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Sex, Society and Sophistry

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NOTES

SEX, SOCIETY AND SOPHISTRY

The case of *Hitaffer v. Argonne Co.*,[1] despite practically unanimous authority to the contrary,[2] allows a wife to recover for the loss of consortium occasioned by the negligent injury of her husband. This case raises the possibility of a new trend toward allowing the wife, as well as the husband, to bring such an action.

This note proposes a reconsideration of the soundness of the theories relied upon by the courts in denying the right of a wife to sue for loss of consortium caused by defendant's negligent conduct toward the husband.[3] While there may be other solutions to the problems involved in actions concerning marital rights, it is intended here only to emphasize the consistently poor reasoning prevalent in the courts today upon which they base their denial to the wife.

The Meaning of "Consortium"

The word "consortium" has been variously defined.[4] The definition given in *Marri v. Stamford St. Ry.*,[5] has had wide acceptance. There it is said.

> "The right of consortium has had modern definition which limits it to a right growing out of the marriage relation which the husband and wife have respectively, to the society, companionship, and affection of each other in their life together. By this definition it is clearly intended to distinguish the right to consortium from that to services. .
>
> "But the right of consortium was by no means fully expressed in the terms of society, companionship, and conjugal affection. The right to service was a prominent factor in it, and in respect to certain kinds of injuries, without doubt, the predominant factor."

1. 183 F 2d 811 (D. C. Cir.), *cert. denied*, 71 S. Ct. 80 (1950).

2. Hipp v. E. I. Dupont de Nemours & Co., 182 N. C. 9, 108 S. E. 318 (1921), 35 Harv. L. Rev. 343 (1922). The *Hipp* case was later overruled by *Hinnant v. Tide Water Power Co.*, 189 N. C. 120, 126 S. E. 307 (1925).

3. For a general discussion of the question see Prosser, Handbook of the Law of Torts 946 (1941), Holbrook, *The Change in the Meaning of Consortium*, 22 Mich. L. Rev. 1 (1923), Kinnaird, *Loss of Consortium*, 35 Ky. L. J. 220 (1947), Lippman, *The Breakdown of Consortium*, 30 Col. L. Rev. 651 (1930), 5 Cornell L. Q. 171 (1920), 9 Ind. L. J. (1933), 39 Mich. L. Rev. 820 (1941).

4. " [T]he companionship or society of a wife." Black, Law Dictionary (3d ed. 1933). "The right of the husband and wife respectively to the conjugal fellowship, company, co-operation and aid of the other." Bouvier, Law Dictionary (8th ed. 1914). See Holbrook, *supra* note 3.

5. 84 Conn. 9, 11, 78 Atl. 582 (1911).

Such a definition, however, cannot be reconciled with the facts of the many decisions which deal with this concept. The basic confusion concerning the meaning of "consortium" follows as a result of its usage alike in actions both for negligent and intentional invasions. The courts have consistently allowed the wife to sue for loss of consortium intentionally caused. Just as consistently, however, these same courts have denied the wife's right of action for loss of consortium based on negligence. In an effort to resolve this conflict some courts have separated consortium, commonly defined as "sex, society and services," into its component parts. These courts have insisted that "consortium" consists of a material side (services), and a sentimental side (companionship, affection and sexual relations), and have gone so far as to require an injury to this material side in actions for negligence while they ignore its absence in actions on intentional torts. Perhaps the only logical solution would be that although consortium does consist of the right to sex, society and services, the violation of any of these toward either spouse, be it in a negligent or intentional manner, should constitute a wrong redressible at law

DIRECT INVASIONS

It is not necessary for the scope of this note to discuss in detail the actions which may be brought by a wife whose right to consortium is intentionally invaded. It is sufficient to note that at common law a wife could never sue for the loss of consortium since she was legally incapacitated.[6] With the advent of the married women's acts, however, the wife was enabled to sue for the loss of consortium when it resulted from an intentional invasion. Today, among other things, a wife may bring such an action for alienation of affections,[7] criminal conversation,[8] and the furnishing to her husband of habit forming drugs.[9]

DENIAL BASED ON HISTORY

Where a spouse has been negligently injured it has been held in almost every jurisdiction in the United States,[10] that a husband may recover for the loss of his right to consortium and that a wife may not.[11] Many courts

6. 3 BL. COMM. *143.

