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Recent Decisions: Equal Protection of the Laws--Loss of Consortium--Wife's Right to Recover for Negligent Injury to Husband [*Copeland v. Smith Dairy Prod. Co.*, 288 F. Supp. 904 (N.D. Ohio 1968)]

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tive history of section 4 as well as the plain meaning of the statute itself will restrain any further judicial extension of the kind witnessed in *Lincoln Mills* through *Avco*. The matter does seem ripe for a Congressional solution, for the *Avco* decision, allowing unions to thwart employers' efforts to end wildcat strikes by injunction simply by removing to a federal court, will have a drastic effect on the balance of power in labor relations.

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EQUAL PROTECTION OF THE LAWS — LOSS OF CONSORTIUM — WIFE'S RIGHT TO RECOVER FOR NEGLIGENT INJURY TO HUSBAND

Copeland v. Smith Dairy Prod. Co., 288 F. Supp. 904 (N.D. Ohio 1968).

The recurring question of a wife's right to recover for the negligent interference of third parties with the marital consortium of her husband has been raised again in Ohio — this time in a federal district court. The recent case of *Copeland v. Smith Dairy Products Co.*[1] was a personal injury suit in which Mr. Copeland claimed, among other injuries, a permanent loss of a portion of his sexual capacity. Mrs. Copeland, as co-plaintiff, alleged loss of her husband's services and marital consortium. Her demand for compensation raised two issues: whether she had a cause of action for loss of services and consortium, and whether a denial of such a cause of action would violate her constitutional right to equal protection of the law. Dismissing the wife's claim, the court held that application of Ohio law would not deny her equal protection. Since no constitutional question of merit had been raised, the federal district court sitting in a diversity action was bound, under the doctrine of *Erie R.R. v. Tompkins*,[2] to apply the state law as enunciated by the highest court of the state which did not provide a cause of action for the wife for loss of consortium resulting from negligence.

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injunctive powers. *See* cases cited in Comment, *Injunctive Relief Against a Union's Violation of a No-Strike Clause*, 52 CORN. L.Q. 132, 136 n.37, 138 n.61 (1966).

The lower federal court cases after *Sinclair* were about evenly divided on whether or not to permit removal from a state court. *See* cases cited Comment, *supra* note 45, at 502.

Recovery for interference with the rights of consortium originated in the English common law and was based on early Roman concepts of the inferior position of the wife.[3] The unity created by marriage resulted in the wife's identity blending into that of her husband's. The wife's inferiority led early courts to grant a cause of action for loss of consortium only to the husband.[4] With the advent of the various Married Women's Acts[5] there has been a departure from these common law concepts, and today the wife's status is generally on a parity with her husband's. As early as 1878, the Ohio courts permitted the wife to recover in an action separate from her husband's for an intentional interference with consortium, without any proof of loss of services.[6] A husband can also recover for negligent interference with consortium if he can prove a loss of services,[7] but in the case of *Smith v. Nicholas Building Co.*[8] a wife was held to have no such right.

Lately, however, some Ohio courts have refused to follow the earlier pronouncements, viewing the disparity between husband and wife in the area of negligent interference as evidence of unequal protection for the wife.[9] Nevertheless, the *Copeland* court

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[1] 288 F. Supp. 904 (N.D. Ohio 1968).

[2] 304 U.S. 64 (1938). For a discussion of the doctrine of this case, see note 10 *infra.*

[3] For historical treatment of the wife's position in the family, see 1 BLACKSTONE, COMMENTARIES 443 (Christian ed. 1807); W. PROSSER, TORTS § 118, at 903 (3d ed. 1964); Lippman, *The Breakdown of Consortium*, 30 COLUM. L. REV. 651 (1930); Pound, *Individual Interests in the Domestic Relations*, 14 MICH. L. REV. 177 (1916); Note, *The Case of the Lonely Nurse: The Wife's Action for Loss of Consortium*, 18 W. RES. L. REV. 621, 623-28 (1967) [hereinafter cited as *Lonely Nurse*].

[4] 1 BLACKSTONE, *supra* note 3, at 442; 3 BLACKSTONE, *supra* note 3, at 143. The cause of action has been analogized to that of interference with the master-servant relationship. *See* W. PROSSER, *supra* note 3, at 895, 915; Lippman, *supra* note 3. *But see* 3 BLACKSTONE, *supra* note 3, at 140, 142, where a distinction is made between recoverable injuries to a wife and to a servant. The wife's injuries, resulting in deprivation to the husband of the company and assistance of his wife, raised a form of action in trespass called *per quod consortium amisit.* Recovery for loss of services of the servant was *per quod servitium amisit.*

[5] *See* H. CLARK, DOMESTIC RELATIONS 261-79 (1968).

