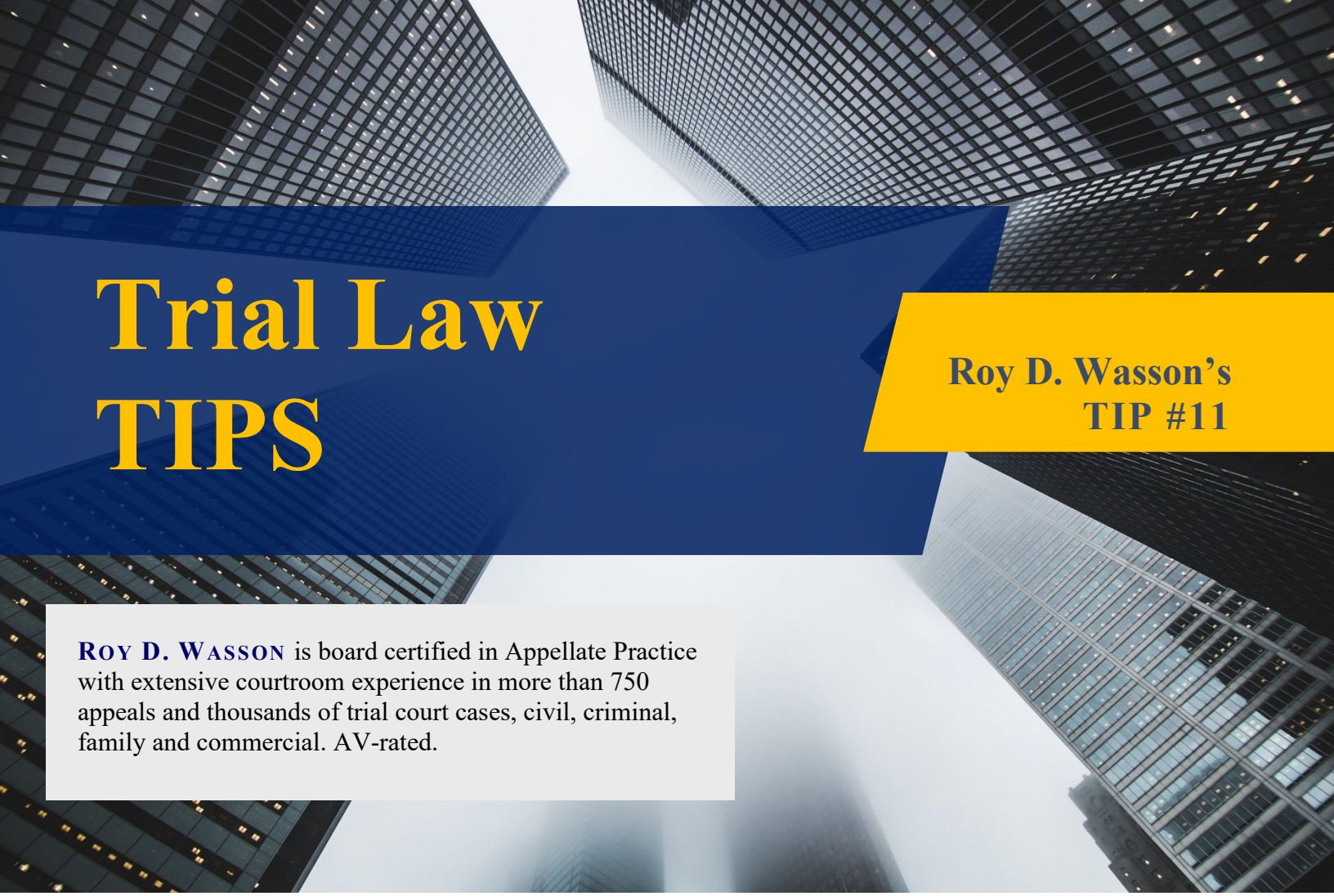

Trial Law TIPS

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Proving Damages for Loss of Consortium Claims

Introduction

Under Florida law, there is no permanency requirement or other minimum threshold of severity necessary to recover loss of consortium damages. Instead, the only threshold is the one which the bodily-injured spouse must meet to recover pain and suffering. Several reported cases have recognized the recovery of even nominal loss of consortium, thereby indicating the lack of need to prove long-lasting damages. Other cases have reversed the denial of loss of consortium damages where the evidence established that the duration of those losses was as little as one week or a few weeks.

