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TIME TO REFORM THE REFORMS? LOSS OF CONSORTIUM ACTIONS IN SOUTH AUSTRALIA AND QUEENSLAND

Abstract

Contemporary actions for loss of consortium — an action historically brought by a husband against a tortfeasor to recover damages for tortious wrongs committed against his wife — are doctrinally inconsistent with contemporary tort law, and inherently gendered in principle and application. Loss of consortium claims were an early target for reform as part of the feminist legal project. Australian jurisdictions have approached this reformation in two ways — either by abolishing the action or expanding a plaintiff's right to standing and access to this claim. All Australian jurisdictions *except* for South Australia and Queensland abolished the actions (abolitionist jurisdictions). Conversely, statutory reform in South Australia and Queensland pursued formal gender equality by expanding access to spouses of both genders (expansionist jurisdictions). In this article, we review consortium's history and reform, finding that in pursuing formal gender equality, the expansionist jurisdictions have failed to address the substantive gender inequality at the heart of consortium actions. Instead, they broadened and further entrenched disempowerment of vulnerable primary plaintiffs in ways that are inconsistent with best practice under international and domestic human rights law. We propose that these reforms should be revisited with a view to abolition. Damages for harms should instead be directed towards primary plaintiffs, consistent with other developments in tort law.

I Introduction

Third parties are generally prevented from suing tortfeasors who wrongfully injure others:

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The authors wish to thank the reviewers for their helpful feedback, and Associate Professor Bruce Arnold for his suggestions and discussions on an earlier draft. Any errors or views expressed in this article are the authors' own.

> The law seeks to compensate the accident victim, but not anybody else who, because of their relationship to him, suffers loss of some kind consequent upon the accident.[1]

Historically, however, the law has made exceptions for certain classes of people who are dependent on others. At common law, loss of servitium actions enabled a master to seek redress for the loss of an injured servant's services.[2] Loss of consortium actions enabled husbands to seek redress for loss of consortium[3] of wives,[4] encompassing the loss of their services, companionship, and society.[5] However, the emancipation of women, such as through the *Matrimonial Causes Act 1959* (Cth)[6] and the *Married Women's Property Acts* in Australian states,[7] diminished the proprietary spousal interest supporting loss of consortium claims by: abolishing actions for enticement and criminal conversation; permitting women to hold property; and, to bring legal claims in their own right. Despite this, consortium actions survived, albeit dogged by doctrinal uncertainty about their scope (including what harms should be recognised),[8] — along with concerns about the gendered availability of

1 Peter Handford, 'Relatives' Rights and Best v Samuel Fox' (1979) 14(1–2) *University of Western Australia Law Review* 79, 79. See also *Commonwealth v Quince* (1944) 68 CLR 227, 240–1 (Rich J).

2 Gareth H Jones, 'Per Quod Servitium Amisit' (1958) 79(1) *Law Quarterly Review* 39, 50–1; William S Holdsworth, *A History of English Law* (Methuen, 3rd ed, 1923) 459–60; *Barclay v Penberthy* (2012) 246 CLR 258 ('*Barclay*'); William Blackstone, *The Oxford Edition of Blackstone: Commentaries on the Laws of England: Of Private Wrongs* (Oxford University Press, 2016) bk 3, 96 ('*Of Private Wrongs*').

3 Jeremy D Weinstein, 'Adultery, Law and the State: A History' (1986) 38(1) *Hastings Law Journal* 195, 217; Blackstone, *Of Private Wrongs* (n 2) 94–5.

4 The *Fatal Accidents Act 1846*, 9 & 10 Vict, c 93 (also known as *Lord Campbell's Act*) established than an action could be brought on behalf of the surviving dependents of a fatal tortious accident. Rather than receiving compensation for loss of earning capacity, the action compensates for loss of financial dependency (for example, generally the portion of the primary victim's earnings that ordinarily would have gone to the maintenance of the dependents). The cause of action remains available under Australian law in all jurisdictions: *Civil Law (Wrongs) Act 2002* (ACT) pt 3.1; *Compensation to Relatives Act 1897* (NSW); *Compensation (Fatal Injuries) Act 1974* (NT); *Civil Proceedings Act 2011* (Qld) pt 10; *Civil Liability Act 1936* (SA) pt 5; *Fatal Accidents Act 1934* (Tas); *Wrongs Act 1958* (Vic) pt III; *Fatal Accidents Act 1959* (WA).

5 Evans Holbrook, 'The Change in the Meaning of Consortium' (1923) 22(1) *Michigan Law Review* 1, 2; Ann C Riseley, 'Sex, Housework, and the Law' (1980) 7(4) *Adelaide Law Review* 421, 425–7.

6 *Matrimonial Causes Act 1959* (Cth), later repealed by *Family Law Act 1975* (Cth) s 3.

7 *Married Women's Property Act 1882*, 45 & 46 Vict, c 75; *Married Women's Property Act 1893* (NSW); *Married Women's Property Act 1890* (Qld); *Married Women's Property Act 1893* (SA); *Married Women's Property Act 1893* (Tas); *Married Women's Property Act 1884* (Vic); *Married Women's Property Act 1892* (WA) (collectively, '*Married Women's Property Acts*').

8 GHL Fridman, 'Consortium as an "Interest" in the Law of Torts' (1954) 32(10) *Canadian Bar Review* 1065.

the cause of action.[9] Notwithstanding widespread judicial disquiet about consortium actions, courts have proved reluctant to either expand availability of the action to wives or abolish it entirely,[10] and instead, have deferred reform to the legislature.[11]

Although much feminist legal scholarship focusses on issues including employment discrimination and domestic violence,[12] some has focussed on feminist issues within private law, including the law's valuation of women's work in the calculation of damages in tort, and the law's limited recognition of harms to women's sexual interests.[13]

Law reform efforts since the 1970s ultimately led to widespread statutory abolition of the action for loss of consortium in the majority of Australian jurisdictions.[14] South Australia and Queensland instead pursued formal gender equality reforms, expanding the cause of action to wives as well as husbands. Actions for loss of consortium remain available under s 65 of the *Civil Liability Act 1936* (SA) and s 58 of the *Civil Liability Act 2003* (Qld). In practice, the actions are rarely argued, and damages awarded are usually 'modest'.[15]

We suggest that expansion reforms are a formal, rather than substantive, response to gender inequality. In practice, the fact that reform objectives are often subordinate

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9 Joanne Conaghan, *Law and Gender* (Oxford University Press, 2013) 29–69.

10 *Best v Samuel Fox & Co Ltd* [1951] 2 KB 639 ('*Best*').

11 Ibid.

12 In Australia, see, eg: Ngaire Naffine, *Law and the Sexes: Explorations in Feminist Jurisprudence* (Allen & Unwin, 1990); Regina Graycar and Jenny Morgan, *The Hidden Gender of Law* (Federation Press, 1st ed, 1990); Margaret Thornton, *The Liberal Promise: Anti-Discrimination Legislation in Australia* (Oxford University Press, 1990).

13 Margaret Thornton, 'Loss of Consortium: Inequality before the Law' (1984) 10(2) *Sydney Law Review* 259 ('Loss of Consortium'); Janice Richardson and Erika Rackley, *Feminist Perspectives on Tort Law* (Routledge, 2012); Leslie Bender, 'Teaching Torts as if Gender Matters: Intentional Torts' [1994] (1) *Virginia Journal of Social Policy and the Law* 115; Leslie Bender, 'An Overview of Feminist Torts Scholarship' (1993) 78(4) *Cornell Law Review* 575; Leslie Bender, 'A Lawyer's Primer on Feminist Theory and Tort' (1988) 38(1) *Journal of Legal Education* 3; Joanne Conaghan, 'The Measure of Injury: Race, Gender and Tort Law' (2011) 38(2) *Journal of Law and Society* 331; Joanne Conaghan, 'Tort Law and Feminist Critique' (2003) 56(1) *Current Legal Problems* 175; Martha Chamallas and Lucinda M Finley (eds), *Feminist Judgments: Rewritten Tort Opinions* (Cambridge University Press, 2020); Anita Bernstein, *The Common Law Inside the Female Body* (Cambridge University Press, 2018); Martha Chamallas and Jennifer B Wriggins, *The Measure of Injury: Race, Gender and Tort Law* (New York University Press, 2010).

14 *Civil Law (Wrongs) Act 2002* (ACT); *Law Reform (Marital Consortium) Act 1984* (NSW); *Common Law (Miscellaneous Provisions) Act 1986* (Tas); *Law Reform (Miscellaneous Provisions) Act 1941* (WA); *Administration of Justice Act 1982* (UK).

15 Jillian Barrett, 'Damages for Loss of Consortium and Servitium' [2019] (151) *Precedent* 34.

to judicial concerns about awarding 'double damages' is problematic for determining which spouse should control expenditure of damages. Less directly but still importantly, the reform objectives are undermined by social factors including the inequitable distribution of funds, as well as issues with the economic recognition of both paid and unpaid labour. In turn, these factors may affect damages awards for both the primary plaintiff and the consortium-deprived spouse.

Further, while the reforms formally engage with gender equality, they undermine substantive equality by extending the objectification and denial of agency of vulnerable primary plaintiffs beyond gender boundaries. This is inconsistent with Australia's obligations under international human rights law.[16] The *Convention on the Rights of Persons with Disability* ('*CRPD*') is particularly salient. An overlooked intersection arises from the fact that many of those whose injuries are sufficiently serious to support their spouse bringing a claim for loss of consortium under the reforms will also satisfy definitions of 'disability'.[17] To date, surprisingly little scholarship has examined the expansion of consortium from an intersectional perspective,[18] considering it not just as a gendered issue, but also as a disability issue. In doing so, we draw on concepts including ableism, objectification, and vulnerability theory to support our contention that the expansion reforms should themselves be abolished.

