Montana Law Review

Volume 50
Issue 2 *Summer 1989*

Article 8

July 1989

Loss of Consortium and Loss of Services Actions: A Legacy of Separate Spheres

Susan G. Ridgeway

LOSS OF CONSORTIUM AND LOSS OF SERVICES ACTIONS: A LEGACY OF SEPARATE SPHERES

Susan G. Ridgeway*

I. INTRODUCTION

Montana, like most other jurisdictions, currently recognizes an action for loss of an injured spouse's consortium.[1] The right of recovery for loss of consortium was available originally only to husbands, but a majority of jurisdictions have extended the right of recovery to all spouses.[2] Recently, a few jurisdictions have recognized an action for loss of a child's society[3] or for loss of parental society.[4] The vast majority of jurisdictions, however, do not recognize relational claims in the parent-child relationship except for loss of a child's services.[5] The Montana Supreme Court has not

---

* The author would like to thank Bari Burke, Professor, School of Law, University of Montana, Missoula, Montana; Greg Munro, Professor, School of Law, University of Montana, Missoula, Montana; and Susan Roy, Attorney at law, Garlington, Lohn & Robinson, Missoula, Montana, for their helpful suggestions and comments. Any errors or omissions are the author's alone.

1. Bain v. Gleason, ___ Mont. ___, 726 P.2d 1153 (1986); *see also* Duffy v. Lipsman-Fulkerson & Co., 200 F. Supp. 71 (D. Mont. 1961); Dutton v. Hightower & Lubrecht Constr. Co., 214 F. Supp. 298 (D. Mont. 1963); Hall v. United States, 266 F. Supp. 671 (D. Mont. 1967); Johnson v. United States, 496 F. Supp. 597 (D. Mont. 1980); for other jurisdictions *see* H. CLARK, THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES § 11.3 at 390 n.12 (abr. 2d ed. 1988); RESTATEMENT (SECOND) OF TORTS § 693 annot. (1977).

Montana law allows recovery of damages for loss of consortium and loss of society in wrongful death actions (*see* Swanson v. Champion Int'l Corp. 197 Mont. 509, 517, 646 P.2d 1166, 1170 (1982)); however, loss of consortium and loss of society in wrongful death actions is beyond the scope of this comment.

2. Love, *Tortious Interference with the Parent-Child Relationship: Loss of an Injured Person's Society and Companionship*, 51 IND. L.J. 590, 596 (1976); *see also* Leaphart & McCann, *Consortium: An Action for the Wife*, 34 MONT. L. REV. 75, 79 (1973).

3. *See, e.g.*, Howard Frank M.D., P.C. v. Superior Court, 150 Ariz. 228, 722 P.2d 955 (1986); Norvell v. Cuyahoga County Hosp., 11 Ohio App. 3d 70, 463 N.E.2d 111 (1983); Shockley v. Prier, 66 Wis. 2d 394, 225 N.W.2d 495 (1975). *See* Annotation, *Parent's Right to Recover for Loss of Consortium in Connection with Injury to a Child*, 54 A.L.R. 4TH 112 (1987). Although some courts use the term "consortium" in the parent-child relationship, most courts use the term society to denote the absence of a sexual relationship.

4. *See, e.g.*, 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); Ueland v. Reynolds Metals Co., 103 Wash. 2d 131, 691 P.2d 195 (1984); Theama v. Kenosha, 117 Wis. 2d 508, 344 N.W.2d 1502 (1984); *See* Annotation, *Child's Right of Action for Loss of Support, Training, Parental Attention, or the Like, Against a Third Person Negligently Injuring Parent*, 11 A.L.R. 4TH 549 (1982).

5. *See, e.g.*, Borer v. American Airlines, Inc., 19 Cal. 3d 441, 138 Cal. Rptr. 302, 563 P.2d 858 (1977); Baxter v. Superior Court of Los Angeles County, 19 Cal. 3d 138 Cal. Rptr. 315, 563 P.2d 871 (1977); Dralle v. Ruder, 124 Ill. 2d 61, 529 N.E.2d 209 (1988); Sizemore v. Smock, 430 Mich. 283, 422 N.W.2d 666 (1988); Siciliano v. Capitol City Shows, Inc., 124 N.H. 719, 475 A.2d 19 (1984). In *Sizemore*, the Michigan Supreme Court declined to recognize an action for loss of a child's consortium after having recognized an action for loss of a

had occasion to decide whether parents and children have the right to bring an action for loss of society, but this issue will likely confront the court in the near future.[6]

The issue of whether parents and children should be entitled to actions for loss of society has forced courts to reexamine the interests protected by relational claims of family members and the function of the tort system in protecting those interests. This comment examines what and whose interests actions for loss of consortium and society have historically protected. It asserts that the ways in which courts have chosen to limit liability reflect antiquated models for human relationships. Further, this comment asserts that courts should either recognize relational claims of all family members, or none at all.

II. CURRENT STATE OF THE LAW

Under the loss of consortium theory, courts allow one spouse to recover damages for relational losses caused by wrongful injury to the other.[7] A plaintiff's claim for loss of consortium damages thus derives from a separate tort claim brought by the plaintiff's injured spouse.[8] Courts broadly define consortium to include all aspects of the marital relationship, but how courts view the marital relationship itself varies by jurisdiction.[9] Courts uniformly hold that damages for loss of consortium compensate for impairment to both "material" and "sentimental" aspects of the marital relationship.[10] While the material aspects correspond to economically quantifiable losses, the sentimental aspects refer to those losses not suitable for market valuation.[11] Though jurisdictions agree that consortium consists of material and sentimental elements, they do not always agree on what specific relational elements it comprises. Most jurisdictions recognizing consortium actions hold that each spouse is entitled to the other's "society, companionship, affection and sexual relations,"

---

parent's consortium just seven years earlier. *Sizemore*, 430 Mich. at ___, 422 N.W.2d at 667.

6. In *Beery v. Armco Steel Corp.*, No. CV 87-160-BLG (D. Mont., Memorandum and Order, May 17, 1988), U.S. District Court Judge James Battin refused plaintiffs' request for certification to the Montana Supreme Court of the issue of plaintiffs' entitlement to a claim for loss of parental consortium because plaintiffs had chosen to file in federal court. *Id.* at 3-4. Judge Battin granted defendant's motion to dismiss plaintiffs' claim for loss of parental consortium in federal court, holding that the issue "should be addressed by the legislature and not by the judiciary." *Id.* at 3.

7. RESTATEMENT (SECOND) OF TORTS § 693 (1977).

8. *See Johnson*, 496 F. Supp. at 601.

9. CLARK, *supra* note 1, § 11.3 at 396.

10. American courts historically separated consortium into "sentimental" and "material" elements. *See*, Hitaffer v. Argonne Co., 183 F.2d 811, 814 (D.C. Cir. 1950), *cert. denied*, 340 U.S. 852 (1950); Lippman, *The Breakdown of Consortium*, 30 COLUM. L. REV. 651, 666 (1930). Some courts today, however, use the terms "tangible" and "intangible" in place of "material" and "sentimental." *See* CLARK, *supra* note 1, § 11.1 at 382-83. For clarity, the terms material and sentimental are used herein.