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Only the Spouse Suffering Bodily Injury Must Exceed Threshold

The threshold which must be met to support a claim for loss of consortium is not that the ***consortium loss*** is permanent, but that the ***physical injuries*** to the other spouse are permanent. Absent a finding of permanent injury to the spouse suffering bodily injuries, the spouse claiming lost consortium may not recover for his or her damages. *See Faulkner v. Allstate Ins. Co.*, 367 So. 2d 214, 217 (Fla. 1979)("Mrs. Faulkner's claim for loss of consortium is derivative in nature and wholly dependent on her husband's ability to recover. . . . Since Mr. Faulkner's claim is barred by his failure to meet the no-fault threshold (except as provided herein) his wife's claim is likewise barred"). *See also, e.g., McDaniel v. Prysi*, 432 So. 2d 174, 175 (Fla. 2d DCA 1983)("Even if the evidence was sufficient to sustain a claim of loss of consortium, Margaret was not entitled to recover damages unless her husband met the permanency threshold"). *Accord, e.g., Commercial Clean-Up Enterprises, Inc. v. Holmquist*, 597 So. 2d 343 (Fla. 2d DCA 1992).

Once the injured plaintiff is found to have suffered a permanent injury, however, his or her spouse may recover loss of consortium damages, even if the damage to the marital relationship is only temporary.

Awards of Lost Consortium for Temporary Losses

Numerous reported decisions have reversed awards of zero to the spouse claiming loss of consortium damages where the unrebutted evidence established harm to the marital relationship of some duration, without any need for the jury to find permanent damage to that relationship. A typical general statement of the law in this area is as follows: "Where damages are awarded to an injured spouse and a loss of consortium claim is filed, the spouse claiming loss of consortium is entitled to at least nominal damages if there is substantial, unrebutted testimony that the accident has had a

substantial impact on the couple's marital life." *Frye v. Suttles,* 568 So. 2d 983 (Fla. 1st DCA 1990). *See also, e.g., Big Lots Stores, Inc. v. DeDiaz*, 18 So. 3d 1065 (Fla. 3d DCA 2009), which held:

> Further, regarding the loss of consortium issue, we find that undisputed evidence was presented on Mr. Diaz's loss of consortium claim to require an award of at least nominal damages. *See Tavakoly v. Fiddlers Green Ranch of Fla., Inc*., 998 So. 2d 1183 (Fla. 5th DCA 2009) (holding that where the plaintiff established entitlement to some damages for loss of consortium, a zero verdict is inadequate as a matter of law), and citations therein; *Jones v. Double D Props., Inc*., 901 So. 2d 929, 931 (Fla. 4th DCA 2005)("When the claiming spouse presents evidence that is substantial, undisputed, and unrebutted concerning the impact the injury had on the marital relationship, such spouse is entitled to receive at least nominal damages for loss of consortium."); *Fleming v. Albertson's, Inc*., 535 So. 2d 682, 684 (Fla. 1st DCA 1988); *see also Aurbach v. Gallina*, 721 So. 2d 756, 758 (Fla. 4th DCA 1998) (on a consortium claim, where sufficient undisputed evidence was presented that would require an award of at least nominal damages, a zero verdict is inadequate as a matter of law), approved, 753 So. 2d 60 (Fla. 2000); *Christopher v. Bonifay*, 577 So. 2d 617 (Fla. 1st DCA 1991) (a spouse is entitled to reversal of a zero verdict only if it can be established that the record contains substantial, undisputed evidence of loss of consortium).

Id. at 1068.

