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Husband and Wife - Woman's Action for Loss of Consortium - Discrimination on Basis of Sex

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> be to force litigants to the fullest preparation of their cases before trial. This can best be accomplished by strictly enforcing the principles of law governing new trials.[16]

The State of North Dakota adopted the Federal Rules of Civil Procedure as part of the NORTH DAKOTA CENTURY CODE in 1957. Since that time the North Dakota courts have not been called upon to construe Rule 60(b) (2). It seems reasonable, however, that the North Dakota courts would require a high degree of diligence in procuring evidence before trial in order that newly discovered evidence would be a means of obtaining a new trial. In requiring this high degree of diligence, North Dakota should follow the federal courts in strictly enforcing the rules governing the granting of new trials for newly discovered evidence.

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HUSBAND AND WIFE—WOMAN'S ACTION FOR LOSS OF CONSORTIUM—DISCRIMINATION ON BASIS OF SEX. — Plaintiff's husband had been injured as a result of the negligent tort of the defendant aluminum casting company. These injuries resulted in the plaintiff's loss of consortium of her husband. The circuit court sustained a demurrer on the grounds that loss of consortium does not constitute a cause of action. On appeal, the Supreme Court of Wisconsin *held* that the loss of consortium action was available to women. *Moran v. Quality Aluminum Casting Co.*, 34 Wis. 2d 542, 150 N.W.2d 137 (1967).

This case is in direct opposition to a recent Tennessee case which *held* that a woman had no cause of action for the loss of consortium due to her husband's injury although the husband would have had an action if the wife had been so injured. The Tennessee court said this was not discrimination on the basis of sex, but was no more than a practical and logical classification.[1]

The Tennessee decision is clearly within the majority in cases involving negligent tort causing loss of consortium. It arises from the early development of the concept as a cause of action for the husband only and has continued thus for reasons both substantive and procedural.

Emerging from the medieval concept of the marital union with the wife being inferior,[2] consortium was originally considered a

16. Moore v. Rosecliff Realty Corp., 88 F. Supp. 956, 961 (D.N.J. 1950).

1. Krohn v. Richardson, Merrill, Inc., 406 S.W.2d 166 (Tenn. 1966).
2. 10 ST. LOUIS U. L. J. 276, 277 (1965).

property interest of the husband in his wife's domestic services. The courts held this analogous with a master's interest in the services of his servant.[3]

Also, at common law, notice was taken only of wrongs done to the superior of the parties related, leaving the inferior's loss totally disregarded.[4] This is shown by the fact that as the servant had no property interest in his master, the wife likewise had no property interest in her husband.[5]

Procedurally, a wife could not recover because she had no capacity to sue in her own name. The husband and wife were one person in law with the wife being subservient. Therefore, a woman's legal existence was suspended during marriage or at least incorporated and consolidated into that of her husband.[6]

From these beginnings, the right of a woman to sue for loss of consortium has been greatly hampered. This is in spite of the substantial change in the concept of consortium itself. This change came early in the twentieth century with cases indicating that consortium is no longer just a property right, but stands for loss of society, companionship, conjugal affections, fellowship and assistance.[7] Later interpretations included sexual intercourse.[8]

Meanwhile, women's rights in general have been greatly expanded. With the passing of "Married Woman's Acts" in older jurisdictions and inclusion of them in the constitutions of the newer states,[9] women have been granted much broader legal respect.

This fact was noted in a early North Dakota case involving the distinction between husband's and wife's rights to sue for intentional injury causing loss of consortium . . . i. e. alienation of affections:

> The tendency of modern thought is to abrogate the idea of superior and inferior from the relationship of husband and wife, as under statutes which have passed in various states, married women are permitted to sue independently of their husbands, and to hold separate property, the reason for the distinction would no longer be tenable. . . .[10]

Although this trend was accepted in several jurisdictions, the majority has never recognized her right to maintain an action for

