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out that it is possible for a lessor to avoid the results reached here.

It will not admit of argument that plaintiffs' principal *cause* or motive in granting a lease to the defendant was to obtain an unconditional obligation on the part of defendant to drill on their land. If this obligation is not obtained, there is an absence of *cause* and therefore no contract.[5] Again, it should not admit of argument that defendant's obligation, which the plaintiffs were seeking to enforce, was subject to a potestative condition.[6] In other words, what appeared at first blush from the written lease to be an absolute duty to drill turned out to be an illusory promise.[7] This result was doubtless not what the lessor expected.

The solution to the problem is found in careful draftsmanship by the lessor's attorney. Form leases are mainly the product of "lessee interests," and it seems only natural that lessees would attempt to secure a mineral lease without running any risks thereunder.[8] "Lessor interests" can be adequately protected by careful attention to the interrelation of the provisions of the proposed lease. The draftsman must be sure that "unless" clauses, surrender clauses, separate forfeiture clauses, and other provisions do not overlap the obligatory provisions of express covenants so as to deprive them of their binding quality. Without exercise of this precaution, the lessor may be without a remedy for lessee's failure to drill, as were the plaintiffs in the principal case.

John S. Covington

TORTS—INTERFERENCE WITH CHILD'S INTEREST IN NORMAL FILIAL RELATION

Plaintiff, a child, alleged that he had been deprived of his mother's aid, comfort, kindness, and assistance by defendant's

5. See Arts. 1824-1825, LA. CIVIL CODE of 1870. For an excellent discussion of this topic, see Smith, *A Refresher Course in Cause*, 12 LOUISIANA LAW REVIEW 2 (1951).

6. See Arts. 2024-2034, LA. CIVIL CODE of 1870. Cases treating this aspect of a lease are: Lieber v. Ouachita Natural Gas & Oil Co., 153 La. 160, 95 So. 538 (1922); Raines v. Dunson, 145 La. 525, 82 So. 690 (1919); McClendon v. Busch-Everett Co., 138 La. 722, 70 So. 781 (1916); Caddo Oil & Mining Co. v. Producers' Oil Co., 134 La. 701, 64 So. 684 (1913).

7. See 1 CORBIN, CONTRACTS §§ 16, 145, 149 (1950).

8. For an interesting account of how such an attempt backfired, see Noxon v. Union Oil Co. of California, 210 La. 1074, 29 So.2d 67 (1946).

having negligently injured her. He sought to recover damages for this loss. *Held*, a motion to dismiss the complaint was sustained. *Hill v. Sibley Memorial Hospital*, 108 F. Supp. 739 (D.D.C. 1952).

At common law, a husband or parent deprived of the services of his wife or child by their wrongful injury may recover the value of those services from the wrongdoer.[1] In such actions, the husband is allowed to recover additional damages for the loss of his wife's society and the interference with the sexual aspect of their relationship.[2] In theory, the parent is allowed to recover only such damages as might compensate him for the loss of the child's services. Since accurate evaluation of that loss is usually impossible, however, it is probable that parents also recover for the loss of the child's fellowship and society.[3] On the other hand, neither wife nor child can recover from the wrongdoer who injures the husband or parent the value of the husband's services and conjugal companionship or of the parent's guidance, society, and assistance.[4] The traditional explanation of this incongruity is that, at common law, husbands and parents have a right—akin to a property right—to the services of their wives and children, while the latter have no corresponding right to the services of the husband or parent.[5] This loss-of-services basis of the action by the husband or parent has been characterized as a mere fiction employed to grant recovery for the less tangible damage he has sustained.[6] Indeed, the slightest loss of services seems to support the action.[7] In spite of this, only three American jurisdictions have departed from the traditional view and allowed the wife recovery for the loss of consortium, occasioned by the husband's

1. *E.g.*, Union Pac. Ry. v. Jones, 21 Colo. 340, 40 Pac. 891 (1895); Duffee v. Boston Elevated Ry., 191 Mass. 489, 77 N.E. 1036 (1906); Pritsker v. Greenwood, 47 R.I. 384, 133 Atl. 656 (1926); Cook v. Atlantic Coast Lines R.R., 196 S.C. 230, 13 S.E.2d 1, 133 A.L.R. 1144 (1941). See POLLOCK, LAW OF TORTS 54 *et seq.* (15th ed., Landon, 1951); PROSSER, HANDBOOK OF THE LAW OF TORTS 938, § 102 (1941).