11. *See, e.g.*, Wood v. Mobil Chem. Co., 50 Ill. App. 3d 465, 478, 365 N.E.2d 1087, 1096 (1977).

the so-called sentimental elements of consortium.[12] In addition to these elements, some jurisdictions still hold that one spouse is entitled to the other's "services," which roughly correspond to the material elements of consortium.[13] Jurisdictions that include services as an element of consortium either view services as consisting of household chores,[14] or, paradoxically, define services as a "sentimental" element.[15] The term "services" itself thus encompasses both material and sentimental aspects. Women traditionally performed the services (homemaking chores) for which some courts still permit recovery.[16] Those jurisdictions recognizing loss of services as an element of consortium thus base recovery on a historical view of marriage wherein the husband owns the value of his wife's services.[17] Regardless of how they characterize consortium, all courts evaluate the same factors as proof of impairment of consortium. These factors include the injured spouse's inability to maintain the home, care for family members, procreate, show affection, engage in sexual relations, and participate in social activities.[18]

In contrast to analysis of the action for loss of spousal consortium, courts strictly limit other family members' actions. A parent may recover only to the extent of the loss of a child's services or earnings.[19] Because most children today do not provide services of economic value to their parents, the loss of services action is obsolete.[20] A few courts implicitly or explicitly allow recovery for loss of a child's consortium,[21] defined as "society" and "companionship."[22] Most jurisdictions, however, continue to hold that the only purpose of this action is to compensate the parent for economic losses.[23] Though a few jurisdictions have recognized a child's action for loss of a parent's consortium, most courts reject these claims.[24] Those courts recognizing the child's action view parental consortium as including "nurture" and "guidance" as well as "society" and "companionship."[25]

---

12. CLARK, *supra* note 1, § 11.3 at 390. Historically, courts viewed consortium as consisting of society, services, and sexual relations. *Siciliano*, 124 N.H. at 726, 475 A.2d at 22; RESTATEMENT (SECOND) OF TORTS § 693 (1977). Most courts today, however, define consortium as comprising "society, companionship, affection and sexual relations." RESTATEMENT (SECOND) OF TORTS § 693 comment f.

13. *See* RESTATEMENT (SECOND) OF TORTS § 693 comment f (1977).

14. *See, e.g.*, Harkins v. Paschall, 348 So. 2d 1019, 1024 (Miss. 1977).

15. *See, e.g.*, Madison v. Colby, 348 N.W.2d 202, 206 (Iowa 1984); Burns v. Pepsi-Cola Metro. Bottling Co., 353 Pa. Super. 571, ___, 510 A.2d 810, 812 (1986).

16. *See, e.g., Harkins*, 348 So. 2d at 1024 (Miss.).

17. *See infra* text accompanying notes 62, 78-80.

18. CLARK, *supra*, note 1, § 11.3 at 396-97.

19. *Id.*, § 11.4 at 398.

20. *See id.* at 399.

21. See cases at *id.*, 399 n.9 (for implicit allowance of recovery) and 399 n.10 (for explicit allowance of recovery).

22. *E.g., Schockley*, 66 Wis. 2d at 394, 225 N.W.2d at 495.

23. CLARK, *supra* note 1, § 11.4 at 399.

24. *Id.*

25. *E.g., Ferriter*, 381 Mass. at 516, 413 N.E.2d at 696; *see also Theama*, 117 Wis. 2d

In sum, tort actions by family members constitute a model of the family wherein spouses are entitled to an action for loss of consortium, while parents and children are not. No one would suggest that parents value their children only for their paper route earnings, or that children do not value their parents' guidance. The law thus fails to recognize or protect current family interests.[26] Tort law involving family members persists as an antiquated model for family relationships. Indeed, family members' relational torts still reflect their historical roots in Roman, English, and nineteenth century American models.

III. HISTORICAL ROOTS

A. *The Roman Patriarchal Model*

Today's action for loss of consortium stems back to Roman times when the *paterfamilias* governed the household, the basic unit of society.[27] The Roman version of today's loss of consortium action vindicated the husband's and father's right to control his wife and children, as well as all other members of the household. The *paterfamilias* could bring an action against anyone who insulted or assaulted his wife, children, slaves or servants.[28] The theory underlying this action was that household members were so closely identified with the *paterfamilias* that "the wrong was one to himself."[29] Emancipated or independent male members of the household could bring a direct action for their personal injuries.[30] Even in those instances, however, the *paterfamilias* retained the right to bring an indirect action for the insult he suffered.[31] Women and children had no right to recover for injury to themselves or others because they had no individual identity in the eyes of the law.[32] Any rights or protections they enjoyed derived entirely from their male guardians.[33] Roman law thus

---

at 508, 344 N.W.2d at 513.

26. Love, *supra* note 2, at 601.

27. *See* Hafen, *Marriage, Kinship, and Sexual Privacy*, 81 MICH. L. REV. 463, 483, 569 (1983).

28. *See* 3 BRACTON, Tr. I, f. 115 (*quoted in* Sayre, *Inducing Breach of Contract*, 36 HARV. L. REV. 663, 664 (1923)):

> [O]ne suffers injury not only through his own person, but also through others whom he has in his household, . . . as for instance through his children and wife. So, a man could bring an action for injury done to his wife, but not vice versa. For it is proper that a wife should be defended by her husband; not the husband by the wife. And so one suffers injury through those whom he may have in his household, for instance his servants and his slaves, if violence should be done to them and they should be beaten, either because of insult to him or because it was to his interest not to be deprived of their services.

29. W. PROSSER & W. KEETON, THE LAW OF TORTS § 129 at 980 (1984).

30. *Id.*

31. Sayre, *supra* note 28, at 663.

32. *See* Pound, *Individual Interests in the Domestic Relations*, 14 MICH. L. REV. 177, 179-80; *see also* Leaphart & McCann, *supra* note 2, at 76 (for a discussion of women's rights).

33. *Id.*

protected the relational interests only of the *paterfamilias*. Further, Roman law defined the interest protected as the reputation of the *paterfamilias* and his right of control over other household members.[34]

The American loss of consortium claim reflects this patriarchal origin of relational interests. It is only in the last century that our law has begun to recognize the relational interests of women. Indeed, the extension of the right of recovery to women was the first break from the patriarchal model. The law still does not, however, recognize the relational interests of children. The notion that the right of recovery is somehow associated with the right of control over others thus persists.

B. The English Master-Servant Model

In the thirteenth century, English jurists applied the *paterfamilias* action wholesale to non-familial master-servant relationships so that masters could recover for the diminished value of their injured servants.[35] After tailoring the action to the master-servant relationship, courts eventually applied the *paterfamilias* action to family relationships as well. These courts analogized the master with the husband and father and the servant with the wife and children.[36] English law thus translated the *paterfamilias* model into the master-servant model finally imposed on family relationships. This historical development reflects both the patriarchal and increasingly proprietary or commercial models of family life in English society.

