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Torts - Infants - Child Has a Right to Sue for Loss of an Injured Parent's Society and Companionship

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RECENT CASES

TORTS—INFANTS—CHILD HAS A RIGHT TO SUE FOR LOSS OF AN INJURED PARENT'S SOCIETY AND COMPANIONSHIP

Plaintiff, Christine Berger, was involved in a rear-end automobile collision with defendant.[1] Plaintiffs, Wayne and Christine Berger, subsequently filed a complaint on their own behalf and sought damages for medical expenditures, loss of income and loss of consortium.[2] As next friend, Wayne Berger sought damages for his mentally retarded daughter's loss of society, companionship, love and affection of her mother as a result of the injuries sustained by Mrs. Berger.[3] Defendant conceded the issue of liability as to plaintiffs and sought a trial on the amount of damages.[4] The trial court, however, granted defendant's motion for summary judgment as to the issue of liability for the minor daughter's loss of society and companionship.[5] Plaintiff cross- appealed the trial court's summary judgment and the Michigan Court of Appeals *held* that a child may maintain a cause of action for loss of parental society and companionship when a parent is severely injured.[6] Berger v. Weber, — Mich. App. —, 267 N. W. 2d 124 (1978).

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1. Berger v. Weber —Mich. App. —, 267 N. W. 2d 124 (1978).
2. *Id.*
3. *Id.* It was further alleged that the mentally retarded child was dependent upon her mother to administer to her peculiar physical and psychological needs and because Mrs. Berger had allegedly sustained both physical and psychological injuries in the accident, she could no longer continue to administer to the peculiar needs of her retarded daughter. *Id.* at —, 267 N. W. 2d at 125.
4. *Id.* The jury awarded Wayne and Christine Berger $142,000 upon which defendant appealed, alleging error in the jury instructions. *Id.*
5. *Id.* The trial court ruled that there was no cause of action in Michigan for a minor child's loss of a parent's society and companionship. *Id.*
6. *Id.* The Michigan court rejected the contention that the child has an independent action for loss of economic support.

> Because the injured parent may recover for financial losses resulting from his or her disability, we reject the contention that a child has an independent action for "support," at least in the economic sense. To allow a parent to recover lost wages, for example, and to also allow a child to recover for loss of support would result in double recovery.

Id.

Courts have consistently refused to grant a right of action to a child for loss of a parent's love, care, and companionship resulting from a tortious injury to the parent.[7] Although the rule has been questioned by some commentators[8] and courts have confessed that such a claim is supported by natural justice,[9] logical symmetry and sentimental appeal,[10] courts have denied recovery based on a variety of grounds. The basic reasons for the denial of recovery are: the absence of precedent for such an action;[11] the exposure of the defendant to multiple claims for a single wrongful act;[12] the uncertainty and remoteness of the damages involved;[13] the child's recovery might overlap with that of the injured parent;[14] the child has no legal claim to any benefit from his parents except support and maintenance;[15] the action would expose the defendant to exorbitant liability;[16] and that creation of such a cause of action is a legislative function.[17] Some commentators have urged that recognition of such a cause of action would be anomalous since most states have refused to recognize a child's action for intentional invasion of the family relationship stemming from the alienation of affections of a parent.[18] Other considerations such as increased insurance costs as well as the danger of fabricated actions have been used against the recognition of such a cause of action for children.[19] Prior to *Berger,*

Therefore the court's holding is confined to a child's independent action for loss of society and companionship caused by tortious injury to its parent. Thus, in *Berger,* the court recognized a new cause of action which has been heretofore expressly rejected by most jurisdictions. *Id.*

7. *See* Annot., 69 A. L. R. 3d 528 (1976); 56 B. U. L. REV. 722 (1976).

8. W. PROSSER, LAW OF TORTS § 125 at 896 (4th ed. 1971). "It is not easy to understand and appreciate this reluctance to compensate the child who has been deprived of the care, companionship and education of his mother, or for that matter his father, through the defendant's negligence. This is surely a genuine injury, and a serious one. . ." *Id.*

9. Hill v. Sibley Memorial Hosp., 108 F. Supp. 739, 741 (D. D. C. 1952); Hoffman v. Dautel, 189 Kan. 165, 167, 368 P.2d 57, 59 (1962).

