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The Case of the Lonely Nurse: The Wife's Action for Loss of Consortium

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"[A]s a proximate result of the defendants' negligence, [the plaintiff] . . . has been transformed 'from a loving wife into a lonely nurse . . . .'"*

IN DECEMBER 1965, an Ohio common pleas court announced its willingness in *Clem v. Brown*[1] to allow a wife to bring an action for loss of the consortium of her husband resulting from the defendant's negligent operation of his automobile. An action for loss of consortium is uniformly allowed to a woman when a defendant has *intentionally* interfered with the marriage relationship.[2] But most courts have bristled at attempts to bring this action where injury to the marriage has arisen through a defendant's negligent, as opposed to his willful, conduct.[3] In overruling the defendant's demurrer, the court in *Clem v. Brown*[4] challenged Ohio's historic position opposing this action, basing its stand upon the equal protection clause of the fourteenth amendment. The Paulding County Common Pleas Court was not alone in this move; a visible trend toward allowing an action for negligent invasion of the marital relationship has been discernible in this country since 1950.[5] Nevertheless, although the trend exemplified by the holding in the *Clem* decision has been cited in at least three recent Ohio cases,[6] other judges have continued to sustain defendants' demurrers. Obviously, a common pleas decision cannot be regarded as strong enough authority to change Ohio's opposition to the action; however, it does appear that Ohio's lawyers and courts are considering the problem.

I. THE MEANING OF CONSORTIUM

Consortium has been defined variously, "sometimes in terms enormously complex as the judges followed the habit of lawyers of never using one word where 2 may be employed."[7] The essence

* Ekalo v. Constructive Serv. Corp. of America, 46 N.J. 82, 84, 215 A.2d 1, 2 (1965).

[1] 3 Ohio Misc. 167, 207 N.E.2d 398 (C.P. 1965).

[2] 27 AM. JUR. *Husband and Wife* § 513 (1940).

[3] *Id.* § 514.

[4] 3 Ohio Misc. 167, 207 N.E.2d 398 (C.P. 1965).

[5] See Ekalo v. Constructive Serv. Corp. of America, 46 N.J. 82, 88, 215 A.2d 1, 4 (1965) and cases cited therein.

[6] Simms v. Shannon, Civil No. 829103, Ohio C.P., May 24, 1966; Marks v. Bertovich, Civil No. 822199, Ohio C.P., Dec. 11, 1965; Clement v. Schleuther, Civil No. 798279, Ohio C.P., May 26, 1964.

[7] Montgomery v. Stephan, 359 Mich. 33, 35, 101 N.W.2d 227, 228 (1960).

of consortium is the mutual right of a husband and wife to the society, companionship, comfort, and affection of one another.[8] It represents the fellowship of husband and wife — the right of each to the company of the other in every conjugal relation.[9] In modern parlance it is probably what Madison Avenue wags would term "togetherness." However, whereas the word "togetherness" is indiscriminately applied to all family relationships, consortium is a right which arises from, and is peculiar to, marriage.[10] It is *not* a euphemism for sexual relations, although some courts do include this element in the definition.[11] More accurately, consortium is concerned with the sentimental elements of the marital relationship — that constellation of companionship, dependence, reliance, affection, sharing, and aid which are legally recognizable, protected rights arising out of the civil contract of marriage.[12] Courts variously include or exclude from the penumbra of consortium the idea of *services, i.e.*, the contribution of the wife's physical labor to the smooth and efficient running of the household and rearing of the children.[13] Both in England and in the United States, the husband's action for loss of consortium was based upon the understanding that his legal obligation to support his wife was balanced by her obligation to serve him.[14] The two obligations, parallel but not reciprocal, arose as a natural consequence of the civil contract into which the two parties had entered. Because of the emphasis placed upon the wife's obligation to serve, early common law jurists were able to defend the sanctity of the family by finding an analogy between the husband-wife relationship and the master-servant relationship. In England, any interference with the status and relationship of the parties to a contract was frowned upon as long ago as the fifteenth century.[15] Thus, early courts had no difficulty in sustaining the cause of a husband who claimed interference with a right of the marriage contract. The husband had a "quasi-proprietary interest"

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

[9] 28 OHIO JUR. 2D *Husband and Wife* § 7 (1958).

[10] Pyle v. Waechter, 202 Iowa 695, 701, 210 N.W. 926, 929 (1926) (dictum).

[11] Ekalo v. Constructive Serv. Corp. of America, 46 N.J. 82, 215 A.2d 1 (1965) (by implication).

[12] Brown v. Kistleman, 177 Ind. 692, 98 N.E. 631 (1912).

[13] Note, *Judicial Treatment of Negligent Invasion of Consortium*, 61. COLUM. L. REV. 1341, 1343 (1961).

[14] HARPER & SKOLNICK, PROBLEMS OF THE FAMILY 11 (1962).

[15] PROSSER, TORTS 723 (2d ed. 1955).

in his wife[16] just as he had in his servant. The wife's interest in the marriage, however, was never afforded similar protection.

