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To Have and Not Hold: Applying the Discovery Rule to Loss of Consortium Claims Stemming from Premarital, Latent Injuries

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I. INTRODUCTION

> It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if . . . the rule simply persists from blind imitation of the past.[1]

Joel Friedman had a slow growing tumor on his thoracic spine. Unfortunately, his doctors negligently failed to diagnose or treat it.[2] Joel then married his wife, Jihane, with whom he initially had a fulfilling physical relationship.[3] As his illness progressed, however, Joel began experiencing erectile dysfunction.[4] Ultimately, he became completely impotent.[5] When later testing disclosed Joel's undiagnosed tumor, the Friedmans became aware of their cause of action for medical malpractice.[6]

Fortunately, our legal system provides some redress to Joel. The discovery rule[7] protects his claim from the statute of limitations.[8] Joel, however, is not the only victim in this case. His wife, Jihane, has also suffered and will continue to face a significant loss of consortium due to the malpractice of her husband's physicians.[9]

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1. OLIVER WENDELL HOLMES, *The Path of the Law*, *in* COLLECTED LEGAL PAPERS 167, 187 (1952).
2. *See* Friedman v. Klazmer, 718 A.2d 1238, 1238 (N.J. Super. Ct. Law Div. 1998).
3. *See id.*
4. *See id.*
5. *See id.*
6. *See id.*
7. *See infra* Part II.
8. *See* Sandra Conroy, *The Delayed Discovery Rule and* Roe v. Archdiocese, 13 LAW & INEQ. J. 253, 260 (1995) (noting that equitable exceptions have been established by courts to avoid strict statutes of limitations); Susan D. Glimcher, *Statutes of Limitations and the Discovery Rule in Latent Injury Claims: An Exception or the Law?*, 43 U. PITT. L. REV. 501, 501-02 (1982) (explaining that injuries that do not occur immediately often bypass traditional statutes of limitations in many jurisdictions).
9. *See Friedman*, 718 A.2d at 1238.

Unlike Joel, Jihane does not have a cause of action against the physicians in a majority of courts today.[10] As a rule, courts hold that marriage at the time of injury is a prerequisite for bringing a loss of consortium claim.[11] Although a physically injured victim is able to employ the discovery rule to bring the underlying claim of malpractice, most jurisdictions do not allow the deprived spouse[12] to use the discovery rule to circumvent the marriage requirement in bringing a loss of consortium claim.[13] A growing minority of courts, however, allows the deprived spouse to use the discovery rule when the physically injured spouse's injuries have manifested only after the marriage.[14]

Two main factors have brought this issue before the courts in the last ten years. First, toxic tort litigation has become more frequent in recent years.[15] The latency period[16] for injuries caused by toxic substances can range from a few years to more than one generation.[17] A

10. *See* Green v. A.P.C., 960 P.2d 912, 919 (Wash. 1998) (en banc) (recognizing that the majority of courts would not allow loss of consortium damages stemming from a premarital injury). For examples of courts refusing to allow a cause of action based upon a premarital, latent injury, see Doe v. Cherwitz, 518 N.W.2d 362, 364-65 (Iowa 1994) and Anderson v. Eli Lilly & Co., 588 N.E.2d 66, 67-68 (N.Y. 1991).

11. *See infra* note 68.

12. This Note will refer to the spouse who has suffered physical injury as the "injured spouse" and will refer to the spouse who brings the loss of consortium claim as the "deprived spouse."

13. *See supra* note 10.

14. *See Green*, 960 P.2d at 919; *see also* Gregg v. Hay-Adams Hotel, 942 F. Supp. 1, 10 (D.D.C. 1996); Armstrong v. Lamy, 938 F. Supp. 1018, 1051 (D. Mass. 1996); Wiggins v. Equifax Servs., Inc., 848 F. Supp. 213, 225-26 (D.D.C. 1993); Dodson-Barnette v. Support Sys. Int'l, Inc., No. 88-1039, 1989 U.S. Dist. LEXIS 6407, at *2-3 (D.D.C. May 30, 1989); Kociemba v. G.D. Searle & Co., 683 F. Supp. 1577, 1578 (D. Minn. 1988); Stager v. Schneider, 494 A.2d 1307, 1315-16 (D.C. 1985); Morales v. Davis Bros. Constr. Co., 706 So. 2d 1048, 1051 (La. Ct. App. 1998); Herndon v. Southwestern Elec. Power Co., 655 So. 2d 678, 680 (La. Ct. App. 1995); Aldredge v. Whitney, 591 So. 2d 1201, 1204-05 (La. Ct. App. 1991); Gore v. Rains & Block, 473 N.W.2d 813, 817 (Mich. Ct. App. 1991); Moss v. Pacquing, 455 N.W.2d 339, 343 (Mich. Ct. App. 1990); Furby v. Raymark Indus., 397 N.W.2d 303, 305-06 (Mich. Ct. App. 1986); H.R.B. v. J.L.G., 913 S.W.2d 92, 99 n.5 (Mo. Ct. App. 1995); Friedman v. Klazmer, 718 A.2d 1238, 1240 (N.J. Super. Ct. Law Div. 1998); Cleveland v. Johns-Manville Corp., 690 A.2d 1146, 1149 (Pa. 1997); Vazquez v. Friedberg, 637 A.2d 300, 301 (Pa. Super. Ct. 1994); Berardi v. Johns-Manville Corp., 482 A.2d 1067, 1071 (Pa. Super. Ct. 1984).

15. *See* Kim Marie Covello, Wilson v. Johns-Manville Sales Corp. *and Statutes of Limitations in Latent Injury Litigation: An Equitable Expansion of the Discovery Rule*, 32 CATH. U. L. REV. 471, 471 (1983); Michael D. Green, *The Paradox of Statutes of Limitations in Toxic Substances Litigation*, 76 CAL. L. REV. 965, 966-67 (1988). Some of the most prominent examples of toxic tort cases are those involving DES, Agent Orange, and asbestos. *See id.* at 976.

16. For the purposes of this Note, the "latency period" is the time span after the force causing injury has been set in motion and before its deleterious effects have manifested.

17. *See* Green, *supra* note 15, at 973. For instance, asbestos-related diseases might not manifest until 15 to 50 years from the time of exposure. *See id.* Similarly, injuries resulting from in utero DES exposure often exist for many years without detection; indeed "DES daughters" commonly do not discover their injuries until they first attempt to become pregnant. *See*

person exposed to a toxic substance may not discover the resulting injury until after marriage because of these long latency periods.[18]

The second factor that has caused plaintiffs to bring loss of consortium claims before the courts at an ever increasing rate is the medical and legal acceptance of repressed memory syndrome. Both the medical community and scholarly writings have convinced courts and legislatures to acknowledge this phenomenon.[19] Repressed memory syndrome occurs when children respond to horrible traumas by burying the memories in their subconscious.[20] Since repressed memories are most commonly linked to childhood sexual abuse,[21] many victims have problems functioning sexually after recalling these horrible memories as adults.[22] The resulting sexual dysfunction can cause victims' spouses to suffer a loss of consortium.[23]

Tracey I. Batt, *DES Third-Generation Liability: A Proximate Cause*, 18 CARDOZO L. REV. 1217, 1221 (1996).

18. *See, e.g.*, Consorti v. Owens-Corning Fiberglas Corp., 45 F.3d 48, 51 (2d Cir. 1995) (noting that courts will see an increasing number of loss of consortium claims stemming from premarital, latent injuries due to the large amount of asbestos-related litigation); Clark v. Eli Lilly & Co., 725 F. Supp. 130, 131 (N.D.N.Y. 1989); Anderson v. Eli Lilly & Co., 557 N.Y.S.2d 981, 982 (N.Y. App. Div. 1990), *aff'd*, 588 N.E.2d 66 (N.Y. 1991); *Green*, 960 P.2d at 914.

19. *See* Julie M. Kosmond Murray, *Repression, Memory, and Suggestibility: A Call for Limitations on the Admissibility of Repressed Memory Testimony in Sexual Abuse Trials*, 66 U. COLO. L. REV. 477, 477-78 (1995); *see also* Gary Hood, *The Statute of Limitations Barrier in Civil Suits Brought by Adult Survivors of Child Sexual Abuse: A Simple Solution*, 1994 U. ILL. L. REV. 417, 417-18.

20. *See* Lisa A. Atkins, *Remembered Memories . . . True or False?—Should the Discovery Rule be Applied to Toll the Statute of Limitations?*, 24 CAP. U. L. REV. 581, 582 (1995) (" 'Children struggle not to think trauma-related ideas and not to feel trauma-related feelings. . . . By not thinking about their trauma, by not talking about it, children try to heal their wounds and to look "normal." ' ") (quoting LENORE TERR, TOO SCARED TO CRY 111 (1990)).

21. *See id.* at 581-83.

22. *See* Armstrong v. Lamy, 938 F. Supp. 1018, 1050-51 (D. Mass. 1996); H.R.B. v. J.L.G., 913 S.W.2d 92, 94-95 (Mo. Ct. App. 1995). *See generally* Lisa Bickel, Note, *Tolling the Statute of Limitations in Actions Brought by Adult Survivors of Childhood Sexual Abuse*, 33 ARIZ. L. REV., 427, 429 (1991) (stating that victims of childhood sexual abuse often suffer sexual dysfunction as adults and an "inability to cope with the role of wife"). Psychologists are unsure how these memories are revived. *See* Julie Schwartz Silberg, *Memory Repression: Should it Toll the Statutory Limitations Period in Child Sexual Abuse Cases?*, 39 WAYNE L. REV. 1589, 1595 (1993). Usually, an event triggers the release of the repressed memories. *See id.* at 1595-96. The triggering event can be anything from smelling a particular scent to reading a story about sexual abuse victims. *See id.* at 1596.

23. *See, e.g.*, *Armstrong*, 938 F. Supp. at 1051 (discussing the loss of consortium a wife experienced when her husband recalled long-suppressed memories of childhood sexual abuse); Claus v. Whyle, 526 N.W.2d 519, 521-23 (Iowa 1994) (noting that a husband could not teuch certain parts of his wife's body or engage in foreplay with her after she remembered episodes of childhood sexual abuse). "Revival usually occurs years later, when victims are older and less vulnerable." *Id.* Most jurisdictions today hold that the statute of limitations does not begin to run until the victim recalls the repressed memories. *See* Murray, *supra* note 19, at 477-78.

