Kentucky Law Journal

Volume 52 | Issue 4 Article 11

1964

Husband and Wife--Damages--Wife's Right to Damages for Loss of Consortium Due to Negligent Injury of Husband

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HUSBAND AND WIFE—DAMAGES—WIFE'S RIGHT TO DAMAGES FOR LOSS OF CONSORTIUM DUE TO NEGLIGENT INJURY OF HUSBAND.—The plaintiff's husband was injured when his vehicle was struck at a railroad crossing. The defendant railroad had been found negligent in a previous action,[1] and had been held liable to the husband for his injuries. The wife, suing for loss of consortium, urged the court to reconsider its previous stand denying the wife a cause of action growing out of the injury negligently inflicted upon her husband,[2] on the ground that other jurisdictions have recently allowed such an action.[3] *Held:* Judgment for defendant affirmed. "Since there is a diversity of opinion among the courts in other jurisdictions and this court . . . having regard for stare decisis, we affirm the judgment." *Baird v. Cincinnati, N. O. & T. Pac. R.R.*, 368 S.W.2d 172, 174 (Ky. 1963).

Consortium is defined as the conjugal fellowship of husband and wife.[4] The concept of a cause of action for the loss of this fellowship originated during a period of history when the wife had few legal privileges. She could neither sue nor be sued. She could not own property as she was property of her husband. The action for consortium was based on this proprietary interest which husbands had in their wives. Interference with consortium was an interference with the natural use of property and constituted actionable trespass upon that property right.[5] The wife had no corresponding property interest in the husband, and therefore she was given no right of action for an interference with her consortium.[6]

After the passage of the Married Woman's Acts,[7] the courts were forced to consider whether a wife should be allowed a cause of action for the loss of, or interference with, her consortium. Prior to 1950, the courts almost uniformly held such a right did exist in case of

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[1] Baird v. Cincinnati, N.O. & T. Pac. Ry., 315 F.2d 717 (6th Cir. 1963).

[2] Cravens v. Louisville & N. Ry., 195 Ky. 257, 242 S.W. 628 (1922); LaEase v. Cincinnati, N. & C. Ry., 249 S.W.2d 534 (Ky. 1952).

[3] Dini V. Naiditch, 20 Ill. 2d 406, 170 N.E.2d 881 (1963); Montgomery v. Stephan, 359 Mich. 33, 101 N.W.2d 227 (1960); Brown v. Ga.-Tenn. Coaches Inc., 88 Ga. App. 519, 77 S.E.2d 24 (1953); Acuff v. Schmit, 248 Iowa 272, 78 N.W.2d 480 (1956); Missouri P. Transportation Co. v. Miller, 227 Ark. 351, 299 S.W.2d 41 (1957); Hitaffer v. Argonne Co. 87 App. D.C. 57, 183 F.2d 811, *cert. denied* 340 U.S. 852 (1950).

[4] Black, Law Dictionary 382 (4th ed. 1951); In Dini v. Naiditch, *supra* note 3, at 891, the court said, "Consortium includes in addition to material sources, elements of companionship, felicity, and sexual intercourse, all welded into a conceptual unity."

[5] Holbrook, *The Change in the Meaning of Consortium,* 22 Mich. L. Rev. 1 (1923).

[6] 8 Holsworth, A History of English Law 427 (2d ed. 1937); 1 Blackstone, Commentaries 442.

[7] See, *e.g.*, Ky. Acts ch. 52 §§ 505, 506 (1894), now KRS 404.010 (1954).

intentional interference,[8] but that no such right existed in cases of negligent interference.[9] Reasons advanced for denying recovery for loss of, or interference with, a wife's consortium in negligence cases were: (1) possibility of double recovery since a husband can recover in his own action for his diminished ability to support his family; (2) unforeseeability and remoteness of the injury; and (3) the theory that a wife has no right corresponding to a husband's right to her services.[10]

Hitaffer v. Argonne,[11] a 1950 federal court decision, made a complete departure from the prevailing rule and allowed a wife to recover for the loss of the consortium of her husband as a result of his negligent injury.[12] The court, after an extensive review of the prior litigation on the subject, found that consortium consisted of more than just material services,[13] and found love, affection, and sexual relations to be predominant elements, the loss of which were a direct damage to a wife. Refusing to be bound by stare decisis, the court found that the reasons advanced for denying a wife a cause of action for negligent interference with her right to consortium were insufficient.[14]

The legal logic of the *Hitaffer* case is irrefutable. It reflects the same thinking and reaches the same conclusion as the major treatises on the subject.[15] The effect of the case has been to spearhead a trend toward allowing the wife equal recovery with the husband for loss of

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[8] See, *e.g.*, Clark v. Hill, 69 Mo. App. 541 (1897); Turner v. Heavrin, 182 Ky. 65, 206 S.W. 23 (1918).