II. Development of the Consortium Action

The paternalistic view of the husband's right to his wife's services, without a corresponding right in the wife, appears to have had its origin in ancient Roman law.[17] A Roman woman, the daughter of a citizen, could marry *sine manu* or *cum manu* — *manus* being the power of the husband over the wife.[18] A woman married *sine manu* remained subject to her father's control all her life, but when a woman married *cum manu*, her person and her possessions were transferred to the authority of her husband or her father-in-law.[19] The power of the father, *patria potestas*, or the power of the husband, *manus*, meant literally the power of life or death over the woman.[20]

A. Women Under Roman Law

In the early days of the Republic (508-202 B.C.), the husband alone possessed legal rights. He alone could buy, sell, or hold property, or enter a contract.[21] Furthermore, only the *pater-familias* could bring an action if the wife had been injured or harmed, because she was so identified with him as to make the wrong done to her as if it were done to him.[22] During this period, the Roman matron was unable to appear in court, even as a witness or to claim dower rights in her husband's estate.[23] Her lot did improve, however, as the Republic progressed and the Empire appeared.[24] One writer believes that by the close of the Empire period, the Roman woman had gained many legal rights but that she was clever enough to conceal her freedom under the guise of continuing legal disabilities.[25] Nevertheless, whether or not she engaged in pretense, "The

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16 *Id.* at 683.

17 Lippman, *The Breakdown of Consortium*, 30 COLUM. L. REV. 651 (1931).

18 DURANT, CAESAR AND CHRIST 68 (1944).

19 *Ibid.*

20 GAIUS, ELEMENTS OF ROMAN LAW 94 (2d ed. Poste transl. 1875). If a woman committed a crime, her husband or her father could sentence her to death. *Ibid.*

21 DURANT, *op. cit. supra* note 18, at 57.

22 PROSSER, *op. cit. supra* note 15, at 723.

23 DURANT, *op. cit. supra* note 18, at 57.

24 *Id.* at 223-24, 396.

25 *Ibid.*

law of the Republic assumed that she was never *sui iuris*, 'of her own right,' but always dependent upon some male guardian . . . ."[26]

B. The Common Law View of Consortium

Legally, married women were as non-existent under the common law as their Roman sisters. Like the Roman matron, the early English lady was understood as being one with her husband;[27] as a consequence, her "very being and existence [was] suspended during coverture or entirely merged or incorporated into that of her husband."[28] It was long understood that if injuries were inflicted upon the wife, harm was done the husband in the same way that damages were sustained by the master when violence was inflicted upon his servant. Blackstone explained the analogy of husband and wife to master and servant by observing: "[T]he inferior hath no kind of property in the company, care, or assistance of the superior, as the superior is held to have in those of the inferior; and therefore the inferior can suffer no loss or injury."[29]

Like the *patria potestas* and *manus* of the old Romans, the common law authority of husband over wife was absolute. By marriage, a husband acquired absolute title to all her personal property, the right to reduce her choses in action to possession, and the right to collect the rents and profits of her real estate.[30] Just as her property became her husband's, so the product of her labor became exclusively his. The logic of the legal inferiority of women was explained by Sir Thomas Smith in *The Book of the Commonwealth of England.* Husband and wife each had their role to play —

> the man to get, to travel abroad and to defend; the wife to serve, to stay at home and to distribute that which is gotten, for the nurture of the children and family: which to maintain, God hath given the man the greater wit, better strength, better courage, to compel our women to obey, by reason or force.[31]

Mention has been made of the correspondence which the common law jurists found between the master-servant relationship and the marriage relationship. Prohibiting interference with the status of master and servant was an early concern of the common law.[32]

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[26] *Id.* at 396.

[27] 1 BLACKSTONE, COMMENTARIES *442 (Christian ed. 1807).

[28] 2 *id.* at *433.

[29] 3 BLACKSTONE, COMMENTARIES *143 (Lewis ed. 1897).

[30] Martin v. Robson, 65 Ill. 129 (1872).

[31] Quoted in BINGHAM, INFANCY AND COVERTURE 184 (1849).

[32] PROSSER, *op. cit. supra* note 15, at 723.

Similarly, very early in the history of the common law, an action could be brought against one who had interfered with the relationship between husband and wife. In the quaint English, quasi-French, Latin legal jargon of 1618, there is reported a tort action for battery against one Livesey for harming Guy's wife. The defendant's act was said to have deprived *le baron* of the company and comfort "que un feme [*sic*] port a sa baron."[33] The brief opinion has a plaintive tenor from which the reader might infer that the justice's opinion was founded upon a marsh of sympathy rather than upon firm legal ground.

The first mention of the husband's *legal* right to the comfort of his wife was made almost fifty years later in *Hyde v. Scyssor*.[34] Error was assigned by the defendant for allowing a husband to bring a trespass action without joining his injured wife.[35] The court held that no error existed because the action was not for battery to the wife but for loss and damage suffered by the plaintiff-husband for want of "her company and aid."[36] That the wife might suffer similarly from a deprivation of her husband's company and aid must never have occurred to the common law judges who labored under the fiction of the conceptual legal unity of the pair.

One might have expected this concept of unity to have travelled from the King's Bench[37] to the ecclesiastical courts which coexisted in England during those centuries when the early common law was developing.[38] Curiously, however, in the view of the ecclesiastical courts, husband and wife were two separate entities. Recognition of this non-identity can probably be attributed to the civil law upon which ecclesiastical law was founded,[39] as under the civil law husbands and wives possessed separate estates and could make separate contracts, undertake separate debts and obligations, and suffer separate personal injuries. Women therefore could sue and be sued in their own names.[40] These courts, concerned with the spirituality and morality of man, had jurisdiction over matters such as defama-

[33] Guy v. Livesey, 2 Rolls 51, 81 Eng. Rep. 653 (K.B. 1618).