This Note advocates the minority position, which applies the discovery rule to loss of consortium claims stemming from premarital injuries that remain latent until after marriage. Part II discusses the development of the discovery rule. Part III examines the evolution of the loss of consortium cause of action. Part IV discusses the justifications for the marriage requirement and demonstrates that the justifications are inappropriate in the latent injury context. Part V explains why the discovery rule should circumvent the marriage requirement when the injured spouse's injuries remained latent until after marriage. Part VI examines the reasoning of courts that have refused to apply the discovery rule to such loss of consortium claims. Finally, Part VII concludes that loss of consortium damages should be available in cases of premarital, latent injuries if neither spouse knew or could have known of the injury at the time of the marriage.

II. DEVELOPMENT OF THE DISCOVERY RULE

Statutes of limitations are legislative enactments establishing time limits within which civil claims must be brought.[24] After the time limit has expired, a cause of action is barred regardless of its merits.[25] Statutes of limitations serve three purposes.[26] First, they provide a defendant with reasonable notice of a claim so that he or she may preserve evidence for a defense.[27] Second, they prevent a defendant from fearing unlimited future liability for a particular action.[28] Finally, they encourage people to efficiently adjudicate their grievances.[29]

The most significant exception to the statute of limitations is the discovery rule.[30] The discovery rule delays application of the statute of limitations until the claimant discovers or could have reasona-

24. *See* Conroy, *supra* note 8, at 260. Early English common law courts did not place any time limits on a plaintiff's right to bring a tort claim. *See* Steven L. White, *Toward a Time-of-Discovery Rule for the Statute of Limitations in Latent Injury Cases in New York State*, 13 FORDHAM URB. L.J. 113, 116-17 & nn.27-28 (1985). In 1623, the second Limitation Act was passed, which instituted a statute of limitations for tort actions. *See* Limitation Act of 1623, Jac. 1, ch. 16. Many Colonial legislatures adopted this act with little alteration. *See* White, *supra*, at 117.

25. *See* Conroy, *supra* note 8, at 260 (citing Brian D. Gallagher, *Damages, Duress, and the Discovery Rules: The Statutory Right for Victims of Childhood Sexual Abuse*, 17 SETON HALL LEGIS. J. 505, 525 (1993)).

26. *See* Hood, *supra* note 19, at 424.

27. *See id.*

28. *See id.*

29. *See id.*

30. *See* Green, *supra* note 15, at 976.

bly discovered the cause of action.[31] This rule developed because courts realized the inherent unfairness of barring a claim when the injury could not have been discovered until after the statutory period.[32]

The United States Supreme Court first recognized the discovery rule in *Urie v. Thompson*.[33] In *Urie*, the plaintiff was diagnosed with silicosis caused by continuous exposure to silicone dust at his workplace.[34] Although the three-year statute of limitations would have barred the suit, the Court held that the plaintiff's "blameless ignorance" should not prevent recovery.[35] As one court explained:

> Use of the discovery rule eases the unconscionable result to innocent victims who by exercising even the highest degree of care could not have discovered the cited wrong. By focusing on discovery as the element which triggers the statute of limitations, the discovery rule gives those injured adequate time to seek relief on the merits without undue prejudice to . . . defendants.[36]

Many states were slow to accept the discovery rule after the Supreme Court's *Urie* decision.[37] In the 1960s and 1970s, however, a number of jurisdictions began to apply the doctrine in medical malpractice cases.[38] Today, the vast majority of courts and commentators have endorsed application of the discovery rule in cases involving latent injuries.[39] Courts now commonly apply the discovery rule in pro-

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31. *See* Bickel, *supra* note 22, at 431-32.

32. *See* Cynthia Alice Feigin, *Statutes of Limitations: The Special Problem of DES Suits*, 7 AM. J.L. & MED. 91, 96 (1981).

33. Urie v. Thompson, 337 U.S. 163, 170 (1949); *see also* Atkins, *supra* note 20, at 585. However, California was an earlier proponent of the discovery rule, recognizing the doctrine as early as 1920. *See* Firth v. Richter, 196 P. 277, 281 (Cal. Ct. App. 1920); *see also* Melissa G. Salten, *Statutes of Limitations in Civil Incest Suits: Preserving the Victim's Remedy*, 7 HARV. WOMEN'S L.J. 189, 214 (1984).

34. *Urie*, 337 U.S. at 165-66.

35. *Id.* at 170.

36. Oliver v. Kaiser Community Health Found., 449 N.E.2d 438, 441 (Ohio 1983).

37. Twelve years after *Urie*, only seven states (California, Colorado, Louisiana, Missouri, North Carolina, Pennsylvania, and Texas) had adopted the discovery rule. *See* Teeters v. Currey, 518 S.W.2d 512, 517 (Tenn. 1974).

38. *See id.*; *see also* JOHN W. WADE ET AL., PROSSER, WADE AND SCHWARTZ'S TORTS: CASES AND MATERIALS 602 (9th ed. 1994).

39. *See* Green, *supra* note 15, at 977-78.

fessional malpractice actions,[40] products liability suits,[41] toxic tort claims,[42] and recovered memory cases.[43]

III. EVOLUTION OF THE LOSS OF CONSORTIUM CAUSE OF ACTION

The evolution of the loss of consortium tort[44] reflects societal and legal changes.[45] Courts originally conceived of the cause of action as a master's claim for injury to his servant. The cause of action soon evolved to include a husband's claim for loss of his wife's household services. In modern times, courts have recognized a wife's right to bring a loss of consortium claim and have expanded consortium to include sexual relations, love, and companionship. With the recognition of a wife's right to bring a loss of consortium claim, however, came the requirement that the deprived spouse be married to the injured spouse at the time of injury.[46]

A. Historical Background

The loss of consortium concept developed in the early common law, which recognized a master's cause of action against a tortfeasor who injured his servant.[47] By 1619, the common law developed a similar right of action in a husband, allowing him to recover for injuries to

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40. *See, e.g., Teeters*, 518 S.W.2d at 512, 517 (applying the discovery rule to a medical malpractice action brought by a woman who delivered a child after undergoing a bilateral tubal ligation).

41. *See, e.g.*, Harper v. Eli Lilly & Co., 575 F. Supp. 1359, 1364 (N.D. Ohio 1983) (denying application of the statute of limitations in an action against DES manufacturers, where plaintiffs suffered injuries many years after in utero DES exposure).

42. *See, e.g.*, Wilson v. Johns-Manville Sales Corp., 684 F.2d 111, 112 (D.C. Cir. 1982) (refusing to apply the statuto of limitations to an action brought by the widow of an asbestos worker).

43. *See, e.g.*, H.R.B. v. J.L.G., 913 S.W.2d 92, 95-97 (Mo. Ct. App. 1995) (allowing a man who had repressed memories of sexual abuse by a priest to bring a cause of action after the statute of limitations had lapsed).

44. This Note only considers spousal consortium. Some states have allowed parents and children to bring loss of consortium claims. *See generally* Annotation, *Child's Right of Action for Loss of Support, Training, Parental Attention, or the Like, Against a Third Person Negligently Injuring Parent*, 11 A.L.R.4th 549 (1982); Todd R. Symth, Annotation, *Parent's Right to Recover for Loss of Consortium in Connection with Injury to Child*, 54 A.L.R. 4th 112 (1987).

45. *See* Susan Demidovich, Comment, *Loss of Consortium: Should Marriage Be Retained as a Prerequisite?*, 52 U. CIN. L. REV. 842, 842 (1983); Kris Treu, Comment, *Loss of Consortium and Engaged Couples: The Frustrating Fate of Faithful Fiancees*, 44 OHIO ST. L.J. 219, 219-20 (1983).

46. This Note will refer to the requirement that a marital relationship exist between the deprived spouse and injured spouse at the time of injury in order for the deprived spouse to bring a loss of consortium claim as the "marriage requirement."

47. *See* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 125, at 931 (5th ed. 1984).

his wife.[48] Although recovery was initially granted for the husband's loss of domestic services, courts have broadened the concept of consortium to include affection, companionship, and sexual company.[49]

Originally, courts did not recognize a corresponding cause of action on behalf of an injured husband's wife,[50] as both substantive and procedural barriers prevented her recovery. Courts held that the wife of an injured husband had no cause of action for loss of consortium because the action depended on the master-servant relationship, and courts did not consider the wife to be entitled to her husband's services.[51] Additionally, the courts perceived that a husband's recovery included any damages his wife had suffered because a wife's legal identity merged into her husband's at marriage, preventing her from bringing suit in her own name.[52] Thus, a wife had to be joined by her husband in any suit, and her husband would retain any recovery.[53]

The movement for gender equality in the latter half of the nineteenth century cleared most of the obstacles that prevented women from suing for loss of consortium.[54] Married Women's Acts enabled women to retain earnings, own property, and bring suit on their own behalf.[55] As a result of these Acts, courts began to recognize a woman's cause of action for loss of consortium resulting from *intentional* interference with the marital relationship.[56] Even with this statutory evolution, however, courts still would not allow a married woman to bring a loss of consortium claim resulting from a *negligent* injury to her husband.[57] A husband, however, had long been entitled to

48. *See id.* (citing Hyde v. Scyssor, 79 Eng. Rep. 83 (1620)).

49. *See* KEETON, *supra* note 47, § 125, at 931; *see also* Wood v. Mobil Chem. Co., 365 N.E.2d 1087, 1096 (1977).

50. *See* Treu, *supra* note 45, at 220.

51. *See* Demidovich, *supra* note 45, at 843-44.

52. *See id.* at 843-44.

53. *See id.* This requirement allowed a husband to profit from his own wrongdoing in some instances. *See id.* at 844. For example, the wife of an unfaithful husband could sue his mistress for alienation of affections. Since the husband was entitled to the wife's recovery, he was able to benefit from his infidelity. Claims for alienation of affections and criminal conversation have subsequently been abolished. *See* KEETON, *supra* note 47, § 124, at 930 (recognizing that both causes of action have been abolished or severely limited in a majority of states).

54. *See* Demidovich, *supra* note 45, at 844.

55. *See id*; *see also* Treu, *supra* note 45, at 221. Examples of some states' versions of these acts can be found at ARIZ. REV. STAT. ANN. § 25-214 (West 1991); 750 ILL. COMP. STAT. ANN. 65/0.01-22 (West 1999).

