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Volume 1 | Issue 1 Note

1952

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Recommended Citation

Note, Husband and Wife-Consortium Right of Action in Wife for Negligent Injury to Husband, 1 Clev.-Marshall L. Rev. 73 (1952)

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Husband and Wife - Consortium[1] - Right of Action in Wife for Negligent Injury to Husband

*by James B. Taylor**

PLAINTIFF, Lucia Hitaffer, brought an action for damages against The Argonne Company, Inc., employer of her husband, for her loss of consortium due to the injuries received by her husband through defendant's negligence. *Held*: A wife has a good cause of action for loss of consortium due to a negligent injury of her husband.[2]

The decision in the principal case is, to the knowledge of the writer, the only one so holding in the United States. In spite of the absence of such decisions, all who are faced with this particular aspect of the law are puzzled. They are puzzled because the husband is allowed a cause of action for the loss of his wife's consortium due to a negligent injury; yet, under identically the same circumstances, the wife is denied a cause of action.

A view of the common law status of the wife as noted in *Sheard v. Oregon Elec. Ry.*[3] shows why the courts were then justified in allowing the husband to recover and denying such a right to the wife.

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[1] Consortium may be defined as being the right each spouse has to the companionship, affection, society, co-operation and aid of the other spouse (but does not include right of services of wife in her husband).

[2] Hitaffer v. Argonne Co., 183 F. 2d 811 (D. C. Cir. 1950), (reversing the United States District Court for the District of Columbia).

[3] 137 Ore. 341, 2 P. 2d 916 (1931). Plaintiff, a widow, brought an action against defendant for the loss of consortium of her husband whose injury and subsequent death, she alleged, occurred through the negligence of the defendant. Plaintiff contended that the MARRIED WOMEN'S ACT had abrogated the common law disability of the wife, thus giving her a good cause of action. Defendant demurred, contending that the pleading did not state facts sufficient to constitute a cause of action. Demurrer was sustained by the Circuit Court and further sustained on appeal to the Supreme Court.

The Court in pointing out that the MARRIED WOMEN'S ACT does not entirely abrogate the common law status of the wife cites her common law status:

"In bygone generations when the customs, conduct, and beliefs of the English people were crystallizing themselves into the rules of human conduct . . . known as the common law, a woman was not regarded socially

Legislative enactment of laws emancipating married women—commonly called the MARRIED WOMEN'S ACT[4]— tended to remove many of the common law disabilities. In Ohio an act was passed in 1877 which for all practical purposes emancipated a wife from control of her husband. It placed her on an equal footing with him in respect to their rights and obligations.[5] Under these statutes she may enter into any engagement or transaction with her husband or any other person, which either might if unmarried. This being so, it is difficult to understand why the courts deny her relief when the loss of her husband's consortium is due to a negligent injury.

Ohio Courts have construed the above statutes as giving a wife a cause of action for loss of her husband's consortium when the loss or injury is due to a wilful, malicious or intentional act.[6] Defamation of a wife's character causing alienation of her husband's affection and a deprivation of his consortium is also a basis for relief.[7] The action was allowed also where the husband was driven insane by a third party's threats of violence.[8]

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or civilly the equal of her husband. He had the right to her labor and services. It was her duty to administer to him in all relations of domestic life, including the rearing of his children and the maintenance of his household. Marriage operated as a suspension, for most purposes, of the legal existence of the wife. In those days husband and wife were regarded as one—and he was that one. That contemplation of the married woman created in her various disabilities; her inability to contract; to maintain an action in her own name, etc. With much truth it has been said that in those bygone days the relationship between husband and wife was that of a liege lord and his vassal. Such being the manner in which the law regarded husband and wife, it can readily be understood why a husband could maintain an action for the loss of consortium of his wife without there being available to the wife a similar action . . ."

[4] Ohio General Code Sec. 8002-1 *et Seq.*

[5] Shively v. Shively, 54 Ohio L. Abs. 527, 88 N. E. 2d 280 (1948).

