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The Child's Action for Loss of Society and Companionship: The Next Logical Step - Theama v. Kenosha

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THE CHILD'S ACTION FOR LOSS OF SOCIETY AND COMPANIONSHIP: THE NEXT LOGICAL STEP

Theama v. Kenosha
117 Wis.2d 508, 344 N.W.2d 513 (1984)

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INTRODUCTION

The courts repeatedly have disallowed a cause of action by a child for the loss of love, care, guidance and companionship of an *injured* parent.[1] Typically arguments against allowing the cause of action have been: lack of precedential support for the action;[2] uncertainty or difficulty in ascertaining damage awards;[3] fear of a defendant being held liable to persons other than the child;[4] fear of multiple claims and increased litigation for a single tortious wrong;[5] and the possibility that recovery for the parent's injury and the child's injury might overlap.[6] However, the Wisconsin courts have allowed parents[7] and spouses[8] to recover for similar losses when a child or spouse has been injured. Nonetheless, prior to the supreme court's decision in *Theama v. Kenosha*,[9] the Wisconsin courts had not extended the loss of society and companionship cause of action to children of injured parents.

In *Theama*, the Supreme Court of Wisconsin looked beyond prior

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1. *See infra* note 31.

2. *See, e.g.*, Koskela v. Martin, 91 Ill. App. 3d 568, 571, 414 N.E.2d 1148, 1151 (1980); General Elec. Co. v. Bush, 88 Nev. 360, 368, 498 P.2d 366, 371 (1972).

3. *See, e.g.*, Hoesing v. Sears, Roebuck & Co., 484 F. Supp. 478, 480 (D. Neb. 1980); Russell v. Salem Transp. Co., 61 N.J. 502, 507, 295 A.2d 862, 864 (1972).

4. For example, a recurrent argument is that if the child is allowed to recover for the parent's injury, what prevents the right of action from being extended to a sibling, close friend or parent of the injured parent who maintained a close relationship with the injured parent? *See, e.g.*, Borer v. American Airlines, Inc., 19 Cal. 3d 441, 446, 563 P.2d 858, 861-62, 138 Cal. Rptr. 302, 305-06 (1977); Russell v. Salem Transp. Co., 61 N.J. 502, 507, 295 A.2d 862, 864 (1972).

5. *See, e.g.*, Hoffman v. Dautel, 189 Kan. 165, 169, 368 P.2d 57, 60 (1962); Eschenbach v. Benjamin, 195 Minn. 378, 380, 263 N.W. 154, 155-56 (1935) (overruled by Thill v. Modern Erecting Co., 284 Minn. 508, 170 N.W.2d 865 (1969)).

6. *See, e.g.*, Halberg v. Young, 41 Hawaii 634, 646-47 (1957); *Hoffman*, at 169, 368 P.2d at 60; *Russell*, at 507, 295 A.2d at 864.

7. Shockley v. Prier, 66 Wis. 2d 394, 225 N.W.2d 495 (1975).

8. Moran v. Quality Aluminum Casting Co., 34 Wis. 2d 542, 150 N.W.2d 137 (1967).

9. 117 Wis. 2d 508, 344 N.W.2d 513 (1984).

case law, confronted and rejected the typical arguments, and allowed a new cause of action to a minor child for the loss of a negligently injured parent's love, care, guidance, society and companionship.[10] In short, it took the next logical step. Initially, this comment will discuss the historical setting in which the case was decided. Next, this comment will illustrate the reasoning utilized by the court in reaching its decision. Finally, this comment will analyze the reasoning employed by the court and discuss the possible problems flowing from this decision.

HISTORICAL BACKGROUND

At early common law, all rights stemming from injuries to family members generally were held by the father under doctrine of *paterfamilies*.[11] The father's rights derived from the master-servant relationship. The father was analogized to the master, and the family members treated as being legally comparable to servants. Therefore, the father had an actionable claim for an injury to a family member resulting in the loss of that family member's services.[12] However, the father's recovery was limited to the pecuniary value of the lost services[13] and incidental expenses, such as medical costs.[14] Over time, the sentimental value of such losses gained recognition; thus, the father's loss of a family member's love, care and companionship became compensable in court.[15]

A wife, at common law, did not have a similar action. The rationale for this denial was the common law doctrine that a woman became legally nonexistent as a person when she married and assumed a status much like that of a chattel.[16] Eventually, in the landmark case of *Hitaffer v. Argonne Co.*,[17] the Court of Appeals for the District of Columbia in 1950 recognized a cause of action by a wife for loss of society and companionship when her husband was injured by another.

The Wisconsin common law basically tracked the common law of

10. *Id.*

11. For a discussion of the doctrine, *see* Fisher, *Pater Familias—A Cooperative Enterprise*, 41 ILL. L. REV. 27 (1946).

12. Lippmann, *The Breakdown of Consortium*, 30 COLUM. L. REV. 651, 652-53 (1930).

13. Note, *New Infant Rights in Tort*, 35 VA. L. REV. 618, 620 (1949).

14. Dennis v. Clark, 56 Mass. 347 (1848).

15. Selleck v. Janesville, 104 Wis. 570, 80 N.W. 944 (1899).

16. *See* Moran v. Quality Aluminum Casting Co., 34 Wis. 2d 542, 150 N.W.2d 137 (1969).

17. 183 F.2d 811 (D.C. Cir. 1950), *rev'd in part on other grounds*, 242 F.2d 220 (D.C. Cir. 1957), *cert. denied*, 354 U.S. 914 (1957). *Hitaffer* was reversed on appeal on the ground that the specific language of the District of Columbia Workmen's Compensation Act, 33 U.S.C. § 985 (1927), barred a wife from maintaining an independent cause of action for loss of society and companionship when her husband was injured on the job. Smither & Co. v. Coles, 242 F.2d 220, 226 (D.C. Cir. 1957). The existence of the independent cause of action in other circumstances was not overruled. *Id.*

other states. Although the Wisconsin courts initially refused to follow the *Hitaffer* lead, it adopted the cause of action allowing a wife to recover for the loss of her injured husband's society and companionship[18] in the 1967 case of *Moran v. Quality Aluminum Casting Co.*[19] The next step taken by the Wisconsin courts was to permit a parent to recover for the loss of a child's society and companionship when the child was injured.[20]

In addition to recognizing new causes of action, the Wisconsin courts were developing a parallel line of reasoning concerning the proper view of the parent-child relationship. No longer could the parent-child relationship correctly be looked upon as analogous to the master-servant relationship.[21] The Wisconsin courts noted that, in modern society, the benefit of the parent-child relationship is not the child's potential earning capacity; conversely, the parent's benefit in the relationship is more properly viewed as the child's society and companionship.[22] Further, the Wisconsin judiciary recognized that serious injuries to a child can have a "shattering effect" on the parent-child relationship and that "the loss of the enjoyment of those experiences normally shared by parents and children need[ed] no enumeration."[23]

Commentators and other courts also recognized the change in perception of the parent-child relationship, and thus began to emphasize the great detrimental impact on the child caused by an injury to the parent. Prosser suggested that the loss of a parent's society and companionship was a genuine and serious injury.[24] Another writer noted that such a loss deprives a child of the "essentials for a healthy development" and that it was of "the highest importance" to protect the benefits a child derives from its parents.[25] The Supreme Court of Kansas deemed the parent-

18. *See e.g.*, Nickel v. Hardware Mutual Casualty Co., 269 Wis. 647, 70 N.W.2d 205 (1955).