56. *See* Demidovich, *supra* note 45, at 844. This allowed wives to bring suit for alienation of affections and criminal conversation. *See* Treu, *supra* note 45, at 221& n.19. Most states have since abolished these causes of action. *See generally* 41 AM. JUR. 2D, *Husband & Wife* § 270 (1995).

57. *See* Demidovich, *supra* note 45, at 844-45; *see also* Treu, *supra* note 45, at 221.

a legal remedy if a third party interfered, either intentionally or negligently, with his right to a relationship with his wife.[58]

Finally, in 1950, the United States Court of Appeals for the District of Columbia recognized in *Hitaffer v. Argonne Co.*[59] that a wife has equal standing to bring a loss of consortium claim based on a negligent act that injures her husband.[60] While many state courts initially hesitated to depart from the settled rule that barred women from bringing a loss of consortium claim based on negligence,[61] the overwhelming majority of jurisdictions now allow a wife to bring a claim for loss of consortium whether the claim is based on intentional or negligent acts.[62]

B. Consortium and the Marriage Requirement

The *Hitaffer* decision changed the way courts conceptualized the loss of consortium tort.[63] The *Hitaffer* court rejected the idea that loss of consortium was based on a loss of spousal services.[64] Instead, loss of consortium was held to encompass sexual relations as well as the love and companionship of a spouse.[65] The court denounced the traditional reasons for denying a wife's cause of action and based its decision on the mutual rights of both husband and wife that arise out of the marital relationship.[66] Courts have almost uniformly accepted this theory of consortium.[67]

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58. *See* Demidovich, *supra* note 45, at 843.

59. Hitaffer v. Argonne Co., 183 F.2d 811, 819 (D.C. Cir. 1950). Seven years later, *Hitaffer* was overruled in part on a worker's compensation point. *See* Smither & Co. v. Coles, 242 F.2d 220, 221-22 (D.C. Cir. 1957). The loss of consortium holding, however, was unaffected by this ruling and remains good law. *See id.*

60. *See* Demidovich, *supra* note 45, at 845; *see also* Treu, *supra* note 45, at 221. The Supreme Court of North Carolina had previously allowed a similar claim. *See* Hipp. v. E.I. Dupont de Nemours & Co., 108 S.E. 318, 325 (N.C. 1921). However, a later decision effectively overturned this case. *See* Hinnant v. Tide Water Power Co., 126 S.E. 307, 311-12 (N.C. 1925), *overruled by* Nicholson v. Hugh Chatham Mem'l Hosp., 266 S.E.2d 818, 821 (N.C. 1980). *See generally* Demidovich, *supra* note 45, at 845 n.27.

61. *See* Demidovich, *supra* note 45, at 846. Most jurisdictions initially viewed *Hitaffer* as a renegade decision in a well-settled area of law. *See id.* at 846 & n.33 ("Eleven years after *Hitaffer* was decided, only six states had accepted the court's reasoning.").

62. *See id.* at 846; *see also* KEETON, *supra* note 47, § 125, at 932; 41 C.J.S. *Husband & Wife* § 117, at 413-14 (1991).

63. *See* Treu, *supra* note 45, at 221; *see also* Demidovich, *supra* note 45, at 845.

64. *Hitaffer*, 183 F.2d at 814; *see also* Demidovich, *supra* note 45, at 845; Treu, *supra* note 45, at 221.

65. The court stated that loss of consortium encompassed the loss of sexual relations, love and companionship, "all welded into a conceptualistic unity." *Hitaffer*, 183 F.2d at 814.

66. *See id.*

67. *See* KEETON, *supra* note 47, § 125, at 932; *see also* Wood v. Mobil Chem. Co., 365 N.E.2d 1087, 1096 (Ill. App. Ct. 1977); RESTATEMENT (SECOND) OF TORTS § 693(1) (1981); BLACK'S LAW DICTIONARY 213 (6th ed. 1991); Demidovich, *supra* note 45, at 221.

A marital relationship between the parties at the time of injury has therefore become a universal requirement for a loss of consortium claim.[68] Courts have consistently denied recovery to engaged couples[69] and unmarried couples living together.[70] The three primary rationales that courts have offered to justify the marriage requirement are preventing the creation of a cause of action through marriage, assumption of the risk, and limiting tort liability.[71]

IV. THE TRADITIONAL APPROACH TO THE MARRIAGE REQUIREMENT IS NOT APPROPRIATE IN THE LATENT INJURY CONTEXT

Some courts facing loss of consortium claims stemming from premarital, latent injuries have chosen to mechanically apply the common law rule requiring marriage at the time of injury.[72] This approach excludes recovery for married couples who have suffered a loss of consortium resulting from a premarital, latent injury.[73] Courts have proposed three justifications for the marriage requirement: (1) the law should not permit a person to "marry a cause of action"; (2) the risk of future loss of consortium is assumed at the time of marriage; and (3) allowing loss of consortium claims arising from premarital injuries

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68. *See* Rockstroh v. A.H. Robins Co., 602 F. Supp. 1259, 1269 (D. Md. 1985); KEETON, *supra* note 47, at 932. *But see* Bulloch v. United States, 487 F. Supp. 1078, 1085-88 (D.N.J. 1980), *repudiated by* Childers v. Shannon, 444 A.2d 1141, 1141-43 (N.J. Super. Ct. Law Div. 1982); Sutherland v. Auch Inter-Borough Transit Co., 366 F. Supp. 127, 133-34 (E.D. Pa. 1973), *repudiated by* Rockwell v. Liston, 71 Pa. D. & C.2d 756, 757-58 (Fayette County, Pa. 1975). Both of these courts were federal courts applying state law. Subsequent cases in the respective states, however, concluded that marriage at the time of the accident was a prerequisite for a loss of consortium claim. *See Childers*, 444 A.2d at 1141-43; *Rockwell*, 71 Pa. D. & C.2d at 757-58. *See generally* 41 AM. JUR. 2D *Husband & Wife* § 252 (1995); 41 C.J.S. *Husband & Wife* § 117, at 413-14 (1991); Charles Plovanich, Annotation, *Recovery for Loss of Consortium for Injury Occurring Prior to Marriage*, 5 A.L.R.4th 300 (1981 & Supp. 1997).

69. *See, e.g.*, Sostock v. Reiss, 415 N.E.2d 1094, 1099 (Ill. App. Ct. 1980) (refusing to allow a person who was engaged to the injured party at the time of accident to recover for loss of consortium); *accord* Sawyer v. Bailey, 413 A.2d 165, 169 (Me. 1980). *See generally* Treu, *supra* note 45.

70. *See, e.g.*, Curry v. Carterpillar Tractor Co., 577 F. Supp. 991, 993-94 (E.D. Pa. 1984) (refusing te allow a cohabitant of an injured person to recover for loss of consortium); *accord* Laws v. Griep, 332 N.W.2d 339, 340 (Iowa 1983). *See generally* Demidovich, *supra* note 45; Sonja A. Soehnel, Annotation, *Action for Loss of Consortium Based on Nonmartial Cohabitation*, 40 A.L.R.4th 553 (1985).

71. *See* Green v. A.P.C., 960 P.2d 912, 918 (Wash. 1998) (en banc); *see also* Stager v. Schneider, 494 A.2d 1307, 1315-16 (D.C. 1985).

72. *See* Gross v. Sauer, No. 37 83 58, 1992 WL 205277, at *1-*2 (Conn. Super. Ct. Aug. 14, 1992); Fullerton v. Hospital Corp. of Am., 660 So. 2d 389, 391 (Fla. Dist. Ct. App. 1995) ("In the absence of any statutory law on this point, Florida courts are required to follow the common-law rule.").

73. This requirement also prevents recovery for engaged couples and couples living together outside of marriage. *See Stager*, 494 A.2d at 1315-16; *Green*, 960 P.2d at 918-19.

would provide for near-unlimited liability for tortfeasors.[74] These justifications for the marriage requirement are inapposite in the latent injury context, however, and should not bar recovery for a loss of consortium claim.[75]

A. The Spouse of a Person with a Premarital, Latent Injury Does Not Marry a Cause of Action

In limiting loss of consortium claims, courts have often declared that injustice would result from allowing someone to "marry a lawsuit,"[76] suggesting that a tortfeasor should not be held liable for a claim that arises simply because the injured party decides to marry. In *Walsh v. Armstrong World Industries*, the plaintiff was exposed to asbestos in his work environment.[77] At the time of his marriage, the plaintiff had discovered asbestos-related injuries to his lung, and the court emphasized that the plaintiff's spouse knew of her husband's illness and disability before their marriage.[78] The *Walsh* court refused to allow a person to create loss of consortium liability by the voluntary act of marrying a person with manifest injuries.[79]

While the *Walsh* court properly invoked the rule barring a person from marrying a lawsuit when the plaintiff's injuries were manifest at the time of marriage, if the underlying injury is latent at the time of marriage, a court cannot logically conclude that a spouse married a lawsuit.[80] In the latent injury context, the spouse's voluntary act of marriage is to a seemingly uninjured person. Thus, a person whose spouse bears a latent injury at the time of marriage cannot knowingly marry a cause of action because neither spouse knew of the injury at the time of the marriage.[81]

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74. *See Green*, 960 P.2d at 918; *see also Stager*, 494 A.2d at 1315-16.

75. *See infra* Parts IV.A-C.

76. Walsh v. Armstrong World Indus., 700 F. Supp. 783, 786 (S.D.N.Y. 1988).

77. *Id.* at 784.

78. *See id.* at 784-85.

79. *See id.* at 786.

80. *See Green*, 960 P.2d at 918. *Wagner v. International Harvester Co.* is often cited for the proposition that a spouse should not be able to marry a cause of action. *See* Wagner v. International Harvester Co., 455 F. Supp. 168, 169 (D. Minn. 1978). *Wagner* quoted this proposition from a Pennsylvania decision, *Sartori v. Gradison Auto Bus Co.*, 42 Pa. D. & C.2d 781 (Wash. County, Pa. 1967). The Pennsylvania Supreme Court has held that the discovery rule should apply in the premarital, latent injury context. Since it has decided to apply this exception, it does not consider marrying a person with a latent injury as marrying a cause of action. *See* Cleveland v. Johns-Manville Corp., 690 A.2d 1146, 1149 (Pa. 1997).

