No. 82474-6

MADSEN, C.J. (concurring) — I agree with the lead opinion's conclusion that the children should be permitted to bring their lawsuit for loss of consortium. However, I write separately because I disagree with the lead opinion's reasoning in several respects. First, the lead opinion errs by treating the question of feasibility as a question of fact. Feasibility, like joinder, is a question of law. In addition, although the lead opinion correctly rejects the "best interests of the child" as a factor in determining feasibility, it then inconsistently says there is a question of fact in this case as to whether joinder was in the best interests of the children. The best interests of the child cannot be both irrelevant and relevant, as the lead opinion's analysis suggests.

Although I disagree with the lead opinion that there are questions of fact remaining on the issue of feasibility, I nevertheless agree with the result because I believe it is time to reject the feasibility of joinder requirement for children bringing loss of consortium claims independent of their parents. We should apply ordinary joinder rules.

Discussion

Contrary to the lead opinion's assertion, this court has never characterized joinder

as a question of fact. Although it may be predicated upon a factual inquiry, the question of joinder is itself one of law for the trial court to determine and for this court to review for abuse of discretion. *Gildon v. Simon Prop. Group, Inc.*, 158 Wn.2d 483, 493, 145 P.3d 1196 (2006). Legal inquiries generally require factual findings to support an analysis, but this does not make them issues of fact.

That joinder is a question of law can be seen in the analysis a court must engage in to resolve the issue. Civil Rule (CR) 19 sets out the rules for joinder and the steps to determine whether joinder is "feasible" or not and how to proceed where joinder is not "feasible." CR 19(a), (b). Our case law interpreting CR 19 requires an inquiry focused on the legal standards: whether a party is necessary "for a just adjudication" and if so, where the necessary party is absent and cannot be joined, whether the action may proceed "in equity and good conscience." *Burt v. Dep't of Corrections*, 168 Wn.2d 828, 833, 231 P.3d 191 (2010); *Gildon*, 158 Wn.2d at 493 ("considering the nature of the balancing and factual inquiry" we review a dismissed failure to join for abuse of discretion while the underlying legal conclusion is reviewed de novo). Similar to our analysis under CR 19, I would conclude that a decision on the feasibility of joinder in the context of a child's independent loss of consortium claim is a question of law.

Turning to the definition of "feasible," the lead opinion rejects best interests of the child as a consideration. It does so on the ground that the foundational case, *Ueland v. Pengo Hydra-Pull Corp.*, 103 Wn.2d 131, 691 P.2d 190 (1984), which adopted the feasibility standard, considered "possibility" and "practicality" but did not include the

best interests of the child as part of a feasibility determination. Yet, having rejected this consideration, the lead opinion nevertheless imports the best interests of the child into its analysis of feasibility when it holds that a question of fact remains as to the parents' need to file a claim prior to completion of the father's surgery in order to avoid financial ruin. According to the lead opinion, the timing of the parents' lawsuit may impact the children's interests.

If the best interests of the child are not a relevant part of the inquiry, then the lead opinion should not consider it here. Indeed, whether the parents "needed" to file their claims in order to avoid financial ruin has no bearing on the ability (i.e., the possibility or practicality) of the children to join their parents' lawsuit. There is no evidence that joining the children's claim to their parents' claim was not legally possible at that time when viewed under the correct standard.

In addition, I am concerned with the lead opinion's holding that the inability of the children to know the full extent of their father's injury bears on the issue of feasibility. As Justice Fairhurst's concurrence notes, this discussion by the lead opinion suggests that whether a claim for loss of consortium may be brought depends on whether the injury giving rise to the consortium claim is a permanent injury. It does not. Indeed, the children's parents brought their claim for loss of consortium despite the fact that they did not know whether the father would recover at the time of filing.

Nevertheless, the lead opinion appears to believe that children should know the full extent of injury before filing a loss of consortium claim. But, adults are not subject

to this requirement, and for good reason. Knowledge of the extent of the injury relates to damages. The risk of under- or overestimating damages is not unique to children independently claiming loss of consortium, but exists for all plaintiffs. Indeed, statutes of limitations often prevent a plaintiff from waiting to learn the precise extent of injuries before filing a claim. There is no principled reason to treat a child's loss of consortium claim differently.

In my view, the lead opinion's flawed analysis illustrates why it is time to reject the feasibility of joinder requirement for children that we adopted in *Ueland*. There we noted the evolving nature of children as litigants. We have now reached a point in the common law where children are seen as litigants in their own right and should not be subjected to standards different from those imposed on adults. To do so only creates a trap for the unwary child litigant. Instead, we should apply ordinary joinder rules to determine whether a child's lawsuit must be joined with his or her parent's suit. This will avoid confusing analysis such as the one in which the lead opinion engages.

I would dispense with the feasibility requirement entirely, and remand to the trial court to apply ordinary rules of joinder.

AUTHOR:
Chief Justice Barbara A. Madsen

WE CONCUR: