

# The Protection Of Interests In The Marital Relation

The protection of interests in the marital relation by use of actions for alienation of affections, criminal conversation and loss of consortium as a result of personal injury to a spouse is intimately dependent upon the existence of a right of consortium in the spouse prosecuting the action. The Supreme Court of Ohio has defined consortium as including the affection, solace, comfort, companionship and society incidental to the marital relationship as well as the domestic services of the wife.<sup>1</sup>

At common law, the right of consortium was exclusively in the husband and the courts protected his right from either intentional or negligent injury. The wife was denied such a right, however, on the theory that she lost her status as a legal entity upon marriage, and had no legal right to the companionship or services of her husband. Even granting that she had such a right, she could not maintain an action for its loss because she could only bring the action by joining her husband as a party plaintiff, who, if recovery were permitted, would himself receive the proceeds of any judgment.<sup>2</sup>

With the passage of the Married Women's Acts,<sup>3</sup> designed to place the wife on a legal parity with her husband, married women began to assert a right of action for loss of consortium. Thus the question arose whether, by virtue of the changed legal status of a married woman, she now possessed a right of consortium and, if so, whether she could maintain an action for the loss of this right.

At this point the meaning of consortium becomes uncertain as a general proposition. The right seems to be divided into a "sentimental" side, the right to affections, companionship, exclusive sexual intercourse and comfort, and a "services" side, the husband's right to the domestic services of his wife.<sup>4</sup> The Ohio courts, following the majority of courts in this country, have adopted the view that both husband and wife possess a right of consortium respecting sentimental interests in the marital relationship.<sup>5</sup> On the other hand, the courts have been generally in accord in denying the wife a right to consortium in her husband's domestic services, while granting the husband such a right in the wife's services. This distinction is questionable both from a logical and a historical standpoint.

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<sup>1</sup> *Smith v. Nicholas Bldg. Co.*, 93 Ohio St. 101, 112 N.E. 204 (1915).

<sup>2</sup> *Westlake v. Westlake*, 34 Ohio St. 621, 32 Am. Rep. 397 (1878); *Flandermeyer v. Cooper*, 85 Ohio St. 327, 98 N.E. 102 (1912).

<sup>3</sup> 84 OHIO LAWS 132 (1887), OHIO GEN. CODE §§ 8002-1 *et seq.* (Supp. 1951).

<sup>4</sup> *Holbrook, The Change in the Meaning of Consortium*, 22 MICH. L. REV. 1 (1923); *Lippman, The Breakdown in Consortium*, 30 COL. L. REV. 651 (1930).

<sup>5</sup> *Flandermeyer v. Cooper*, *supra* note 2; *Smith v. Lyon*, 9 Ohio App. 141, 29 Ohio C.A. 492 (1918).

Before the Married Women's Acts, the common law gave only the husband the right to his spouse's domestic services, based upon the theory that the wife was her husband's servant. "The same principles as were applied to the servant," says Holdsworth, "were applied to the wife."<sup>6</sup> With the passage of the Acts, the extension of equality to the wife destroyed the servant concept as a basis for the right. Thus, the courts were compelled to decide whether the husband's right to his wife's services had become obsolete and should be abolished, whether the wife was now to have an equal right to the services of the husband, or whether the historical basis of the right in the husband was to be ignored but his right preserved on some other theory. The majority of jurisdictions, including Ohio, have adopted the latter choice,<sup>7</sup> while continuing to deny the wife a similar right to her husband's services,<sup>8</sup> although a few courts have given both equal rights.<sup>9</sup>

Although it is generally stated that both the husband and wife have a right of consortium, the courts have vigorously denied that each is entitled to the same right, in the face of legislation purporting to give equal rights to the parties to the marital relation. The only possible explanation is that traditions have caused our courts to refuse to recognize clearly worded statutes, a phenomenon which is hardly a novelty in the law.

Having established that both parties to the marital relation possess a right of consortium of one type or another, additional difficulties arise as to when each may enforce such a right.

#### ALIENATION OF AFFECTIONS

The action for alienation of affections exists for the purpose of protecting the right of consortium from intentional and malicious invasion by an outsider.

The right of consortium which the courts are here protecting is the "sentimental" type, i.e., the right to affection, companionship, exclusive sexual intercourse and comfort. Thus both spouses have an equal right, and the courts have been almost unanimous in allowing both to bring an action for alienation of affections to protect the right.<sup>10</sup>

In order to recover for alienation of affections, some act of re-

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<sup>6</sup> 8 HOLDSWORTH, HISTORY OF ENGLISH LAW 429 (3rd. ed. 1933).

<sup>7</sup> 3 VERNIER, AMERICAN FAMILY LAWS 86 (1935).

<sup>8</sup> *Shaweker v. Spinell*, 125 Ohio St. 423, 181 N.E. 896 (1932); *B. & O. R. Co. v. Glenn*, 66 Ohio St. 395, 64 N.E. 438 (1902).

<sup>9</sup> *Eliason v. Draper*, 25 Del. 1, 77 Atl. 572 (1910).

