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THE RECENT OHIO SUPREME COURT RULING *in Clouston v. Remlinger Oldsmobile Cadillac Inc.*[1] reversed a rule which had existed in Ohio for over fifty years. Ohio has now been added to the growing list of states which allow to a wife an action for damages for loss of consortium arising from negligent injury to her husband.

Prior Rule

Prior to this decision, the leading case in Ohio was *Smith v. Nicholas Building Co.*,[2] which held that although a husband was allowed a cause of action for negligent injury to his wife for his loss of consortium, the wife was not entitled to recover for her loss of consortium arising out of injury to her husband caused by the defendant's negligence. The reason advanced by the court back in 1915 was that the husband's action for loss of consortium was accompanied by a loss of services claim, but the wife's action for loss of consortium was not accompanied by a loss of services claim. The husband never had an action for loss of consortium unaccompanied by a claim for loss of the services of his wife. Since any claim for loss of the husband's services would be solely the husband's, the court reasoned that the wife should not therefore be permitted a cause of action for loss of consortium.

In almost the same breath, the court further explained that there was "no question" but that either a husband or a wife may recover without alleging any loss of services claim if the injury inflicted was an intentionally inflicted injury, as distinguished from a negligently inflicted injury.[3] The wife in Ohio has, in fact, long been able to bring an action for loss of consortium arising from the intentional torts of alienation of affection[4] and criminal conversation.[5]

It is therefore interesting to note that notwithstanding the acknowledgment of damage and injury to either the wife or husband for loss of consortium, the court was somehow inclined to permit the right of action to the wife for damages intentionally caused, but not for those

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1 22 Ohio St. 2d 65, 258 N.E. 2d 230 (1970); see also, Durham v. Gabriel, 22 Ohio St. 2d 75, 258 N.E. 2d 236 (1970) decided the same day.

2 93 Ohio St. 101, 112 N.E. 204 (1915).

3 *Id.* at 205.

4 Westlake v. Westlake, 34 Ohio St. 621 (1878).

5 Smith v. Lyon, 9 Ohio App. 141 (1918).

identical damages if they were negligently caused. While no rational explanation appears to have ever been offered for such a distinction, this was nevertheless the prevailing law in Ohio until *Clouston.* Recognizing the fallacy in a rule which deprives the wife of recovery of damages for a substantial injury directly produced to her by reason of the defendant's wrongdoing, many states have reversed their previous position and have permitted the wife to recover for loss of consortium due to negligent injury to her husband.[6]

Outstanding in its analysis and discussion of the problem is the landmark case of *Hitaffer v. Argonne Co., Inc.*[7] where the ancient and usual reasons advanced for denying the wife her right of recovery are carefully detailed and with corresponding precision struck down by Judge Clark, who commented:

> . . . after piercing the thin veils of reasoning employed to sustain the rule, we have been unable to disclose any substantial rationale on which we would be willing to predicate a denial of a wife's action for loss of consortium due to a negligent injury to her husband.[8]

Judge Clark states that the reasons given by various courts for deprivation of this right of action to the wife are that the injury to the wife is too indirect to be compensable, that her injuries are too remote to be capable of measure, and that the common law recognized no such right without a showing of loss of services which, however, was solely the husband's claim.[9]

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[6] Missouri Pacific Transportation Co. v. Miller, 227 Ark. 351, 299 S.W. 2d 41 (1957); Gist v. French, 136 Cal. App. 2d 247, 288 P. 2d 1003 (1955); Stenta v. Leblang, 185 A. 2d 759 (Del. 1962) indicated apparent approval of Yonner v. Adams, 53 Del. 229, 167 A. 2d 717 (1961); Hitaffer v. Argonne Co., Inc., 183 F. 2d 811 (D.C. Cir. 1950), cert. den., 71 S. Ct. 80, 340 U.S. 852; Bailey v. Wilson, 100 Ga. App. 405, 111 S.E. 2d 106 (1959); Dini v. Naiditch, 20 Ill. 2d 406, 170 N.E. 2d 881 (1960); Troue v. Marker, 252 N.E. 2d 800 (Ind. 1969); Acuff v. Schmit, 248 Iowa 272, 78 N.W. 2d 480 (1956); Kotsiris v. Ling, 451 S.W. 2d 411 (Ky. App. 1970); Deems v. Western Maryland Railway Co., 247 Md. 95, 231 A. 2d 514 (1967); Owen v. Illinois Baking Corp., 260 F. Supp. 820 (W.D. Mich. 1966); 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); Duffy v. Lipsman-Fulkerson & Co., 200 F. Supp. 71 (D. Mont. 1953); Cooney v. Moomaw, 109 F. Supp. 448 (D. Neb. 1953); Ekalo v. Constructive Services Corp. of America, 46 N.J. 82, 215 A. 2d 1 (1965); Millington v. Southeastern Elevator Co., 22 N.Y. 2d 498, 239 N.E. 2d 897 (1968); Ross v. Cuthbert, 239 Ore. 429, 397 P. 2d 529 (1964); Mariani v. Nanni, 95 R.I. 153, 185 A. 2d 119 (1962); 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).

