VERMONT SUPERIOR COURT
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CIVIL DIVISION
Case No. 23-CV-01070

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| Michael G. Feinberg, individually, and as father and next best friend of minor child L.F., and Sara Feinberg,<br>Plaintiffs<br>v.<br>Killington/Pico Ski Resort Partners, LLC,<br>Defendant | DECISION ON MOTION TO DISMISS |

## RULING ON DEFENDANT'S MOTION TO DISMISS

Plaintiffs Michael and Sara Feinberg bring this negligence action against Defendant Killington/Pico Ski Resort Partners, LLC ("Killington") seeking damages for injuries suffered by Mr. Feinberg while skiing at Killington's ski area. Plaintiffs allege that, on March 16, 2022, Mr. Feinberg and his 11-year-old daughter L.F. were skiing at Killington Mountain Resort & Ski Area, which is owned, operated, and maintained by Defendant. Mr. Feinberg broke his neck in a fall. L.F. was near to Mr. Feinberg when the accident occurred and witnessed it. As a result of the fall, Mr. Feinberg is paralyzed from the neck down. L.F., through Feinberg as her father and next best friend, asserts claims for loss of parental consortium and negligent infliction of emotional distress. Pursuant to Rule 12(b)(6) of the Vermont Rules of Civil Procedure, Killington moves to dismiss L.F.'s loss of parental consortium claim, arguing that Vermont does not recognize such a claim based on the facts alleged. For the reasons discussed below, Killington's motion is DENIED.

## Discussion

In reviewing a motion to dismiss, the Court accepts "all facts alleged in the complaint as true and in the light most favorable to the nonmoving party." *Coutu v. Town of Cavendish*, 2011 VT 27, ¶ 4. "The purpose of a motion to dismiss for failure to state a claim upon which relief can be granted is to test the law of the claim, not the facts that support it." *Samis v. Samis*, 2011 VT 21, ¶ 9. However, as the Supreme Court has repeatedly cautioned, trial courts should be especially reluctant to grant motions to dismiss for failure to state a claim "when the asserted theory of liability is novel or extreme, as such cases should be explored in the light of facts as developed by the evidence, and, generally, not dismissed before trial because of the mere novelty of the allegations." *Alger v. Dep't of Labor & Indus.*, 2006 VT 115, ¶ 12 (quotation omitted).

Here, Killington argues that under *Hay v. Medical Center Hospital*, 145 Vt. 533 (1985), Vermont does not recognize a child's claim for loss of parental consortium unless the parent is deceased or permanently comatose. Therefore, Killington contends that because Mr. Feinberg's injuries caused him to become a quadriplegic, but not in a permanent coma, L.F.'s claim must be dismissed. L.F. argues that the Supreme Court's holding in *Hay* was not so narrow as to foreclose her claim based on her father's catastrophic injury in this case. The Court agrees.

In *Hay*, 145 Vt. at 536, the Vermont Supreme Court considered a matter of first impression: "whether we will judicially recognize a minor child's cause of action for a claimed loss of parental consortium when the parent has been tortiously injured but has not deceased." Prior to *Hay*, Vermont common law permitted only a loss of spousal consortium claim where the injured person was not deceased. *Id*. However, the *Hay* Court acknowledged its role "to adapt the common law to the changing needs and conditions of the people of this state" and pointed out that it "has often met changing times and new social demands by expanding outmoded common law concepts." *Id*. at 542-43. Thus, concluding "that prior Vermont law presents no obstacle to our recognition of a cause of action for loss of parental consortium" and emphasizing that it "has never denied a child recovery for loss of parental consortium," the Court chose "to follow what appears to be a growing trend in this area of the law" and recognize "a new cause of action for the loss of parental consortium." *Id*. at 538, 544-45.

While the facts in *Hay* involved a parent who had been rendered permanently comatose, and therefore the Supreme Court necessarily stated that a claim for loss of parental consortium existed under those facts, we reject Killington's assertion that the *Hay* opinion forecloses such claims involving other catastrophic injuries. On the contrary, as noted by the dissent, although the majority's "specific holding relates to the permanent 'brain death' of the mother, its general discussion makes it clear that this is not a sine qua non for liability, and that the Court is adopting a cause of action for a minor's loss of parental consortium, without limitation." *Id*. at 546. Nowhere in its opinion does the Court state that a child cannot recover for loss of consortium when the parent is grievously injured but not killed or rendered permanently comatose. Nor has Killington cited to the Court any other authority where the Vermont Supreme Court expressly rejected such a claim.

Moreover, *Hay* cited with approval cases from other state jurisdictions which upheld a child's right to recover for loss of parental consortium when the parent was not deceased or comatose. For example, the cases relied on by the *Hay* Court involved parents who were paralyzed, brain damaged, or had sustained other serious physical and psychological injuries leading to permanent disabilities. *See, e.g.*, *Ferriter v. Daniel O'Connell's Sons, Inc.*, 413 N.E.2d 690, 691 (Mass. 1980) (injured parent was "paralyzed from the neck down");[1] *Berger v.*

[1] Much of the *Ferriter* decision was superseded by statute to prevent recovery for loss of consortium by spouses or children of employees covered by workers' compensation law. *See Corrigan v. Gen. Elec. Co.*, 548 N.E.2d 1238, 1240 (Mass. 1990). However, the underlying cause of action was not affected. *See, e.g., O'Shaughnessy v. Wharf Holdings, LLC*, 2018 WL 6378388, at *1-2 (Mass. Sup. Ct. Oct. 2018) (noting that the Massachusetts Supreme Judicial Court "recognized in 1980 that children have a viable claim for loss of parental society if they

*Weber*, 303 N.W.2d 424, 424 (Mich. 1981) (parent "sustained severe and permanent psychological and physical injuries"); *Ueland v. Reynolds Metals Co.*, 691 P.2d 190, 191 (Wash. 1984) (parent "suffered severe and permanent mental and physical disabilities); *Theama v. City of Kenosha*, 344 N.W.2d 513, 513 (Wisc. 1984) (parent "suffered severe injuries to the head and internal organs, which resulted in permanent damage to the brain and impairment of visual, perceptual, motor and speech functions, as well as other physical and emotional effects").[2] Thus, had the *Hay* Court intended the new cause of action for loss of parental consortium to be limited to situations where the parent was irreversibly brain dead but not deceased, we would have expected the Court to distinguish those other cases as going too far, rather than relying on them to support its holding.