When English jurists tailored the Roman action to the master-servant relationship, two distinct types of relational claims emerged, loss of services and enticement. A master's right of recovery for loss of services depended on a showing that the defendant inflicted violence on the servant and that the master thereby suffered a loss of the servant's services.[37] The requirements of violence and actual loss of services limited the master's recovery to damages of a property nature.[38] The master's cause of action for loss of services was no different than an action for trespass against his property or chattel.[39]

A century later, the Statutes of Labourers gave the master another possible action in addition to the common law action for loss of services.[40] The Statutes provided a master with an action against third parties who enticed a servant "belonging" to him.[41] While the common law remedy

---

34. Sayre, *supra* note 28, at 664.

35. *See id.*

36. Lippman, *supra* note 10, at 653 (for analogy to the wife); Love, *supra* note 2, at 600 (for analogy to the child).

37. Sayre, *supra* note 28, at 664.

38. *Id.*

39. Lippman, *supra* note 10, at 653.

40. Sayre, *supra* note 28, at 665. England's fourteenth century Statutes of Labourers were designed to freeze the status of servants and laborers in the face of a labor shortage following the Black Plague. *Id.*

41. *Id.* at 665-66; Qwen, *Interference with Trade: The Illegitimate Offspring of an*

protected the master's economic interest in his servant's services, the statutory remedy created a system of compulsory labor to secure a master's control over his servants.[42] The statutory remedy thereby gave the master a proprietary interest in servants themselves.[43]

Over the years, courts confused and combined the common law action for loss of services and the statutory action for enticement.[44] Moreover, English courts applied both theories not only to relationships between master and servant, but also to relationships between husband and wife and father and child.[45] By the eighteenth century, this intermingling had produced the hybrid actions of *per quod consortium amisit*, or loss of a wife's consortium, and *per quod servitium amisit*, or loss of a child's services.[46] Women had no legal claims for loss of their husbands' consortium or loss of their children's services.[47]

The loss of consortium claim protected the husband's legally recognized interest in his relationship with his wife. At common law, marriage entitled a husband not only to his wife's menial services, but also to her property, custody or "society," chastity, and sexual services.[48] Any trespass on these rights gave the husband and master an action based on damage to his chattel interest in his wife.[49] The loss of consortium claim in eighteenth-century England thus portrayed marriage as a master-servant relationship and a husband's exclusive right to sexual intercourse with his wife as among the services to which he was entitled.[50]

Beginning in the eighteenth century, courts invoked the loss of services theory to protect a father's interest in his child's services and custody as well.[51] A father's loss of services was the premise of an action against a third party who had mistreated or enticed a child.[52] Application of the loss of services action to the father-child relationship arose by analogy to an aspect of the master-servant relationship, the apprenticeship model. In return for the support and training of a child, a master or fa-

---

Illegitimate Tort?, 3 MONASH U.L. REV. 41, 42-43 (1976).

42. *See* Owen, *supra* note 41, at 42-43.

43. *Id.*

44. *See id.* at 43; Sayre, *supra* note 28, at 666.

45. Owen, *supra* note 41, at 43-44.

46. *See id.* at 44.

47. *See* CLARK, *supra* note 1, § 11.3 at 391 (consortium), and § 11.2 at 385 (services).

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

49. *Id.* Indeed, at English common law wives were classified with servants and both were considered chattel. Lippman, *supra* note 10, at 653.

50. *See* Lippman, *supra* note 10, at 655-56 (for a discussion of the historical development); Owen, *supra* note 41, at 470. English courts based a husband's action for adultery on the "fiction" that the adulterer caused him to suffer a loss of his wife's services. A husband, however, could recover damages from an adulterer even when he could not demonstrate a loss of his wife's services. The action for criminal conversations thus implicitly permitted a husband to recover for loss of his wife's sexual services. Lippman, *supra* note 10, at 656-58.

51. Owen, *supra* note 41, at 45.

52. *Id.*

ther was entitled to the child's labor or services.[53] The loss of services claim also entitled a father to recover from a third party who had seduced his daughter.[54] Thus, as in the marital relationship, the law recognized the father as master and the child as his capital asset.

Today's loss of consortium action still reflects its roots in the master-servant model. In the marital relationship, some jurisdictions still permit one spouse to recover the value of the other's lost services.[55] The master-servant model is even more apparent in the law governing parent-child relationships where the law permits recovery only for loss of the child's earnings or services. As a result of the persistence of the master-servant analogy, American courts have characterized relational interests as property interests.[56]

C. *The American "Separate Spheres" Model*

In the nineteenth century, American courts adopted the English actions for loss of consortium and loss of services. At first, courts recognized the rights only of husbands and fathers.[57] As married women gained the right to own property, make contracts, and sue,[58] however, courts began to consider whether a wife had a right to recover for loss of her husband's consortium and whether a mother had a right to recover for loss of her child's services.

American courts first treated "consortium" as a contractual right that vested upon marriage.[59] While the judiciary insisted on the one hand that the law regard marriage as nothing more than a private civil contract, on the other it dictated the parties' rights and obligations in the contract.[60] The courts generally agreed on the "terms" of the marriage contract: each spouse had a right to the other's society, companionship, affection, sexual intercourse, and fidelity.[61] In addition, under the marriage contract, a wife was entitled to her husband's support, and a husband was entitled to his wife's "services."[62] The legal treatment of consortium as a right deriving from a marriage contract thus invented the fiction that in marriage a husband "bought" his wife's services and a wife "sold" her services in exchange for support. While the master-servant

53. *Id.* at 45-46.

54. *Id.*

55. *E.g.*, *Madison*, 348 N.W.2d. at 206 (Iowa); *Harkins*, 348 So. 2d at 1024 (Miss.); *Burns*, 353 Pa. Super. at ___, 510 A.2d at 812.

56. *See* Green, *Relational Interests*, 29 ILL. L. REV. 460, 460-63 (1934) (for discussion).

57. PROSSER & KEETON, *supra* note 29, § 124 at 924.

58. The Married Women's Property Acts attempted to abolish the common law disabilities of married women by granting them independent rights to own and control property, bring suit, and manage their own earnings. Holbrook, *supra* note 48, at 1, 4; *see also* CLARK, *supra* note 1, § 7.2 at 289-90.

59. Lippman, *supra* note 10, at 651.

60. *Id.*; M. GROSSBERG, GOVERNING THE HEARTH 18-21 (1985).

61. Lippman, *supra* note 10, at 651.

62. *Id.*

analysis of marriage translated the *paterfamilias* action into English law, the contract analysis of marriage translated the master-servant action into American law. Though transformed, the *paterfamilias* and master-servant models thus persisted in contract analysis of the marital relationship.

The characterization of marriage as a contract, entitling a husband to his wife's services and a wife to her husband's support, reflects the "separate spheres" and functions assigned to men and women during the Industrial Revolution.[63] In the late nineteenth and early twentieth centuries, the law adopted a model of the family wherein men earned the family's livelihood in the workplace and women maintained the home and reared children.[64] Regardless of what men and women actually did, according to the legal fiction, men occupied the public sphere of the workplace, and women occupied the private sphere of the home.[65] The husband was not only the breadwinner, but also remained master of the home even though he bore no responsibility for the home's creation.[66] The wife remained his servant as nurturer of both her husband and her husband's children.[67] Finally, while men braved the corrupting influence of the public sphere, women were responsible for fostering the family's spiritual and moral health.[68]

Courts perpetuated the supposed separate spheres of male and female life in the loss of consortium action. The law limited a wife's right to recover for loss of her husband's consortium to those situations where, by suing, she fulfilled her perceived function of exerting moral influence over the marital relationship. For example, a wife could sue someone who se-

---

63. For a discussion of the separate spheres of men and women in nineteenth century America *see* Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497, 1499-500 (1983) and N. COTT, THE BONDS OF WOMANHOOD 64-74 (1977).

64. GROSSBERG, *supra* note 60, at 27, 300.

65. *See* Bradwell v. Illinois, 83 U.S. (16 Wall.) 130, 140-41 (1872) (Bradley, J., concurring); Mueller v. Oregon, 208 U.S. 412, 422 (1908); *see also* Olsen, *supra* note 6, at 1499; COTT, *supra* note 63, at 64-74 (1977).