[6] Flandermeyer v. Cooper, 85 Ohio St. 327, 98 N.E. 102 (1912) (defendant sold morphine to plaintiff's husband, knowing he was an addict); Westlake v. Westlake, 34 Ohio St. 621 (1878) (father wrongfully induced his son to send away and abandon plaintiff daughter-in-law).

[7] Curry v. Board of Comm'rs, 135 Ohio St. 435, 21 N.E.2d 341 (1939); Smith v. Nicholas Bldg. Co., 93 Ohio St. 101, 112 N.E. 204 (1915); Crowe v. Bumford, 13 Ohio App. 2d 208, 235 N.E.2d 247 (1968) (husband denied recovery for failure to present evidence of any compensible loss of wife's services).

[8] 93 Ohio St. 101, 112 N.E. 204 (1915). It also would seem that the wife in Ohio has no right to the services of her husband. *Id.*

[9] Leffler v. Wiley, 15 Ohio App. 2d 67, 239 N.E.2d 235 (1968); Umpleby v. Dor-

followed the ruling of *Smith*, which remains the only authoritative pronouncement of the Ohio Supreme Court on the subject. Lacking a federal question on which to base a decision, the federal district court is obliged to follow state law.[10] Thus, in *Copeland*, the court was required to consider first the question of equal protection, for if there were no violation of the Federal Constitution, application of Ohio law would be mandatory. The deductive reasoning of the court closely followed that of the *Smith* court:[11] A husband has no independent cause of action for negligent loss of consortium unaccompanied by proof of loss of services. A wife, in Ohio, cannot prove loss of services because she has no right to the services of her husband. Therefore, the wife can have no cause of action for negligent interference. The conclusion reached by the court was that the wife is afforded identical application of the law and that there is no unequal protection.[12] Once this issue was decided, the federal court, following state law as set forth in the *Smith* decision, dismissed Mrs. Copeland's complaint. The court did suggest, however, that Ohio should reconsider its position on prohibiting an independent right of recovery for negligent interference with consortium.[13]

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sey, 10 Ohio Misc. 288, 227 N.E.2d 274 (C.P. 1967); Clem v. Brown, 3 Ohio Misc. 167, 207 N.E.2d 398 (C.P. 1965). Anchoring their decisions on the Federal Constitution, these courts have permitted the wife to recover.

In Ganoe v. Stoner, Civ. No. 837 (Lake Cty. Ct. App. 1968) (unreported, but opinion partially quoted in Copeland v. Smith Dairy Prod. Co., 288 F. Supp. 409 (N.D. Ohio 1968), the Lake County Court of Appeals strongly intimated the need for a change in the anachronistic Ohio law on the subject of the wife's recovery for loss of consortium, but yielded because of its subordinate position within the state court system. More recently, however, the Lake County Court has taken a definitive position holding that loss of consortium is an item of damages available to a wife on the same basis as it is to a husband. Durham v. Gabriel, 16 Ohio App. 2d 51 (1968).

[10] Erie R.R. v. Tompkins, 304 U.S. 64 (1938) (federal courts are obliged to follow state law in questions not related to federal laws). *Erie* interprets law to include the statutory law as well as the uncodified judge-made law of a state's highest court. *Erie* has since been interpreted to provide that where the highest court in a state has not made a ruling on a point of law, lower court decisions (appellate) may be followed. Stoner v. New York Life Ins. Co., 311 U.S. 464 (1940). But in King v. Order of United Commercial Travelers of America, 333 U.S. 153 (1948), it was decided that a federal court was not obliged to follow a court of common pleas of South Carolina, whose rulings were not binding precedent on any other court in that state.

[11] In the *Smith* case the court said:

> In none of the cases to which our attention has been called has it been held that the right for which plaintiff is contending here existed in the husband unaccompanied by a claim for a loss of services. There is no reason then why the wife should be permitted to maintain an action where the same right does not exist in the husband. 93 Ohio St. at 104, 112 N.E. at 205.

[12] 288 F. Supp. at 905.

[13] *Id.* at 906.