[7] *Supra* n. 6.

[8] *Id.* at 813.

[9] *Id.* at 814-15.

Direct Injury

The argument that the injury to the wife is indirect and thus not compensable is not a tenable argument according to Judge Clark.[10] The injury to the wife is directly traceable to the wrongdoing of the tort feasor. Furthermore, how could such an argument be seriously advanced when one considers that the identical damage caused to the husband is regarded as a direct and proximate consequence of the defendant's wrong? If the loss of the wife's consortium is a direct result of the defendant's negligence insofar as the husband is concerned, then it is obviously a direct and proximate result of the defendant's negligence when the wife has suffered similar damages.

Furthermore, if the damage by reason of loss of consortium to the wife is held to be a proper measure of damages for *intentional* wrongdoing by a tortfeasor, then how could it be held otherwise as to a *negligent* tortfeasor? Obviously, if the damages are sufficiently direct when they are intentionally caused, then they would be equally as direct when they are unintentionally but negligently caused.

Measure of Damages

An effective answer to the contention that a wife's loss of consortium is too vague or indefinite to be capable of measurement in pecuniary terms is given by *Millington v. Southeastern Elevator Co.*[11] which holds that such a contention, logically extended, would likewise hold that a jury is not competent to award damages for pain and suffering. It is further stated in *Novak v. Kansas City Transit, Inc.*[12] that the wife may recover for the loss of only those elements of consortium which represent a separate and distinct loss to her. Her damages would then be computed by deducting the husband's compensation from the damages awarded to her to avoid double recovery.

Although no specific scale exists to determine what elements of consortium represent a separate and distinct loss to the wife, in most cases they do not include any right of recovery for loss of financial support by the husband since only the husband is entitled to recover this element, nor do they include any right of recovery for nursing services since the husband is also entitled to recover for such services.[13] And if the wife's award includes damages her husband has already received, her recovery will be deemed excessive and subject to reduction.[14]

However, the dissenting opinion in *Novak* held:

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[10] *Id.* at 815.

[11] *Supra* n. 6.

[12] *Supra* n. 6 at 543-544.

[13] Kotsiris v. Ling, *supra* n. 6.

[14] Arkansas Louisiana Gas Co. v. Strickland, 238 Ark. 284, 379 S.W. 2d 280 (1964).

> The judge who is able to avoid double damages by "accurately delineating" the items that the husband has recovered or will recover in another action in another court, and correctly instruct the jury on the items of damages properly recoverable in this particular case will indeed need the wisdom of a Solomon, not to mention the utter confusion of the juries.[15]

The age-old argument of "double recovery" is, however, without merit. Certainly there is a double recovery because both the husband and the wife were individually and separately damaged. There is, however, no double recovery in the sense that duplication of the same damage is awarded to either the husband or the wife. The fact that a single marital relationship is involved does not negate the fact that if the relationship is disturbed, both spouses are separately damaged. For their separate damage each is obviously entitled to recovery.

In the final analysis, the proof of those elements of consortium which represent a separate and distinct loss to the wife will be presented, as in the proof of pain and suffering, by presentation of testimony and other evidence that bears on the issue; and the weight of this evidence, or, in other words, the determination of the value of damages for loss of consortium, is simply another matter for the jury's consideration.

Common Law

That the common law recognizes no cause of action for the loss of so-called "sentimental elements" of consortium in the absence of a showing of loss of services is simply a rule without a reason. The fallacy is well exposed by Judge Clark in *Hitaffer* when he explains that there are many cases which have permitted a husband to recover for alienation of affection or criminal conversation in which there was absolutely no loss of material services of the wife.[16]

It should be mentioned at this point that the common law rule must simply be abandoned with respect to this issue. The Married Women's Acts promulgated throughout the land[17] have removed the procedural disabilities of the woman by permitting her to sue in her own name, to hold land in her own name, and to be entitled to the same rights to which a man or a husband is entitled.