81. Stager v. Schneider, 494 A.2d 1307, 1316 (D.C. 1985); *see also Green*, 960 P.2d at 918-19.

For example, in *Kociemba v. G.D. Searle & Co.*, a husband brought a loss of consortium claim after an intrauterine device ("IUD") rendered his wife infertile.[82] The IUD had been implanted one year before their marriage.[83] When they married, the couple did not know and could not have known of the damage the IUD caused to the wife's reproductive system.[84] The defendant-manufacturer argued that permitting this claim would allow the plaintiff to marry a cause of action.[85] The court rejected this argument, however, concluding that unless the deprived spouse knew or should have known of the consortium-depriving injury at the time of the marriage, then he could not have "married into" the cause of action.[86] This result demonstrates that the "marry a lawsuit" justification for the marriage requirement is inapposite in the latent injury context.

B. The Deprived Spouse Cannot Assume the Risk of Loss of Consortium If the Risk Is Unknown at the Time of Marriage

In denying claims for loss of consortium brought by couples engaged at the time of injury, courts have emphasized that the deprived spouse assumed the risk of loss of consortium arising from any premarital injury.[87] For example, in *Sawyer v. Bailey*, an engaged couple was involved in an automobile accident on their way to pick up their wedding invitations.[88] The prospective bride suffered severe neck and back injuries.[89] Nevertheless, the couple married a few months later.[90] After the marriage, the bridegroom sued for loss of consortium due to the injuries his wife sustained in the auto accident.[91] In denying his

82. *See* Kociemba v. G.D. Searle & Co., 683 F. Supp. 1577, 1578 (D. Minn. 1988). IUDs are contraceptive devices implanted in a woman's uterus. *See* MARY F. HAWKINS, UNSHIELDED: THE HUMAN COST OF THE DALKON SHIELD 7 (1997). These devices are made of various materials, including plastic, steel, and nylon. *See* 3 J.S. SCHMIDT, ATTORNEYS' DICTIONARY OF MEDICINE AND WORD FINDER I-167 (1999). Although it is uncertain how IUDs prevent pregnancy, the device likely causes an irritation that prevents the uterus from accepting an ovum. *See id.* at I-167 to I-168. Some IUDs have been shown to cause pelvic inflammatery disease and perforation of the uterus, both of which can cause infertility. *See* BOSTON WOMEN'S HEALTH BOOK COLLECTIVE, THE NEW OUR BODIES, OURSELVES 295 (1992). Moreover, IUDs have caused death in some instances. *See id.*

83. *See Kociemba*, 683 F. Supp. at 1578.

84. *See id.*

85. *See id.*

86. *Id.*

87. *See, e.g.*, Green v. A.P.C., 960 P.2d 912, 918 (Wash. 1998) (en banc).

88. Sawyer v. Bailey, 413 A.2d 165, 166 (Me. 1980).

89. *See id.*

90. *See id.*

91. *See id.*

claim, the Supreme Court of Maine declared that the plaintiff assumed the risk of any possible loss of consortium arising from his wife's premarital injury when he entered into the marriage.[92]

Courts should not reach this conclusion in the latent injury context, however. Inherent in the assumption of risk defense is the requirement that the plaintiff have knowledge of the risk and voluntarily assume it.[93] This second justification is absent in cases of premarital, latent injuries, for in those cases the deprived spouse did not have knowledge of the risk at the time of the marriage.[94] A person cannot voluntarily assume a risk of which he is unaware.[95]

For example, in *Stager v. Schneider*, the defendant-physician ordered a routine chest x-ray as part of standard preoperative procedures for his patient's bilateral foot problems.[96] The x-ray revealed an increased density in the right lung, which the physician noted in his report as possibly cancerous.[97] The physician, however, never informed his patient of this condition.[98] Three months later, the patient married.[99] A regular physical examination after the marriage revealed a cancerous tumor on the patient's lung.[100] Surgery was performed to remove the upper lobe of her right lung, two of her ribs, and surrounding nerves, muscles, and tissue.[101]

When the patient sued her physician for the medical malpractice leading to her permanent injury, her husband joined the claim, seeking loss of consortium damages.[102] The court recognized that when the discovery rule controls the underlying claim, the same rule should control the loss of consortium claim, and the court thus allowed the husband's claim.[103] Likewise, in *Friedman v. Klazmer*, the court allowed a nearly identical claim for similar reasons.[104] These courts have recognized the principle that a risk cannot be assumed without knowl-

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92. *See id.* at 167 ("When Daniel Sawyer later took Lynn Jackson as his lawful wedded wife, he took her for better or for worse in her then existing stato of health, voluntarily taking unto himself any marital deprivation that might result from his wife's premarital injury.").

93. *See* WADE, *supra* note 38, at 590(1); *see also* Stager v. Schneider, 494 A.2d 1307, 1316 (D.C. 1985); Green v. A.P.C., 960 P.2d 912, 918 (Wash. 1998) (en banc).

94. *See* WADE, *supra* note 38, at 590(1).

95. *See id.*

96. *Stager*, 494 A.2d at 1310.

97. *See id.*

98. *See id.*

99. *See id.* at 1315.

100. *See id.*

101. *See id.*

102. *See id.* at 1309-10.

103. *See id.* at 1316.

104. *See* Friedman v. Klazmer, 718 A.2d 1238, 1240-41 (N.J. Super. Ct. Law Div.). For a recitation of tbe facts of this case, see *supra* Part I.

edge of the risk.[105] The courts have thus concluded that a spouse cannot assume the risk of loss of consortium if neither spouse knew or had reason to know of any injury at the time of marriage. This conclusion demonstrates that the assumption of risk justification for the marriage requirement is inapposite in the latent injury context.

C. Allowing This Cause of Action Would Not Create Unlimited Tort Liability

In determining whether to allow a loss of consortium claim stemming from premarital, latent injuries, a court first determines whether the tortfeasor owed the deprived spouse a duty of care.[106] This analysis begins by considering the foreseeability of the deprived spouse's injuries.[107] It is foreseeable that a person who suffers a latent injury will subsequently marry, and equally foreseeable that the injury will affect the couple's relationship.[108] Of course, it is also foreseeable that an injured person would have friends, children, siblings,

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105. The District of Columbia Court of Appeals stated:

> The rationale for [the marriage requirement] has been variously stated: a person should not be permitted to marry a cause of action; one takes a spouse in the then existing state of health and thus assumes the risk of any deprivation resulting from prior disability; on social policy grounds, liability at some point must be delimited. We have no hesitance in expressing our agreement with [these justifications] where the issue is the right te claim consortium where the tortious conduct and the fact of injury were both *known or knowable* prior to marriage. That, however, is not this case.

Stager, 494 A.2d at 1315-16 (emphasis added) (citations omitted). The court observed that the deprived spouse did not know of the wrongful conduct or the fact of injury prior te marriage. *See id.* at 1316. The Superior Court of New Jersey, Law Division, made a similar observation:

> While it is true that one may not marry a cause of action, a more accurate statement is that one may not "knowingly" marry a cause of action. Stated another way, a spouse may proceed with a loss of consortium claim where the injury was suffered before marriage, so long as the injury was not discovered or reasonably discoverable by either spouse until after marriage .... Jihane Friedman is entitled to bring her loss of consortium claim since neither she nor Joel Friedman knew, or had reason to know, of Joel's premarital tumor or potential malpractice claim which was not discovered until after their marriage.

Friedman, 718 A.2d at 1240-41.

106. *See* Laurie J. Barsella, Comment, *Negligent Injury to Family Relationships: A Reevaluation of the Logic of Liability*, 77 NW. U. L. REV. 794, 806 (1983).

107. *See id.*

108. *See* Green v. A.P.C., 960 P.2d 912, 919 (Wash. 1998) (en banc). The *Green* court stated:

> [I]t 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 te those who might some day be in consortium with the injured party. Thus, allowing such claims does not expose a tortfeasor to unbounded liability.

See also Consorti v. Owens-Corning Fiberglas Corp., 45 F.3d 48, 51 (2d Cir. 1995) (noting that a loss of consortium claim stemming from a premarital tert is a cause of action that "can be expected to recur in a significant number of cases").

cousins, etc., who might also experience a decline in the quality of their relationship with the injured party.[109]

Given the potential for unlimited foreseeability and subsequent unlimited liability, courts have concluded they cannot possibly compensate every foreseeable injury.[110] In determining tort liability, courts are thus careful to draw a line between compensating the injured and placing undue burdens on tortfeasors.[111] Courts have almost uniformly rejected loss of consortium claims brought by cohabitants or persons engaged to the injured party at the time of accident.[112] The public policy of limiting liability is the primary reason courts have given for rejecting these claims.[113] In *Tong v. Jocson*, for example, the court denied loss of consortium to an engaged party, concluding, " '[N]ot every loss can be made compensable in money damages, and legal causation must terminate somewhere.' "[114]

In contrast to these cases, loss of consortium claims arising out of premarital, latent-effect torts do not create unlimited liability. Indeed, allowing a claim in this situation would not extend loss of consortium beyond the traditional consortium parties—husband and wife.[115] A married couple suing for loss of consortium in a case involving a premarital, latent-effect tort does not expand the traditional consortium parties because the couple meets the marriage require-

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109. *See* Borer v. American Airlines, Inc., 563 P.2d 858, 862 (Cal. 1977) (en banc) ("No one suggests that [brothers, sisters, cousins, in-laws, friends, or colleagues] possess a right of action for loss of . . . consortium; all agree that somewhere a line must be drawn.").

110. *See id*; *see also* Tobin v. Grossman, 249 N.E.2d 419, 424 (N.Y. 1969) ("Every injury has ramifying consequences, like the ripplings of the waters, without end. The problem for the law is to limit the legal consequences of wrongs to a controllable degree."); Barsella, *supra* note 106, at 806 ("While many injuries and losses are foreseeable, not all should be actionable.").

111. *See, e.g.*, *Borer*, 563 P.2d at 862.