[6] Flandermeyer v. Cooper, 85 Ohio St. 327, 98 N. E. 102, 40 L. R. A. (N. S.) 360 (1911), Ann. Cas. 1913A, 913. Plaintiff, Lillie M. Cooper, sought damages against defendant, Henry H. Flandermeyer, a pharmacist, for the malicious and wrongful sales of morphine to her husband, contending that such sales and subsequent use of the drug rendered her husband incapable of consortium. *Held:* A good cause of action is stated. Damages will be allowed for loss of consortium resulting from a malicious or wilful injury.

[7] Westlake v. Westlake, 34 Ohio St. 621, 32 Am. Rep. 397 (1878). Plaintiff, Cassander Westlake, sought damages from defendant, Joseph Westlake, father of her husband, contending that defendant maliciously spoke of her as being an unchaste woman, causing her husband to become alienated from her, and to despise her and to refuse to live with her. *Held:* A good cause of action is stated.

[8] Clark v. Hill, 69 Mo. App. 541 (1897). Where defendant, with the ability to do so, threatened to hang plaintiff's husband, causing such fear in the husband as to drive him insane. *Held:* The act gives rise to a cause of action.

Where the loss of her husband's consortium is the result of personal injuries caused by the mere negligence of a third person, the wife has no cause of action; she did not have such right at common law and no legislation has been enacted to give her this right.[9] Nevertheless, at the same time that this right is denied to the wife, her husband has a cause of action under identical circumstances.[10] In such a case, the gist of the action is the loss of his wife's services, and the right has not been affected by legislation which has abrogated the common law disabilities of the wife.[11] This anomaly of the law indicates a change.

The reasons for denying a wife a right equivalent to that of her husband do not seem logical when viewed in the light of public policy. The most common reason is predicated upon the finding that no legislation has been enacted to give her this right.[12] In *Flandermeyer v. Cooper* where the wife's action based on malice was allowed, the reasoning of the court seems broad enough to fit situations in which the injury is due to negligence.[13] Nonetheless, the overwhelming weight of authority is contrary to allowing the wife such a cause of action[14] and would indicate that the question is a settled one. However, the opposite is fortunately true. In 1913 an Ohio court (Superior Court of Cin-

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[9] Smith v. Nicholas Bldg. Co., 93 Ohio St. 101, 112 N. E. 204 (1915). Plaintiff, Edna H. Smith, sought damages against the defendant, The Nicholas Bldg. Co., for injuries received by her husband, Floyd J. Smith, while riding on an elevator in defendant's office building, such injuries being due to defendant's negligence. Plaintiff contended that as a result of these negligent injuries her husband was crippled for life and rendered incapable of consortium. *Held:* A wife has no right of action against a person for the loss of the consortium of her husband caused by personal injuries sustained by him through the negligence of such person.

[10] Smith v. Nicholas Bldg. Co., *supra* note 9.

[11] *Ibid.*

[12] *Ibid.*

[13] Note 6, *supra,* at page 337. "A statutory right cannot change except by action of the law-making power of the state. But it is the boast of the common law 'Its flexibility permits its ready adaptability to the changing nature of human affairs,' so that whenever, either by growth or development of society or by the statutory changes of the legal status of any individual, he is brought within the principles of the common law, then it will afford him the same relief that it has theretofore afforded to others coming within the reasons of its rules. If the wrongs of the wife are the same in principle as the wrongs of the husband, there is now no reason why the common law should withhold from her the remedies which it affords the husband."

[14] Tyler v. Brown-Service Funeral Homes Co., 250 Ala. 295, 34 So. 2d 203 (1948); Notes 21 A. L. R. 1517 (1922); Feneff v. N. Y. Cent. & H. R. R., 203 Mass. 278, 89 N. E. 436, 24 L. R. A. (N. S.) 1024, 133 Am. St. Rep. 291 (1909); Hinnant v. Tidewater Power Co., 189 N. C. 120, 126 S. E. 307 (1925); Smith v. Nicholas Bldg. Co., 93 Ohio St. 101, 112 N. E. 204 (1915), L. R. A. 1916E, 700 Ann. Cas. 1918D, 206. (A few of the overwhelming majority of cases so holding.)