19. 34 Wis. 2d 542, 150 N.W.2d 137 (1967). The *Moran* court stated: "The genius of the common law is its ability to adapt itself to the changing needs of society." Noting the change in societal conditions, the court believed that the time was ripe to adopt the action. *Id.* at 551-52, 150 N.W.2d at 141.

20. Shockley v. Prier, 66 Wis. 2d 394, 225 N.W.2d 495 (1975). In *Shockley*, a mother gave premature birth to twins. One child died at birth while one survived. As a result of doctor and hospital negligence, the surviving child received too much oxygen, and therefore, suffered permanent blindness and disfigurement. The court allowed the parents to recover for the loss of the injured child's society and companionship. *Id.* at 404, 225 N.W.2d at 501. Prior to *Shockley*, recovery was limited to the loss of the child's earning capacity and to the medical expenses incurred as a result of the child's injury. Callies v. Reliance Laundry Co., 188 Wis. 376, 206 N.W. 198 (1925).

21. *Shockley*, 66 Wis. 2d at 400-01, 225 N.W.2d at 499-500.

22. *Id.*

23. *Id.* at 401, 225 N.W.2d at 499.

24. W. PROSSER, HANDBOOK OF THE LAW OF TORTS, § 125 at 935-36 (5th ed. 1984).

25. Comment, *The Child's Claim for Loss of Consortium Damages: A Logical and Sympathetic Appeal*, 13 SAN DIEGO L. REV., 231, 237-38 (1975) (quoting Miller v. Monsen, 228 Minn. 400, 403, 37 N.W.2d 543, 545 (1949). *See also* Comment, *The Child's Cause of Action for Loss of Consortium*, 5 U. SAN. FERN. V.L. REV. 449 (1975).

child relationship to be "vitally important" and commented that the loss of a parent's society and companionship deprived the child "of something that is indeed valuable and precious."[26]

The stance taken by these authors and courts has been bolstered by the United States Supreme Court's historical and continued recognition of the rights of children under the Constitution. For example, the Court recognized that children possess first amendment rights,[27] and are protected under the due process and equal protection clauses of the fourteenth amendment.[28] Moreover, the Supreme Court has recognized and protected the integrity of the family unit.[29]

It appears that factors such as the change in society's view of the parent-child relationship, the potentially serious damage caused to a child due to an injury inflicted upon its parent, the necessity of a parent's society and companionship in the child's healthy development, the increased protection of a child's constitutional rights, and the focus on the integrity of the family unit point to need to compensate the child when the parent-child relationship has been damaged by an injury to a parent. Indeed, there seems to be a trend in the courts toward granting a cause of action to compensate the child for such losses.[30]

Despite this trend, however, the majority of jurisdictions have refused to recognize the child's cause of action for loss of a parent's society and companionship.[31] These courts have set forth several arguments against granting the action. The first argument is that recognition of the

26. Hoffman v. Dautel, 189 Kan. 165, 168-69, 368 P.2d 57, 59 (1962).

27. *See* Board of Educ. v. Barnette, 319 U.S. 624 (1943).

28. *See* Goss v. Lopez, 419 U.S. 565 (1975) (due process); In re Winship, 397 U.S. 358 (1970) (due process); In re Gault, 387 U.S. 1 (1967) (due process); Brown v. Board of Educ., 347 U.S. 483 (1954) (equal protection).

29. Meyer v. Nebraska, 262 U.S. 390, 399 (1923). Integrity of the family unit is protected by the due process clause of the fourteenth amendment, *id.*, and the equal protection clause of the fourteenth amendment. Skinner v. Oklahoma, 316 U.S. 535, 541 (1942). Protection of the integrity of the family unit may also be afforded by the ninth amendment. Griswold v. Connecticut, 381 U.S. 479, 496 (1965) (Goldberg, J., concurring). *See also* Prince v. Massachusetts, 321 U.S. 158 (1944) (recognizing the importance of family relationships).

30. Jurisdictions that have recognized a child's cause of action for loss of society and companionship are: Ferriter v. Daniel O'Connell's Sons, Inc., 381 Mass. 507, 413 N.E.2d 690 (1980); Berger v. Weber, 411 Mich. 1, 303 N.W.2d 424 (1981); Veland v. Reynolds Metals, 103 Wash. 2d 131, 691 P.2d 190 (1984); Theama v. Kenosha, 117 Wis. 2d 508, 344 N.W.2d 513 (1984).

31. The jurisdictions that have declined to adopt the cause of action are: Early v. United States, 474 F.2d 756 (9th Cir. 1973); Pleasant v. Washington Sand & Gravel Co., 262 F.2d 471 (D.C. Cir. 1958); Hoesing v. Sears, Roebuck & Co., 484 F. Supp. 478 (D. Neb. 1980); Turner v. Atlantic Coast Line R.R. Co., 159 F. Supp. 590 (N.D. Ga. 1958); Borer v. American Airlines, Inc., 19 Cal. 3d 441, 563 P.2d 858, 138 Cal. Rptr. 302 (1977); Halberg v. Young, 41 Hawaii 634 (1957); Koskela v. Martin, 91 Ill. App. 3d 568, 414 N.E.2d 1148 (1980); Hoffman v. Dautel, 189 Kan. 165, 360 P.2d 57 (1962); Eschenbach v. Benjamin, 195 Minn. 378, 263 N.W. 154 (1935); General Elec. Co. v. Bush, 88 Nev. 360, 498 P.2d 366 (1972); Russell v. Salem Transp. Co., 61 N.J. 502, 295 A.2d 862 (1972); Duhan v. Milanowski, 75 Misc. 2d 1078, 348 N.Y.S.2d 696 (N.Y. Sup. Ct. 1973); Gibson v. John-

right to recover should be left to the legislature, or similarly, that a lack of precedent restrains the courts from granting the right.[32]

