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## SEX, SOCIETY, SERVICES—THE WIFE'S CLAIM FOR LOSS OF CONSORTIUM

Plaintiff wife sought to recover for loss of consortium caused by defendants' negligent injury to her husband. The trial court sustained a demurrer against her on the ground that this was not an item of recovery for the wife. On appeal to the Court of Appeals of Ohio, Franklin County, *held*, reversed: Loss of consortium is an item of damage to a wife to the same extent as to a husband. *Leffler v. Wiley*, 15 Ohio App. 2d 67, 239 N.E.2d 235 (1968).

In many jurisdictions a wife cannot recover for loss of consortium<sup>1</sup> caused by negligent injury to her husband, although a husband can so recover if his wife is negligently injured. The wife did not have an action for loss of consortium at common law,<sup>2</sup> nor did she have an action for intentional interference with the marriage relationship. But the common law rule denying her action was promulgated at a period in history when she could not contract or bring an action of any kind. A husband had a right of action for injury to his wife on the theory that she was his servant and he was entitled to her services in the home; the wife, as a mere chattel, did not have similar rights.<sup>3</sup> As a result of the Married Women's Acts, courts extended to the wife the right to sue for intentional interference with consortium,<sup>4</sup> but not for loss of consortium resulting from negligent injury to her husband.<sup>5</sup> This distinction accommodated the unreasonable division of consortium into pecuniary services and sentimental damages.<sup>6</sup>

In 1913 the Ohio case of *Griften v. Cincinnati Realty Co.*<sup>7</sup> held that the wife had a right to sue for loss of consortium caused by negligent conduct, but this case was overruled in 1915 by *Smith v. Nicholas Bldg. Co.*<sup>8</sup> The wife's claim was also allowed by the North Carolina Supreme

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1. The term "consortium" encompasses services, support, love, affection, society, companionship and sexual relations. Too many courts have arbitrarily divided consortium into pecuniary services on the one hand and conjugal affection and companionship on the other. The loss due to negligent acts of third parties is usually based on the pecuniary component, and that due to willful injury on the sentimental elements. See Lippman, *The Breakdown of Consortium*, 30 COLUM. L. REV. 651 (1930).

2. *Hinnant v. Tide Water Power Co.*, 189 N.C. 120, 126 S.E. 307 (1925).

3. Even if she had a right to her husband's services, doubtlessly in her subordinate status as satisfier she would nevertheless have had no right to compensation for loss of sexual relations, love or affection. It is difficult to justify such a classification based on sex alone. As is commonly accepted in this enlightened age, sex is not a one-way affair. Women, like men, are more human than divine; they have similar appetites which require similar gratification.

4. *Smith v. Nicholas Bldg. Co.*, 93 Ohio St. 101, 112 N.E. 204 (1915); *Flandermeyer v. Cooper*, 85 Ohio St. 327, 98 N.E. 102 (1912).

5. *Giggey v. Gallagher Transp. Co.*, 101 Colo. 258, 72 P.2d 1100 (1937); *Boden v. Del-Mar Garage, Inc.*, 205 Ind. 59, 185 N.E. 860 (1933); *Brown v. Kistleman*, 177 Ind. 692, 98 N.E. 631 (1912).

6. See note 1 *supra*.

7. 27 Ohio Dec. 585 (Cinn. Super. Ct. 1913).

8. 93 Ohio St. 101, 112 N.E. 204 (1915).

Court in the 1921 decision of *Hipp v. E.I. Dupont De Nemours & Co.*,<sup>9</sup> which was overruled by *Hinnant v. Tide Water Power Co.*<sup>10</sup> in 1925. Thus, both of these pioneer cases lost their force within a few years of the decisions.

The majority of jurisdictions, including Florida, continue to refuse to recognize the wife's consortium action for negligent injury of her husband.<sup>11</sup> Various reasons have been advanced by the courts for their denial of the wife's action.<sup>12</sup>

Some courts hold that such an action would result in a double recovery for the same injury, because the husband's action for decreased ability to support his family would overlap with the wife's suit for loss of his services.<sup>13</sup> However, the wife's action includes many elements which are not compensable in the husband's claim—the so-called sentimental elements of love, affection, companionship, and sexual relations.

Other courts argue that the injury to the wife is too indirect and remote to warrant protection.<sup>14</sup> But certainly her loss is no more remote than that of her husband, who is allowed recovery for his loss.