16 Those obligations are normative rather than justiciable: Australia has yet to enact into domestic legislation many of the International Human Rights Instruments it has ratified, however those instruments are acknowledged by the judiciary as being an influential source of law. See, eg: *Mabo v Queensland [No 2]* (1992) 175 CLR 1, 29–30 (Brennan J); Michael Kirby, 'The Australian Use of International Human Rights Norms: From Bangalore to Balliol: A View from the Antipodes' (1993) 16(2) *University of New South Wales Law Journal* 363; Philip Lynch, 'Harmonising International Human Rights Law and Domestic Law and Policy: The Establishment and Role of the Human Rights Law Resource Centre' (2006) 7(1) *Melbourne Journal of International Law* 255; Michael Kirby, 'The Impact of International Human Rights Norms: "A Law Undergoing Evolution"' (1995) 25(1) *University of Western Australian Law Review* 30; Justice Michael Kirby, 'The Road from Bangalore: The First Ten Years of the Bangalore Principles on the Domestic Application of International Human Rights Norms' (Speech, Conference on the 10th Anniversary of the Bangalore Principles, 28 December 1998); *Dietrich v The Queen* (1992) 177 CLR 292; Wendy Lacey, 'Judicial Discretion and Human Rights: Expanding the Role of International Law in the Domestic Sphere' (2004) 5(1) *Melbourne Journal of International Law* 108, 113.

17 *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008) art 1 ('*CRPD*'). Article 1 was enacted into Australian domestic law via the *Disability Discrimination Act 1992* (Cth) s 4 (definition of 'disability'); *Equal Opportunity Act 1984* (SA) s 5 (definition of 'disability'); *Disability Services Act 2006* (Qld) s 11.

18 See, eg: Kimberle Crenshaw, 'Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color' (1991) 43(6) *Stanford Law Review* 1241; Nancy J Hirschmann, 'Disability as a New Frontier for Feminist Intersectionality Research' (2012) 8(3) *Politics and Gender* 396.

Even under circumstances where the injured partner's injuries are so severe that they lose the capacity to act independently, there are other legal frameworks, including guardianship and supported decision-making powers, that have been amended recently to ensure compliance with the *CRPD*.[19] The amendments provide more appropriate mechanisms to support the needs of those primary plaintiffs than do actions for loss of consortium.

This article argues that abolition of the loss of consortium cause of action Australia-wide is both timely and necessary. It does so in four parts. In Part II, we review the historical origins of the action as a remedy for wrongs. Part III presents judicial disquiet over the scope and application of the action, alongside the feminist law critique that influenced statutory reform — either abolition or expansion — in Australia. In Part IV, we consider the effectiveness of expansion in addressing pre-reform concerns including gender equity, awarding of double damages, and ageism. We examine expansion through the lenses of vulnerability and objectification, including its intersection with human rights law, international disability rights discourse and family law. Here, this article will demonstrate that the reforms are inconsistent with the obligations of Australia towards vulnerable people generally, and that they fail to address the underlying substantive gender inequality issues associated with this historic cause of action. In Part V, we call for further reform to abolish the action entirely, arguing that while expansion of the right to bring an action may have had little impact on the day-to-day business of the courts, the normative potency of the law makes the retention of a cause of action so steeped in archaic and discriminatory values unconscionable in modern society. Thus, laissez-faire arguments against further reform based on the infrequency of use of the cause of action should be disregarded.

We also refute claims that the abolition of consortium would permit otherwise compensable wrongs to go uncompensated, noting that a recurring concern about loss of consortium claims is the potential for awarding of double damages — judicial responses to which have resulted in insufficient compensation — and the absence of evidence from abolition jurisdictions of any crisis of insufficient compensation. In recognition of the law's significant normative power to signal the value the community assigns to the rights of the most vulnerable, we conclude that restricting the award of damages to the primary plaintiff satisfies the need for adequate compensation while respecting and prioritising the primary plaintiff's dignity and autonomy, interests which should not be subordinated to derivative interests of the primary plaintiff's spouse.

II Development and Scope of Loss of Consortium

The scope and content of loss of consortium actions lack precision, which is partly due to the mutability of the underlying principles on which the cause of action

19 Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws* (Final Report No 124, August 2014) ('*Equality, Capacity and Disability*').

rests.[20] The earliest reported claims for loss of consortium relied upon the law's recognition of the proprietary or quasi-proprietary interest a husband had in the person, companionship, and labours of his wife.[21] Wives, under coverture, lacked a separate legal identity, and so could not recover damages for harms they suffered unless the claim was brought by their husbands.[22]

In *Guy v Livesey*,[23] the Court of King's Bench distinguished between a husband's action brought on his wife's behalf for her injuries, and one brought for the injuries occurring to him as a consequence of the injuries to her — describing the latter as 'only a damage and loss to himself, for which he shall have this action'.[24] Despite this distinction, the effect of coverture was to aggregate all claims for damages arising from negligent or intentional injury to the wife into a single claim brought by the husband. For practical purposes, courts were rarely required to attribute specific damages to a particular spouse.

The passage of the *Married Women's Property Acts*,[25] through which married women acquired limited legal independence from their husbands, dissolved the doctrine of marital unity, recognising that husbands and wives do not necessarily have common interests.[26] As wives and husbands became independently capable of bringing claims against the same defendant relating to the same negligent or trespassory acts, the need to identify which elements of a claim rightly belonged to a wife suing as a primary plaintiff, and which elements should be captured under a related loss of consortium claim brought by her husband assumed greater practical significance. The risk of awarding duplicate damages[27] became a prominent concern amongst judges hearing loss of consortium claims.[28]

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20 Holbrook (n 5); Glanville Williams, 'Some Reforms in the Law of Tort' (1961) 24(1) *Modern Law Review* 101; Peter Brett, 'Consortium and Servitium: A History and Some Proposals' (1955) 29(6) *Australian Law Journal* 321, 389, 428; Jacob Lippman, 'The Breakdown of Consortium' (1930) 30(5) *Columbia Law Review* 651.

21 Holbrook (n 5) 2.

22 William Blackstone, *The Oxford Edition of Blackstone: Commentaries on the Laws of England: Of the Rights of Persons* (Oxford University Press 2016) bk 1, 285 ('*Of the Rights of Persons*').

23 (1618) 79 ER 428.

24 Ibid 428.

25 *Married Women's Property Acts* (n 7).

26 Alecia Simmonds, 'Courtship, Coverture and Marital Cruelty: Historicising Intimate Violence in the Civil Courts' (2019) 45(1) *Australian Feminist Law Journal* 131, 134, 141; *Wright v Cedzich* (1930) 43 CLR 493 ('*Wright*'); Graycar and Morgan, *The Hidden Gender of Law* (n 12) 117; Jayme S Lemke, 'Interjurisdictional Competition and the Married Women's Property Acts' (2016) 166(3–4) *Public Choice* 291, 294.

27 *Van Gervan v Fenton* (1992) 175 CLR 327; *Griffiths v Kerkemeyer* (1977) 139 CLR 161 ('*Griffiths*').

28 Holbrook (n 5) 6; *Thorne v Strohfeld* [1997] 1 Qd R 540 ('*Thorne*'); *Norman v Sutton* (1989) 9 MVR 525 ('*Norman*'); *Johnson v Nationwide Field Catering Pty Ltd* [1992] 2 Qd R 494, 496 ('*Johnson*').

Throughout its existence, consortium has lacked precise conceptual boundaries.[29] *Baker v Bolton*[30] established that any claims for loss of consortium expired with the death of the injured wife. Lord Sumner subsequently described the relevant interest as 'not in the life but in the service or consortium during life'.[31] Despite this clarification, the rule has attracted extensive academic criticism,[32] and further confused the principle underlying the action. The High Court of Australia in *Toohey v Hollier*[33] ('*Toohey*') stated:

> There is no reason to suppose that the word *consortium* possessed or acquired a legal meaning. … The notion of sharing a domestic life was probably all that was intended.[34]

Shared aspects of a domestic life in consortium claims typically fell into two categories: (1) loss of the wife's services within the household — typically related to running the household and caring for and educating the children; and (2) the less-tangible loss of the wife's society and companionship. Both categories proved to be controversial.

A *Services*

Historically, the doctrine of coverture was used to reject a wife's claims for loss of consortium on the basis that the wife had no comparable proprietary interest in services performed by her husband. Emphasising the material value of the services, the court reasoned that if such services were required, the husband, as controller of finances and property, would bear responsibility for paying for them. In *Lynch v Knight*,[35] Lord Wensleydale characterised a husband's interests as

> the benefit which the husband has in the *consortium* of the wife, is of a different character from that which the wife has in the *consortium* of a husband. The relation of the husband to the wife is in most respects entirely dissimilar from that of the master to the servant, yet in one respect it has a similar character. The assistance of the wife in the conduct of the household of the husband, and in the education of his children, resembles the service of a hired domestic, tutor,

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29 *Kungl v Schiefer* (1960) 25 DLR (2d) 344 (Ontario Court of Appeal) (Schroeder JA); Holbrook (n 5).

30 *Baker v Bolton* (1808) 170 ER 1033, 1033 (Lord Ellenborough).

31 *The Amerika* [1917] AC 38, 54.

32 Anthony Gray, '*Barclay v Penberthy*, the Rule in *Baker v Bolton* and the Action for Loss of Services: A New Recipe Required' (2014) 40(3) *Monash University Law Review* 920. Allan Beever, '*Barclay v Penberthy* and the Collapse of the High Court's Tort Jurisprudence' (2013) 31(2) *University of Queensland Law Journal* 307; Jones (n 2); Dan Flanagan, '*Barclay v Penberthy*: Polishing the Antiques of Australian Tort Law' (2013) 35(3) *Sydney Law Review* 655.

33 *Toohey v Hollier* (1955) 92 CLR 618 ('*Toohey*').

34 Ibid 625–6 (emphasis in original).

35 (1861) 11 ER 854 ('*Lynch*').