10. Suter v. Leonard, 45 Cal. App. 3d. 744, 746, 120 Cal. Rptr. 110, 111 (1975).

11. Pleasant v. Washington Sand & Gravel Co., 262 F.2d 471, 473 (D. C. Cir. 1958); Jeune v. Del. E. Webb Constr. Co., 77 Ariz. 226, 227-28, 269 P.2d 723, 724 (1954); Borer v. American Airlines Inc., 19 Cal. 3d 441, 449, 563 P.2d 858, 864 138 Cal. Rptr.302, 308 (1977); Hankins v. Derby, 211 N. W. 2d 581, 585-86 (Iowa 1973).

12. 19 Cal. 3d at 448-49, 563 P.2d at 864, 138 Cal. Rptr. at 307; Hoffman v. Dautel, 189 Kan. 165, 169, 368 P.2d 57, 60 (1962); Eschenbach v. Benjamin, 195 Minn. 378, 380, 263 N. W. 154, 155-56 (1935).

13. 19 Cal. 3d at 448, 563 P.2d at 863, 138 Cal. Rptr. at 307; Russell v. Salem Transp. Co., 61 N.J. 502, 507, 295 A.2d 862, 864 (1972).

14. Garza v. Kantor, 54 Cal. App. 3d 1025, 1028, 127 Cal. Rptr. 164, 165 (1976); Hoffman v. Dautel, 189 Kan. at 169, 368 P.2d at 60; Russell v. Salem Transp. Co., 61 N. J. at 507, 295 A.2d at 864.

15. Pleasant v. Washington Sand & Gravel Co., 262 F.2d at 472-73; Gibson v. Johnston, 144 N. E. 2d 310, 312 (Ohio Ct. App. 1956), *appeal dismissed,* 166 Ohio St. 288, 141 N. E.2d 767 (1957).

16. Russell v. Salem Transp. Co., 61 N. J. at 506, 295 A.2d at 864.

17. Pleasant v. Washington Sand & Gravel Co., 262 F.2d at 473; Hill v. Sibley Memorial Hosp., 108 F. Supp. at 741; Duhan v. Milanowski, 75 Misc. 2d 1078, —, 348 N. Y. S.2d 696, 701 (1973).

18. *See* Lewis, *Three New Causes of Action? A Study of the Family Relationship,* 20 Mo. L. REV. 107,117 (1955). *But see* Miller v. Monsen, 228 Minn. 400, 37 N. W. 2d 543 (1949); Wrangham v. Tebelius, 231 N. W.2d 753 (N. D. 1975).

19. 54 MICH. L. REV. 1023 (1956). In Blair v. Seitner Dry Goods Co., 184 Mich. 304, 151 N.

only a federal court in Hawaii had recognized that a child may have a cause of action for loss of society and companionship.[20] However, that ruling was reversed[21] when the Supreme Court of Hawaii later ruled that a minor had no cause of action where injuries to the parent did not result in death.[22]

In reaching its decision, the court in *Berger* took notice of the judicial recognition of the emerging rights of children.[23] At common law, children lacked legal competence, were generally considered the property of their parents and occupied a most subjugated position.[24] Recent decisions by the United States Supreme Court have since elevated the child's status as a person, with many of the same rights as adults.[25] The Court has stated that children are persons under the Constitution,[26] and entitled to protection for freedom of speech,[27] equal protection against racial discrimination,[28] and due process in civil[29] as well as criminal contexts.[30] There has also been a pronounced emergence of new

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W. 724 (1915), the court found that minor children may suffer on account of an injury to a parent but that "it has never been considered that they had an action therefor." 184 Mich. at 313, 151 N. W. at 727. *Blair* has since been overruled, but on other grounds. Montgomery v. Stephan, 359 Mich. 33, 101 N. W. 2d 227 (1960).

Similarly, the court in Hayrenen v. White Pine Copper Co., 9 Mich. App. 452, 157 N. W. 2d 502 (1968), grounded its objection to a child's recovery on the lack of "statutory or prior judicial authority at the present time. . . ." 9 Mich. App. at 456, 157 N. W. 2d at 503.

In deciding which statute of limitations was applicable in a wrongful death action, the Michigan Supreme Court indicated that a minor had no right of action for injuries to his parent. Cugell v. Sani-Wash Laundy Co., 280 Mich. 286, 289, 273 N. W. 571, 572 (1937).

20. Scruggs v. Meredith, 134 F. Supp. 868 (D. Hawaii 1955). The District Court found no prior case or statutory precedent existed in the Hawaii state courts. However, the court read previous decisions in related areas as demonstrating that Hawaii intended to protect all legal interests of the family. *Id.* at 871.

