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COMMENTS

IS A WIFE ENTITLED TO DAMAGES FOR LOSS OF CONSORTIUM?

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The question of the wife's right to recover damages for loss of consortium affords an exceptionally apt illustration of the saying, "The history of what the law has been is necessary to the knowledge of what the law is." [1] Consortium is defined as "the conjugal fellowship of husband and wife and the right of each to the company, cooperation and aid of the other in every conjugal relation." [2] The right of consortium is inherent in the marriage relationship.

At the common law, when a wife was injured due to the negligence of another, there was no question about the right of the husband to recover damages for loss of her consortium.[3] But when the husband was injured, the wife was not entitled to a corresponding right to recover for loss of his consortium. One reason for granting this right to the husband while denying it to the wife was that she was his inferior and only the husband, as the superior, had a property right in consortium.[4]

Another explanation for denying the wife damages for loss of her husband's consortium was a procedural one. At the common law, she could not sue unless she was joined by her husband, and he was entitled to the proceeds of the action.[5] Hence, even if she had been accorded the right to sue, she could not have effectively exercised that right.

A third reason offered in the cases is that the husband was entitled to her services, but she was not entitled to his services, and the other elements of consortium are incidental to the right to services. This reason is not set forth in the earlier cases but is found in more recent opinions which undertake to

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[1] HOLMES, THE COMMON LAW 37 (1938).

[2] Pratt v. Daly, 55 Ariz. 535, 104 P.2d 147, 150 (1940).

[3] Kelley v. Mayberry Township, 154 Pa. 440, 26 Atl. 595 (1893).

[4] 3 Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND 343 (1874), states: "We may observe that in these relative injuries notice is taken of the wrong done to the superior of the parties related by the breach and dissolution of either the relation itself, or at least the advantages accruing therefrom; while the loss of the inferior by such injuries is totally disregarded. One reason for which may be this: that the inferior hath no kind of property in the company, care or assistance of the superior, as the superior is held to have in those of the inferior; and therefore the inferior can suffer no loss of injury."

[5] Holbrook, *The Change in the Meaning of Consortium,* 22 MICH. L. REV. 1 (1923).

justify the common law distinction between the respective rights of the husband and wife as to the loss of the other's consortium.[6]

With the enactment of Married Women's Property Acts in the nineteenth century, which removed the procedural barriers to suits by married women and developed a more enlightened social attitude toward women in general, it would seem that the historic reasons for denying a wife an action for loss of consortium no longer prevail. One would expect that the common law, with its boasted quality of ready adaptation to changed conditions, would long since have equalized the rights of a husband and wife with respect to the consortium question. This would be in accordance with the principle that when the reason for a rule of law ceases, the rule itself ceases. But, on the contrary, prior to 1950 not a single appellate court in America or England had altered the rule which denied a wife the right to sue for loss of her husband's consortium.[7]

It is not to be wondered, therefore, that the American Law Institute in 1934 adopted the common law rule of consortium to which the courts had unanimously adhered. Restatement of Torts, Section 695, reads:

> A married woman is not entitled to recover from one who, by his tortious conduct against her husband has become liable to him for illness or other bodily harm, for harm thereby caused to any of her marital interests or for any expense incurred in providing medical treatment for her husband.[8]

Similarly, the comment on that section states: "However, the law has not recognized her right to recover against one who has caused harm to such interests by conduct which is not intended to harm them." [9]

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[6] Stout v. Kansas City Terminal Ry. Co., 172 Mo. App. 113, 157 S.W. 1019 (1913); Smith v. Nicholas Bldg. Co., 93 Ohio St. 101, 112 N.E. 204 (1915); Best v. Samuel Fox and Co. Ltd. (1952) A.C. 716 (H.L.). In the Best Case, Lord Porter observed that consortium was an inseparable bundle of rights, stemming from a concept of proprietary interest; that a wife was never regarded as having any equivalent proprietary right in her husband, so there was nothing to which the vestigial right could attach. He also indicated that the inconsistency between granting the right to the husband while denying it to the wife was not of importance. He stated: "The common law is a historical development rather than a logical whole and the fact that a particular doctrine does not logically accord with another or others is no ground for its rejection."