112. *See supra* notes 69-70. Although a few courts have allowed recovery in these situations, these cases have been subsequently overruled or repudiated. *See* Bulloch v. United States, 487 F. Supp. 1078, 1087 (D.N.J. 1980) (holding that a New Jersey court would allow a cohabitant's claim for loss of consortium), *repudiated by* Childers v. Shannon, 444 A.2d 1141, 1141-43 (N.J. Super. Ct. Law Div. 1982); Sutherland v. Auch Inter-Borough Transit Co., 366 F. Supp. 127, 133-34 (E.D. Pa. 1973) (allowing a person engaged to the injured party at the time of accident to recover for loss of consortium), *repudiated by* Rockwell v. Liston, 71 Pa. D. & C.2d 756, 757-58 (Fayette County, Pa. 1975); Butcher v. Superior Ct., 188 Cal. Rptr. 503, 511-12 (Cal. Ct. App. 1983) (holding that an unmarried cohabitant may state a cause of action for loss of consortium by showing that the relationship is stable and significant), *overruled by* Elden v. Sheldon, 758 P.2d 582, 590 (Cal. 1988) (in bank).

113. *See, e.g.*, Tong v. Jocson, 142 Cal. Rptr. 726, 727 (Cal. Ct. App. 1977); Sawyer v. Bailey, 413 A.2d 165, 168 (Me. 1980) ("Legal causation must terminate somewhere and in the case of loss of consortium must as a social public policy be limited te the factual status of husband and wife existing at the time of the occurrence of the tortious conduct.").

114. *Tong*, 142 Cal. Rptr. at 727 (quoting Suter v. Leonard, 120 Cal. Rptr. 110, 111 (Cal. Ct. App. 1975)).

115. *See* cases cited *supra* notes 67-68.

ment.[116] Moreover, in these cases only one claim for loss of consortium can exist—that of the deprived spouse at the time the injury is discovered. This fact precludes loss of consortium claims by other past or future spouses. In allowing a deprived spouse to recover for loss of consortium resulting from latent, premarital injuries discovered only after marriage, a court does not bring unlimited liability upon the tortfeasor; rather, liability for loss of consortium remains limited to the traditional consortium parties.[117] This conclusion demonstrates that the policy justification for the marriage requirement is inapposite in the latent injury context.

V. THE DISCOVERY RULE SHOULD APPLY TO LOSS OF CONSORTIUM CLAIMS STEMMING FROM PREMARITAL, LATENT INJURIES

Courts should apply the discovery rule to loss of consortium claims arising from premarital, latent injuries for several reasons. First, application of the discovery rule in these situations does not circumvent the underlying justifications for the marriage requirement. Second, failure to apply the discovery rule in these situations produces inequity, as a spouse suffering loss of consortium in these cases did not and could not have known of the claim until injuries manifested. Third, use of the discovery rule in these situations to recognize loss of consortium claims serves the purpose of encouraging love and companionship between marital partners.

A. The Marriage Requirement Was Not Intended to Prohibit Claims Stemming from Premarital, Latent Injuries

The reasons for allowing the discovery rule to circumvent the statute of limitations in latent injury cases also warrant application of the rule to circumvent the marriage requirement in the case of premarital, latent injuries. Before the discovery rule was applied to the statute of limitations, latent injury causes of action were unfairly barred.[118] One purpose of a statute of limitations is to encourage the efficient adjudication of grievances.[119] In the latent injury context, however, the statute of limitations did nothing to encourage efficient

116. *See* Friedman v. Klazmer, 718 A.2d 1238, 1241 (N.J. Super. Ct. Law Div. 1998).

117. *See* Stager v. Schneider, 494 A.2d 1307, 1316 (D.C. 1985).

118. *See* Feigin, *supra* note 32, at 96 ("This discovery rule developed out of a recognition of the unfairness inherent in allowing statutes of limitations to run from the time of the negligent act, when the injury was not, and could not have been discovered until much later.").

119. *See* Hood, *supra* note 19, at 424.

adjudication given that parties can only bring suit when they know of their injuries. After courts realized the inequity of applying the statute of limitations to latent injury claims, they adopted the discovery rule to rectify the unjust results.[120]

In a similar manner, courts shonld apply the discovery rule to loss of consortium claims to prevent the injustice of the marriage requirement. Courts adopted the marriage requirement to prevent someone from knowingly marrying an injured person and then bringing a cause of action.[121] This requirement, like the statute of limitations, was a seventeenth-century conception of tort law,[122] which failed to envision the modern concept of latent injuries such as medical malpractice, toxic torts, and repressed memory syndrome. When a premarital injury is manifest at the time of marriage, the marriage requirement succeeds in preventing a person from consciously acquiring a cause of action through marriage; in the latent injury context, however, a person cannot consciously act to acquire a cause of action. The mechanical application of the requirement conld thus bar claims that it was not designed to preclude.

B. Principles of Equity Suggest that the Discovery Rule Should Apply to Loss of Consortium Claims Stemming from Premarital, Latent Injuries

Denying a deprived spouse a cause of action for torts occurring before marriage in cases where injuries were latent at the time of marriage offends principles of equity.[123] *Friedman v. Klazmer* illustrates this point. In *Friedman*, both spouses were healthy at the time of the marriage.[124] Soon after the marriage, however, the husband became completely impotent due to the defendants' negligence.[125] Although his wife entered the marriage believing she would enjoy a lifetime of close companionship with her husband, the quality of their relationship declined with time because of the defendants' negligence.[126]

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120. *See* Feigin, *supra* note 32, at 91, 96.

121. *See* Kociemba v. G.D. Searle & Co., 683 F. Supp. 1577, 1578 (D. Minn. 1988) ("The purpose of the general rule is to prevent an individual from making a conscious decision to acquire a cause of action by marrying an injured party.").

122. *See supra* Part III.A.

123. *See* Friedman v. Klazmer, 718 A.2d 1238, 1240 (N.J. Super. Ct. Law Div. 1998); Green v. A.P.C., 960 P.2d 912, 919 (Wash. 1998) (en banc).

124. *Friedman*, 718 A.2d at 1238.

125. *See id.*

126. *See id.* For a more detailed recitation of the facts of *Friedman*, see *supra* Part I.

For reasons of equity, the injured spouse is allowed use of the discovery rule to revive the underlying claim; the deprived spouse should similarly be given the benefit of the discovery rule for loss of consortium claims.[127] The spouse who suffered physical injury did not and could not have known of the injury at the time the statute of limitations lapsed. Likewise, the spouse who suffered a loss of consortium did not and could not have known of the injury and resulting deprivation at the time of the marriage. Courts have recognized the inequity of barring the claim of a person whose injury was unknowable before the statutory period expired and have adopted the discovery rule to save these claims from the statute of limitations.[128] Latent, premarital injuries are similarly unknowable at the time of marriage, and courts should adopt the discovery rule to prevent the unfairness of barring the claim of a spouse who has suffered a loss of consortium but had no way of expecting the loss at the time of marriage. As the *Friedman* court explained, "[i]f this court was to mechanically apply the rule that a party must be married before an injury in order to recover loss of consortium damages, an inequitable result would occur."[129]

In *Green v. A.P.C.*, the Supreme Court of Washington also faced the issue of whether the discovery rule could be used to circumvent the marriage requirement and found that equity required its application in this context.[130] The plaintiff was a woman exposed to DES in utero.[131] Almost four years after her marriage, the plaintiff discovered that she had a malformed uterus as a result of her DES exposure.[132] This condition resulted in an extremely grueling pregnancy.[133] Along with her claim against the DES manufacturers, her husband made a claim for loss of consortium.[134] The court concluded that inequity would result from the failure to apply the discovery rule

127. *See Green*, 960 P.2d at 919.

128. *See* Feigin, *supra* note 32, at 91, 96.

129. *Friedman*, 718 A.2d at 1240.

130. *Green*, 960 P.2d at 918-19.

131. *See id.* at 914. Physicians prescribed DES to millions of pregnant women during the 1950s and 1960s for prevention of miscarriage. *See* Batt, *supra* note 17, at 1218. This practice stopped in 1971 after DES was linked to various health problems for both these women and their children. *See id.* at 1218, 1221. For "DES daughters" like Kathleen, these problems include a T-shaped uterus, a hooded cervix, and increased risk of miscarriage and ectopic pregnancy. *See id.* at 1221. In utero DES exposure also places adult daughters at a highly increased risk of a rare but fatal form of cancer. *See* Martin v. Abbott Lab., 689 P.2d 368, 374 (Wash. 1984) (en banc).

132. *See Green*, 960 P.2d at 914.

133. *See id.*

134. *See id.*

to the loss of consortium claim and thus allowed the husband's claim.[135]

C. The History of the Loss of Consortium Cause of Action Suggests that Claims Should be Allowed in the Premarital, Latent Injury Context

Since the loss of consortium concept at common law viewed the wife as a chattel, many commentators believed that gender equality would abolish the loss of consortium cause of action.[136] The tort flourished, however, because it evolved as a protection of the marital relationship.[137] Courts soon viewed the right to the loss of consortium claim as an outgrowth of the marital contract rather than a principle of property law.[138] In a marriage, the spouses receive the legally recognized right to one another's companionship, comfort, and affection.[139] With this benefit, each spouse assumes duties and responsibilities to the other.[140] Thus, the marital relationship became the "touchstone of the consortium claim."[141]

Courts should allow a spouse whose partner manifests an injury that was latent at the time of marriage to bring a loss of consortium claim because the couple has the prerequisite marital relation-

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135. *See id.* at 919 ("[L]oss of consortium damages should be available for a premarital injury if the injured spouse either does not know or cannot know of the injury.").

136. *See* WADE, *supra* note 38, at 1125 n.7.

137. *See* Kelly M. Martin, Note, *Loss of Consortium: Should California Protect Cohabitants' Relational Interest?*, 58 S. CAL. L. REV. 1467, 1470 (1985) ("*Hitaffer* . . . stand[s] for the proposition that the purpose of the cause of action for loss of consortium is to provide protection for the marital relationship.").

138. *See* Hitaffer v. Argonne Co., 183 F.2d 811, 816 (D.C. Cir. 1950), *overruled on other grounds by* Smither & Co. v. Coles, 242 F.2d 220, 221-22 (D.C. Cir. 1957). The *Hitaffer* court explained:

> Marriage gives each the same rights . . . . Each is entitled to the comfort, companionship, and affection of the other. The rights of the one and obligations of the other spring from the marriage contract . . . . Any interference with these rights, whether of the husband or of the wife, is a violation, not only of natural right, but also of a legal right arising out of the marriage relation.

Id. (quoting Bennett v. Bennett, 23 N.E. 17, 18 (N.Y. 1889)).

