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Torts--Parent's Recovery for Loss of Society and Companionship of Child

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TORTS—PARENT'S RECOVERY FOR LOSS OF SOCIETY AND COMPANIONSHIP OF CHILD

In situations where a child has been killed or injured as the result of a third party's negligent, tortious act, case law overwhelmingly supports the view that a parent may not recover damages from the third-party tortfeasor for the loss of the child's society and companionship.[1] A growing minority of cases, however, have expreessly recognized that such losses are recoverable, and other cases have employed language susceptible to the interpretation that recovery for such losses may be allowed.[2] While most of this development has been in the area of wrongful death, rather than personal injury, the analysis for one area is without distinction from the analysis for the other.[3] Consideration will be given to the cases in which this issue has been raised, and to the justifications that courts have used to arrive at their decisions to exclude or include such loss as an element of damages.

I. The Traditional View: A Parent may not Recover For Loss Of A Child's Society And Companionship

Traditionally, a child was considered by the law to be in the same relationship with his parent as a servant was to his master.[4] That is, a child, like a servant, was thought to be solely an economic asset to his family because he was another source of income, at least to the extent of paying his upkeep. Child labor was crucial to the economic system at that time,[5] but socially, the child was

[1] *See generally* McGarr v. National & Providence Worsted Mills, 24 R.I. 447, 53 A. 320 (1902); Quinn v. City of Pittsburgh, 243 Pa. 521, 90 A. 353 (1914).

In a personal injury case, a parent may recover the entire value of the child's lost services on the theory that the parent will have to bear the cost of raising the injured child. C. McCormick, Handbook on the Law of Damages §91 (1935). In the wrongful death situation the parent has been allowed to recover only the value of the loss of services as reduced by the cost of raising the child who has been killed, and the value of such services and contributions as the parents could have reasonably expected to receive from that child during his majority. C. McCormick, Handbook on the Law of Damages §101 (1935).

[2] Annot., 69 A.L.R.3d 553, 555 (1976).

[3] In the analysis of the cause of action for loss of services and society of a child, courts freely cite as authority cases from either wrongful death or personal injury actions, regardless of which is before the bar in a particular suit. *See, e.g.*, Shockley v. Prier, 66 Wis.2d 394, 225 N.W.2d 495 (1975).

[4] Katz, Schroeder & Sidman, *Emancipating Our Children—Coming of Legal Age in America*, 7 Fam. L.Q. 211, 212 (1973).

[5] *Id.*

deemed to be of little worth. Intangible feelings such as sentiment, affection and companionship derived from the society of a child were deemed to be legally nonexistent.[6] This view of a child's place in society dates back to colonial America, where children occupied the lowest rung of the social ladder.[7]

As a result of this concept of a child's status, loss of services and wages of the injured or deceased child came to be recognized as a customary and necessary element of recoverable damages.[8] In most jurisdictions that considered the question, however, the view became firmly established that a parent had no cause of action for the recovery of damages for the loss of a child's society and companionship. This strictly pecuniary view of a parent's loss which results from a child's death was emphatically stated in *McGarr v. National & Providence Worsted Mills:*[9]

> [T]he proper measure of damages is the pecuniary value of the child's services from the time of the injury until it attains its majority . . . In short, the measure of damages in such a case is the same as that which obtains in a case brought by a master for the loss of services of his servant or apprentice. It is therefore practically a business and commercial question only, and the elements of affection and sentiment have no place therein.[10]

Today, most jurisdictions still recognize the traditional view and deny recovery for loss of society and companionship. Generally, courts do not discuss the basis of their holding that a parent is limited to recovery for loss of a child's services, and seem content to merely cite precedent that denies loss of society and companionship as elements of damage.[11] In New York, there have been three cases in which the issue has been raised since 1963.[12] Each of these

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[6] Love, *Tortious Interference with the Parent-Child Relationship: Loss of an Injured Person's Society and Companionship,* 51 IND. L.J. 590, 599 (1976).

[7] Under the English common law, there was no recovery allowed a parent for the wrongful death of a child; legally, a child was worthless to his parents. 25 BAYLOR L. REV. 118 (1973). To remedy this situation, Lord Campbell's Act, Originally, Fatal Accidents Act, 1846, 9 & 10 Vict. c. 93, was enacted by Parliament. While the act did not provide a yardstick by which to measure damages, the English court held that damages were to be based solely on pecuniary loss and not the loss of comfort, society and companionship. Blake v. Midland Ry. Co., 18 Q.B. 93, 118 Eng. Rep. 35 (1852).

[8] 25 BAYLOR L. REV. 118 (1973).

[9] 24 R.I. 447, 53 A. 320 (1902).

[10] *Id.* at 460-61, 53 A. at 325-26.

[11] Annot., 69 A.L.R.3d 553, 555 (1976).

[12] White v. City of New York, 37 A.D.2d 603, 322 N.Y.S. 2d 920 (1971); Beyer

three cases briefly hold that the loss of a child's society by a parent is not compensable; cite a 1946 case[13] as controlling; but give no explanation of why such a conclusion was made. Likewise, the Alabama,[14] North Dakota[15] and Mississippi[16] courts state that no recovery is allowable to a parent for loss of society and companionship of an injured child, but put forth no rationale for the decision.

