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LOSS OF CONSORTIUM: WHY LIMIT IT TO THE HUSBAND?

INTRODUCTION

It was well settled at an early date that a husband had a legal right to his wife's services and companionship, and that a separate action existed in his favor for any wrongful or negligent interference with this right "per quod consortium amissit." The common law rationale was that such a right was incident to the marriage relationship and could not exist without it. The courts of today, with some exceptions, still accept the common law view.

The wife, on the other hand, was not vested with the right to recover for loss of consortium; she held no proprietary right to her husband's services. She also could not institute suit in her own name. The Married

1. E.g., Chicago, B. & Q. R.R. v. Honey, 63 F. 39 (8th Cir. 1894); Birmingham Southern R.R. v. Linter, 141 Ala. 429, 38 So. 363 (1904); Marri v. Stanford St. Ry., 84 Conn. 9, 78 Atl. 582 (1911); Walker v. First Savings & Trust Co., 103 Fla. 1025, 138 So. 780 (1931); Georgia R.R. & Banking Co. v. Tice, 124 Ga. 459, 52 S.E. 916 (1905); Citizens St. Ry. v. Twynam, 121 Ind. 375, 23 N.E. 159 (1890); Newhitter v. Hatten, 42 Iowa 288 (1875); Kelly v. New York, N. H. & H. R.R., 168 Mass. 308, 46 N.E. 1063 (1897); Mageau v. Great Northern R.R., 103 Minn. 290, 115 N.W. 651 (1908); Skoglund v. Minneapolis St. Ry., 45 Minn. 330, 47 N.W. 1071 (1891); Smith v. City of St. Joseph, 55 Mo. 456 (1891); Middle v. Leigh, 75 N.D. 418, 28 N.W.2d 530 (1947); Hopkins v. Atlantic St. Lawrence R.R., 36 N.H. 9 (1857); Garrison v. Sun Printing & Publishing Ass'n., 207 N.Y. 1, 100 N.E. 430 (1912); Holleman v. Harward, 119 N.C. 150, 25 S.E. 972 (1896); Kimberly v. Howland, 143 N.C. 398, 55 S.E. 778 (1906); Sellick v. City of Janesville, 104 Wis. 570, 80 N.W. 944 (1899).


5. Lynch v. Knight, 9 H.L. Cas. 577, 11 Eng. Rep. 854 (1861); Lord Wensleydale in stating the majority opinion, "the loss of such service of the wife, the husband, who alone has all the property of the married parties, may repair by hiring another servant; but the wife sustains only the loss of the comfort of her husband's society and affectionate attention, which the law can not estimate or remedy. She does not lose her maintenance, which he is bound to still supply; and it can not be presumed that the wrongful act complained of puts an end to the means of support without an averment to that effect."

6. 3 BLACKSTONE, COMMENTARIES 143; In the following cases the court resolved the "services" argument by contending that the wife could not show a loss of services: Boden v. Del-Mar Garage, 205 Ind. 59, 185 N.E. 860 (1933); Feneff v. N.Y. Cent. & Hudson River R.R., 203 Mass. 278, 89 N.E. 436 (1909); Smith v. Nicholas Bldg. Co., 93 Ohio St. 101, 112 N.E. 204 (1915); HARPER & JAMES, THE LAW OF TORTS, § 8.9, at 639 (1956).

7. VERNIER, AMERICAN FAMILY LAWS § 179 (1935); However the wife of the King of England could institute suit. The reason given by Lord Coke is that the wisdom
Women's Acts, although they relieved many of the incapacities of coverture, did not create a right in favor of a married woman to recover for her loss of consortium due to a negligent act of a third party. With the exception of a few holdings and scattered dissents, judicial attitude still refuses to grant the wife recovery.

The purpose of this paper is to trace the development of the action for loss of consortium from the common law to its present state, for it is evident that this phase of our law has not kept pace with the progress shown in the field of domestic relations generally.

**Loss of Consortium Under the Common Law**

According to the common law husband and wife were one person, that person being the husband. A married woman had no capacity to sue, nor could she hold property as a femme sole. As a result, any wrong committed upon her was either left in abeyance or was actionable only if of the common law would not have the king troubled and disquieted with private and petty causes. He is presumed to be busied with public affairs, and it will not be intended that he would stoop to marital coercion. See note, 37 Am. Dec. 709 (1841).