Another argument is that the wife had no right at common law, and since the Married Women's Acts created no new rights she is still without such a remedy.<sup>15</sup> These acts gave the wife a separate and distinct legal existence from that of her husband, whose conjugal interests were already protected. Surely the giving of a separate equal existence meant the creation of new interests in the wife, which were not meant to be left unprotected by the courts. The wife has a legally protected interest in consortium when it is intentionally injured; she should certainly not be denied protection of that identical interest when injury occurs through negligence.

9. 182 N.C. 9, 108 S.E. 318 (1921).

10. 189 N.C. 120, 126 S.E. 307 (1925).

11. *Smith v. United Constr. Workers*, 271 Ala. 42, 122 So.2d 153 (1960); *Deshotel v. Atchison, T. & S.F. Ry.*, 50 Cal. 2d 664, 328 P.2d 449 (1958); *Johnson v. Enlow*, 132 Colo. 101, 286 P.2d 630 (1955); *Gallagher v. Pequot Spring Water Co.*, 2 Conn. Cir. 354, 199 A.2d 172 (Cir. Ct., App. Div. 1963); *Wilson v. Redding*, 145 So.2d 252 (Fla. 2d Dist. 1962); *Miller v. Sparks*, 136 Ind. App. 148, 189 N.E.2d 720 (1963); *Hoffman v. Dautel*, 192 Kan. 406, 388 P.2d 615 (1964); *Baird v. Cincinnati, N.O. & T. Pac. R.R.*, 368 S.W.2d 172 (Ky. 1963); *Potter v. Schafter*, 161 Me. 340, 211 A.2d 891 (1965); *Nicholson v. Blanchette*, 239 Md. 168, 210 A.2d 732 (1965); *Hartman v. Cold Spring Granite Co.*, 247 Minn. 515, 77 N.W.2d 651 (1956); *Simpson v. Poindexter*, 241 Miss. 854, 133 So.2d 286 (1961); *Snodgrass v. Cherry-Burrell Corp.*, 103 N.H. 56, 164 A.2d 579 (1960); *Roseberry v. Starkovich*, 73 N.M. 211, 387 P.2d 321 (1963); *Neuberg v. Bobowicz*, 401 Pa. 146, 162 A.2d 662 (1960); *Page v. Winter*, 240 S.C. 516, 126 S.E.2d 570 (1962); *Krohn v. Richardson-Merrell, Inc.*, 219 Tenn. 37, 406 S.W.2d 166 (1966); *Garrett v. Reno Oil Co.*, 271 S.W.2d 764 (Tex. 1954); *Baldwin v. State*, 125 Vt. 317, 215 A.2d 492 (1965); *Seagraves v. Legg*, 147 W. Va. 331, 127 S.E.2d 605 (1962).

12. See Note, *Husband and Wife—Loss of Consortium*, 9 IND. L.J. 182 (1933).

13. *Deshotel v. Atchison, T. & S.F. Ry.*, 50 Cal. 2d 664, 328 P.2d 449 (1958).

14. *Brown v. Kistleman*, 177 Ind. 692, 98 N.E. 631 (1912); *Feneff v. N.Y. Cent. & H.R.R.R.*, 203 Mass. 278, 89 N.E. 436 (1909).

15. *Howard v. Verdigris Valley Elec. Co-op*, 201 Okla. 504, 207 P.2d 784 (1949).

Some courts have proposed as a solution the abolishment of the husband's right to sue for loss of consortium, thus equalizing his position with that of his wife.<sup>16</sup> Other courts have simply held that the matter should be left to their legislatures. Probably the major reason for denying the wife's recovery is precedent,<sup>17</sup> an excuse which falls somewhat short of providing a satisfactory answer to an unsatisfactory situation.

These common law rules were uniformly adhered to by the courts until the 1950 District of Columbia decision of *Hitafter v. Argonne Co.*,<sup>18</sup> a case which marked the beginning of the end of this irrational discrimination against women. *Hitafter* was not generally accepted, however, and by 1958 only three states, Arkansas,<sup>19</sup> Georgia<sup>20</sup> and Iowa,<sup>21</sup> had followed that decision. Since 1958 thirteen additional states have accepted *Hitafter* by overruling, if necessary, the common law rule of their states.<sup>22</sup> Also, federal decisions have interpreted Montana and Nebraska law as allowing the action.<sup>23</sup>

The question of constitutionality necessarily arises in this area of damages with respect to the failure to afford women the equal protection of the laws guaranteed by the fourteenth amendment to the United States Constitution.<sup>24</sup> There are no United States Supreme Court deci-

16. *West v. City of San Diego*, 346 P.2d 479 (Cal. App. 1959); *Helmstetler v. Duke Power Co.*, 224 N.C. 821, 32 S.E.2d 611 (1945).