[34] 2 Croke Rep. 538, 79 Eng. Rep. 462 (K.B. 1620).

[35] Battery was the one action which required the joining of the wife. PROSSER, *op. cit. supra* note 15, at 690.

[36] Hyde v. Scyssor, 2 Croke Rep. 538, 79 Eng. Rep. 462 (K.B. 1620).

[37] CARTER, A HISTORY OF THE ENGLISH COURTS 41 (6th ed. 1935). By 1272, the King's Bench, the Exchequer, and the Common Bench were in existence and were developing the common law. *Id.* at 41-42.

[38] Westlake v. Westlake, 34 Ohio St. 621, 626 (1878).

[39] *Ibid.*

[40] *Id.* at 627.

tion of character and, most importantly, marriage. Five distinct causes of action could be brought in the spiritual courts,[41] of which one was a suit for restitution of conjugal rights.[42] Thus, when a wife entered, alleging loss of consortium because her husband had been enticed away from her by his family, she might emerge with her husband restored to her, the oddity of the relief being attributed to the fact that ecclesiastical courts could not award damages to make whole the aggrieved plaintiff but could restore the very thing of which the wife had been deprived.[43]

Despite the example of the spiritual courts, the common law courts remained unmoved and persisted in allowing the cause of action to the husband alone on the basis of interference with *his* rights arising out of the marriage contract. "[T]his unsatisfactory state of the common law"[44] existed, in part, undoubtedly because a wife's services to the household were capable of being estimated in money, whereas the value of the wife's society was too ethereal to be assessed. Thus, we see later cases fixing more and more upon the idea of service rather than society in awarding compensation in the husbands' actions.[45]

Not until 1861 did either English or American courts entertain the notion that loss of comfort and aid was not too vague to be measured and that possibly a cause of action for loss of consortium might be allowed to the wife. In *Lynch v. Knight*,[46] the possibility was indeed entertained — and promptly discarded. Mrs. Lynch sued Knight for making defamatory statements about her which had caused her husband to send her away from his home and back to her parents. Lord Wensleydale held fast to the accepted position that the only loss capable of measurement was one in which the husband was deprived of the "assistance of the wife in the conduct of the household . . . and in the education of the children."[47] With the classical instinct of a lord to the manor born, Wensleydale believed that the amount of compensation for the wife's services would be dependent upon the position of husband and wife in society.[48]

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[41] *Id.* at 626.

[42] *Ibid.*

[43] *Ibid.*

[44] *Id.* at 631.

[45] See Hinnant v. Tidewater Power Co., 189 N.C. 120, 124, 126 S.E. 307, 309 (1925); Smith v. Nicholas Bldg. Co., 93 Ohio St. 101, 103, 112 N.E. 204, 205 (1915).

[46] 9 H.L. 577, 11 Eng. Rep. 854 (K.B. 1861).

[47] *Id.* at 598, 11 Eng. Rep. at 863.

[48] *Ibid.*

The more interesting opinion, and the one which legal scholars often cite as the opening shot in the reluctant war that courts were to wage in behalf of the wife, is Lord Campbell's.[49] Campbell ventured that the action for consortium might lie, but his pronouncement was timid and tentative, and the cause of Lynch did not prevail.[50] The case, however, is important as a beginning.

C. *The Help of the Married Women's Acts*

In the 1840's, women received another boost to their cause when many jurisdictions began to promulgate the Emancipation or Married Women's Acts.[51] By these acts, the legal unity of husband and wife under the common law was severed; thereafter, a married woman acquired the right to sue, to be sued, to contract, and to own and control property as well as the dubious right of being able to commit a tort without having her husband considered the tortfeasor due to his legal "oneness" with her.[52]

After passage of these acts, cases of first impression began to appear wherein wives recovered for loss of consortium when an intentional interference with their marital relationship occurred.[53] One defendant, bewildered by being sued for a tort which hitherto had had no definition in the legal lexicon, was chastised by the judge: " 'It is said such an action as this was never brought before . . . . I wish never to hear this objection again.' "[54] The decision assented to the observation that the protean imagination of man can invent countless torts which have never been recognized before by the courts but which are nonetheless actionable.[55] Calling for a new application of legal principles regarding married women, *Clark v. Harlan*[56] acknowledged the defendant's liability in damages for having enticed away the plaintiff's husband and causing her to lose his companionship as well as the services which he rendered in taking care of her property interests. This attempt to inject the

[49] *Id.* at 589, 11 Eng. Rep. at 859.

[50] *Id.* at 601, 11 Eng. Rep. at 864.

[51] PROSSER, *op. cit. supra* note 15, at 672.

[52] *Ibid.* See also Holbrook, *The Change in the Meaning of Consortium*, 22 MICH. L. REV. 1 (1923).

[53] *Id.* at 4; Eliason v. Draper, 25 Del. 1, 77 Atl. 572 (1910); Sims v. Sims, 79 N.J.L. 577, 76 Atl. 1063 (Ct. Err. & App. 1910); Bennett v. Bennett, 116 N.Y. 584, 23 N.E. 17 (1889).