8. FLA. STAT. §§ 708.08 (1957), typical of statutes in other states wherein women are given the right to sue and be sued, hold property as a femme sole, contract and be contracted with, etc.


11. E.g., McDade v. West, 80 Ga. App. 481, 56 S.E.2d 299 (1949) (dissent); Ripley v. Ewell, 61 So.2d 420 (Fla. 1952) (dissent without opinion); Bernhardt v. Perry, 276 Mo. 612, 208 S.W. 462 (1918) (dissent).


13. See PROSSER, TORTS § 948 (1941); HARPER, TORTS 566 (1933); See Holbrook, supra note 12; Lippman, The Breakdown of Consortium, 30 COLUM. L. REV. 651 (1950).

14. 3 BLACKSTONE, COMMENTARIES 143.

15. Ibid.

16. VERNIER, AMERICAN FAMILY LAW § 179 (1935); Even if husband and wife are living apart, see Beach v. Beach, 2 Hill 260 (N.Y. 1842); Robinson v. Reynolds, 1 Aikens 174 (Vt. 1826). Some authority allowing wife to sue if husband forces her to live apart from him, see Love v. Moyehan, 16 Ill. 277 (1855).

17. Real property given jure uxoris to husband. See AM. JUR. HUSBAND AND WIFE § 55 (1940).
her husband were properly joined. Then recovery could be granted to the wife for her injury, and the husband was afforded a separate action in his own right. Compensatory damages could be granted to him for his loss due to: abduction, or the carrying away of his wife; adultery; having criminal conversation with her; or for his loss of consortium. A husband's right of consortium at the common law included the right to the service of his wife to be rendered to him, together with the right to her society and the comfort incident to her companionship. He was allowed recovery for any wrongful deprivation of this right even though the wife was not accustomed to do any physical labor for the husband, and though the pecuniary value of such services could not be accurately ascertained. The only limitations which were placed upon his recovery were contributory fault by the wife and the necessity that the defendant would be directly liable to the wife.

The tendency of the common law courts was to place much emphasis on services, although they did not attempt to separate the elements embracing consortium. They strictly enforced the view that the wife owed a duty to provide various marital services to her husband and any impairment thereof by a third person was actionable. The husband, on the other hand, owed no such duty to provide these various marital services to his wife; hence any injury inflicted upon the husband would not breach any duty owing to the wife and as such was not actionable per se. Services, as defined by the courts, were not only those services provided by a domestic servant,
but also the conjugal society of a wife. Although such services were lacking in pecuniary market value, the majority of courts held that it was in the province of a jury to determine the pecuniary value of the loss.

In 1867, a New York court in the case of Hoard v. Peck allowed a husband to recover for loss of his wife's consortium where a druggist had sold her large quantities of laudanum without her husband's consent. The court's ruling was based on the fact that the defendant had aided the wife to breach a duty to her husband, and as such was liable to him in the same way as a lover, concubine or harborer. In 1886 a similar action was brought in a North Carolina court. The facts were the same, with the additional circumstance that the plaintiff had forbidden the defendant to sell the laudanum to his wife. Here, too, it was held that the husband could recover for his loss of consortium, extending the doctrine of the husband's right to his wife's services to an unusual degree and emphasizing the proprietary nature of the right.

The law in relation to husband and wife and their relative rights to consortium was at this point settled and seemed to be universally accepted. The wife was not vested with the right to her husband's services and could not maintain the action for the loss of consortium. However, at least one court held that the action did exist in favor of the wife; only her marital status prevented its enforcement. Due to the scarcity of cases reported following the latter line of reasoning, we can conclude that the action as interpreted by the courts at that time did not include the wife. The husband, on the other hand, had a clear right; the intentional or unintentional violation of which gave rise to a cause of action.


30. Reeves v. Lutz, 179 Mo. App. 61, 162 S.W. 280, at 287 (1914) (juror's experience without evidence of value).


33. Lippman, supra note 13, at 661, 662.

34. Blackstone says, "We may observe that in these relative injury cases notice is only 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 unregarded. One reason for this is 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 or injury. The wife cannot recover damages for beating her husband for she hath no separate interest in anything during coverture." 3 BLACKSTONE, COMMENTARIES § 143.