Furthermore, the court found that:

> (T)he cause of action is not founded upon the degre or quantity of the loss. Rather it is premised upon an invasion of a right. So it is that both logic and the law agree that redress may be had for a temporary impairment as well as for the total destruction of a right incident to the family relationship.

Id.

21. Meredith v. Scruggs, 244 F.2d 605 (9th Cir. 1957).

22. Halberg v. Young, 41 Haw. 634 (1957). The court found no such course of action to exist at common law. *Id. See also* Annot., 59 A. L. R.2d 454 (1958).

23. —Mich. App. at —, 267 N. W. 2d at 126.

24. In re Gault, 387 U. S. 1, 17 (1967).

25. "Minors as well as adults, are protected by the Constitution and possess constitutonal rights". Planned Parenthood of Cent. Mo. v. Danforth, 428 U. S. 52, 74 (1976). "Whatever may be their precise impact, neither the 14th Amendment nor the Bill of Rights is for adults alone". In re Gault, 387 U. S. at 13.

26. Tinker v. Des Moines School Dist., 393 U. S. 503, 511 (1969).

27. West Virginia State Bd. of Educ. v. Barnette, 319 U. S. 624 (1943) (right to refuse to salute the flag); Tinker v. Des Moines School Dist., 393 U. S. 503 (1969) (right to wear black armbands to protest Vietnam War). *But see* Ginsberg v. New York, 390 U. S. 629 (1968) (children's right to obtain sexually oriented materials more restricted than that of adults).

28. Brown v. Board of Educ. of Topeka, 347 U. S. 483 (1954) (right of black children to equal educational opportiunity).

29. Goss v. Lopez, 419 U. S. 565 (1975) (right to notice and informal hearing in school discipline context).

30. In re Winship, 397 U. S. 358 (1970) (proof beyond a reasonable doubt); In re Gault, 387 U.

rights for children within the family itself.[31] Children are now allowed to obtain some types of medical treatment without parental consent,[32] as well as legal representation in certain legal proceedings.[33] In addition, numerous cases have abolished or limited the doctrine of parental tort immunity which barred children's suits to recover for injuries caused by parental negligence.[34] A child may also sue a tortfeasor for negligently inflicted pre-natal injuries.[35] The court in *Berger* found that these cases reflect a growing awareness by the judiciary that children are persons with a variety of legal interests, including parental society and companionship, which are deserving of legal protection.[36]

In allowing the child to recover when his parent is wrongfully injured, the court in *Berger* also recognized that the child suffers a serious loss when he is deprived of a parent's love, care, guidance and affection.[37] Even where recovery has been denied, most courts have recognized that a child does suffer a realistic injury,[38] and a valuable loss as a result of his parent's injury.[39] Furthermore, the loss of these benefits can have a severe impact on the child's development and personality.[40] Because every individual's character and disposition have an impact on society, "it is of the highest importance to the child and society that its right to receive the benefits derived from its parents be protected."[41] The court in *Berger* also recognized the importance of the "family unit"[42] and

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S. 1 (1967) (rights to notice, counsel, confrontation, cross-examination and privilege against self-incrimination).

31. 56 B. U. L. REV. at 743 (1976).

32. All but five states have statues which permit minors to consent to treatment for venereal disease, and all states by statute permit minors to consent to treatment for drug abuse or dependency. *See* Pilpel, *Minor's Right to Medical Care,* 36 ALB. L. REV. 462, 472-87 (1972).

33. *See* Wendland v. Wendland, 29 Wis. 2d 145, 138 N. W. 2d 188 (1965) (in a hotly contested divorce, a guardian ad litem should be appointed to represent the interests of the child).

34. Gibson v. Gibson, 3 Cal. 3d 914, 479 P.2d 648, 92 Cal. Rptr. 288 (1971); Plumley v. Klein, 388 Mich. 1, 199 N. W.2d 169 (1972); Silesky v. Kelman, 281 Minn. 431, 161 N. W. 2d 631 (1968); Nuelle v. Wells, 154 N. W.2d 364 (N. D. 1967).

35. *See* Womack v. Buckhorn, 384 Mich. 718, 187 N. W.2d 218 (1971) (a child has a right to begin life with a sound mind and body).

36. —Mich. App. at —, 267 N. W.2d at 127.