A second argument advanced by the courts concerns the assessment of damages in such a case. This argument is two-fold. First, the determination and measure of damage is uncertain.[33] In addition, the damages are noncompensatory in nature.[34] In this aspect of the argument, the courts typically have noted that monetary compensation will not allow the child to regain the parent's lost society and companionship. Further, to say that the child will be compensated is a mere fiction; in reality, the child can never be compensated for such an injury. Therefore, monetary compensation amounts to a future benefit not related to the present loss.[35]

The courts' third argument against allowing the cause of action is that it will increase the number of parties entitled to recover for a defendant's negligence.[36] These courts are wary that once a child's action is recognized, the door may be open to allow siblings, friends or relatives to recover for the loss of the injured's society and companionship. Thus, it is necessary to draw the line of liability before the door is opened.[37]

The fourth argument advanced by the courts is that multiple claims and increased litigation will arise if the new cause of action is allowed. The thrust of this argument is that if an independent action for the child is recognized, *each* child of an injured parent would have its own right of action, allowing multiple lawsuits to arise from a single occurrence.[38] For example, if an injured parent had several children, in the absence of any legally compelled joinder or consolidation rule, each child could bring suit at different times. Therefore, the tortfeasor would be forced to

ston, 144 N.E.2d 310 (Ohio Ct. App. 1956); Norwest v. Presbyterian Intercommunity Hosp., 52 Or. App. 853, 631 P.2d 1377 (1981), *aff'd* 293 Or. 543, 652 P.2d 318 (1982).

32. *See* Koskela v. Martin, 91 Ill. App. 3d at 570-71, 414 N.W.2d at 1150-51; Norwest v. Presbyterian Intercommunity Hosp., 52 Or. App. at 858-60, 631 P.2d at 1380.

33. The thrust of this argument is that considering the intangible nature of the loss of society and companionship, the damage figure cannot be reached through any precise computation or calculation. By comparison, a damage award for medical expenditures can arguably be more accurately determined by the use of tangible documentation, such as medical bills. *See* Hoesing v. Sears, Roebuck & Co., 484 F. Supp. at 480; Borer v. American Airlines, Inc., 19 Cal. 3d at 447-48, 563 P.2d at 862-63, 138 Cal. Rptr. at 306-07; *Koskela*, 91 Ill. App. 3d at 571, 414 N.E.2d at 1151.

34. *See Hoesing*, 484 F. Supp. at 479; *Borer*, 19 Cal. 3d at 447-48, 563 P.2d at 862-63, 138 Cal. Rptr. at 306-07.

35. *Borer*, 19 Cal. 3d at 447-48, 563 P.2d at 862-63, 138 Cal. Rptr. at 306-07 (Mork, J., dissenting).

36. *Id.*

37. *Id.*

38. *Hoesing*, 484 F. Supp. at 478-79; *Borer*, 19 Cal. 3d at 449, 563 P.2d at 863, 138 Cal. Rptr. at 307; *Koskela*, 91 Ill. App. 3d at 572, 414 N.E.2d at 1151.

defend several lawsuits on several different occasions which arose out of one event.

A final argument attacking the recognition of the child's cause of action is the potential for double recovery. Some courts have reasoned that an injured parent may be compensated for loss of future earnings which, in part, aid the ability to care for that parent's family. These courts believe that juries might include the injured parent's inability to support the child when measuring the child's damage award in an action for loss of a parent's society and companionship. Therefore, there is a possibility of an overlap in damage awards; both the parent and child would be compensated for the parent's loss of future earnings.[39]

Prior to *Theama v. Kenosha*,[40] the Wisconsin courts had not permitted a child to recover for the loss of an injured parent's society and companionship.[41] However, the Wisconsin courts had held that a parent could recover for the loss of society and companionship of a child during minority when the loss was caused by another's negligent conduct.[42] Additionally, a parent or a minor child could recover for such a loss under the Wisconsin wrongful death statute.[43] It was against this backdrop that the Supreme Court of Wisconsin decided *Theama*.

THEAMA V. KENOSHA
FACTS OF THE CASE

At approximately 2:30 in the morning on June 27, 1978, Robert Theama was driving his motorcycle through the streets of Kenosha, Wisconsin.[44] Due to insufficient lighting on the street, Theama was unable to see a deep hole in the surface of the public highway. Theama's motorcycle struck the hole. As a result of the impact, Theama lost control of the

39. *Koskela*, 91 Ill. App. 3d at 571-72, 414 N.E.2d at 1151. *See also Hoesing*, 484 F. Supp. at 480; *Borer*, 19 Cal. 3d at 449, 563 P.2d at 866, 138 Cal. Rptr. at 310; Russell v. Salem Transp. Co., 61 N.J. 502, 507, 295 A.2d 862, 867 (1972).

40. 117 Wis. 2d 508, 344 N.W.2d 513 (1984).

41. *Id.* at 511, 344 N.W.2d at 514.

42. Shockley v. Prier, 66 Wis. 2d 394, 225 N.W.2d 495 (1975).

43. The Wisconsin wrongful death action statute can be found at WIS. STAT. § 895.04(4) (1985). *Inter alia*, the statute allows for recovery by unemancipated or dependent children of up to $50,000 for the loss of deceased parents' society and companionship. Further, the loss of society and companionship has been recognized as an element of damages under the statute and its predecessors since 1931. *See* 1931 Wis. Laws ch. 263, § 1(2). It should be noted that the Wisconsin courts have interpreted the wrongful death action statute to establish a priority system for recovery. Under this priority system, a child has an independent cause of action for loss of the deceased parents' society and companionship only when neither parent survives. Cogger v. Trudell, 35 Wis. 2d 350, 151 N.W.2d 146 (1967).