[54] Clark v. Harlan, 13 Ohio Dec. Reprint 634 (Cinc. Super. Ct. 1871) (quoting Chapman v. Pickersgill, 2 Wills. 145, 95 Eng. Rep. 734 (K.B. 1762)).

[55] *Id.* at 634-35.

[56] 13 Ohio Dec. Reprint 634, 636 (Cinc. Super. Ct. 1871).

element of the husband's services was interesting but not successful. It was not for loss of her husband's services that Mrs. Clark recovered; rather, recovery was granted because the court thought it illogical, under the new emancipation acts, to secure a wife's right to claim a separate estate, for example, and yet deny her the right to recover for a personal injury.[57]

D. *The Reluctant Authorization of a Remedy for Intentional Interference*

From this rather insignificant beginning, recovery for intentional interference with the marital relationship began to receive some judicial support. A few years after the *Clark* case, a husband, giving credence to his father's opinion of his wife, hauled her seven miles in a small wagon and installed her unceremoniously in a small tenement house. The court, in *Westlake v. Westlake*,[58] permitted the outraged wife to sue her father-in-law, determining that the benefit which the wife has in the consortium of the husband was said to equal that which the husband had in the wife.[59]

The recoveries occurring after 1861 emanated from suits protesting intentional intrusion in the relation between man and wife. A wife could recover for enticement,[60] for alienation of affections,[61] and for criminal conversation.[62] An Ohio case, distinguished by the pathos of its facts, awarded damages to a wife for loss of the consortium of her husband, a morphine addict.[63] The wife alleged and proved that the defendant druggist had repeatedly sold the drug to her husband despite her entreaties not to supply him.[64] Other cases, in which liquor was furnished to alcoholic husbands, resulted in similar awards of damages.[65]

The development of the cause of action in the late nineteenth and early twentieth centuries was a time for exploring the meaning of the Married Women's Acts. On the one hand, an oft-cited reason for *denying* the consortium action where negligence was presented was that the acts gave women no new rights but merely

[57] *Ibid.*

[58] 34 Ohio St. 621 (1878).

[59] *Id.* at 633.

[60] Bennett v. Bennett, 116 N.Y. 584, 23 N.E. 17 (1889).

[61] Hart v. Knapp, 76 Conn. 135, 55 Atl. 1021 (1903).

[62] Nieburg v. Cohen, 88 Vt. 281, 92 Atl. 214 (1914).

[63] Flandermeyer v. Cooper, 85 Ohio St. 327, 98 N.E. 102 (1912).

[64] *Ibid.*

[65] See, *e.g.*, Pratt v. Daly, 55 Ariz. 535, 104 P.2d 147 (1940).

allowed them to bring, in their own names, actions for those rights which had existed at common law.[66] Just as frequently, the reason given for *allowing* the action to women was that the emancipation acts removed all legal disabilities and gave women a new legal freedom.[67] One judge in Ohio remarked jubilantly that the only freedom now denied women was suffrage.[68] Surely the judges of that period who allowed the action must often have regarded themselves as knights of old, doing battle for ladies in distress. Yet no matter how enthusiastically some courts might wax over the new freedom of women, the cause of action for invasion of the consortium right was still limited to intentional or malicious injury. Only in a few dissenting opinions[69] and in two cases, quickly overturned,[70] was there any indication of a contrary persuasion. Denial of the cause of action was characteristically based upon five major premises. First, it was said if the legislature had wished to permit the action, it would have written an appropriate statute;[71] second, since the injury was suffered by the husband, the consequences to the wife were too remote and unforeseeable to be compensable;[72] third, if damages were awarded to the husband, the consortium lost by the wife was undoubtedly calculated into the husband's award by the jury;[73] and fourth, the emancipation acts gave married women no new rights.[74] Finally, where all else failed, the old common law argument was advanced that a wife suffered no compensable injury in the loss of her husband's consortium because she suffered no loss of services — services being the distinctly distaff contribution to the marital relation.[75]

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[66] Hitaffer v. Argonne Co., 183 F.2d 811, 816 & n.30 (D.C. Cir.), *cert. denied*, 340 U.S. 852 (1950).

[67] Holbrook, *supra* note 52, at 4-5.

[68] Griffen v. Cincinnati Realty Co., 27 Ohio Dec. 585, 589 (Cinc. Super. Ct. 1913).

[69] See, *e.g.*, dissenting opinions in Bernhardt v. Perry, 276 Mo. 612, 632-42, 208 S.W. 462, 467-70 (1918); Landwehr v. Barbas, 241 App. Div. 769, 270 N.Y. Supp. 534, *aff'd without opinion*, 270 N.Y. 537, 200 N.E. 306 (1934).

[70] Hipp v. E. I. Dupont deNemours & Co., 182 N.C. 9, 108 S.E. 318 (1921), overruled by Hinnant v. Tidewater Power Co., 189 N.C. 120, 126 S.E. 307 (1925); Griffen v. Cincinnati Realty Co., 27 Ohio Dec. 585 (Cinc. Super. Ct. 1913), overruled by Smith v. Nicholas Bldg. Co., 93 Ohio St. 101, 112 N.E. 204 (1915).

[71] See, *e.g.*, Hipp v. E. I. Dupont deNemours & Co., *supra* note 70, at 14-15, 108 S.E. at 320-21 (by implication).