[7] It is true that the Supreme Court of North Carolina, in 1921, recognized the wife's right to sue in the case of Hipp v. E. I. Dupont de Nemours, 182 N.C. 9, 108 S.E. 318 (1921) but it overruled that case four years later in Hinnant v. Tide Water Power Co., 189 N.C. 120, 126 S.E. 307 (1925). In addition strong dissenting opinions were filed in cases where the majority denied the right, as in Bernhardt v. Perry, 276 Mo. 612, 208 S.W. 462 (1919); Landwehr v. Barbas, 270 N.Y. 537, 200 N.E. 306 (1936); and McDade v. West, 80 Ga. App. 481, 56 S.E. 2d 299 (1949).

[8] RESTATEMENT, TORTS § 695 (1938).

[9] *Id.* Explanatory Notes § 695 comment *a* at 497. Similarly, HARPER & JAMES, LAW OF TORTS 639 (1956); states: "The right of the wife to recover for loss of her husband's consortium has been generally denied, except in the case of alienation of affections and criminal conversation which are intentional invasions of her interest in his society, love, and affection. She never was entitled to his services; she is still entitled to support and maintenance, and if he has been incapacitated, it will be grounds for recovery on his part; and for the mere loss of comfort and companionship she could not recover, as a long settled policy of the law."

Also, 41 C.J.S. *Husband and Wife* § 404, 900 (1944) states: "In the absence of statute, a

However, the reasons advanced by the courts in recent years for following the common law rule have been, in the main, different from those originally cited in its support.

The reason most commonly given in the more recent cases is that the injury to the wife sustained in the loss of her husband's consortium is indirect and too remote.[10] These courts did not undertake to explain how the husband's injury, due to loss of her company was different from her injury in this respect.

Another reason urged was that, since a husband is required to support his wife, she benefits indirectly from his recovery, and to allow her to recover for loss of consortium would result in double recovery for the same injury.[11] This reason overlooks the fact that there are many elements of consortium other than financial support. In fact, the duty of the husband to support his wife was never regarded as an element of the right of consortium at early common law.

A third reason, already noted,[12] is that since he is entitled to her services and she is not entitled to his, he alone should have the right to sue for loss of consortium on the theory that all of the elements of consortium flow from his right to the wife's services. If we assume that consortium is limited to services, or dependent upon services, this reason for distinguishing between the husband and wife would have merit. Consortium, however, is a broader right and contains many elements independent of services, such as companionship, sexual relations, comfort and the like.

It appears, then, that the reasons set forth in the cases for denying to the wife the right to sue are either no longer applicable or are illogical attempts to justify a rule of law that has nothing to support it but the fact that it has always been the law. Hence, through the years, whereas the courts were unanimous in sustaining the rule, law professors and legal writers have consistently attacked it.[13]

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wife has no cause of action for any loss sustained by her, including loss of consortium, in consequence of her personal injuries inflicted on the husband." 27 AM. JUR., *Husband and Wife* § 514, is to the same effect.

[10] Feneff v. N.Y. Cent. & H.R.R. Co., 203 Mass. 278, 89 N.E. 436 (1909); Brown v. Listleman, 177 Ind. 692, 98 N.E. 631 (1912); Stout v. Kansas City Terminal Ry. Co., *supra* note 6; Emerson v. Taylor, 133 Md. 192, 104 Atl. 538 (1918); Hinnant v. Tide Water Power Co., *supra* note 7; Eschenbach v. Benjamine, 195 Minn. 378, 263 N.W 154 (1935); Giggey v. Gallagher Transp. Co., 101 Colo. 258, 92P.2d 1100 (1937).

[11] Stout v Kansas City Terminal Ry. Co., *supra* note 6; Bernharelt v. Perry *supra* note 7; Tobiassen v. Polley, 96 N.J.L. 66, 114 Atl. 153 (1921); Giggey v. Gallagher Transp. Co., *supra* note 10; McDaniel v. Trent Mills, 197 N.C. 342, 148 S.E. 440 (1929); Feneff v. N.Y. Cent. & H.R.R. Co., *supra* note 10.

[12] See note 6 *supra.*

[13] For example Prosser, *Handbook on the Law of Torts* 948 (1941) writes: "In spite of almost universal condemnation on the part of legal writers, there is little indication of any change in the rule. Obviously it can have no other justification than that of history, or the fear of an undue extension of liability of the defendant or a double recovery by wife and husband for the same damages. The loss of 'services' is an outworn fiction, and the wife's interest in the undisturbed relation with her consort is no less worthy of protection than that of her husband."