66. GROSSBERG, *supra* note 60, at 27, 300.

67. *See, e.g.*, Indianapolis & Martinsville Rapid Transit Co. v. Reeder, 51 Ind. App. 533, 546, 100 N.E. 101, 106 (1912):

> These services may . . . include such services as might be rendered by hired servants, which have a fixed value or market value, but they also include such services as a wife alone can render the husband . . . such as she may extend to him by way of her society and counsel, her pervading superintendence and care over his household, [and] her nurture, guidance and training of his children . . . .

See also, GROSSBERG, *supra* note 60, at 27, 300.

68. *See* Olsen, *supra* note 63, at 1499: "The home was said to provide a haven from the anxieties of modern life—'a shelter for those moral and spiritual values which the commercial spirit . . . [was] threatening to destroy.'" For a discussion of how the forces of industrialization "disestablished" middle-class women, see A. DOUGLAS, THE FEMINIZATION OF AMERICAN CULTURE 50-94 (1977). According to Douglas, women who previously labored in communal situations lost recognition as economic producers and assumed a "sentimental" role as moral reformers in a society disturbed by the consequences of laissez-faire industrial expansion. *Id.* at 12, 55-59.

duced her husband,[69] repeatedly sold opium to him against her protests,[70] or who "intentionally" or "maliciously" tried to destroy the marriage.[71] Courts thus permitted a wife to recover for loss of her husband's society and companionship only in situations where the defendant "induced"[72] her husband to behave in a manner that threatened to destroy the integrity of the marital relationship. A wife could recover in these situations because her husband had no interest in bringing his own action, and usually shared culpability with the defendant.[73]

While a wife thus had a limited consortium claim for the purpose of detering a corruptive defendant, the law did not permit her to sue in situations where, by suing, she appeared to challenge her husband's authority over her. A wife, therefore, could not sue for loss of her husband's consortium if he had a right to bring his own action.[74] Even if the husband did not have his own action, a wife could not recover for loss of his support or services.[75] Such claims would have suggested that a wife had control over her husband and the economic affairs of the family, in direct conflict with "separate spheres" ideology.[76] Only by appearing to sue for the purpose of preserving the marital relationship could a wife indirectly protect her right to the support of her husband.[77]

A husband, on the other hand, could recover for loss of his wife's consortium in as many ways as he could under English common law. Whereas under English common law courts awarded damages for loss of services, sexual relations, and society, American courts typified the husband's injury predominantly as one for loss of services.[78] Nonetheless, such services often implicitly included society, affection, and sexual intercourse.[79] Though the Married Women's Property Acts gave women the

---

69. Lippman, *supra* note 10, at 662-63.

70. *E.g.*, Flandermeyer v. Cooper, 85 Ohio St. 327, 98 N.E. 102 (1912); Moberg v. Scott, 38 S.D. 422, 161 N.W. 998 (1917).

71. *E.g.* Work v. Campbell, 164 Cal. 343, 128 P. 943 (1913); Wallace v. Wallace, 85 Mont. 492, 279 P. 374 (1929). American courts apparently modeled the action for intentional or malicious interference, "alienation of affections," on the theory of tortious inducement of breach of contract. If the defendant caused one spouse to lose affection for the other, then the defendant's conduct amounted to an inducement to breach the marriage contract. *See* Lippman, *supra* note 10, at 660; Owen, *supra* note 41, at 41, 47.

72. Lippman, *supra* note 10, at 660.

73. Holbrook, *supra* note 48, at 6.

74. *Id.*

75. *Hitaffer*, 183 F.2d at 813, 814; Note, *The Case of the Lonely Nurse: The Wife's Action for Loss of Consortium*, 18 W. RESERVE L. REV. 621, 629 (1967) (authored by Marian F. Ratnoff).

76. GROSSBERG, *supra* note 60, at 27, 300; *see also Bradwell*, 83 U.S. (16 Wall.) at 140-41.

77. *See* Annotation, *Wife's Right to Sue for Loss of Consortium*, 5 A.L.R. 1049-50 (1920).

78. *See Hitaffer*, 183 F.2d at 813-14.

79. *See* Denver Consol. Tramway Co. v. Riley, 14 Colo. App. 132, ___, 59 P. 476, 479 (1899): "The wife does not occupy the position of a servant, and her services to her husband are not those of a servant. She makes his home inviting, and ministers to his happiness in a multitude of ways outside the drudgery of household labor." *See also Indianapolis*, 51 Ind.

right to their own earnings, courts continued to hold that the husband, not the wife, owned a wife's household services.[80] A husband could thus recover for loss of his wife's services regardless of whether she maintained her own action.[81] Meanwhile, courts seldom permitted a wife to recover for loss of her husband's consortium. Though the marriage contract entitled a wife to her husband's support, her husband's earnings were viewed as his property alone, and courts reasoned that permitting a wife to recover for loss of her husband's support would lead to double recovery.[82] Furthermore, courts denied a wife the right to recover for loss of her husband's services on grounds that the marriage contract did not entitle her to his services.[83] Finally, though the marriage contract entitled a wife to her husband's society, she could not recover for loss of this aspect of the relationship because courts predicated recovery for loss of society on the right to recover for loss of services.[84]

In sharp contrast to the law's denial of the wife's right to recover for loss of her husband's services or support, courts continued to treat a wife's services as the property of her husband. The husband's loss of consortium action for his wife's services epitomized his presumed authority over the home and his essential ownership of his wife's services. Indeed, by implicitly permitting husbands to recover for loss of their wives' sexual services and denying wives such a claim, courts conferred on husbands ownership of their wives' bodies as well.[85] The disparate treatment of husbands and wives reflected a key concept of the separate spheres ideology, that men dominated not only the public sphere, but also the private sphere of the home.

Eventually, courts uniformly held that a wife could base consortium actions on intentional conduct by a defendant, but that she could not recover for negligently inflicted injury.[86] Meanwhile, courts permitted a husband to recover for loss of a wife's consortium whether defendant acted negligently or intentionally.[87] This distinction helped courts to justify the disparate treatment the separate spheres analysis imposed. The dis-

---

App. at 546, 100 N.E.2d at 106; Lippman, *supra* note 10, at 656, 666-67, 673.

80. *See* Shaw v. Shaw, 122 Mont. 593, 613, 208 P.2d 514, 524 (1949): "It is the duty of the wife without compensation to attend to all the ordinary household duties and labor faithfully in the advancement of her husband's interests." *See also* Holbrook, *supra* note 48, at 6-7.

81. Holbrook, *supra* note 48, at 7-8.

82. *See Hitaffer*, 183 F.2d at 814.

83. *See id.* at 813.

84. *See id.* at 813, 814 (for a discussion of how courts predicated recovery for loss of society on the right to loss of services).

85. See Lippman, *supra* note 10, at 651, 656, 658. The contract theory of marriage still permits spouses to exercise sexual contract rights. For example in *Favrot v. Barns*, 332 So. 2d 873, 875 (La. App. 1976), the court held that the contract of marriage obligated spouses to fulfill the reasonable and normal sexual desires of the other. *Id.* at 875. A contract right to sexual relations is eerily akin to the historical ownership of a wife's body.

86. *See Hitaffer*, 183 F.2d at 816; *see also* Holbrook, *supra* note 48, at 7.

87. *Hitaffer*, 183 F.2d at 816; *see also* Holbrook, *supra* note 48, at 7, and Lippman, *supra* note 10, at 666.

tinction also led, however, to further complications in common law definitions of consortium damages.