Significantly, it appears that the federal court sat without benefit of the reasoning and logic of the Franklin County Court of Appeals, which handed down *Leffler v. Wiley*[14] only 3 days before *Copeland*. In *Leffler* the court declared that Ohio laws presently afford unequal protection for the wife in the area of marital consortium. The court exposed an underlying discrimination based on sex[15] and noted that consortium is always an element of damages for the husband, provided that he can prove loss of services. At the same time, consortium can never be an element of damages in a wife's claim for negligent interference, because she is effectively foreclosed from this element by the present state law.[16]

The importance of *Copeland* lies in the court's position on the question of equal protection. Although no appeal has been filed,[17] the potential for major changes in Ohio law remains. Because a common pleas decision from one county jurisdiction is not binding on another county in Ohio,[18] and because a decision from a federal district court is not always binding on state courts,[19] it is conceivable that similar future actions may produce decisions which are both contrary to the *Copeland* decision and in accord with the four inferior courts that have permitted recovery by the wife. In view of the present conflict on this issue and the potential for more conflicting decisions, the Ohio Supreme Court may view itself as compelled to hear this issue to resolve the lack of uniformity problem within the state.

If the Ohio Supreme Court is confronted with the issues raised in *Copeland*, it would seem to be limited to three paths of action:

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[14] 15 Ohio App. 2d 67, 239 N.E.2d 235 (1968).

[15] *Accord*, Durham v. Gabriel, 16 Ohio App. 2d 51 (Lake Cty. Ct. App. 1968). The equal protection argument is appealing because it "focusses attention on the persistent adherence of the courts to subtle forms of discrimination against women." H. CLARK, *supra* note 5, at 275.

[16] *See notes* 16 & 17 *supra* & accompanying text.

[17] Plaintiffs do have identical actions pending in the common pleas courts of Ashland County (Case No. 30068) and Wayne County (Case No. 44708). Defendant's Reply Brief in Support of Motion to Dismiss at 7, 8, Copeland v. Smith Dairy Prod. Co., 288 F. Supp. 904 (N.D. Ohio 1968).

[18] Wolf v. Gardner, 386 F.2d 295 (6th Cir. 1967). Decisions of state courts of appeal also are not binding on each other, although these courts frequently follow each other in the interest of stability (unless a decision is clearly wrong). *In re* Anstat's Estate, 4 Ohio App. 2d 284, 208 N.E.2d 771 (1964); Pilkington v. Saas, 25 Ohio L. Abs. 663 (Ct. App. 1937). It is probably of substantial significance that two Ohio Courts of Appeal have adopted a position contrary to the *Smith* case. *See* cases cited note 9 *supra*.

[19] Kelley v. Ford Motor Co., 104 Ohio App. 185, 139 N.E.2d 99 (1957); 21 C.J.S. *Courts* § 206, at 377-78 (1940).

the court may (1) reaffirm the present law as set forth in *Smith*, while dismissing the constitutional argument; (2) overrule *Smith* on a non-constitutional basis; or (3) discard precedent on the considerations of equal protection as guaranteed in the state and federal constitutions.[20] The first alternative would unify case law within the state and effectively overrule the lower court decisions that permit recovery by the wife.[21] Public pressure might then force the question upon the state legislature. This result appears inappropriate, because the rule against the wife's recovery originated in judicial decisions and, therefore, it can be argued that the proper place for change is in the courts.[22] The second choice — overruling *Smith* on a non-constitutional basis — also would resolve the problem of lack of uniformity of case law within the state; furthermore, the acceptance of this alternative would result in the return of the wife to a position of parity with her husband. However, such a decision might not be forceful enough to cause a total reexamination of all the surrounding areas of law relevant to the marital relation in order to insure that the wife is, in fact, entirely equal to her husband in the rights and protections afforded her. Finally, the third alternative would present the anomaly of divergence between state and federal interpretations of equal protection.

The last two paths of action, occasioning a reversal of Ohio's present position on denial of a wife's consortium action, could provide impetus for examination and change in several related areas of law. Of specific interest are the Married Women's Acts,[23] the intentional-negligent interference dichotomy,[24] and the husband's duties or services to his wife.[25] The Married Women's Acts comprise the root substance of the consortium problem. Did these

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[20] U.S. CONST. amend. XIV, § 1; OHIO CONST. art. I, § 2 (1851).