[72] *Cf. id.* at 18, 108 S.E. at 322 for a discussion of these grounds.

[73] Feneff v. New York Cent. & H.R.R.R., 203 Mass. 278, 281, 89 N.E. 436, 437 (1909); Sheard v. Oregon Elec. Ry., 137 Ore. 341, 343-44, 2 P.2d 916, 917 (1931).

[74] See Hitaffer v. Argonne Co., 183 F.2d 811, 816 & n.30 (D.C. Cir.), *cert. denied*, 340 U.S. 852 (1950).

[75] See Lynch v. Knight, 9 H.L. 577, 11 Eng. Rep. 854 (K.B. 1861) for the prototype of this argument.

III. THE HITAFFER THRUST

In 1950, a federal court suddenly indicated its regret over prior decisions which had refused to allow the wife to sue[76] and called for a change of attitude in the courts' handling of the problem.[77] Methodically, *Hitaffer v. Argonne Co.*[78] set up all the reasons which had been advanced for denying the consortium action, and with corresponding precision the court struck down the arguments which had been offered immediately after the emancipation acts as well as those which developed along the way to *Hitaffer*.[79] Initially, there were cases, such as *Marri v. Stamford St. Ry.*,[80] which divide the concept of consortium into distinct elements: for example, love, companionship, sexual relations, affection, and material service.[81] The posture is recognizable as that advanced by *Lynch v. Knight*.[82] Courts which reason in this way, the *Hitaffer* court believed, had been trapped by a rhetorical habit of common law pleading into using two words where one would suffice.[83] When both loss of services and loss of conjugal affection were pleaded, "no distinct functions were intended."[84] Consequently, because consortium is a conceptualistic unity, courts commit error whenever loss of one or another of the elements is distinguished. "[T]here can be no rational basis for holding that in negligent invasions suability depends on whether there is a loss of services."[85] It is rather the *injury to the unity* of consortium that matters.

A second group of cases,[86] exemplified by *Bernhardt v. Perry*,[87]

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

[77] *Id.* at 819.

[78] 183 F.2d 811 (D.C. Cir.), *cert. denied*, 340 U.S. 852 (1950).

[79] See text accompanying notes 44-68 *supra*.

[80] 84 Conn. 9, 78 Atl. 582 (1911).

[81] See, *e.g.*, Bolger v. Boston Elevated R.R., 205 Mass. 420, 91 N.E. 389 (1910). For an excellent discussion, see Gueuin v. Manchester St. Ry., 78 N.H. 289, 99 Atl. 298 (1916).

[82] 9 H.L. 577, 11 Eng. Rep. 854 (K.B. 1861). See also text accompanying note 75 *supra*.

[83] 183 F.2d at 813-14.

[84] *Id.* at 813.

[85] *Id.* at 814.

[86] See, *e.g.*, Giggey v. Gallagher Transp. Co., 101 Colo. 258, 72 P.2d 1100 (1937); Eschenbach v. Benjamin, 195 Minn. 378, 263 N.W. 154 (1935); Tobiassen v. Polley, 96 N.J.L. 66, 114 Atl. 153 (Sup. Ct. 1921).

[87] 276 Mo. 612, 208 S.W. 462 (1919), *appeal dismissed*, 254 U.S. 662 (1920), overruled by Novack v. Kansas City Transit, Inc., 365 S.W.2d 532, 539 (Mo. 1963).

also emphasizes the element of services in defining consortium. These cases assert that where the husband has sued in his own right for personal injury, an element of his damage award compensates him for any impairment of his faculties and obligations,[88] and that therefore any separate recovery by the wife for loss of consortium would pose a risk of double recovery. Perhaps the origin of this view lies in a classic article on consortium by Roscoe Pound,[89] who wrote in 1916:

> [O]ur modes of trial are such and our mode of assessment of damages by the verdict of a jury is . . . so crude that if husband and wife were each allowed to sue, instead of each recovering an exact reparation, each would be pretty sure to recover what would repair the injury to both.[90]

The *Hitaffer* opinion, admitting the possibility of a double recovery, counsels that the husband's recovery must be taken into account when measuring the wife's damages and points to the court's power to apportion damages as a means of avoiding the problem.[91]

A third group of cases[92] refuses to allow the wife's action on the ground that her injury is not a direct, foreseeable consequence of the defendant's negligence. Such arguments fail for two reasons, according to the *Hitaffer* court. First, the wife's injury is a direct consequence of the husband's injury.[93] Second, if one follows the logic of these courts, on what foundation do they lay recovery when the husband has been intentionally injured?[94] Is not the same area of the marital relation affected?

Hitaffer addresses itself to the problem of refuting cases which hold, as did *Brown v. Kistleman*,[95] that the Married Women's Acts substantiated women's property rights and that the marital relationship, being neither a property right nor a right arising out of a contract of bargain or sale, is not within their protective bounds.[96] Viewing this attitude as archaic, *Hitaffer* espouses a modern rule:

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88 276 Mo. at 629, 208 S.W. at 466.

89 Pound, *Individual Interests in the Domestic Relations*, 14 MICH. L. REV. 177 (1916).

90 *Id.* at 194.

91 183 F.2d at 819.