> or governess; is of material value, capable of being estimated in money; and the loss of it may form the proper subject of an action, the amount of compensation varying with position in society of the parties.[36]

Effectively restricting women from bringing claims for loss of consortium, he continued:

> The loss of such service of the wife, the husband, who alone has all the property of the married parties, may repair by hiring another servant; but the wife sustains only the loss of the comfort of her husband's society and affectionate attention, which the law cannot estimate or remedy. She does not lose her maintenance, which he is bound still to supply …[37]

In *Wright v Cedzich*, the High Court similarly denied availability of consortium damages to a wife.[38] Justice Isaacs, dissenting, critiqued Lord Wensleydale's characterisation of the spousal relationship, pointing out:

> *The children are hers as well as his* … Why is her care for her own child to be considered that of his *servant*, rather than that of *a wife and a mother*, and as the natural consequence of the union into which both have entered, and of the responsibility to the child which both parents owe by every tie of nature and justice? Does she tend and watch and care for her children because she is ordered — actually or impliedly — by her husband, and does he either actually or impliedly pay her wages as for services rendered to him at his direction in so doing?[39]

Increased formal workforce participation by women has entrenched — rather than resolved — the difficulties presented by the 'material value' requirement of the services. Courts have assumed increased external labour participation by women correlates to decreased domestic labour, resulting in a devaluation of women's domestic labour, and reduced damages awards, disregarding evidence to the contrary.[40]

Reflecting contemporaneous non-recognition of mental pain or anxiety as compensable harms, Lord Wensleydale further sought to restrict recovery for loss of consortium entirely to special damages related to services lost by the husband. This proposition was supported in *Best v Samuel Fox & Co Ltd* ('*Best*'),[41] and — with qualification — in Australia in *Toohey*.[42]

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36 Ibid 863 [598] (emphasis in original).

37 Ibid 863 [599].

38 *Wright* (n 26) 500, 531, 535.

39 Ibid 509 (emphasis in original).

40 Riseley (n 5); Thornton, 'Loss of Consortium' (n 13) 267; *Bagias v Smith* [1979] FLC 78, 497 ('*Bagias*').

41 [1951] 2 KB 639 ('*Best*').

42 *Toohey* (n 33) 627.

B *Society and Comfort*

In *Best*,[43] a workplace injury rendered the plaintiff wife's husband permanently impotent. Dismissed at first instance for want of a cause of action, the Court of Appeal, rather than denying that wives had a right to bring claims for loss of consortium, instead found that the plaintiff's loss was incomplete, and therefore could not be recognised by damages. This principle of 'indivisibility' — requiring either temporary or permanent loss of services *and* society and companionship — lacked authority.[44]

The House of Lords in turn reverted to the issue relied on by the judge at first instance: that the cause of action was not available to wives, for the reasons outlined by William Blackstone[45] and Lord Wensleydale,[46] described above, amongst others. On the principle of indivisibility, the House of Lords was circumspect. Lords Goddard and Porter were supportive, consistent with their efforts to restrict claims to pecuniary damages. Lord Reid, Lord Oaksey concurring, rejected the indivisibility principle.[47]

In *Toohey*, the High Court considered an appeal from an award of general damages to a husband whose wife was injured in a motor vehicle accident. Dismissing the appeal, the Court noted that

> such elements as mental distress are to be excluded but the material consequences of the loss or impairment of his wife's society, companionship and service in the home and the expense of her care and treatment incurred as the result of the injury form proper subjects of compensation to the husband.[48]

The effect of this seems to be that if a husband could show 'material consequences' based on loss of services, he could also recover general damages for aspects excluding 'mental distress' arising from loss of her companionship and society. It is unclear what 'material and temporal' — pecuniary — losses associated with loss of society and companionship would support a claim in the absence of a component for loss of services.[49] In essence, pecuniary loss arising from loss of services seems to be an essential component of a loss of consortium claim — effectively excluding women from the cause of action for want of evidence of a pecuniary loss arising from loss

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43 *Best* (n 41).

44 *Toohey* (n 33); Eric CE Todd, 'Reflections on Best v. Samuel Fox, Ltd' (1952) 15(2) *Modern Law Review* 246, 250.

45 Blackstone, *Of the Rights of Persons* (n 22) 284–7.

46 See above nn 35–6.

47 *Best* (n 41) 736.

48 *Toohey* (n 33) 627 (Dixon CJ, McTiernan, Kitto JJ).

49 It is the view of the authors that costs associated with accessing assisted reproductive technologies necessitated by the injury could potentially be recognised as pecuniary losses. Loss of childbearing ability has been recognised as an element of 'companionship and society', in contrast to loss of sexual capacity per se.

of their husband's services, except presumably in those rare circumstances where the wife was the main earner.

Could claims for loss of society and companionship, without accompanying claims for loss of services, demonstrate the necessary 'material or temporal loss' to be recognised by the courts? This was a question considered in *Birch v Taubmans Ltd*,[50] a case similar to *Best*, except that the total and permanent loss of sexual capacity affected the wife rather than the husband. The New South Wales court upheld an appeal against a jury award of £1 in nominal damages for loss of comfort and society. Seeking to differentiate between the 'material or temporal' and 'spiritual' impacts of loss of a wife's comfort and society in the context of sexual capacity, the Court referenced the husband's 'right' to intercourse within marriage, including for procreation.[51] Neither line of reasoning has aged well. The common law right of a husband to intercourse is no longer recognised,[52] while the emphasis on procreation presumably excludes recognition of loss by a couple who were past child-bearing age, did not wish to have children, or for other reasons were not able to do so.[53]

Three South Australian judgments further developed the law regarding society and comfort. In *Hasaganic v Minister for Education*,[54] the Supreme Court of South Australia recognised a claim for loss of sexual capacity per se, rather than loss of sexual capacity as loss of childbearing capacity. *Markellos v Wakefield*[55] distinguished between an overall deterioration in the quality of the atmosphere and companionship of the marriage from mental distress (not compensable under *Toohey*). *Meadows v Maloney*[56] recognised the significant material loss of companionship arising from the injury to the wife, again distinguishing it from 'mental distress'.

C *An Element of Moral Luck?*

One problem evident in the lines of authority, alluded to by Lord Porter in *Best* — but not well-developed — is the role played by moral luck in consortium actions. According to Thomas Nagel:

50 (1956) 57 SR (NSW) 93 ('*Birch*').

51 Ibid 99.

52 *R v L* (1991) 174 CLR 379.

53 Riseley (n 5) sensibly suggests that a better explanation is that recognition of a husband's right to his wife's society is 'an exception to the common law rule excluding emotional damage from recovery': at 433.

54 (1975) 5 SASR 554 ('*Hasaganic*').

55 (1974) 7 SASR 436.

56 (1972) 4 SASR 567.

> Where a significant aspect of what someone does depends on factors beyond his control, yet we continue to treat him in that respect as an object of moral judgment, it can be called moral luck.[57]

Legal liability for negligence generally follows similar principles. The defendant must take the plaintiff as he or she finds them:[58] a young, old, male, female, injured, fit or — in this context — married or not. In addition to rejecting Mrs Best's claim on the grounds of the difference in the quality of the services noted above, Lord Porter, echoed by Lord Goddard, sought to distinguish precedent and obiter supportive of recognising wives' claims contained in *Gray v Gee* ('*Gray*'),[59] and *Place v Searle* ('*Place*'),[60] from the facts in *Best*. While *Gray* and *Place* indicated that both husband and wife alike have a 'cause of action against a third party who, without justification, destroys that consortium',[61] both cases related to actions for enticement where the defendant knew the plaintiff was married. Distinguishing them from *Best* — a claim for negligent injury — Lord Porter stated: 'I know of no case where such a right of action has even been suggested where there is no evidence that the defendant knew of the existence of a wife or husband',[62] echoing the earlier views of McCardie J in *Butterworth v Butterworth*.[63] The difference in liability for defendants could be significant: if they negligently injured married men whose families were complete, or single women, based on the common law at the time of *Best*, no action for loss of consortium would lie. In contrast, if the defendant injured a young married woman of childbearing age, in addition to any damages arising directly as the result of a claim brought by her for her injuries, the defendant would also potentially face another claim for loss of consortium brought by her husband, for which damages could be substantial.

By the mid-20th century, actions for loss of consortium were attracting significant criticism from judges and scholars alike.[64] In *Best*, no fewer than nine judges throughout the course of proceedings opposed expansion of the tort, while affirming female equality as a legal principle, and criticising past subordination of women.[65] Notwithstanding extensive concerns about the tort, *Best* highlighted that if any reform was to occur it would be legislative rather than judicial.

Best foreshadowed the legislative response and reasoning adopted by the majority of Australian jurisdictions, for largely similar reasons to those identified in *Best*,

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57 Thomas Nagel, 'Moral Luck' in Daniel Statman (ed), *Moral Luck* (State University of New York Press, 1993) 57–71, 59.

58 *Watts v Rake* (1960) 108 CLR 158, 164.

59 (1923) 39 TLR 429.

60 [1932] 2 KB 497 ('*Place*').

61 *Best* (n 41) 726 (Porter LJ), quoting ibid 512 (Scrutton LJ).

62 Ibid 727.

63 *Butterworth v Butterworth* (1920) P 126, 142, 151.

64 See, eg: Todd (n 44); Handford (n 1).

65 Conaghan, *Law and Gender* (n 9) 31.

which remain, in the authors' own views, valid. Curiously, of those jurisdictions which undertook legislative reform, the approaches taken were polarised between expansion, which the court in *Best* rejected, and abolition, which they supported, albeit via legislative rather than judicial reforms. The next Part of this article considers the historical context of the reforms and contextualises the need to revisit their outcome in the expansionist jurisdictions, with a view towards abolition.

III An Appetite for Reform

In 1970, the Law Reform Commission of South Australia reported on law relating to women and women's rights, including tort law reform.[66] Although brief, the recommendations were clear: amend the *Wrongs Act 1936* (SA) ('*Wrongs Act*')[67] to broaden the scope of consortium beyond *Wright* to reflect *Best* in scope, but exclude the reasoning ultimately employed in *Best*.[68] The *Wrongs Act* was subsequently amended to extend availability of consortium actions to wives, specifying that damages were to be calculated in the same way for spouses regardless of gender.[69]

The report's brevity was a limitation. While it was apparent that the committee sought to reduce or eliminate laws that were discriminatory, it lacked contextual justification for its recommendations. Its approach presented a seemingly obvious solution to an overtly discriminatory aspect of the common law, through expansion of access to the cause of action to spouses of both genders. This was, however, not the only approach that could have been taken.

The English Law Reform Committee in the late 1960s reviewed loss of servitium and loss of consortium actions,[70] finding that

> the action for loss of consortium is now an anachronism and that it ought to be abolished. But merely to abolish the action without putting anything in its place would lead to injustice.[71]

Referring to a proposal by Glanville Williams,[72] it proposed to permit either spouse to recover 'reasonable medical and nursing expenses and all other costs properly incurred in consequence' of an injury to husband or wife, including the costs of any

66 Law Reform Committee of South Australia, *Law Relating to Women and Women's Rights* (Report No 11, 1970) ('*Law Relating to Women*').