[21] Cases cited note 9 *supra.*

[22] *See* H. CLARK, *supra* note 5; Note, *Judicial Treatment of Negligent Invasion of of Consortium*, 61 COLUM. L. REV. 1341 (1961). *But see* Stone, *The Common Law in the United States*, 50 HARV. L. REV. 4, 12 (1936), where Chief Justice Stone stated:

> Judge-made law, which at its best must normally lag somewhat behind experience, was unable to keep pace with the rapid change . . . . It was inevitable that the attempt should be made to supply the unsatisfied need by recourse to legislation. So it has become increasingly our habit to look for the formulation of legal doctrine suited to new situations, not to the courts . . . but to the legislature . . . .

[23] OHIO REV. CODE §§ 2307.09, 3103.01-.08 (Anderson Supp. 1967).

[24] For an extensive discussion of this problem, *see* Ekalo v. Constructive Serv. Corp., 46 N.J. 82, 215 A.2d 1 (1965); Lippman, *supra* note 3.

[25] *See* OHIO REV. CODE §§ 3103.01, .03 (Anderson Supp. 1967).

Acts create new rights for the wife; or has her right to consortium always been present? Affirmative answers to either of the questions preclude further argument for denying the wife a right to recovery. If both questions are answered in the negative, then the further question arises: should the wife now be given the same right as the husband? Alternatively, should the present rights of the husband be taken away from him in order to insure equality of treatment of both parties?[26] If the wife is her husband's equal, perhaps she no longer owes him services.

The intentional-negligent interference dichotomy has resulted from the courts' early insistence on a separation of intentional and negligent torts. Two theories exist to form the basis for this current distinction in the area of marital relations. The first and more prevalent theory emphasizes the punishment of the intentional wrongdoer.[27] Proponents of the punishment concept, not wishing to extend punishment to the unintentional act, would severely curtail recovery in the area of negligent interference. The second theory focuses on the injured party rather than the tortfeasor, and proposes compensation for the injury.[28] Perhaps the time has come for public policy to dictate that Ohio courts replace old notions of punishment with the more realistic proposal of compensation to the injured party, regardless of the type of interference. Pointing a judicial finger at the distinction drawn between the intentional and negligent interference, the Court of Appeals for the District of Columbia brought this problem into its proper perspective when it stated that "[t]he civil side of the court cannot permit an award of punitive damages except as incidental to an actionable civil wrong."[29] The concept of punishment or punitive

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[26] Nine states have chosen the alternative that the husband no longer has a cause of action for negligent injury to his wife. H. CLARK, *supra* note 5, at 273. *See generally* W. PROSSER, *supra* note 3, at 913; Lippman, *supra* note 3, at 662; *Lonely Nurse*, *supra* note 3. *But see* Holbrook, *The Change in the Meaning of Consortium*, 22 MICH. L. REV. 1 (1923):

> The insistence on equality between the spouses is certainly justified, in view of the present public opinion, and such equality is certainly the end toward which the Married Women's Acts tend. But can it not be attained better by giving the right to the wife than by taking it away from the husband? *Id.* at 8.

[27] "In such cases the law usually inflicts heavy damages upon the wrongdoer, more in the nature of punishment than as compensation. It is not necessary that there be any pecuniary loss." Smith v. Nicholas Bldg. Co., 93 Ohio St. at 105, 112 N.E. at 205 (1915). *See also* Lippman, *supra* note 3, at 654-60.

[28] *See* Lippman, *supra* note 3, at 654-60.

[29] Hitaffer v. Argonne Co., 183 F.2d 811, 816 (D.C. Cir.), *cert. denied*, 340 U.S. 852 (1950).

damages has no foothold in the area of tort law unless there is first an actionable wrong.[30] The basic wrong is the injury and the intent to injure is viewed as a justification for punitive damages.

The logic of the *Copeland* court[31] in adhering to the Ohio law glosses over the hidden inequalities that lie within the laws associated with domestic relations. Courts have held that a wife cannot sue for the services of her husband because the husband can recover for his own losses;[32] however, consideration of the principle that a wife may also recover for her own personal losses[33] will show the illogic of the original argument and the inequity of permitting this reasoning to continue.

A second inconsistency in the logic of *Copeland* is demonstrated by the ruling that marital consortium does not include the services of a husband.[34] Regardless of the implication of *Smith*, a husband does owe services to his wife. The importance of a wife's rights in the area of sexual intercourse is emphasized by the multiple grounds — adultery, impotency, and fraud — that are now available to her for dissolution of the marriage.[35] The loss of a husband's sexual capacity should be considered a separate and distinct loss or injury to his wife.[36] Although the nature of the services supplied by the husband may differ from those supplied by the wife, the husband's services definitely inhere in the marriage

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[30] These damages would then be appended to the normal compensation of the injured party, for they do not arise from an independent cause of action. *See* Schumacher v. Siefert, 35 Ohio App. 405, 407, 172 N.E. 420 (1930). *See also* C. McCORMICK, DAMAGES § 83 (1935).

