Cleveland State Law Review

Volume 17 | Issue 3 Article 7

1968

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CONSORTIUM HAS BEEN DEFINED as one's right to conjugal fellowship and relations with his spouse, and to her company, cooperation and assistance in the marital relationship as a partner in the family unit. Its loss by a husband has long been recognized as compensable if brought about by either the negligent or intentional wrongdoing of another. An action by a husband for loss of consortium allows him to seek recovery for the loss of, or the impaired ability of his wife to perform her usual services in the care of the home, as well as for his loss of her society, companionship and comfort.

Common sense would seem to dictate that if a husband has these rights with respect to his wife, the wife would have similar rights to her husband's consortium. In the past, however, most jurisdictions allowed the wife to maintain an action for damages to compensate for her loss of her husband's consortium only if the loss was brought about by an intentional or malicious act.[1] Typical of those types of actions in which a wife was permitted to recover is an action for alienation of affections.

Legal writers have long maintained that a wife should be allowed to bring an action for loss of consortium, even though the injury to her husband was due to the negligence—as opposed to the intentional misconduct—of the defendant. Most courts have traditionally held, however, that a wife has no such cause of action, advancing such reasons as a fear that the injury to the wife is too remote or indirect, that to allow the action would result in a double recovery to husband and wife for the same injury, and that since a wife has no legal right to her husband's services, she can have no claim for loss of conjugal affection and social comfort. Still other courts argue that since a wife had no such right of action at common law, she still has none, despite the passage of the Married Women's Acts, since those statutes merely removed disabilities but created no new rights in women.

In recent years an ever-increasing number of more liberal courts have taken the view that a wife should have the same right of action for loss of consortium as her husband, rejecting each of the old arguments with logic and an appreciation of the existing realities of the modern world and of the relationship between the sexes.

One of the landmark cases illuminating the path toward what the legal writers would call the enlightened view is *Hitaffer v. Argonne Co.,*

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* Of the Cleveland, Ohio bar.

[1] Annot., 5 A.L.R. 1049 (1920); 59 A.L.R. 680 (1929); 27 Am. Jur., *Husband and Wife* § 513, at 113 (1940).

Inc.,[2] which clearly held that a wife—deprived of her husband's aid, assistance, enjoyment and sexual relations by an injury to his person resulting from another's negligence—can maintain an action for loss of consortium, regardless of whether such loss is accompanied by a loss of services. The court ruled that there is more to consortium than mere services of a spouse:

> Beyond that there are the so called sentimental elements to which the wife has a right for which there should be a remedy.[3]

The court methodically struck down each of the outdated arguments against a wife's right of action, holding that the rights of the parties to a marriage are mutual and are equally entitled to protection of the law. The argument against "double recovery" was recognized as one which could be satisfactorily met by requiring that a husband's recovery of damages for impairment of his ability to support his wife must be taken into account in determining the amount of the wife's damages.

In 1957 the Supreme Court of Arkansas heard *Missouri Pacific Transportation Co. v. Miller*,[4] in which a wife sought damages to compensate her for the loss of her husband's consortium following a collision between a bus on which he was a passenger and a truck. She claimed that the vehicles were driven negligently and that as a result of that negligence, her husband was permanently paralyzed in both legs, and permanently injured in other respects to such an extent as to be unable to have sexual relations, attend church, be superintendent of the Sunday School, take care of his children, tend the garden, or help his wife cook or maintain the house. There was no statute in Arkansas specifically providing a wife with the right to bring an action for loss of consortium. The Arkansas Supreme Court reasoned, however, that since a wife was allowed to recover for loss of consortium as a result of an intentional tort, there was no sound reason for denying her compensation merely because the action was based upon negligence. The Court, in its opinion, noted twenty two cases which were contra to the *Hitaffer* case. It rejected these cases and relied upon *Hitaffer* and cases from the District of

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[2] Hitaffer v. Argonne Co., Inc., 183 F. 2d 811 *cert. denied* 340 U.S. 852 (1950). The Hitaffer case was overruled in part by Smither and Company Inc. v. Coles, 242 F. 2d 220, *cert. denied* 354 U.S. 914 (1957). The Court held that the wife of an injured employee was barred from maintaining an action against his employer for loss of consortium as a result of injuries sustained by the employee while working for an employer, on the ground that the employer was negligent. The Longshoremen's and Harbor Worker's Compensation Act, 33 U.S.C. § 905 states that the liability of the employer was exclusive and in place of all other liability, under the statute. The court held that the statute was comprehensive and barred an action when the employee was covered under the Act. The basic holding on the Hitaffer case that the wife has an action for loss of consortium due to a negligent injury to her husband was not overruled, and is the present state of the law for employees not covered under the Workmen's Compensation Act.

