Florida Law Review

Volume 24 | Issue 1 Article 14

September 1971

Compensation for Loss of Consortium: The Wife's Cause of Action

Frederick D. Smith

cution in its direct case.[45] The Court emphasized that the necessity for truthfulness in the adversary process necessitated the limitation upon *Miranda*.[46] Nonetheless the incentive to violate *Miranda* is clearly present. If an incriminating statement is obtained illegally, it may prevent the defendant from testifying at his trial,[47] and, in effect, deprive him by illegal means of his exercise of a constitutional right.

ROBERT C. JOYNER

COMPENSATION FOR LOSS OF CONSORTIUM: THE WIFE'S CAUSE OF ACTION

Gates v. Foley, 247 So. 2d 40 (Fla. 1971)

Petitioner brought an action to recover damages for loss of consortium resulting from total disability to her husband sustained in an automobile collision, which was proximately caused by the negligence of respondent. The trial court denied the wife's cause of action and an appeal was taken to the Fourth District Court of Appeal, which affirmed.[1] The Supreme Court of Florida reversed and unanimously HELD, a wife is entitled to compensation for loss of consortium when her husband has been negligently injured, provided the husband has a cause of action against the same defendant.[2]

Consortium is defined by Florida case law as a composite of those relationships between husband and wife that are basic to the amity of a marital union: comfort, protection, society, companionship, love, counsel, sexual relations, solace, assistance, and fellowship.[3] Florida has long recognized the common law right of the husband to recover damages for loss of

45. *Id.* at 225.
46. *Id.* at 225, 226.
47. *See* text accompanying note 37 *supra*.

1. 233 So. 2d 190 (4th D.C.A. Fla. 1970).
2. 247 So. 2d 40 (Fla. 1971). Certiorari was granted by the Supreme Court of Florida pursuant to a petition supported by a certificate from the Fourth District Court of Appeal stating that the decision was one involving a question of great public interest. *See* FLA. CONST. art. V, §4(2).
3. *See, e.g.*, Ligthow v. Hamilton, 69 So. 2d 776, 778 (Fla. 1954); Ripley v. Ewell, 61 So. 2d 420, 422 (Fla. 1952); Florida Cent. & P.R.R. v. Foxworth, 41 Fla. 1, 73, 25 So. 338, 347 (1899).

his wife's consortium when she is injured by the tort of a third person.[4] But prior to the instant case, Florida courts had twice refused to recognized such a cause of action for the wife,[5] reasoning that a departure from the common law must come from the legislature.[6]

At common law the wife was not vested with an interest in the services of her husband and thus was denied the right to recover for loss of consortium.[7] The husband and wife existed in master-servant relationship and only the husband, by virtue of his superior role, was afforded the property interest necessary to support a cause of action.[8] While this archaic common law approach was adopted by statute in Florida,[9] the absence of legislation in other areas has not, in the past, precluded Florida courts from overruling common law principles.[10] For example, prior to the statutory repeal of the causes of action for alienation of affections,[11] a wife was able to recover for loss of her husband's services resulting from an intentional invasion of the marital relationship.[12] Similarly, a widow has a cause of action for loss of consortium under the Florida wrongful death statute[13] when her husband is killed by a negligent tort-feasor.[14] Neither action was maintainable at common law.

Despite a willingness to overrule common law principles in some instances, the court in *Ripley v. Ewell*[15] felt bound by the common law[16] and

---

4. *See, e.g.*, Waller v. First Sav. & Trust Co., 103 Fla. 1025, 138 So. 780 (1931). *See also* FLA. STAT. §2.01 (1969), which adopts the common law.

5. Ripley v. Ewell, 61 So. 2d 420 (Fla. 1952); Wilson v. Redding, 145 So. 2d 252 (2d D.C.A. Fla. 1962).

6. Ripley v. Ewell, 61 So. 2d 420, 424 (Fla. 1952); Wilson v. Redding, 145 So. 2d 252 (2d D.C.A. Fla. 1962).

7. *See, e.g.*, Lynch v. Knight, 11 Eng. Rep. 854 (1861).