Smith v. Nicholas Building Co., for example, was decided in Ohio in 1915. This was five years before the 19th Amendment was passed which gave women the right to vote. The courts must be reminded that old law must not be followed merely because it is old law. In his

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[15] Novak v. Kansas City Transit, Inc., *supra* n. 6 at 548.

[16] Hitaffer v. Argonne Co., Inc., *supra* n. 6 at 815.

[17] In Ohio, Ohio Rev. Code § 2307.09: "A married woman may be sued as if she were unmarried, and her husband may be joined with her only when the cause of action is in favor or against both."

dissenting opinion in the case of *Troue v. Marker,*[18] Justice Sharp commented on this very problem:

> In the proper performance of its judicial function this court is constantly engaged in examining and modifying prior precedents. Although we use a logical format for this function the changes in the law which result are more generally based on experience than strict logic. When examined in the light of modern reality the underlying basis of prior precedents of this court and our Supreme Court in regard to a wife's loss of consortium no longer exists. I do not consider this to be a destruction of stare decisis but a fulfillment of its proper function.[18]

Equal Protection

The essence of consortium is not merely the right to the services of the spouse but also the right to the sentimental elements of the marriage. These elements include love, affection, companionship and sexual relations.[19] It is self evident that when negligence on the part of an individual interferes with and damages these material and delicate rights of either a wife or a husband, a reasonable and fair recovery of damages should be permitted for such a wrong.

This right is protected by the "equal protection" clause of the 14th Amendment of the United States Constitution,[20] as well as the constitution of the various states.[21] In fact, the Common Pleas Bench, as well as the Appellate Bench, in the State of Ohio has held, even prior to *Clouston,* that a rule which allows a husband recovery for loss of consortium negligently caused while at the same time denying a similar recovery to the wife ". . . constitutes discrimination which is so unjustifiable as to be violative of due process of law contrary to the 14th Amendment to the United States Constitution." [22]

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[18] 249 N.E. 2d 512, 523 (Ind. App. 1969); rev'd 252 N.E. 2d 800 (Ind. 1969).

[19] Hitaffer v. Argonne Co., Inc., *supra* n. 6 at 814.

[20] U.S. Const. amend. XIV, provides: ". . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of laws."

[21] See, for example, Ohio Const. art. I, § 16, which provides: "All courts shall be open, and every person, for any injury done him in his land, goods, person, or reputation, shall have remedy by due course of law and shall have justice administered without denial. . . ."

[22] Umpleby v. Dorsey, 10 Ohio Misc. 228, 227 N.E. 2d 274, 275-76 (C.P. 1967); Clem v. Brown, 3 Ohio Misc. 167, 207 N.E. 2d 398 (C.P. 1965); Leffler v. Wiley, 15 Ohio App. 2d 67, 239 N.E. 2d 235 (1968) which stated at 236: "If a statute were to affirmatively create such a right in a husband and yet deny it to a wife, such a classification based on sex alone would violate Article I of the Constitution of Ohio and the Fourteenth Amendment to the Constitution of the United States. The common-law distinction between husband and wife in regard to consortium is equally based upon an unreasonable, discredited concept of the subservience of the wife to her husband. The courts should not perpetuate in the common law a discrimination that could not constitutionally be created by statute."

If women have an equal right to vote, they should likewise be permitted an equal right to just compensation when they are damaged. If a wife has duties in the marriage relationship, including the duty to support her husband (as she does in some states, including Ohio,[23] under certain circumstances), she should have the reciprocal right to recover damages for negligent interference with and damage to her marital relationship.

Separate Action

A number of jurisdictions which allow a wife an action for loss of consortium still maintain that the claim can only be asserted in a joint action with the husband's claim.[24] The better rule is that since the wife's injury is separate and distinct from her husband's and since her injury is independently capable of measurement, she should be allowed to bring an action independent of any action her husband might bring.[25]

It has also been held that the wife's right of action is a substantive right so that the effect of a decision granting the wife an action after the husband's claim has already been settled is retroactive.[26] Therefore, if no right of action for loss of consortium existed for the wife on the date of the husband's injury, but did arise in favor of the wife after the husband's claim had been settled, the wife would under these circumstances be entitled to bring a separate action.[27]

Although the wife may bring a separate action, her claim is still subject to the same defenses which could properly be asserted against the husband's claim. If, for example, the husband was contributorily negligent, the wife's action would be barred by this defense to his claim.[28] Nor are damages for loss of consortium recoverable in an independent action by the wife when her husband has been killed instantaneously,[29] since recovery is only allowable between time of injury and death as it has been in a husband's action for loss of consortium of his wife.[30]

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[23] Ohio Rev. Code § 3103.01: "Husband and wife contract towards each other obligations of mutual respect, fidelity, and support."