17. Note, *A Consideration of the Problems in Consortium Recovery*, 30 IND. L.J. 276 (1955).

18. 183 F.2d 811 (D.C. Cir. 1950).

19. *Missouri Pac. Transp. Co. v. Miller*, 227 Ark. 351, 299 S.W.2d 41 (1957).

20. *Brown v. Georgia-Tennessee Coaches, Inc.*, 88 Ga. App. 519, 77 S.E.2d 24 (1953).

21. *Acuff v. Schmit*, 248 Iowa 272, 78 N.W.2d 480 (1956).

22. *Stenta v. Leblang*, 55 Del. 181, 185 A.2d 759 (1962); *Nichols v. Sonneman*, 91 Idaho 199, 418 P.2d 562 (1966); *Dini v. Naiditch*, 20 Ill. 2d 406, 170 N.E.2d 881 (1960); *Deems v. Western Md. Ry.*, 247 Md. 95, 231 A.2d 514 (1967); *Montgomery v. Stephan*, 359 Mich. 33, 101 N.W.2d 227 (1960); *Novak v. Kansas City Transit*, 365 S.W.2d 539 (Mo. 1963); *Ekalo v. Constructive Serv. Corp. of Am.*, 46 N.J. 82, 215 A.2d 1 (1965); *Millington v. Southeastern Elevator Co.*, 22 N.Y.2d 498, 239 N.E.2d 897, 293 N.Y.S.2d 305 (1968); *Clem v. Brown*, 3 Ohio Misc. 167, 207 N.E.2d 398 (1965); *Ross v. Cuthbert*, 239 Ore. 429, 397 P.2 529 (1964); *Mariani v. Nanni*, 95 R.I. 153, 185 A.2d 119 (1962); *Hoekstra v. Helgeland*, 78 S.D. 82, 98 N.W.2d 669 (1959); *Moran v. Quality Aluminum Casting Co.*, 34 Wis. 2d 542, 150 N.W.2d 137 (1967).

23. *Luther v. Maple*, 250 F.2d 916 (8th Cir. 1958) (applying Nebraska law); *Dutton v. Hightower & Lubrecht Constr. Co.*, 214 F. Supp. 298 (D. Mont. 1963); *Duffy v. Lipsman-Fulkerson & Co.*, 200 F. Supp. 71 (D. Mont. 1961); *Cooney v. Moomaw*, 109 F. Supp. 448 (D. Neb. 1953).

24. Where a state in its police power capacity imposes a classification scheme in the regulation of social and economic welfare, these areas are generally considered reasonable, and the burden rests with whoever challenges the classification to overcome the presumption of constitutionality. But where the classification impinges upon the basic rights of man (and woman!), as in discrimination based on race, religion, color, and national origin, such classification is forbidden; or at least the presumption of constitutionality is overcome. Courts generally have oversimplified the distinction on account of sex by finding that sex is a valid basis for classification. Such blanket treatment totally defeats the meaning of equal protection for women. See *McKay, Political Thickets and Crazy Quilts: Reapportionment and Equal Protection*, 61 MICH. L. REV. 645 (1963). See also *Commonwealth v. Daniel*, 243 A.2d 400 (1968), wherein the Pennsylvania Supreme Court held that women are entitled to the protection afforded by the equal protection clause, at least at the

sions dealing with the narrow issue of constitutionality pertaining to a wife's claim for loss of consortium caused by negligent injury of her husband. Recently, however, the Court held that equal protection should be extended to a woman seeking recovery for the wrongful death of her illegitimate child.<sup>25</sup>

The specific issue of whether denial of the wife's claim for consortium is a denial of equal protection under the fourteenth amendment has been dealt with recently by the U.S. Court of Appeals for the Seventh Circuit and the New York Court of Appeals, as well as by the federal district courts. For example, the 1967 decision of *Karczewski v. Baltimore & O. R.R.*<sup>26</sup> held that to deny a wife the right of action for loss of her husband's consortium due to negligent injury was a classification without reason, arbitrary, and a violation of the equal protection clause of the fourteenth amendment.