37. *Id.*

38. 19 Cal. 3d at 453, 563 P.2d at 866, 138 Cal. Rptr. at 310.

> [W]e do not doubt the reality or the magnitude of the injury suffered by the plaintiffs. We are keenly aware of the need of children for the love, affection, society and guidance of their parents; any injury which diminishes the ability of a parent to meet these needs is plainly a family tragedy, harming all members of that community.

Id.

39. Hill v. Sibley Memorial Hosp., 108 F. Supp. at 741. "When a child loses the love and companionship of a parent, it is deprived of something that is indeed valuable and precious." *Id.*

40. —Mich. App. at —, 267 N. W.2d at 127.

41. Miller v. Monsen, 228 Minn. 400, 403, 37 N. W.2d 543, 545 (1949). The court found that a minor child had a cause of action against one enticing its parent from their family home and could recover damages sustained as a result of the enticement. *Id.*

42. —Mich. App. at —, 267 N. W.2d at 128.

the child's interest in the maintenance and benefits from the family relationship.[43]

In *Berger,* the court found the reasons for not allowing the child's cause of action[44] to be unpersuasive.[45] In addition, the court considered the reasons advanced in *Borer v. American Airlines Inc.*[46] as unpersuasive.[47] In first considering the lack of precedent argument, the *Berger* court found the contention to misperceive the evolving concept of the common law, and such a contention carried to its logical extreme would result in a static body of law.[48] Other courts have ruled that the absence of precedent should not preclude a cause of action,[49] and that the common law should change with the needs of society.[50] Thus the *Berger* court declared that "when the crowd is marching in the wrong direction, it is time to break rank and strike out on our own."[51]

The second argument which the court took issue with concerned the uncertainty of damages and the inability of money damages to compensate for such an intangible loss.[52] While it has been suggested that the monetary value of a parent's companionship and affection is too speculative for damages to be assessed to compensate for the loss,[53] the *Berger* court found the task no more difficult than the task of determining a spouse's identical loss or the almost identical loss of a child in a wrongful death action when a parent is killed.[54] Once liability is established, difficulty in determining damages should not bar recovery.[55] Moreover, it has long been the role of the jury to determine these type of damages[56]

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43. *Id. See also* Hankins v. Derby, 211 N. W.2d at 589 (Iowa 1973) (Mason, J., dissenting).

44. *See supra* notes 10-19 and accompanying text.

45. —Mich. App. at —, 267 N. W.2d at 128.

46. 19 Cal. 3d 441, 563 P.2d 858, 138 Cal. Rptr. 302. The Supreme Court of California refused to recognize a new cause of action for loss of consortium in a parent-child relationship. In that case, the plaintiffs were nine children whose mother was injured when an allegedly defectively manufactured or installed lighting fixture fell from the ceiling, striking and injuring the mother. *Id.*

47. —Mich. App. at —, 267 N. W.2d at 128.

48. *Id.*

49. Hoffman v. Dautel, 189 Kan. 165, 368 P.2d 57 (1962). "Novelty is not sufficient to prevent recovery and the absence of precedent does not prove that a cause of action cannot be maintained." *Id.* at —, 368 P.2d at 59. *See also* Hill v. Sibley Memorial Hosp., 108 F. Supp. at 740.

50. Hoffman v. Dautel, 189 Kan. 165, 368 P.2d 57 (1962).

> One of the basic characteristics of the common law is that it is not static, but is endowed with vitality and a capability to grow. It never becomes permanently crystalized but changes and adjusts from time to time to new developments in social and economic life to meet the changing needs of a complex society.

Id. at —, 368 P.2d at 59. *See also* Hill v. Sibley Memorial Hosp., 108 F. Supp. at 741.

51. —Mich. App. at —, 267 N. W.2d at 128.

52. *Id.*

53. Russell v. Salem Transp. Co., 61 N. J. at 507, 295 A.2d at 864 (1972).

54. —Mich. App. at —, 267 N. W.2d at 128.