Several courts denying recovery for loss of society and companionship to a parent, however, have presented additional grounds for denial. One such ground is that the loss of a child's society and companionship by a parent is intangible and therefore not compensable.[17] Money cannot really compensate the parent for the loss he suffers as the result of the death or injury of his child; thus, it is reasoned that the parent would be receiving a windfall benefit unrelated to the loss, rather than receiving compensation for actual damages incurred. The argument on this point results from balancing the inadequacy of monetary damages used to make the loss whole against the social cost of paying such awards.[18] Most awards of damages of this type would be satisfied by insurance policies, and the burden of paying such awards would be shouldered by the general public in the form of increased insurance

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v. Murray, 33 A.D.2d 246, 306 N.Y.S.2d 619 (1970); Foti v. Quittel, 19 A.D.2d 635, 241 N.Y.S.2d 15 (1963).

[13] Gilbert v. Stanton Brewery, 295 N.Y. 270, 67 N.E.2d 155 (1946). In *Gilbert v. Stanton Brewery*, the Court of Appeals of New York gives no reason for its denial of the cause of action either, except that Werbolovsky v. New York & Boston Despatch Exp. Co., 63 Misc. 329, 117 N.Y.S. 150 (1909), did not allow it. 295 N.Y. at 273, 67 N.E.2d at 156. *Werbolovsky*, cites without further explanation Barnes v. Keene, 132 N.Y. 13, 29 N.E. 1090 (1892), as authority for its holding. 63 Misc. at 330, 117 N.Y.S. at 150. *Barnes* states that the only allowable compensation is for pecuniary loss, including the value of the child's services, and cites as authority Cuming v. Brooklyn City R. Co., 109 N.Y. 95, 16 N.E. 65 (1888); Drew v. Sixth Ave. R. Co., 26 N.Y. 49 (1862); and Whitney v. Hitchcock, 4 Denio 461 (1847). 132 N.Y. at 15, 29 N.E. at 1090.

[14] Birmingham Ry., Light & Power Co. v. Baker, 161 Ala. 135, 136-37, 49 So. 755, 755-56 (1909).

[15] Kalsow v. Grob, 61 N.D. 119, 122, 237 N.W. 848, 849 (1931). In disallowing recovery for loss of society and companionship the court points out that such has been the law in North Dakota since 1900, and cites Haug v. Great N. Ry. Co., 8 N.D. 23, 77 N.W. 97 (1898), and Scherer v. Schlaberg, 18 N.D. 421, 122 N.W. 1000 (1909), as authority.

[16] Butler v. Chrestman, 264 So.2d 812, 816-17 (Miss. 1972).

[17] *E.g.*, Baxter v. Superior Court of Lost Angeles County, 19 Cal. 3d 461, 464, 563 P.2d 871, 873, 138 Cal. Rptr. 315, 317 (1977).

[18] Borer v. American Airlines, Inc., 19 Cal. 3d 441, 447, 563 P.2d 858, 862, 138 Cal. Rptr. 302, 306 (1977).

premiums or, otherwise, in the "enhanced danger" that accrues from a greater number of people choosing to go without insurance as the result of higher costs.[19]

The difficulty involved in measuring the damages actually suffered as a result of the loss of something as intangible as a child's society and companionship is also advanced as a reason to deny a parent's recovery.[20] A court may find it hard to set a standard by which to decide when an award of $10,000 is inadequate or an award of $500,000 is excessive.[21] This difficulty in defining and quantifying damages leads to a risk of double recovery,[22] for asking a jury to distinguish the loss to the parent of his child's society and companionship from his loss of the child's services may be asking too much.[23] While similar arguments have been raised and rejected in regard to a wife's action for loss of consortium,[24] courts respond with the rationale that such a holding in regard to the parent-child relationship "would imply an indefinite extension of liability for loss of consortium to all foreseeable relationships."[25] It appears that the courts which hold this view fear an uncontrollable trend in the judiciary to grant similar awards to more distant relations and friends of the injured child. Such a result would presumably flow from the precedent set by allowing a parent a

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[19] *Id.*

[20] Baxter v. Superior Court of Los Angeles County, 19 Cal. 3d 461, 464, 563 P.2d 871, 873, 138 Cal. Rptr. 315, 317 (1977).

[21] Borer v. American Airlines, Inc., 19 Cal. 3d 441, 448, 563 P.2d 858, 863, 138 Cal. Rptr. 302, 307 (1977).

[22] Baxter v. Superior Court of Los Angeles County, 19 Cal. 3d 461, 464, 563 P.2d 871, 873, 138 Cal. Rptr. 315, 317 (1977).

[23] *Cf.* Borer v. American Airlines, Inc., 19 Cal. 3d 441, 448, 563 P.2d 858, 863, 138 Cal. Rptr. 302, 307 (1977). It would appear that the allowance of lost society and companionship as an element of damages would not foreclose the use of loss of services as an element of damages, too. In Washington, which allows the recovery of lost society and companionship in wrongful death cases, Lockhart v. Besel, 71 Wash. 2d 112, 426 P.2d 605 (1967), a case has been heard in which the loss of society and companionship was allowed as an element of damages and the value of the child's services was an allowable element as well, but the evidence showed that the cost of care and maintenance would be more than or close to the value of the services, so the verdict was reduced to exlude any amount reflecting loss of services. Clark v. Icicle Irrigation Dist., 72 Wash. 2d 201, 432 P.2d 541 (1967).

[24] *See, e.g.,* Rodriguez v. Bethlehem Steel Corp., 12 Cal.3d 382, 525 P.2d 669, 115 Cal. Rptr. 765 (1974); Ekalo v. Constructive Service Corp. of America, 46 N.J. 82, 215 A.2d 1 (1965).