[3] *Id.* at 814.

[4] 227 Ark. 351, 299 S.W. 2d 41 (1957).

Columbia,[5] Mississippi,[6] California,[7] Iowa,[8] and Georgia[9] which have followed the *Hitaffer* doctrine.

In 1961 a Delaware trial court refused to grant defendant's motion to dismiss a wife's claim for loss of her husband's consortium allegedly suffered as a result of defendant's negligence.[10] The trial judge rejected dictum to the contrary found in earlier Delaware cases, and held that "since a husband has a remedy for loss of consortium through negligent injury to his wife, it must logically follow that she has a like remedy." [11] This decision was later mentioned with apparent approval in dictum by the Delaware Supreme Court in *Stenta v. Leblang*.[12]

In *Walden v. Coleman*,[13] the Georgia Court of Appeals held:

> It is now recognized in this State that a wife has an independent cause of action for the loss of consortium of her husband due to a tortious injury inflicted upon him, although she may not in such action recover any item of damages which would be a proper item of damages in an action directly by the husband.[14]

The Ohio View

In 1915 the Supreme Court of Ohio was confronted with a case in which a wife attempted to recover damages for the loss of her husband's consortium but not for the loss of his services. The injuries to her husband were occasioned by the negligence of the defendant and not by defendant's intentional misconduct. The Court held in *Smith v. Nicholas Bldg. Co.*,[15] that she could not separate a claim for loss of her husband's sentimental, social and marital contributions from a claim for loss of services. The two aspects of such a claim, one encompassing a remedy for the invasion of the sentimental side of the marriage relationship, and the other dealing with the loss of the husband's services, were thought to be bound together in the absence of a statute allowing them to be made into two separate causes of action. The court went on to hold that where the husband's injuries were caused by defendant's negligence as opposed to an intentional or malicious act, the wife could not maintain an action for loss of consortium. The husband's right to recover dam-

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[5] Cooney v. Moomaw, 109 F. Supp. 448 (D.C. 1953).

[6] Delta Chevrolet Company v. Waid, 211 Miss. 256, 51 So. 2d 443 (1951).

[7] Gist v. French, 136 Cal. App. 2d 247, 288 P. 2d 1003 (1955). This case overruled on other grounds in 6 Ca. R. 294, 328 P. 2d 451, 353 P. 2d 934 (1958).

[8] Acuff v. Schmit, 248 Iowa 272, 78 N.W. 2d 480 (1956).

[9] Brown v. Georgia-Tennessee Coaches, 88 Ga. App. 519, 77 S.E. 2d 24 (1953).

[10] Yonner v. Adams, 167 A. 2d 717 (Super. Ct. Del. 1961).

[11] *Id.* at 726.

[12] 185 A. 2d 759 (Del. 1962).

[13] 105 Ga. App. 242, 124 S.E. 2d 313 (1962).

[14] *Id.* at 315, 124 S.E. 2d at 314.

[15] 93 Ohio St. 101 (1915).

ages was thought to be sufficient since his cause of action would entitle him to seek full compensation for the impairment of his physical powers and for the diminution of his earning capacity and ability to support his wife.

This 1915 decision was thought to be the Ohio view until quite recently when Ohio courts, realizing that it was unfair to allow a husband to recover for loss of his wife's consortium while denying that same right to a wife, began to abandon the old rule. In *Clem v. Brown*,[16] defendant filed a motion to strike from a wife's petition her claim that as a result of the defendant's negligence, her husband was injured and she lost his services and consortium. The Judge of the Common Pleas Court of Paulding County held that the old reasons underlying the common law denial of the wife's right to damages in such a case were no longer valid. After setting forth the various reasons used to support the old common law theories, Judge Hitcock said:

> Given the premises, we may admire this precise reasoning after the manner of Aristotle and Euclid but my observations in the days of my bachelorhood and through nearly a quarter century of marriage to one woman tell me these premises have in Ohio been extinct for several generations.[17]

The Court went on to overrule that part of the motion seeking to strike out her claim for loss of consortium, and held that under the equal protection clause of the United States Constitution, a wife has a cause of action for loss of consortium for the negligent injury to her husband.