[9] Feueff v. New York Cent. & H. R.Ry., 203 Mass. 278, 89 N.E. 436, (1909); Stout v. Kansas City Terminal R.R., 172 Mo. App. 113, 157 S.W. 1019 (1913); Cravens v. Louisville & N. R.R., 195 Ky. 257, 242 S.W. 628 (1922).

[10] Baird v. Cincinnati, N.O. & T. Pac. R.R., 368 S.W.2d 172, 173 (Ky. 1963).

[11] 87 App. D.C. 57, 183 F.2d 811 (D.C. Cir. 1950), *cert. denied* 340 U.S. 852 (1950).

[12] The *Hitaffer* case has been overruled in part by Smither & Co. v. Coles, 100 U.S. App. D.C. 68, 242 F.2d 220 (D.C. Cir. 1957), where the court said that a wife of an employee who received full benefits under a workmen's compensation statute was barred from recovering from the employer for loss of consortium in view of the statute.

[13] The idea that consortium is made primarily of material services and that this loss is compensated for in the husband's separate action is one advanced by many courts in denying the wife a cause of action. Those courts fear that to allow the wife's action would result in double recovery. See, *e.g.*, Marri v. Stamford St. Ry., 84 Conn. 9, 78 Atl. 582 (1911).

[14] Among the reasons advanced for denying recovery, other than double recovery and remoteness of injury are: if a cause of action is to be allowed the wife, it must come from the legislature. Ash v. S.S. Mullon Inc., 43 Wash. 2d 345, 261 P.2d 118 (1953); no right of recovery in wife for loss of sentimental services, Stout v. Kansas City Terminal Ry., 172 Mo. App. 113, 157 S.W. 1019 (1913).

[15] Prosser, Torts 704 (2d ed. 1955); 1 Harper & James, Torts 635 (1st ed. 1956); Annot., 23 A.L.R.2d 1378 (1952).

consortium. Eleven state courts[16] and several federal district courts have considered the problem since 1950, and basing their verdicts on the reasoning of the *Hitaffer* case, have overruled contrary decisions and allowed the wife a cause of action. During this same period, seventeen states refused to follow the *Hitaffer* case.[17]

The principal case is the second time the question of a wife's right to recover for the negligent interference with her right to consortium has been before the Kentucky court since the *Hitaffer* decision. In 1952, in *LaEase v. Cincinnati, N. & C. Ry.*,[18] the court, while acknowledging the *Hitaffer* decision, felt bound by stare decisis and denied recovery without any discussion of the actual problem involved. In the principal case, the court made a complete examination of the problem involved and the progress of the law on the subject, taking special note of the progress since 1950 and the *Hitaffer* case. The court in its closing paragraph summed up its findings:

> In the present age the distinction between the right of a wife and of a husband to maintain the action is at odds with reason. The same may be said as to the inconsistency inherent in recognizing a wife has a cause of action for the impairment of consortium where her husband's injury was the result of an intentional or malicious wrong, but not where it is the result of negligence. Nevertheless, since there is a diversity of opinion among the courts in other jurisdictions and this court has heretofore expressly declined to depart from its earlier decision, having regard for the doctrine of stare decisis, we affirm the judgment.[19]

It is felt that the court placed undue weight on the doctrine of stare decisis[20] and it is urged that at its next opportunity the court bestow upon the wife this right of action for the negligent interference with her consortium.

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CONTRACTS—CONSIDERATION—EFFECT OF SUBSEQUENT COMPROMISE FOR MORE MONEY.—The defendant advertised for subcontractor bids on various phases of a large construction project. The plaintiff, a subcontractor, submitted a bid to the defendant, and was subsequently advised that its figure would be used in defendant's bid. The de-

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[16] Baird v. Cincinnati, N.O. & T. Pac. R.R., *supra* note 10, at 174.
[17] *Ibid.*
[18] 249 S.W.2d 534 (Ky. 1952).
[19] Baird v. Cincinnati, N.O. & T. Pac. R.R., *supra* note 10, at 174.
[20] "It is as much the duty of this court to restore a right which has been erroneously withheld by judicial opinion as it is to recognize it properly in the first instance. We do indeed have a 'charge to keep', but that is not a charge to perpetuate error. . . ." Felton, Judge, in Brown v. Ga.-Tenn. Coaches, Inc., 88 Ga. App. 519, 527; 77 S.E.2d 24, 32 (1953).