[25] Borer v. American Airlines, Inc., 19 Cal.3d 441, 448, 563 P.2d 858, 863, 138 Cal. Rptr. 302, 307 (1977).

recovery, when previously the damages in question were strictly confined to the marital relationship.

Finally, it has been argued that the logic used to award damages for loss of consortium in the marital relationship should be extended to the parent-child relationship. The basis of this argument is that consortium in the spousal relationship is the same as society and companionship in the parent-child relationship. Most courts, however, have found that loss of consortium is not analogous to the loss of society and companionship of a child because the marital relationship is significantly different from that of parent-child. In so doing, most courts cite the sexual aspects of the husband-wife relationship as one example of the difference. This very question was considered in *Brennan v. Biber*,[26] where the New Jersey court rejected the analogy.[27] The New Jersey court had only one year earlier allowed a wife a cause of action for loss of consortium when her husband was injured,[28] and the court in *Brennan* held that the cause of action for loss of consortium by a wife was an extension of the law that could be accomplished without "any compulsion of going farther"[29] and allowing a similar recovery in the parent-child relationship. Consortium, it is reasoned, is more than "services" in the ordinary sense.[30] The Supreme Court of California has held that there are significant differences between the marital relationship and the parent-child relationship, and that these differences support the limitation of a cause of action for loss of consortium to the marital situation.[31] The court defended

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[26] 93 N.J. Super. 351, 225 A.2d 742 (1966), *aff'd*, 99 N.J. Super. 247, 239 A.2d 261 (1968).

[27] *Id.* at 366-67, 225 A.2d at 750.

[28] Ekalo v. Constructive Service Corp. of America, 46 N.J. 82, 215 A.2d 1 (1965). In *Ekalo*, the New Jersey Supreme Court stated that, "[t]he law has always been most solicitous of the husband and wife relationship, perhaps more so than the parent and child relationship." *Id.* at 92, 215 A.2d at 6.

[29] 93 N.J. Super. at 367, 225 A.2d at 751.

[30] When a wife is incapacitated from furnishing her husband with the customary wifely society and companionship, the loss, past and prospective, is an element of damages the husband may recover from the wrongdoer. Apart from society and companionship, this loss of "consortium" which the husband may recover includes the value of the domestic duties the wife generally provides in return for the husband's duty to provide her with proper support and maintenance. *See* C. McCORMICK, HANDBOOK ON THE LAW OF DAMAGES §92 at 331-32 (1935).

[31] Borer v. American Airlines, Inc., 19 Cal.3d 441, 444, 563 P.2d 858, 860, 138 Cal. Rptr. 302, 304-05 (1977). Consortium has been defined as the "loss of conjugal fellowship and sexual relations." *Id.* at 443, 563 P.2d at 860, 138 Cal. Rptr. at 304. Other courts have reasoned that the husband-wife relationship is more worthy of protection than the parent-child relationship when the loss is of the intangible

this holding by pointing out that an "action for loss of consortium rests in large part on the 'impairment or destruction of the sexual life of the couple.' "[32] Clearly, no similar element of damage is present in the parent-child relationship.

Furthermore, though the loss of society and companionship in the parent-child relationship is just as foreseeable as the loss of consortium in the marital relationship, mere foreseeability of an injury to a legally-recognized relationship does not necessarily postulate a cause of action; social policy must at some point intervene to deter liability.[33] As Judge Breitel stated in *Tobin v. Grossman,*[34] "Every injury has ramifying consequences, like the rippling of the waters, without end. The problem for the law is to limit the legal consequences of wrongs to a controllable degree."[35] In dealing with the concept of foreseeability in this area, some courts state that if a cause of action for a parent's loss of society and companionship is allowed, then a cause of action for brothers, sisters, cousins, in-laws, friends, colleagues and acquaintances, who have been deprived of the injured party's companionship, will follow.[36] Conse-

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aspects of the relationship. *See, e.g.,* Pleasant v. Washington Sand & Gravel Co., 262 F.2d 471 (D.C. Cir. 1958); Smith v. Richardson, 277 Ala. 389, 171 So. 2d 96 (1965); Russell v. Salem Transp. Co., 61 N.J. 502, 295 A.2d 862 (1972); General Elec. Co. v. Bush, 88 Nev. 360, 498 P.2d 366 (1972). "Presumably, these courts have focused on the marital relationship as a source of sexual satisfaction." Love, *Tortious Interference with the Parent-Child Relationship: Loss of an Injured Person's Society and Companionship,* 51 IND. L.J. 590, 596-97 (1976).

[32] Borer v. American Airlines, Inc., 19 Cal. 3d 441, 448, 563 P.2d 858, 863, 138 Cal. Rptr. 302, 307 (1977) (quoting Rodriguez v. Bethlehem Steel Corp., 12 Cal. 3d 382, 405, 525 P.2d 669, 684, 115 Cal. Rptr. 765, 780 (1974)).

[33] Borer v. American Airlines, Inc., 19 Cal.3d 441, 446, 563 P.2d 858, 861, 138 Cal. Rptr. 302, 305 (1977). The *Borer* case actually determined that there was not an allowable cause of action for a child for the loss of parental consortium. The *Borer* case had a companion case, Baxter v. Superior Court of Los Angeles County, 19 Cal. 3d 461, 563 P.2d 871, 138 Cal. Rptr. 315 (1977), which determined that no cause of action existed for loss of a child's society and companionship. The reasoning and policy decisions used in *Borer* are often referred to and were relied on by the court in *Baxter* as controlling. 19 Cal.3d at 463, 563 P.2d at 872, 138 Cal. Rptr. at 316.