67 *Wrongs Act 1936* (SA) ('*Wrongs Act*').

68 *Law Relating to Women* (n 66) 5–6.

69 *Wrongs Act* (n 67) s 33, as amended *by Statutes Amendment (Law of Property and Wrongs) Act (No 19) 1972* (SA) Pt III s 33.

70 English Law Reform Committee, *Loss of Services* (Report No 11, Cmnd 2017, 1963).

71 Ibid 9.

72 Williams (n 20) 104–5.

domestic help required to replace services normally or previously provided by the injured partner.[73] Although an expansion model of reform on gender lines, it was significantly narrower in scope than the South Australian reforms, restricting claims to 'material or temporal' loss of services only, rather than loss of companionship and society.

South Australia's reforms foreshadowed it becoming the first Australian jurisdiction to pass sex discrimination laws three years later.[74] By the 1980s, feminist legal scholars were turning their attention to the gendered nature of tort law, particularly where damages awarded in tort intersected with broader feminist concerns about wage equality and recognition of the social value of women's unpaid labour.[75] On loss of consortium, Margaret Thornton noted that the courts'

> lowly perception of the value of the full-time homemaker tends to emanate from a judicial and societal inability to evaluate the contributions of unpaid work in a capitalist structure concerned with the acquisition of wealth and monetary reward. … The judiciary have adopted the view that the loss of all these skills is compensable at the lowest market rate for a replacement domestic worker or servant.[76]

Thornton observed that even when the wife was engaged in full time employment and still continued to do the bulk of the domestic work, the courts remained 'preoccupied with [consideration of] the husband's loss'.[77]

Subsequent law reform enquiries culminated in abolition of loss of consortium actions in all but two of the remaining Australian jurisdictions. The Australian Law Reform Commission's ('ALRC') Final Report on *Loss of Consortium and Compensation for Loss of Capacity to Do Housework* in the Australian Capital Territory[78] detailed 'discriminatory treatment of wives',[79] and recommended its abolition.[80] It referenced the New South Wales Law Reform Commission Research Paper which

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73 *Loss of Services* (n 70) 9.

74 *Sex Discrimination Act 1975* (SA).

75 Robin West, 'Women in the Legal Academy: A Brief History of Feminist Legal Theory' (2018) 87(3) *Fordham Law Review* 977; Martha Albertson Fineman, 'Feminist Legal Theory' (2005) 13(1) *American University Journal of Gender, Social Policy and the Law* 13; Nicola Lacey, 'Feminist Legal Theory' (1989) 9(3) *Oxford Journal of Legal Studies* 383; Carrie Menkel-Meadow, 'Feminist Legal Theory, Critical Legal Studies, and Legal Education or "The Fem-Crits Go to Law School"' (1988) 38(1–2) *Journal of Legal Education* 61.

76 Thornton, 'Loss of Consortium' (n 13) 263.

77 Ibid 268.

78 Australian Law Reform Commission, *Community Law Reform for the Australian Capital Territory: Second Report: Loss of Consortium and Compensation for Loss of Capacity to Do Housework* (Report No 32, 1986) ('*Loss of Consortium and Compensation*').

79 Ibid 4.

80 Ibid 10.

proposed reforming earnings-based, lump sum award compensation mechanisms and favouring providing compensation for non-earners, including primary plaintiffs in consortium claims.[81] The ALRC noted that:

> an equalised loss of consortium action would not in fact operate equally because the amount of damages awarded to husbands for the loss of wives' services would tend to be greater than damages awarded to wives in equivalent actions.[82]

Further, expansion would result in the action only being available to married people, presenting an additional problem from the perspective of discrimination.[83]

In New South Wales, consortium was expressly abolished by the *Law Reform (Marital Consortium) Act 1984* (NSW). In debating the reforms, the New South Wales legislature described consortium actions as 'abhorrent to the community's current view of the position of women in society'[84] and rejected the alternative reform — expansion of the action to women — as 'entrench[ing] the odium of proprietorial rights in marriage'.[85]

The Australian Capital Territory,[86] Tasmania,[87] and Western Australia[88] similarly abolished the cause of action. The Western Australian Parliament described it as 'anachronistic' because 'it is a right which is not shared by the wife; in other words, one cannot petition or sue the other way'.[89] Victoria and the Northern Territory, instead of abolition, implemented broader reform of legislation governing claims and calculation of damages,[90] which have been interpreted as abolishing the cause of action for practical purposes.[91]

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81 Michael R Chesterman, *Accident Compensation: Proposals to Modify the Common Law* (Consultation Paper, New South Wales Law Reform Commission, 1983).

82 *Loss of Consortium and Compensation* (n 78) 4.

83 Ibid 6.

84 New South Wales, *Parliamentary Debates*, Legislative Council, 10 May 1984, 541 (BJ Unsworth, Minister for Transport and Vice-President of the Executive Council).

85 Ibid 546 (Ann Symonds).

86 *Civil Law (Wrongs) Act 2002* (ACT) s 218.

87 *Common Law (Miscellaneous Actions) Act 1986* (Tas) s 3.

88 *Law Reform (Miscellaneous Provisions) Act 1941* (WA) s 3.

89 Western Australia, *Parliamentary Debates*, Legislative Council, 16 July 1986, 1881 (John Williams).

90 *Motor Accidents (Compensation) Act 1979* (NT) s 5; *Work Health Act 1997* (NT) s 52, repealed by *Work Health and Safety (National Uniform Legislation) Act 2011* (NT); *Transport Accident Act 1986* (Vic) ss 93(1), (1A), (2).

91 *Doughty v Martino Developments Pty Ltd* (2010) 27 VR 499, 508 [20]; *CSR Ltd v Eddy* (2005) 226 CLR 1, 22–3 [44] ('*CSR*').

Queensland did not reform actions for loss of consortium until 1989, which was prompted in part by the circumstances of *Thorne v Strohfeld*[92] where Mrs Thorne's husband suffered serious injuries, including permanent brain injury. A primary claim against the defendant was brought and settled on behalf of Mr Thorne. Under the common law at the time, Mrs Thorne was unable to bring a claim for loss of consortium. Responding to publicity surrounding the case, Queensland's then Attorney-General in a proposal to Cabinet recommended creating a 'wife's action for loss of consortium'.[93] The recommendation supported expansion rather than abolition despite noting the preponderance of abolition reforms in other jurisdictions. The Attorney-General noted the observation of Peter Handford that actions for loss of consortium award damages to spouses for loss of society, companionship, and assistance, which are not otherwise capable of compensation through awards to the primary victim:[94] 'from a policy point of view, it would perhaps be undesirable to abolish the husband's right to bring an action for loss of consortium, as it is such an entrenched part of our legal system'.[95]

With the *Law Reform (Husband and Wife) Act Amendment Act 1989* (Qld), the Queensland legislature intended to provide 'positive benefits to Mrs Thorne and to *the women of Queensland* … as this right of action [had] been available to men during this time, [and] it [was] only fair that the remedy be available *to all women as well*'.[96] The stated purpose was to specifically confer 'equal opportunity for women in this area of the law'.[97] Gender discrimination was, thus, identified as the sole mischief which the legislation was to remedy.

Notwithstanding the legislative reforms, Mrs Thorne's engagement with the legal system was not straightforward. Initially awarded $115,850 in damages to cover both the services and companionship and society elements of her consortium claim, the Queensland Court of Appeal, concerned about awarding of double damages for the service component brought about by an award of *Griffiths v Kerkemeyer*[98] damages — damages awarded to a plaintiff for domestic assistance or care, when that care is provided to the plaintiff gratuitously by friends or relatives of the plaintiff — included in Mr Thorne's previously settled claim, reduced her award to $31,350. Justice of Appeal Pincus and Helman J stated:

92 *Thorne* (n 28) 542, 545.

93 Explanatory Notes, Law Reform (Husband and Wife) Act 1968 Amendment Bill 1989 (Qld) ('Explanatory Notes').

94 Handford (n 1) 118.

95 'Creation of a Wife's Action for Loss of Consortium', *Queensland Government* (Web Page, 10 October 1988) 2 [8] <https://www.archivessearch.qld.gov.au/items/ITM3001199>.

96 Explanatory Notes (n 93) 3 (emphasis added).

97 Ibid.

98 *Griffiths* (n 27).

> We are in respectful disagreement with his Honour's conclusions, as it appears to us that the wife's claim for loss of the husband's services relates to the same matters as were claimed in the husband's suit.[99]

In 2010, Queensland's legislation was further amended, making the provisions gender-neutral. Consequently, the statutory action for loss of consortium is currently available to all spouses of injured persons in Queensland, including same sex and de facto partners.[100] The statutory claim also survives the death of a spouse.[101]

The *Civil Liability Act 2003* (Qld),[102] and the *Workers' Compensation and Rehabilitation Act 2003* (Qld) ('*WCR Act*')[103] establish qualifying parameters for the award of damages for the loss of consortium.[104] These provisions restrict the statutory action to circumstances where a spouse has died from their injuries or where the injured spouse's general damages have been assessed at or in excess of a prescribed amount — currently $49,700 for injuries occurring after 1 July 2022.[105] The *WCR Act* and its regulations operate to a similar effect.[106]

Part IV addresses some practical implications of the expansionist reforms, evident from the subsequent case law. Expansion through legislative reform has resulted in greater substantive inequality than was flagged even by the ALRC, including entrenching discriminatory and objectifying treatment of other disadvantaged groups, particularly people with disabilities. For these reasons, added to the initial gender-based concerns prompting the earlier abolition reforms, we argue that it is necessary for expansionist jurisdictions to reconsider their retention of the cause of action.

IV A Reform in Need of Reform?

Following the expansion reforms, few claims have come before the courts[107] and courts have largely relied on pre-reform common law decisions on husband's loss of

99 *Thorne* (n 28) 98.

100 *Acts Interpretation Act 1954* (Qld) s 32DA(5)–(6).

101 *Barclay* (n 2) 279.

102 *Civil Liability Act 2003* (Qld) s 58.

103 *Workers' Compensation and Rehabilitation Act 2003* (Qld) ss 306M, 610 ('*WCR Act*').