55. *Id.*

56. 19 Cal. 3d at 454, 565 P.2d at 866-67, 138 Cal. Rptr. at 310-11 (1977). (Mosk, J., dissenting).

which they have done successfully.[57] The California Supreme Court in *Borer* argued that because the child's loss is intangible, money damages were inadequate.[58] The court in *Berger,* however, found this to be more of a comment on the inadequacy of legal remedies in general rather than a valid reason for denying recovery to a child.[59]

The court in *Borer* also argued that there was a possibility of double recovery by the child,[60] because the juries have already compensated the child for lost economic support through an award to the parent, or indirectly included a child's emotional loss through an award to the parent.[61] In *Berger,* the court agreed with the first of these arguments and declined to allow a child an action for loss of economic support.[62] The court, however, felt that the second argument could be circumvented through use of proper jury instructions.[63] The holding in *Berger* was restricted to allow recovery for the loss of *parental*[64] society and companionship only.[65] Thus the court felt that it had successfully closed the familiar "floodgate of litigation" argument.[66]

In dealing with the possibility of multiple lawsuits, the court in *Berger* took notice of crowded trial dockets and concluded that the child's interests in recovery outweighed the possibility of multiple lawsuits.[67] The possibility of pyramiding claims[68] and the potential burden of liability on the defendant[69] was a strong point made by

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57. Miller v. Monsen, 228 Minn. at —, 37 N. W.2d at 546.

58. 19 Cal. 3d 441, 563 P.2d 858, 138 Cal. Rptr. 302. "[T]he inadequacy of monetary damages to make whole the loss suffered, considered in light of the social cost of paying such awards, constitutes a strong reason for refusing to recognize the asserted claim." *Id.* at 447, 563 P.2d at 862, 138 Cal. Rptr. at 306.

59. —Mich. App. —, 267 N. W.2d 124. "Money cannot purchase eyesight for one who is blinded nor can it truly compensate for intangibles such as pain and suffering or the loss of life. To say that a child cannot be fully compensated for his or her loss does not justify ignoring the loss altogether." *Id.* at —, 267 N. W.2d at 128-29.

60. 19 Cal. 3d at 448, 563 P.2d at 863, 138 Cal. Rptr. at 307.

61. *Id.*

62. —Mich. App. at —, 267 N. W.2d at 129.

63. *Id.* The court felt that rather than having juries make blind calculations of the child's loss in determining an award to the parent, the child's loss could be openly argued in court and the jury could be instructed to consider the child's loss separately thus, in the court's view, eliminating the possibility of double recovery. *Id.*

64. *Id.* (emphasis added) This would include not only natural parents but also those who have assumed a parental role to a child. Whether a person serves as a parent would have to be adjudicated on a case by case basis. *Id.*

65. *Id.*

66. *Id.* "The rights of a new class of tort plaintiffs should be forthrightly judged on their own merits, rather than engaging in gloomy speculation as to where it will all end." *Id.*

67. *Id.*

68. Garza v. Kantor, 54 Cal. App. 3d at 1028, 127 Cal. Rptr. at 165; Hoffman v. Dautel, 189 Kan. at —, 368 P.2d at 60.

69. Russell v. Salem Transp. Co., 61 N. J. 502, 295 A.2d 862 (1972). "If the claim were allowed there would be a substantial accretion of liability against the tort-feasor arising out of a single transaction (typically the negligent operation of an automobile)." *Id.* at —, 295 A.2d at 864.

some courts in denying the child's action.[70] A possible solution suggested was compulsory joinder of actions,[71] which has been used by some states in the spousal loss of consortium area.[72]

The court in *Berger* also considered the contention that because children may not recover for intentional invasion of the family relationship,[73] it would be anomalous to allow recovery for negligent invasion.[74] The *Berger* court noted that a child was able to recover damages in a wrongful death action even though the action for alienation of affections had been abolished.[75] Furthermore, the alienation of affections action was based upon different policy grounds.[76] Thus the *Berger* court found this contention unpersuasive.[77]

Finally, the *Berger* court considered the argument that "consortium" was limited to the sexual aspect of the spousal relationship and that, therefore, a child could not recover.[78] The court did not attempt to decide what "consortium" did or did not include.[79] In *Borer,* the court found that the spousal action for loss of consortium[80] rested in large part on the "impairment or destruction of the sexual life of the couple" and that, therefore, no similar element of damage existed in a child's suit for loss of consortium.[81]

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70. 19 Cal. 3d at 448-49, 563 P.2d at 863, 138 Cal. Rptr. at 307.

71. 56 B. U. L. REV. at 733 (1976).