[31] *See* text accompanying notes 11 & 12 *supra.*

[32] Smith v. Nicholas Bldg. Co., 93 Ohio St. 101, 112 N.E. 204 (1915).

[33] Baltimore & Ohio R.R. v. Glen, 66 Ohio St. 395, 64 N.E. 438 (1902) (personal injuries and suffering); Hrvatin v. Cleveland Ry., 69 Ohio App. 499, 44 N.E.2d 283 (1942) (income lost from employment outside the home); Stritmatter v. McArthur, 21 Ohio L. Abs. 31 (Ct. App. 1935) (loss of ability to perform domestic services).

[34] *See, e.g.*, Annot., 23 A.L.R.2d 1378, 1394 (1952), noting that denial of recovery for the wife is not inconsistent with allowing a husband to recover on the theory that the action is based on his right to her services and that there is no corresponding right in the wife. "This is a valid distinction if the premise that the right is dependent on services is correct, but it is very doubtful if such a premise is valid. . . ." *Id.* at 1395.

[35] OHIO REV. CODE §§ 3105.01(C), (D), (F), 3105.31(D), (F) (Anderson Supp. 1967). Fraud has been construed to include concealed intent not to have sexual intercourse with the marital partner. Miller v. Miller, 1 Ohio Dec. 354 (C.P. 1894). For a general discussion on marriage laws, see Ross, *The Ohio Law of Marriage*, 14 W. RES. L. REV. 725 (1963).

[36] *Compare* Lippman, *supra* note 3, at 662-64, *with* 57 COLUM. L. REV. 902 (1957).

relation.[37] Undoubtedly critics may find other inconsistencies in the logic of the Ohio law of consortium. However, the doubtful efficacy of continued emphasis on lost services of either the wife or the husband is of primary concern. Compensation should be founded on the "violation of inherent marital rights."[38]

The propriety of continuing to deny the wife recovery for loss of consortium has been questioned by sources outside the judiciary. For many years legal scholars have noted the inequality of treatment between husband and wife in the area of domestic relations.[39] Past arguments justifying the inequitable treatment of the wife, such as double recovery,[40] remoteness of injury, indirect recovery, no common law right to services, unnatural result of the husband's injury, fear of expansion of recovery to all members of the family, and legislative intent have been dissected, analyzed, and discarded.[41] Public opinion also has been highly influential in assuring the equality of the female, as reflected in the areas of equal job opportunities and equal working conditions, which are now the subject of the Civil Rights Act of 1964.[42]

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[37] Note, *Judicial Treatment of Negligent Invasion of Consortium*, 61 COLUM. L. REV. 1341, 1352 (1961).

[38] Lippman, *supra* note 3, at 664. Further discussion of the intentional-negligent dichotomy and the variance of services for husband and wife may not be profitable in view of the explanation offered by Jacob Lippman:

> This confusion . . . can be traced to the use of words. Redundancy in common law pleading is familiar to all lawyers. Thus when the pleading alleged loss of services, conjugal affection, companionship, etc., no distinct functions were intended. It was the same kind of verbiage that we still use in deeds, wills and in pleadings. On this, however, has been postulated an absurd division of *consortium* into services on the one hand, and conjugal affection, etc., on the other . . . . It seems to me that if the right of *consortium* is to be recognized, there can be no distinction made between negligence actions and so-called intentional actions. *Id.* at 668.

"It is not the fact that one or the other elements of *consortium* is injured in a particular invasion that controls the type of action which may be brought but rather that the *consortium* as such has been injured at all." Hitaffer v. Argonne Co., 183 F.2d 811, 814 (D.C. Cir.), *cert. denied*, 340 U.S. 852 (1950).

[39] *See, e.g.*, H. CLARK, *supra* note 5; W. PROSSER, *supra* note 3, at § 119; Holbrook, *supra* note 26; Lippman, *supra* note 3; Pound, *supra* note 3. *See also* references in Ekalo v. Constructive Serv. Corp., 46 N.J. 82, 89, 215 A.2d 1, 5 (1965).

[40] New Jersey and Wisconsin have solved this problem by requiring a wife's claims to be joined to those of her husband. *See* cases cited note 43 *infra*. *Cf.* Dini v. Naiditch, 20 Ill. 2d 406, 435, 170 N.E.2d 881, 895 (1960) (dissenting opinion). *But see* Pound, *supra* note 3, at 194.