44. Theama v. Kenosha, 117 Wis. 2d 508, 509, 344 N.W.2d 513, 513 (1984).

motorcycle and was thrown from the vehicle.[45] The accident caused severe injuries to Theama's head and internal organs which resulted in permanent brain damage and impairment of visual, perceptual, motor and speech functions.[46] In addition, Theama sustained other physical and emotional injuries.[47]

Theama brought suit against the City of Kenosha and Employers Mutual Liability Insurance Company of Wisconsin.[48] The complaint contained four claims.[49] The third and fourth claims were brought on behalf of Theama's minor children, Terry and Tracy Theama, to recover for the loss of their father's care, society, companionship, protection, training and guidance[50] which resulted from his extensive injuries.[51]

The trial court granted defendants' motion for summary judgment on the claims involving the minor children. The trial court reasoned that despite the permanence of the father's injuries, no independent common law action for loss of consortium could be justified when both the children's mother and father were still living.[52]

Theama appealed and, in an unpublished opinion, the court of appeals summarily affirmed the trial court's ruling.[53] Theama then appealed to the Supreme Court of Wisconsin. The issue on appeal was: "whether or not a minor child may maintain a cause of action against a tortfeasor for loss of society and companionship of a parent."[54] The question was one of first impression for the court.[55] Although the action did not exist at common law,[56] the supreme court reversed the lower court's decision and remanded the case holding that, "a minor child may recover for the loss of a parent's society and companionship caused by negligent injury to the parent."[57]

45. *Id.*
46. *Id.*
47. *Id.* at 510, 344 N.W.2d at 513.
48. Hereinafter referred to collectively as "defendants."
49. The first and second claims of the complaint were not an issue on appeal. In the first claim, Robert Theama sought damages for his own injuries as well as for pain and suffering, loss of earnings and earning capacity, expenses for past and future care, and for past and future medical expenses. In the second claim, Theama's wife, Patricia Theama, sought damages for the loss of support, society, companionship and consortium due to her husband's injuries. *Theama*, 117 Wis. 2d at 510, 344 N.W.2d at 513.
50. Hereinafter these losses will be referred to collectively as "loss of society and companionship."
51. *Theama*, 117 Wis. 2d at 510, 344 N.W.2d at 513.
52. *Id.* at 510, 344 N.W.2d at 514. The trial court relied heavily on Cogger v. Trudell, 35 Wis. 2d 350, 151 N.W.2d 146 (1967). *See supra* note 43.
53. *Theama*, 117 Wis. 2d at 510, 344 N.W.2d at 513.
54. *Id.* at 511, 344 N.W.2d at 513.
55. *Id.*
56. *Id.*
57. *Theama*, 117 Wis. 2d at 509, 344 N.W.2d at 513.

THE REASONING OF THE COURT

The *Theama* court made clear very early in its opinion that, for the first time, a Wisconsin court would sanction a child's action for loss of a parent's society and companionship.[58] After reviewing the historical development of the cause of action,[59] the court stated: "it would be contrary to justice to deny the gravity of harm suffered by a child who is deprived of his or her parent's society and companionship due to another's negligence."[60]

The court first addressed the argument that there was no precedent in Wisconsin case law to support the new action, and moreover, that the legislature was the appropriate forum for recognition of the right.[61] The court's response was that the rule denying the child's action was a creature of the court, not the legislature; therefore, the duty to change the rule if and when it became outdated fell just as much on the court as on the legislature.[62] In addition, the supreme court found convincing analogous precedent that protected the society and companionship interest in the husband-wife relationship and the similar interest of a parent in the parent-child relationship and noted that the child had a very similar interest.[63] The conclusion was clear: the next logical step in the current progression was the protection of the child's interest in the parent-child relationship.[64]

The *Theama* court next dealt with the problem of the uncertainty of damages to be recovered in the child's action for loss of society and companionship. Reasoning by analogy was again employed. The court drew an analogy to causes of action allowing recovery for similar intangible injuries. The court pointed out that recovery is allowed under Wisconsin law for: pain and suffering in personal injury[65] and wrongful death ac-

58. *Theama*, 117 Wis. 2d at 509, 344 N.E.2d at 513 (1984).

59. For a discussion of the historical context, *see supra* notes 11-43 and accompanying text.

60. *Theama*, 117 Wis. 2d at 518, 344 N.W.2d at 518. The court emphasized that it believed that it was its "mandate by oath to do justice, as well as [its] conscience" to recognize the cause of action. *Id.* at 520, 344 N.W.2d at 518.

61. *Theama*, 117 Wis. 2d at 518-19, 344 N.W.2d at 518.

62. *Id.* at 519, 344 N.W.2d at 518. The court stated that it would not be difficult to simply follow precedent with the "vast support from dusty books;" however, the court feared that the "dust" from "the decision would remain in [its] mouths, a reproach to law and conscience alike." *Id.* (*citing* Montgomery v. Stephan, 359 Mich. 33, 37-38, 101 N.W.2d 227 (1960)).

63. *See Moran*, 34 Wis. 2d 542, 150 N.W.2d 137 (1969), and *Shockley*, 66 Wis. 2d 394, 225 N.W.2d 495 (1975). The *Theama* court noted that in these decisions, it did not wait for the legislature to create similar causes of action on behalf of the wife or parents. Further, the *Theama* court added that deferral to the legislature in the case at bar would be tantamount to the court "shirking" its responsibility. *Theama*, 117 Wis. 2d at 521, 344 N.W.2d at 519.

64. *Theama*, 117 Wis. 2d at 521, 344 N.W.2d at 519.

65. Sennott v. Seeber, 6 Wis. 2d 590, 95 N.W.2d 269 (1959).

tions;[66] loss of consortium of a spouse in personal injury actions;[67] loss of a spouse's society and companionship in a wrongful death suit;[68] and, loss of a minor child's society and companionship in both personal injury[69] and wrongful death suits.[70] Like a child's injury of the loss of a parent's society and companionship, the above mentioned injuries are intangible and nonpecuniary. Nonetheless, the *Theama* court declared that courts and juries daily assess damages for such uncertainties with apparent success.[71]

The court next addressed the contention that such injuries to a child are noncompensatory in nature. In short, monetary compensation could not replace a parent's society and companionship.[72] The court found this to be unpersuasive. According to the court, monetary compensation is a substitute, albeit a poor one, for a parent's society and companionship. In spite of the unsatisfactory nature of the substitute, an award of money damages is the "only workable way that [the] legal system has found to ease the injured party's tragic loss."[73] The *Theama* court continued by discussing other possible benefits of a monetary damage award to the child. Along with other benefits,[74] the damage award could be used to aid the child's continued normal and complete mental development.[75] Finally, it noted that allowing the child an independent recovery ensures that the award will be utilized for the child's benefit, not by the parent for other purposes.[76]

The court then considered the argument that the new cause of action would increase the number of parties entitled to recovery based on a tortfeasor's conduct. According to this argument, by permitting a child an independent cause of action, a new class of plaintiffs would be created,