[34] 24 N.Y.2d 609, 301 N.Y.S.2d 554, 249 N.E.2d 419 (1969).

[35] *Id.* at 619, 301 N.Y.S.2d at 561, 249 N.E.2d at 424. The general thrust of this type of analysis is that "enough is enough" and the liability for which the negligent tortfeasor will be held responsible must be terminated at some point. The act which leads to the suit is not willfully done and hence, there is only so much that the negligent wrongdoer can be held accountable for before he is literally drained of all his resources.

[36] *See* Borer v. American Airlines, Inc., 19 Cal. 3d 441, 446, 563 P.2d 858, 862, 138 Cal. Rptr. 302, 306 (1977). The same court states in Baxter v. Superior Court

quently, whether to allow a cause of action in the parent-child relationship, when compared to the marital relationship, is a question of policy rather than logic.[37] The line must be drawn somewhere and the courts, absent a legislative determination, must draw it. Most jurisdictions have chosen to draw the line at the marital relationship. No other relationships, family or friend, will support an action for loss of society and companionship in these jurisdictions when such deprivation is the result of a negligently-inflicted injury.[38]

II. The Progressive View: A Parent May Recover For The Loss Of A Child's Society And Companionship

The narrow pecuniary-loss test, which excludes recovery for the loss of a child's society and companionship, may have met the needs of the community in the last century when the American society was still largely rural and a child was considered an economic asset to the family. Changes which have occurred in the economic life of our society since the test was first adopted, however, require reappraisal of its application today.[39] A child is no longer an economic asset to his family.[40] "It must be conceded that the majority of today's children render far less service to their parents than did children in the last century."[41] Child labor laws[42]

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of Los Angeles County, 19 Cal. 3d 461, 464, 563 P.2d 871, 873, 138 Cal. Rptr. 315, 317 (1977):

> To be sure, the risk of multiple claims and disproporionate awards is slightly less in the present context [a parent's action for loss of a child's society and companionship], since an injured child has only two parents who can sue for loss of consortium, while an injured parent may have many children. That minor difference between the cases [*Borer* and *Baxter*], however, plainly does not suffice to justify allowing a parental cause of action. . . .

[37] Ekalo v. Constructive Service Corp. of America, 46 N.J. 82, 92, 215 A.2d 1, 7 (1965); Borer v. American Airlines, Inc., 19 Cal. 3d 441, 446, 563 P.2d 858, 862, 138 Cal. Rptr. 302, 306 (1977). There are several states which do not allow a parental action for loss of society and companionship in a personal injury suit that will allow it in the case of wrongful death. *See generally* Zeller v. Reid, 38 Cal.2d 622, 101 P.2d 730 (1940) (allowing such a recovery under Cal. Civ. Proc. Code § 377 (Deering's Cum. Supp. 1977)); Kelley v. Ohio River R. Co., 58 W. Va. 216, 52 S.E. 520 (1905) (allowing recovery in a wrongful death action under the applicable statute, now found at W. Va. Code § 55-7-6 (Cum. Supp. 1977)).

[38] *Id.*

[39] Fussner v. Andert, 261 Minn. 347, 352, 113 N.W.2d 355, 359 (1961).

[40] Shockley v. Prier, 66 Wis.2d 394, 399, 225 N.W.2d 495, 498 (1975).

[41] Fussner v. Andert, 261 Minn. 347, 352, 113 N.W.2d 355, 359 (1961).

[42] Employment of children, where interstate commerce is involved, is regulated today by the Fair Labor Standards Act, 29 U.S.C. §§ 201-219, especially 29 U.S.C.

and the great increases in school and college attendance[43] have resulted in fewer children working outside the home. A child's true value to his or her parent, once considered to be only sentimental in character, should now be recognized as being that value manifested by the society and comfort which flow from the relationship.[44]

In recent years, several courts have taken notice of these societal changes and have recognized that the pecuniary-loss test is outmoded and does not, by itself, provide a proper vehicle for assessing the damages incurred by a parent when his child has been injured. These courts have stepped into a previously unexplored realm and permitted recovery for lost society and companionship.

One reason put forth by these courts for allowing such recovery is that the loss of consortium in the spousal relationship is analogous to the loss of society and companionship of a child. Although the California court has rejected the analogous cause of action[45] largely because it fears an uncontrollable extension of such recovery to more distant relationships,[46] the same court has stated, "That the law might be urged to move too far . . . is an unacceptable excuse for not moving at all."[47] While it must be admitted that damages awarded for loss of marital consortium include compensation for the interruption of normal sexual relations that do not exist in the parent-child relationship, courts should not overlook the fact that consortium includes more than just sexual relations.[48] Consor-

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§ 203(1), 212 and 213(c) and (d) (1949). The several states have also enacted laws which regulate the use of child labor within each state. *See, e.g.,* W. VA. CODE §§ 21-6-1 to -11 (1973 Replacement Vol.) *as amended by* W. VA. CODE §§ 21-6-2, -3, -4, -7, -8(a) and -11 (Cum. Supp. 1977); MICH. STAT. ANN. § 17.701-17.730 (1975 Replacement Vol.); ILL. ANN. STAT. ch. 48, § 31.1-31.22 (Smith-Hurd 1969) *as amended by* ILL. ANN. STAT. ch. 48, §§ 31.1, 31.2, 31.3, 31.6 31.7, 31.9, 31.13 and 31.19 (Smith-Hurd Cum. Supp. 1977).

