

## **The Cheating Spouse and Loss of Consortium**

**The Case:** A lawsuit was filed by a 40-year-old, white female plaintiff who claimed she had a loss of consortium because of the long term recovery from an injury and subsequent death of her husband. The plaintiff contends that a faulty computer caused an explosion in her husband's work place, leaving him severely burned. Although he was burned on over 75% of his body, he was able to survive for a period of nine months. Ultimately, he died of complications associated with the burns.

The plaintiff's husband, Robert, was a member of a maintenance crew in a factory that had recently modified computer designs in the paint shop and cleaning sections of the factory. An ignition flash, at the wrong time, caused volatile gases to ignite and the fire quickly spread through the shop area. Robert was one of three who were caught in the shop. One of the others died at the scene, and the third person survived his serious burns. Robert was engaged in cleaning spray equipment and the computer had indicated the area was shut down and safe. A state fire marshal's investigation determined there was probably a computer malfunction and when a spark was introduced, the explosion occurred.

Robert was literally burned from head to toe and the last nine months of his life were spent in a hospital, where heroic methods were unable to save his life.

Robert and his wife had been married for 12 years, they owned their own home, and had no children. All outward indications are that Robert and his wife enjoyed a normal marital relationship and there was never a separation. During the period of Robert's hospitalization, his wife visited him several times a week, even during periods when he was comatose.

Subsequent investigation disclosed that Robert's wife, the plaintiff, had been involved in an extramarital affair for a period in excess of one year prior to Robert's injury. Evidence supports the conclusion that Robert's wife continued the affair during the period of Robert's hospitalization. Testimony would be produced indicating that, on many occasions, she would visit Robert in the hospital and then proceed to her lover's apartment, where she would visit for several hours.

Testimony would be that the investigators for an insurance carrier discovered the possibility that she may have been having an extramarital affair and that information was then provided to a private investigation agency, who conducted a thorough investigation. Evidence is such that the plaintiff is expected to admit the affair at trial and that her testimony would be that she still loved her husband, suffered a loss, and was engaged in behavior she is ashamed of. She will testify that she was trying to break off the affair at the time of the injury, but she then needed the other person to support her during the time

she was dealing with Robert's burns. It is expected that her testimony will be relatively straightforward and repentant.

**The Research Design:** Research design for this particular focus group was somewhat unusual. For the purposes of the research, the plaintiff, in effect, admits liability. The issue is primarily one of damages with particular reference to loss of consortium. Witnesses were presented in videotape format and a local actress of approximately the same age as the plaintiff was retained to play the plaintiff's role on a videotaped deposition. Additionally, jurors were provided with all appropriate hospital records, charts and photographs. Attorneys represented both sides of the case and gave opening statements in which argument was allowed.

**Case Findings:** Three panels of jurors were used in this research design and all three panels arrived at the same generalized conclusions. The panels unanimously found fault with the plaintiff for her activities, but to a great degree, they minimized her guilt and maximized her loss. Most of the jurors were completely prepared to accept that she could have had a relationship, was planning on breaking it off, and then needed to keep the relationship because of the emotional needs created by the accident.

The jurors were outraged by the fact that a corporation would retain private investigators to "sneak around" and follow a woman to discredit her just to save money. The jurors found the conduct of the corporation to be wholly inappropriate. During a post-deliberation debriefing of jurors, many jurors believed they probably awarded more money because of the investigation than they would have without the investigation.

This trial simulation disclosed that jurors' attitudes are such that it would be extremely risky for a defendant to produce information that a female plaintiff was having an extramarital affair.

**Applicable Findings:**

1. Juries seem to place the right to privacy from corporate America above the right of corporate America to protect itself.
2. Attacking a widow, under these circumstances, places the corporation at great risk.
3. A jury was very quick to find forgiveness for an individual but did not extend any of that feeling to the corporation.
4. Jurors clearly believe that one may have an extramarital affair without reducing the love, need, and attachment due one's mate.

**Comments:**

1. This research design was very specific, dealing with a female survivor and a male decedent. There was no attempt to determine whether the same finding would be made with a male plaintiff and a female decedent.

2. This case involved a long-term illness caused by severe burns. It is very possible that if death had been instantaneous, the jury findings would have been totally different.
3. Any defendant considering using this type of information to reduce a loss of consortium claim should do so with great care. It is highly recommended that each specific case be tested with a trial simulation prior to trial.

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