66. Wangen v. Ford Motor Co., 97 Wis. 2d 260, 294 N.W.2d 437 (1980).
67. Ballard v. Lumbermen's Mutual Casualty Co., 33 Wis. 2d 601, 148 N.W.2d 65 (1967).
68. Herro v. Steidl, 255 Wis. 65, 37 N.W.2d 874 (1949).
69. Shockley v. Prier, 66 Wis. 2d 394, 225 N.W.2d 495 (1975).
70. Peot v. Ferraro, 83 Wis. 2d 727, 266 N.W.2d 586 (1978).
71. *Theama*, 117 Wis. 2d at 522, 344 N.W.2d at 520.
72. *Id.*
73. *Id.* at 523, 344 N.W.2d at 520. The court added that monetary damages are much more preferable than the alternative of totally denying recovery. *Id.*
74. One author commented that the award may be used to acquire live-in help who, aside from providing domestic aid, could offer the child some incidental guidance and companionship. Additionally, the damage award may be used to procure necessary psychiatric treatment for the child arising out of the child's possible maladjustment to its loss. The writer suggested that this may make the difference between satisfactory and unsatisfactory adjustment to the loss. Note, *The Child's Right to Sue for Loss of a Parent's Love, Care and Companionship Caused by Tortious Injury to the Parent*, 56 B.U.L. REV. 722, 734 (1976).
75. *Theama*, 117 Wis. 2d at 523, 344 N.W.2d at 520.
76. *Id.* at 524, 344 N.W.2d at 520-21. The court reasoned that to deny the child's right to recover premised on the notion that a parent's society and companionship is irreplaceable would be to perpetuate an error. *Id.* at 524, 344 N.W.2d at 520.

including friends, siblings or other relatives of the injured parent.[77] The *Theama* court was not swayed by this argument. It believed that the argument failed to consider the importance of the nuclear family and the foreseeability factor. Emphasis was placed on the fact that in other actions for loss of society and companionship in the family setting,[78] courts have readily limited the right to recover to those most likely to be severely affected by the loss.[79]

The next major argument addressed by the court was the issue of increased litigation. The problem posited was that recognition of the new action would permit each injured child to bring suit; thus, multiple lawsuits potentially could arise from a single occurrence.[80] The court first pointed out that, in the instant case, the issue was not presented because the claims of the children were combined with the claims of the parents.[81] However, the *Theama* court went on to explain that the argument lacked merit. It reasoned that the fear of increased litigation is a common, if not standard, fear whenever a court is called upon to recognize a new cause of action; nonetheless, that has not prevented courts from allowing new causes of action.[82]

The final argument confronted by the supreme court related to double recovery. The concern was that juries may take into account the child's loss of a parent's support when arriving at the child's damage award for the loss of society and companionship even though this loss is not relevant to the cause of action. Since the parent, when injured by another, is entitled to recover for the loss of ability to support the child, there is the potential for overlap in compensation.[83] However, the court believed that this problem could be easily remedied by limiting the par-

77. *Id.* at 524, 344 N.W.2d at 521.

78. *See* Weitl v. Moes, 311 N.W.2d 259, 286 (Iowa 1981). The Supreme Court of Iowa in *Weitl* ruled that a child has an independent cause of action for loss of parental consortium. The court overruled *Weitl* in Audubon-Extra Ready Mix, Inc. v. Illinois Cent. Gulf. Ry. Co., 335 N.W.2d 148 (Iowa 1983). In this case, the court ruled that under an Iowa statute, I.C.A. § 613.15, a child's claim for loss of parental consortium should be brought by the administrator if the parent was dead, or by the injured parent if the parent survived. However, the child could not bring the action independently. *Id.*

79. *Theama*, 117 Wis. 2d at 524, 344 N.W.2d at 521. The court noted that most children are emotionally dependent on their parents while the same is not usually true for other remote relatives or friends of the parent. In addition it is not foreseeable, as in the case of a child, that a remote relative or friend will suffer serious emotional impairment as a result of the parent's injury. *Id.* at 524-25, 344 N.W.2d at 521 (citing 56 B.U.L. REV. at 738, *supra* note 74).

80. *Theama*, 117 Wis. 2d at 525-26, 344 N.W.2d at 521.

81. *Id.* at 526, 344 N.W.2d at 521.

82. *Id.*

83. *Id.* at 526, 344 N.W.2d at 521-22. The court noted that the same problem comes into play when a wife sues for the loss of a husband's consortium; yet, the courts have allowed recovery in those situations. *Id. See* Moran v. Quality Aluminum Casting Co., 34 Wis. 2d 542, 150 N.W.2d 137 (1967).

ent's recovery to the child's loss of the parent's inability to monetarily support the child. Further, the child's recovery would be limited to the loss of the parent's society and companionship.[84]

Having recognized the new cause of action,[85] the court proceeded to characterize the action. The supreme court stated that the child must prove a *prima facie* negligence case.[86] Further, any defenses available against the injured parent to limit or bar recovery, such as contributory negligence, will affect the child's action in a similar fashion.[87] The new cause of action was limited by presently allowing recovery only where the child has not yet reached the age of majority.[88] Once again, the court emphasized that recovery shall be limited to a child's loss of a parent's society and companionship.[89] Finally, the court acknowledged that the legislature may expand the action, place a ceiling on the amount recoverable, or abolish the action altogether.[90]

ANALYSIS

No precedent existed in Wisconsin case law squarely on point which mandated the *Theama* holding. Clearly the case law in the majority of jurisdictions called for a contrary decision.[91] However, by analogizing to similar actions, the *Theama* court was willing to take the next logical step in recognizing a child's action for loss of society and companionship. The court correctly demonstrated that the judiciary plays a critical role in the development of the common law.[92] The common law does not consist of an absolute set of rules. On the contrary, it is a breathing body of general principles subject to judicial adaptation to societal conditions and perceptions of justice.[93] In fact, "the peculiar boast and excellence"[94] and the "genius of the common law is its ability to adapt itself to

84. *Theama*, 117 Wis. 2d at 526, 344 N.W.2d at 522.

85. *Id.* at 527, 344 N.W.2d at 522.

86. *Id.* Here the court noted that in this respect, the new action was basically the same as the parent's claim for personal injuries.

87. *Id.*

88. *Id.* The reasoning behind the limitation was that the child's minority is when the parent-child relationship will be the most gravely affected by a negligent injury to the parent. *Id.*

89. Under this action, the child would not recover for the loss of the injured parent's financial support. *Id.* at 528, 344 N.W.2d at 522. The ruling is consistent with the limit placed by the court in Shockley v. Prier, 66 Wis. 2d 394, 225 N.W.2d 495 (1975), on a parent's right to recover for the loss of a child's society and companionship.