[43] Fussner v. Andert, 261 Minn. 347, 353, 113 N.W.2d 355, 359 (1961).

[44] *Id.*

[45] Baxter v. Superior Court of Los Angeles County, 19 Cal. 3d 461, 563 P.2d 871, 138 Cal. Rptr. 315 (1977).

[46] *See* Borer v. American Airlines, Inc., 19 Cal. 3d 441, 563 P.2d 858, 138 Cal. Rptr. 302 (1977) (analysis relied on in *Baxter).*The *Baxter* case involved the question of a parent's right to recover loss of society and companionship for a negligently-inflicted injury; the court found that the parent could not recover.

[47] Rodriquez v. Bethlehem Steel Corp., 12 Cal.3d 382, 404, 115 Cal. Rptr. 765, 779, 525 P.2d 669, 683 (1974).

[48] Nicholson v. Blanchette, 239 Md. 168, 182-83, 210 A.2d 732, 740 (1965); Murray v. Murray, 30 N.M. 557, 558-59, 240 P. 303, 304 (1925).

tium has been defined by various courts to include aid,[49] comfort,[50] moral support,[51] affection,[52] society[53] and companionship, as well as sexual relations.[54] The nonsexual loss suffered by a spouse is at least as great as the sexual loss. The companionship and moral support that a marriage provides is no less important to each spouse than is the sexual side of the relationship.[55] A parent should not be denied an action for society and companionship lost when his child is negligently injured or killed simply because the sexual relations present in a marriage are not present in the parent-child relationship.[56]

The contention is also made that because the elements of society and companionship are intangible they cannot be adequately compensated and therefore should not be compensated at all in order to avoid having a parent receive an award unrelated to an injury.[57] Universally, a parent would rather have the child alive or uninjured than have monetary compensation for the loss. While it is true that the monetary award cannot actually replace the loss of society and companionship,[58] courts frequently allow damages in other areas where the impairment cannot be replaced. Clearly, a monetary award cannot replace lost consortium; it cannot replace an arm or a leg lost as a result of a tortiously inflicted injury; it cannot replace sight to a man blinded by an accident, nor hearing to a man who is deaf. Nevertheless, courts regularly allow

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[49] Henley v. Rockett, 243 Ala. 172, 174, 8 So.2d 852, 853 (1942); McMillan v. Smith, 47 Ga. App. 646, 646, 171 S.E. 169, 170 (1933); Bradstreet v. Wallace, 254 Mass. 509, 510, 150 N.E. 405, 406 (1926).

[50] Knighton v. Knighton, 252 Ala. 520, 523, 41 So.2d 172, 174 (1949); Thill v. Modern Erecting Co., 284 Minn. 508, 510, 170 N.W.2d 865, 867 (1969).

[51] American Airlines, Inc., 19 Cal. 3d 441, 455, 563 P.2d 858, 868, 138 Cal. Rptr. 302, 312 (1977) (Mosk, J., dissenting).

[52] Little Rock Gas & Fuel Co. v. Coppedge, 116 Ark. 334, 349, 172 S.W. 885, 890 (1915); Lampe v. Lagomarcino-Grupe Co., 251 Iowa 204, 206, 100 N.W.2d 1,2 (1959).

[53] Reeves v. Lutz, 179 Mo. App. 61, 85, 162 S.W. 280, 286 (1913); Cook v. Atlantic Coast Line R.R. Co., 196 S.C. 230, 241, 13 S.E.2d 1,6 (1941); Dobrient v. Ciskowski, 54 Wis. 2d 419, 423, 195 N.W.2d 449, 451 (1972).

[54] *E.g.*, Hobbs v. Holliman, 74 Ga. App. 735, 739, 41 S.E.2d 332, 335 (1947); Hoekstra v. Helgeland, 78 S.D. 82, 88, 98 N.W.2d 669, 682 (1959); Hanson v. Valdivia, 51 Wis. 2d 466, 473, 187 N.W.2d 151, 155 (1971).

[55] Rodriguez v. Bethlehem Steel Corp., 12 Cal. 3d 382, 405-06, 525 P.2d 669, 684, 115 Cal. Rptr. 765, 780 (1974).

[56] Borer v. American Airlines, Inc., 19 Cal. 3d 441, 456, 563 P.2d 858, 868, 138 Cal. Rptr. 302, 312 (1977) (Mosk, J., dissenting).

[57] *Id.* at 447, 563 P.2d at 862, 138 Cal. Rptr. at 306.

[58] Gresham v. Courson, 177 So.2d 33, 39 (Fla. Dist. Ct. App. 1965).

damages under these circumstances[59] and the argument that the injured item itself is not replaced is never heard. Lost society and companionship *is* intangible, but to a parent, it is no less real an injury than any of the injuries mentioned above.[60]

Furthermore, extending liability for negligently inflicting loss of a child's society and companionship on a parent will not result in an implied cause of action for other more distant relatives. Courts may avoid the occurrence of any extension by placing an express limitation on the allowed action to the parent-child relationship. An action for loss of society and companionship should logically follow from the parent-child relationship.[61] A court could certainly allow the action without creating a corresponding claim in brothers, sisters, cousins, aunts, uncles and friends.