2. *E.g.*, Baldwin v. Kansas City Rys., 231 S.W. 280 (Mo. App. 1921); Guevin v. Manchester St. Ry., 78 N.H. 289, 99 Atl. 298 (1916). The wife's services, society, and sexual intercourse are generally said to constitute the "consortium"; see Holbrook, *The Change in the Meaning of Consortium*, 22 MICH. L. REV. 1 (1923).

3. PROSSER, HANDBOOK OF THE LAW OF TORTS, 941, n. 17 (1941).

4. Pound, *Individual Interests in the Domestic Relations*, 14 MICH. L. REV. 177, 185, 194 (1916); PROSSER, HANDBOOK OF THE LAW OF TORTS 946 (1941).

5. Hitaffer v. Argonne Co., 183 F.2d 811, 23 A.L.R.2d 1366 (D.C. Cir. 1950); PROSSER, HANDBOOK OF THE LAW OF TORTS 946 (1941).

6. PROSSER, HANDBOOK OF THE LAW OF TORTS 948 (1941).

7. *E.g.*, Baldwin v. Kansas City Ry., 231 S.W. 280 (Mo. App. 1921). See POLLOCK, LAW OF TORTS 171 (15th ed., Landon, 1951); PROSSER, HANDBOOK OF THE LAW OF TORTS 941, n. 17 (1941).

wrongful injury.[8] Recovery by the child in the instant case would have been without precedent.

The District of Columbia is one of the jurisdictions allowing the wife recovery for the loss of the injured husband's consortium. This probably induced plaintiff to bring the present action. But the district court chose to be guided by other decisions of its court of appeals, denying recovery to a child in actions for the loss of a "family life," caused by defendant's enticement of the child's parent away from home.[9] Admitting the difference between that action and the present one,[10] the court nevertheless regarded the decisions as indicating the unwillingness of the appellate court to protect the child's interest in the guidance and society of his parent generally.

Plaintiff would probably have fared no better in Louisiana. In one respect, our courts accord more generous protection than does the common law to the family's non-pecuniary interests in each other's well being. With the minority,[11] Louisiana courts, in actions for wrongful death, allow recovery by the spouse for the loss of consortium, by the parent for the loss of the child's affection and fellowship, and by the child for the loss of the parent's advice and society.[12] None of these losses will support an action if the spouse, child or parent is not fatally injured, however.[13] One

8. Hitaffer v. Argonne Co., 183 F.2d 811, 23 A.L.R.2d 1366 (D.C. Cir. 1950); Cooney v. Moomaw, 109 F. Supp. 448 (D. Neb. 1953); Brown v. Georgia-Tennessee Coaches, Inc., 88 Ga. App. 519, 77 S.E.2d 24 (1953).

9. Edler v. McAlpine-Downie, 180 F.2d 385 (D.C. Cir. 1950), following McMillan v. Taylor, 160 F.2d 221 (D.C. Cir. 1946).

10. Fear of unfounded claims and extortionate practices and distaste for the public airing of the facts involved have contributed to throwing the action for alienation of affections out of favor in several states. Those factors were not present in the instant case. See Feinsinger, *Legislative Attack on "Heart Balm,"* 33 MICH. L. REV. 979 (1935); Note, 32 CORN. L.Q. 432 (1947).

11. Cases are collected in 74 A.L.R. 82 (1931).

12. Underwood v. Gulf Refining Co. of Louisiana, 128 La. 968, 55 So. 641 (1911); Poindexter v. Service Cab Co., 161 So. 40 (La. App. 1935) (deceased spouse); Russell v. Taglialavore, 153 So. 44 (La. App. 1934) (same); Roby v. Kansas City Southern Ry., 130 La. 896, 58 So. 701 (1912) (deceased child); Serpas v. Collard Motors, 178 So. 261 (La. App. 1938) (deceased parent) *semble.* In the *Underwood* case the court said, "[I]n an action by one of the beneficiaries mentioned [in Article 2315 of the Civil Code] . . . for damages caused by the death of the mother, father, husband, or child, the mental suffering of the plaintiff, resulting from the wound to the feelings, loss of society, and of kindly offices, is an element which is to be considered equally with the material or pecuniary loss." 128 La. 968, 995, 55 So. 641, 650 (1911).