139. *See Hitaffer*, 183 F.2d at 816; Abraham Somer, *Consortium*, 34 S. CAL. L. REV. 334, 335 (1961).

140. *See* Somer, *supra* note 139, at 335; *see also* Tremblay v. Carter, 390 So. 2d 816, 818 (Fla. Dist. Ct. App. 1980); Deems v. Western Md. Ry., 231 A.2d 514, 521 (Md. Ct. App. 1967) ("[T]here is, in a continuing marital relationship, an inseparable mutuality of ties and obligations, of pleasures, affection and companionship, which makes that relationship a factual entity."); 55 C.J.S. *Marriage* § 3, at 551 (1998) ("[C]ertain rights and duties incident te the relationship come into being."). Public policy and the law have long favored marriage as the foundation of our society. *See In re* Peterson's Estate, 365 P.2d 254, 256 (Colo. 1961); Tremblay, 390 So. 2d at 818;. *See generally* 52 AM. JUR. 2D *Marriage* § 3 (1970).

141. Friedman v. Klazmer, 718 A.2d 1238, 1241 (N.J. Super. Ct. Law Div. 1998).

ship.[142] Spouses in this situation have accepted the burdens and responsibilities of the marital relationship. In exchange, the state should protect their right to one another's companionship by honoring their loss of consortium claims. All of the same justifications for allowing a spouse to bring a loss of consortium claim[143] apply equally in the premarital, latent injury context.

VI. COURTS REFUSING TO APPLY THE DISCOVERY RULE TO LOSS OF CONSORTIUM CLAIMS STEMMING FROM PREMARITAL, LATENT INJURIES HAVE EMPLOYED FAULTY REASONING

While significant reasons exist to justify application of the discovery rule to loss of consortium claims based on latent, premarital injuries,[144] some courts have still refused use of the discovery rule in these situations. Courts in New York and Iowa, for example, have considered the merits of such claims, but have nonetheless concluded that the discovery rule should not circumvent the marriage requirement. These courts, however, have used flawed reasoning to reject the application of the discovery rule to these cases. The decisions of the New York Court of Appeals have overlooked statutory authority and misconstrued the essence of the loss of consortium claim. The Iowa Supreme Court has based its decisions on a fundamental misunderstanding of the discovery rule. Both courts have failed to examine the countervailing reasons for allowing loss of consortium claims in the premarital, latent injury context.

A. New York Courts

1. *Anderson v. Eli Lilly & Co.*

The New York Court of Appeals first addressed application of the discovery rule to loss of consortium claims based on latent, premarital injuries in *Anderson v. Eli Lilly & Co.* (*"Anderson II"*).[145] In

142. *See id.*

143. *See* Reep v. Commissioner of Dep't of Employment & Training, 593 N.E.2d 1297, 1302 (Mass. 1992) ("The right to recover for loss of consortium promotes the value of family.").

144. *See supra* Part V.

145. Anderson v. Eli Lilly & Co. ("Anderson II"), 588 N.E.2d 66 (N.Y. 1991). Before the Court of Appeals addressed the issue, two federal courts applying New York law adjudicated similar cases. In *Walsh v. Armstrong World Industries*, 700 F. Supp. 783, 784 (S.D.N.Y. 1988), the widow of an asbestos victim sued, inter alia, for the consortium she was deprived of during her late husband's decline. However, in this case, the deprived spouse knew of her husband's illness and disability before their marriage. *See id.* at 785. The defendant argued that the claim should

Anderson, the plaintiff alleged that her in utero exposure to DES prevented her from giving birth to a healthy child, ultimately causing her to undergo a radical hysterectomy.[146] Her husband asserted a claim for loss of consortium.[147] He argued that the general rule requiring marriage at the time of the injury should only apply if the injuries are manifest at the time of marriage.[148] The court rejected this claim and held that the deprived spouse must be married to the physically injured spouse at the time of injury to bring a claim for loss of consortium.[149] The court offered only one sentence to explain its holding: " 'Consortium represents the marital partners' interest in the continuance of the marital relationship as it existed at its inception, not upon some guarantee that the marital partners are free of any preexisting latent injuries.' "[150]

The *Anderson II* court's conclusion is faulty for four reasons. First, the court's statement misinterprets the precedent it relied on—*Millington v. Southeastern Elevator Co.*[151] The lower appellate court cited *Millington* for the proposition that "[c]onsortium represents the marital partners' interest in the continuance of the marital relationship as it existed at its inception."[152] In actuality, the *Millington* court only stated that "consortium . . . represents the interest of the injured party's spouse in the continuance of a healthy and happy marital life."[153] Thus, the lower court in *Anderson I* added the "as it existed at

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be denied because the plaintiff was not married to the decedent at the time his injury accrued. *See id.* at 784. The court agreed, holding that "a spouse may not recover loss of consortium damages for injury that is manifest at the time of marriage." *Id.* at 785. The court also noted that "[a] spouse who married a victim of toxic exposure after exposure, but during the latency period of the disease, should perhaps be entitled to recovery for loss of consortium." *Id.*

Less than one year later, the U.S. District Court for the Northern District of New York faced the very issue about which the *Walsh* court speculated, a loss of consortium claim arising from a premarital, latent-effect tort. *See* Clark v. Eli Lilly & Co., 725 F. Supp. 130 (N.D.N.Y. 1989). In this case, the injured spouse had been exposed in utero to DES. *See id.* at 131. Her injuries only manifested after she became married. *See id.* at 132. In rejecting her husband's claim for loss of consortium, the court noted, "the courts of New York . . . have not focused on the spouses' premarital knowledge. On the contrary, . . . New York courts have focused solely on whether the tortious conduct preceded marriage." *Id.* This pre-*Anderson* holding relied upon the default common law rule, which requires marriage at the time of the injury, and failed to explore the unique situation resulting in the latent injury context.

146. *See* Anderson v. Eli Lilly & Co. ("Anderson I"), 557 N.Y.S.2d 981, 982 (N.Y. App. Div. 1990).

147. *See id.*

148. *See Anderson II*, 588 N.E.2d at 67.

149. *See id.*

150. *Id.* at 67-68 (quoting *Anderson I*, 557 N.Y.S.2d at 983) (citing Millington v. Southeastern Elevator Co., 239 N.E.2d 897, 900 (N.Y. 1968)).

151. *Millington*, 239 N.E.2d 897.

152. *Anderson I*, 557 N.Y.S.2d at 983.

153. *Millington*, 239 N.E.2d at 900.

its inception" language.[154] The original statement of the *Millington* court suggests that the court would have been more sympathetic to loss of consortium actions arising from premarital, latent injuries, due to the important public policy of protecting healthy and happy marital relationships.[155]

Second, the *Anderson II* court's statement is fundamentally at odds with the modern understanding of the loss of consortium cause of action. Consortium does not simply represent the marital partners' interest in the continuance of the marital relationship as it existed at the marriage's inception, as the court holds. If followed, this reasoning would create a rule whereby recovery for loss of consortium would not take into account the amount of consortium the deprived spouse actually lost. The problem with such a rule can be demonstrated by considering two couples whose marriages were arranged by their parents. In the first situation, the husband is injured just one day after meeting his new bride on their wedding day. In the second situation, the husband's injuries do not manifest until some thirty years after the marriage, during which time the couple has grown inseparable. Under the rule set out in *Anderson II*, the loss of consortium claims in both situations would be valued at the time of the wedding. Even though the second couple nurtured their relationship for three decades, the deprived wife in the second situation would receive the same compensation as the first wife for her loss of consortium claim.

No other court has even contemplated such a superficial valuation. When valuing a loss of consortium claim, courts calculate the actual damages[156] of the deprived spouse by analyzing the quality of the couple's relationship[157] as it existed at the time the impaired spouse initially suffered a loss of consortium.[158] This method allows a factfinder to determine the actual consortium the deprived spouse will

154. *Compare Anderson I*, 557 N.Y.S.2d at 983, *with Millington*, 239 N.E.2d at 900.

155. *See supra* Part V.C.

156. *See, e.g.*, Gosnell v. Dorchester Sch. Dist. No. 2, 389 S.E.2d 865, 866 (S.C. 1990) ("Damages awarded for loss of consortium are compensatory damages, which are by definition actual damages.").

157. *See* Johnson v. ABC Ins. Co., 532 N.W.2d 130, 134 (Wis. 1995) (explaining that the amount of damages for loss of consortium is dependent on the quality of the couple's relationship); *see also* Countryman v. County of Winnebago, 481 N.E.2d 1255, 1259 (Ill. App. Ct. 1985) (holding that evidence that the injured spouse engaged in an extramarital affair is relevant to the valuation of the deprived spouse's loss of consortium claim).

158. *See* Kottka v. PPG Indus. Inc., 388 N.W.2d 160, 169 (Wis. 1986) (" '[Y]ou should consider the nature, the form, and quality of the relationship that existed between (the spouses) up to the time of the injury.' ") (quoting Wisconsin Jury Instruction 1815); *see also* Denaux v. United States, 572 F. Supp. 659, 667 (D.S.C. 1983) (evaluating plaintiff's consortium claim based on the companionship the couple shared in the "golden years of their lives").

have to forego.[159] Thus, consortium represents the marital partners' interest in the continuance of the marital relationship as it existed at the time of the loss of consortium, not at the marriage's inception.

The third reason that the *Anderson II* court's conclusion is faulty is that, even assuming the court's premise—that consortium represents the marital partners' interest in the continuance of the marital relationship as it existed at the marriage's inception—is correct, the conclusion that a claim based on premarital, latent injuries is barred does not follow. The *Anderson II* court's understanding of consortium does not preclude a claim for loss of consortium based on premarital, latent injuries because when a spouse enters a marriage with a latent injury, the injury has no effect on the marital relationship at that time.[160] Instead, the couple, despite the latent injury, has a normal marital relationship at the inception of the marriage because the premarital injury has not yet manifested. If consortium represents the continuance of the marital relationship as it existed at its beginning, the deprived spouse in the latent injury context should thus have a cause of action against the tortfeasor.[161]

Fourth, the court failed to adequately consider applicable statutory authority. More than five years before the court decided *Anderson II*, the New York legislature enacted the discovery rule in toxic exposure cases.[162] N.Y. C.P.L.R. 214-c(2) provides:

> [T]he three year period within which an action to recover damages for *personal injury* . . . caused by the latent effects of exposure to any substance or combination of substances, in any form, upon or within the body . . . must be commenced shall be computed from the date of discovery of the injury by the plaintiff or from the date when through the exercise of reasonable diligence such injury should have been discovered by the plaintiff, whichever is earlier.[163]

Since the legislature did not define "personal injury" under this section, New York's general rules of statutory construction apply.[164] These rules define "personal injury" as an "actionable injury to the

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159. The value of the marital relationship increases when a couple's love grows stronger over the years. Likewise, consortium decreases when spouses experience turmoil in their marriage.