[24] Deems v. Western Maryland Railway Co., *supra* n. 6; Millington v. Southeastern Elevator Co., *supra* n. 6; Ekalo v. Constructive Services Corp. of America, *supra* n. 6.

[25] Tjaden v. Moses, 94 Ill. App. 2d 361, 237 N.E. 2d 562 (1968); Kotsiris v. Ling, *supra* n. 6.

[26] Shepherd v. Consumers Cooperative Association, 384 S.W. 2d 635 (Mo. 1964).

[27] Edeler v. O'Brien, 38 Wis. 2d 691, 158 N.W. 2d 301 (1968) overruling Moran v. Quality Aluminum Casting Co., *supra* n. 6, which held that the wife's action must be asserted jointly with the husband's.

[28] Logullo v. Joannides, 301 F. Supp. 722 (D. Del. 1969).

[29] DeWitt v. B & C Machine Co., 25 Ohio St. 2d 40 (1971).

[30] Shaweker v. Spinell, 125 Ohio St. 423, 181 N.E. 896 (1932).

But it has also been held that the mere fact that a wife has not prevailed in an action for bodily injury should not bar an independent action by the husband.[31] Equal protection would seem to demand that the wife be granted the same privilege if she can show that the defense which barred her husband's action will not bar her action.

The applicable Statute of Limitations is also a subject for consideration in connection with the wife's separate cause of action. In Ohio, an action for bodily injury must be brought within two years after the cause arose,[32] but this bodily injury must be sustained by the one bringing the action.[33] It is readily apparent that the wife has suffered no bodily injury in connection with her action for loss of consortium. Thus, the two year Statute of Limitations, while applying to her husband's action for bodily injury, should not apply to her.

In Ohio, a four year Statute of Limitations applies to an injury to any right of the plaintiff not arising from contract, bodily injury, or property damage.[34] Since consortium is a basic right of a spouse arising from the marriage, it has been held in the case of a husband's action for loss of consortium that any injury to this right falls within this four year Statute of Limitations.[35] Here again equal protection demands that the wife's action for loss of consortium should also be permitted the four years period after the negligent act which gave rise to a cause of action. The application of the four year statute would thus provide the wife the same Statute of Limitations for her loss of consortium action as is afforded the husband.

Conclusion

The jurisdictions which still deny the wife the right of recovery of damages for loss of consortium should review their position and recognize that it is quite appropriate that the judiciary, as opposed to the legislature, take the initiative in making this long overdue correction.[36] As Justice Sharp stated in *Troue v. Marker*:

> The legislature did not close the court house door to the wife for her loss of consortium and I do not believe we are required to wait for the legislature to open it.[37]

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[31] Krant v. Cleveland Ry. Co., 132 Ohio St. 125, 5 N.E. 2d 324 (1936).

[32] Ohio Rev. Code § 2305.10.

[33] Krant v. Cleveland Ry. Co., *supra* n. 31 at 326.

[34] Ohio Rev. Code § 2305.09.

[35] Cincinnati Street Ry. Co. v. Whitehead, 176 N.E. 583 (Ohio App. 1930).

[36] See, for example: Deems v. Western Maryland Railway Co., *supra* n. 6 at 518; Moran v. Quality Aluminum Casting Co., *supra* n. 6 at 143; Brown v. Georgia-Tennessee Coaches, Inc., 88 Ga. App. 519, 77 S.E. 2d 24, 32 (1953); Dini v. Naiditch, *supra* n. 6 at 885; Montgomery v. Stephan, *supra* n. 6 at 233.

[37] *Supra* n. 18 at 523.

The correction of the old and unreasonable rule should be made in a clear, unequivocal and uncomplicated fashion, without the attachment of specious formulas or devious notions and conditions to confuse a rule of law which should simply state that a wife has the same right of recovery of damages for loss of consortium as is granted to the husband.