8. 3 BLACKSTONE COMMENTARIES *143: "We may observe that in these relative injuries, notice is only taken of the wrong done to the superior of the parties related by the breach and dissolution of either the relation itself, or at least the advantages accruing therefrom; while the loss of the inferior by such injuries is totally unregarded. One reason for [this] . . . may be . . . that the inferior hath no kind of property in the company, care, or assistance of the superior, as the superior is held to have in those of the inferior; and therefore the inferior can suffer no loss or injury. The wife cannot recover damages for beating her husband, for she hath no separate interest in any thing during her coverture."

9. *See* FLA. STAT. §2.01 (1969). *See also* Ripley v. Ewell, 61 So. 2d 420, 421 (Fla. 1952).

10. In Randolph v. Randolph, 146 Fla. 491, 495, 1 So. 2d 480, 481 (1941), the court characterized this attitude by noting: "When the reason for any rule of law ceases, the rule should be discarded."

11. FLA. STAT. §771.01 (1969).

12. *See, e.g.*, Kilgore v. Kilgore, 154 Fla. 841, 19 So. 2d 305 (1944).

13. FLA. STAT. §768.02 (1969).

14. *See, e.g.*, Seaboard Air Line Ry. v. Martin, 56 So. 2d 509 (1950). Similarly, the court has overturned the common law in the areas of wrongful death, Waller v. First Sav. & Trust Co., 103 Fla. 1025, 138 So. 780 (1931); suits against married women for torts committed *ex contractu*, Banfield v. Addington, 104 Fla. 661, 140 So. 893 (1932); and governmental immunity to tort action, Hargrove v. Town of Cocoa Beach, 96 So. 2d 130 (Fla. 1957).

15. 61 So. 2d 420 (Fla. 1952).

16. "While we should not hesitate to declare the law as we find it, even though the unwary who have been ill advised in their action may suffer, we should not by judicial

consequently refused to recognize a wife's cause of action for loss of consortium. The court reasoned that if it departed from the common law it would confront the choice of ignoring either the reasons for the wife's inability to recover or the reasons for creating a cause of action in the husband.[17] The court preferred to uphold the husband's rights under the common law.[18]

The *Ripley* court expressed additional concern that if a wife could sue for loss of consortium, settled claims would be reopened and "new liabilities imposed upon persons who have already paid once for the result of their negligent acts."[19] In the instant case the court receded from this position and recognized that negligent tort-feasors have in the past avoided making full compensation because of their immunity to suits by wives for loss of consortium.[20] The court stated, however, that only those claims not barred by the statute of limitations[21] will be allowed.[22]

At least twenty-five other jurisdictions now recognize a wife's right to compensation for loss of consortium,[23] and there is virtually unanimous agreement with this trend among legal commentators.[24] In addition, the Married Women's Property Act[25] abrogates the disabilities of coverture under the common law[26] and the Florida constitution eliminates any disparity between the rights of men and women.[27] The holding in the instant case indicates that Florida has aligned itself with the emerging weight of authority.

Present Florida law does not allow a child, however, to recover damages for loss of services when his parent is disabled as a result of the negligence of a third person.[28] Although the instant case may establish the predicate for such an action, other jurisdictions, including those allowing compensation to the wife, have rejected such a cause of action by the child.[29] The

---

fiat make changes in established law that will injuriously affect many persons who could not possibly foresee or anticipate such action on our part." *Id.* at 424.

17. *Id.*
18. *Id.*
19. *Id.*
20. *Cf.* 247 So. 2d at 44.
21. FLA. STAT. §95.11 (4) (1969).
22. 247 So. 2d at 45.
23. *See* 247 So. 2d at 42 n.1 for a list of these jurisdictions.
24. *Id.* at 42 n.2.
25. FLA. STAT. §708.08 (Supp. 1970), *amending* Fla. Stat. §708.08 (1969).
26. *Id.*
27. FLA. CONST. art. X, §5.
28. *See* Ripley v. Ewell, 61 So. 2d 420, 422 (Fla. 1952).
29. *See, e.g.*, Hill v. Sibley Memorial Hosp., 108 F. Supp. 739 (D.C. Cir. 1952). "This Court confesses that it has been difficult for it on the basis of natural justice to reach the conclusion that this type of an action will not lie. When a child loses the love and companionship of a parent, it is deprived of something that is indeed valuable and precious. Courts should ever be alert to widen the circle of justice to conform to the changing needs and conditions of society. At the same time a lower Court should be cautious in laying down a completely new rule in the light of prior holdings of our Court of Appeals indicating hesitancy to extend the right of recovery . . . to a child." *Id.* at 741.