<sup>10</sup> *Heitmann v. Slee*, 43 Ohio App. 302, 182 N.E. 659 (1932); *Smith v. Lyon*, note 5 *supra*.

straint<sup>11</sup> or malice<sup>12</sup> must be shown. The act must have been intentional; mere negligence resulting in alienation of affections will not, as a general rule, give a right of action.<sup>13</sup> When the invasion is shown to have been intentional, and where affections were alienated as a result, legal malice will be presumed from the knowledge of the invader that the wayward spouse was married. The theory is that from such knowledge — a necessary ingredient to the maintenance of the action — a malicious intent may be implied.<sup>14</sup>

Alienation of affections must have resulted as a consequence of the invader's act. Connivance by one spouse to bring about the third person's invasion of the marital relation will preclude the conniving party from maintaining an action. So also where the alienation resulted from the neglect, lack of support<sup>15</sup> or other improper conduct of the plaintiff.<sup>16</sup> A mere voluntary bestowal of affections on a third party without any act inducing such bestowal will not give a cause of action.<sup>17</sup> It is not essential to the maintenance of the action that the acts complained of caused an actual separation<sup>18</sup> or that adultery has been committed, if alienation of affections can be shown.<sup>19</sup> Moreover, a divorce procured by the spouse whose rights are alleged to have been invaded, subsequent to the acts complained of, will not preclude that person from bringing an action for the alienation.<sup>20</sup>

The question of the liability of parents and relatives of a spouse for alienation of affections has often arisen, giving the courts a difficult problem in view of the close and confidential family relationship of the parties involved. In general, the courts have applied the same rules in this situation as in those where the invader was a stranger to the family relationship. Legal malice, however, will rarely be implied; the intention of the parents must clearly be shown to have been to invade the marital relation rather than to protect their child. Where the parents have an honest and reasonable belief that it is necessary to house and protect their daughter although in fact there is no such necessity, they are not liable though the wife's affections for her husband were alienated thereby.<sup>21</sup>

Although the action is commonly spoken of as being one to

<sup>11</sup> *Friend v. Thompson*, W. 636 (Ohio 1834).

<sup>12</sup> *Westlake v. Westlake*, note 2 *supra*.

<sup>13</sup> *Lillegren v. Burns Detective Agency*, 135 Minn. 60, 160 N.W. 203 (1916).

<sup>14</sup> *Stefanicik v. Kuhns*, 44 Ohio Op. 288, 96 N.E. (2d) 318 (1950); *Booth v. Krause*, 45 Ohio L. Abs. 43, 65 N.E. (2d) 89 (1946).

<sup>15</sup> *Myers v. Reynolds*, 3 Ohio N.P. 186, 5 Ohio Dec. 619 (1896).

<sup>16</sup> *Smith v. Lamneck*, 9 Ohio L.R. 87 (1911).

<sup>17</sup> *Bloomer v. Cherry*, 5 Ohio L.R. 534 (1907).

<sup>18</sup> *Binder v. Buller*, 15 Ohio N.P. (N.S.) 394, 27 Ohio Dec. 653 (1914).

<sup>19</sup> *Stefanicik v. Kuhns*, note 14 *supra*; *Booth v. Krause*, note 14 *supra*.

<sup>20</sup> *Heitmann v. Slee*, note 10 *supra*.

<sup>21</sup> *Holtz v. Dick*, 42 Ohio St. 23, 51 Am. Rep. 791 (1884).

protect the right of consortium, it is actually in the nature of compensation for the loss of and a penalty for the invasion of the right of consortium, the harm already having been done by the time the action is brought. The Ohio courts have consistently refused beforehand protection of the right, by the use of injunctive relief directed against the invader, on the quite familiar theories that the injunction would be difficult to enforce and that a right of consortium is not a "property" right for the protection of which injunctive relief will issue.<sup>22</sup>

#### CRIMINAL CONVERSATION

The action for criminal conversation is said to be supplementary to that for alienation of affections. Robert A. Brown, in his treatment of the subject, states the distinction as follows: "The line between the two actions is necessarily somewhat indistinct, but criminal conversation is the more definite action. Its defect, which the action for alienation of affections corrects, is that a criminal conversation action furnishes no adequate protection against many serious injuries to the marital relationship which may not involve adultery, or if they do involve that offense, also involve an injury to the consortium in other respects."<sup>23</sup> Here again, both parties to the marital relation may bring the action, the suit being allowed on the basis that, since the Married Women's Acts, each spouse acquires the right to exclusive sexual intercourse as a fundamental right of the marriage contract, and the Acts made this right of the wife enforceable.<sup>24</sup> From the language of the courts which, like Ohio, allow the action, it is clear that the right of consortium involved in this action is of the "sentimental" type.