92 See, *e.g.*, Boden v. Del-Mar Garage, Inc., 205 Ind. 59, 185 N.E. 860 (1933); Feneff v. New York Cent. & H.R.R.R., 203 Mass. 278, 89 N.E. 436 (1909); Smith v. Nicholas Bldg. Co., 93 Ohio St. 101, 112 N.E. 204 (1915).

93 183 F.2d at 815.

94 *Id.* at 817.

95 177 Ind. 692, 98 N.E. 631 (1912).

96 183 F.2d at 815.

the husband's right to the conjugal society of his wife is not a property right nor is it greater than the wife's right. The rights are equal and must receive the equal protection of the law.[97]

All of the cases which it examined and rejected, the *Hitaffer* opinion claims, are instances of indulgence in "legalistic gymnastics,"[98] and the court would not countenance the incongruity of the policies expressed by them.[99]

IV. The Aftermath of Hitaffer: A Meager Crop

No dramatic revolution in legal thinking occurred after *Hitaffer*. The court was criticized sharply by a writer discussing the impact of insurance upon damage awards for personal injury.[100] "The recent case of *Hitaffer v. Argonne Co.* is another instance where decision is made to turn on a series of fashionable propositions[101] quite divorced from their function in the current scene."[102] The writer observed that the law often permits distinctions to be drawn between willful and negligent interference and that a social purpose exists in protecting an individual against malicious injury which inflicts a more serious blow upon the individual.[103] Countering this argument, a student writer[104] indicated that where there is malicious interference with the marital relation, there are also grounds for divorce in which lies an opportunity to start a new life, whereas a physical disability suffered by a spouse never affords an opportunity to start anew. Instead, in serious cases, the wife is often charged with the lifelong duty of nursing an invalid.[105]

The first state to follow the lead of *Hitaffer* was Georgia. In 1953, *Brown v. Georgia-Tennessee Coaches, Inc.*,[106] reprinted the *Hitaffer* decision almost in its entirety and concluded that Georgia

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[97] *Id.* at 816.

[98] *Ibid.*

[99] *Ibid.*

[100] Jaffe, *Damages for Personal Injury: The Impact of Insurance*, 18 LAW & CONTEMP. PROB. 219, 228-31 (1953).

[101] Presumably the writer means the fashionable propositions of emancipation and equality.

[102] Jaffe, *supra* note 100, at 229. (Footnotes omitted.)

[103] *Ibid.*

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

[105] *Id.* at 1354.

[106] 88 Ga. App. 519, 77 S.E.2d 24 (1953).

was going to change its holdings in the consortium area so as to be consistent with "this day when human rights are on the tongues"[107] of every man, woman, and child. The very existence of civilization depends upon whether fundamental human rights survive, and with characteristic Southern chivalry, the Georgia court determined to enforce the right of the wife, which was based upon the "sacred relationship of marriage."[108] In overturning past decisions, the court felt it was not disregarding the Married Women's statutes but merely interpreting the law in a manner compatible with the demands and developments of contemporary civilization.[109]

Slowly, case by case, various jurisdictions have arrived at similar conclusions. Seven years after *Hitaffer*, only five states allowed wives to recover for loss of consortium.[110] Arkansas noted that where other states had felt constrained to deny the action because of the rigidity of the common law, it was the very capacity of the common law to grow and develop as new conditions arose which made it possible for Arkansas to change its law.[111]

By 1961, several additional states had granted wives the right to bring the action.[112] Michigan joined the group with an animated opinion by Justice Smith who commented that consortium had been defined until the dictionary had run dry.[113] "[L]et some scoundrel dent a dishpan in the family kitchen," he noted, "and the law, in all its majesty, will convene the court . . . and . . . suffer a jury of her peers to assess the damages."[114] Her right to the undisturbed consortium of her husband was surely worthy of equal protection. "The obstacles to the wife's action were judge-invented and they are

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[107] *Id.* at 533, 77 S.E.2d at 32.

[108] *Ibid.*

[109] *Ibid.*

[110] Cooney v. Moomaw, 109 F. Supp. 448 (D. Neb. 1953); Missouri-Pacific Transp. Co. v. Miller, 227 Ark. 351, 299 S.W.2d 41 (1957); Brown v. Georgia-Tennessee Coaches, Inc., 88 Ga. App. 519, 77 S.E.2d 24 (1953); Acuff v. Schmidt, 248 Iowa 272, 78 N.W.2d 480 (1956); Smith v. Smith, 205 Ore. 286, 287 P.2d 572 (1955).

[111] Missouri-Pacific Transp. Co. v. Miller, *supra* note 110, at 358-59, 299 S.W.2d at 46.

[112] See, *e.g.*, Duffy v. Lipsman-Fulkerson Co., 200 F. Supp. 71 (D. Mont. 1961); Dini v. Naiditch, 20 Ill. 2d 406, 170 N.E.2d 881 (1960); Montgomery v. Stephan, 359 Mich. 33, 101 N.W.2d 227 (1960); Hoekstra v. Helgelund, 78 S.D. 82, 98 N.W.2d 669 (1959). *Cf.* Mariani v. Nanni, 95 R.I. 153, 185 A.2d 119 (1962).

[113] Montgomery v. Stephan, *supra* note 112, at 36, 101 N.W.2d at 228.