[41] For a general treatment of these arguments, see Hitaffer v. Argonne Co., 183 F.2d 811 (D.C. Cir. 1950); Ekalo v. Constructive Serv. Corp., 46 N.J. 82, 215 A.2d 1 (1965); H. CLARK, *supra* note 5; W. PROSSER, *supra* note 3; Lippman, *supra* note 3.

[42] 42 U.S.C. § 2000e (Supp. II, 1965-66). For a recent application of this act in the area of equal rights for women, see the Equal Employment Opportunity Commission's ruling that airline stewardesses could no longer be reassigned or their em-

Within the judiciary a growing number of courts are lending credence to these persuasions. At present there are 16 jurisdictions that permit a wife's recovery for negligent interference with consortium.[43] Other states recognize the need for change, but prefer to allow their legislatures to initiate the change.[44] Although the Ohio Supreme Court must make its ultimate decision only after examination of all attendant circumstances and re-appraisal of the laws of the state, external pressures should also exert great influence. The time has come for Ohio to face these issues squarely, and either join the growing ranks of proponents of the new concepts of equality for women or reaffirm its adherence to medieval[45] and illogical common law ideas of consortium.

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ployment terminated because of marriage or solely because they had reached age 32 or 33. Neal v. American Airlines, Inc., 37 U.S.L.W. 2133 (EEOC June 20, 1968); Dodd v. American Airlines, Inc., 37 U.S.L.W. (EEOC June 20, 1968).

Recent cases of the Supreme Court in the field of family relations also indicate how sensitive the Court is to the demands of equal protection of all persons in their familial relationships. *See, e.g.*, Levy v. Louisiana, 391 U.S. 68 (1968); Glona v. American Guar. & Liab. Ins. Co., 391 U.S. 73 (1968).

[43] Duffy v. Lipsman-Fulkerson & Co., 200 F. Supp. 71 (D. Mont. 1961); Cooney v. Moomaw, 109 F. Supp. 448 (D. Neb. 1953); Missouri Pac. Transp. Co. v. Miller, 227 Ark. 351, 299 S.W.2d 41 (1957); Yonner v. Adams, 53 Del. 229, 167 A.2d 717 (1961); Brown v. Georgia-Tennessee Coaches Inc., 88 Ga. App. 519, 77 S.E.2d 24 (1953); Dini v. Naiditch, 20 Ill. 2d 406, 170 N.E.2d 881 (1960); Acuff v. Schmit, 248 Iowa 272, 78 N.W.2d 480 (1956); Montgomery v. Stephan, 359 Mich. 33, 101 N.W.2d 227 (1960); Novak v. Kansas City Transit, Inc., 365 S.W.2d 539 (Mo. 1963); Ekalo v. Constructive Serv. Corp., 46 N.J. 82, 215 A.2d 1 (1965) (wife must join claim with her husband's); Millington v. Southeastern Elevator Co., 22 N.Y.2d 498, 293 N.Y.S.2d 305, 239 N.E.2d 897 (1968); Ellis v. Fallert, 209 Ore. 406, 307 P.2d 283 (1957) (right to recover is derivative — where husband is under workman's compensation wife cannot recover); Mariani v. Nanni, 95 R.I. 153, 185 A.2d 119 (1962) (by implication) (recovery denied because action was derivative and husband was thwarted in his action by the fellow servant doctrine); Hoekstra v. Helgeland, 78 S.D. 82, 98 N.W.2d 669 (1959); Moran v. Quality Aluminum Casting Co., 34 Wis. 2d 542, 150 N.W.2d 137 (1967) (wife must join claim with her husband's); COLO. REV. STAT. ANN. § 90-2-11 (1963).

[44] As previously mentioned, some commentators assert that the legislature is not the appropriate place for changing laws relating to consortium:

> The answer given by some courts that this is a matter for the legislature overlooks the obvious fact that the legislature has already spoken in the Married Women's Property Acts. The purpose of those Acts could not be clearer: They are intended to place husband and wife on an equal footing. H. CLARK, *supra* note 5, at 278. *See also* W. PROSSER, *supra* note 3, at § 119.

[45] ". . . Precedents predicated on a medieval society are not out of harmony with the conditions of modern society, and cannot in good conscience be deemed determinative." Dini v. Naiditch, 20 Ill. 2d 406, 429, 170 N.E.2d 881, 892 (1960).