When women won the right to sue at all, courts began to bifurcate the "sentimental" from the "material" elements of consortium damages,[88] and to place greater importance on the "material."[89] Courts explained, for example, that the damages contemplated in intentional tort actions to which women were entitled were "sentimental," and that the damages contemplated in negligent tort actions, to which men were entitled, were "material."[90] Thus, courts did not allow a wife to recover for loss of her husband's society and affection because these damages had a "sentimental" value to her. By contrast, courts allowed a husband to recover for loss of his wife's society and affection because courts perceived these damages as "material" to him. The notion that the husband's society had a sentimental value to his wife and that the wife's society had a material value to her husband again reflected the separate sphere schism between the female private and the male public domains. As a consequence of the separate spheres ideology, the law arbitrarily and illogically separated consortium into "material" and "sentimental" elements and treated a wife's society as a "material" element inseparable from her services.

By permitting a husband to recover for loss of a wife's services, American courts perpetuated aspects of the *paterfamilias* and master-servant models. The early American consortium action portrayed marriage as essentially a master-servant relationship, and consortium as essentially a relational commodity. The characterization of marriage as a contract entitling a husband to his wife's services and a wife to her husband's support, the subordination of the private sphere and interests to the public, and the valuation of material relational interests over sentimental relational interests reflected not only the subordination of wives to their husbands, but also the subordination of relational interests in the "female" sphere to those in the "male" sphere. Today's loss of consortium claim, with its distinction between material and sentimental damages, still reflects this archaic subordination of sentimental to material interests. Moreover, only in the last forty years have courts recognized a wife's right to recover sentimental damages for loss of consortium, and courts still do not recognize the right of parents and children to recover sentimental damages.

D. The Modern Consortium Action

It was not until the 1950s that American courts began to allow a wife to recover for loss of consortium resulting from negligent injury to her husband. In the landmark case of *Hitaffer v. Argonne Co.*,[91] the U.S. Court of Appeals for the District of Columbia rejected the assertion that

88. *See Hitaffer*, 183 F.2d at 813-14; *see also* Lippman, *supra* note 10, at 666-67.
89. *See Hitaffer*, 183 F.2d at 813.
90. *See id.*
91. 183 F.2d 811, 812-13 (D.C. Cir. 1950), *cert. denied*, 340 U.S. 852 (1950).

loss of services was a necessary or even predominant factor in an action for loss of consortium.[92] The *Hitaffer* court held that the various damages comprising consortium are "welded together into a conceptualistic unity" and that the separation of these elements into the sentimental and material was "arbitrary" and unfounded.[93] The *Hitaffer* court viewed the marriage contract as creating a "legally protected interest," and reasoned that both negligent and intentional invasions of marital interests were actionable by both spouses.[94] The *Hitaffer* decision thus established that the marital relationship entitled wives as well as husbands not only to the other's "material services," but also to the other's "companionship, love, felicity, and sexual relations."[95] The majority of jurisdictions, including Montana,[96] eventually followed the *Hitaffer* court's lead.[97]

Despite its more realistic view of the loss a spouse suffers when the other is injured, the *Hitaffer* court nevertheless perpetuated aspects of the separate spheres model. Though the *Hitaffer* court attempted to establish gender equality in consortium actions by permitting both men and women to recover for both material and sentimental elements, it continued to view consortium as a right deriving from a contract of marriage. The *Hitaffer* court reasoned that the right to the conjugal society of one's spouse "spring[s] from the marriage contract" and that "[a]ny interference with these rights, . . . is a violation, not only of natural right, but also of [the] legal right arising out of the marriage relation."[98]

Like the *Hitaffer* court, the Montana Supreme Court has viewed the right to spousal consortium as arising from the duties and obligations implied in the marriage contract. In *Bain v. Gleason*, the Montana Supreme Court bolstered its contract view of marriage by reference to the Montana statute specifying that spouses have "obligations of mutual respect, fidelity, and support."[99] The court, however, based the right of one spouse to recover for loss of the other's "aid, protection, affection and society" neither on the parties' view of their marriage contract, nor on the rights and responsibilities the state imposes as a third party to the marriage contract.[100] Rather, the Montana Supreme Court followed the American common law in basing consortium rights on a marital contract, the terms

92. *Id.* at 814. Although the *Hitaffer* court was not the first to recognize a wife's action for loss of consortium (*see* Holbrook, *supra* note 48, at 8), most jurisdictions in the United States that had previously refused to recognize the wife's action eventually followed the *Hitaffer* decision. *See* Annotation, *Wife's Right of Action for Loss of Consortium*, 36 A.L.R. 3d 900 (1971) [hereinafter *Wife's Right of Action*].

93. *Hitaffer*, 183 F.2d at 814.

94. *Id.* at 817.

95. *Id.* at 814. The *Hitaffer* court viewed the husband's material services as both his duty of support and his role as his wife's "advisor and counselor." *Id.* at 819.

96. *Bain*, ___ Mont. at ___, 726 P.2d at 1155.

97. *See Wife's Right of Action*, *supra* note 92.

98. *Hitaffer*, 183 F.2d at 816.

99. *Bain*, ___ Mont. at ___, 726 P.2d at 1155.

100. *See Bain*, ___ Mont. at ___, 726 P.2d at 1155; *see also* Lippman, *supra* note 10, at 651.

of which courts presume.[101] Like other courts, the Montana Supreme Court presumes that every marriage has certain relational attributes. Montana law thus compensates spouses for loss of those attributes because of the legal fiction that, absent a marriage contract, these relational aspects would not exist.[102]

The American common law characterization of consortium as a contractual right reflects a "male" model of the family. Carol Gilligan, often cited in feminist legal critiques, has studied the difference between men's and women's perceptions of human relationships.[103] Legal scholars applying Gilligan's research conclude that men tend to "define morality and justice in the vocabulary of rights . . ." and to resolve conflicts by "abstracting human relationships from their particular contexts . . . ."[104] Men, therefore, "typically see their relationships with others in contractual terms, as derived from arms' length dealings among lonely contenders for places on the ladder of hierarchy."[105] Women, by contrast, tend to "define morality and justice in the language of responsibility" and to resolve conflicts by "preserving human relationships."[106] Women, accordingly, are not as interested in applying abstract and hierarchical rules as they are in fostering human "connectedness."[107] As one commentator has observed, Gilligan's identification of men's and women's perceptions parallels the nineteenth century ideology of the distinct functions and attributes of American men and women.[108] Moreover, Gilligan's images of the "ladder of hierarchy" and the "web of connection" correspond to the "separate spheres" ideology of American jurisprudence.[109] According to the "separate spheres" ideology, contractual relationships characterize the public, "male" sphere, and service to and connectedness with others characterize the "female" sphere.[110] Basing consortium rights on a contract model thus betrays greater valuation of relationships based in the "male" sphere than of relationships based in the "female" sphere, and further, reflects a "male" model of the family.

The most obvious instance of courts imposing the male contract

---

101. *See* Lippman, *supra* note 10, at 651.

102. Note that the definition of consortium used today in Montana traces back to a 1929 case for alienation of affections, *Wallace v. Wallace*, 85 Mont. 492, 279 P. 374 (1929).

103. The following discussion employs generalizations about ways of perceiving denoted "male" and "female." This characterization by gender, however, is not intended to suggest that individual men and women perceive in these ways.

104. Karst, *Woman's Constitution*, 1984 DUKE L.J. 447, 483 (*citing* C. GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT (1982)).

105. *Id.*

106. *Id.* at 483-84.

107. *Id.*

108. *See* Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 VA. L. REV. 543, 585-86 (1986). *See infra* text accompanying notes 63-68, for discussion.

109. *See* Sherry, *supra* note 108, at 590-91; *see also* Karst, *supra* note 104, at 481-86. Gilligan "evokes two contrasting images: for men, the ladder of hierarchy; for women, the web of connection." Karst, *supra* note 104, at 462.