> It seems evident to me there are today no factual differences justifying a continuation of the Ohio rule denying only to wives and not to husbands a cause of action for loss of consortium caused by negligent injury occasioned one's spouse.[18]

However, under the theory that the husband had both the duty to support his wife and the opportunity in his own lawsuit to claim damages for any impairment of his ability to perform that duty, Judge Hitchcock sustained that part of the motion to strike seeking to strike out a claim for loss of the husband's services.

Clem v. Brown therefore represents the first inroad into the old theory denying recovery in Ohio to wives whose husbands were negligently injured. Mrs. Clem at the trial court level at least accomplished in 1965 precisely what Mrs. Smith tried and failed to attain in 1915.

The *Clem* case of 1965 was followed by the case of *Umpleby v. Dorsey*.[19] A policeman's wife brought an action in the Stark County Common Pleas Court for Twenty Thousand Dollars damages against a motor-

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[16] 3 Ohio Misc. 167, 207 N.E. 2d 398 (1965).

[17] *Id.* at 172, 207 N.E. 2d at 401.

[18] *Id.*

[19] 10 Ohio Misc. 288, 227 N.E. 2d 274 (1967).

ist who she claimed negligently ran down and injured her husband, depriving her of his "love, services, conjugal relations, and consortium." The defendant filed a demurrer and the Common Pleas Court overruled it, holding:

> The Ohio Rule that a husband may recover for the loss of the consortium of his wife caused by negligence, but that a wife may not recover for the loss of the consortium of her husband caused by negligence, constitutes discrimination which is so unjustifiable as to be violative of due process of law, contrary to the 14th Amendment to the United States Constitution.[20]

The trial court, Judge Putman, pointed out that the old Ohio Rule "denying a woman recovery under these circumstances was founded upon the concept that a woman was neither the social nor civil equal of her husband." In the court's words, "this distinction bears no relationship to fact and today is not even recognized by legal fiction. It is the essence of arbitrary discrimination and the antithesis of equal protection." [21]

Umpleby therefore allowed the wife to sue for both loss of services and loss of consortium, while the *Clem* case allowed the wife to sue for loss of consortium alone, without allowing her claim for loss of services.

Ohio has long allowed a wife's claim for loss of her husband's consortium to be brought independent of a claim for loss of services, so long as the action was founded upon an intentional or malicious tort.[22] In *Flandermeyer v. Cooper,*[23] the Ohio Supreme Court recognized a certain equality between the sexes and held:

> Husband and wife are entitled to the affection, society, cooperation and aid of each other in every conjugal relation, and either may maintain an action for damages against anyone who wrongfully and maliciously interferes with the marital relationship and thereby deprives one of the society, affection and consortium of the other.[24]

It is only when the wife's action is founded upon negligence that an inequality is recognized, as exemplified in *Smith*[25] which held that loss of consortium and loss of services were bound together and could not be separated so as to allow a loss of consortium action independent of a claim for loss of services.

In 1966 the Lake County Court of Appeals was presented with an appeal from the Common Pleas Court, which had sustained a demurrer to a petition brought by a wife, founded upon negligence, claiming damages for loss of consortium due to the injury of her husband. The wife

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[20] *Id.* at 290, 227 N.E. 2d at 276.

[21] *Id.* at 289, 227 N.E. 2d at 275.

[22] Flandermeyer vs. Cooper, 85 Ohio St. 327 (1912).

[23] Ibid.

[24] Id. at 327.

[25] *Supra,* note 15.

appellant asked the Court of Appeals to determine that *Smith v. Nicholas Building Company*[26] was no longer the law of Ohio. Three judges of the Ninth Ohio Appellate District, sitting by designation in the Seventh District (Lake County) heard the case and decided not to decide the question presented, ruling:

> This Court does not believe that a subordinate court should decide so important a policy matter. We must, on the authority of the above named case, sustain the judgment of the trial court.[27]

Within eighteen months of that decision, two other decisions were rendered by Ohio Courts of Appeals in Franklin[28] and Lake[29] counties. In both cases wives had filed actions for loss of consortium resulting from negligent injury to their husbands, and demurrers were sustained by the trial courts. In each case, the decision of the trial court was reversed and each case was remanded for further proceedings. In the Franklin County case, *Leffler*,[30] Presiding Judge Duffey analyzed the 1915 *Smith* decision, noted that it considered loss of consortium to be incidental to loss of services rather than an independent recoverable item of damages, but went on to observe that:

