NOTES

Breaking the Age Barrier in Alaska: Including Adult Children in Loss of Filial Consortium Actions

The Alaska Supreme Court has recognized causes of action for loss of filial consortium in personal injury cases involving minor children. This note will argue that loss of filial consortium actions should be extended to include adult children because such an extension would be consistent with the modern legal understanding of loss of consortium. Including adult children in the child's cause of action poses no problem as a matter of common law interpretation. However, including adult children in the parent's cause of action is problematic because the court recognized the parent's claim on the basis of Alaska Statutes section 09.15.010, which permits recovery only for injured minor children. This note will argue that section 09.15.010 is the wrong foundation on which to base the parents' claim, but if the court adheres to this basis, this note will argue that section 09.15.010 should be held unconstitutional on equal protection grounds.

I. INTRODUCTION

In recent years, the Alaska Supreme Court has recognized causes of action for tortious interference with the parent-child relationship, or loss of filial consortium.[1] In *Hibpshman v. Prudhoe Bay Supply, Inc.*,[2] the court created a minor child's

1. Consortium in the parent-child context has been variously defined. Generally, it has been said to include such intangibles as love, affection, comfort, companionship, society and solace. In the case of the child suing for loss of a parent's consortium, it also includes guidance, protection and loss of a role model. *See* Jean C. Love, *Tortious Interference with the Parent-Child Relationship: Loss of an Injured Person's Society and Companionship*, 51 IND. L.J. 590, 616-17 (1976).

2. 734 P.2d 991 (Alaska 1987).

independent cause of action for loss of parental consortium resulting from injuries tortiously inflicted on the child's parent. Subsequently, in *Gillispie v. Beta Construction Co.*,[3] the court determined that Alaska Statutes section 09.15.010 permits parents to maintain a cause of action for loss of their minor child's society resulting from the child's death or injury tortiously inflicted by a third person.

These Alaska decisions are part of a national trend. Currently, sixteen states recognize the child's cause of action, eight more than when the Alaska Supreme Court handed down its decision in *Hibpshman*.[4] The parent's cause of action is recognized by fifteen states.[5] However, states recognizing one cause of action do not

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3. 842 P.2d 1272 (Alaska 1992).

4. Those states, including Alaska, are the following: Arizona, Villareal v. Arizona Dept. of Transp., 774 P.2d 213 (Ariz. 1989); Florida, FLA. ST. ANN. § 768.0415 (West Supp. 1995); Iowa, Audobon-Exira Ready Mix, Inc. v. Illinois Cent. Gulf R.R., 335 N.W.2d 148 (Iowa 1983); Louisiana, Horton v. McCrary, 620 So.2d 918 (La. Ct. App. 1993); Massachusetts, Ferriter v. Daniel O'Connell's Sons, 413 N.E.2d 690 (Mass. 1980); Michigan, Berger v. Weber, 303 N.W.2d 424 (Mich. 1981); Montana, Keele v. St. Vincent Hosp. & Health Care Ctr., 852 P.2d 574 (Mont. 1993); Ohio, Gallimore v. Children's Hosp. Medical Ctr., 617 N.E.2d 1052 (Ohio 1993); Oklahoma, Williams v. Hook, 804 P.2d 1131 (Okla. 1990); Texas, Reagan v. Vaughn, 804 S.W.2d 463 (Tex. 1991); Vermont, Hay v. Medical Ctr. Hosp., 496 A.2d 939 (Vt. 1985); Washington, Ueland v. Reynolds Metals Co., 691 P.2d 190 (Wash. 1984); West Virginia, Belcher v. Goins, 400 S.E.2d 830 (W. Va. 1990); Wisconsin, Theama v. City of Kenosha, 344 N.W.2d 513 (Wis. 1984); and Wyoming, Nulle v. Gillette-Campbell County, 797 P.2d 1171 (Wyo. 1990).