7 Foot v. Card, 58 Conn. 1, 18 Atl. 1027 (1889).

8. Oppenheim v. Kridel, 236 N. Y. 156, 140 N. E. 227 (1923).

9. Flandemeyer v. Cooper, 85 Ohio St. 327, 98 N. E. 102 (1912).

10. Some of the states which deny the husband an action for loss of consortium resulting from a negligent injury to the wife are Connecticut, Massachusetts, Michigan and North Carolina. See, *e. g.,* Marri v. Stamford St. Ry., 84 Conn. 9, 78 Atl. 582 (1911), Feneff v. New York Cent. & H. R. R., 203 Mass. 278, 89 N. E. 436 (1909), 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)

11. See Hitaffer v. Argonne Co., 183 F 2d 811, 812, n. 5 (D. C. Cir.), *cert. denied,* 71 S. Ct. 80 (1950).

base their decisions denying the wife a corresponding right to that of her husband on various theories, the validity of which comprise the body of this note.

A reason which is popular with the courts for denying the existence of the wife's action is that because of the medieval theory of the merger of her identity into that of her husband, she was legally incapacitated at common law These cases proceed to hold that as she could not sue at common law and the right has not since been given specifically by any enabling statute, she still cannot sue.[12] No fault can be found with the assertion regarding her inability at common law But it is wholly unsound, in view of the sweeping and fundamental changes manifested by the married women's acts,[13] to deny the wife's right on the basis of authorities decided centuries before these acts were ever contemplated. Here the statement of Mr. Justice Holmes is appropriate.

> "It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past."[14]

The second premise of the argument, which says that no right to sue was specifically given the wife by the acts removing her common law disabilities, was adequately disposed of in *McDade v. West*.[15] There a six-judge court was evenly divided on the precise question under consideration. The three judges in favor of allowing the remedy to the wife agreed that she had no such right at common law, and that the married women's acts gave no such remedy *eo nomine*. But they argued that these same acts, without specifically granting such rights, have been held to allow the wife to sue for a *wilful* injury to the consortium, which right she did not have at common law If the acts gave one right by implication, why not the other? The three judges who would allow the wife's right further contended that at common law a wife could not sue in trover for a horse because she could not own a horse. Today, without a specific enabling statute, but merely under the general language of the married women's acts, she can recover her horse even from her husband. These examples lead to the conclusion that there is something more than the absence of a specific grant of the right which causes the courts to hold that

12. Howard v. Verdigris Valley Electric Cooperative, Inc., 201 Okla. 504, 207 P 2d 784 (1949), Maloy v. Foster, 169 Misc. 964, 8 N. Y. S. 2d 608 (Sup. Ct., Tioga County 1945), Nash v. Mobile & O. R. R., 149 Miss. 823, 116 So. 100 (1928), Tobiassen v. Polley, 96 N. J. L. 66, 114 Atl. 153 (Sup. Ct. 1921), Smith v. Nicholas Bldg. Co., 93 Ohio St. 101, 112 N. E. 204 (1915), Goldman v. Cohen, 30 Misc. 336, 63 N. Y. Supp. 459 (Sup. Ct. 1900).

13. Marri v. Stamford St. Ry., 84 Conn. 9, 78 Atl. 582 (1911).

14. HOLMES, COLLECTED LEGAL PAPERS 187 (1920).

15. 80 Ga. App. 481, 56 S. E. 2d 299 (1949). See also dissent of Bond, C. J., in Bernhardt v. Perry, 276 Mo. 612, 208 S. W 462, 467 (1919).

the wife has no right of action for loss of consortium when based on defendant's negligence. If the real reason is an attempt to set an arbitrary point beyond which the negligent defendant will not be held liable, candor would seem to require that that reason be given in the opinions. Such practice would at least do away with what have been spoken of as "legalistic gymnastics."[16]

DENIAL BASED ON REQUIREMENT OF "SERVICES"