Finally, allowing a loss of parental consortium claim when the parent is rendered quadriplegic is consistent with the policy considerations advanced by the *Hay* Court in establishing the claim. The Supreme Court noted that the elements of a loss of parental consortium claim, such as "love, companionship, affection, society, comfort, services and solace," are similar to a claim for loss of spousal consortium, and are equally "deserving of protection." *Hay*, 145 Vt. at 537 (quoting *Berger*, 303 N.W.2d at 426). Further, the Court observed that, unlike a spouse, "the child is in a uniquely difficult position to make up for the loss of a parent." *Id*. Thus, while

> an adult is capable of seeking out new relationships in an attempt to fill in the void of his or her loss, a child may be virtually helpless in seeking out a new adult companion. Therefore, compensation through the courts may be the child's only method of reducing his or her deprivation of the parent's society and companionship.

*Id*. at 538 (quoting *Theama*, 344 N.W.2d at 516). Moreover, the Court believed that providing compensation to the child would ultimately result in societal benefit, because "through compensation [the child] may be able to adjust his or her loss with stability" and ideally "become a normal adult who is capable of functioning as such in his or her own social setting." *Id*. at 545

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can show that they are minors dependent on the injured parent" (quoting *Ferriter*, 413 N.E.2d at 696)).

[2] Since *Hay*, additional states have recognized the existence of claims where the parent was seriously injured but not deceased. *See, e.g.*, *Hibpshman v. Prudhoe Bay Supply, Inc.*, 734 P.2d 991, 997 (Alaska 1987) ("We hold that minor children have an independent cause of action for loss of parental consortium resulting from injuries tortiously inflicted on their parent by a third person."); *Villareal v. Dep't of Transp.*, 774 P.2d 213, 216 (1989) (holding that "children may recover for loss of consortium when a third party causes serious, permanent, and disabling injury to their parent"); *N. Pac. Ins. Co. v. Stucky*, 338 P.3d 56, 65-66 (extending Montana's cause of action for loss of parental consortium to claims "brought by the adult child of an injured parent"); *see also Campos v. Coleman*, 123 A.3d 854, 869 (Conn. 2015) (declining "to impose the limitation adopted by a number of courts that damages are recoverable only when the parent has suffered a serious, permanent and disabling mental or physical injury that is so overwhelming and severe that it causes the parent-child relationship to be destroyed or to be nearly destroyed" (quotation omitted)).

(quoting *Theama*, 344 N.W.2d at 521)); *see also Campos*, 123 A.3d at 859 (discussing "public policy factors favoring recognition of a cause of action for loss of parental consortium").

Such policy considerations are implicated regardless of whether the parent is deceased, comatose, or quadriplegic. While in theory a quadriplegic parent could provide some love, affection, and other elements of consortium, such a parent likely would be unable to fully provide for the psychological and emotional needs of the child. Further, the quadriplegic parent can offer very little physical consortium, which Vermont recognizes as a key part of the parent-child relationship. *See Hay*, 145 Vt. at 537 (citing *Hoadley v. Int'l Paper Co.*, 72 Vt 79, 83-84 (1899) ("It needs no argument to prove that physical training is as necessary for the well being of a child as mental and moral nurture.")). Thus, as the Court noted in *Hay*, "it is inappropriate that a minor child may recover [for loss of parental consortium] if a parent is killed, but not if the parent is rendered permanently comatose," or in this case, a quadriplegic. *Id*. The distinction to be drawn based on the extent of the parents' injuries has to do with the nature of the loss of consortium, not whether a loss occurs at all; significant damage to the parent-child relationship can be expected to occur in all three types of cases.[3] Further, the child of a quadriplegic parent may have an even harder time adjusting than the child whose parent is deceased or comatose, in light of the extensive care that quadriplegia requires and the constant reminder of the parent's injury.

In short, in recognizing a minor child's right to sue for damages for the loss of parental consortium under the facts presented to it, the *Hay* Court explained that its decisions "inevitably will be based upon what we deem to be in the best interests of justice and of the citizens of the State of Vermont." *Id*. at 545. This Court is persuaded that the Vermont Supreme Court would also recognize a minor child's claim for loss of parental consortium based on the situation presented here, and indeed, that such a claim falls within holding of *Hay*. Accordingly, the Court concludes L.F. has alleged facts sufficient to state a claim for loss of parental consortium.

## Order

Accordingly, for the foregoing reasons, the Motion to Dismiss is DENIED.

Electronically signed on July 20, 2023 at 10:36 AM pursuant to V.R.E.F. 9(d).

Megan J. Shafritz
Superior Court Judge

[3] Consideration of the extent of the impact of the catastrophic injuries on the parent-child relationship should be reserved for the jury. *See, e.g.*, *Campos*, 123 A.3d at 870 ("[T]he severity of the injury to the parent and its actual effect on the parent-child relationship[,] the nature of the child's relationship with the parent, the child's emotional and physical characteristics, and whether other consortium giving relationships are available to the child are factors to be considered by the fact finder on a case-by-case basis in determining the amount of damages." (quotation omitted)).