5. In addition to Alaska, those states are: Arizona, Howard Frank, M.D., P.C. v. Superior Ct., 722 P.2d 955 (Ariz. 1986); Florida, United States v. Dempsey, 635 So. 2d 961 (Fla. 1994); Hawaii, Masaki v. General Motors, 780 P.2d 566 (Haw. 1989); Iowa, IOWA R. CIV. P. 8; Idaho, Hayward v. Yost, 242 P.2d 971 (Idaho 1952); Louisiana, Pino v. Gauthier, 633 So. 2d 638 (La. Ct. App. 1993); Massachusetts, MASS. ANN. LAWS ch. 231, § 85X (Law. Co-op. Supp. 1994); New Jersey, Davis v. Elizabeth Gen. Medical Ctr., 548 A.2d 528 (N.J. Super. Ct. Law Div. 1988); North Dakota, Jacobs v. Anderson Bldg. Co., 430 N.W.2d 558 (N.D. 1988); Ohio, Gallimore v. Children's Hosp. Medical Ctr., 617 N.E.2d 1052 (Ohio 1993); Rhode Island, Jameson v. Hawthorne, 635 A.2d 1167 (R.I. 1994); Texas, Enochs v. Brown, 872 S.W.2d 312 (Tex. Ct. App. 1994); Washington, WASH. REV. CODE ANN. § 4.24.010 (West 1988); and Wisconsin, Shockley v. Prier, 225 N.W.2d 495 (Wis. 1975). The courts in Illinois are divided: *Compare* Barkei v. Delnor Hosp., 531 N.E.2d 413 (Ill. App. Ct. 1988) (no cause of action) *with* Dymek v. Nyquist, 469 N.E.2d 659 (Ill. App. Ct. 1984) (cause of action).

necessarily acknowledge the other. Moreover, a small majority of states still do not recognize filial consortium actions.[6]

Alaska's recognition of filial consortium claims represents a humane approach to the law. It compensates parents and minor children for the real losses they suffer as a result of the injury to such relationships. This note will argue that the Alaska Supreme Court should take this approach one step further by extending both causes of action to include adult children.

When the Alaska Supreme Court recognized the causes of action for loss of filial consortium, it limited its holdings to minor children. However, in both cases, these were the facts before the court. Thus, the limitation can and should be construed in light of

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6. Twenty-two states have rejected a child's cause of action for loss of parental consortium as a result of negligent injury. *See* Patterson v. Hays, 623 So. 2d 1142 (Ala. 1993); Gray v. Suggs, 728 S.W.2d 148 (Ark. 1987); Borer v. Am. Airlines, 563 P.2d 858 (Cal. 1977); Lee v. Colorado Dept. of Health, 718 P.2d 221 (Colo. 1986); Williams v. Picard, 1993 WL 7599 (Conn. Super. Ct., Jan. 7, 1993); Pleasant v. Washington Sand & Gravel Co., 262 F.2d 471 (D.C. Cir. 1958); W. J. Bremer Co. v. Graham, 312 S.E.2d 806 (Ga. Ct. App. 1983); Van de Veire v. Sears, 533 N.E.2d 994 (Ill. App. Ct. 1989); Dearborn Fabricating & Eng'g Corp. v. Wickham, 551 N.E.2d 1135 (Ind. 1990); Schneck v. City of Shawnee, 647 P.2d 1263 (Kan. 1982); Durepo v. Fishman, 533 A.2d 264 (Me. 1987); Monias v. Endal, 623 A.2d 656 (Md. 1993); Salin v. Kloempken, 322 N.W.2d 736 (Minn. 1982); Barbera v. Brod-Dugan Co., 770 S.W.2d 318 (Mo. Ct. App. 1989); Guenther v. Stollberg, 495 N.W.2d 286 (Neb. 1993); General Electric v. Bush, 498 P.2d 366 (Nev. 1972); Russell v. Salem Transp. Co., 295 A.2d 862 (N.J. 1972); DeAngelis v. Lutheran Medical Ctr., 449 N.E.2d 406 (N.Y. 1983); Vaughn v. Clarkson, 376 S.E.2d 236 (N.C. 1989); Morgel v. Winger, 290 N.W.2d 266 (N.D. 1980); Norwest v. Presbyterian Intercommunity Hosp., 652 P.2d 318 (Or. 1982); Steiner v. Bell Tel. Co., 517 A.2d 1348 (Pa. Super. Ct. 1986); Still v. Baptist Hosp., 755 S.W.2d 807 (Tenn. Ct. App. 1988).