Another group of cases bases its denial of the wife's cause of action on a use of the word "consortium," by which services are made the predominant factor.[17] They state correctly that the development of the action for loss of consortium by the husband at common law originated by analogy from the right of a master to the services of his servant.[18] And, although they speak of consortium as containing companionship, affection and sexual relations, as well as services, they nevertheless hold that services are the all-important constituent. The next step in the argument is that since the wife has no right to the services of her husband, she cannot complain when his ability to perform those services is injured. That services are not the predominant factor in the composition of consortium is shown by alienation of affections cases in which recovery was allowed in spite of the fact that the spouse had not been enticed away from the home and was, therefore, still rendering his or her services,[19] and criminal conversation actions in which the husband and wife were even living apart at the time of the tort.[20] In those situations there were no services to be damaged, but that fact was not a bar to recovery Thus, as a matter of precedent the cases are wrong which say that there can be no recovery in the absence of damage to the plaintiff's right to services. In regard to this attempt to separate the different elements of consortium, it was said in the *Hitaffer* case:[21]

> *"Consortium,* although it embraces within its ambit of meaning the wife's material services, also includes love, affection, companionship, sexual relations, etc., all welded into a conceptualistic unity And, although loss of one or the other of these elements may be greater in the case of any one of the several types of invasions from which

16. Hitaffer v. Argonne Co., 183 F 2d 811, 816 (D. C. Cir.), *cert. denied,* 71 S. Ct. 80 (1950).

17 Boden v. Del-Mar Garage, Inc., 205 Ind. 59, 185 N. E. 860 (1933), Stout v. Kansas City Terminal Ry., 172 Mo. App. 113, 157 S. W 1019 (1913), Marri v. Stamford St. Ry., 84 Conn. 9, 78 Atl. 582 (1911), Feneff v. New York Cent. & H. R. R., 203 Mass. 278, 89 N. E. 436 (1909).

18. Hyde v. Scyssor, Cro. Jac. 538, 79 Eng. Rep. 462 (1620), Guy v. Livesey, Cro. Jac. 501, 79 Eng. Rep. 428 (1619).

19. Foot v. Card, 58 Conn. 1, 18 Atl. 1027 (1889).

20. Pierce v. Crisp, 260 Ky. 519, 86 S. W 2d 293 (1935).

21. 183 F 2d 811, 814 (D. C. Cir.), *cert. denied,* 71 S. Ct. 80 (1950).

consortium may be injured, there can be no rational basis for holding that in negligent invasions suability depends on whether there is a loss of services. It is not the fact that one or the other of the elements of *consortium* is injured in a particular invasion that controls the type of action which may be brought but rather that the *consortium* as such has been injured at all."

One writer has advanced a plausible suggestion as to the origin of the fiction that consortium could be split up into its constituents

"This confusion, I believe, can be traced to the use of words. Redundancy in common law pleading is familiar to all lawyers. Thus when the pleading alleged loss of services, conjugal affection, companionship, etc., no distinct functions were intended. It was the same kind of verbiage that we still use in deeds, wills and in pleadings. On this, however, has been postulated an absurd division of *consortium* into services on the one hand, and conjugal affection, etc., on the other. The cases show that this separation is arbitrary and, in the main, fictitious."[22]

Thus, neither on authority nor reason is there logical justification for the cases which, while they use the same word, use one meaning of that word when allowing recovery by a husband based on a negligent injury to his wife and another meaning when denying the right of the wife on an identical set of facts. If damage to the plaintiff-spouse's right to services is essential in the wife's action it would seem to be equally essential in those actions by the husband where no services are in fact injured.

DENIAL BASED ON DOUBLE DAMAGES

Some courts advance as a reason for denying recovery to the wife a fear that the defendant would thus be exposed to pay double damages.[23] They note that in the husband's own action based upon his injuries, he may recover for all damages including that of his failure to support his wife, and they feel that as head of the household, he will use the funds so recovered to recompense the wrongs inflicted upon his family.[24] They point out that if the wife may then bring suit for the loss of consortium she will recover damages already paid by the defendant. Even if it be conceded that the husband actually does not recover for his wife's loss of his com-

22. Lippman, *The Breakdown of Consortium*, 30 COL. L. REV. 651, 668 (1930). See also to the effect that services are not required in the husband's action for negligent injury to the wife, Guevin v. Manchester St. Ry., 78 N. H. 289, 99 Atl. 298 (1916).

