**Montana Law Review**

Volume 34
Issue 1 *Winter 1973*

Article 5

1-1-1973

# Consortium: An Action for the Wife

Bill Leaphart
*Law Clerk, U.S. District Court of Montana*

Richard E. Mccann
*Law Clerk, United States District Court of Montana*

# CONSORTIUM: AN ACTION FOR THE WIFE

**Bill Leaphart* and Richard E. McCann†**

*There once was a lady in court*
*She sued for her losses in tort:*
*It's my husband, she said,*
*He's no good in bed.*
*Since he can't be replaced, some money will do.*
*Oh no, said the court, he's entitled, not you.*

## *INTRODUCTION*

With due allowance for poetic license, this represents what the law has been for several hundred years, and what it continues to be in many jurisdictions.

It is the intent of this article to trace that law from its earliest foundations to its present state of flux; to describe its present status in Montana; and to make some predictions about its future.

Literally translated, consortium means "casting lots together."[1] Black describes it as: "Conjugal fellowship of husband and wife, and the right of each to the company, co-operation, affection, and aid of the other in every conjugal relation."[2] Early law emphasized the loss of services,[3] but the concept has grown to include all the elements of a marriage relationship: love, affection, society, sex, companionship, and various other attributes.[4]

---

*Law Clerk to Judge W. D. Murray, United States District Judge, Butte, Montana. B.A. Univ. of Montana, 1969; J.D. Univ. of Montana 1972.

†Law Clerk to Judge William J. Jameson, United States District Judge, Billings, Montana. B.A. Rocky Mountain College 1965; J.D. Univ. of Montana 1972.

[1] CASSEL, LATIN-ENGLISH DICTIONARY (1958); BOUVIER'S LAW DICTIONARY (8th ed. 1914) translates "a union of lots or chances."

[2] BLACK'S LAW DICTIONARY (4th ed. 1951).

[3] Best v. Samuel Fox & Co., A.C. 716 (1952); Karczewski v. Baltimore & Ohio Railroad Company, 274 F. Supp. 169, 171 (N.D.Ill. 1967); JOWITT, THE DICTIONARY OF ENGLISH LAW 461 (1969) states that "the only loss which the law will recognize is loss of service, seritium." Williams v. Ward, 18 Ohio App. 2d 37, 246 N.E.2d 780, 783-84 (1969) rejected the common law emphasis on services: "Consider the mischief which would result if we approved a rule which permitted a husband to recover for loss of his wife's consortium only where he proved as part of such loss a loss of his wife's services requiring an expenditure of his funds to replace such services. Under such a rule the husband could have his laundry done once by a commercial laundry where his wife had difficulty in performing the task, thereupon the husband could recover a substantial sum for all the elements of consortium. This illogical solution makes a game of the law and shouldn't be tolerated."

[4] G. CLARK, DOMESTIC RELATIONS 261 (1968); Deems v. Western Maryland Railway Co., 247 Md. 95, 231 A.2d 514, 521 (1967) *noted in* 13 VILLANOVA L. REV. 418 (1968): "Beyond and apart from the legal obligations of the husband to support his wife . . . there is, in a continuing marital relationship, an inseparable mutuality of ties and obligations, of pleasure, affection, and companionship, which make that relationship a factual entity." Marri v. Stamford St. Ry. Co., 84 Conn. 9, 78 A. 582, 583 (1911).

## HISTORICAL BACKGROUND

### ROMAN LAW

At Roman Law a woman might marry *sine manu*—forever subject to her father's power, or *cum manu*—subject to her husband's power, the *patria potestas,* or power of the father being transferred to the husband upon marriage.[5] The power of the husband or father over the woman was that of life and death;[6] it was absolute, and even as women gained power and rights as the Roman Empire grew,[7] what power she held was never *sui generis,* but was always dependent upon and derived from a male guardian.[8] As the husband's rights were absolute under Roman Law and the woman's non-existent, in the law at least,[9] there is little question as to the absence of a woman's right to consortium or even to anything comparable under the civil law of the Holy Roman Empire even though consortium was considered the very essence of the marriage relationship.[10]

### COMMON LAW

It is this foundation that was carried into the common law of England. The doctrine was analogous to the master-servant relationship in early English history, and initially the rights of woman were as non-existent as at the Roman Law.[11] Growth and change in the law soon became evident, however.

The first stage of development was the husband's right of action for loss of consortium.[12] A husband could sue, for example, for loss of his wife's consortium as a result of an action of alienation of affection, allowing the action against one who intentionally interfered with the marriage relationship.[13] In 1618, in *Guy v. Livesey,*[14] Guy brought suit against Livesey for injuring Guy's wife. The court held that the action was

[5]Comment, *The Case of the Lonely Nurse: The Wife's Action for Loss of Consortium,* 18 WEST. R. L. REV. 621 (1967).

[6]*Id.*

[7]*Id.* The writer suggests that women did gain some "rights" and privileges in society, but were careful to leave the law unchanged.

[8]*Id.*

[9]*Id.*

[10]Note, *Consortium and the Common Law,* 15 S.CAR. L. Q. 810 (1963), *citing* 23 DIGEST OF JUSTINIAN, MODESTINUS, 2.1 *and* W. BUCKLAND and A. MCNAIR, ROMAN LAW AND THE COMMON LAW (1936).

[11]Lippman, *The Breakdown of Consortium,* 30 COL. L. REV. 651 (1930); Holbrook, *The Change in the Meaning of Consortium,* 22 MICH. L. REV. 1 (1923); *The Case of the Lonely Nurse, supra* note 5.

[12]Holbrook, *supra* note 11 at 2; Lippman, *supra* note 11; Grobart v. Grobart, 5 N.J. 161, 74 A.2d 294 (1950); Farrow v. Roderique, 224 S.W.2d 630 (M. 1949).

[13]Note, *The Action for Loss of Consortium in Indiana,* 3 IND. LEGAL FORUM 240 (1969) lists 3 actions available to the husband; alienation of affection; enticement; and criminal conversation. While courts often used the first two as distinct actions, they are more often considered interchangeable, and only different labels for the action. *Contra; infra* note 42.

[14]Guy v. Livesey, 81 Eng. Rep. 653 (K.B. 1618). The action was brought alleging that the defendant had "assaulted and beat the wife of thee plaintiff *per quod consortium exoris suae* for three days *amisit.*" Per Quod Consortium Amisit is translated "whereby he has lost the benefit of her society" in JOWITT, *supra* note 3.

brought "for the particular loss of the husband, for which he shall have this action, as the master shall have for the loss of his servant's service."[15]

The earliest reported cases which dealt with the possibility of separate causes of action by either spouse was the *Chomley and Conges* Case.[16] The husband sued for Conges' battery of his (Chomley's) wife. Conges' defense was that the husband must join the wife in the action. The suit was allowed without joinder.

The first indication of the husband's legal right to the services and comfort of his wife was in 1610,[17] when the court held that "the action is not brought for the battery of the wife, but for the loss and damages of the husband, for want of her company and aid."[18] While the unity of husband and wife as a single entity in marriage,[19] and the status of a wife as a mere chattel[20] was thus firmly established at law, the situation was remarkably different in the ecclesiastical courts.[21] There, husband and wife were separate and independent entities.[22] Women could sue and be sued in their own names, and could bring five distinct actions—one of which was a suit for the restitution of conjugal rights.[23] And so it was here, in the spiritual courts of England, that the right of the wife to have restored to her the marriage relationship, in form at least, was born. No action for damages was allowed, a remedy that was to come later—albeit, much, much later.

In the meantime, in 1861, an English court of law considered and rejected a wife's cause of action for damages for loss of consortium, resulting from an intentional tort.[24] Mrs. Lynch's husband sent her away from him to go to her parents because of information given him by one Knight—defamatory and false information alleged Mrs. Lynch, bringing suit for the loss of comfort and aid of her husband. The court found that the only loss sustained that was capable of measurement was in the husband, Mr. Lynch, for being deprived of the "assistance of the wife in the

[15]Guy v. Livesey, *supra* note 14 at 654.
[16]Chomley and Conges, 74 Eng. Rep. 748 (Common Pleas 1586).
[17]Hyde v. Scyssor, 79 Eng. Rep. 462 (K.B. 1620).
[18]*Id.*
[19]Ekalo v. Construction Service Corp. of America, 46 N.J. 82, 215 A.2d 1 (1965). I. BLACKSTONE'S COMMENTARIES §442 (Lewis's ed. 1900); "By marriage, the husband and wife are one person in the law: That is the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband."
[20]Kronenbitter v. Washburn Wire Co., 4 N.Y.2d 524, 151 N.E.2d 898 (1958); Note, *The Action for Loss of Consortium in Indiana, supra* note 13.
[21]Comment, *The Case of the Lonely Nurse, supra* note 5; Westlake v. Westlake, 34 Ohio St. 621 (1878).
[22]I. BLACKSTONE'S COMMENTARIES, *supra* note 19 at § 444: "In civil law the husband and wife are considered two distinct persons; and may have separate estates, contracts, debt and injuries; and therefore in our ecclesiastical courts, a woman may sue and be sued without her husband." The "civil law" referred to is the Canon Law of the Catholic Church, first imposed by the Church from Rome, and reinforced by William I, when he separated the ecclesiastical and civil courts. I. BLACKSTONE'S COMMENTARIES, *supra* note 19 at § 62.
[23]Comment, *The Case of the Lonely Nurse, supra* note 5 at 626.
[24]Lynch v. Knight, 11 Eng. Rep. 854 (K.B. 1861). The case came on appeal from Ireland after having been found for the plaintiff by the Court of Exchequer Chamber.

conduct of the household and in the education of the children.[25] And further, that the measure of damages would be dependent upon the station of life held by the Lynches.[26]

Lord Campbell, the Lord Chancellor, however, tentatively offered that the action of consortium might indeed lie for Mrs. Lynch. A bare beginning was this dissent, to be sure, but nevertheless, a beginning.[27]

Considerable academic discussion concerns itself with whether woman's right to sue existed at all or whether it did exist but was procedurally barred from being asserted by the requirement that only the husband could bring suit.[28] The second alternative was tested, however, by an equity court,[29] since if the bar was in fact only procedural, equity might be expected to remove it. It did not, and so it might reasonably be concluded that the right of a woman to sue for damages for loss of consortium simply did not exist at the common law.[30]

The actions allowed to the husband for the loss of consortium were for many years only those caused by intentional torts. The action for consortium caused by an act of negligence did not exist, even for the husband. And the wife, of course, had no action at all except as she might choose to be re-united in the ecclesiastical court.

The distinction in the husband's action, between intentional torts and negligent torts suggests the next step in the development of the law: granting to the husband the right to sue for loss of consortium resulting from the negligence of another. It should be remembered, however, that the growth of negligence actions was taking place at this time,[31] and that the absence of a husband's action for consortium for a negligent tort was not due to any restriction on that particular right, but upon the general absence of any action for a negligent tort.[32] With this step, another was being taken; a few courts began to allow the wife's action for damages

[25] *Id.* at 85. The court also found that the husband had acted wrongly in sending his wife away.

[26] *Id.* at 863.

[27] *Id.* at 859-60. Lord Campbell died June 23, 1861, after hearing the case, but before the opinion was brought. His dissent was delivered by Lord Brougham. Lord Campbell was prophetic: "But the loss of conjugal society is not a pecuniary loss, and I think it may be a loss which the law may recognize, (sic) to the wife as well as to the husband. The wife is not the servant of the husband. . . ."

[28] Holbrook, *supra* note 11 at 4; Note, *Consortium and the Common Law*, *supra* note 10 at 813.

[29] Ex Parte Warfield, 40 Tex. Crim. 413 (1899); Hall v. Smith 140 N.Y.S. 796 (1913).

[30] Modern courts, however, in granting the right of a wife to sue for damages for loss of consortium under the statutory authority granting women's actions, have concluded that they could do so only because the right did exist at common law and was only procedurally barred. Brown v. Georgia-Tennessee Coaches, Inc., 88 Ga. App. 519, 77 S.E.2d 24 (1957). Note, *Consortium and the Common Law*, *supra* note 10 at 813-19, discusses the question and concludes that it may never be fully answered.

[31] F. HARPER, HARPER ON TORTS § 66 (1933): "Negligence as a separate tort is hardly recognized in the law until the beginning of the nineteenth century." W. PROSSER, LAW OF TORTS § 28 (1964): "About the year 1825 negligence began to be recognized as a separate and independent basis of tort liability."

[32] *Id.*

for loss of her husband's consortium caused by the intentional acts of another. This step was not the result of the general growth of tort law, however, as was the husband's. It occurred for a very different reason—specific legislation giving rights to women: the "Emancipation Acts," or "Married Women's Acts."

The husband's right to sue was rapidly expanded to include loss caused by negligence as that branch of the tort law grew during the Nineteenth Century,[33] but it is not within the scope of this paper to examine those cases in any detail. It is critical, however, to note that the step was taken, and that its place in the evolving law is following the established action for loss caused by intentional torts, for that same sequence appears later in the evolution of women's actions, repeating itself as the right of women to sue is asserted. It is important, also, to note that "As in the case for an intentional violation, the action for negligence is also based upon an act *per quod consortium amisit*—by which consortium is lost."[34]

It is from this setting, then, that the step to the rights of women could be taken. The right of a man to sue for loss of consortium caused by intentional torts, and then negligent torts, established slowly as the law of negligence grew, suggests, by its very order of development, the next step.

That next step came with the Married Women's Acts.[35] By these statutes, the legal unity of husband and wife as it had existed at the common law was severed.[36] Under these statutes, married women acquired the right to sue and to be sued in their own name,[37] to contract,[38] to own and control property,[39] and even the dubious right to commit a tort in their own name.[40] By virtue of these statutes, women were able to recover damages for loss of consortium due to injuries done to their husband by the intentional acts of others, causing damage and loss to the marriage

[33]Sanford v. City of Augusta, 32 Me. 536 (1851) (defective highway); Long v. Morrison, 14 Ind. 595 (1860) (medical malpractice); Hunt v. Winfield, 36 Wis. 154 (1874) (defective highway); Skoglund v. Minneapolis St. Rt. Co., 45 Minn. 330, 47 N.W. 1071 (1891) (auto accident); Blair v. Chicago & A.R. Co., 89 Mo. 334, 1 S.W. 367 (1866) (wife injured in railway accident, common carrier).

[34]Weedon v. Timbrell, 101 Eng. Rep. 199 (K.B. 1793).

[35]Holbrook, *supra* note 11; Lippman, *supra* note 11; Rosenberg, *Negligently Caused Loss of Consortium: A Case for Recognition as a Cause of Action in Connecticut*, 2 CONN. L. REV. 399 (1969).

[36]REVISED CODES OF MONTANA, §§ 36-101 to 36-131 (1947) [hereinafter cited R.C.M. 1947] contain the major statutory changes enacted by the Married Women's Act passed by the 4th legislature in 1895.

[37]R.C.M. 1947, § 36-110. Married women may prosecute actions. A married woman in her own name may prosecute action for injuries to her reputation, person, property, and character, or for the enforcement of any legal or equitable right, and may in any manner defend any action brought against herself.
R.C.M. 1947, §36-128. May sue and be sued. A married woman may sue and be sued in the same manner as if she were sole. R.C.M. 1947, § 93-2803.

[38]R.C.M. 1947, §§ 36-105, 36-129, 36-130.

[39]R.C.M. 1947, §§ 36-111, 36-112, 36-127, 16-118.

[40]R.C.M. 1947, §§ 93-4706; 93-4707; *supra* note 37; Teal v. Chancellor, 117 Ala. 612, 23 So. 651 (1898).

relationship.[41] Actions by women were allowed for the same intentional torts as those allowed to men at the common law.[42]

The development of actions for the wife based on intentional torts also included the seeds for the next step in the law, but the germination of those seeds was quickly extinguished: dissents,[43] and two cases,[44] both quickly overruled, declared the right of women to recover damages for loss of consortium caused by the negligence of another.

There was no absence of actions or opportunities for the courts to apply or to change the law, depending upon their interpretation of the Married Women's Acts.[45] The actions, however, were uniformly and consistenty denied, for a number of reasons, but usually including some or all of the following:

1. The law must be changed by legislative act, not by the courts.[46]
2. The consequences to the wife were too remote, and indirect, and mere consequential damages from the direct injury to the husband.[47]
3. Any loss that the wife might have sustained was adequately compensated for in the award to the husband for his injuries.[48]
4. The Emancipation Acts or the Married Women's Acts gave no new rights to women.[49]
5. The woman had suffered no loss of services; it being loss of services that the common law emphasized in allowing the husband's action.[50]

[41]Lippman, *supra* note 11 at 670; Rosenberg, *supra* note 35 at 413-14; D. STEWART, THE LAW OF HUSBAND AND WIFE § 77 (1885); Note, *The Action for Loss of Consortium in Indiana, supra* note 13 at 245; Norfolk Ry. & Light Co. v. Williar, 104 Va. 679, 52 S.E. 380 (1905); Clark v. Hill, 69 Mo. App. 541 (1897). *Contra*: Logan v. Logan, 77 Ind. 558 (1881).

[42]Alienation of Affection, and Enticement: Root v. Root, 31 F. Supp. 562 (N.D. Cal. 1940); Jefferson v. Kenoss, 38 Cal. App. 2d 496, 10 P.2d 711 (1940); Riggs v. Smith, 52 Idaho 43, 22 P.2d 358 (1932); Criminal Conversation: Woodman v. Goodrich, 234 Wis. 565, 291 N.W. 768 (1940); Newsome v. Fleming, 165 Va. 89, 181 S.E. 393 (1935). Montana, in R.C.M. 1947, § 17-1201, abolished the civil action for alienation of affections, but R.C.M. 1947, § 64-209 grants an action to husband or wife for enticement.

[43]*See e.g.* the dissents in *Bernhardt v. Perry*, 276 Mo. 612, S.W. 462, 467-70 (1918); *Landwehr v. Barbas*, 241 App. Div. 769, 270 N.Y. Supp. 534, 535 (1934).

[44]Hipp v. E. I. Dupont de Nemours & Co., 182 N.C. 9, 108 S.E. 318 (1921), overruled by Hinnant v. Tidewater Power Co., 189 N.C. 120, 126 S.E. 307 (1925); Griffen v. Cincinnati Realty Co., 27 Ohio Dec. 585, overruled by Smith v. Nicholas Bldg. Co., 93 Ohio St. 101, 112 N.E. 204 (1915).

[45]*Infra*, notes 46, 47, 48, 49, 50.

[46]Miskunas v. Union Carbide Corp., 399 F.2d 847 (7th Cir. 1968); Garrett v. Reno Oil Co., 271 S.W.2d 764 (Tex. 1954); Rush v. Great American Insurance Company, 376 S.W.2d 454 (Tenn. 1964); Page v. Winter 240 S.C. 516, 126 S.E.2d 570 (1962); Casey v. Manson Const. & Engineering Co., 247 Or. 274, 428 P.2d 898 (1967); Seagraves v. Legg, 147 W.Vo. 331, 127 S.E.2d 605 (1962).

[47]Lockwood v. Wilson H. Lee Company, 144 Conn. 155, 128 A.2d 330 (1956); Gambino v. Mgfr's. Coal & Coke Co., 175 Mo. App. 653, 158 S.W. 77 (1913); Goldman v. Cohen, 30 Misc. 336, 63 N.Y.S. 459 (1900); McDade v. West, 80 Go. App. 481, 56 S.E.2d 299 (1949).

[48]Snodgrass v. Cherry-Burrell Corp., 103 N.H. 56, 164 A.2d 579 (1960); Eschenbach v. Benjamine, 195 Minn. 378, 363 N.W. 154 (1935); Gigger v. Gallagher Transp. Co., 101 Colo. 258, 72 P.2d 1100 (1937).

[49]Bernhardt v. Perry, 276 Mo. 612, 208 S.W. 462 (1919); Brown v. Kistleman, 177 Ind. 692, 98 N.E. 631 (1912); Emerson v. Taylor, 133 Md. 192, 104 A. 538 (1918); Howard c. Verdigris Val. Elec. Co-op., 207 P.2d 784 (Okla. 1949).

[50]Copeland v. Smith Dairy Products Co., 288 F. Supp. 904 (N.D. Ohio 1968); *supra* note 48.

It was not until 1950, in the case of *Hitaffer v. Argonne*,[51] that these and other objections were authoritatively dealt with, and the first substantial gain established.

## *CURRENT LAW*

### The Hitaffer Decision

Certainly the *Hitaffer* opinion and decision marks a new period in the development of consortium law. It stood almost alone for nearly a decade after it was decided,[52] but since then the movement has accelerated until there seems little doubt that a majority of jurisdictions will ultimately align themselves with the position taken in that case by granting unequivocally the right of a woman to sue for the loss of consortium caused by the negligence of another. The opinion warrants a closer look.

Lucia Hitaffer sued her husband's employer, the Argonne Company, for its negligence, the result of which her husband, Pierce Hitaffer, sustained severe and permanent injuries to his body, in particular in and about his abdomen. As a consequence Lucia was deprived of his aid, assistance, enjoyment, and, specifically, sex relations.[53] Mr. Hitaffer received workmen's compensation for his injuries, but the action brought by his wife for damages for loss of consortium was dismissed by the trial court for failure to state a cause of action. Lucia Hitaffer appealed the dismissal.[54]

The appellate court, the Washington, D. C. Circuit Court of Appeals, recognized the solidarity of jurisdictions denying the wife's action for loss of consortium in negligence cases,[55] and then proceeded with a comprehensive analysis and rejection of the major arguments used to deny those actions. To the arguments listed above the court answered that legislatures, in enacting the Emancipation Acts, had removed the wife's disability to invoke the law's protection of rights, possessed by her as an equal partner of marriage even before the passage of those statutes.[56] With that the court rejected arguments that the Acts had given women no new rights, and that any change in the law required additional legislative action.

Loss of consortium to a husband in not so remote as to preclude a cause of action, and with this analogy the court rejected the argument of remoteness of the wife's action,[57] and also of remoteness of a negligence action as opposed to an intentionally caused injury, reasoning that the

[51]Hitaffer v. Argonne, 87 App. D.C. 47, 183 F.2d 811 (1950), *cert. denied*, 340 U.S. 851.

[52]Acuff v. Schmit, 248 Iowa 272, 78 N.W.2d 480 (1956); Missouri Pacific Transp. Co. v. Miller, 227 Ark. 351, 299 S.W.2d (1957); Bailey v. Wilson, 100 Ga.App. 405, 111 S.E.2d 106 (1959); Hoekstra v. Helgeland, 78 S.D. 82, 98 N.W.2d 669 (1959); Brown v. Georgia-Tennessee Coaches, Inc., *supra* note 30; *infra*, appendix.

[53]Hitaffer v. Argonne, *supra* note 51 at 812.

[54]*Id.*

[55]*Id.*

[56]*Id.* at 816.

[57]*Id.* at 817.

extent or the nature of an injury is not determined by the nature of the cause.[58] The court flatly rejected the notion that a wife's damages were included in the husband's recovery.[59] Further, the court noted, it is absurd, even if cause is considered, to reward the wife of an unfaithful husband and then to deny recovery to the wife whose husband is perfectly loyal to the marriage relationship but is negligently injured, which is, of course, the result of allowing the wife's action based on intentional torts while denying it for negligent torts.[60]

Finally, the court summarized its position:

> Furthermore, we can conceive of no reason for denying the wife this right for the reason that in this enlightened day and age they simply do not exist. On the contrary, it appears to us that logic, reason and right are in favor of the position we are now taking. The medieval concepts of the marriage relation to which other jurisdictions have reverted in order to reach the results which have been handed to us as evidence of the law have long since ceased to have any meaning. It can hardly be said that a wife has less of an interest in the marriage relation than does the husband or in these modern times that a husband renders services of such a different character to the family and household that they must be measured by a standard of such uncertainty that the law cannot estimate any loss thereof. The husband owes the same degree of love, affection, felicity etc., to the wife as she to him. He also owes the material service of support, but above and beyond that he renders other services as his mate's helper in her duties, as advisor and counselor, etc. Under such circumstances it would be judicial fiat for us to say that a wife may not have an action for loss of consortium due to negligence.
>
> It is therefore the opinion of this court that in light of the existing law of this jurisdiction, in light of the specious and fallacious reasoning of those cases from other jurisdictions which have decided the question, and in light of the demonstrable desirability of the rule under the circumstances, a wife has a cause of action for loss of consortium due to a negligent injury to her husband.[61]

## Recent Developments

Two other considerations warrant attention. *Hitaffer*[62] and other cases[63] discuss the right of action of a wife for loss of consortium in terms of constitutional guarantees under the equal protection clause of the fourteenth amendment.[64] Once that argument is accepted as applicable, two routes are available. *Hitaffer* and a growing number of jurisdictions hold that equal protection of the law requires that both the husband and the wife be allowed to bring the action.[65] Others, as might be expected, hold that the result is that neither husband nor wife can sue.[66]

[58] *Id.*

[59] *Id.* at 814.

[60] *Id.* at 817.

[61] *Id.* at 819.

[62] *Supra* note 51.

[63] Karczewski v. Baltimore & Ohio RR Co., *supra* note 3. Owen v. Illinois Baking Corp., 260 F. Supp. 820 (W.D. Mich. 1966).

[64] The constitutional argument is discussed at length below.

[65] An enumeration of jurisdictions is contained in the appendix.

[66] Hellmstetter v. Duke Power Co., 224 N.C. 821, 32 S.E.2d 611 (1945); West v. City of San Diego, 54 Cal.2d 469, 346 P.2d 479 (1959); Bugbee v. Fowle, 277 Mich. 485, 269 N.W. 570 (1936); Marri v. Stamford, *supra* note 4.

A third group exists, holding that the wife has an action but only when it is joined with her husband.[67] Their argument is that only by requiring joinder can double recovery be prevented.[68] These jurisdictions, however, recognize that there are in fact separate actions, and that the joinder is a procedural device to prevent an undesirable recovery. Another rationale is also used to achieve a joinder requirement, but that is one which recognizes only a single action, reasoning that the injury is to the marriage relationship which necessarily involves two people, husband and wife. Any action based on injury to that relationship, therefore, requires a joinder of both parties.[69]

Finally, there are those jurisdictions which, relying on the common law,[70] do not allow the wife's action, while upholding the husband's; and, until recently, still citing case law handed down prior to the Emancipation Acts.[71]

The appendix indicates that the years from 1950 to 1958 saw little change. Just as evident is the accelerated change since 1958. There seems little doubt that the trend will continue, and that it is simply a matter of time—and probably not a long time—before a substantial majority of jurisdictions will allow a wife to sue for damages for loss of consortium caused by the negligence of another.

## *MONTANA LAW*

### THE STATE COURTS

As of yet the Montana supreme court has not specifically answered the question of whether a husband or a wife can sue for loss of consortium due to the negligent injury to the spouse. There would, however, seem to be no doubt that a husband would be able to bring such a suit in Montana since Montana is a common law state, and the husband's right to damages for loss of consortium was established early in the common law. The woman's right to sue for her loss of consortium would, however, be open to the sundry arguments enumerated above, both for and against such a right. What little Montana law there is relevant to this point definitely points to allowing the woman to sue for her loss of consortium. The Married Woman's Act removed the wife's disability to sue on her own behalf.[72]

[67]Thill v. Modern Erecting Company, 284 Minn. 508, 170 N.W.2d 865 (1969); Ekalo v. Constructive Service Corp. of America, *supra* note 19.

[68]Moran v. Quality Aluminum Casting Co., 34 Wis.2d 542, 150 N.E.2d 137 (1967); Stenta v. Leglang, 5 Storey 181, 185 A.2d 759 (1962).

[69]Deems v. Western Maryland Railway Co., *supra* note 4; *contra*: Clouston v. Remlinger, 22 Ohio St. 65, 258 N.E.2d 230 (1970).

[70]Igneri v. C.I.E. Transports Oceaniques, 323 F.2d 257 (2nd Cir. 1963); Snodgrass v. Cherry-Burrell Corp., *supra* note 48; Page v. Winter, *supra* note 46; Garrett v. Reno Oil, *supra* note 46; Rush v. Great American Insurance Co., *supra* note 46. *Baldwin v. State*, 125 Vt. 317, 215 A.2d 492 (1965) denied the wife's action on the grounds that there was no direct duty running from the defendant to the wife, and only in breach of such a direct duty would an action lie.

[71]Copeland v. Smith Dairy Products, 288 F. Supp. 904 (N.D. Ohio, 1964). Overruled by Clouston v. Remlinger, *supra* note 69.

[72]R.C.M. 1947, § 36-128.

The *Revised Codes of Montana* have reflected this evolution by making marriage a civil contract,[73] bilateral in nature, and by stating that when a man and woman marry, they contract toward each other obligations of mutual respect, fidelity, and support.[74] The supreme court did hold, in an older Montana decision,[75] that in addition to support, a wife is entitled to aid, protection, affection, and society, all of which are within the scope of "consortium."[76]

FEDERAL COURTS

While the Montana supreme court has not faced the issue, there have been three federal cases[77] in Montana which have dealt directly with the problem of a woman's right to sue for loss of consortium, and one insurance case[78] having collateral impact on the issue. Since these cases came before the federal courts at a time when there existed no Montana supreme court decisions in point, the federal courts had to decide what the state law was. It is well settled that in the absence of any state supreme court decisions on the subject, the federal judge must apply what he finds to be the state law, after looking at other relevant decisions.[79] The Erie Doctrine requires that he apply state law.[80] Thus, in a situation where there are no decisions directly in point, he is in effect "sitting as a state court."[81] In 1961, Federal District Judge Murray "sat as a state court" in the case of *Duffy v. Lipsman*[82] and upheld the wife's right to sue for loss of consortium in light of the Montana case law interpretations of the Married Women's Act and the statutes establishing mutual contractual rights in the marriage relationship. In 1963, Judge Murray followed the *Duffy* decision in *Dutton v. Hightower & Lubrecht Const. Co.*[83] by again allowing the wife to sue for loss of consortium. Judge Murray said that "denying a right of action for the wife's loss of consortium would be to perpetrate an inequality between husband and wife which the Montana supreme court held the Married Woman's Act was intended to remove."[84] In 1967, the Montana federal court again recognized the woman's right to sue for loss of consortium, but denied the right in the case before it because her husband had been contributorily negligent.[85] In the same year, Judge

[73]R.C.M. 1947, § 48-101. Marriage is a personal relation arising out of a civil contract, to which the consent of parties capable of making it is necessary. Consent alone will not constitute marriage; it must be followed by a solemnization, or by mutual and public assumption of the marital relation.
[74]R.C.M. 1947, § 36-101. Husband and wife contract toward each other obligations of mutual respect, fidelity, and support.
[75]Wallace v. Wallace, 85 Mont. 492, 279 P. 374 (1929).
[76]BLACK'S LAW DICTIONARY (4th ed. 1968).
[77]Duffy v. Lipsman-Fulkerson & Co., 200 F. Supp. 71 (D. Mont. 1961); Dutton v. Hightower & Lubrecht Const. Co., 214 F. Supp. 298 (D. Mont. 1963); Hall v. United States, 266 F. Supp. 671 (D. Mont. 1967).
[78]Wohlberg v. Hartford Accident and Indemnity Co., 262 F. Supp. 711 (D. Mont. 1967).
[79]Commissioner v. Bosch, 387 U.S. 456, 465 (1967).
[80]Erie R. Co. v. Tompkins, 304 U.S. 64 (1938).
[81]Commissioner v. Bosch, *supra* note 79.
[82]Duffy v. Lipsman, *supra* note 77.
[83]Dutton v. Hightower & Lubrecht Const. Co., *supra* note 77.
[84]*Id.* at 301.
[85]Hall v. United States, *supra* note 77.

Smith apparently broke with the position taken in those two cases when he held, in a suit against an insurance company, that the husband could not recover for the incidental loss he suffered from the negligent injury to his wife.[86] In this case, the plaintiff's auto collided with the insured's pickup truck. As a consequence, the plaintiff asked for special damages in the state court suit, for repairs and loss of use of his vehicle and special damages for reasonable expenses of doctors, hospitals, medicine and other expenses resulting from the injury to his wife. He then asked for damages for loss of services of his wife, past and future. The insurance coverage was limited to $5,000 for each person and $10,000 for each occurence. The plaintiff's husband claimed that he should receive, in addition to recovery for the injury sustained by his wife, an additional $5,739.60; $739.60 damages to his truck, and $5,000 for loss of his wife's services. The court held that the policy limits of $5,000 for injury to one person referred to the physically injured person only, and that that limit must apply even though others suffered losses caused by that injury. In essence, the court held that the policy coverage did not extend to loss of consortium, since the terms of the policy do not distinguish between the physical injury to the wife and the consequential injury to the husband in his loss of consortium. That interpretation is supported in the facts of the case. The husband's action for loss of consortium is clearly established by common law so there would be little doubt as to its availability in Montana. This case, therefore, ought not to be taken as holding against a right of action for loss of consortium for either husband or wife.

There is, however, a very distinct difference between the two injuries, as is pointed out in *Yonner v. Adams*:[87]

> Take the case of a husband whose reproductive organs are incapacitated, his damages are predicated upon his injury which precludes him from copulation. However, his wife's loss is just as real as it is distinct. She can no longer enjoy her legally sanctioned and morally proper privilege of copulation and is deprived of her full enjoyment of her marital state. These are her rights, not his.[88]

Recognition of this distinction might very well have resulted in an opposite holding.

THE CONSTITUTIONAL ARGUMENT

The question of granting or denying a woman the right to sue for loss of consortium also raises obvious constitutional issues of due process and equal protection as guaranteed by the fourteenth amendment of the United States Constitution. Since the common law recognizes the husband's right to sue for loss of consortium and Montana, in turn, recognizes the common law, it would be a flagrant violation of the fourteenth amendment to deny the woman the same right merely because of her sex.[89]

[86]Wohlberg v. Hartford Accident & Indemnity Co., *supra* note 78.
[87]Yonner v. Adams, 53 Del. 229, 167 A.2d 717 (1961).
[88]*Id.* at 729.
[89]Karczewski v. Baltimore & Ohio RR Co., *supra* note 3.

The scope of the due process clause, broad enough to shield the confessed criminal, must also shield the law abiding citizen.[90] The same courts which protect the rights of criminals cannot rationally shut the door to the woman who claims damages for loss of her right to achieve motherhood within the marriage relationship.[91]

The United States Supreme Court, in *Hernandez v. Texas*[92] pointed out that the fourteenth amendment is not directed solely against discrimination due to a two class theory, i.e., the difference between blacks and whites. Irrationally discriminating against women merely because of their sex would easily fall within the purview of the fourteenth amendment prohibition. One writer has put it this way:

> Obviously society has a legitimate interest in the protection of women's maternal and familial functions. But in discussing the legal status of women, courts generally have been content to parrot the doctrine that sex forms the basis of a reasonable classification and ignore the fact that women vary widely in their activities and as individuals. What is needed to remove the present ambiguity of women's legal status is a shift of emphasis from women's class attributes (sex per se) to their functional attributes. The boundaries between social policies that are genuinely protective of the familial and maternal functions and those that unjustly discriminate against women as individuals must be delineated.[93]

As this author points out, the only valid rationale for discriminating against women is based upon protecting their maternal and familial functions. Denying women the right to sue for loss of consortium obviously would not satisfy this line of reasoning.

THE DOUBLE RECOVERY ARGUMENT

A few courts have suggested that the possibility of double recovery provides the rationale needed for the distinction and that the fourteenth amendment is therefore not violated.[94] They fear that by allowing the husband to recover for his injury, lost earnings and other injuries, the total injury sustained has been fully recompensed and that if the woman were also allowed to recover, there would be a double recovery.

This reasoning ignores the fact that the injury to the wife is distinct from that of the husband.[95] Even granting that the husband may recover for loss of services and of earning power, the wife's recovery for loss of consortium covers a good deal more than mere services; intangibles of love, sex, companionship, affection, and all the recognized attributes of

[90]Umpleby v. Dorsey, 10 Ohio Misc. 288, 277 N.E.2d 274, 275 (1967). Ohio overruled the woman's right to sue for loss of consortium in *Copeland v. Smith Dairy Products Co.*, 288 F. Supp. 904 (N.D. Ohio 1968) but recognized it again in *Clouston v. Remlinger Inc.*, 22 Ohio St. 65, 258 N.E.2d 230 (N.D. Ohio 1970).

[91]Umpleby v. Dorsey, *supra* note 71.

[92]Hernandez v. Texas, 347 U.S. 476 (1954).

[93]Murray and Eastwood, *Jane Crow and the Law: Sex Discrimination and Title VII*, 34 GEO. WASH. L. REV. 232 (1965).

[94]Miskunas v. Union Carbide Corp., *supra* note 46; Copeland v. Smith Dairy Products Co., *supra* note 71, which was overruled by Clouston v. Remlinger, *supra* note 69.

[95]Hitaffer v. Argonne Co., *supra* note 51.

marriage. The danger of double recovery can be entirely eliminated by requiring that the claim for loss of consortium be tried jointly with the claim for damages to the physically injured husband.[96]

As has been discussed above, a number of courts recognize a distinct difference between the physical injuries to one spouse and loss of consortium to the other but require, for procedural purposes, that the two claims be tried jointly. This practice can often deny recovery to one spouse if the other, for example, settles out of court.[97] In any case, the danger of double recovery is so slight as not to justify a procedural device barring or even limiting the wife's action.

One jurisdiction requires that the action for loss of consortium be tried jointly by man and wife but does so on substantive rather than procedural grounds.[98] The theory relied upon is that there is a single injury to the marriage relationship as an entity, rather than an injury to one spouse, or even to both if considered independently. Since the marriage relationship is by definition, and by its very nature, mutual, its impairment requires that both parties to the relationship join in the action.

Aside from the fear of double recovery, unwarranted in the majority of cases, the only rationale offerred for the male-female distinction on the question of consortium is longevity, an argument not entirely rational. In light of the reasons offered and considering repeated federal and state legislative affirmations of women's rights[99] the court should be willing to adapt the common law to modern conditions, even without the statutory changes imposed by the Married Women's Acts.

The common law should be susceptible to change in an evolving society—to remain static in the face of change would mean an unwillingness to face reality. "The law," as Dean Pound put it,

> must be stable, and yet it can't stand still. Were we to rule upon precedent alone, were stability the only reason for our being, we would have no trouble with this case. We would simply tell the woman to begone and to take her shattered husband with her, that we no longer need to be affronted by a sight so repulsive. In so doing we would have vast support from the dusty books. But dust from the decision would remain in our mouths through the years ahead, a reproach to law and conscience alike. Our oath is to do justice not to perpetrate error.[100]

And reflective of the same concept: "Legally today the wife stands on a par with her husband, she is an equal partner. The precedents of the older cases are violative of woman's statutory rights and constitutional safeguards."[101]

[96] *Supra* note 67.
[97] Ekalo v. Constructive Service Corp. of America, *supra* note 67.
[98] Deems v. Western Maryland Railway Co., *supra* note 67 at 522.
[99] 42 U.S.C. § 2000; Murray and Eastwood, *supra* note 93.
[100] Montgomery v. Stephan, 359 Mich. 33, 101 N.W. 2d 227, 229 (1960).
[101] *Id.* at 235.

## CONCLUSION

While the Montana supreme court has not yet faced the issue as to whether a wife can sue for damages for loss of consortium, it must surely do so, and probably soon. While this is certainly not an ultimate in the evolution of the law, still the pressure and devolpment of the law of several hundred years now presses for this next step. The law has moved from the man's right to sue for loss of consortium—first for intentional torts, then for negligent torts—to the woman's right in intentional torts. Now the next step must be taken. Indeed it has been taken in twenty jurisdictions since 1950.[102] The federal courts in Montana have declared that the law of Montana is that a wife has the right to sue for damages for loss of consortium for negligent injury to her husband. All that really remains undone is the clincher: that the Montana supreme court also declare this to be the law of Montana.

And with that, the rhyme that opened this article might be changed to read something like this:

At common law she was merely a chattel—
Her position in life, not unlike cattle.
Dependent, looked down on, and unable to sue—
These things, she swore, men someday would rue.
She slowly gained ground in improving her plight:
Consortium is hers, as a matter of right.
We are both now entitled to sex and affection,
So says our clause of equal protection!

[102] In 1963, in *Igneri v. C.I.E. Transports Oceaniques, supra* note 70 the court recorded 9 jurisdictions for and 19 against. In 1968, CLARK, *supra* note 4 recorded 14 jurisdictions for and 22 against. The current tally is 20 for and 19 against. See appendix, *infra*.

## APPENDIX

Those States Following the *Hitaffer* Decision:

| | | |
|---|---|---|
| 1. | Ark. | Missouri Pac. Transp. Co. v. Miller, 227 Ark. 351, 229 S.W.2d 41 (1957). |
| 2. | Colo. | C.R.S. 1963 90-2-11. Crouch v. West, 29 Colo.App. 72, 477 P.2d 805 (1970). |
| 3. | Del. | Yonner v. Adams, 3 Storey 229, 167 A.2d 717 (Del. Super. 1961); Stenta v. Leblang, 185 A.2d 759 (Del. 1962). |
| 4. | Ga. | Hightower v. Landrum, 109 Ga.App. 510, 136 S.E.2d 425 (1964). |
| 5. | Idaho | Nichols v. Sommeman, 91 Idaho 199, 418 P.2d 562 (1966). |
| 6. | Ill. | Karczewski v. Baltimore & Ohio RR Co., 274 F.Supp. 169 (N.D.Ill. 1967). |
| 7. | Ind. | Trove v. Marker, 249 N.E.2d 512 (Ind.App.), 252 N.E.2d 800 (1969). |
| 8. | Iowa | Acuff v. Schmidt, 248 Iowa 272, 78 N.W.2d 480 (1956). |
| 9. | Mich. | Montgomery v. Stephan, 359 Mich. 33, 101 N.W.2d 227 (1960); Sove v. Smith, 311 F.2d 5 (1962). |
| 10. | Md. | Deems v. Western Maryland Railway Co., 247 Md. 95, 231 A.2d 514 (1967) (conditions relief on joinder of parties). |
| 11. | Minn. | Thill v. Modern Erecting Co., 284 Minn. 508, 170 N.W.2d 865 (1969). |
| 12. | Mo. | Novak v. Kansas City Transit Co., 365 S.W. 2d 539 (1963); Manning v. Jones, 349 F.2d 992 (8th Cir. 1965). |
| 13. | Mont. | Duffy v. Lipsman-Fulkerson & Co., 200 F.Supp. 71 (D.Mont. 1961); Dutton v. Hightower & Lubrecht Const. Co., 214 F.Supp. 298 (D. Mont. 1963). |
| 14. | Neb. | Guyton v. Solomon Dehydrating Co., 302 F.2d 283 (8th Cir. 1962), cert. den. 371 U.S. 817 (1962). |
| 15. | N.J. | Ekalo v. Constructive Service Corp. of America, 46 N.J. 82, 215 A.2d 1 (1966) (wife may sue if she joins her claim with that of her husband). |
| 16. | N.Y. | Millington v. Southeastern Elevator Co., 22 N.Y.2d 498, 239 N.E.2d 897 (1968). |
| 17. | Ohio | Clouston v. Remlinger Inc., 22 Ohio St. 65, 258 N.E.2d 230 (1970). |
| 18. | Or. | O.R.S. 108.010; Ross v. Cuthbert, 239 Or. 429, 397 P.2d 529 (1964). |
| 19. | S.D. | Hoekstra v. Helgeland, 78 S.D. 82, 98 N.W.2d 669 (1959). |
| 20. | Wis. | Moran v. Quality Aluminum Casting Co., 34 Wis.2d 542, 150 N.W.2d 137 (1967) (conditions relief on joinder with husband's claim). |

Those State Contra to the *Hitaffer* Decision:

| | | |
|---|---|---|
| 1. | Ala. | Smith v. United Const. Workers, 271 Ala. 42, 122 So.2d 153 (1960). |
| 2. | Ariz. | Jeune v. Del Webb Const. Co., 77 Ariz. 226, 269 P.2d 723 (1954). |
| 3. | Cal. | Deshotel v. Atchison, T. & S.F.R. Co., 50 Cal.2d 664, 328 P.2d 449 (1958). |
| 4. | Conn. | Lockwood v. Wilson H. Lee Co., 144 Conn. 155, 128 A.2d 330 (1956). |
| 5. | Fla. | Ripley v. Ewell, 61 So.2d 420 (1952). |
| 6. | Ky. | Baird v. Cincinnati Elec. Ry., 368 S.W.2d 172 (1963). |
| 7. | Me. | Potter v. Schafter, 161 Me. 340, 211 A.2d 891 (1965). |
| 8. | N.M. | Roseberry v. Starkovich, 73 N.M. 211, 387 P.2d 321 (1963). |
| 9. | N.H. | Snodgrass v. Cherry-Burrell Corp., 103 N.H. 56, 164 A.2d 579 (1960). |
| 10. | Okla. | Nelson v. A.M. Lockett & Co., 206 Okl. 334, 243 P.2d 719 (1952). |
| 11. | Pa. | Neuberg v. Bobowicz, 401 Pa. 146, 162 A.2d 662 (1960). |
| 12. | S.C. | Page v. Winter, 240 S.C. 516, 126 S.E.2d 570 (1962). |
| 13. | Tenn. | Rush v. Great American Ins. Co., 213 Tenn. 506, 376 S.W.2d 454 (1964). |
| 14. | Tex. | Garrett v. Reno Oil Co., 271 S.W.2d 764 ref. n. r. e. (Civ.App. 1954). |
| 15. | Vt. | Baldwin v. State, 125 Vt. 317, 215 A.2d 492 (1965). |
| 16. | Va. | Carey v. Foster, 345 F.2d 772 (4th Cir. 1965). |
| 17. | Wash. | Ash v. S.S. Mullen, Inc., 43 Wash.2d 345, 261 P.2d 118 (1953). |
| 18. | W.Va. | Seagraves v. Legg, 147 W.Va. 331, 127 S.E.2d 605 (1962). |
| 19. | Wyo. | Bates v. Donnafield, 481 P.2d 347 (Wyo. 1971). |