Sixteen states have rejected a parent's cause of action for loss of a child's consortium resulting from negligent injury. *See* Baxter v. Superior Court., 563 P.2d 871 (Cal. 1977); Mahoney v. Lensink, 550 A.2d 1088 (Conn. App. Ct. 1988); Wheeler v. Drummond, 1990 WL 58253 (Del. Super. Ct. Apr. 17, 1990); District of Columbia v. Howell, 607 A.2d 501 (D.C. 1992); McKee v. Humana of Ky., Inc., 834 S.W.2d 711 (Ky. Ct. App. 1992); Monias v. Endal, 623 A.2d 656 (Md. 1993); Sizemore v. Smock, 422 N.W.2d 666 (Mich. 1988); Powell v. American Motors Corp., 834 S.W.2d 184 (Mo. 1992); Heidt v. Heidt, 842 P.2d 723 (Nev. 1992); Siciliano v. Capitol City Shows, Inc., 475 A.2d 19 (N.H. 1984); Wilson v. Galt, 668 P.2d 1104 (N.M. Ct. App. 1983); Gilbert v. Stanton Brewery, 67 N.E.2d 155 (N.Y. 1946); Beerbower v. Oregon Health Sciences Univ., 736 P.2d 596 (Or. Ct. App. 1987); Brower v. City of Philadelphia, 557 A.2d 48 (Pa. Commw. Ct. 1989); Boucher v. Dixie Medical Ctr., 850 P.2d 1179 (Utah 1992); Gates v. Richardson, 719 P.2d 193 (Wyo. 1986).

the common law practice of limiting holdings to the specific facts of the case under consideration. Therefore, when the appropriate case arises, these causes of action should be extended to adult children.

The parent-child relationship does not end when the child becomes eighteen. It endures throughout life and can be characterized by love, care and affection for the duration. The Iowa Supreme Court recognized this reality when, in *Audobon-Exira Ready Mix, Inc. v. Illinois Central & Gulf Railroad*,[7] it refused to limit the award of loss of parental consortium damages to children still in their minority. The court stated that "'[e]ven adult and married children have the right to expect the benefit of good parental advice and guidance.'"[8]

The most viable legal argument against extending loss of filial consortium damages to adult children is that the mutual obligation of support and obedience between parents and children terminates when the child reaches the age of majority. Parents cannot expect to recover for injury to their adult children because their legal entitlement to the child's obedience and services no longer exists when the child reaches eighteen. Similarly, because children can expect to be supported by their parents only until their majority, damages for a parent's injury should be awarded only up to that point and no further.

This argument flies in the face of common law developments in the loss of consortium area. In particular, it fails to recognize the historical development of consortium damages away from the old loss of services definition toward one based on loss of society and companionship. Before fully developing this point, it will first be necessary to trace the historical evolution of loss of consortium actions at common law in general and under Alaska law specifically.

Part II of this note will analyze this evolution and demonstrate that barring loss of filial consortium claims for adult children is logically inconsistent with the changed legal conception of consortium damages. Part III will first utilize social scientific studies to demonstrate the enduring nature of the parent-child relationship into the child's adulthood. The note will then analyze authorities

7. 335 N.W.2d 148 (Iowa 1983).

8. *Id.* at 152 (quoting Schmitt v. Jenkins Truck Lines, 170 N.W.2d 632, 665 (Iowa 1969)).

from states that have granted coverage to adult children. This analysis will be followed by an examination of Alaska's wrongful death statute, which imposes no age restriction on those who may sue for wrongful death damages. Arguments against extending the causes of action to adults will then be assessed and refuted. Finally, Part IV will offer specific recommendations to the Alaska Supreme Court in the loss of filial consortium area.