23. Giggy v. Gallagher Transportation Co., 101 Colo. 258, 72 P 2d 1100 (1937), Tobiassen v. Polley, 96 N. J. L. 66, 114 Atl. 153 (Sup. Ct. 1921).

24. Sheard v. Oregon Electric Ry., 137 Ore. 341, 2 P 2d 916 (1931), Bernhardt v. Perry, 276 Mo. 612, 208 S. W 462 (1919).

panionship, guidance, and conjugal relations, such courts express reluctance to allow two suits because sympathetic juries in both actions may take all the injuries into consideration and, therefore, award higher judgments to each than should be given.

This form of logic leaves much wanting. The possibility of a double recovery in practice would seem to call for a solution other than that of denying the wife's right of action entirely For example, if the wife's action were required to be joined with that of her husband, the speculations of two juries would be eliminated.[25] The *Hitaffer* case proposes a simple solution as follows

> " [D]etermine the damages to the wife's consortium in exactly the same way as those of the husband are measured in a similar action and subtract therefrom the value of any impairment of his duty of support. "[26]

If the courts continue to deny the wife's right of action for loss of consortium, basing their denial on this reasoning, there will continue to exist a very real and substantial damage uncompensated for by law A wife whose husband sees fit to compromise with the defendant in a settlement out of court, be it fair or not, has no redress.[27] The law, as it stands, takes no cognizance of the possibility that the head of the household, in fact, may not compensate his wife for her loss. By both logic and practical necessity, it would appear that a more adequate and just remedy must be adopted in order that a wife's loss of consortium does not go unredressed.

DENIAL BASED ON THEORY THAT THE INJURY TO THE WIFE IS TOO REMOTE

One of the most popular theories used to deny an action for loss of consortium to the wife is that, when the action is based on a negligent injury to the husband, the resulting injury to the wife is too remote to allow a recovery[28] The courts argue that in actions based on such things as

25. An example of this procedure is found in Pennsylvania where the husband's action must be joined with that of his wife. Act of May 8, 1895, P L. 54, PURDON'S PA. STAT. ANN. tit. 12, § 1621 (1931). This procedure was restated by Rule 2228(a), Pa. R. Civ. P (1940).

26. 183 F 2d 811, 819 (D. C. Cir.), *cert. denied,* 71 S. Ct. 80 (1950)

27 Kosciolek v. Portland Ry., Light & Power Co., 81 Ore. 517, 160 Pac. 132 (1916).

28. Maloy v. Foster, 169 Misc. 964, 8 N. Y. S. 2d 608 (Sup. Ct. 1945), Giggy v. Gallagher Transportation Co., 101 Colo. 258, 72 P 2d 1100 (1937), Eschenbach v. Benjamin, 195 Minn. 378, 263 N. W 154 (1935), Sheard v. Oregon Electric Ry., 137 Ore. 341, 2 P 2d 916 (1931), Nash v. Mobile & O. R. R., 149 Miss. 823, 116 So. 100 (1928), Hoagland v. Louisville & N. R. R., 195 Ky. 257, 242 S. W 628 (1922), Emerson v. Taylor, 133 Md. 192, 104 Atl. 538 (1918), Kosciolek v. Portland Ry., Light & Power Co., 81 Ore. 517, 160 Pac. 132 (1916), Gambino v. Manufacturers' Coal & Coke Co., 175 Mo. App. 653, 158 S. W 77 (1913), Stout v. Kansas City Terminal Ry., 172 Mo. App. 113, 157 S. W 1019 (1913), Brown v. Kistleman, 177 Ind. 692, 98 N. E. 631 (1912).

alienation of affections and criminal conversation the injury to the consortium is direct. Some opinions go so far as to state that the law is trying merely to punish the defendant. Judge Clark in the *Hitaffer* case states