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3. Guy v. Livesy, 1 Cro. 502, 79 Eng. Rep. 428 (K.B. 1618).
4. 3 BLACKSTONE'S COMMENTARIES 1139 (Lewis Ed., 1897).
5. *Id.*
6. BLACKSTON'S COMMENTARIES 154 (Chase Ed. 1890).
7. *See* Rott v. Goehring, 33 N.D. 413, 157 N.W. 294, 296 (1916).
8. *See* Dini v. Naiditch, 20 Ill.2d 406, 170 N.E.2d 881, 819 (1960).
9. The "Married Women's Acts" freed a woman from her procedural disabilities at common law. *See e.g.* ILL. ANN. STAT. ch. 68, sec. 1 (Smith Hurd, 1963); MO. REV. STAT. sec. 451.250, 451.300 (1959).
10. Rott v. Goehring, 33 N.D. 413, 157 N.W. 294, 297 (1916), Court Citing 8 AM. & ENG. ENCYC. OF LAW (2 Ed.) 261.

loss of consortium.[11] The reasoning of the majority follows several paths. One is the contention that to allow the wife to collect damages when the husband can also sue would be condoning double recovery.[12] *Hitaffer v. Argonne*[13] repudiated this contention by pointing out that the loss of consortium is a separate and distinct injury from the actual physical injury to the husband. The wife's action is confined to her independent loss, exclusive of any impairment to earning capacity, health care and incidentals for which the husband would be compensated.[14] In his action, she has recovered nothing for her loss of society, affection, comfort, or sexual intercourse.[15]

Another majority contention is that the courts recognize the changes which have taken place in the development of consortium, but that the judicial branch is powerless to act upon them. These courts contend that the "Married Women's Acts" added no new actions.[16] It is in this line of reasoning that general policies clash. On one hand it is true that security and certainty require that accepted and established legal principles under which rights accrue must be followed to lend a stability to the law.[17] It is for this reason that some courts have said that although the rights should exist, precedent is too strong for not allowing it.[18] However, the minority follows the opposing policy that changed conditions warrant changes in the law.[19] Further, it has been held that as the common law in this area was originally judicially made rather than by statute, the courts are the logical branch to effect these needed changes.[20]

A third contention of the majority is that the injury to the wife is too remote and indirect to be compensible. Fearing even greater expansion in the field of liability, it has been said that each man's life is linked with the lives of many others. Thus it should not be suggested that everyone who is adversely affected

11. Rush v. Great American Insurance Co., 213 Tenn. 506, 376 S.W.2d 454, 458 (1964); Burk v. Anderson, 232 Ind. 77, 109 N.E.2d 407, 408 (1953); Fischbach v. Auto Boys, Inc., 106 N.Y.S.2d 416, 417 (1951); Helmstetler v. Duke Power Co., 224 N.C. 821, 32 S.E.2d 611, 613 (1945); Boden v. Del-Mar Garage, 205 Ind. 59, 185 N.E. 860, 864 (1933).

12. Giggey v. Gallagher Transportation, 101 Colo. 258, 72 P.2d 1100, 1101 (1937); Toblassen v. Palley, 96 N.J.L. 66, 114 A. 153, 154 (1921).

13. Hitaffer v. Argonne, 183 F.2d 811, 814 (D.C. Cir. 1950).

14. *Id.*

15. Yonner v. Adams, 167 A.2d 717, 728 (Del. 1961).

16. Nash v. Mobile Ry., 149 Miss. 823, 116 So. 100, 101 (1928); Bernhardt v. Perry 276 Mo. 612, 208 S.W. 462, 466; error dismissed, 254 U.S. 662 (1918).

Cf. Southern Ry. v. Maples, 201 Tenn. 85, 296 S.W.2d 870, 873 (1956). "It is settled law in this state that rules of the common law are not repealed by implication. . . If the statute does not include and cover such a case, it leaves the law as it was before enactment."

17. *See* Ottertail Power Co. v. Van Bank, 72 N.D. 497, 8 N.W.2d 599, 607 (1942).