104 *Civil Liability Act 2003* (Qld) s 58; ibid.

105 *Civil Liability Regulation 2014* (Qld) reg 6; *Workers' Compensation and Rehabilitation Regulation 2014* (Qld) reg 128.

106 *WCR Act* (n 103) s 128.

107 *Corkery v Kingfisher Bay Resort Village Pty Ltd* [2010] QSC 161, [95] ('*Corkery*'). Recent Westlaw and LexisNexis searches identified 39 claims brought in South Australia, and 49 claims brought in Queensland, since the respective expansion reforms.

consortium in interpreting the reforms.[108] Despite the reforms, loss of consortium actions continue to raise issues of discrimination and unfairness.

In *Thorne*, the Queensland Court of Appeal was concerned about the risk of awarding double damages arising from the overlap between a spousal loss of consortium services claim, and the primary victim's claim for *Griffiths v Kerkemeyer* and gratuitous services damages.[109] This risk increases if the primary claim settles, as in *Thorne*, particularly where there is uncertainty about precisely which heads of damage had been claimed and compensated.[110]

Where the primary claim involving *Griffiths v Kerkemeyer* damages is concluded within the courts and if no action for loss of consortium is brought concurrently, it is presumed that the damages awarded for the primary claim appropriately compensate for the losses incurred, including those of any non-injured spouse.[111] A separate and subsequent claim for loss of consortium by the non-injured spouse will accordingly be restricted in scope, to prevent awarding of double damages for the same harm.[112] However, these court-imposed limitations on awarding of double damages are evaded where the non-injured spouse brings their claim for loss of consortium concurrently, or, as in *Thorne*, settled damages for the loss of consortium claim are assessed to mitigate against awarding of double damages (reduced) by favouring the injured spouse.[113]

The post-reform situation is also complicated regarding gratuitous services formerly provided by, rather than to, the primary victim. Previously, *Sullivan v Gordon*[114] damages allowed the injured party to recover for the future costs of services that, but for the injury suffered, they would have gratuitously provided. However, in *CSR Ltd v Eddy*,[115] the High Court overturned *Sullivan v Gordon*. Statutory reform was subsequently imposed in Queensland,[116] subjecting both the injured and non-injured

108 See, eg: *Daly v DA Manufacturing Co Pty Ltd* [2002] QSC 308, [46] (Muir J) ('*Daly*'); *Johnson v Kelemic* [1979] FLC 90–675, 78, 491 (Reynolds JA); *Toohey* (n 33) 625.

109 *Sianis v Barlow* (1987) 48 SASR 469; *Norman* (n 28) 523–3 (Gleeson CJ, Kirby P and Hope AJA); Hedvika Knopova, 'Loss of Consortium: Thorn in Our Side: *Thorne v Strohfeld*' (1998) 20(1) *University of Queensland Law Journal* 115.

110 *Thorne* (n 28).

111 *Norman* (n 28) 9–13; *Andrewartha v Andrewartha [No 2]* (1987) 45 SASR 85, 87–9 (O'Loughlin J) ('*Andrewartha*'); Jeffrey Rolls 'Loss of Consortium Claims' [1997] (23) *Plaintiff* 18.

112 *Thorne* (n 28).

113 *Norman* (n 28) 12; *Bresatz v Przibilla* (1962) 108 CLR 541, 549–50 (Owen J).

114 (1999) 47 NSWLR 319.

115 *CSR* (n 91) 13 [19], 32 [68] (Gleeson CJ, Gummow and Heydon JJ).

116 *Civil Liability Act 2003* (Qld) s 59A, as inserted by *Civil Liability and Other Legislation Amendment Act 2010* (Qld) s 10.

spouse to the same threshold requirement of an Injury Scale Value ('ISV')[117] — currently 23 or higher[118] — to claim damages in respect of loss of those services.[119] There, the similarities end. The non-injured spouse is entitled to claim for loss of the benefit of receiving those services without having to satisfy any additional requirements, as they form part of the services component for loss of consortium. The injured spouse, in contrast, in bringing a claim for loss of the ability to provide those services, must demonstrate that the services would have been provided to a member of their household or their unborn child,[120] and that the services would have been provided for a minimum of six hours a week, for a minimum period of six months.[121] So long as general damages are assessed at a minimum ISV of 23, the non-injured spouse may bring an action for loss of consortium pursuant to s 58 of the *Civil Liability Act 2003* (Qld). The injured spouse — as the former provider of the services — is subject to a higher threshold when seeking recovery for loss of the same services than the non-injured spouse seeking to recover for loss of their right to receive them. The non-injured spouse is compensated more readily for a harm which they do not personally suffer.[122]

Queensland's statutory reforms have had the unintended consequence of allowing the non-injured spouse to recover for loss of gratuitous domestic services more readily than the injured spouse.[123] Pursuant to s 59A, the injured spouse encounters additional barriers to recovering for the same loss.[124] Ergo, loss is conceptualised as a loss of benefit by the non-injured spouse, rather than a loss of the injured spouse's capacity.[125] South Australia has adopted a similar framework of qualifying injury severity thresholds in the context of motor vehicle accidents. For other types of accident, however, no such qualifying ISV equivalent provisions apply.[126]

A further tension exists between the expanded reforms, and the principles underpinning the *Family Law Act 1975* (Cth) ('*FLA*'). At common law, a claim for loss

117 *Civil Liability Act 2003* (Qld) s 61. An injury scale value (ISV) is a numerical value between 0 and 100 representing a plaintiff's general damages, that is, pain and suffering, loss of amenity or life expectancy, or disfigurement: *Civil Liability Act 2003* (Qld) ss 51, 61. The ISV is used as prescribed under the *Civil Liability Regulations 2014* (Qld) to convert the level of injury into a monetary sum.

118 Ibid s 75.

119 Ibid s 58.

120 Ibid ss 59A(2)(b)–(c).

121 Ibid s 59A(2)(e)(i)–(ii).

122 Regina Graycar, 'Compensation for Loss of Capacity to Work in the Home' (1985) 10(3) *Sydney Law Review* 528, 537–9.

123 *Civil Liability Act 2003* (Qld) s 58.

124 Ibid s 59A.

125 Thornton, 'Loss of Consortium' (n 13) 267; Graycar (n 122) 530–6.

126 *Civil Liability Act 1936* (SA) s 65(2).

of consortium does not survive divorce.[127] Readily accessible no-fault divorce,[128] permitting the termination of the spousal relationship, is irreconcilable with the presumption of continuing spousal rights to the services of the other[129] which underpins actions for loss of consortium.[130] Queensland's reforms, in expanding the action, implicitly create additional barriers to exiting a marriage to spouses of any gender in contrast to the Commonwealth's efforts to remove them.

Dissolution of the spousal relationship can cause a double deprivation of damages to the injured party, particularly if the injured spouse's award for general damages has been reduced to prevent awarding of double damages and accommodate a concurrent non-injured spouse's claim for loss of consortium.[131] Underlying the division of the total damages amongst the claims brought in separate actions of the spouses for the same loss is the assumption that there is communal wealth in a spousal relationship with each spouse having equal access[132] However, where the non-injured spouse leaves the relationship, damages awarded for their loss of consortium follow. A non-injured spouse can potentially receive a windfall if, after obtaining lump sum damages for the loss of their injured spouse's consortium, they subsequently dissolve the relationship and enter into a new spousal relationship with a fit person who provides the consortium which the damages for loss of consortium remedied.[133] Hence, the injured spouse is denied the damages which were awarded as a result of their personal injury for a second time.[134] In this circumstance, avoidance of the risk of awarding double damages may result in the injured spouse being insufficiently compensated.[135]

The pervasiveness of sex-role stereotypes continues to affect damages.[136] Where both spouses work outside the home, courts assume that both spouses equally contribute to the domestic workload,[137] obscuring the continuing gendered reality of domestic labour division and the phenomenon of the 'second shift'.[138] The loss of a wife's domestic services to the household[139] and her sexual services to her husband

127 *Parker v Dzundza* [1979] Qd R 55, 57 (Hoare J) ('*Parker*').

128 *Family Law Act 1975* (Cth) s 48 ('*FLA*').

129 See Graycar (n 122) 546; Riseley (n 5) 446.

130 *Wright* (n 26) 510 (Isaacs J).

131 Graycar (n 122) 541.

132 Riseley (n 5) 450.

133 Graycar (n 122) 543, discussing *Bagias* (n 40) 740 (Hutley JA).

134 *FLA* (n 128) s 79.

135 Graycar (n 122) 553.

136 *Sloan v Kirby* (1979) 20 SASR 263; Thornton, 'Loss of Consortium' (n 13) 270–1.

137 Graycar (n 122) 543.

138 Arlie Russell Hochschild and Anne Machung, *The Second Shift: Working Parents and the Revolution at Home* (Penguin Books, 2nd ed, 2012).

139 Ibid; *CSR* (n 91) 12–15 [16]–[24] (Gleeson CJ, Gummow and Heydon JJ).

are treated as being of greater than loss of their value to her.[140] This translates into minimal damages being awarded to women for loss of their husband's consortium, particularly household services and sexual relations, when compared with damages deemed appropriate for husbands.[141] Thus, while expansion reforms purportedly pursue gender equality, in effect, they perpetuate existing structural inequality.[142]

Consortium has been interpreted as encompassing both loss of services and loss of society components. This includes extending loss of sexual expression beyond the loss of reproductive capacity[143] to include diminution in the quality or frequency of sexual intercourse,[144] as well as the loss or interruption of sexual life between spouses.[145] In the absence of express legislative intention to the contrary, the effect of the statutory reform should have been to apply those principles to claims brought by either spouse. Problematically, however, the courts have failed to develop a method for quantifying the intangible aspects of the conjugal relationship or provide reasons explaining how they have determined awards of damages under either statutory or common law claims. As Lyons J stated in *Corkery v Kingfisher Bay Resort Village Pty Ltd* ('*Corkery*'), '[n]o recent authority has been identified which would be of significant assistance in assessing the amount of [damages for a] claim'.[146] Instead, courts have mostly awarded nominal sums,[147] leaving many of the judicial concerns about the fair and just estimation of those claims unaddressed.