13. Hubgh v. New Orleans & Carrollton R.R., 6 La. Ann. 495 (1851) (husband's consortium); Bea v. Russo, 21 So.2d 530 (La. App. 1945) (wife's consortium); see Grier v. Tri-State Transit Co., 36 F. Supp. 26 (W.D. La. 1940); *cf.* Lively v. State, 15 So.2d 617 (La. App. 1943) (husband, as administrator of community, recovers expense of hiring housekeeper). Black v. The Carrollton R.R., 10 La. Ann. 33 (1855) (parent's mental suffering when child injured); Sperier v. Ott, 116 La. 1087, 41 So. 323 (1906) (parent's mental

reason for this found in the jurisprudence is that "[Louisiana] has never had any law which authorized one person to recover damages for injuries to his feelings, as a consequence of injury sustained by another, *still living*, whether in his person, character, or feelings. . . ."[14] (Italics supplied.) This states the result, but explains it no more than to say that "actions for injury to the person are personal."[15] Another reason found is that, in Louisiana, no member of a family has a "property" right to the services of another; even wives and children do not occupy the servile status of wives and children at common law.[16] This reason is not convincing, if the common law loss-of-services basis of the husband's or parent's action is, as has been suggested, a fiction. It is submitted that the true reasons for not allowing these family relational interests more protection lie far beneath the surface of most reported opinions. French treatises have dealt with this subject and the views in two of them, one by Mazeaud (H. and L.) and one by Savatier,[17] are especially instructive.

Neither of these treatises is opposed to the allowance of damages for a purely moral—as distinguished from a material—injury. But they disagree as to the proper basis for allowing such recovery.[18] MM. Mazeaud are of the opinion that recovery for moral damage is compensatory in nature. Admitting that money

anguish when child unlawfully arrested); *cf.* Koob v. Cooperative Cab Co., 213 La. 903, 35 So.2d 849 (1948) (injured child's parent recovers for use and benefit of child).

14. Kaufman v. Clark, 141 La. 316, 320, 75 So. 65, 66 (1917).

15. Black v. The Carrollton R.R., 10 La. Ann. 33, 40 (1855).

16. Moulin v. Monteleone, 165 La. 169, 115 So. 447 (1927); see Art. 226, LA. CIVIL CODE of 1870.

17. MAZEAUD, H. & L., TRAITÉ THEORIQUE ET PRATIQUE DE LA RESPONSABILITÉ CIVILE DELICTUELLE ET CONTRACTUELLE (3d ed. 1938); SAVATIER, TRAITÉ DE LA RESPONSABILITÉ CIVILE EN DROIT FRANÇAIS (2d ed. 1941). Generally, in France only wrongful death allows the family to recover for their moral damage caused by the injury of one of them. *"Quand une personne souffre, sa douleur se répercute sur tous ceux qui l'aiment. Mais les tribunaux n'admettent guère que ce dommage d'affection fonde, chez ceux-ci, une action en responsabilité. Même les parents d'un enfant devenu infirme ne peuvent réclamer . . . réparation de leur propre douleur. Cependant, certaines décisions accordent des dommages-intérêts a un fiancé pour un accident ayant rendu la fiancée infirme, la veille du mariage; . . . à l'épouse ou aux parents d'un prisonnier pour la douleur à eux causée par une injuste arrestation. . . . Enfin, et surtout, un récent arrêt de la cour suprême adoucit sa sévérité en ouvrant une indemnité aux parents que l'infirmité de leur enfant mineur atteint très douloureusement dans leur affection."* 2 SAVATIER, *supra* at 104, § 538. A wife has similarly recovered for her moral damage caused by her husband's insanity, resulting from his wrongful injury. LALOU, TRAITÉ PRATIQUE DE LA RESPONSABILITÉ CIVILE § 156 (4th ed. 1949).