[114] *Id.* at 48-49, 101 N.W.2d at 234.

herewith judge-destroyed."[115] *Dini v. Naiditch*[116] called the double-recovery bogey a convenient cliché for denying the wife's action.[117] In 1966, the trend was sufficiently established for the *American Bar Association Journal* to note it[118] and commend the action of New Jersey in following the trend in *Ekalo v. Constructive Serv. Corp. of America.*[119] *Ekalo* is another carefully constructed decision which goes through the litany of reasons offered by other courts for denying the action. The court resolved the problem of double recovery by requiring joinder of the husband's and wife's actions and relied on the court's power of remittitur to prevent unduly large recoveries.[120] The court dispelled the fears which have been expressed by some jurisdictions that the action would extend to other members of the family.[121] The husband-wife relation is a special one, the court observed, and it is not logical to expand recovery to any other family member.[122]

V. THE OHIO SEESAW

Ohio has a long history of indecision regarding the action for loss of consortium. Very soon after the passage of the Married Women's Act,[123] the action was allowed for intentional injury.[124] Shortly thereafter came *Flandermeyer v. Cooper*,[125] a unique decision in that it was the first case allowing the wife to sue for the injury she sustained by the furnishing of a drug to her addicted husband.[126]

In 1913, *Griffen v. Cincinnati Realty Co.*[127] attempted to permit an action for a negligent injury to the plaintiff's husband. It was alleged that the plaintiff had nursed and cared for her husband for a period of fifteen weeks and that she found it necessary to give

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115 *Id.* at 49, 101 N.W.2d at 235.

116 20 Ill. 2d 406, 170 N.E.2d 881 (1960).

117 *Id.* at 427, 101 N.E.2d at 891.

118 Rossman & Allen, *What's New in the Law: Husband and Wife . . . Consortium*, 52 A.B.A.J. 492 (1966).

119 46 N.J. 82, 215 A.2d 1 (1965).

120 *Id.* at 91-93, 215 A.2d at 6-7.

121 *Id.* at 92, 215 A.2d at 6-7.

122 *Ibid.*

123 67 Ohio Laws 111 (1870) (now OHIO REV. CODE § 2307.09) and 84 Ohio Laws 132 (1887) (now OHIO REV. CODE §§ 3103.01-.08).

124 See authorities cited note 53 *supra.*

125 85 Ohio St. 327, 98 N.E. 102 (1912). See text accompanying notes 63-64 *supra.*

126 *Ibid.*

127 15 Ohio N.P. (n.s.) 123 (Super. Ct. 1913).

up her job as a seamstress.[128] By reason of the defendant's negligence, she alleged, she had suffered the loss of her husband's society, companionship, and conjugal affection.[129] "[T]here has been a gradual emancipation of married women since Blackstone's . . . day,"[130] the decision stated, concluding that to disallow the action would constitute a disregard of legislative intent and a retrogression to the antiquated doctrine of Blackstone.[131] "We are not so jealous of the privileges bestowed upon husbands by the common law, nor so insensible of the spirit of the times, as to adopt such views."[132]

Such militancy as would have done proud the most ardent suffragette was short-lived in Ohio. Two years later, *Smith v. Nicholas Bldg. Co.*,[133] was handed down, becoming the leading case in this area. The owner of an office building was charged with the careless operation of an elevator, causing serious injury to the plaintiff's husband.[134] Her husband, she alleged, had become nervous, irritable, morose, and ill-tempered, and was getting worse.[135] The court posed the issue: Has the wife a right of action against a person for the loss of consortium of her husband caused by personal injuries sustained by him through the negligence of such person?[136] The resounding reply was in the negative.[137] The opinion moved up the customary artillery. There had been no loss of services by the wife; there had been no right to bring the action at common law; nor was there a statute conferring the right. The husband was entitled to full compensation for the injury received and for any diminution in his earning capacity. Indirectly, his wife and children would be benefited. The right of recovery should be remedial, not punitive.[138]

For fifty years all indecision ceased while Ohio followed the *Smith* case. In the face of this steadfast position, the common pleas opinion by Judge Hitchcock in *Clem v. Brown*[139] startled

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[128] *Id.* at 125.
[129] *Id.* at 126.
[130] *Id.* at 127.
[131] *Id.* at 128.
[132] *Ibid.*
[133] 93 Ohio St. 101, 112 N.E. 204 (1915).
[134] *Id.* at 102, 112 N.E. at 204-05.
[135] *Id.* at 102, 112 N.E. at 205.
[136] *Id.* at 103, 112 N.E. at 205.
[137] *Id.* at 108, 112 N.E. at 206.
[138] *Id.* at 107, 112 N.E. at 205 (by implication).
[139] 3 Ohio Misc. 167, 207 N.E.2d 398 (C.P. 1965).