> The availability of these procedures — absolute compulsory joinder and compulsory joinder at the defendant's option — should foreclose the argument that recognition of the child's action would result in a burdensome multiplicity of suits. Moreover, utilization of these procedures would unite the separate suits and permit one settlement of all the claims, thus alleviating the overcrowding of dockets. The child's action would not require a separate trial; instead, it would be an adjunct to the parent's personal injury suit. There would be no increased burdens on judicial time and energy other than trying the issue of damages sustained by the child.

Id.

72. Several states require that a consortium claim be joined for trial with the underlying injury suit. *See* Thrill v. Modern Erecting Co., 284 Minn. 508, 518, 170 N. W.2d 865, 869 (1969); General Electric Co. v. Bush, 88 Nev. 360, 367-68, 498 P.2d 366, 371 (1972).

73. In Michigan, MICH. COMP. LAWS. ANN. § 600.2901 (1968) has abolished actions for alienation of affections. This statutory prohibition specifically prevents a minor from recovering from one who has induced a parent away from home. *See* Miller v. Kretschmer, 374 Mich. 459, 132 N. W.2d 141 (1965). *But see* Miller v. Monsen, 228 Minn. 400, 37 N. W.2d 543 (1949).

74. —Mich. App. at —, 267 N. W.2d at 129.

75. *Id.*

76. *Id.* at —, 267 N. W.2d at 130. The *Berger* court pointed out that:

> (W)hen a parent is enticed from the home, the value of parental love and companionship is open to question. The alienation of affections action is grounded on the theory that an innocent spouse or parent has been maliciously enticed from the home by a seductive intruder. The modern scenario is more likely to disclose a dissappointed spouse who is as much the pursuer as the pursued.

Id. at—, 267 N.W.2d at 130. *See also* 56 B. U. L. REV. at 739 (1977).

77. —Mich. App. at —, 267 N. W.2d at 130.

78. *Id.*

79. *Id.*

80. Hitaffer v. Argonne Co., 183 F.2d 811 (D.C. Cir. 1950), *cert. denied,* 340 U. S. 852 (1950), was the first decision to recognize the wife's right to recover for loss of consortium when her husband was injured by the defendant's negligence.

81. 19 Cal. 3d at 448, 563 P.2d at 863, 138 Cal. Rptr. at 307. *See also* Rodriguez v. Bethlehem

Furthermore, courts[82] have found the two relationships to be different not only in kind, but also in degree.[83] Consortium, however, has been defined to encompass more than mere sexual relations between spouses.[84]

One contention not discussed in the *Berger* ruling, but discussed in *Borer,* was the argument that denial of the child's cause of action was in violation of the fourteenth amendment's Equal Protection Clause.[85] The court in *Borer* deferred to the legislature and found that the legislature could have rationally concluded that only upon the parent's death should intangible losses to a child become actionable.[86] Other courts also have deferred to the legislature[87] and some have expressly stated that creation of such an action should be an act of the legislature.[88]

The courts in North Dakota have not yet considered whether a child has an action for loss of parental society and companionship. The North Dakota Supreme Court has ruled that a wife may sue for the alienation of affections and loss of her husband's society, support and protection.[89] In addition, the court has recognized a

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Steel Corp., 12 Cal.3d 382, 405, 525 P.2d 669, 684, 115 Cal. Rptr. 765, 780 (1974).

82. Garza v. Kantor, 54 Cal. App. 3d 1025, 127 Cal. Rptr. 164 (1976).

83. *Id.* at 1028, 127 Cal. Rptr. at 165.

> These relationships are not the same. The one rests in contract. . . . The other does not. The one endures for the length of the marriage; the other, generally speaking, is a continuing close familial relationship only during the minority of the child at most. Love, affection, companionship and services between adults differ in kind and not simply in degree from the same matters when they exist within the relationship of parent and child.

Id.

84. Montgomery v. Stephan, 359 Mich. at 36, 101 N. W.2d, at 228 (defining consortium as "love, companionship, affection, society, sexual relations, services, solace. . . and more"). *See also* Lippman, *The Breakdown of Consortium,* 30 COLUM. L. REV. 651, 652-53 (1930).

85. 19 Cal. 3d at 451, 563 P.2d at 865, 138 Cal. Rptr. at 309. The argument usually made is that there is no rational basis to support a ruling that permits the children of a deceased parent to recover the value of lost affection and companionship in a wrongful death action, but denies the children of a seriously disabled parent a similar cause of action. *See, e.g., id.* at 451, 563 P.2d at 865, 138 Cal. Rptr. at 309.