18. The Louisiana Supreme Court has had difficulty with the question of the proper basis of recovery for moral damage. A good example is Underwood v. Gulf Refining Co., 128 La. 968, 55 So. 641 (1911), holding recovery for such damage to be compensatory, not punitive, after a lengthy discussion of the question.

cannot perfectly repair injured sensibilities, they argue that money gives the plaintiff the best means the law has available to restore to his "moral patrimony" that which the defendant wrongfully took from it.[19] Under the legislation obliging "him by whose fault damage is done" to repair it, they would allow all persons morally damaged to sue the wrongdoer for money damages. But, turning to the area of wrongful death and wrongful physical injury, they see danger of releasing, by the unrestricted application of that principle to those wrongs, a veritable avalanche of suits.[20] M. Savatier, on the other hand, abhors the notion that the vulgar joy of receiving a sum of money can compensate a plaintiff for suffering moral injuries. He takes the position that recovery for such injuries represents the enforcement of a private penal justice.[21] Since this is the case, a physically injured person suing in his own behalf and recovering for the moral damages he has suffered (pain and suffering, for example) punishes the defendant and discharges his moral responsibility. To allow the injured party's family to recover in a subsequent action against the same defendant for the moral damage they have suffered would be subjecting the defendant to double punishment and abuse.[22]

It is believed that the reality of the dangers to which these writers point casts far more light upon the Louisiana jurisprudence and the present common law than does any loss-of-services theory.[23] The assessment of damages for a moral injury is at best guesswork.[24] The defendant's culpability and capacity to pay are apt to influence whoever is charged with fixing the quantum of plaintiff's damages. To allow the defendant's blameworthiness and ample means to be repeatedly paraded before the trier of fact by anyone aggrieved by the injured party's misfortune might well lead to abuse of the defendant. Moreover, the danger of unleashing a host of claims for moral trifles is—unfortunately—probably not fanciful. The Supreme Court of Louisiana faced both of these dangers in actions for wrongful death. They were avoided by granting the defendant in such actions the

19. 1 MAZEAUD, H. & L., TRAITÉ THÉORIQUE ET PRATIQUE DE LA RESPONSABILITÉ CIVILE DELICTUELLE ET CONTRACTUELLE 377 (3d ed. 1938).

20. *Id.* at 387.

21. 2 SAVATIER, TRAITÉ DE LA RESPONSABILITÉ CIVILE EN DROIT FRANÇAIS 93 (2d ed. 1951).

22. *Id.* at 95.

23. *Cf.* Pound, *Individual Interests in the Domestic Relations*, 14 MICH. L. REV. 177, 194 (1916); PROSSER, HANDBOOK OF THE LAW OF TORTS 948 (1941); Sperier v. Ott, 116 La. 1087, 41 So. 323 (1906) (opening the door).

24. MCCORMICK, HANDBOOK OF THE LAW OF DAMAGES 315, § 88 (1935).

right to have cumulated in one suit the deceased's surviving action and the wrongful death actions proper, vested in the statutory beneficiaries.[25] No legislation compelled the court to reach this result. A similar right of joinder might be given the defendant in actions for wrongful injury and actions by others for their moral injury, caused by the incapacity of the physically injured. Then, as now, only one suit would follow each wrongful injury and the defendant would have his wrongdoing and financial responsibility brought before the trier of fact only once. The remaining question would then be, should the family's interests in each other's well being be protected by allowing recovery for the moral injury suffered by them as a result of the physical injury of one member. This addresses itself purely to one's sense of natural justice. The question has been answered in the affirmative by our Supreme Court in the area of wrongful death.[26] Surely the moral impact of a dear one's death is not necessarily greater or of longer duration than that of his physical or mental mutilation. Nor does it seem that the harm suffered by the injured party's family is more directly or proximately caused by the defendant's fault when death ensues than when it does not. The Louisiana Constitution provides that "every person for injury done him in his rights, lands, goods, person or reputation shall have adequate remedy by due process of law and justice administered without denial, partiality, or unreasonable delay."[27] Even to allow nominal damages to the aggrieved family would seem more consistent with this provision than complete denial of recovery.

Donald J. Tate

WORKMEN'S COMPENSATION—EMPLOYERS' RIGHTS AGAINST THIRD PERSONS—NATURE OF CLAIM

Plaintiff's employee had been fatally injured during the course of and within the scope of his employment due to the alleged negligence of the defendant. An action was brought under La. R.S. 23:1101 by the employer against the defendant, a third person tortfeasor, for amounts paid and to be paid under the Louisiana Workmen's Compensation Law to the dependent il-

25. Reed v. Warren, 172 La. 1082, 136 So. 59 (1931); Norton v. Crescent City Ice Mfg. Co., 178 La. 135, 150 So. 855 (1933).
26. See note 12 *supra*.
27. LA. CONST. Art. I, § 6.