In 1950 the case of *Hitaffer v. Argonne Co.*[14] was decided by the Court of Appeals for the First Circuit. In an exhaustive and well-reasoned opinion, the court conceded that the unanimous judicial opinion of the nation supported the common law rule that a wife may not recover for loss of consortium in a negligence action, but after analyzing the reasons for the rule as advanced in the cases supporting it, the court demonstrated that those reasons were without merit, and held unanimously that the wife could recover for consortium. The court attacked the inconsistency of the law in permitting one rule for a husband and another for the wife and concluded:

> The husband owed the same degree of love, affection, felicity, etc. to the wife as she to him. . . . He also owes the material service of support, but beyond that he renders other services as his mate's helper in her duties, as advisor and counselor. Under such circumstances, it would be a judicial fiat for us to say that a wife may not have an action for loss of consortium due to negligence.[15]

Following the *Hitaffer* decision the majority of the courts which considered the question continued to adhere to the common law rule, although without enthusiasm. Some of these courts conceded the logic and correctness of the *Hitaffer* opinion but rested their decisions simply on the doctrine of *stare decisis*.[16] Other courts indicated their disapproval of the common law rule but indicated that they had no right to remake the common law.[17] Still others reasoned that the common law rule was so universal and of so long standing that any change should be made by the legislature.[18]

One court in construing a state statute on workmen's compensation held that the act did not allow a wife to sue for loss of consortium.[19] The federal cases since 1950 indicated that the courts were favorably impressed by the

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See also: Holbrook, *The Changes in the Meaning of Consortium, supra* note 5: 30 COLO. L. REV. 651 (1930); Kinnaird, *Domestic Relations—Right of Wife to Sue for Loss of Consortium Due to a Negligent Injury to Her Husband,* 35 KY. L. J. 202 (1947); Clarke, *Workman's Compensation: The Right of a Wife to Sue Her Husband's Employer for Loss of Consortium: Interpretation of an Exclusive Liability Clause:* Hitaffer v. Argonne Co., 36 CORNELL L. Q. 148 (1950); *Consortium—The Right of Wife to Recover for Negligent Injury to Husband,* 26 N.Y.U. L. REV. 205 (1951); *Husband and Wife—Rights and Liabilities of Wife as to Third Parties—Wife's Loss of Consortium Held Actionable Where Husband Negligently Injured,* 64 HARV. L. REV. 672 (1951); Lieber, *Torts—The Wife Has a Cause of Action for Loss of Consortium,* 18 U. PITT. L. REV. 842 (1957).

[14] 183 F.2d 811, 23 A.L.R. 2d 1366 (D.C. Cir. 1950).

[15] *Id.* at 819, 23 A.L.R. 2d 1375.

[16] La Eace v. Cincinnati, Newport & Covington Ry. Co., Inc., 249 S.W. 2d 534 (Ky. 1952); Coastal Tank Lines, Inc. v. Canoles, 207 Md. 37, 113 A.2d 82 (1955); Larocca v. American Chain & Cable Co., 23 N. J. Super. 195, 92 A.2d 811 (1952); Nelson v. A. M. Lockett & Co., 206 Okla. 334, 243 P.2d 719 (1952).

[17] Jeune v. Del. E. Webb Const. Co., 77 Ariz. 226, 269 P.2d 723 (1954); Ripley v. Ewell, 61 So.2d 420 (Fla. 1952).

[18] Garrett v. Reno Oil Co., 271 S.W. 2d 764 (Texas 1954); Nickel v. Hardware Mutual Casualty Co., 269 Wis. 647, 70 N.W. 2d 205 (1955).

[19] Ash v. S. S. Mullen, Inc., 43 Wash. 2d 345, 261 P.2d 118 (1953).