The continued presence of the gender discrimination underpinning the common law right of action is consequently evident due to the lack of consideration given to a wife's loss of consortium regarding the impairment or diminution of sexual relations resulting from the injury of her male spouse. In *Daly v DA Manufacturing Co Pty Ltd*,[148] the impact of the husband's injury on the couple's sexual relationship was considered only insofar as it demonstrated stress on their marriage occasioned by the injury. In *Corkery*, the 'permanent impairment of sexual function experienced by Mr Corkery' was considered in relation to the husband's primary claim, but not for the wife's claim for loss of consortium.[149] Further, in *Thorne*, where the husband

140 Thornton, 'Loss of Consortium' (n 13) 271.

141 Riseley (n 5) 448.

142 Thornton, 'Loss of Consortium' (n 13) 271.

143 *Hasaganic* (n 54) 558. Cf *Thomas v Iselin* [1972] QWN 15, where the injured wife of the plaintiff was past childbearing age; Thornton, 'Loss of Consortium' (n 13) 266.

144 *Birch* (n 50); *Bagias* (n 40) 497; *Pickering v Ready Mixed Concrete (Queensland) Pty Ltd* [1967] QWN 45; *Parker* (n 127); *Andrewartha* (n 111); *Talbot v Lusby* [1995] QSC 143 ('*Talbot*'); *Henley v Queensland* [2002] QDC 256; *Corkery* (n 107).

145 *McIntyre v Miller* (1980) 30 ACTR 8; *Kealley v Jones* [1979] 1 NSWLR 723 ('*Kealley*'); *Corkery* (n 107); *Talbot* (n 146).

146 *Corkery* (n 107) [95], citing *McDonnell v Mount Sugarloaf Forest Pty Ltd* [2000] QSC 054 and *Lebon v Lake Placid Resort Pty Ltd* [2000] QSC 049 ('*Lebon*').

147 See, eg: *Toohey* (n 33) 624; *Kealley* (n 145) 741 (Hutley JA).

148 *Daly* (n 108) [48], [50].

149 *Corkery* (n 107) [73].

had sustained brain damage, the court did not consider how this affected the sexual aspect of the marital relationship for the wife's loss of consortium claim.[150]

This contrasts with the court's approach to sexual intercourse in husbands' claims for loss of consortium. In *Lebon v Lake Placid Resort Pty Ltd*, where 'sexual intercourse ceased from the date of the accident … it [was] not surprising that the parties became isolated and eventually the matrimonial relationship broke down completely'.[151] The damages accordingly considered the 'loss of comfort' suffered by the husband due to his wife's injuries. Thus, women continue to be treated as the passive receptacles of male sexual gratification. Further, it evidences an assumption that the sexual aspect of the marital relationship is not as important to women as it is to men.

Even when damages awarded primarily focuses on quantifiable loss of domestic and related services, which the injured spouse would ordinarily have provided for the benefit of the non-injured spouse, the gendered influence of the common law in the precedent cases is prominent. Where the injured party is male, the chief component of a wife's damages for loss of consortium appears to be for loss of the husband's services, such as 'household repairs and maintenance'.[152] In *Nationwide Field Catering*, it was accepted that a husband did no housework prior to his wife's injury.[153] It was then stated that '[e]ven when both spouses work there is nothing surprising in that as the division of labour may leave the outside tasks to the husband'.[154] This further exposes the gendered assumptions which inform judicial decision-making and how formal legislative reform has failed to 'fix' the gender discrimination in the right of action which prompted it, while still impinging on the damages awarded for the primary claim.[155]

These cases demonstrate that, despite the expansion's ostensible commitment to redressing gender inequality, cases relying on the reformed provisions have not necessarily achieved substantive equality between the genders. The limitations of formal equality as a means of achieving practical equality are well-recognised: formal equality begs the question 'equal to whom?';[156] and the male standard has typically become the accepted objective universal standard.[157] Sandra Fredman observes:

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150 *Thorne* (n 28) 546.

151 *Lebon* (n 146) [63].

152 See, eg, *Thorne* (n 28) 543.

153 *Johnson* (n 28) 496.

154 Ibid.

155 *Curran v Young* (1965) 112 CLR 99, 100–1 (Barwick CJ); *Taylor v Stratford* [2004] 2 Qd R 224, 225–6 (Wilson J).

156 Martha Albertson Fineman, 'Vulnerability and Inevitable Inequality' (2017) 4(3) *Oslo Law Review* 133, 135 (emphasis omitted) ('Inevitable Inequality').

157 See generally: Catharine A MacKinnon, 'Substantive Equality: A Perspective' (2011) 96(1) *Minnesota Law Review* 1; Regina Graycar and Jenny Morgan, 'Examining Understandings of Equality: One Step Forward, Two Steps Back?' (2004) 20(1) *Australian Feminist Law Journal* 23.

> formal equality assumes that the aim is identical treatment. Yet … where there is antecedent inequality, 'like' treatment may in practice entrench difference. Thus unequal treatment may be necessary to achieve genuine equality.[158]

The grounds of discrimination are not limited to gender. They include 'race, disability, sexual orientation, religion and belief, age, and nationality' at a minimum.[159]

Substantive equality, as an alternative to formal equality, considers antecedent inequalities and seeks to address them. It has proven elusive to define, and consequently has attracted criticism. Fredman's four-dimensional model of substantive equality addresses many of the criticisms of both formal equality and less sophisticated models of substantive equality:

> First, it aims to break the cycle of disadvantage associated with status or outgroups. This reflects the redistributive dimension of equality. Secondly, it aims to promote respect for dignity and worth, thereby redressing stigma, stereotyping, humiliation, and violence because of membership of an identity group. This reflects a recognition dimension. Thirdly, it should not exact conformity as a price of equality. Instead, it should accommodate difference and aim to achieve structural change. This captures the transformative dimension. Finally, substantive equality should facilitate full participation in society, both socially and politically. This is the participation dimension.[160]

The reforms regarding the expansion of this action do not address the first or third of these aims; monetary value of claims and damages awarded to women remain low, overshadowed by gender stereotypes of the division of household labour and its devaluation when done by women. Although women can bring claims, their claims are expressly limited to those which have recognised precedent, regardless of whether those precedents adequately reflect women's needs. These limitations, however, need not require wholesale abolition of loss of consortium actions. The second and fourth aims, however, undermine the entire basis of expansion.

Under Fredman's model, substantive equality aims to promote respect for dignity including — but not limited to — recognition of the individual's autonomy and right to self-determination.[161] Yet loss of consortium actions, by their very nature as indirect or secondary claims, patently fail to do this. The actions are brought by an outsider to the relationship arising between plaintiff and defendant, and rely on the objectification of the primary plaintiff. To draw on Immanuel Kant's second formulation of the categorical imperative — the Humanity formulation — consortium actions permit that outsider to treat the plaintiff as a means to an end.[162] The outsider

158 Sandra Fredman, *Discrimination Law* (Oxford University Press, 2nd ed, 2011) 13.

159 Ibid 25.

160 Ibid.

161 Fredman (n 158) 19–25.

162 Immanuel Kant, *Groundwork for the Metaphysics of Morals*, tr Allen W Wood and J.B Schneewind (Yale University Press, 2002) 46–9.

(spouse) can recover for harm to his interests via the intermediate and more direct harm occurring to his wife. His harm and ability to recover damages is dependent on something that has been done to her; but she is not required to participate in his efforts to recover damages for any harm that has occurred to him. She has become solely a means to an end: the damages he receives do not go to her, she has no legal claim or interest in them, and she is not a party to the litigation. Her autonomy is denied and she is objectified.

For Martha Nussbaum, 'objectification entails making into a thing, treating *as* a thing, something that is really not a thing'.[163] She identifies seven 'notions' of treating '*as an object*': instrumentality; denial of autonomy; inertness; fungibility; violability; ownership; and denial of subjectivity.[164] Nussbaum's formulation of objectification is broader than those of Kant, and of Catharine MacKinnon[165] and Andrea Dworkin,[166] who viewed objectification as primarily about instrumentality.[167] According to Nussbaum, objectification occurs where a human being is treated in one or more of these seven ways:[168]

1. Instrumentality: The objectifier treats the object as a tool of his or her purposes.

2. Denial of autonomy: The objectifier treats the object as lacking in autonomy and self-determination.

3. Inertness: The objectifier treats the object as lacking in agency, and perhaps also in activity.

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163 Martha C Nussbaum, 'Objectification' (1995) 24(4) *Philosophy and Public Affairs* 249, 257 (emphasis in original).

164 Ibid.

165 See, eg: Catharine A MacKinnon, *Feminism Unmodified: Discourses on Life and Law* (Harvard University Press, 1987); Catharine A MacKinnon, *Towards a Feminist Theory of the State* (Harvard University Press, 1989); Catharine A MacKinnon, 'Pornography Left and Right' (1995) 30(1) *Harvard Civil Rights-Civil Liberties Law Review* 143; Catharine A MacKinnon, 'Sexuality, Pornography, and Method: "Pleasure under Patriarchy"' (1989) 99(2) *Ethics* 314; Catharine A MacKinnon, *Only Words* (Harvard University Press, 1993); Catharine A MacKinnon, 'Speech, Equality, and Harm: The Case Against Pornography' in L Lederer and R Delgado (eds), *The Price We Pay: The Case Against Racist Speech, Hate Propaganda, and Pornography* (Hill and Wang, 1995).

166 Andrea Dworkin, *Pornography: Men Possessing Women* (Women's Press, 1981); Andrea Dworkin, *Intercourse* (Free Press, 1987); Andrea Dworkin, 'Against the Male Flood: Censorship, Pornography, and Equality' in Drucilla Cornell (ed), *Oxford Readings in Feminism: Feminism and Pornography* (Oxford University Press, 2000) 19. Andrea Dworkin, *Woman Hating* (E.P. Dutton, 1974).

167 Evangelia Papadaki, 'Understanding Objectification: Is There a Special Wrongness Involved in Treating Human Beings Instrumentally?' (2012) 11(1) *Prolegomena* 5, 6.

168 Nussbaum, 'Objectification' (n 163). See also ibid.

4. Fungibility: The objectifier treats the object as interchangeable (a) with other objects of the same type, and/or (b) with objects of other types.

5. Violability: The objectifier treats the object as lacking in boundary-integrity, as something that it is permissible to break up, smash, break into.