> . . . regardless of whether it be incidental or independent, the common law of Ohio does recognize loss of consortium as an item of damages recoverable by a husband.
>
> If a statute were to affirmatively create such a right in a husband and yet deny it to a wife, such a classification based upon sex alone would violate Article I of the Constitution of Ohio and the Fourteenth Amendment to the Constitution of the United States. The common-law distinction between husband and wife in regard to consortium is equally based upon an unreasonable, discredited concept of the subservience of the wife to her husband. The courts should not perpetuate in the common law a discrimination that could not constitutionally be created by statute.
>
> In our opinion, loss of consortium is an item of damages to a wife exactly to the same extent as to the husband. We hold that her legal rights to recover are equal to those of her husband.[31]

The *Durham*[32] case, decided a few months later by the Lake County Court of Appeals, in considering *Smith* observed that in 1915 the Ohio Supreme Court felt that the husband's loss of a wife's conjugal society, companionship and association was a natural and foreseeable conse-

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[26] Ibid.

[27] Ganoe v. Stoner, No. 837 (Lake Co. Ct. App.) 1966, an unreported decision.

[28] Leffler v. Wiley, 15 Ohio App. 2d 67 (1968).

[29] Durham v. Gabriel, No. 905 (Lake Co. Ct. App.), July 8, 1968, to date an unreported decision.

[30] *Supra*, Note 28.

[31] Id. at 68.

[32] *Supra*, Note 29.

quence of a negligent act but that such a loss suffered by a wife was not. The Court of Appeals felt that this was an evidentiary matter and should not be decided as a matter of law on the basis of sex. Moreover, the opinion quoted Judge Duffey in *Leffler* in rejecting the theory that loss of consortium must be incidental to loss of services.

It is obvious that the question should and probably will soon be reconsidered and resolved by the Ohio Supreme Court. Hopefully the more enlightened view, as represented by *Clem, Umpleby, Leffler* and *Durham* in Ohio will prevail.

Conclusion

The 14th Amendment argument requiring application of the equal protection clause seems to the writer to be one which will be persuasive to many courts confronted with this question in the future. The current trend of case law seems to increasingly support the rule that a wife is entitled to "equal protection" under the law and that therefore, like her husband, is entitled to maintain an action for loss of consortium based upon negligence.[33] Whether or not the state supreme courts wish to recognize the right of a wife to maintain an action for loss of consortium in a negligence case, in the final analysis, they may have to do so.

In recent years, we have seen a number of cases decided by the United States Supreme Court which have affirmatively changed state law so as to conform with federal standards of due process and equal protection under the 14th Amendment. The areas in which state court judges must follow federal concepts are expanding and consortium may well be included. In the words of Judge Putman of the Common Pleas Court of Stark County, Ohio:

> Our courts now receive with open arms the confessed rapist; appoint him a lawyer; hear his case, grant him his remedy; turn him loose upon the streets, under certain circumstances where he has been denied the equal protection and due process of law.
>
> Are these same courts to close their doors, without a hearing, upon the married woman who claims damages for loss of her right to achieve motherhood within the marriage relationship?
>
> The conclusion is inescapable.
>
> The equal protection of laws and the right to due process of law are not reserved to those accused of crime, but apply to all citizens in their civil actions.

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[33] Missouri-Pacific Transportation Co. v. Miller, *supra* note 4; Luther v. Maple, 250 F. 2d 916 (8th Cir. 1958); Brown v. Georgia-Tennessee Coaches Inc., *supra* note 9; Dini v. Naiditch, 20 Ill. 2d 406, 170 N.E. 2d 881 (1960); Acuff v. Schmit, *supra* note 8; Montgomery v. Stephan, 359 Mich. 33, 101 N.W. 2d 227 (1960); Duffy v. Lipsman-Fulkerson & Co., 200 F. Supp. 71; Cooney v. Moomaw, *supra* note 5; Ekalo v. Constructive Service Corp., 46 N.J. 82, 215 A. 2d 1 (1965); Smith v. Smith, 205 Ore. 286, 287 P. 2d 572 (1955); Mariani v. Narri, 185 A. 2d 119 (1962); Hoekstra v. Hegeland, 78 S.D. 82, 98 N.W. 2d 669 (1959); Sove v. Smith, 311 F. 2d 5 (6th Cir. 1962).