The argument that it may be too much to ask a jury to distinguish the loss of a child's society and companionship from the loss of services[62] is another position that has been rebutted by the very courts that have advanced such a position. Juries regularly award damages for pain and suffering,[63] emotional distress and mental anguish[64] in conjunction with damages for actual pecuniary loss. These awards are regulated by trial court instructions which spell out the elements of damages which may be considered.[65] Our system of justice relies on the ability of the jury to so determine damages in keeping with instructions of law given by the court. Even when an excessive verdict is returned, the court has the duty to reduce it to an amount reasonably commensurate with the proven damages.[66] Simply stated, the nature of the jury system

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[59] Brandt v. C. F. Smith & Co., 242 Mich. 217, 218 N.W. 803 (1928) (blindness); Gerdes v. Christopher & Simpson Architectural Iron & Foundry Co., 124 Mo. 347, 27 S.W. 615 (1894) (loss of a leg); Bjorndal v. Lane, 157 Mont. 543, 487 P.2d 527 (1971) (loss of a finger); Houston, E. & W. T. Ry. Co. v. Roach, 52 Tex. Civ. App. 95, 114 S.W. 418 (1908) (impairment of hearing).

[60] The tortfeasor should not be allowed to shield his liability because monetary compensation cannot actually replace that which is lost. When an injury has been caused it ought to be compensated. Presently, monetary compensation is the means available to do so.

[61] Lockhart v. Besel, 71 Wash.2d 112, 117, 426 P.2d 605, 609 (1967).

[62] *See* text accompanying notes 23-28, *supra.*

[63] *E.g.*, American Fidelity & Cas. Co. v. Farmer, 77 Ga. App. 187, 48 S.E.2d 137 (1948).

[64] *See* Wallace v. Coca-Cola Bottling Plants, Inc., 269 A.2d 117 (Me. 1970); Monteleone v. Co-Operative Transit Co., 128 W. Va. 340, 36 S.E.2d 475 (1945).

[65] Hoekstra v. Helgeland, 78 S.D. 82, 107, 98 N.W.2d 669, 682 (1959).

[66] When an excessive verdict is rendered the trial judge may order that the winning party enter a remittitur. If the party refuses, the case stands reversed and

itself allows determination of these types of damages.

The most often-cited reason for not allowing a recovery by a parent for lost society and companionship of a child is the lack of judicial precedent.[67] This argument is no longer valid. In the past decade courts have increasingly stepped into this previously almost unexplored realm and permitted a recovery for lost society and companionship by parents. Cases differ in approach, reasoning and limitations on the action, but all concur on one point: the pecuniary-loss test is outmoded and does not, by itself, provide a proper vehicle for assessing the damages a parent incurs when a child has been injured.

One state supreme court has reasoned that lost society and companionship is actually a "pecuniary loss" suffered by the parent, as that term is used in the state's wrongful death statute.[68] Some statutes actually include loss of society and companionship as express elements of damage in the wrongful death suit while other statutes limit recovery for wrongful death to pecuniary loss only, although pecuniary loss is not defined.[69] Only Michigan has gone so far as to interpret pecuniary loss to include society and companionship.[70] The Michigan Supreme Court was able to ration-

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he can go before another jury at another trial. Jacksonville Tractor Co. v. Steelbach, 117 Fla. 233, 234, 157 So. 509 (1934); Annot., 95 A.L.R. 1163 (1935). Likewise, an appellate court can order the reduction of compensatory damages when they are excessive and if the winning party refuses, a new trial shall be ordered. Seested v. Post Printing & Publishing Co., 326 Mo. 559, 31 S.W.2d 1045 (1930). The new trial, if necessary, may either be *de novo* or confined to the determination of damages with the previous finding of liability left standing, at the discretion of the court ordering the new trial. Jacksonville Tractor Co. v. Steelbach, 117 Fla. at 234, 157 So. at 509. C. McCORMICK, HANDBOOK ON THE LAW OF DAMAGES § 19 (1935).

[67] Love, *Tortious Interference with the Parent-Child Relationship: Loss of an Injured Person's Society and Companionship*, 51 IND. L.J. 590, 595 (1976).

[68] Fussner v. Andert, 261 Minn. 347, 352-53, 113 N.W.2d 355, 359 (1961). The statute the court was interpreting may be found at MINN. STAT. ANN. § 573.02, subd. 1 (West Cum. Supp. 1978).

[69] *E.g.*, ILL. ANN. STAT. ch 70, § 2 (Smith-Hurd Cum. Supp. 1977); NEB. REV. STAT. § 30-810 (Reissue of 1975); N.Y. EST., POWERS & TRUSTS LAW § 5.43 (McKinney 1967).

[70] Wycko v. Gnodtke, 361 Mich. 331, 105 N.W.2d 118 (1960). *But see* Breckon v. Franklin Fuel Co., 383 Mich. 251, 174 N.W.2d 836 (1970). In *Breckon*, the same Michigan court said that it had never intended that its opinion in *Wycko* be interpreted as including loss of society and companionship as compensable elements of pecuniary loss. In Smith v. City of Detroit, 388 Mich. 637, 202 N.W.2d 300 (1972), the Michigan court reversed itself by expressly overruling *Breckon* and reinstating the holding of *Wycko*, thus allowing loss of companionship as an element of damages under that state's Wrongful Death Act. *Id.* at 651, 202 N.W.2d at 304.