> "The incongruity of the position taken by the authorities is further demonstrated in those cases where they have attempted to explain the reason for allowing the wife to sue for the so-called intentional or malicious invasions to her consortium, while denying her the right to sue when the very same interest is injured due to the defendant's negligence. Where this denial is predicated on the rationale that a wife's interest in the marital relation lies in an area into which the law will not enter, they hold that in cases of alienation of affections, etc., necessity compels the law to step in in order to inflict the seducer or enticer with heavy damages by way of punishment and atonement rather than compensation. The civil side of the court cannot permit an award of punitive damages except as incidental to an actionable civil wrong.
>
> "
>
> "There can be no doubt, therefore, that if a cause of action in the wife for the loss of consortium from alienation of affections or criminal conversation is to be recognized it must be predicated on a legally protected interest."[29]

The courts which advance this rationale hold that in an injury caused by negligence the damage to the wife's consortium is indirect, hence there is no proximate cause for which the defendant may be held liable. It is difficult to see how the injury to the wife becomes any more or less direct merely because the husband participates willfully in one type of action and not in the other. Even if a distinction be admitted, however, the argument becomes utterly untenable when it is realized that these same courts find sufficient proximate cause to allow a recovery when a husband is suing for the loss of consortium based upon a negligent injury to his wife. One court actually admits that possibly the loss to the wife of consortium is no more remote in negligence than it is for the husband. It reasons, however, as follows

> "A practical reason that is available possibly justifies what seems like a discrimination between husband and wife. The wife is well compensated by other special privileges and rights for the absence of this remedy"[30]

The court fails to mention any of these "other special privileges and rights." Where a court must use as its reason for denying recovery that

29. 183 F 2d 811, 816 (D. C. Cir.), *cert. denied*, 71 S. Ct. 80 (1950).
30. Sheard v. Oregon Electric Ry., 137 Ore. 341, 2 P 2d 916, 920 (1931).

the plaintiff may be well compensated in some field other than law, it might be advisable for the court to attempt to find a new reason.

CONCLUSION

This note has attempted to point out some of the existing inconsistencies and obsolete reasoning in the present-day concept concerning a wife's action for loss of consortium. The dissenting opinion of Chief Justice Bond in *Bernhardt v. Perry*[31] expresses well the absurdity of holding to a theory the reason for which has long since passed.

> "The feudal system was inducted into England by William after he won at Hastings, it was the social and political basis of the stratocracies then in the zenith of their power on the continent of Europe. Its barbarous behests were imposed upon the conquered nation and were infused into the common law and brought over to this country as a part of their heritage by the colonists. It has taken ages to eliminate them, but the unceasing evolution of the law in response to reason and social opinion has extirpated many of the crudities, cruelties, and absurd corollaries of feudalism from the body of the law, which is ceaselessly adjusting itself to the growth of society and the advance of civilization. And it is not too much to say that judicial progression has been carried forward in exact proportion as these notions have been relegated to the decayed system from which they sprang. So prone are the courts to cling to consuetudinary law, even after the reason for the custom has ceased or become a mere memory that it has required hundreds of years to obtain the meed of justice for married women. Right reason, the constant corrector of customary law, has reformed social habits and created enlightened public thought, now crystallized into a clear and positive statute in this state, whose necessary import and only intelligible purpose was to destroy the last vestige of the odious injustice which denied to married women the full property rights of every other human being."

One jurisdiction has attempted to solve the problem by a statute specifically enabling the wife to recover for the loss of consortium resulting from a negligent injury to her husband.[32] The case of *Hitaffer v. Argonne* proves that it is possible to adapt the existing law to the needs of a modern civilization. Perhaps this decision will help to modernize the views of courts in future actions. If the courts, however, continue to deprive the wife of a remedy for an actual wrong and to allow recovery by the husband, the only solution must be found in legislative action.

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31. Bernhardt v. Perry, 276 Mo. 612, 208 S. W 462, 470 (1919).
32. Ore. Laws 1941, c. 228, ORE. COMP. LAWS ANN. tit. 63, § 202 (1943).