d/b/a)	
THE ARCHDIOCESE OF SEATTLE,)	
)	
Respondents.)	

The undersigned declares under penalty of perjury, under the laws of the State of Washington that the following is true and correct:

That on February 9, 2010 I sent, via facsimile and U.S. Mail, a true and correct copy of the Appellant’s Reply Brief to:

Michael Patterson
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Signed at Seattle this 9th day of February, 2010.



Donna M. Pucel