alize this interpretation as one made in light of modern conditions. Other statutes give little guidance as to the allowable elements of recovery, and leave that determination to the judiciary.[71] Some wrongful death statutes specifically spell out lost society and companionship as elements to be considered in awarding damages for wrongful death.[72] In states with the latter type of statutes there can be no argument but that public policy favors the consideration of these elements of damage, but courts in most of these states, and in others where the loss is an allowable element of damages for wrongful death of a child without express statutory authority, still encounter self-inflicted difficulty in expanding the policy of including elements of society and companionship to the cases where the victim was negligently injured and survived.[73]

Among the courts allowing an action by a parent for lost society and companionship in a wrongful death suit, there is some controversy concerning the effect of the child's reaching majority

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In Bridges v. Stephens, 238 Ark. 801, 803, 384 S.Wd.2d 490, 492 (1964), the Arkansas court held that the statutory language referring to "pecuniary injuries" is not limited to a strictly financial support interpretation, but rather should "include compensation for the loss of love, care, supervision, and training." The court in *Bridges* was addressing the question as it related to a child's recovery for the wrongful death of a parent.

[71] *E.g.*, IDAHO CODE § 5-311 ((Cum. Supp. 1977); UTAH CODE ANN. § 78-11-7 (1953). These statutory provisions contain language to the effect that damages will be allowed that are, under all the circumstances, fair and just.

[72] *E.g.*, OKLA. STAT. ANN. tit. 12, § 1055 (West Cum. Supp. 1977-1978); VA. CODE § 8.01-52 (1977 Replacement Vol.); W. VA. CODE ANN. § 55-7-6 (Cum. Supp. 1977).

[73] California is a prime example of this. In Baxter v. Superior Court of Los Angeles County, 19 Cal. 3d 461, 563 P.2d 871, 138 Cal. Rptr. 315 (1977), the California court rejected an attempt to include loss of society and companionship as an element of damages in a personal injury case. Earlier, in an action by a husband for his wife's wrongful death, the same court allowed the elements of lost society and companionship to be included in the recovery. Krouse v. Graham, 19 Cal.3d 59, 137 Cal. Rptr. 863, 562 P.2d 1022 (1971). This distinction seems to be untenable. It is difficult to understand how a court can rationalize that a parent whose child becomes permanently bed-ridden due to an injury is not suffering loss of society and companionship while a parent whose child is killed does. In either case, the parents are deprived of the normal relations that they would usually enjoy during their mutual lives. In each instance the child in unable to play ball with his father or go shopping with her mother or participate with the family on picnics or a thousand other things that are the natural outgrowth of the parent-child relationship. While it must be admitted that the personal injury cases will usually involve injuries less severe than this, the jury can determine the damages for loss of society and companionship actually lost as a result of the injury actually incurred, just is they now determine the value of such in a wrongful death action.

on the parent's ability to maintain the action. Among the small number of jurisdictions presently allowing the action no consensus is yet discernible. The courts can choose from among several options in this regard: 1) the injury must occur while the child is a minor and damages will be limited to the remaining period of minority;[74] 2) the injury must occur while the child is a minor, but damages may be awarded for the expectancy of the parent-child mutual life[75] and 3) a cause of action will accrue to parents regardless of the child's age at the time of the accident.[76]

Some courts have given damages for "loss of services" in such amount that it seems obvious that, without saying so, they are allowing recovery for loss of society and companionship.[77] A much more realistic situation would exist if these courts would announce that they are allowing compensation for loss of society and companionship so that juries can know for what they are awarding damages, and therefore make a more informed and more knowledgeable determination.[78]

The Supreme Court of Wisconsin in *Shockley v. Prier*[79] may have loosened the single key stone that will cause the nation's courts to follow suit and allow this cause of action to be more widely accepted. The court in *Shockley* began by noting that the age old rule denying the recovery was court-made and hence could be court-changed, without previous precedent, in light of modern societal conditions.[80] The court then proceeded to explain which various policy reasons it relied on and why the recent cases in other jurisdictions expressly denying such a cause of action were insuffi-

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[74] *See* Wardlow v. Keokuk, 190 N.W.2d 439 (Iowa 1971).

[75] *Cf.* Currie v. Fitting, 375 Mich. 440, 134 N.W.2d 611 (1965).

[76] Kelley v. Ohio River R.R. Co., 58 W. Va. 216, 52 S.E. 520 (1905). In this case, the father, 75 years old, was allowed to maintain an action for his son's wrongful death. His son was 37 years old at the time of his death.

[77] Fussner v. Andert, 261 Minn. 347, 354, 113 N.W.2d 355, 360 (1961). The Minnesota court says that it has long allowed excessive verdicts to stand without close scrutiny to determine the actual extent of monetary loss. As examples of this practice the court cited Tollafson v. Ehlers, 252 Minn. 370, 90 N.W.2d 205 (1958); Schroht v. Voll, 245 Minn. 114, 71 N.W.2d 843 (1955); and Moore v. Palen, 228 Minn. 148, 36 N.W.2d 540 (1949).

[78] If verdicts are going to be allowed which include elements that are not ordinarily equated in dollar value, jurors should be so instructed in the interest of fairness and uniformity. Fussner v. Andert, 261 Minn. 347, 359, 113 N.W.2d 355, 362-63 (1961).

[79] 66 Wis.2d 394, 225 N.W.2d 495 (1975).

[80] *Id.* at 397, 225 N.W.2d at 497.

cient to convince it not to take the step it did.[81]

The "Pandora's Box effect" feared by many courts was avoided by the *Shockley* court because the court limited the action to the parent-child relationship and to cases arising after the date of the opinion. Further, the claim was limited to those cases where the parent's cause of action is combined with that of the child's for his personal injuries.[82] These limitations make the opinion restrictive as to its application and avoid any inference of a logical extension of such a claim to any relationship more remote than that of parent-child.