Hitaffer decision and would prefer to follow it, but could not do so because the states where they sat adhered to the common law rule.[20]

The *Hitaffer* case not only shook the hold of the common law consortium rule on the states which refused to abandon it, but led others to follow it in permitting a wife to sue. Of these latter states, the most dramatically affected by the decision was Georgia. The Supreme Court of that state in 1949 had, by a divided court, affirmed a lower court decision denying a wife the right to sue for loss of consortium.[21] In 1953 the same question came before the court again, and the earlier case was overruled in an opinion which not only approved of the *Hitaffer* opinion but quoted it in full.[22]

In 1956 the Supreme Court of Iowa, in the case of *Acuff v. Schmit,*[23] also followed the *Hitaffer* decision. This opinion recognized that the dominant reason at common law for denying relief to the wife was her lack of capacity to sue at law, except as she was joined with her husband as a party plaintiff, and held that since this was no longer the law the reason for denying the wife relief was invalid. The court stressed the inconsistency of denying the wife the right to sue and stated:

> While we recognize the almost total lack of precedent for allowing appellant's cause of action we deem precedent to be worthy of support only when it can stand the scrutiny of logic and sound reasoning in the light of present day standards and ideals.[24]

A year later the Supreme Court of Arkansas, in the case of *Missouri Pac. Transp. Co. v. Miller,*[25] sustained a verdict in favor of a wife for loss of consortium on the strength of the *Hitaffer* decision. The court pointed out that the overwhelming judicial opinion was in favor of the rule denying the wife the right to recover, but held that the rule of the *Hitaffer* case was sound and should be adopted.

The *Hitaffer* case has also been cited with approval by the Supreme Court of Mississippi in the case of *Delta Chevrolet Co. v. Waid.*[26] The court sus-

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[20] Werthan Bag Corp. v. Agnew, 202 F.2d 119 (6th Cir. 1953); O'Neil v. U.S., 202 F.2d 366 (6th Cir. 1953); Seymour v. Union News Co., 217 F.2d 168 (7th Cir. 1954); Filice v. U.S., 217 F.2d 515 (9th Cir. 1954). *Contra* Cooney v. Moomaw, 109 F. Supp. 448 (D. Neb. 1953).

[21] McDade v. West, *supra* note 7.

[22] Brown v. Georgia-Tennessee Coaches, Inc., 88 Ga. App. 519, 77 S.E. 2d 24 (1953). In the *Brown* case the Court said: "It is as much the duty of this court to restore a right which has been erroneously withheld by judicial opinion as it is to recognize it properly in the first instance." *Id.* 77 S.E. 2d at 32.

[23] 248 Iowa 272, 78 N.W. 2d 480 (1956).

[24] *Id.* at 278, 78 N.W. 2d at 485.

[25] 227 Ark. 351, 299 S.W. 2d 41 (1957).

[26] 211 Miss. 256, 51 So.2d 443 (1951).

tained a large judgment in favor of a wife for loss of her husband and held that the jury was correct in taking into consideration the loss of his society and companionship. It was also approved by the Appellate Court of California in *Gist v. French,*[27] where the court held that since a husband is entitled to damages for loss of his wife's services the parties are placed on an equal basis. In its dictum the court stated:

> The parties to a marriage are each entitled to the comfort, companionship and affection of the other. Any interference with the right of either spouse to the enjoyment of the other is the violation of a natural right as well as a legal right arising from the marriage relation.[28]

In Pennsylvania there are no appellate court decisions either affirming or denying the right of a wife to damages for loss of consortium. Seven lower courts, however, have been called upon to decide this issue. Of these, five followed the majority rule,[29] and pointed to the great weight of authority. However, the Court of Common Pleas of Allegheny County, in an opinion[30] by Judge Soffel, reviewed the modern trend in the law and held that a wife may sue for loss of consortium.

From the foregoing review, it would seem that the common law rule denying consortium damages to a wife should be changed. The rule has little to commend it except that it is ancient and is supported by overwhelming authority. The reasons originally advanced for its existence no longer prevail and those more recently urged in its support have been irrefutably exposed as being without logical foundation.

It may be contended that possibly neither the husband nor the wife should recover damages for the loss of consortium of the other. This was the position taken by Lord Porter in the case of *Best v. Samuel Fox and Co., Ltd.,*[31] which denied recovery for such loss to a wife.

This view, it is submitted, is untenable. Loss of consortium is still a proper element of damages in a negligence case. It is as real and substantial

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[27] 136 Cal. App. 2d 247, 288 P.2d 1003 (1955).

[28] *Id.* at 254, 288 P.2d at 1009.