cinnati), permitted the wife to recover where loss of consortium was due to the negligent injury of the husband.[15] In 1915 without referring, however, to the Cincinnati Court's decision, the Supreme Court of Ohio held that a wife has no cause of action for loss of consortium due to negligent injury of her husband.[16] A North Carolina Court in 1921 found for a wife on similar facts[17] but four years later it was overruled.[18] In 1949 the Court of Appeals of Georgia was equally divided on the question whether or not a wife should be allowed a cause of action for negligent injury of her husband.[19] Judge Felton in his minority opinion said: "We do not think that any of the reasons advanced by the authorities for denying a wife such a right of action are valid. These reasons seem to be: (1) no statute gives the right, (2) the injury is one for which the husband can sue, and (3) the injury is remote and consequential as to the wife. Our answer to (1) is that the common law gives a remedy wherever a right is violated. . . . Our answer to (2) is that the wrong is not one for which the husband can sue. A husband can sue for his loss of the consortium of his wife but not for *her* loss of *his* society. Our answer to (3) is that if the injury is not too remote and consequential when the husband sues for loss of consortium, it is not so when a wife sues. The wrong is a direct wrong to the valuable interest of the wife, whether intentional or not, the damages for which the husband cannot sue. In these days of increased enlightenment, her rights should be recognized and enforced."

The farsightedness and wisdom of dissents are seldom welcomed at the time that they are advanced. Nevertheless, their foresight is often justified by eventual recognition as majority rules of law. With this thought in mind, it is well to consider the dissenting opinion of Judge Scudder in *Landwehr v. Barbas.*[20] A wife sued for loss of consortium of her husband due to the negligence of a third person resulting in his emasculation. The dissent was based on the question: "May a wife maintain such an action? We know she could not at common law, but in recent

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[15] Avonia V. Griffen v. Cincinnati Realty Co., *et al.*, 27 Ohio Dec. 585, 15 Ohio N. P. (N. S.) 123 (1913).
[16] Smith v. Nicholas Bldg. Co., *supra*, note 9.
[17] Hipp v. E. I. DuPont deNemours & Co., 182 N. C. 9, 108 S. E. 318, 18 A. L. R. 873 (1921).
[18] Hinnant v. Tidewater Power Co., 189 N. C. 120, 126 S. E. 307 (1925).
[19] McDade v. West, 80 Ga. App. 481, 56 S. E. 2d 299 (1949).
[20] 241 App. Div. 769, 270 N. Y. Supp. 534 (1934).

years the status of the wife has changed materially. At common law she could not maintain an action for the alienation of her husband's affections, nor for criminal conversation. Today she may.[21] . . . In the eyes of our law, marriage is a civil contract. . . . Shall it be said that one of the parties to the contract, the wife, may be deprived of its fruits through the tort of a third person without the redress accorded to the husband? . . . We have recognized the right of the wife to recover compensation for the loss of her husband's attention, caresses, affection, exclusiveness, then why not for the loss of her right to motherhood within her marriage contract? . . . For its loss . . . she is entitled to such compensation as the law can afford."

The decision in the principal case, *Hitaffer v. Argonne Co., Inc.*, represents an inroad upon the majority rule. Notwithstanding the overwhelming weight of authority to the contrary,[22] it has been difficult to accept as sound, fair and logical the majority holdings of these courts.

It is recognized that the decision reached in the principal case is not binding on the several state courts. It is believed, however that in the light of public policy the impact of this decision will manifest itself in the gradual overruling of state cases holding contrary to its views. Moreover, courts formerly felt justified in denying relief because there was no precedent on which to base a decision for relief. They may now use this case as a basis for allowing the action.

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[21] *Citing* Bennett v. Bennett, 116 N. Y. 584, 23 N. E. 17, 6 L. R. A. 553 (1899); Oppenheim v. Kridel, 234 N. Y. 156, 140 N. E. 227, 28 A. L. R. 320 (1923).

[22] See note 14, *supra*.