86. *Id.* at 452-53, 563 P.2d at 866, 138 Cal. Rptr. at 310. The majority in *Borer* drew two distinctions between the child whose parent is killed and one whose parent is disabled, both of which flow from the fact that in the latter case, the living victim retains his or her own cause of action. First, recovery for loss of affection and society of the deceased in a wrongful death action fulfills a deeply felt social belief that a tortfeasor who negligently kills someone should not escape liability completely, no matter how unproductive his victim. Secondly, the wrongful death action serves as the only means by which the family unit can recover compensation for the loss of parental care and services in the case of the wrongful death of the parent. While the parent lives, however, the tangible aspects of the child's loss can be compensated in the parent's own cause of action. *See id.* at 451-52, 563 P.2d at 865-66, 138 Cal. Rptr. at 309-10; Suter v. Leonard, 45 Cal. App. 3d 744, 120 Cal. Rptr. 110 (1975).

87. Pleasant v. Washington Sand & Gravel Co., 262 F.2d, at 473; Hill v. Sibley Memorial Hosp., 108 F. Supp. at. 741; Hankins v. Derby, 211 N. W. 2d at 584-85.

88. Duhan v. Milanowski, 75 Misc. 2d 1078, 348 N. Y. S.2d 696 (1973). "[P]laintiff's proposal to establish a child's right of action for loss of services and affection of a parent is an idea whose time has not yet arrived; and further, that when it arrives, its birth will be better attended by the legislature than the judiciary as its legal obstetrician." *Id.* at —, 348 N. Y. S.2d at 703.

89. Oster v. Oster, 49 N. D. 723, 193 N. W. 316 (1923); Rott v. Goehring, 33 N. D. 413, 157 N. W. 294 (1916); Gessner v. Horne, 22 N. D. 60, 132 N. W. 431 (1911); King v. Hanson, 13 N. D. 85, 99 N. W. 1085 (1904). *See also* 44 N. D. L. REV. 276 (1968).

child's cause of action for the alienation of his parent's affections.[90] North Dakota has also done away with parent-child tort immunity, thus allowing a child a cause of action against his parent.[91] In *Nuelle v. Wells*[92] the court held that except for the guest statute,[93] there was no exception to the statutory law[94] which made a person liable for negligent injury to another.[95]

Therefore, it would seem that if a child is allowed to sue his parents for his parent's negligence, the next step would be for North Dakota to allow a child to sue a negligent tortfeasor for causing injury to the child's parent.[96] However, the distinction drawn here could be the direct nature of the injury in the first action as opposed to the indirect injury to the child in the second action. Furthermore, the North Dakota statute providing for tort liability[97] is derived from and almost identical to the California statute[98] discussed in *Borer v. American Airlines Inc.*[99] which denied the child's cause of action. Thus the question remains unanswered as to whether North Dakota will follow California and the majority view or whether it too will find the crowd marching in the wrong direction, break rank, and join Michigan in its next step.[100]

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90. Wrangham v. Tebellius, 231 N. W. 2d 753 (N. D. 1975).
91. Nuelle v. Wells, 154 N. W. 2d 364 (N. D. 1967).
92. *Id.*
93. N. D. CENT. CODE. ch. 39-15 (1931). The guest statute was declared unconstitutional in Johnson v. Hasset, 217 N. W.2d 771 (N. D. 1974).
94. "Everyone is responsible not only for the result of his willful acts but also for an injury occasioned to another by his want of ordinary care or skill in the management of his property or person. . . ."N. D. CENT. CODE § 9-10-06 (1975).
95. 154 N. W.2d at 366.
96. —Mich. App. —, 267 N. W.2d 124.
97. *See supra* note 94.
98. CAL. CIV. CODE § 1714 (West 1978). The only difference between the two statutes is the fact that part of N. D. CENT. CODE § 9-10-06 was deleted in 1973 thereby doing away with the doctrine of contributory negligence. *See* 1973 N. D. SESS. LAWS ch. 78, § 33. In N. D. CENT. CODE § 9-10-07 (1973). North Dakota adopted the doctrine of comparative negligence. *See* 1973 N. D. SESS. LAWS ch. 78, § 1. *See also* Wentz v. Deseth, 221 N. W.2d 101 (N. D. 1973).
99. 19 Cal. 3d 441, 563 P.2d 858, 138 Cal. Rptr. 302.
100. —Mich. App. —, 267 N. W. 2d 124.