160. For example, exposure to asbestos two years before marriage would probably not affect the marital relationship at its inception.

161. For example, consider a man who is exposed to asbestos at age 20. Five years later, he marries. When he is 50, he develops asbestosis from his exposure 30 years earlier. If consortium is measured at the start of the marriage, then in this case it would be measured at age 25. Since there were no symptems interfering with consortium at that time, the wife should have a claim for loss of consortium based on the quality of the marital relationship when her husband was 25 years old.

162. *See* Blanco v. AT&T Co., 689 N.E.2d 506, 509 (N.Y. 1997). *See generally* N.Y. C.P.L.R. § 214-c (McKinney 1999) (passed in 1986).

163. N.Y. C.P.L.R. § 214-c (emphasis added).

164. *See* People v. New York Cent. R.R. Co., 51 N.E. 312, 313 (N.Y. 1898).

person either of the plaintiff, *or of another*."[165] New York common law has consistently interpreted this definition to include loss of services or consortium.[166]

In refusing to apply the discovery rule statute to the plaintiff's loss of consortium claim in *Anderson II*, the court stated: " '[CPLR 214-c] was directed at opening up traditional avenues of recovery by removing a procedural barrier that was unreasonable given the nature of DES injuries. Nothing in the legislation [however] suggests that the Legislature intended to expand the basis for liability.' "[167] This holding disregarded the legislature's intent and failed to consider the policy reasons favoring its application in this case.

The court should have begun its analysis by noting that the statutory discovery rule applied to loss of consortium claims. The New York statutory definition of "personal injury" and its common law interpretation necessitate this outcome.[168] The court should have then considered competing policy reasons for the statute's application to loss of consortium claims in the premarital, latent injury context.

Instead, the court dismissed the claim because it did not believe the statute evidenced an intent to expand liability.[169] This reading is contrary to the legislature's intent and the broad language of the statute. Since the legislature intended C.P.L.R. 214-c to be a remedial measure, the court should interpret it broadly.[170] In *Blanco v. AT&T Co.*, the New York Court of Appeals recognized that this maxim should apply to the discovery rule statute.[171] The court's opinion in *Anderson II*, however, was a strict application of this remedial statute. In light of the legislature's intent in adopting the discovery rule, the New York court should have applied the discovery rule to the plaintiff's loss of consortium claim.

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165. N.Y. GEN. CONSTR. LAW § 37-a (McKinney 1999) (emphasis added).

166. *See, e.g.*, Psoth v. Long Island R.R. Co., 159 N.E. 180, 182 (N.Y. 1927) ("Actions by a father for the loss of the services of his child, or a husband for the loss of the services of his wife have in legal parlance been classed with personal injury cases."); Augenblick v. Augenblick, 117 N.Y.S. 2d 69, 71-72 (N.Y. Sup. Ct. 1952) (holding that a husband's loss of consortium claim falls within the statutory definition of "personal injury").

167. Anderson v. Eli Lilly & Co. ("Anderson II"), 588 N.E.2d 66, 68 (N.Y. 1991) (alterations in original) (quoting Enright v. Eli Lilly & Co., 570 N.E.2d 198, 202 (N.Y. 1991)).

168. *See supra* Part VI.A.1.

169. *See Anderson II*, 588 N.E.2d at 68.

170. *See* Blanco v. AT&T Co., 689 N.E.2d 506, 509 (N.Y. 1997).

171. *See id.*

2. *Consorti v. Owens-Corning Fiberglas Corp.*

Four years after *Anderson II*, the New York Court of Appeals again considered whether a spouse could bring a loss of consortium claim stemming from a premarital, latent injury.[172] The Second Circuit certified this issue to the court in *Consorti v. Owens-Corning Fiberglas Corp.* ("*Consorti II*").[173] The certified question was "whether . . . a consortium claim based on mesothelioma, occurring after a marriage but resulting from exposure to asbestos occurring before the marriage, is a valid claim under New York law."[174] The New York Court of Appeals answered that a loss of consortium claim based on latent, premarital injuries is not recognizable if the injured spouse and deprived spouse were not married at the time of injury.[175]

Although the *Consorti II* court could have simply cited the holding in *Anderson II* and entered judgment for the defendant, the court cited *Anderson II* merely for the following proposition:

> Under settled New York law, because consortium represents each marital partner's interest in the continuance of the marital relationship as it existed at the *inception* of the marriage, a loss of consortium cause of action by the spouse of an injured person "does not lie if the alleged tortious conduct and resultant injuries occurred prior to the marriage."[176]

The court failed to recognize that *Anderson II* had already held that a spouse could not bring a loss of consortium claim arising from a premarital, latent injury.[177] Instead, the court acknowledged that most of the date of injury jurisprudence concerned application of the statute of limitations.[178] The court reasoned that "the same considerations apply in determining the date of injury for purposes of a loss of consortium claim."[179] The court proceeded to use the statute of limitations juris-

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172. Consorti v. Owens-Corning Fiberglas Corp. ("Consorti II"), 657 N.E.2d 1301, 1301 (N.Y. 1995).

173. *See id.*

174. Consorti v. Owens-Corning Fiberglas Corp. ("Consorti I"), 45 F.3d 48, 51 (2d Cir. 1995). In this case, the impaired spouse was exposed to asbestos at his workplace from 1960 to 1970. *Consorti II*, 657 N.E.2d at 1301. Six years after the exposure ended, he married. *See id.* Sixteen years after he was married, he developed mesothelioma, an incurable form of cancer. *See id.*

175. *See Consorti II*, 657 N.E.2d at 1301.

176. *See id.* For a discussion of *Anderson II*, see *supra* Part VI.A.1.

177. *See* Anderson v. Eli Lilly & Co. ("Anderson II"), 588 N.E.2d 66, 68 (N.Y. 1991).

178. *See id.* at 1302 ("The issue of date of injury in toxic substance exposure cases in New York courts has most often been presented in the context of the application of the Statute of Limitations.").

179. *Id.* The holding that the same accrual rule should apply to a loss of consortium claim as applies to the underlying claim accords with the decision in *Armstrong v. Lamy*, 938 F. Supp. 1018, 1051 (D. Mass. 1996). In *Armstrong*, a drama teacher sexually abused the plaintiff during junior high school. *See id.* at 1028. Seventeen years later, the plaintiff recalled the sexual abuse when he saw his son in an elementary school play. *See id.* at 1029; *see also supra* Part I (dis-

prudence to determine the time of injury for the loss of consortium claim.[180]

The court discussed five cases from the preceding sixty years that decided when an injury occurs for statute of limitations purposes.[181] All held that New York adhered to a time of exposure rule, rather than the discovery rule, for determining when the statute of limitations started to run.[182] Accordingly, the court held that the exposure rule still determined when a toxic substance injures someone.[183]

Astonishingly, the *Consorti II* court failed to recognize that the discovery rule statute had abrogated the cases it relied on almost ten years earlier. Two years later, the Court of Appeals acknowledged in *Blanco v. AT&T Co.* that "CPLR 214-c was enacted to abrogate the exposure rule which [the court] had formulated and adhered to in a line of cases stretching from *Schmidt v. Merchants Desp. Transp. Co.*, [200 N.E. 824 (N.Y. 1936)], to *Consorti v. Owens-Corning Fiberglas Corp.*, [657 N.E.2d 1301 (N.Y. 1995)]."[184] The *Blanco* court did not explain why *Consorti* failed to recognize the applicability of N.Y. C.P.L.R. 214-c.

The court's confusing opinion in *Consorti II* has made it unclear whether a spouse has the right to bring a loss of consortium claim arising from a premarital, latent injury. The court held that the same accrual standard should apply to the claims of both the injured and deprived spouses.[185] Unfortunately, the court proceeded to ignore the discovery statute and mistakenly applied the time of exposure rule to

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cnssing repressed memory syndrome). As a result of this trauma, the plaintiff experienced extreme mental and physical distress, including paranoia, nightmares, insomnia, headaches, and appetite loss. *See Armstrong*, 938 F. Supp. at 1051. Plaintiff's wife suffered loss of consortium due to these injuries. *See id.* In recognizing her claim, the court held that since the discovery rule was the proper standard for the underlying claim, it should also apply to the loss of consortium claim. *See id.*

180. *See Anderson II*, 588 N.E.2d at 1302-03.

181. *See id.*; *see also* Snyder v. Town Insulation, 615 N.E.2d 999 (N.Y. 1993), *called into doubt by* N.Y. C.P.L.R. § 214-c (McKinney 1999) (passed in 1986); Steinhardt v. Johns-Manville Corp., 430 N.E.2d 1297 (N.Y. 1981), *superseded by* N.Y. C.P.L.R. § 214-c; Thorton v. Roosevelt Hosp., 391 N.E.2d 1002 (N.Y. 1979), *superseded by* N.Y. C.P.L.R. § 214-c; Schwartz v. Heyden Newport Chem. Corp., 188 N.E.2d 142 (N.Y. 1963), *superseded by* N.Y. C.P.L.R. § 214-c; Schmidt v. Merchants Despatch Transp. Co., 200 N.E. 824 (N.Y. 1936), *superseded by* N.Y. C.P.L.R. § 214-c).

182. *See supra* note 181.

183. *See Consorti II*, 657 N.E.2d at 1303:

> [Through] succeeding generations of Judges composing this Court, over some 60 years, the Schmidt rule fixing the occurrence of tortious injury as the date when the toxic substance invades or is introduced into the body, has been reconsidered and reaffirmed, despite importunings that adoption of a medical date-of-injury standard would achieve more just results.

184. Blanco v. AT&T Co., 689 N.E.2d 506, 509 (N.Y. 1997); *see also* N.Y. C.P.L.R. § 214-c.

185. *See Consorti II*, 657 N.E.2d at 1302.

the loss of consortium claim.[186] Since the Court of Appeals has subsequently recognized the abrogation of the time of exposure rule in toxic exposure cases,[187] the court should apply the discovery rule to loss of consortium claims stemming from premarital, latent toxic exposure injuries.