110. *See* Sherry, *supra* note 108, at 590-91; *see also* Karst, *supra* note 104, at 481-86.

model on family relationships is their insistence upon a marriage contract as a condition precedent to a consortium claim. In *Gonzales v. Hudson*,[111] the California Supreme Court held that one partner had no right to a consortium claim where a couple had lived together for thirteen years and had two children.[112] The *Gonzales* court refused to base recovery solely on the "psychological and emotional relationship between a man and a woman."[113] The court reasoned that the foundation of society depends on the institution of marriage,[114] that courts must draw a line between liability and nonliability somewhere,[115] and that a test to determine whether a relationship had the characteristics of a marriage would be vague and inviting of "mischief."[116] While a concern for limiting liability may have motivated the *Gonzales* court, the court's unwillingness to permit recovery for "sentimental" losses absent a formal marriage contract implies that sentimental aspects have no value absent a contract for support and services. The *Gonzales* decision thus reflects a greater valuation of the contract model of relationships founded in the male sphere than on models of relationships founded in the female sphere.

E. The Modern Loss of Services and Society Action

By the early twentieth century, to compensate parents for injuries to children, most American jurisdictions had adopted the English loss of services action.[117] At first, American courts recognized only a father's claim for loss of his child's services.[118] After passage of the Married Women's Property Acts, courts permitted a mother as well to sue for loss of her child's services, but courts subordinated a mother's right to the father's right.[119] Just as a wife could sue for loss of her husband's consortium only when her husband had no interest in his own action, a mother could sue for loss of her child's services only when her husband was unable to bring suit himself.[120] Eventually, courts placed the mother's right on equal footing with the father's.[121]

American courts at the turn of the century based the loss of services action on an implied contract between parent and child. Just as in the judiciary's interpretation of the marriage contract, courts explicitly based parents' right to recover damages for loss of a child's services on the master-servant relationship.[122] The law entitled a parent to a child's labor

111. *Gonzales v. Hudson*, 200 Cal. App. 3d 45, 245 Cal. Rptr. 753 (1988).
112. *Id.* at ___, 245 Cal. Rptr. at 757.
113. *Id.* at ___, 245 Cal. Rptr. at 755.
114. *Id.* at ___, 245 Cal. Rptr. at 756.
115. *Id.* at ___, 245 Cal. Rptr. at 756.
116. *Id.* at ___, 245 Cal. Rptr. at 757.
117. Love, *supra* note 2, at 599.
118. CLARK, *supra* note 1, § 11.4 at 398.
119. PROSSER & KEETON, *supra* note 29, § 125 at 935.
120. *Id.*
121. CLARK, *supra* note 1, § 11.4 at 399.
122. As the Rhode Island Supreme Court noted, "the measure of damages in such a

and earnings in supposed return for the parent's support and education of the child.[123] Primary in this analysis of parental recovery was the principle that the child's earning capacity belonged to the parent as long as the child was a minor.[124] Courts denied a parent compensation for sentimental losses because the law treated the parent-child relationship as the equivalent of a master-servant or master-apprentice relationship.[125] Some jurisdictions did permit a parent's recovery for loss of a child's society and affection as "parasitic" to damages for loss of services when the defendant intentionally abducted, enticed, or seduced the child.[126] Courts did not permit recovery for loss of society and affection, however, when the defendant negligently deprived the parent or master of a child's services.[127] This distinction between damages for negligence and those for intentional torts paralleled the distinction courts drew between consortium damages for husbands and wives. As in consortium, by recognizing loss of a child's services, courts endorsed the "male" contract model of the parent-child relationship. Also, as in consortium, by failing to recognize sentimental losses in all but circumscribed instances, courts devalued the relational interests of the "female" sphere.

Today, the loss of services action is, of course, obsolete.[128] The common law doctrine for loss of services originated in a time when the economic system could not have survived without child labor.[129] Children today, however, are no longer economic assets to the family, but rather are causes of great expenditure.[130] Not only have social and economic changes

---

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." McGarr v. National & Providence Worsted Mills, 24 R.I. 447, 453, 53 A. 320, 325 (1902). *See also* Love, *supra* note 2, at 599-600.

123. GROSSBERG, *supra* note 60, at 259. Indeed, parents were equated with masters. *Id.*

124. *See* Annotation, *What Items of Damage on Account of Personal Injury to Infant Belong to Him and What to Parent*, 37 A.L.R. 11 (1925).

125. *McGarr*, 24 R.I. at 453, 53 A. at 325-26; Green, *supra* note 56, at 482.

126. PROSSER & KEETON, *supra* note 29, § 124 at 924-28.

127. *Id.* § 125 at 934.

128. *See* CLARK, *supra* note 1, § 11.2 at 385.

129. *Shockley*, 66 Wis. 2d at 400, 225 N.W.2d at 499, (quoting Katz, Schroeder, and Sidman, *Emancipating Our Children—Coming of Legal Age in America*, 7 FAM. L.Q. ___, 212-225 (1973):

> In colonial America children occupied the lowest rungs of the social ladder. . . . [C]hildren and servants were treated similarly before the law and were subject to the harshest punishments for relatively trivial offenses. Apprenticeship "was merely a specialized form of servitude." Children owed the strictest obedience to their parents and were expected to assume completely subservient positions within the family unit. Since child labor was crucial to the economic system, the parental right to a minor child's services and wages was also a practical necessity.

130. *Shockley*, 66 Wis. 2d at 339, 225 N.W.2d at 498. "It does not take an advanced degree in economics to see that it costs much more to raise a child than a child could ever earn during his or her minority." *Siciliano*, 124 N.H. at 733-34, 475 A.2d at 27 (Douglas, J., dissenting). The traditional pecuniary loss rule required juries to estimate the value of the child's services and then subtract the cost of parental support. If this rule were literally followed today, 'the average child would have a negative worth.' *Id.* (*quoting* Selders v. Armentrout, 190 Neb. 275, 279, 207 N.W.2d 686, 689 (1973)).

rendered the loss of services action obsolete, but so has the changed status of the parent-child relationship.[131] Today, parents value children from wholly "sentimental" impulses, not for the child's earnings and labor.

No court today would suggest that because the parent-child relationship is equivalent to that of master-servant, parents should not recover damages for loss of a child's society and companionship. Nevertheless, the "modern" loss of services action is no different than the early loss of services action, and the majority of jurisdictions continues to limit the damages a parent may recover to those for loss of a child's services.[132] Moreover, loss of services actions now reflect the law's subordination of the parent-child relationship to the marital relationship. The *Hitaffer* principle assured that spouses could recover for sentimental losses. Arguably, then, consortium actions protect modern interests in the marital relationship. Most courts have yet failed, however, to endorse and protect the modern parent-child relationship by compensating for "sentimental" losses in this realm. Current law thus denigrates the value of the parent-child relationship in contrast to the value of the marital relationship.

IV. Current Relational Interests

Current relational tort claims still reflect their historical origins in the *paterfamilias*, master-servant, and contract models of family relationships. Today's law portrays a family model wherein "material" relational interests are more valuable than "sentimental" relational interests, and relationships founded on contract (such as marriage) are more valuable than those that are not (such as the parent-child relationship). The law thus recognizes the relational interests of the "male" sphere and devalues relational interests of the "female" sphere.

