

A New World: Why 'Per Quod' Claims Should Be Available for Unmarried Couples

"While legal marriage is currently a prerequisite to bringing per quod claims, the reasoning to preclude unmarried cohabitants from bringing per quod claims dates back to the 1982 case of *Childers v. Shannon* and no longer applies to the current societal realities," writes Zachary M. Green.

Since the 1980s, New Jersey courts have held that legal marriage is a prerequisite to bringing a per quod claim. See *Childers v. Shannon*, 183 N.J. Super. 591 (Law Div. 1982); *Leonardis v. Morton Chemical, Div. of Morton Norwich Products*, 184 N.J. Super. 10, 11 (App. Div. 1982); *Lemma v. Racing*, 2011 N.J. Super. Unpub. LEXIS 1212 (App. Div. 2011). However, due to the dated policy considerations underlying these decisions, there is a reasonable basis to argue that unmarried cohabitants, and other individuals with intimate familial relationships, should have standing to assert a per quod claim.

One of the early cases to evaluate the requirements of a per quod claim was *Childers v. Shannon*. In *Childers v. Shannon*, the plaintiff sought to recover for injuries to her fiancé arising out of an auto accident that occurred two months before the wedding. *Childers*, supra, 183 N.J. Super. at 592. The defendants filed a motion to dismiss the per quod claim because the plaintiffs were not married at the time of the accident. Id.

In support of their claim, the plaintiffs cited the federal decision of *Bulloch v. United States*, 487 F. Supp. 1078 (D.N.J.1980), in which a loss of consortium claim was maintained by an unmarried individual. The court allowed the loss of consortium claim on the assumption that New Jersey courts would not punish long-time cohabitants for not being married. *Childers*, supra, 183 N.J. Super. at 594.

The court in *Childers* determined the *Bulloch* analysis was flawed, finding the requirement of marriage was not a matter of reward or punishment. Id. "Rather, marriage is the only dependable means by which a relationship—of which consortium is an element—may be legally defined." Id. It found that "[m]arriage is the only legal touchstone by which the strength of a male–female relationship may be tested" and "it is not the function of th[e] court to sift through the myriad relationships of a party in a negligence action to determine which of those near and dear have suffered an injury proximately caused by tortious conduct." Id. at 595. The court granted the defendants' motion to dismiss, stating that it was "unwilling to denigrate marriage to the status of a formality ... To do so is to bastardize not only the children born of such unions but the very fabric of society." Id. at 595.

Since *Childers*, courts have held that the right of recovery for loss of consortium is founded upon the marriage relation and absent such relationship, the right does not exist. See *Leonardis v. Morton Chemical, Div. of Morton Norwich Products*, supra, 184 N.J. at 11. In *Lemma v. Racing*, 2011 N.J. Super. Unpub. LEXIS 1212 (App. Div. 2011), the Appellate Division referenced *Childers* in declining to address the plaintiff's per quod claims, stating that while "New Jersey recognizes a spouse's derivative claim for loss of consortium ... courts have not extended this cause of action to unmarried individuals." Id. at *18.

Despite the *Childers* court's concern with examining relationships, New Jersey courts consistently evaluate the existence of an intimate familial relationship for the purpose of bringing "bystander" claims. *Dunphy v. Gregor*, 136 N.J. 99, 112 (1994). In their evaluation of such relationships, courts have determined that unmarried cohabitants can be engaged in intimate familial relationships, despite not being bound by blood or marriage. In *Dunphy*, the court identified factors to "define the intimacy and familial nature of such a relationship," including: "the duration of the relationship, the degree of mutual dependence, the extent of common contributions to a life together, the extent and quality of shared experience, and . . . whether the plaintiff and the injured person were members of the same household, their emotional reliance on each other, the particulars of their day to day relationship, and the manner in which they related to each other in attending to life's mundane requirements." Id.

It recognized that "traditional principles of tort liability can be adapted to address areas in which recognition of a cause of action and the imposition of a duty of care are both novel and controversial" and determined that, "[a]lthough novel, applying the standard of an intimate familial relationship to an unmarried cohabitant ... and affording her the protections of bystander liability is hardly unfair." Id. at 109. "[T]he sound assessment of the quality of interpersonal relationships is not beyond a jury's ken and ... courts are capable of dealing with the realities, not simply the legalities, of relationships to assure that resulting emotional injury is genuine and deserving of compensation." Id. at 111.

While legal marriage is currently a prerequisite to bringing per quod claims, the reasoning to preclude unmarried cohabitants from bringing per quod claims dates back to the 1982 case of *Childers v. Shannon* and no longer applies to the current societal realities. The policy considerations relied upon to limit per quod claims to legally married individuals, specifically the considerations that marriage is the only dependable means by which a relationship may be legally defined and that the courts should not sift through relationships to determine whether there is sufficient intimacy, have been rendered moot by the *Dunphy* line of cases. Additionally, according to the 2010 census data, over 7.5 million unmarried couples live together (which translates into 15 million people). This is a whopping 138% increase since 1990, and an increase of 13 % from 2009 alone. According to research by the Pew Research Center, that number continues to climb, and the number of adults in cohabitating relationships was approximately 18 million in 2016.

Moreover, according to Pew Research, the number of U.S. adults that are married today has fallen to 50%, down 9 percentage points over the last 25 years and down 22 percentage points from 1960. Today's marriage rates are more closely linked to socio-economic status than ever before, with 69% of never married individuals who may want to marry stating that not being financially stable is a reason they are not currently married. Id. Finally, 40% of unmarried households have children, making the right for recovery of unmarried cohabitants essential to maintaining the household after an injury to one partner.

The policy considerations upon which *Childers* decision was based no longer apply to the realities of the present. Therefore, while legal marriage is still required in New Jersey to assert a per quod claim, the law should be modified to allow an unmarried cohabitant with an intimate familial relationship to the injured party to assert a per quod claim.

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