The emancipation of women presented many new problems. Did the husband still have the right to his wife's services, or did his right come to an end? Did the wife always have equal rights, left in abeyance only because of coverture, or was she now cloaked with new rights in the marriage relationship? It is interesting to note that almost all states after the passage of the enabling acts extended recovery to the wife for criminal conversation and alienation of affections. The wife has also been allowed recovery for the interference with the marital relation by reason of the sale of excessive quantity of drugs to the husband. Although these new actions favoring married women are almost universally accepted, the rationale from state to state is not at all consistent. It is held by some courts that these rights always existed, but that the common law incapacity of coverture prevented their enforcement. The majority, on the other hand, contend that the wife is now given an equal right to the marriage relationship. Both schools of thought appear to be faulty, the first on the ground that there are few cases cited from the common law which inferred that such rights had ever existed. Moreover, they could not have existed, since the action was premised on the right to services, which right the wife did not possess. The latter view seems to abandon the historical basis of the action, loss of services, and now contends that a wife has an equal interest in the marital relationship. Hence these courts now premised the action upon the breach or violation of an inherent marital right. However the majority of these same courts contended that the husband's right still remained independent, and loss of his wife's services still remained the basis of his action. Some author.

ities limited the husband's action to intentional, or, as the court termed them, direct invasions.\textsuperscript{44} However, an overwhelming majority held that the Married Woman's Acts did not take anything from the husband.\textsuperscript{45} Still other jurisdictions, noticing the inconsistencies beginning to appear, denied recovery to either spouse.\textsuperscript{46}

Inevitably there began to appear in our courts throughout the country the issue of whether a wife could now maintain an action for loss of consortium due to a negligent injury inflicted upon her husband. The majority of cases resolved the issue in the negative,\textsuperscript{47} holding that the negligent injury to her husband was too indirect and consequential to her,\textsuperscript{48} and that any allowance of damages would result in double recovery for a single wrong.\textsuperscript{49}

After the passage of the enabling acts the courts in their attempt to keep in the spirit of \textit{stare decisis} and at the same time open their hearts to the feeling of emancipation of women, actually allowed the law to fall into a state of confusion and false realism. The courts found it reasonable that the action for loss of consortium take on two distinct meanings depending upon which spouse sought to bring it. One was for the loss of services owed directly to the husband, the violation of which amounted to a direct loss to him, and the other for a denial of a marital right owed directly to the wife, the impairment of which amounted to a direct loss to her. The court further reasoned that any negligent injury inflicted upon the husband would not be a violation to the marital right, at least not a direct violation, but any intentional act would fall under an actionable violation of the marital right. Perhaps the majority of our judiciary are in accord with Lord Porter in \textit{Best v. Samuel Fox & Co.}\textsuperscript{50} wherein 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 grounds for its rejection."

44. Marri v. Stanford St. Ry., 84 Conn. 9, 78 Atl. 582 (1911); Blair v. Seitner Dry Goods Co., 184 Mich. 304, 151 N.W. 724 (1915), husband's right of action limited to direct loss of a service performed for him by the wife.


46. See authority cited in note 3 supra.

47. See authority cited in notes 9 and 12 supra.

48. Ibid.


50. \textit{In re} Hitaffer, 2 K.B. 639 (The conclusion reached is also interesting, the court refused to grant the wife recovery for "partial" loss of consortium, indicated that if there was a total loss the wife could recover. Husband was emasculated. What constitutes total? Perhaps death.)
Modern Acceptance or Disapproval of the Common Law

In 1921, a North Carolina court\(^{51}\) refused to follow the weight of authority, and held that no sound reason existed for allowing recovery to the husband and denying recovery to the wife, and as such became the first court to allow recovery by the wife for her loss of consortium due to a negligent injury to her husband. Before much acceptance could be given to this decision, the same court reversed itself in a later decision.\(^{52}\) Hence the law at this point was steadfast in its refusal to recognize equal rights in married women. In 1950 the controversial case of Hitaffer v. Argonne Co.\(^{53}\) was before a federal court in Washington, D.C., wherein a married man was injured due to the negligence of his employer. As a result he became incapable of having sexual relations with his wife. He recovered for his loss under the Longshoreman’s and Harbor Workers Compensation Act in a separate suit.\(^{54}\) His wife, the plaintiff, brought suit in her own name to recover for her loss of consortium. The court in a lengthy opinion reviewed all of the reasoning advanced by the weight of authority and refused to blindly follow the doctrine of stare decisis. Instead they took a progressive step\(^{55}\) in bursting through the inconsistent, illogical barrier which lay in their path and held that a wife could maintain this action. The court found no difficulty in overcoming the “too remote” argument accepted by the vast majority by contending that the loss of consortium was direct regardless of the lack of intent which caused the act. It was further stated by the court that the denial of the action to the wife by the majority was based on a series of fictions and a use of words. The court in effect made practical a very sound theory that when the logic of a rule fails so should the rule. It is astounding to think that a simple application of sound logic together with good sense reasoning could result in an opinion so basically contrary to the modern weight of authority.