The New York Court of Appeals has twice confronted the issue of whether to recognize a loss of consortium claim arising from a premarital, latent toxic exposure.[188] Its first consideration of the issue in *Anderson II* produced a precedent internally inconsistent, inconsistent with prior law, inconsistent with the modern conception of loss of consortium, and inconsistent with statutory authority. The court further confused the jurisprudence by applying an accrual rule[189] that had previously been abrogated by statute. Nonetheless, the *Consorti II* court applied the same accrual standard to the loss of consortium claim as it would have applied to the underlying claim.[190] While this was the correct method for analyzing the loss of consortium claim, the court mistakenly held that the time of exposure rule applied to the underlying claim. Now that the court has recognized the applicability of the discovery rule in the toxic exposure context,[191] the *Consorti II* reasoning suggests that New York courts should apply the discovery rule to a loss of consortium claim arising from premarital, latent toxic exposure.

B. Iowa Courts

The Supreme Court of Iowa has addressed the issue of loss of consortium claims based on latent, premarital injuries in three cases,[192] all of which involved repressed memory syndrome stemming from sexual abuse. In *Doe v. Cherwitz*, a patient and her husband brought claims against a doctor who allegedly sexually assaulted her during a pelvic examination.[193] She repressed this premarital incident until after her wedding.[194] Since the discovery rule applied to his wife's claim, the husband argued that the discovery rule should also apply to

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186. *See id.* at 1302-03.

187. *See Blanco*, 689 N.E.2d at 509.

188. *See Consorti II*, 657 N.E.2d at 1301; Anderson v. Eli Lilly & Co. ("Anderson II"), 588 N.E.2d 66, 67-68 (N.Y. 1991).

189. *Anderson II*, 588 N.E.2d at 67-68.

190. *Consorti II*, 657 N.E.2d at 1302-03.

191. *See Blanco*, 689 N.E.2d at 509.

192. *See* Frideres v. Schiltz, 540 N.W.2d 261 (Iowa 1995) (en banc); Claus v. Whyle, 526 N.W.2d 519 (Iowa 1994); Doe v. Cherwitz, 518 N.W.2d 362 (Iowa 1994).

193. *Cherwitz*, 518 N.W.2d at 362.

194. *See id.* at 365.

his loss of consortium claim.[195] In rejecting this contention, the court held:

> The discovery rule anticipates that the claimant had a valid cause of action within the period of limitations, but for some reason, was unaware of it. Here, because there was no marital relation[ship] between [the couple], there was no cause of action within the period of limitations, and the discovery rule cannot create oue when none had ever existed during the period of limitations.[196]

This holding demonstrates a fundamental misunderstanding of the discovery rule. The *Cherwitz* court envisioned the discovery rule as only reviving a claim when the plaintiff did in fact have a cause of action within the statutory period and the claim was, for some reason, "unknown and basically unknowable" to the plaintiff during that time.[197] However, because of the latency period for some injuries, plaintiffs often do not have a cause of action within the statutory period, yet courts nonetheless apply the discovery rule. The discovery rule generally begins the running of the statute of limitations when a party knew or should have known all the essential elements of the cause of action.[198] In some situations, such as those involving asbestos exposure, an element of the cause of action, for example damages, is not sustained within the statutory period.[199] The discovery rule thus allows the claim of a plaintiff in a situation where the plaintiff did not have a claim during the statute of limitations, suggesting that the *Cherwitz* court failed to properly understand the discovery rule when it denied a cause of action for loss of consortium resulting from latent, premarital injuries.

The *Cherwitz* court failed to contemplate that a plaintiff could use the discovery rule to bring a cause of action for injuries that did not manifest during the statutory period. Use of the discovery rule is not limited to situations where the rule can revive a preexisting cause of action. The court's holding that "the discovery rule cannot create a [cause of action] when none had ever existed during the period of limitations" was thus fundamentally flawed. Given the basic concept of tort law that a person must have sustained injuries before having a valid cause of action, the discovery rule frequently "creates" a cause of action when none had existed during the statutory period.[200] The

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195. *See id.*

196. *Id.*

197. *Id.*

198. *See* Green v. A.P.C., 960 P.2d 912, 915 (Wash. 1998) (en banc).

199. *See, e.g., id.* at 915.

200. Another flaw in the *Cherwitz* standard was that it did not completely bar the application of the discovery rule to loss of consortium claims stemming from a premarital, latent injury. The court only barred use of the discovery rule when the plaintiff had no marital relationship

Cherwitz court failed to understand that the discovery rule could likewise "create" a cause of action for loss of consortium where none had existed before the expiration of the statute of limitations.

Later that same year, the Supreme Court of Iowa revisited the *Cherwitz* standard. In *Claus v. Whyle*, the court faced a similar issue.[201] The *Claus* court quoted the *Cherwitz* language,[202] and although the court did not clearly articulate the holding, it adhered to the traditional marriage requirement by requiring the deprived spouse to prove marriage at the point of initial injury.[203]

Less than one year later, the Supreme Court of Iowa again adjudicated a factually similar case with the same underlying issue.[204] In *Frideres v. Schiltz*, the discussion did not include the flawed *Cherwitz*

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within the period of limitations. *See Cherwitz*, 518 N.W.2d at 365. Thus, under *Cherwitz*, it was possible in some cases to bring a loss of consortium claim stemming from a premarital latent tort, a result the court probably did not intend.

A hypothetical will illustrate this type of scenario. Assume the statutory period for bringing a medical malpractice claim is three years. In Year 1, a woman undergoes an appendectomy. During the operation, the surgeon negligently leaves a knife in her body. The next year, she marries. In Year 3, she discovers her injury. Her husband suffers an ongoing loss of consortium due to the surgeon's malpractice. In this scenario, the husband would have a valid loss of consortium claim under the *Cherwitz* approach. He has the prerequisite marital relationship within the statute of limitations.

Thus, the *Cherwitz* standard permits a loss of consortium claim depending on when the injury manifests. If a spouse is unknowingly exposed to medical malpractice before marriage and marries before the statute of limitations expires, the other spouse would be allowed to bring a loss of consortium claim. However, this point is moot because the Supreme Court of Iowa subsequently refined and expanded this standard. *See infra* Part VI.B.

201. Claus v. Whyle, 526 N.W.2d 519, 527 (Iowa 1994) ("In *Doe v. Cherwitz*, 518 N.W.2d 362, 364-65 (Iowa 1994), we addressed the same issue presented here.").

This case was brought by Beverly Jo and Aaron Claus, the daughter of a sexually abusive father, and her husband. *See id.* at 523. Although Beverly Jo had problems functioning sexually during the couple's courtship, it was not until after their marriage that she realized the source of her dysfunction. *See id.* at 522. Within a couple of years of her marriage, Beverly Jo began to have flashbacks of the abuse. *See id.* Even if the court would have allowed Aaron to use the discovery rule, it is arguable whether he would have succeeded on his claim. It would depend on whether a court permitted a deprived spouse to use the discovery rule whenever it is available to the underlying claim, or whether knowledge of injury at marriage would prevent a deprived spouse's use of the discovery rule. This issue is not considered in this Note because, for purposes of this Note, it is assumed that neither spouse was aware of the injury before marriage.

202. *See id.* at 527.

203. *See id.* The court held:

> Aaron and Beverly Jo were not married until September 20, 1989, approximately two years after [her father] 'actually' sexually abused Beverly Jo on November 7, 1987. Without a marital relationship on November 7, 1987, Aaron did not have a right to bring an action for spousal consortium at that time. Accordingly, the discovery rule is inapplicable.

Id.

204. *See* Frideres v. Schiltz, 540 N.W.2d 261, 262 (Iowa 1995) (en banc). The impaired spouse in this case was sexually abused by her brother and physically abused by her father. *See id.*

discovery rule analysis.[205] Instead, the court based its decision on the implied holding from *Claus*: "Without a marital relationship at the time of [injury], a spouse has no right to bring a cause of action for loss of consortium. Under these circumstances, the discovery rule is not applicable."[206]

The Supreme Court of Iowa's analysis has two important flaws. First, the law developed from a fundamental misunderstanding of the discovery rule.[207] The court's failure to recognize that the discovery rule will permit a claim even though the person never had a cause of action during the statutory period skewed its analysis. Second, like New York, Iowa has failed to thoroughly examine the countervailing reasons for allowing or not allowing the loss of consortium cause of action in the latent injury context. This is necessary in determining whether or not the tortfeasor owes a duty to the spouse of the victim of a premarital, latent injury.

VII. CONCLUSION

The concerns that led to the traditional approach to loss of consortium claims are not present in the premarital, latent injury context. The traditional approach requiring marriage at the time of injury developed to prevent persons from marrying an injured person for the purpose of creating a loss of consortium claim. Courts adhered to the traditional approach so that the recognition of a claim where the plaintiff had assumed the risk would not extend liability to unlimited proportions, unfairly burdening the tortfeasor.

Where the premarital injury is latent, these threats do not exist, for it is impossible to "marry a lawsuit," or assume a risk, where the injury is unknown and unknowable at the time of the marriage. Furthermore, application of the discovery rule to loss of consortium claims stemming from latent, premarital injuries does not extend liability beyond the traditional parties. The traditional approach denying this type of claim fails to consider that equitable principles and the history of the cause of action suggest that courts should apply the discovery rule in cases of premarital, latent injuries. The discovery rule is available to rescue the underlying claim from the statute of limitations; it likewise should be available to rescue a loss of consortium

205. *See id* at 268. *Cherwitz* was analyzed in adjudicating the underlying claim. *See id.* at 267-68.

206. *Id.* at 268.

207. *See supra* Part VI.B.

claim from the traditional marriage requirement. Courts that have disagreed with this reasoning have misunderstood both the modern conception of loss of consortium and the discovery rule.

The same principles that led courts and legislatures to create the discovery rule are the principles that justify application of the rule to loss of consortium claims in the premarital, latent injury context. Failure to apply the discovery rule to these claims is blind imitation of the past resulting in denial of recovery to spouses who, through no fault of their own, could not have discovered their claim until after the wedding bells rang.

Paul Davis Fancher[*]

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