> The due process of law which now requires the state court to free the confessed killer, robber and rapist, where denied, cannot permit a state court rule requiring a law-abiding citizen to lose in state court because of the sole fact that she is a woman.[34]

In *Owen v. Illinois Baking Corporation*,[35] a U. S. District Court in Michigan held that to deny a wife the right to sue for loss of consortium while permitting such suit to her husband is to deny the wife her right to equal protection under the 14th Amendment. The Court refused to set aside a $5,000 judgment rendered in the wife's favor as compensation to her for her loss of her husband's consortium suffered when her husband was injured in an auto accident. Her husband received $30,000 in a companion case for his own injuries. Defendant argued that (1) under Indiana law, a wife could not maintain an action for loss of consortium based upon negligence and cited Indiana authority to that effect; (2) the accident occurred in Indiana and under the Erie Doctrine the court must therefore follow the law of Indiana. The District Court held that while Indiana law did not allow the action, and that although under the Erie Doctrine federal courts are bound to follow the substantive law of the states in diversity cases, it would not in this case because "where a federal question is presented, the court does not look to state law, but to federal law as interpreted by the United States Supreme Court." [36]

The following year the same question arose in a U. S. District Court case in Illinois when a wife sought recovery for loss of consortium after her husband had been rendered sexually impotent following an auto-train collision resulting from the alleged negligence of the railroad. In *Karczewski v. The Baltimore and Ohio Railroad Company*[37] the law of Indiana was once again involved since the train wreck occurred in that state. In a very well reasoned and detailed opinion, Judge Marovitz held that to follow the Indiana law which discriminated against women in such situations would be a violation of the Fourteenth Amendment and accordingly, the defendant's motion for summary judgment was denied.

A contrary view was taken recently by a U. S. District Court in Ohio in the case of *Copeland v. Smith Dairy Products Co.*[38] in which the court decided that no Fourteenth Amendment violation was involved in following the Ohio Supreme Court decision of *Smith v. Nicholas Building Co.*[39] denying a wife the right to sue for loss of consortium in a negligence action. The trial judge reasoned that in Ohio:

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[34] *Supra* note 19.

[35] 260 F. Supp. 820 (N.D. Mich. 1966).

[36] Porter Royalty Pool Co. v. Commissioner of Internal Revenue, 165 F. 2d 933 (6th Cir. 1948) *cert. denied* 334 U.S. 833 (1960).

[37] 274 F. Supp. 169 (1967).

[38] 15 Ohio Misc. 43 (N.D. Ohio 1968).

[39] *Supra,* Note 15.

(a) A husband cannot sue in negligence for loss of consortium unless he also claims and proves loss of services, since the two are bound together;

(b) A wife cannot bring an action for loss of her husband's "services" because those "services" belong to the husband alone and he alone can sue for his inability to render them;

(c) Since a wife cannot sue for loss of services, she, like a husband who for some reason could not prove loss of his wife's services, cannot maintain a negligence action for loss of consortium alone.

(d) Since both husband and wife are denied the right to bring a loss of consortium action independent of a loss of services action, they are treated alike and to deny wife this right of action is not to deny her equal protection of the laws under the Fourteenth Amendment.

The trial judge did not think it a denial of equal protection for Ohio law to maintain that in a negligence case, there are never circumstances in which a wife could sue for loss of consortium, but that there are circumstances in which a husband may recover for loss of consortium (by including a loss of services claim). The court seemed to suggest that it was not unequal protection of law to deny a wife the right to sue for the loss which she herself suffers when her husband cannot provide services for her although the husband has this right if his wife is injured. In the words of the trial judge:

> The "rights of man" would not be furthered if these claims of the husband were to be split off to give the wife the right to claim loss of her husband's services.[40]

When one considers that to deny the wife the right to recover for loss of her husband's services also apparently denies her the right to recover for loss of consortium as well, it is obvious that the protection of the law is not equally extended to them.

The rule that in a negligence action loss of consortium must be tied to a loss of service claim is artificial and meaningless when one considers that it does not apply to an action involving an intentional tort. Its only result is to deny a wife relief afforded to a husband. On the other hand, should this rule be maintained, then to deny a wife the right to bring a loss of service action and therefore a loss of consortium action as well, achieves the same result. *Copeland* did indicate that possibly these rules should be re-evaluated by the Supreme Court of Ohio, but unlike other U. S. District Courts that have considered State laws containing such anachronisms, found they did not result in unequal protection of the law, and therefore dismissed Mrs. Copeland's action for loss of her husband's services, help, and assistance and marital consortium.

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[40] *Supra,* Note 38 at 46.

In the opinion of this writer, a denial of the wife's right of action is arbitrary and a relic of the past, existing without reasonable justification. If such a case is ever reviewed by the U. S. Supreme Court, it will not be surprising if the Fourteenth Amendment equal protection argument proves effective. In such an eventuality, no amount of legalistic reasoning, embracing artificial distinctions found in State law, will be sufficient to prevent a wife from suing for loss of consortium in a negligence case.