*Miskunas v. Union Carbide Corp.*,<sup>27</sup> a 1968 decision of the U.S. Court of Appeals for the Seventh Circuit, followed by double-recovery theory; the court, basing its decision on Indiana precedent, denied the wife's claim. The court stated that it would prefer to accord the wife the action, but that it was for the Indiana legislature or judiciary to recognize or not recognize the tort. Significant was the strong dissent by Schnackenberg, C. J., who felt that the district court's application of Indiana law denied the plaintiff wife the equal protection guaranteed her by the fourteenth amendment. He labelled Indiana's precedent "patent discrimination"<sup>28</sup> and could find "no justification in reason or law for this unjust result."<sup>29</sup>

In *Millington v. Southeastern Elevator Co.*,<sup>30</sup> decided in 1968, the

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criminal level. Appellants had challenged the validity of their sentences on the ground that the Muncy Act, which provides a mandatory and exclusive procedure and sentencing provision for women convicted of crimes punishable by imprisonment for more than one year, denied women the equal protection of laws required by the fourteenth amendment. The court held that since a judge sentencing a woman under the Muncy Act had no discretion in fixing the maximum period during which she must be imprisoned, whereas a judge sentencing a man might consider extenuating facts and factors, an arbitrary and invidious discrimination was thereby created in violation of the fourteenth amendment.

25. *Glonn v. American Guar. & Liab. Ins. Co.*, 88 S. Ct. 1515 (1968). The Supreme Court in reversing the district court and the court of appeals, stated at 1517: "Where the claimant is plainly the mother, the State denies equal protection of the laws to withhold relief merely because the child, wrongfully killed, was born to her out of wedlock." *Cf. Levy v. Louisiana*, — U.S. — 88 S. Ct. 1509 (1968), which involved an action on behalf of minor illegitimate children for the wrongful death of their mother. The U.S. Supreme Court started from the premise that "illegitimate children are . . . 'persons' within the meaning of the Equal Protection Clause of the 14th Amendment," and, reversing the court of appeal, held that if a state permits actions to recover for wrongful death and conscious pain and suffering it cannot deny illegitimate children this remedy. The *Glonn* and *Levy* decisions would appear to apply, by analogy, to the discrimination based on sex alone; there, as here, the distinction has no basis in reason or logic.

26. 274 F. Supp. 169 (N.D. Ill. 1967).

27. 399 F.2d 847 (7th Cir. 1968).

28. *Id.* at 854.

29. *Id.*

30. 22 N.Y.2d 498, 239 N.E.2d 897, 293 N.Y.S.2d 305 (1968).

New York Court of Appeals avoided the constitutional question, but mentioned in passing that the reasoning of the United States Supreme Court in *Levy v. Louisiana*<sup>31</sup> seemed applicable because it was concluded there that there was no basis for the discrimination. In *Millington*, the court expressly overruled its earlier decision in *Kronenbitter v. Washburn Wire Co.*<sup>32</sup> and found that the plaintiff, whose husband was paralyzed from the waist down as a result of injuries caused by defendants' negligence, was entitled to maintain an action for loss of consortium, "thereby terminating an unjust discrimination under New York law."<sup>33</sup>

In the instant case, *Leffler v. Wiley*, the court pointed out that the common law distinction between husband and wife in regard to consortium is based on an unreasonable concept of subservience of the wife to her husband, and that to create such a right in a husband and deny it to a wife on the basis of sex alone would violate the fourteenth amendment. The court held that courts "should not perpetuate in the common law a discrimination that could not constitutionally be created by statute."<sup>34</sup>

The instant case represents another forward stride in the direction of nondiscrimination against women where there is no rational basis for distinction between the rights of husband and wife. It is a holding based on reason and logic which looks beyond history and precedent. By rejecting medieval concepts shown to be without justification, it adds its illumination to an area of the law too slowly creeping out of the Dark Ages. To compensate a wife for destruction of her marriage is inadequate, at best, but to deny her any recovery at all is infinitely worse. Today, at least, a wife is a partner in marriage rather than a servant to it. A deprivation of her husband's love, affection and sexual relations constitutes a real injury to the marital relationship and one which should be compensable at law.

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31. See note 25 *supra*.

32. 4 N.Y.2d 524, 151 N.E.2d 898, 176 N.Y.S.2d 354 (1958).

33. *Montgomery v. Stephan*, 359 Mich. 33, 101 N.W.2d 227 (1960). The court quoted from that case:

[W]hen her husband's love is denied her, his strength sapped, and his protection destroyed . . . we are urged to rule that she has suffered no loss compensable at the law. But let some scoundrel dent a dishpan in the family kitchen and the law, in all its majesty, will convene the court, will march with measured tread to the halls of justice, and will there suffer a jury of her peers to assess the damages. Why are we asked, then, in the case before us, to look the other way? Is this what is meant when it is said that justice is blind?

34. 15 Ohio App. 2d 67, 68, 239 N.E.2d 235, 236 (1968).