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DOMESTIC RELATIONS—RIGHT OF WIFE TO SUE FOR LOSS OF CONSORTIUM DUE TO A NEGLIGENT INJURY TO HER HUSBAND

Any student of the law of domestic relations will note the lack of uniformity which allows a husband to recover pecuniary damages for the loss of consortium due to a negligent injury to his wife by a third person, but does not grant a corresponding right under similar circumstances to a wife.

For example, D, while driving his automobile, negligently runs over and injures W, the wife of H. By the great weight of authority, H may bring an action and recover for his loss of consortium due to the negligence of D, and prior recovery by W, for the personal injuries she sustained will not preclude H's recovery.[1]

However, a simple reversal of the injured parties in the above set of facts will cause a different result. To illustrate, D, in negligently operating his automobile runs over the husband H instead of his wife W. D will be liable to H for the injuries he sustained but it is well settled that W cannot maintain an action for the loss of consortium she suffered due to the negligence of D.[2]

It is apparent, therefore, that this lack of a corresponding right on the part of the wife denotes something in the marital status upon which the courts have seized to reach this inconsistent result. One explanation is that at common law the wife's identity merged with that of her husband and they became one person in law,[3] the wife being unable to bring an action for redress for injuries to her person or property without the joinder of her husband.[4] This loss, as a result of marriage, of the ability to sue alone has been advanced as a reason for the absence of

[1] Commercial Carriers, Inc. et al. v. Small, 277 Ky. 189, 126 S.W. 2d 143 (1939); Brahan v. Meridian Light & Ry. Co., 121 Miss. 269, 83 So. 467 (1919); Matteson v. New York Central R.R., 35 N. Y. 487 (1866).

[2] Fuller v. American Telephone & Telegraph Co., 21 F. Supp. 741 (1937); Hoagland v. L. & N. R. R., 195 Ky. 257, 242 S.W. 628 (1922); Maloy v. Foster, 169 Misc. 964, 8 N. Y. S. 2d 608 (1938).

[3] 1 BL. COMM. *441.

[4] 1 BL. COMM. *442.

decisions at early common law allowing a wife recovery for loss of consortium.[5]

Another reason often presented for this absence of authority is that, regardless of the procedural difficulty, there was no substantive right in the wife at common law.[6] Most courts have followed this line of reasoning holding that the Married Women's Acts,[7] while removing the procedural difficulty existing at common law, create no new right in this instance, and therefore deny the wife an action corresponding to the one allowed the husband under similar circumstances.[8]

However, contrary to this reasoning, the wife has been allowed an action under modern married women's acts for loss of consortium in those cases where the act of the defendant is *wilful* and *intentional*.[9] Thus, as in the case of *Clark* v. *Hill*,[10] where the defendant drove the plaintiff's husband insane by threats of violence, and in cases involving the widely recognized actions of alienation of affections[11] and criminal conversation,[12] the courts have allowed the wife to maintain an action for loss of consortium. In allowing recovery for intentional invasions of the wife's consortium and denying it for negligent invasions, the courts have attempted to justify their decisions upon two grounds; first, that the damages caused by loss of consortium are too remote and consequential;[13] second, in the case of aliena-

[5] Holbrook, *The Change in the Meaning of Consortium* (1923) 22 MICH. L. REV. 1, at 2.

[6] *Ibid.*

[7] KY. R. S. (1944) 404.020.

[8] Hoagland v. L. & N. R.R., 195 Ky. 257, 242 S.W. 628 (1922); Nash v. Mobile & Ohio Ry., 149 Miss. 823, 116 So. 100 (1928); Bernhardt et al. v. Perry, 276 Mo. 612, 208 S. W. 462 (1918).

[9] Clark v. Hill, 69 Mo. App. 541 (1897); Flandermeyer v. Cooper, 85 Ohio St. 327, 98 N.E. 102 (1912); Moberg v. Scott, 38 S.D. 422, 161 N.W. 998 (1917); *see* Commercial Carriers, Inc. et al. v. Small, 277 Ky. 189, 196, 126 S.W. 2d 143, 146 (1939); *see* Hoagland v. L. & N. R.R., 195 Ky. 257, 264, 242 S.W. 628, 632 (1922); *see* Maloy v. Foster, 169 Misc. 964, 8 N.Y.S. 2d 608 (1938). 27 AM. JUR. 113; 13 R. C. L. 1444; Pound, *Individual Interests in the Domestic Relations* (1916) 14 MICH. L. REV. 177, at 195.

[10] 69 Mo. App. 541 (1897).

[11] Hudima v. Hudyma, 131 Conn. 281, 39 A. 2d 890 (1944); Deitzman v. Mullin, 108 Ky. 610, 57 S. W. 247 (1900).