The requirements for the maintenance of this action are far less stringent than those of the action for alienation of affections. Here, the invader need have had no knowledge that his adulterous partner was married, nor need he have been the moving party to the adulterous relations. No alienation of affections need have resulted, as the action is based wholly upon the act of adultery in violation of the other spouse's exclusive right to sexual intercourse.<sup>25</sup>

#### PERSONAL INJURY TO A SPOUSE

At common law, as we have already seen, no right of consortium was recognized in the wife, and she could not maintain an action for

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<sup>22</sup> *Snedaker v. King*, 111 Ohio St. 225, 145 N.E. 15 (1924).

<sup>23</sup> 82 UNIV. PA. L. REV. 474 (1934).

<sup>24</sup> *Smith v. Lyon*, note 5 *supra*.

<sup>25</sup> *Baltrunas v. Baubles*, 23 Ohio App. 104, 154 N.E. 747 (1926).

the loss of her husband's consortium where he had suffered personal injuries caused either by negligent or wilful acts. Only the husband could maintain such an action where his wife had been injured.<sup>26</sup>

After the Married Women's Acts, however, removing the common law disabilities of the wife, we have seen that the wife was granted a right of action for alienation of affections and criminal conversation to protect her newly acquired "sentimental" type of consortium; while the husband is entitled to protection of both the "sentimental" type and the "services" type of consortium. It would seem that the wife should at least be entitled to the protection of her admittedly inferior right of consortium in all instances where that right has been injured, but such has not been the case, and the wife here again suffers an inequality. The courts have consistently denied the wife a remedy where the loss of consortium was due to a negligent injury to her husband.<sup>27</sup> By the great weight of authority the wife is said to have no remedy for such injuries to her husband, although the husband's right of action for negligent injury to his wife was early recognized.<sup>28</sup> This denial of an equal right of action has been almost universally condemned by legal writers.<sup>29</sup> The incongruity of the situation is aptly presented by Vernier who states, "The majority view which thus gives the husband an action for a negligent injury to the wife, yet which denies a similar action to her, is logically inconsistent in view of the equality of married women."<sup>30</sup>

The various theories advanced by the courts in following such a divergent path can be reduced to the following: (1) No statute gives the wife a cause of action; (2) the injury is one for which the husband can sue; (3) the injury is remote and inconsequential to the wife, and (4) the injury to the wife is indirect and so not compensable. It is submitted that each of these reasons for denying the wife an action is an equally good reason for denying the husband such an action where the wife has suffered negligent injury. But still a double standard continues.

Hope for an early rectification of this inequality has been created by a few scattered cases giving the wife an equal right with her husband for loss of consortium due to a negligent injury.<sup>31</sup> In Ohio, only one case has been found giving the wife such an action, a decision of the Cincinnati Superior Court in 1913.<sup>32</sup> The Supreme Court has, how-

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<sup>26</sup> *Westlake v. Westlake*, note 2 *supra*.

<sup>27</sup> *Smith v. Nicholas Bldg. Co.* note 1 *supra*.

<sup>28</sup> *B. & O. R. Co. v. Glenn*, note 8 *supra*.

<sup>29</sup> PROSSER, *TORTS* 948 (1st. ed 1941).

<sup>30</sup> 3 VERNIER, *AMERICAN FAMILY LAWS* 86 (1935).

<sup>31</sup> *Hitaffer v. Argonne Co.*, 183 F. 2d. 811 (D.C. 1950).

<sup>32</sup> *Griffen v. Cincinnati Realty Co.*, 27 Ohio Dec. 585, 15 Ohio N.P. (N.S.) 123 (1913).

ever, subsequently adhered to the majority view.<sup>33</sup>

Ohio has afforded the wife as well as the husband an action for loss of consortium where the injury was caused by wilful act. Thus, the wife may maintain an action against one who sells her husband morphine against her protests<sup>34</sup> or for unlawfully supplying her husband with intoxicating liquors.<sup>35</sup>

#### CONCLUSION

The unsatisfactory state of the law concerning the right of consortium and its enforcement, brought about by illogical and unequal rights in the parties to the marital relation, plus the evils of excessive verdicts, coercive settlements and unfounded actions, have caused many states to legislate away rights of action to protect the right of consortium. Ohio has not yet done so, although bills providing for the abolishment of so-called "heart balm" suits, including alienation of affections and criminal conversation, have been before the General Assembly.<sup>36</sup> Yet with all the contradictions and illogical results achieved by the courts in their seemingly groping attempt to give a right of consortium to each of the spouses and to protect that right from invasion by outsiders, it is still entirely possible that the right and the remedies provided to protect it warrant all their troublesome features by reason of their effect in discouraging the intentional breaking up of the marital relation by strangers to it. A device of any value whatsoever in protecting the home and the family unit from all too common disorganization should, today, be carefully examined before it is discarded, whatever faults it may contain.

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<sup>33</sup> Smith v. Nicholas Bldg. Co., note 1 *supra*.

<sup>34</sup> Flandermeyer v. Cooper, note 2 *supra*.

<sup>35</sup> Suligan v. Holmes, 2 Ohio L. Abs. 779 (1923).

<sup>36</sup> House Bill No. 186, 93rd General Assembly of Ohio (1939); Senate Bill No. 192, House Bill Nos. 123, 170, 91st General Assembly of Ohio (1935).