90. *Theama*, 117 Wis. 2d at 528, 344 N.W.2d at 522. The court limited the ruling in this case to causes of action arising on or after March 8, 1984. *Id.*

91. *See supra* note 31.

92. *See* Friedmann, *Legal Philosophy and Judicial Lawmaking*, 61 COLUM. L. REV. 821 (1961).

93. Miller v. Monsen, 228 Minn. 400, 406, 37 N.W.2d 543, 547 (1949).

94. Hurtado v. California, 110 U.S. 516, 530 (1884).

the changing needs of society."[95] Based on society's and the law's changing view of the parent-child and family relationships,[96] the need to change the law in these areas is readily apparent.

The creation of a new cause of action does not require legislative intervention. As the *Theama* court accurately noted, the rule denying a child's cause of action was fashioned by the courts.[97] The courts, however, have allowed parents,[98] and spouses[99] to recover for similar injuries. In none of these situations has there been legislative intervention, nor have there been any apparent significant problems arising out of the recognition of these recoveries such as massive public outcry or an uncontrollable flood of litigation. It seems natural and consistent to take the next step in the progression to compensate the child for the potentially devastating loss of his parent's society and companionship. It seems just as natural and consistent for the courts to take the step.

There is nothing preventing the legislature from altering the new cause of action if it believes that such alternatives are necessary.[100] Moreover, considering that the common law, in part, functions to mold the law to fit societal changes, it would also be within the realm of the *court's* duty to limit, or even abolish, the new action if society called for a change. Lack of precedent or legislative action should not bar a child's recovery.

The uncertainty of the measure of damages and the noncompensatory nature of the damages in a minor child's action for loss of society and companionship presents a problem. It is true that money is not an adequate replacement for society and companionship.[101] Similarly, money cannot adequately replace the negligently caused loss of a limb. However, courts do allow recovery in tort for the loss of limb due to negligence or other similar injuries. As one writer stated: "When the tort itself is of such a nature as to preclude the ascertainment of the amount of damages with certainty, it would be a perversion of fundamen-

95. *Moran*, 34 Wis. 2d at 551, 150 N.W.2d at 141.

96. *See supra* notes 11-43 and accompanying text.

97. Shockley v. Prier, 66 Wis. 2d 394, 225 N.W.2d 495 (1975).

98. *Id.* at 401, 225 N.W.2d at 499.

99. *Moran*, 34 Wis. 2d at 551-52, 150 N.W.2d at 141.

100. Indeed, the *Theama* court acknowledged that limitation, expansion and abolition of the new right was within the scope of legislative action. *Theama*, 117 Wis. 2d at 528, 344 N.W.2d at 522.

101. Uncertainty as to damages led one court to deny recovery to a *parent* for the loss of a child's society and companionship. Baxter v. Superior Court of Los Angeles County, 19 Cal. 3d 461, 563 P.2d 871, 138 Cal. Rptr. 315 (1977).

tal principles of justice to deny all relief to the injured person."[102] It cannot reasonably be argued that somewhat inadequate relief is less beneficial to an injured party than no relief at all.

That the injury is intangible should not bar recovery. Under the law of Wisconsin,[103] as well as other state law,[104] when one spouse suffers an injury, the other spouse's recovery may include reimbursement for such sentimental aspects of the marital relationship as loss of comfort, sexual relations, society and companionship—commonly known as "loss of consortium." In other areas of the law, courts have allowed recovery for intangible injuries.[105] Additionally, in the area of the parent-child relationship, the courts have allowed parents to recover damages for sorrow, mental distress, grief,[106] and mental anguish[107] under wrongful death statutes for the death of a minor child.[108] Juries are capable of measuring such damages.[109]

The *Theama* court believed that poor compensation is better than no compensation and that juries are capable of assessing damages for intangible injuries. However, the possible beneficial uses set forth by the court of the compensation award are not altogether convincing. The court suggested that the money may be used to assure the child's healthy and normal mental development, to hire live-in help who could contribute domestic services, as well as some incidental guidance, and to pay for any psychiatric help needed by the child.[110] The court added that proper limitations and allowing the child a recovery independent of the parent's recovery would guarantee that the money would be used for the child's benefit, not for other purposes such as for the child's support.[111]

However, there is no convincing evidence that a person's wealth during minority has a causal relationship to that person's healthy and normal mental development. Further, it seems contrary to the purpose

102. C. MCCORMICK, LAW OF DAMAGES § 27 at 102 (quoting Story Parchment v. Paterson Co., 282 U.S. 555, 558 (1930)).

103. Ballard v. Lumbermen's Mutual Casualty Co., 33 Wis. 2d 601, 148 N.W.2d 65 (1967).

104. *See, e.g.*, Berger v. Weber, 411 Mich. 1, 16, 303 N.W.2d 424, 427 (1981).

105. *See, e.g.*, Dillon v. Legg, 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968) (mental distress); Pallas v. Crowley, Milner & Co., 322 Mich. 411, 33 N.W.2d 911 (1948) (privacy); Williams v. Marion Rapid Transit, Inc., 152 Ohio St. 114, 87 N.E.2d 334 (1949) (prenatal injuries).

106. Dawson v. Hill & Hill Truck Lines, 671 P.2d 589 (Mont. 1983).

107. Sanchez v. Schindler, 651 S.W.2d 249 (Tex. 1983).

108. *See*, Shockley v. Prier, 66 Wis. 2d 394, 225 N.W.2d 495 (1975) (allowing parent to recover loss of minor child's society and companionship at common law); Peot v. Ferraro, 83 Wis. 2d 727, 266 N.W.2d 586 (1978) (allowing parent to recover loss of minor child's society and companionship in wrongful death actions).

109. Love, *Tortious Interference with the Parent-Child Relationship: Loss of an Injured Person's Society and Companionship*, 51 IND. L.J. 590, 626-28 (1976).

110. *Theama*, 117 Wis. 2d at 523-24, 344 N.W.2d at 520.

111. *Id.* at 524, 527, 344 N.W.2d at 520-21, 522.

of the award—to aid in the child's mental development—for the court to approve of the idea that the money be used to hire live-in help who may offer some "incidental" guidance to the child. Additionally, if the money could be used to acquire psychiatric treatment for the child, the next logical step would be to use the money for other types of medical treatment not necessitated by the child's loss. It would be better for the court to include live-in help and medical expenses in the parent's damage award for loss of ability to support the family.