[12] Turner v. Heavrin, 182 Ky. 65, 206 S.W. 23 (1918); Woodman v. Goodrich, 234 Wis. 565, 291 N.W. 768 (1940).

[13] Feneff v. New York Central & H. R. R., 203 Mass. 278, 89 N.E. 436 (1909); Goldman v. Cohen, 30 Misc. 336, 63 N.Y. Supp. 459 (1900); Kosciolek v. Portland Ry., Light & Power Co., 81 Ore. 517, 160 Pac. 132 (1916).

tion of affections and criminal conversation, the husband being a *particeps criminis* can bring no action and the recovery by the wife will not result in double recovery.[14]

The first reason, as to the damages being too remote and consequential, does not seem logical when, as pointed out above, the courts allow an action to the wife where the injury is *intentional!* Presumably in such cases the courts find no difficulty in determining that the damages are not too remote or consequential. This is an astounding inconsistency.

Also the courts have clearly established a contra result in an action by the husband for *negligent injuries* to his wife. Under the modern view of marriage there seems to be no basis for this distinction between spouses,[15] for since the abrogation of their common law unity,[16] the increasing tendency has been to place the husband and wife upon a plane of equality of rights. Too, in an action by either spouse, the damages arise from an injury to the right of consortium. This may be defined as a right growing out of the marriage relation, shared by the husband and wife alike, to the society, services, and companionship of each other.[17] Therefore, since remoteness is not a factor in considering the husband's recovery and the wife's cause of action arises from an injury to the same right, reason dictates that this is not a valid reason for the denial of the corresponding right to the wife.

The second objection to allowing the wife recovery in negligence actions is that where the husband has recovered for the injuries he has sustained, a recovery by the wife for loss of consortium would result in double recovery. Dean Emeritus Pound has said, "The reason for not securing the interest of the wife . . . seems to be that our modes of trial are such and our mode of assessment of damages by the verdict of a jury is necessarily so crude that if husband and wife were each allowed to sue, instead of each recovering an exact reparation, each would be

[14] Foot v. Card, 58 Conn. 1, 18 Atl. 1027 (1889); Turner v. Heavrin, 182 Ky. 65, 206 S.W. 23 (1918).

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

[16] Ky. R. S. (1944) 404.020.

[17] Marri v. Stamford Street R.R., 84 Conn. 9, 78 Atl. 582 (1911); Feneff v. New York Central & H. R. R., 203 Mass. 278, 89 N. E. 436 (1909); Guevin v. Manchester Street Ry., 78 N. H. 289, 99 Atl. 298 (1916).

pretty sure to recover what would repair the injury to both.''[18] This criticism seems equally applicable to both husband and wife, yet the courts use it to deny the wife recovery[19] and do not apply it to a like action by the husband. Why should it apply to one of the spouses and not the other? There seems to be no valid reason unless it is a historic survivor of the law that considered the wife to be inferior.[20] Only one decision has allowed the wife to recover in negligence actions,[21] while a few courts have recognized the unjust inconsistency and in attempting to solve it, have denied recovery to both husband and wife.[22] This latter solution would seem correct if Pound's criticism, *supra*, were well founded, but neither the question of double recovery, nor the solution seems to be proper when one realizes that there are two separate and distinct injuries to two different people. Each injury is substantial. The person who negligently injuries one spouse cannot avoid the result of a loss of consortium to the other spouse, this being an injury of prime importance, as consortium is the very essence of marriage. Such an injury should not go without redress of pecuniary reparation to the person so injured.

Therefore, since precedents have established that *both* the husband and wife can recover for loss of consortium where the injury is *intentional;* since the *husband* can recover for loss of consortium where the injury is *negligent,* and since the reasons for not allowing the wife a like recovery in similar cases are based upon groundless distinctions, it is concluded that the wife should be allowed an action for loss of consortium due to the negligent injury of her husband.

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[18] Pound, *Individual Interests in the Domestic Relations* (1916) 14 MICH. L. REV. 177, at 194.

[19] Giggey v. Gallagher Transportation Co. et al., 101 Colo. 258, 72 P. 2d 1100 (1937).

[20] 3 BL. COMM. *143.

[21] Hipp v. E. I. DuPont de Nemours & Co., 182 N. C. 9, 108 S. E. 318 (1921).
Contra: Hinnant v. Tide Water Power Co., 189 N. C. 120, 126 S. E. 307 (1924).

[22] Marri v. Stamford Street R. R., 84 Conn. 9, 78 Atl. 582 (1911) (Based on interpretation of a statute); Bolger v. Boston Elevated Ry., 205 Mass. 420, 91 N.E. 389 (1910). See Note (1922) 21 A.L.R. 1517, at 1527.