[29] The Courts of Common Pleas of the following counties: *Montgomery,* Dupe v. Hiensberger, 58 Pa. D. & C. 483 (1947); *Washington,* Faust v. Kunselman, 30 Pa. Wash. Co. 106 (1948); *Lackawanna,* Stedman v. Phillips, 36 Pa. Lack. 128 (1935); Chomko v. Butchkabitz, 53 Pa. Lack. 180 (1952); and Neuberg et ux. v. Bobowicz, decided by the Court of Common Pleas of Philadelphia County, May 8, 1959 at No. 3412 December Term, 1958, Reimel J.

[30] Hayes v. Swensen, 106 Pitts. L. J. 141 (1958), overruling Harris v. McDermot, 87 Pitts. L. J. 287 (1939). Judge Soffel illustrated the essential place of consistency as an attribute of justice by the use of a corollary of the homely but commonly accepted proverb, "What is sauce for the gander is sauce for the goose."

[Editor's note: In the case of Baker v. Ateco Equipment Co., which was decided by the Common Pleas Court of Mercer County, May 5, 1958 at No. 120 December Term, 1957, Judge McKay overruled a demurrer to a complaint by a wife claiming damages for loss of consortium in an action involving personal injuries to her husband.]

[31] Best v. Samuel Fox and Co., Ltd., *supra* note 6 at 728. Lord Porter there said: "Even if it be conceded that the rights of husband and wife ought to be equalized, I agree with the Lord Chief Justice that today a husband's right of action for loss of his wife's consortium is an anomaly

a loss to a husband or wife as the pain they suffer as a result of their injuries. Recovery by either for this loss should not be eliminated. Rather, the inconsistent and illogical barrier to the wife's recovery should be removed so that the right to recover for loss of consortium will be equally available.

The argument has been advanced that, even if it were conceded that the common law rule should be changed, it is of such long standing and so firmly imbedded in the law that the legislature, and not the court, is the more appropriate agency to correct it. There would be considerable merit in this position if a fundamental change in policy were involved. If the rule were changed by judicial decision, the right to damages for consortium, however, would not be created or eliminated for the first time. Rather, an illogical and antiquated barrier preventing one class of citizens from asserting the right would be laid aside. The legislatures have already acted upon the only question of broad policy involved. By enacting Married Women's Property Acts, they have established the policy that the rights of men and women should be equal before the law.

The type of question here involved—an interpretation and application of common law principles to the realities of current life—is peculiarly one which lends itself to judicial correction. The common law is not static, nor are the courts helpless when an historic anomaly in the law is revealed. As stated by Chief Justice Kephart in *Nesbit v. Riesenman,*[32]

> The common law . . . is not a fixed unyielding set of principles of a certain standard applying only as conditions warranted a century ago, but adapts itself to changing conditions as marked by the progress of public, material and social affairs. . . . The function of determining whether a rule of the common law exists, and what it is, lies solely with the court, as does also the question whether given conditions offend the law.[33]

Accordingly, since the law properly gives a husband the right to damages for loss of consortium of his wife consequent upon her being injured by the negligent act of another, and since there is now no valid reason why the right of the wife should be different from his in that respect, it would appear that a wife as a plaintiff should be entitled to damages for loss of consortium of her husband and that, in a proper case, courts should so hold.

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and see no good reason for extending it." This position is not a novel one. The courts of Connecticut, Massachusetts, Michigan, North Carolina and Rhode Island solved the problem of inconsistency by denying the right to sue to the husband. Marri v. Stamford Street R. Co., 84 Conn. 9, 78 Atl. 582 (1911); Bolger v. Boston Elevated R. Co., 205 Mass. 420, 91 N.E. 389 (1910); Blair v. Seitner Dry Goods Co., 184 Mich. 304, 151 N.W. 724 (1915); Helmstetler v. Duke Power Co., 224 N.C. 821, 32 S.E.2d 611 (1945); Martin v. United Electric R. Co., 71 R. I. 137, 42 A.2d 897 (1945).

[32] 298 Pa. 475, 483, 148 Atl. 695, 697 (1930).

[33] See also 11 AM. JUR., *Common Law* § 2 at 155: "It [the common law] is a comprehensive enumeration of principles sufficiently elastic to meet the social development of the people. . . . The capacity for growth and adaptation to new conditions is one of its most admirable features. . . . Whenever an old rule is found unsuited to present conditions or unsound, it should be set aside and a rule declared which is in harmony with those conditions and meets the demands of justice."