6. Ownership: The objectifier treats the object as something that is owned by another, can be bought or sold, etc.

7. Denial of subjectivity: The objectifier treats the object as something whose experience and feelings (if any) need not be taken into account.[169]

Nussbaum identifies extreme instrumentality — treating a person not just as a means, but *merely* as a means — as the most morally problematic of the notions. She states:

> The instrumental treatment of human beings … is always morally problematic; if it does not take place in a larger context of regard for humanity, it is a central form of the morally objectionable.[170]

However, as Evangelia Papadaki has pointed out, it is not clear that any of the seven notions are less morally problematic when taken to their extremes.[171] These 'notions' are evident throughout the consortium action. Expansion of the cause of action to wives permits objectification instead of reducing the opportunity for objectification. Indeed, given the long and troubling history of denial of the autonomy of persons with disability[172] — and the significant likelihood of injured spouses likely to support consortium actions identifying as persons with disability in the aftermath of their injuries — the second of Nussbaum's 'notions' is at least as 'morally problematic' as the first.

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169 Nussbaum, 'Objectification' (n 163) 257 (emphasis omitted).

170 Martha C Nussbaum, *Sex and Social Justice* (Oxford University Press, 1999) 238.

171 Papadaki (n 167) 7, 15, 18.

172 See, eg: Lucy Series, 'Disability and Human Rights' in Nick Watson and Simo Vehmas (eds), *Routledge Handbook of Disability Studies* (Routledge, 2nd ed, 2020) 72, 91; Lucy Series, 'The Development of Disability Rights under International Law: From Charity to Human Rights' (2015) 30(10) *Disability and Society* 1590; Arlene S Kanter, *The Development of Disability Rights under International Law: From Charity to Human Rights* (Routledge, 2015); United Nations Department of Economic and Social Affairs, Office of the United Nations High Commissioner for Human Rights and the Inter-Parliamentary Union, *From Exclusion to Equality: Realizing the Rights of Persons with Disabilities* (United Nations, 2007); Kimberley Brownlee and Adam Cureton, *Disability and Disadvantage* (Oxford University Press, 2009); Franziska Felder, Laura Davy and Rosemary Kayess (eds), *Disability Law and Human Rights: Theory and Policy* (Palgrave Macmillan, 2022).

V What is the Role of the State in this Objectification?

Nussbaum's 'notions' of objectification[173] of the primary victim at the hands of the courts and/or the spouse are enabled by the state with its passage of legislation, retention of common law, and control of institutions. The 'notions' provide some insight into how the state, through its retention of loss of consortium actions, perpetuates objectification of primary victims.

Martha Fineman's vulnerability theory[174] — characterising vulnerability in the human condition as both universal and constant[175] — requires responsive/responsible state policy and law to overcome equality's limitations.[176] Fineman noted that humans experience vulnerability in the context of their social relationships, including relationships which may be 'inherently', 'desirably', or 'inescapab[ly]' unequal.[177] Law has a significant role in normalising and regulating some of those power differentials, including through setting and enforcing the limits of those powers. The law also has the function of establishing responsibilities and privileges attached to the existence of power imbalances and legitimacy of certain powers. Fineman's vulnerability theory involves an exchange of the idealised, neoliberal subject with a more realistic legal subject. This also requires 'a corresponding change in the state's orientation'.[178] That is, to enable the development of resilience, the state (as the legitimate governing entity), bears 'a responsibility to establish and monitor social institutions and relationships that facilitate the acquisition of individual and social resilience'.[179]

As Fineman observes, 'state responsibility for ensuring *equitable* treatment for differently positioned individuals is minimised within the overriding framework of *equality*'[180] — clearly in her mind, equal is not the same as equitable. It is the latter goal which Fineman's model aims to achieve.[181] Fineman's theory identifies

173 Nussbaum, 'Objectification' (n 163).

174 Fineman, 'Inevitable Inequality' (n 156).

175 Ibid 133.

176 Ibid 134.

177 Ibid 133.

178 Meredith Johnson Harbach, 'Childcare, Vulnerability, and Resilience' (2019) 37(2) *Yale Law and Policy Review* 459, 484.

179 Fineman, 'Inevitable Inequality' (n 156) 134.

180 Ibid 135 (emphasis added).

181 Ibid: Fineman takes issue with measuring 'equality' by comparing the circumstances of those individuals who are considered equals. This leads to the problematic question of 'equal to whom?' and presumes that the individuals involved are subject to 'socially and culturally imposed roles, obligations and burdens [that] are similar or equal in nature'. Consequently, if the circumstances of the individuals being compared are not equal/equivalent, equal treatment will often strengthen the unequal power relations that exist. Thus, when it comes to social justice, human vulnerability suggests that 'equality' is a limiting aspiration.

resilience as 'the critical, yet incomplete, solution to our vulnerability'.[182] She also notes that '[m]any of the institutions providing resources that give us resilience can only be brought into legal existence through state mechanisms'.[183]

Although much of Fineman's work focusses specifically on discrimination law and family law, vulnerability theory is applicable to law far more broadly. Courts and the legal systems they represent are clear examples of institutions of the type she references. The common law recognises and privileges certain categories of social relationship, according to a pre-determined suite of powers and obligations on parties within those relationships by virtue of their relationship status. Parent/child, employer/employee,[184] doctor/patient and lawyer/client are examples of social relationships characterised by power imbalances which have currency both in law and society more broadly.

Vulnerability of the plaintiff is ubiquitous throughout tort claims. Indeed, the existence of the claim itself is recognition that the plaintiff occupies a position of vulnerability vis-à-vis the defendant, in which the defendant either has, or has the potential to, cause them harm. Notwithstanding that the individuals concerned may have had no prior interaction, or even specific knowledge of the existence of each other, prior to the event which connects them, within the confines of a tort claim their relationship, for the purposes of the law, is characterised by a pre-determined set of responsibilities and privileges imposed and upheld by the legal system. The power differential between plaintiff and defendant reflects vulnerability is well recognised by scholars and judges alike.[185] In Australia, the High Court has acknowledged vulnerability of the plaintiff *relative to the defendant* vis-à-vis the harm as of importance in determining whether a novel duty of care should be recognised — indeed, this type of vulnerability expressly appears as one of the factors identified by Allsop P in the *Caltex Refineries v Stavar* novel duty of care checklist.[186] That vulnerability can arise from multiple power imbalance types, relating to knowledge, control, and risk. The plaintiff remains vulnerable by virtue of the harm that caused them to bring a claim before the court in the first place: they may be physically vulnerable due to an injury they received at the defendant's hands; their property may have been damaged or destroyed; or they may have suffered some other harm or interference which, prima facie, raises an arguable prospect of the court finding significant enough to award remedies.

While courts are extremely familiar with the concept of vulnerability as it applies between parties, we suggest that less overtly acknowledged is the plaintiff's

182 Ibid 146.

183 Ibid.

184 Ibid 135.

185 See, eg: Jane Stapleton, 'The Golden Thread at the Heart of Tort Law: Protection of the Vulnerable' (2003) 24(2) *Australian Bar Review* 135; Carl F Stychin, 'The Vulnerable Subject of Negligence Law' (2012) 8(3) *International Journal of Law in Context* 337.

186 (2009) 75 NSWLR 649, 676 [103].

vulnerability vis-à-vis the state. This might arise as a result of legal barriers to justice, such as limitation periods, procedural, and evidentiary requirements, or socioeconomic factors including access to justice barriers more broadly. Compensation seeks to address the harm arising from the vulnerability manifesting from the plaintiff's relationship to the defendant, and to redress the resultant power imbalance between the parties where appropriate. Harms arising from the plaintiff's secondary vulnerability — grounded in their relationship with the state — are entirely ignored.

Some vulnerability may be as Fineman described it, 'inescapable' or 'desirabl[e]'.[187] Yet even if it is desirable in the context of relations between the state and the individual (for example by using procedural rules to eliminate unmeritorious claims), that vulnerability should not be exploited by the state or be permitted by the state to be exploited by others. By expanding access to loss of consortium actions, the state is precisely doing that, by facilitating the objectification of the vulnerable.

In loss of consortium claims arising from a primary act of negligence, we propose that the plaintiff's vulnerability vis-à-vis the state is amplified. This is because the state, who is no longer a passive institution, instead becomes a facilitator of the objectification of the primary victim by the plaintiff spouse, furthering the denial of dignity and autonomy of a person who is already vulnerable. Rather than considering the full spectrum of objectification notions in their varying degrees, maintaining and expanding loss of consortium actions render the state complicit in the instrumentalisation of the primary victim as a means — merely a means — of channelling compensation to the plaintiff spouse as per Nussbaum's model. In the absence of offsetting provisions designed to bolster the other six 'notions' identified by Nussbaum, in order to reinforce the humanisation of the primary victim, the state perpetuates the 'morally objectionable' concerns identified as most grave by Nussbaum and exploits the plaintiff's vulnerability vis-à-vis the state. Rather than redressing this state-sponsored objectification, we consider that expansion instead widens the opportunity for objectification of injured plaintiffs of both genders, rather injured wives alone.

The state's facilitation of the objectification of vulnerable people goes beyond gender. Primary victims whose claims meet the ISV threshold will, by definition, have serious injuries, many of which will result in a long term or permanent full or partial loss of function.[188] Consequently, many primary victims will also identify, or be identified as, disabled, as a consequence of their injury.[189] The expansion reforms are inconsistent with the significant obligations the *CRPD* imposed on States with respect to protecting people with disability.

Those obligations include: (1) respect for inherent dignity, individual autonomy including the freedom to make one's own choices, and independence of persons;

187 Fineman, 'Inevitable Inequality' (n 156) 133.

188 *Civil Liability Regulation 2014* (Qld) sch 4.

189 *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008) art 1 ('*CRPD*').

(2) non-discrimination; (3) equality of opportunity; and (4) equality between men and women.[190] States parties are obliged to: (1) 'adopt all appropriate legislative, administrative and other measures for the implementation of the rights recognized'; (2) 'take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices that constitute discrimination against persons with disabilities'; and (3) 'ensure that public authorities and institutions act in conformity', in order to 'ensure and promote the full realization of all human rights and fundamental freedoms for all persons with disabilities without discrimination of any kind on the basis of disability'.[191]

The expansion reforms do not specifically target people with disability for discriminatory treatment in the form of objectification, but their effect is that people with disability are likely to be objectified precisely because their disability, if resulting from negligence, is the very thing that will qualify their spouses to bring loss of consortium claims in the first place. Article 12 of the *CRPD* makes explicit the inconsistency of the reforms with the rights of people with disability who happen to fall within their scope. That article requires States to recognise that people with disability have the right to recognition as persons before the law,[192] and that they have legal capacity on an equal basis with everyone else.[193] Specifically, States

> shall take all appropriate and effective measures to ensure the equal right of persons with disabilities to own or inherit property, to control their own financial affairs and to have equal access to bank loans, mortgages and other forms of financial credit, and shall ensure that persons with disabilities are not arbitrarily deprived of their property.[194]

These provisions are of particular importance to consortium claims. As noted earlier, consortium claims presume a perpetual continuation of marriage, which in effect is to deny the legal agency of the primary victim in a loss of consortium claim to determine whether, and if, they continue with a marriage, or exercise the same legal right conferred upon all other married people within society to access no fault divorce under the *FLA*.[195]

Once again, the reforms may not directly target people with disability, but the overlap between primary victims and the definition of people with disability means that people with disability are disproportionately affected by them. Further, the difficulties in determining which spouse's claim for damages is most appropriate demonstrates that whenever damages for loss of services formerly provided by, or now required to be provided to, the primary victim is awarded to anyone other than

190 Ibid art 3.

191 Ibid art 4.

192 Ibid art 12.1.

193 Ibid art 12.2.

194 Ibid art 12.5.

195 *FLA* (n 128) s 48.

the victim, the primary victim's autonomy to decide how, and under what circumstances, services will be provided, is compromised.

Awarding services damages to a spouse for the increased care demands imposed on them because of the primary victim's injuries denies that victim the ability to decide whether they want their spouse to provide those services, or whether they would prefer to source them at arm's length on the market. If the spouse subsequently becomes unable to provide those services, the primary victim may find themselves unable to purchase replacement services in the event they require them.

Following substantial consultation,[196] Australia has undertaken reform of its capacity[197] laws — which were previously incompatible with art 12 of the *CRPD*[198] — in order to prioritise shared and supported, rather than substituted, decision-making practices.[199]

Consortium actions were overlooked in these law reform consultations; yet justification for privileging third-party claims over the primary claims of people with disability in loss of consortium is even weaker than the 'best interests' rationale previously held to justify substituted decision-making, not least of all because at least some injured plaintiffs retain full mental and intellectual capacity. For those plaintiffs, their substantive disability is physical in nature; however, the effect of the consortium action is to render their mental and intellectual capacity irrelevant, denying their agency and autonomy in a way that does not happen to someone without disability.

Loss of consortium actions, therefore, deny autonomy and legal capacity to primary victims in ways that are inconsistent with the *CRPD*, on insupportable grounds. As with loss of consortium provisions, guardianship and mental health laws are made at the state, rather than national level.[200] That did not prevent the Commonwealth from attracting criticism for non-compliance, nor diminish its significance as a stakeholder in promoting reforms. The link between state-based consortium laws, and non-compliance with art 12 of the *CRPD* may be indirect and normative, but it is nonetheless powerful.[201] Even if a primary victim cannot exercise legal capacity, the various capacity laws provide more nuanced alternative ways in which primary

196 *Equality, Capacity and Disability* (n 19).

197 See generally: Bruce Alston, 'Towards Supported Decision-Making: Article 12 of the Convention on the Rights of Persons with Disabilities and Guardianship Law Reform' (2017) 35(2) *Law in Context* 21; Terry Carney, 'Supported Decision-Making in Australia: Meeting the Challenge of Moving from Capacity to Capacity-Building?' (2017) 35(2) *Law in Context* 44.

198 Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Initial Report of Australia*, 10th sess, 118th mtg, UN Doc CRPD/C/AUS/CO/1 (21 October 2013) 3–6 [24]–[26].

199 *Equality, Capacity and Disability* (n 19) 52–3 [2.75]–[2.79].

200 Ibid 38 [2.9].

201 Ibid 38 [2.10].

plaintiffs' decision-making autonomy can be supported, rather than wholly denied, as consortium provisions currently do by assigning legal interests that rightly and more directly lie with them to their spouses.

Further, each of South Australia and Queensland has discrimination laws that are inconsistent with the expansion reforms. The *Equal Opportunity Act 1984* (SA) and *Anti-Discrimination Act 1991* (Qld) respectively govern the non-discriminatory provision of services, goods, and other public activities to people regardless of sex, gender, age, race, or disability. Neither statute specifically references the passing of laws or sets up an appeal pathway through which discrimination concerns about legislation can be pursued, but it binds the state as a provider of the employment, accommodation, services and goods within the scope of the laws.

It is logically incoherent, as well as normatively problematic, for states that have passed legislation directed at eliminating discrimination against specified groups of people based on certain attributes they possess in the context of engaging in particular public activities, to then pass and retain legislation which has the effect of indirectly discriminating against those people. The dissonance is even greater in the context of Queensland which, having recently become just the third Australian jurisdiction to pass a Human Rights Act,[202] nonetheless retains an expanded loss of consortium action which indirectly discriminates against people with disability. In order to achieve coherence with its commitment to human rights, therefore, we suggest that the Queensland parliament needs to revisit its retention of loss of consortium causes of action.

VI Conclusion

There are dangers inherent in endeavouring to convert a gender-specific action into a gender-neutral one.[203] We have highlighted problems associated with expansionist reform to the law of torts, including insurmountable conceptual defects within the reforms. In this final section, we outline a solution and some responses to those who might argue that undesirable though the appearance of the expansionist reforms might be, their practical effects are minimal.

Superficially, abolition of loss of consortium claims to spouses of both genders may resemble 'levelling down' formal equality, comparable to Fredman's example[204] of the State closing all public swimming pools to avoid an order to desegregate the 'whites only' pools because they discriminate on the grounds of race.[205] But it is more nuanced: rather than removing everyone's right in order to prevent some from exercising that right, abolishing loss of consortium claims is instead more of a corrective step. It removes an arcane 'right' — if indeed it can be claimed to be a

202 *Human Rights Act 2019* (Qld).

203 Thornton, 'Loss of Consortium' (n 13) 271.

204 Fredman (n 158) 10.

205 Ibid, citing *Palmer v Thompson*, 403 US 217 (1971).

right in modern law — and redirects a remedy to the party who was most directly harmed by the wrongdoing in the first place: the primary victim. This is consistent with tort law more generally, which holds that third-party claims are exceptional, rather than the norm. It resolves the difficulties in identifying a coherent principle of law to legitimate recognition of such third-party claims, particularly in the aftermath of female emancipation and reforms to damages laws, including damages for loss of services, and gratuitous services.

Further, it reinstates the dignity and autonomy of the primary plaintiff to exercise control over their own destiny, without the court assuming what that destiny would have entailed through presumption of perpetuation of marriage, inconsistent with family law. It avoids the undesirable influence of moral luck affecting the size of claims that defendants may encounter, increasing certainty both for them and their insurers alike. It also recognises both the significant normative power of law in influencing the attitudes and behaviours of the community, as well as demonstrating the commitment of Australian legal institutions to international and domestic human rights obligations, including with respect to people with disabilities, who will include many of the primary victims of the type of circumstance likely to give rise to claims for loss of consortium.

The South Australian and Queensland law reforms were well-intentioned efforts to address gender inequality. However, as experience in other jurisdictions has demonstrated, sometimes good intentions are insufficient. In *James v Eastleigh Borough Council*,[206] the House of Lords was asked to determine whether the policy of a Borough Council to provide free access to swimming pools and other public facilities to pensioners, in a bid to address socioeconomic disadvantage, was discriminatory considering different pension eligibility ages for men and women. The House of Lords found that the policy was inherently discriminatory, regardless of motivation. Expansion of loss of consortium actions in Australia are conceptually comparable: despite the gender equality motivations of those seeking the reforms, those reforms did not address substantive gender inequality, did not address the technical legal issues arising from over or undercompensating primary victims and spouses, were inconsistent with modern family law reforms, and extended the problematic objectification of primary victims beyond gender lines, discriminating — albeit inadvertently — against persons with disabilities contrary to international and domestic human rights law.

The time has come to abolish loss of consortium claims entirely, or at the very least restrict them to the (nominal) value of personal claims for loss of the amenity of spousal support and companionship, the gaps specifically identified by the Queensland Attorney-General in preferring expansion over abolition. Any component of damages for loss of services previously provided by the primary plaintiff should be entirely compensated within the primary plaintiff's claim, at market rates. Similarly, the primary plaintiff's claim for loss of amenity should always include a component reflecting the impact on their well-being and enjoyment

206 [1990] 2 AC 751.

of life of being unable to provide those services. They are the primary plaintiff's loss, and just as it would have been their prerogative to determine which services they chose to provide for the family, determining the degree of satisfaction or otherwise they receive from doing so, it should remain their prerogative to determine how (if at all) compensation for loss of that satisfaction attached to the service provision should be used.

If loss of consortium is abolished — as we think it should be — there may be concerns that plaintiffs are being denied a right of recovery for a harm they have suffered. Yet there are many other instances of people whose lives are affected negatively because of negligently inflicted harms who are not currently able to receive compensation. Casebooks are littered with family members and first responders, eyewitnesses, and others whose lives have been negatively impacted by negligently caused wrongs, but are unable to establish a duty of care, or prove causation, or provide a diagnosed mental injury, and are consequently left without a cause of action. Loss of consortium is an oddity: a very rare situation where the plaintiff need not personally suffer any recognised form of harm in negligence, to succeed with the claim arising from a negligent act. Rather than viewing reform of this type as deprivation of future claimants, it should instead be seen as correcting an historical anomaly, which has provided a windfall to claimants past.

An alternative and pragmatic, response would be to restrict claims for loss of consortium to simply that: claims for the value of the plaintiff's loss of amenity (associated with either receiving the services formerly provided by the injured spouse or being able to provide those services to the injured spouse). Any special damages component for servitium (the actual provision of services themselves) should be part of the primary victim's claim. As is evident from some of the judgments, such claims may be of limited value, as the costs of pursuing them may exceed the value of the claim itself. The end result is still likely to be the practical demise of consortium, if not its formal death.