reasons for these holdings are diverse: the possibility of extortionary[30] and multiple litigation,[31] inability to define the age at which the child's right would cease,[32] and the inability of a jury to cope with the question of damages.[33] These objections are not peculiar to this cause of action, however, and are dealt with adequately as a matter of course in other actions.[34] Moreover, a child's right to compensation for loss of consortium may be analogized[35] to the wife's right of action, to a child's right to recover for loss of a parent's services under the wrongful death act,[36] or to the common law cause of action existing in a parent for the loss of a child's services.[37] Further, several jurisdictions have recognized a right to compensation by the child for alienation of his parent's affections.[38] This seems to indicate that the child's loss is as great as the wife's where both are deprived of the love, counsel, and protection of the husband-father.

Workmen's compensation is another area in which the instant case may have repercussions. The Florida statute delimiting the liability of an employer under workman's compensation provides that only the injured employee may bring suit against the employer for damages.[39] The principle case adopted the reasoning of *Hitaffer v. Argonne Co.*[40] in which a wife was allowed to sue an employer for loss of consortium although her husband sued under workmen's compensation.[41] The court in *Hitaffer* stated that no person would be allowed a cause of action against the employer by subrogation of the employee's right, but a third person could sue in his own right.[42] The court recognized that the wife's right to compensation from the employer for loss of consortium was a right vested in her and arose directly from the injury to her husband.[43] This reasoning implies there is a duty by the em-

---

30. Miller v. Levine, 130 Me. 153, 160, 154 A. 174, 178 (1931).

31. Morrow v. Yannantuono, 152 Misc. 134, 135, 273 N.Y.S. 912, 913 (Sup. Ct. 1934).

32. 83 U. PA. L. REV. 276, 277 (1934).

33. *Id.*

34. *See, e.g.*, McCall v. Sherbill, 68 So. 2d 362 (Fla. 1954). *See also* W. PROSSER, TORTS 919 (3d ed. 1964).

35. "[T]hough the court will not necessarily strike out a claim *in limine* because of its novelty, it will regard the onus as being on the plaintiff to show some close analogy with an existing head of liability before admitting the claim into the arcana of acknowledged categories of tortious responsibility." 29 CAN. B. REV. 210, 215 (1951) (footnotes omitted).

36. FLA. STAT. §768.02 (1969). *See also* Florida Power & Light Co. v. Bridgeman, 133 Fla. 195, 182 So. 911 (1938).

37. *See* Wilkie v. Roberts, 91 Fla. 1064, 109 So. 225 (1926).

38. Daily v. Parker, 152 F.2d 174 (7th Cir. 1945); Russick v. Hicks, 85 F. Supp. 281 (W.D. Mich. 1949); Johnson v. Luhman, 330 Ill. App. 598, 71 N.E.2d 810 (1947).

39. FLA. STAT. §440.11 (1969). There is a provision, however, for suit by the personal representative of the employee upon his death.

40. 183 F.2d 811 (D.C. Cir. 1950), *cert. denied*, 340 U.S. 852 (1950).

41. *Id. Compare* FLA. STAT. §440.11 (1969), *with* D.C. CODE ANN. §36-501 (1969). Both provide that only the employee, or his representative if the employee dies, may bring an acton for damages against the employer.

42. 183 F.2d 811, 820 (D.C. Cir. 1950), *cert. denied*, 340 U.S. 852 (1950).

43. *Id.*

ployer to the spouse of an employee. Similarly, a federal district court in Florida has stated: "[O]ne who desires to recover damages from an employer . . . must show an independent duty owed by the employer to the third party and a breach of that duty."[44] Florida's recognition of the wife's right of action for loss of consortium may therefore enable her to sue an employer when the husband has a cause of action under workmen's compensation.

The present case indicates that common law disabilities need no longer bar a plaintiff who seeks compensation for damages resulting from injuries that invade the family relationship. This enlightened decision gives cause for optimism that Florida courts will give increasing protection to the interests of all members of a family in tort litigation.

FREDERICK D. SMITH

44. Florida Power & Light Co. v. Hercules Concrete Pile Co., 275 F. Supp. 427, 428 (S.D. Fla. 1967).