That requirement of a "substantial" impact to the couple's life does not mean that the impact has to last forever. Far from it; the courts reverse verdicts of zero on consortium claims even where the evidence shows the duration of the impairment of the plaintiffs' marital relationship to be a matter of days or weeks.

In *Aurbach v. Gallina*, 721 So. 2d 756 (Fla. 4th DCA 1998), the court addressed evidence of the duration of Marcia Aurbach's loss of consortium (which it held was sufficient to prevent a zero verdict on that claim) by citing her injured spouse's hospital confinement for "***twelve days"*** and his post-discharge rehabilitation which lasted "***some months.***" The court held as follows:

> On a consortium claim, where sufficient undisputed evidence was presented that would require an award of at least nominal damages, a zero verdict is inadequate as a matter of law. *See Waldron v. Dorsey*, 585 So. 2d 403, 404 (Fla. 1st DCA 1991); *Christopher v. Bonifay*, 577 So. 2d 617 (Fla. 1st DCA 1991). . . . In this case, there was ***undisputed evidence that supported a consortium award***. After the accident, Michael Aurbach was ***confined in the hospital for 12 days***, during which he underwent surgical procedures. Upon his release from the hospital, his injuries limited him to the first floor of his home and he required Marcia's assistance to perform personal hygiene functions, such as shaving and bathing. In addition to a cervical fracture, Michael Aurbach's foot and ankle could not bear weight ***for some months after the accident***.

Id. at 758(emphasis added). There is nothing in the *Aurbach* decision to support the notion that the wife suffered loss of consortium damages beyond the days when her husband was

hospitalized and the months it took him to recover. No "permanent" loss of consortium was required.

In another case on the subject, the jury's award of zero dollars for a husband's loss of consortium was held to be legally inadequate in *DeLong v. The Wickes Co.*, 545 So. 2d 362 (Fla. 2d DCA 1989). The court reversed for a new trial on those damages based on cited evidence of disruptions to the marital relationship which the court referred to only in the past tense, without any indication that the damages continued beyond the time of trial. The court stated:

> Mr. DeLong's consortium claim was grounded, among other reasons, upon ***three weeks of total care*** of his wife immediately following the accident, with continued care for a ***lengthy period of time***, ***during which*** he was obligated to perform all the household duties previously the province of his wife. In addition, ***during that time*** he had to forego his profession in real estate sales and had to perform additional jobs in order to support the family. The uncontradicted evidence showed that the DeLongs' life-style and sexual relations ***were*** adversely affected by the accident.

Id. at 364 (emphasis added). The adverse effects to the plaintiffs' lifestyle did not continue into the future. The loss of consortium damages which accrued "during that time" in the past when Mrs. DeLong was recovering were recoverable, without any need to establish that such losses were permanent.[1]

[1] It should be noted that the *DeLong* case was overruled on other grounds by the Supreme Court in *Bulldog Leasing Co. v. Curtis*, 630 So. 2d 1060 (Fla. 1994)(disapproving *DeLong's* grant of new trial on both liability and damages where errors affected only damages). The *DeLong* case also was later clarified by the Second District insofar as it seemed to

One of the strongest cases holding that damages for lost consortium must be awarded where there is clear evidence of only ***past, temporary harm*** to the relationship, is *Christopher v. Bonifay*, 577 So. 2d 617 (Fla. 1st DCA 1991). That decision held that a zero award for loss of consortium was legally inadequate, based on evidence that "[t]he husband at the very minimum lost the services of the wife ***during her one week's stay*** in the hospital and that time ***immediately after her discharge*** while she was convalescing." *Id.* at 618 (emphasis added).

While the *Christopher* case does not clearly reflect that it was an auto case subject to the no fault threshold, later auto cases citing it as authority make it clear that its holding applies to cases in which the spouse sustaining bodily injury must meet the No Fault permanency threshold. And those cases make it clear that a temporary interference with the marital relationship will supportCin fact, ***mandate***Can award of damages for lost consortium.