Although many of our legal writers were quick to advocate the thinking advanced in the Hitaffer case,\(^{56}\) the case produced little change in the law. A few courts were in agreement with the case; however, they felt that any change should be brought about by the legislature.\(^{57}\) Florida, in Ripley v.
Ewell, a case of first impression before the supreme court, decided to follow this line of reasoning, agreeing that any change in the law should be brought about by the legislature, not the court. The Florida court did settle one point directly while other courts giving a similar impression did not choose to use concise terms. In rendering the opinion the court stated, "although the laws relating to married women have been construed in favor of married women we cannot say that women are on an exact parity with men." The court, in effect, lent a little logic to a wife's inability to recover in this action. The Florida court, in the absence of legislation to the contrary, found itself bound by the archaic common law, while in other opinions by the same court they have indicated that the common law, although in effect in this state, should not be utilized beyond practicality. It is also interesting to note that Florida adheres to the theory that when the logic of a rule fails so should the rule. It is submitted that the court was using the legislature as its scapegoat in successfully avoiding the controversial issue before them. In comparing the discretion which the court had at its disposal with the resulting opinion in the case it would appear that the case merely stood for the proposition that women are not on an exact parity with men unless the legislature deems them to be. However, inasmuch as the court seemed to be in favor of legislative enactment, it can be concluded that Florida and a few other jurisdictions are more readily adaptable to a change in the law than the vast majority of courts. Florida's position is further substantiated by the fact that Florida's Wrongful Death Statute allows a wife to recover for her loss of consortium due to the wrongful death of her husband.

With the exception of a few dissents it can be said that the Hitaffer case received little acceptance. Recently an Iowa case denounced the common law view and accepted the Hitaffer view. Hence to date we have but a few cases which allow the wife recovery for her loss of consortium due to a negligent injury inflicted upon the husband.

CONCLUSION

All of the reasons and theories refusing the wife the same right as the husband have disappeared. Aside from all of the fictions created by the courts in their refusal to allow recovery to the wife, the only real objection is the courts refusal to disregard the strict and technical view of the doctrine

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58. 61 So.2d 420 (Fla. 1956).
59. The Florida court in reviewing the Hitaffer case expressed their accord in the soundness of the Hitaffer opinion, however found itself "handcuffed" by the existing common law.
60. FLA. STAT. § 768.01 (1957).
61. See authority cited in note 11 supra.
63. See authority cited in note 10 supra.
64. Incapacity of coverture, indirect injury, double recovery.
of stare decisis. This is one of the phases of law in which the doctrine must be disregarded in order to achieve clarity and understanding in our law. The courts need not look to the common law to determine the status of women—they need only look to our modern acts, our constitutional amendments, and even more basic, our society and its acceptance of equal rights of women. It is submitted that there is but a biological similarity to the common law woman and the woman of today. The common law was certainly not meant to be an immovable force which would act as a barrier to changes in society. It was most certainly the spirit of our common law that the court should act as a fulcrum in maintaining an equilibrium between our common law and an advancing society. In this respect the courts should disregard the outmoded philosophy of the common law and accept the sound reasoning advanced by the minority. Refusing recovery to either spouse certainly is not the answer. It is suggested that the courts begin with the common law basis of the action, loss of services, and apply it to a modern contention that a wife is now entitled to these services and a uniform, logical, and equitable result can be achieved. In Florida and a handful of other states, perhaps legislative enactment is the answer; at least from a practical viewpoint, the pitfalls of overturning a century of law can be avoided. Is it too much to be desired that Florida and the majority of states restore logic into this phase of our law? It is consoling, in the light of recent decisions, to note that there is a gradual trend in this direction.

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65. In Ripley v. Ewell, 61 So.2d 420 (Fla. 1956), the court concerned itself with the tremendous amount of litigation which would flood the courts in the form of "stale" claims not yet outlawed by the Statute of Limitations.