If, as the *Theama* court suggested, the money award is limited to the time period when the child is a minor to aid in the child's development, another problem arises. It is clear that a minor child does not have the capacity to dictate the disposition of the money. If the money were to be placed in a trust until the child reaches majority, the money would not be used during the child's minority.[112] It is obvious that the money must be controlled by someone other than the child. If that person is a parent or family member, it is questionable that the money would be used to aid the child's mental and emotional development if the family came upon lean times financially. If the duty were to be placed on a person outside the family, the integrity of the family unit may be threatened.[113] The current workload of the courts would make judicial control over the money next to impossible.

The court may have faltered in suggesting practical applications of the damage award. The practical applications, such as payment for psychiatric care, are tangible. This presents the conceptual problem of awarding tangible relief for an intangible loss, and substitutes apples for oranges. However, the fundamental purpose of the damage award is to compensate the victim in the best manner available at law. With this purpose in mind, it is clear that in spite of these dispositional drawbacks, monetary compensation remains superior to the alternative of no compensation.

In analyzing the argument that granting the cause of action to the child would expose the tortfeasor to increased liability to a greater number of plaintiffs, the supreme court focused on the nuclear family and the factor of foreseeability.[114] However, the court did not explicitly hold that the action was limited solely to children though it did "pres-

112. If the damage award were placed in a trust to be used throughout the child's minority, additional problems arise. The child during minority would lack the capacity to control the use of the trust funds. Therefore, the disposition of the money would necessarily have to be controlled by someone other than the child.

113. Concern for the integrity of the family unit was the foundation of the *Theama* decision. *See supra* notes 88-89 and accompanying text.

114. *Theama*, 117 Wis. 2d at 524, 344 N.W.2d at 521.

ently" limit the action to minor children.[115] Although arguably qualified, this holding is somewhat open-ended. Thus, the possibility is left open for persons other than children to recover for the loss of the injured's society and companionship. It is not certain that in the future an aged parent of an injured parent would be denied recovery under a similar action. The same may hold true for a close friend of the injured or a distant relative who lives in the injured's home. Allowing such actions may open the floodgate to a vast array of litigation.

It is of first importance for the court to adhere to the underlying principle that a minor child, not other friends or relatives of the parent, will suffer the most severe damage when a parent is injured. Children are usually dependent upon their parents for emotional sustenance, while this is rarely the case with more remote relatives.[116] It appears that the Wisconsin court is prepared to draw the line of recovery at minor children. However, this court was willing to expand the loss of society and companionship to children because it was the next logical step in the progression.[117] The court was quick to point out that one of the stellar features of the common law is its ability to adapt to societal change.[118] However, the court should wait until societal change dictates the extension of the new action to others beyond minor children.

The court gave short shrift to the argument that if a new action is recognized, each child would have an independent lawsuit. The argument is that, since the injured parent would also have a claim, a defendant may be faced with defending a number of separate lawsuits at different times. The *Theama* court dismissed this argument by pointing out that the issue was not at bar because the parent's and children's claims had been consolidated.[119] Nonetheless, the court added that this argument is common to nearly every case in which a court is asked to recognize a new action and that the argument lacks merit.[120]

In light of the fact that the court was willing to qualify and set limits on the cause of action,[121] it would not have been unreasonable for the court to give more in-depth consideration to this argument and to set some guidelines. Some courts have *required* that a spouse claiming loss

115. *Id.* at 527-28, 344 N.W.2d at 522.

116. Note, *The Child's Right to Sue for Loss of a Parent's Love, Care and Companionship Caused by Tortious Injury to the Parent*, 56 B.U.L. REV. at 738, *supra* note 74.

117. *Theama*, 117 Wis. 2d at 519, 344 N.W.2d at 518.

118. *Id.* at 511, 344 N.W.2d at 514.

119. *Id.* at 526, 344 N.W.2d at 521.

120. *Id. See, e.g.*, Bivens v. Six Unknown Named Agents, 403 U.S. 388, 428-29 (1971) (Black, J., dissenting) (recognizing damages for fourth amendment violations).

121. *Theama*, 117 Wis. 2d at 527, 344 N.W.2d at 522. The court discussed the elements of a *prima facie* case, possible defenses and certain limits on recovery.

of consortium join the claim with that of the physically injured spouse.[122] Other courts have merely *suggested* the same.[123] The court could have solved the consolidation problem by analogizing to the Wisconsin wrongful death statute which mandates that all separate causes of action arising out of a wrongful death suit "shall" be consolidated upon the motions of "any" party.[124] The *Theama* court could have followed suit and developed some joinder rules, but the court declined to do so. A related problem concerns settlements. All settlements may be deterred if a child is permitted to bring suit after the parent's claim is settled. However, termination of the parent's or child's claim by either settlement or judgment could operate to bar the other claim.[125] Joinder or termination guidelines would lessen the burden of multiple suits and put that argument to rest. The *Theama* court would have done well to stake out joinder and settlement guidelines. However, considering that the consolidation issue was not before the court, such rulings would have been mere *dicta*.

The court did not go into great detail in discussing the problem of possible overlapping damage awards.[126] The court reasoned that the problem readily could be cured by limiting the injured parent's recovery to the loss of the parent's pecuniary ability to support the child and to limit the child's recovery to the loss of the injured parent's society and companionship.[127] Though not explicit in the court's opinion, the most rational method of accomplishing this separation would be to carefully and specifically instruct the jury as to exactly which injuries are to be compensated under each action. Moreover, specific instructions coupled with the joinder of the parent's and child's claim, could deter a jury from secretly awarding damages for the loss of the parent's ability to financially support the child in the child's action if the suit were to be brought alone, or for the child's loss of the parent's society and companionship in the parent's action if the parent's action were to be brought alone. This would bring into the open and legitimize what arguably[128] some juries currently practice, motivated by a gut sense of justice, in deliberations.

122. *See, e.g.*, Schreiner v. Fruit, 519 P.2d 462, 466 (Alaska 1974); General Elec. v. Bush, 88 Nev. 360, 367-68, 498 P.2d 366, 371 (1972).

123. *See, e.g.*, Gates v. Foley, 247 So. 2d 40, 45 (Fla. 1971); Kotsiris v. Ling, 451 S.W.2d 411, 412-13 (Ky. 1970).

124. WIS. STAT. § 895.04(3) (1985).

125. *Cf.* Millington v. Southeastern Elevator Co., 22 N.Y.2d 498, 507-08, 239 N.E.2d 897, 902-03, 293 N.Y.S.2d 305, 312 (1968).

126. For a discussion of the problem of overtapping damages, *see supra* notes 83-84 and accompanying text.

127. *Theama*, 117 Wis. 2d at 526, 344 N.W.2d at 521-22.