One of those cases citing *Christopher* approvingly is *Waldron v. Dorsey*, 585 So. 2d 403 (Fla. 1st DCA 1991). That decision clearly holds that temporary periods of harm to the familial relationship, if clearly established, compel an award of damages for lost consortium:

> Although, as appellees assert, some of the evidence as to the parties' consortium claims was conflicting and reflected losses which were otherwise compensated in the jury verdict awarding damages on the other claims, ***appellants did present some substantial, undisputed evidence from which at least nominal damages should have been returned***. For example, the evidence shows that both parties

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recognize a right to recover for loss of consortium even without a permanent injury to the other spouse. But no court has ever disapproved of the *DeLong* court's holding that a zero award for lost consortium was inadequate where there is clear evidence of only ***past*** damage to the spouses' marital relationship.

> ***underwent surgery*** at least twice as a result of their injuries and both ***endured convalescent periods during*** which their abilities to perform normal household and familial duties necessarily were diminished. Thus, while other evidence in the record may serve to diminish certain portions of the consortium claims, sufficient undisputed evidence was presented to require an award of at least nominal damages. Compare Christopher v. Bonifay, 577 So.2d 617 (Fla. 1st DCA 1991) and Jenkins v. West, 463 So.2d 581 (Fla. 1st DCA 1985).

Id. at 404 (emphasis added).

Another useful case which supports the proposition that the standard for recovering loss of consortium damages is the same in cases subject to the No Fault threshold (as to the injured spouse) and those which are not subject to the threshold is *Bach v. Murray*, 658 So. 2d 546 (Fla. 3d DCA 1995)[2]. After citing as controlling on the consortium issue numerous cases involving automobile collisions which would be subject to a permanency threshold requirement (as to the ***injured*** spouse's claim for intangible damages), but which impose no permanency threshold on the derivative claim, the Court in *Bach* reversed the zero consortium award, holding: "[W]e find that as a result of Bach's hospitalization [for five days to treat abrasions, contusions, and a broken nose and toes], albeit brief, no reasonable-minded juror could have denied Carter at least nominal damages for the loss of Bach's consortium during her hospitalization stay." Likewise, in a case where the injured plaintiff has to prove a permanent injury, his or her spouse can recover for a temporary loss of consortium.

Another oft-cited example of the controlling cases on the standards for recovery of loss of consortium damages is *Webber v. Jordan*, 366 So. 2d 51 (Fla. 2d DCA 1978). *Webber* was an auto case in which the injured wife was subject to the No Fault threshold,

[2] No showing of permanency was required to support the injured plaintiff's claim for pain and suffering damages in *Bach* because she was riding a motor scooter when the collision occurred.

which her injuries exceeded. The jury awarded no damages to the husband, and the defendants sought to affirm that ruling on the ground that the medical expenses incurred by the husband were included in the jury's award to the wife. In reversing, the court held that the husband of the injured victim was entitled to some award of damages for loss of consortium for a temporary period before trial in which the injured wife was convalescing:

> We might agree with the defendants were it not for the substantial, undisputed evidence presented in support of the husband's claim for loss of consortium. The record reflects that the wife suffered a severe whiplash injury of the cervical and dorsal spine, a possible injury to a lumbar disc, and a chip fracture of the callus of the bone in the right foot. ***She remained in a wheelchair for over two months after the accident, and the husband incurred $655 in maid service while the wife was disabled.*** Several doctors treated the wife, and she incurred medical expenses of $3,195.23. Admittedly the wife had suffered from back trouble before the accident, and, obviously the jury must have discounted some of the wife's complaints. Nevertheless, it cannot be said that the husband suffered no damages other than medical expenses as a result of the accident.

Id. at 53(emphasis added).

Thus, a period of past disability is all that needs to be shown to support an award of lost consortium damages. The rumor of a need to prove a permanent loss of consortium is nothing more than the current "Courthouse Legend," and it is about as reliable as the warp drive on a Raelian intergalactic capsule. When you see whoever invented this legend, send 'em my way, okay?

Keep Tryin!

Roy

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