18. Burk v. Anderson, 232 Ind. 77, 109 N.E.2d 407, 408 (1953) (dictum).

19. Missouri Pacific Transportation Co. v. Miller, 227 Ark., 351, 299 S.W.2d 41, 46 (1957).

20. *See generally* Collopy v. Newark Eye & Ear Infirmary, 27 N.J. 42, 141 A.2d 276, 283 (1958).

by an injury inflicted upon another should be allowed to recover his damages.[21] The minority suggests that consortium could hardly be stretched to include others affected by the injury. By definition the interest is one which is confined to the husband and wife relationship.[22] As for being indirect and remote, it would be incongruent to allow this line of reasoning to bar a wife's recovery when the same is not applied to bar a husband's recovery under reversed circumstances.

Having thus viewed the majority and minority stands, the question remaining is what would be the most efficient and sensible method of disposing of the problem and the conflicting laws.

Some jurisdictions have in the past suggested dropping the rights of both husband and wife in the case of consortium lost by negligence of a third party.[23] This is, however, opposed by academic writers on the basis that actual injury does accrue.[24] The elimination of an entire action would leave those injured unprotected.

Some courts have favored legislation as the means of alleviating the problem.[25] However, this is a slow process as has been seen from the fact that changes have been urged in this area for at least two decades with minimal results.

The remedy which appears to be the most logical and which could be most readily implemented is the one followed recently in Ohio and Illinois cases. It was held there that to deny a wife an action for the loss of consortium while allowing a cause of action to her spouse would be to deny the wife her constitutional rights.[26] The Fourteenth Amendment to the United States Constitution reads in part . . . "Nor shall any State . . .deny to any person within its jurisdiction the equal protection of the laws. . ." This has been held to require that all persons similarly situated be treated alike although it does not prohibit differences reasonably related to the purpose which state laws, rules and regulations seek to accomplish.[27]

Although sex may be a legal basis for difference in some areas,[28] the equalizing of married women's procedual rights has

21. Dini v. Naiditch, 20 Ill.2d 406, 17 N.E.2d 881, 894 (1960).
22. Flendermeyer v. Casper, 85 Ohio St. 327, 98 N.E. 102, 105 (1908).
23. Helmstetler v. Duke Power, 224 N.C. 831, 32 S.E.2d 611, 613 (1945); Marri v. Stamford Street Ry., 84 Conn. 9, 78 A. 582, 586 (1911).
24. Simeone, *The Wife's Action for Loss of Consortium—Progress or No?*, 4 ST. LOUIS U.L.J. 424, 438 (1957).
25. Nickel v. Hardware Mutual Casualty Co., 269 Wis. 647, 70 N.W.2d 205, 208 (1955); Garrett v. Reno Oil Co., 271 S.W.2d 764, 767 (Tex. Civ. App. 1954); Ash v. S. S. Mullen, Inc., 42 Wash.2d 345, 261 P.2d 118, 120 (1953).
26. Owen v. Illinois Baking Corp., 260 F. Supp. 820, 821 (W.D. Mich. 1966); Clem v. Brown, 32 Ohio Op.2d 477, 207 N.E.2d 398, 402 (1965).
27. *Accord* Maker v. Town of Brookline, 339 Mass. 209, 158 N.E.2d 320, 323 (1959).
28. Patterson v. City of Dallas, 355 S.W.2d 838, 843 (Tex. 1962) (Prohibiting person of one sex from giving massages to opposite sex in a massage establishment is not

eliminated the legitimate distinctions which produced differences in treatment concerning loss of consortium. Gone is the practical and logical classification of which the Tennessee court speaks. Thus the proper course for a lagging jurisdiction would be to hold that denying a wife an action for loss of consortium caused by negligence also deprives her of "equal protection of the law."

This problem has not come to the attention of the North Dakota courts. However, I believe that the courts could logically hold, as they did in alienation of affections, that the legal distinctions between husband and wife in this area of law no longer are tenable,[29] and thus the wife would have a right to sue for loss of consortium caused by negligence on an equal basis with her husband.

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discrimination based on sex); Clark v. California Employment Stabilization Comm., 332 P.2d 716, 718 (1958) (Provisions of employment insurance statutes denying disability arises or is caused by pregnancy is not discrimination based on sex).

29. *Supra* note 10.