III. The View In West Virginia

The West Virginia Supreme Court of Appeals has not directly considered the allowance of loss of society and companionship as an element of damages for a parent in a personal injury action, but in all cases dealing with a parent's recovery for a child's injury, the recovery has been limited to the pecuniary loss.[83] In *Jordon v.*

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[81] The court noted in its unanimous decision that it had already broken the common law rules and allowed an action to a wife for loss of consortium in Moran v. Quality Aluminum Casting Co., 34 Wis.2d 542, 150 N.W.2d 137 (1967), and that by doing so, it showed the genius of the common law to be its ability to adapt to the changing needs of society. The court further explained that society and its views of children have changed since the common law rule was formulated and in light of these changes, the old pecuniary-loss test is now inadequate. "[T]oday's relationship between parents and children is, or should be, more than that between master and servant." 66 Wis.2d at 402, 225 N.W.2d at 500. The court also based its conclusion on recent decisions in the wrongful death area that have allowed society and companionship to be considered as elements of damages, and cited Lockhart v. Besel, 71 Wash.2d 112, 426 P.2d 605 (1967), as the leading case.

[82] 66 Wis.2d at 404, 225 N.W.2d at 501.

[83] A possible obstacle to West Virginia's adoption of society and companionship as elements of damage in a personal injury action may be in the state's constitution which states that the common law shall continue as the law in West Virginia until altered or repealed by the legislature. W. Va. Const. art. VIII, § 13. Further, W. Va. Code § 2-1-1 (1971 Replacement Vol.) requires that the common law of England "except in those respects wherein it was altered by the general assembly of Virginia" before West Virginia was granted statehood on June 20, 1863, shall remain the law until altered by the legislature. The English common law only allowed damages for the pecuniary loss, measured by loss of services, in which society and companionship played no part. *See* Katz, Schroeder & Sidman, *Emancipating Our Children—Coming of Legal Age in America,* 7 Fam. L.Q. 211 (1973). Neither the Virginia assembly, prior to 1863, nor the West Virginia legislature since that time have changed the English common law rule with respect to the allowable elements of damage in a personal injury suit, though both states have made the express change, in regard to wrongful death, of allowing loss of society and companionship as elements of damage the jury may consider. Va. Code § 8.01-52 (1977 Replacement Vol.); W. Va. Code § 55-7-6 (Cum. Supp. 1977).

Bero,[84] the court ruled out the possibility of allowing the recovery under the guise of loss of services, by stating, "A verdict which is not supported by the evidence or is so large that it indicates that the jury was influenced by passion, partiality, prejudice or entertained a mistaken view of the case, should be set aside."[85] Consequently, evidence tending to establish the probability of future *pecuniary* loss to the parents must be shown in order to allow any recovery for damages in West Virginia, and lost society and companionship are not included therein.

The situation is vastly different in the field of wrongful death. Case law has long allowed these elements to be considered under the wrongful death statute and gives the jury the ability to award damages deemed "fair and just" up to $10,000.[86] In 1976, the legislature took West Virginia one step farther by enacting a new wrongful death statute which expressly allows society and companionship to be considered as elements of damages, and provides no limitation on the amount that can be awarded, other than that it be "fair and just."[87] The cause of action for wrongful death exists for any parent and is unrestricted by limits on the child's age. In West Virginia, whether the child had reached majority is of no consequence to the parent's cause of action for wrongful death.[88]

IV. CONCLUSION

The majority of American jurisdictions still cling to the old pecuniary-loss test in determining an award for a child's injury in an action brought by the parent. Such reliance on principles that relate back to a period when children worked long hours each day in a factory is a failure to recognize the true conditions of modern society and the relationships that exist as a result thereof. Taken to its extreme, a strict application of the pecuniary-loss test would more times than not result in a parent returning from a wrongful death or personal injury action empty-handed, as the cost of raising a child has, in most instances, now exceeded the services and earnings a child can provide to the parent.

The modern approach that some courts have taken is a realis-

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[84] 210 S.E.2d 618 (W. Va. 1974).

[85] 210 S.E.2d at 639.

[86] W. VA. CODE § 55-7-6 (1966) (current version at W. VA. CODE § 55-7-6 (Cum. Supp. 1977)).

[87] W. VA. CODE § 55-7-6 (Cum. Supp. 1977).

[88] Kelley v. Ohio River R.R. Co., 58 W. Va. 216, 52 S.E. 520 (1905).

tic one that compensates a parent for the real loss he suffers as a result of a child's negligent injury or death. The elements of damages to be considered are honestly presented to the jury, so the jury is left in a position to be fairer in assessing the damages and to avoid the temptation to ignore the language of the law and make awards in excess of those the parent is entitled to recover.

Just as courts have recognized that a wife has a cause of action for loss of consortium when her husband is injured,[89] so too should the loss of society and companionship in the parent-child relationship eventually be accepted. The age-old rationale for denying a parent an action for society and companionship ought to crumble in the face of twentieth century realities and the drastic change that has occurred in a child's place in society.

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[89] *See, e.g.*, Brennan v. Biber, 93 N.J. Super. 351, 225 A.2d 742 (1966), *aff'd*, 99 N.J. Super. 247, 239 A.2d 261 (1968).