many lawyers. The original petition contained the allegation of loss of consortium at the very end — almost as an afterthought.[140] The court sustained every demurrer of the defendant but refused to strike the allegation of loss of consortium.[141] There followed an opinion by Judge Hitchcock in which he acknowledged that he would be compelled to sustain the motion to strike if he were to follow *Smith v. Nicholas Bldg. Co.*[142] but that he perceived his oath of office to require him to apply prevailing precedents of justice to concrete cases.[143] Numerous recent cases were then cited in which the fourteenth amendment has been reinterpreted and applied to situations which had previously been held not to lie within its protective language. *Reynolds v. Sims*,[144] *Griffin v. Maryland*,[145] *Escobedo v. Illinois*,[146] and *Malloy v. Hogan*,[147] were said to exemplify this use of the fourteenth amendment. Judge Hitchcock concluded that if the protection of the fourteenth amendment can be expanded to shield criminals, it is no less available to Ohio's virtuous wives.[148] Conceding that Ohio precedent is contrary to his decision and that other courts have viewed the matter as one for legislative attention, Judge Hitchcock held that Ohio precedent and the Ohio Constitution must yield to the supreme law of the land — the United States Constitution.[149]

Ironically, although Mrs. Clem won the battle, she lost the war; the Clems lost their suit for negligence by a jury veridct.[150] Motions for a judgment notwithstanding the verdict and for a new trial were both denied by Judge Hitchcock.[151] As a result, the opportunity to

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140 Petition of Plaintiff, p. 5, Clem v. Brown, 3 Ohio Misc. 167, 207 N.E.2d 398 (C.P. 1965).

141 Journal Entry, May 11, 1965, Clem v. Brown, *supra* note 140.

142 93 Ohio St. 101, 112 N.E. 204 (1915).

143 3 Ohio Misc. at 171, 207 N.E.2d at 400.

144 377 U.S. 533 (1964) (legislative reapportionment required by the fourteenth amendment).

145 378 U.S. 130 (1964) (equal protection to persons of different races wishing to enter an amusement park).

146 378 U.S. 478 (1964) (equal protection extended to criminal suspects in regard to services of a lawyer).

147 378 U.S. 1 (1964) (requiring the protection of the fifth amendment to be applied to the states via the fourteenth amendment).

148 3 Ohio Misc. at 171, 207 N.E.2d at 400.

149 *Id.* at 173, 207 N.E.2d at 402.

150 Journal Entry, Oct. 13, 1965, Clem v. Brown, 3 Ohio Misc. 167, 207 N.E.2d 398 (Ohio C.P. 1965).

151 Journal Entry, Oct. 19, 1965, Clem v. Brown, *supra* note 150.

review the ruling in *Clem v. Brown* was lost. But the opportunity will certainly arise at some time in the near future — not only in Ohio but in those states which remain intransigent.[152]

VI. CONCLUSION

Twelve jurisdictions[153] now clearly allow women a cause of action for loss of consortium due to negligent invasion of the marital relationship. Ohio remains among the majority committed to the view expressed by *Smith v. Nicholas Bldg. Co.*[154] that approval of the action is a legislative rather than a judicial prerogative, although the *Clem* case calls into question the authority of this view. Other jurisdictions have based their refusal to grant the action on such grounds as the fear of double recovery,[155] the remoteness of the injury to the wife,[156] and the inability of courts and juries to place a monetary value upon the sentimental elements of marriage.[157]

Nevertheless, a growing and militant minority of courts which have taken up the cause of the legally offended wife have emphasized the paradoxical position in which women have often stood before the law. "The Constitution in enjoining the equal protection of the laws upon States precludes irrational discrimination as between persons . . . in the incidence of a law."[158] The securing of legal rights to women has had a stormy history in the application of the reasonable classification doctrine. Inevitably, reasons for classification become outmoded, but the discrimination lingers. Lucy Stoner and Susan B. Anthony are ludicrous figures in American folk lore, yet they exemplify the struggle for reform. Suggestions for change have often been met with disbelief and disdain; they then

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152 This would include all state jurisdictions not specifically mentioned in note 153 *infra.*

153 Hitaffer v. Argonne Co., 183, F.2d 811 (D.C. Cir.), *cert. denied*, 340 U.S. 852 (1950); Duffy v. Lipsman-Fulkerson Co., 200 F. Supp. 71 (D. Mont. 1961); Cooney v. Moomaw, 109 F. Supp. 448 (D. Neb. 1953); Missouri-Pacific Transp. Co. v. Miller, 227 Ark. 351, 299 S.W.2d 41 (1957); 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. Schmidt, 248 Iowa 272, 78 N.W.2d 480 (1956); Montgomery v. Stephan, 359 Mich. 33, 101 N.W.2d 227 (1960); Ekalo v. Constructive Serv. Corp. of America, 46 N.J. 82, 215 A.2d 1 (1965); Smith v. Smith, 205 Ore. 286, 287 P.2d 572 (1955); Mariani v. Nanni, 95 R.I. 153, 785 A.2d 119 (1962); Hoekstra v. Helgelund, 78 S.D. 82, 98 N.W.2d 669 (1959).

154 93 Ohio St. 101, 112 N.E. 204 (1915).

155 See text accompanying notes 86-91 *supra.*

156 See text accompanying notes 92-94 *supra.*

157 See text accompanying notes 80-85 *supra.*

158 Goesaert v. Cleary, 335 U.S. 464, 466 (1948).

receive brave support from a vocal minority and may culminate in enactments such as the Married Women's Acts, the nineteenth amendment, and title 7 of the Civil Rights Act of 1964.[159] Although by no means as vital to the legal independence of women as this legislation, recognition of the wife's cause of action for loss of consortium is another aspect of their long struggle for equal protection.

MARIAN F. RATNOFF

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[159] 78 Stat. 253, 42 U.S.C. § 2000(e) (1964).