The law's description of current relational interests in the family does not comport with actual current values or relational interests. When a family member is severely injured, other members of the family suffer primarily a sentimental loss, not a loss of earnings or services. Though the law recognizes the sentimental losses of spouses, it still does not recognize the sentimental losses of parents and children. Furthermore, a family member suffers this loss when the other is severely injured regardless of whether an explicit or implicit contract for support and services establishes their relationship. Courts' reasoning that sentimental losses are based on contract suggests that sex, affection, and love are relational commodities bought and sold in the marketplace.

Courts' justification of the contract model, that the marital relationship is the foundation of society,[133] is prescriptive, not descriptive. Nearly half of all marriages end in divorce.[134] The parent-child relationship, on

131. *Shockley*, 66 Wis. 2d at 400, 225 N.W.2d at 499.

132. Love, *supra* note 2, at 633.

133. *Gonzales*, 200 Cal. App. 3d at ___, 245 Cal. Rptr. at 756; *Dralle*, 124 Ill. 2d at ___, 529 N.E.2d at 214.

134. Note, *Child Support Enforcement in Montana*, 50 MONT. L. REV. 165, 165 n.2

the other hand, endures a lifetime. In addition, single parents head twenty-percent of all American families.[135] Arguably, then, the parent-child relationship is more important to the well being of our society than the spousal relationship. Moreover, children's dependence on their parents further supports the imperative to value the parent-child relationship as much if not more than the spousal relationship. Though our law views children as autonomous individuals,[136] children are dependent upon their parents or guardians for any rights and entitlements that our law guarantees. Furthermore, the state must rely on parents to assure that children receive the attention, guidance, and emotional support they require to become productive and ethical members of society. Spouses, by contrast, have a direct relationship with the state and can look to it independently for protection of their rights. As a consequence of devaluation of relational interests in the female sphere, however, family members' tort claims fail to recognize these critical current relational interests.

V. THE CURRENT DEBATE

In the last fifteen years a number of jurisdictions have considered whether to allow damages for loss of a child's or parent's society. Courts recognizing actions in the parent-child relationship seek to evaluate injuries in light of changing social and economic conditions.[137] Some courts have, therefore, rejected the notion that a parent values a child only for the economic value of the child's labor.[138] Moreover, at least one court has refused to limit recovery to the age of majority, reasoning that such a limitation reflects the archaic loss of services model.[139] Limiting an action to a child's minority fails to value a child's companionship and society which endure beyond the age of majority.[140] Further, some courts have recognized a child's action for loss of a parent's society because of the child's dependency,[141] "rooted not only in economic requirements, but also in [a child's] needs for closeness, guidance and nurture."[142]

Beginning with the California cases of *Borer v. American Airlines*[143]

(1989) (authored by Thomas W. Christie). Sociologists anticipate that 49% of all marriages will fail. *Id.*

135. U.S. BUREAU OF THE CENSUS, U.S. DEPT. OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 43 (1988). Over 80% of all single parents are women. *Id.*

136. *See* GROSSBERG, *supra* note 60, at 24, for a discussion of how American law emphasizes the individual.

137. *E.g.*, *Shockley*, 66 Wis. 2d at 399-401, 225 N.W.2d at 498-99; *Howard Frank, M.D., P.C.*, 150 Ariz. at 231, 722 P.2d at 959.

138. *Shockley*, 66 Wis. 2d at 407, 225 N.W.2d at 500.

139. *Howard Frank, M.D., P.C.*, 150 Ariz. at 231, 722 P.2d at 958.

140. *Id.* at 233, 722 P.2d at 960 (1986). In a recent federal case, the court recognized a parent's constitutionally protected right to the companionship of an adult married child. *Agresta v. Sambor*, 687 F. Supp. 162, 167 (E.D. Pa. 1988).

141. See *Berger*, 411 Mich. at 17, 303 N.W.2d at 427; *Ferriter*, 381 Mass. at 515-16, 413 N.E.2d at 695.

142. *Ferriter*, 381 Mass. at 516, 413 N.E.2d at 696.

143. 19 Cal.3d 440, 138 Cal.Rptr. 302, 563 P.2d 858.

and *Baxter v. Superior Court of Los Angeles*,[144] however, several jurisdictions have recently denied parents and children consortium actions.[145] These courts assert that money cannot compensate loss of society and companionship[146] and that the difficulty of measuring damages for sentimental losses risks double recovery.[147] Money may not compensate parent-child relational losses in reality, but money does not compensate for most losses recognized in the tort system.[148] Awarding damages for loss of society and companionship is no more difficult than awarding damages for emotional distress, for example.[149] Furthermore, the double recovery argument did not succeed in preventing courts from awarding damages for sentimental losses to wives, and it is just as unpersuasive, therefore, for parent-child losses. Just because market models cannot readily measure a loss does not mean that courts should not recognize the value.[150] Courts that refuse to value the parent-child relationship legally because damages cannot be precisely measured place greater importance on the means of justice than on the just end. The tort system, or means, itself forms part of the "male" sphere, recognizing and compensating "sentimental" relational losses, the end, is associated with the "female" sphere.[151] By placing greater value on the means of measuring damages than on the social values the law might reflect in recognizing sentimental losses of parents and children, courts implicitly continue to devalue relational interests in the "female" sphere and perpetuate a reflexive gender bias.

A fear of ballooning litigation particularly motivates these courts to draw the line at such claims. For example, these courts assert that the expense of litigating nonmarital relational claims would overburden courts, that payment for loss of consortium in these claims would overburden society, and that the general public would bear the brunt of these burdens in higher insurance costs.[152] Once courts recognize parent and child losses of consortium, these courts predict, the "floodgates" of litigation would burst with grandmothers', grandfathers', brothers', and sisters' claims.[153] Illogically, such concerns for efficient judicial administration do not obtain in analysis of marital relational claims. Instead, courts have attempted to distinguish marital relational claims from parent-child relational claims in order to justify denial of parents' and children's claims.

---

144. 19 Cal.3d 461, 138 Cal.Rptr. 315, 563 P.2d 871.

145. *E.g.*, *Dralle*, 124 Ill. 2d 61, 529 N.E.2d 209; Sizemore, 430 Mich. 283, 422 N.W.2d 666; *Siciliano*, 124 N.H. 719, 475 A.2d 19.

146. *Baxter*, 19 Cal. 3d at 464, 138 Cal. Rptr. at 317, 563 P.2d at 873.

147. *Borer*, 19 Cal. 3d at 448-49, 138 Cal. Rptr. at 307, 563 P.2d at 863.

148. *Sizemore*, 430 Mich. at 307, 422 N.W.2d at 677 (Archer, J., dissenting); *Siciliano*, 124 N.H. at 737, 475 A.2d at 30 (Boyle, J., dissenting).

149. *Siciliano*, 124 N.H. at 737, 475 A.2d at 30 (Douglas, J., dissenting).

150. *Sizemore*, 430 Mich. at 312, 422 N.W.2d at 680 (Boyle, J., dissenting).

151. *See* Karst, *supra* note 104, at 462.

152. *Borer*, 19 Cal. 3d at 447, 138 Cal. Rptr. at 306, 563 P.2d at 862; *Sizemore*, 430 Mich. at 295, 422 N.W.2d at 672.

153. *Dralle*, 124 Ill. 2d at —, 529 N.E.2d at 213.