128. *See, e.g.*, Halberg v. Young, 41 Hawaii 634, 646-47 (1957); Russell v. Salem Transp. Co., 61 N.J. 502, 507, 295 A.2d 862, 864 (1972).

The court left some minor procedural questions unanswered. Yet, these questions should be resolved under the body of case law sure to develop in the wake of the *Theama* decision. The court simply was not willing to shut its doors to the injured child due to potential procedural difficulties.

The *Theama* decision brings Wisconsin common law into harmony with the spirit of tort common law. Tort law is concerned with relational interests which cannot be characterized as tangible things such as property or the individual. One such interest is the family interest which consists of the husband-wife and parent-child relationships. The damage to the family interest can be far greater than the damage to individual family members.[129] Society and companionship have been defined as elements of the family interest.[130] The *Theama* decision helps protect the family interest by allowing compensation to be awarded when there is injury to one of the relationships that makes up the family interest.

Moreover, tort law has turned away from the pecuniary rationales of the master-servant relationship and loss of earning capacity as bases for allowing a parent to recover for an injured child. Common law actions for abduction and seduction of a child allowed a parent recovery based on the master-servant relationship and loss of services.[131] However, as Prosser noted, pecuniary loss was a mere peg on which to hang the real damages, injury to the family relationship.[132]

Additionally, the Wisconsin Supreme Court in *Shockley v. Prier*[133] recognized that, today, a child's earnings are viewed as his own.[134] Considering that Wisconsin law has lowered the age of majority from 21 to 18, the possibility of a parent acquiring a child's earnings are even more remote.[135] The *Shockley* case recognized that a parent's loss when a child is injured cannot be stated in purely pecuniary terms. The loss also includes damages to the family interest.[136] The *Theama* decision makes clear what was implicit in *Shockley*, that when the family relationship is the protected interest and a parent, a part of the relationship, is injured, the child's injury is more than simply pecuniary loss.

129. Green, *Relational Interests*, 29 ILL. L. REV. 462-64 (1935).

130. Note, *Wrongful Death Damages: Recovery of Investment In and Society and Companionship of a Child*, 27 OHIO ST. L.J. 355, 357 (1966).

131. *See, e.g.*, Young v. Young, 236 Ala. 627, 631, 184 So. 187, 191 (1938) (seduction); Meredith v. Buster, 209 Ky. 623, 273 S.W. 454 (1924) (abduction).

132. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 124 at 927 (5th ed. 1984).

133. 66 Wis. 2d 394, 225 N.W.2d 495 (1975).

134. *Id.* at 400, 225 N.W.2d at 499 (quoting Katz, Shroeder & Sidmen, *Emancipating Our Children—Coming of Legal Age in America*, 7 FAM. L.Q. 211, 224-25).

135. *Id.* at 399, 225 N.W.2d at 498.

136. *Id.* at 401, 225 N.W.2d at 499.

A strong policy justification compels the result of *Theama*. A child suffers a serious loss when deprived of a parent's society and companionship. The loss of these benefits can have a severe detrimental impact on the child's development, leading to adverse consequences on the child's welfare and personality for the duration of his life.[137]

A benefit of the court's ruling on *Theama* is that it eliminates possible inconsistencies in Wisconsin law. As stated, Wisconsin common law under *Shockley* permits a parent to recover for the loss of a child's society and companionship. Had the *Theama* court ruled in favor of the defendants, a child would be denied an analogous cause of action. If the interest sought to be protected in such cases is the family interest, a contrary decision in *Theama* would clearly lead to anomalous results. In the eyes of the law, the benefits of the parent-child relationship would, in effect, be a one-way street. Further, considering the possible impact on a child's development when a parent is injured, the child's interest in an undisturbed family relationship deserves at least as much, if not more, protection than a parent's similar interest. The *Theama* decision puts to rest these possible conflicts.

Aside from ending the possible inconsistencies at common law, *Theama* reduces possible conflicts with the Wisconsin wrongful death statute. Pursuant to the statute, a child may recover for the loss of the parents' society and companionship.[138] Denying the child's action would warrant the conclusion that, under Wisconsin law, the child suffers an injury worthy of compensation only when his parents are killed. If the parents' deaths are the essential element to the child's recovery under the wrongful death statute, it follows that a parent rendered comatose, permanently disabled or vegetative by a negligent act would not be grounds for a recovery by the child. In short, the law would distinguish between a dead and a nonfunctioning, but living, parent. Common sense dictates that such a distinction is without merit. In both situations, the child is deprived of the parent's society and companionship and the family relationship is severely damaged. The *Theama* decision illustrates that the Supreme Court of Wisconsin has not lost its common sense.

137. P. MUSSEN, J. CONGER & J. KAGAN, CHILD DEVELOPMENT AND PERSONALITY 404-06 (6th ed. 1984).

138. *See supra* note 43 and accompanying text. Illinois has a similar wrongful death act. ILL. REV. STAT. ch. 70 §§ 1-2.2 (1981). Under the Illinois statute, a child may recover for the loss of a deceased parent's society and guidance. The phrase "pecuniary injuries" as used in the statute has been interpreted to include the minor child being deprived of the deceased parent's companionship, guidance, love and affection. Hall v. Gillins, 13 Ill. 2d 26, 147 N.E.2d 352 (1958).

CONCLUSION

Despite the lack of supporting case precedent, the *Theama* court took a bold stand by recognizing a new cause of action for a child when a parent is negligently injured. In doing so, the court declined to adhere to dated case law founded upon an ancient view of the parent-child relationship. The court was willing to adapt the law to the perceived changing desires and needs of society.

The decision, however, does not solve all problems. Limitations and guidelines may quickly become necessary. Measuring damages may prove to be somewhat akin to a game of roulette. It may also be true that the court was motivated in part by a strong feeling of compassion for the aggrieved child. Nonetheless, when devastating loss has been suffered, the courts have the ability to offer the only practical relief, money damages. The problems are minor when compared to the tragic loss sustained, and these problems may be worked out in future cases. From the perspective of the child, the decision at worst affords inadequate relief as opposed to no relief. At best, the decision could provide a strong boost to the healthy mental and emotional development of the child if the award is properly applied.

Prior to *Theama*, Wisconsin case law afforded relief for loss of a spouse's consortium, society and companionship, and afforded relief for the loss of a child's society and companionship. Through these causes of action, the integrity of the family unit gained greater respect and protection. Logic and equity demanded the similar protection for the interests of the child. In creating the new course of action, the *Theama* court took the next logical step.