Courts suggest, for example, that the spousal relationship can be distinguished from the parent-child relationship because of the absence of a sexual relationship in the latter[154] and because the marital relationship is somehow more important to society.[155]

Though courts must weigh the detriment of imposing another layer of liability on society against the benefit of recognizing parent-child claims, they should refrain from limiting recovery by relying on antiquated legal models that degrade human relationships. Under prevailing contract theory, denying recovery to parents and children based on the absence of a sexual relationship suggests that sex is a "material" interest and ignores the sentimental aspects of both the spousal and parent-child relationship. Further, the holding of some courts, that recovery for loss of a parent's or child's consortium is limited to the child's minority, reflects a view of the relational interests of parents and children as mere aspects of a master-servant contract.

Courts rejecting tort actions of parents and children ultimately conclude that the social interest in limiting liability outweighs the individual's interest in receiving compensation.[156] Yet few courts have refused to entertain a husband's action for loss of his wife's consortium.[157] To protect the relational interests of some family members while denying protection for others, courts have gone to great lengths to make distinctions that form degrading and anachronistic models for family relationships. In light of the separate spheres ideology, the failure of our law to recognize the sentimental interests of parents and children yet reflects a fundamental gender bias.

VI. Toward Redefining Relational Interests

In the interest of limiting liability, courts have perpetuated antiquated and degrading legal models for family relationships. The relational interests currently recognized by the law in the loss of consortium and services actions are contractual, proprietary, materialistic, and individualistic. Though courts eventually extended to wives the common law right of husbands to recover for "sentimental" as well as "material" losses, current law refuses to recognize the sentimental relational interests of parents and children.

We should seek to fashion a tort system that reflects our present-day relational values. If the law is to recognize relational interests at all, it should recognize those kinship bonds that encourage the growth and de-

154. *Borer*, 19 Cal. 3d at 448-49, 138 Cal. Rptr. at 307, 563 P.2d at 863; *Siciliano*, 124 N.H. at 726, 475 A.2d at 22.

155. *Dralle*, 124 Ill. 2d at ___, 529 N.E.2d at 214.

156. *E.g.*, *Borer*, 19 Cal. 3d at 453, 138 Cal. Rptr. at 310, 563 P.2d at 866; *see Baxter*, 19 Cal.3d at 464, 466, 138 Cal. Rptr. at 317, 318, 563 P.2d at 872, 874; *see Dralle*, 124 Ill. 2d at ___, 529 N.E.2d at 213-14; *Sizemore*, 430 Mich. at 295-96, 299, 422 N.W.2d at 672, 674; *Siciliano*, 124 N.H. at 728, 475 A.2d at 24.

157. CLERK, *supra* note 11, § 11-3 at 390.

velopment of family members regardless of their net worth. Recognizing the relational interests of spouses while refusing to recognize the relational interests of parents and children is instead a sorry denial of those kinship bonds. Current tort law suggests that a spousal relationship is more important than a parent-child relationship. Further, in light of the traditional functions assigned to men and women, family tort actions suggest that breadwinning and providing emotional support and services to breadwinners is more important than parenting. Family members' tort law thus conveys a message that the economic support of a family, whether by earning a wage or by homemaking, is more important than the social and emotional development of its members.

To repudiate this current model, courts should extend the loss of consortium action to parents and children. The law should recognize that family members depend on each other for emotional as well as economic support, and that a family member suffers a deep loss when another family member is severely injured. Extending tort compensation for damages only to parents and children would not open the floodgates of litigation. The spousal and parent-child relationships are the basis of the American family, and therefore, courts need not extend the right to recover relational damages any further.[158] We can recognize that the parent-child relationship, as well as the spousal, forms the foundation of our society without denigrating other kinship relations. Further, recognition of the sentimental losses of parents and children in consortium actions parallels other developments in family tort law. Family members, including parents and children, can now recover damages for the emotional shock of witnessing injury to another family member,[159] and can recover damages for grief caused by the wrongful death of a family member.[160] It makes little sense to recognize the legitimacy of these claims without also recognizing the loss of society claims of parents and children.

Denying claims of parents and children is not the only way to limit liability. Because our law emphasizes the rights of individuals rather than the "relationship among individuals,"[161] courts presume that recognizing the rights of parents and children in addition to those of spouses will result in a multiplication of claims and an explosion of damages.[162] This result arises, however, because courts treat relational interests as "individual" interests rather than as interests of the group to which the injured party belongs.[163] Courts' concern for limiting liability and preventing double recovery can be addressed, therefore, by recognizing the injury

158. *See Sizemore*, 430 Mich. at 306, 422 N.W.2d at 677 n.4 (Archer, J., dissenting).

159. Versland v. Caron Transp., 206 Mont. 313, 671 P.2d 583 (1983).

160. Dawson v. Hill & Hill Truck Lines, 206 Mont. 325, 671 P.2d 589 (1983). For a discussion of why courts should permit recovery for grief *see* Strong and Jacobsen, *Such Damages as are Just*, 43 MONT. L. REV. 55 (1982).

161. *See* Sherry, *supra* note 108, at 544-50, for a discussion contrasting the "atomistic" and "holistic" paradigms of political and moral philosophy.

162. *E.g.*, *Borer*, 19 Cal. 3d at 450, 138 Cal. Rptr. at 308-09, 563 P.2d at 863-64.

163. *See* Pound, *supra* note 32, at 179-80.

suffered by the kinship unit as a whole, rather than by adjudicating the isolated claims of every member.[164] By first examining the injury to the group as a whole, and then devising a system for distributing the award among individual members, courts could avoid the potential problems of double recovery and extended liability.

On the other hand, the tort system may simply be unable to protect relational interests at all.[165] One court observed that in parents' loss of consortium claims, parents would have to present evidence of diminution of the value of their child's society and companionship resulting from the injury.[166] Said the court, "a parent's interest in minimizing the value of a living child contrasts sharply with the situation in a wrongful death action, where the opposite claim is made and loss is presumed."[167] Nonetheless, courts entertain evidence of the diminution of an injured spouse's value. Therefore, if courts refuse to recognize the claims of parents and children, then they should deny the claims of spouses as well. Denial of all family members' claims—spouses, parents, and children—would merely constitute the admission that the tort system cannot appropriately value relational claims. Moreover, by abolishing the spousal loss of consortium action, courts would repudiate the materialistic and patriarchal concepts on which it is based.

VII. CONCLUSION

Historically, the law defined relational interests according to the value that men placed on their servants, their wives, and their children. Though the law has recognized the individual legal identities of women and children,[168] it has been reluctant to recognize their relational interests, especially where those interests differ from those traditionally protected by the law.

The judiciary should strive to analyze relational interests in light of current family relationships, and not limit its recognition of legal interests to those based on patriarchal and materialistic concepts that devalue the interests associated with the "female" sphere. Courts should recognize the claims of parents and children, as well as those of spouses, because the parent-child relationship is fundamental to the kinship unit. While the tort system may not be the best means of recognizing or protecting these interests among family members, we should not permit the means of protecting relational interests to determine legal perceptions of family relationships. If the judiciary must admit the inability of the tort system

---

164. *See Sizemore*, 430 Mich. at 311, 422 N.W.2d at 679 n.5 (Archer, J., dissenting). Courts should "look beyond the idea of rights as personal zones of non-interference to a conception of justice that recognize[s] our interdependence." Karst, *supra* note 107, at 471.

165. For a discussion on this point *see* Comment, *Negligent Injury to Family Relationships: A Reevaluation of the Logic of Liability*, 77 NW. U.L. REV. 794, 804-05 (1983).

166. *Dralle*, 124 Ill. 2d at ___, 529 N.E.2d at 213.

167. *Id.*

168. *See* GROSSBERG, *supra* note 60, at 24.

to value the relational interests of parents and children, then it should abolish all relational claims and the materialistic and patriarchal concepts upon which they are founded.