II. HISTORY OF LOSS OF CONSORTIUM

A. Common Law Developments

The trend in the states towards recognition of the loss of filial consortium causes of action represents a fundamental reconceptualization of the legal understanding of the parent-child relationship. At common law, the father (and only the father) could recover damages based on lost services and potential earnings when his child was injured. The father's relationship with the child was likened to that existing between master and servant. The common law had long recognized that the master could sue for loss of a servant's services when the servant was tortiously injured. Thus, children were considered by the law to be mere economic assets, as evidenced by the father's damages being limited to pecuniary losses.[9]

The relationship between husband and wife was similarly regarded. The husband could sue for the loss of his wife's services, *per quod consortium amisit.*[10] Gradually, however, the husband

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9. *See* Michael B. Victorson, Note, *Torts—Parent's Recovery for Loss of Society and Companionship of Child*, 80 W. VA. L. REV. 340, 341 (1978) (quoting McGarr v. National & Providence Worsted Mills, 53 A. 320, 325-26 (1902)). The court in *McGarr* stated:

> [T]he proper measure of damages is the pecuniary value of the child's services from the time of the injury until it attains its majority . . . [.] In short, the measure of damages in such a 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. It is therefore practically a business and commercial question only, and the elements of affection and sentiment have no place therein.

McGarr, 53 A. at 325-26.

10. "[W]hereby he lost the company [of his wife]." BLACK'S LAW DICTIONARY 1141 (6th ed. 1990). An early case that recognized this cause of action was Guy v. Livesay, 79 Eng. Rep. 428 (1619); *see* Michael A. Mogill, *And Justice for Some: Assessing the Need to Recognize the Child's Action for Loss of Parental Consortium*, 24 ARIZ. ST. L.J. 1321, 1328 n.39 (1992).

was able to recover for loss of sexual attentions, society and affection under the rubric of the consortium action.[11] The wife had no reciprocal cause of action for loss of her husband's consortium because she had no entitlement to her husband's services.[12] Moreover, only the husband could bring a claim for loss of consortium because the wife had no legal identity at common law. This situation was not ameliorated by the passage of the Married Women's Acts in the nineteenth century, which gave married women legal status. Women gained the capacity to sue from these acts but not the right to sue for consortium damages.[13] Not until 1950 did a court hold that a wife could sue for loss of her husband's consortium caused by negligent injury.[14]

Today, the overwhelming majority of states permit wives to sue for loss of consortium.[15] Allowing wives to sue shifted the focus

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11. W. PAGE KEETON ET. AL., PROSSER AND KEETON ON THE LAW OF TORTS § 125, at 931 (5th ed. 1984).

12. *Id.* Blackstone stated with regard to the husband-wife relationship:

> 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 which may be this: 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 she hath no separate interest in any thing, during her coverture.

3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 143 (1758).

13. GEORGE C. CHRISTIE & JAMES E. MEEKS, CASES AND MATERIALS ON THE LAW OF TORTS 765-66 (2d ed. 1990).

14. Hitaffer v. Argonne Co., 183 F.2d 811 (D.C. Cir. 1950); *see* KEETON, *supra* note 11, § 125 at 931-32.

15. The wife's right of recovery for loss of consortium from the negligent injury of her husband is recognized by Alaska and 45 other states and the District of Columbia. *See* Williams v. Alabama Neon Sign Co., 304 So. 2d 895 (Ala. 1974); Schreiner v. Fruit, 519 P.2d 462 (Alaska 1974); City of Glendale v. Bradshaw, 503 P.2d 803 (Ariz. 1972); Ouachita Nat'l Bank v. Tosco Corp., 686 F.2d 1291 (8th Cir. 1982) (applying Arkansas law); Pesce v. Summa Corp., 126 Cal. Rptr. 451 (Cal. Ct. App. 1975); Lee v. Colorado Dep't of Health, 718 P.2d 221 (Colo. 1986); Hopson v. St. Mary's Hosp., 408 A.2d 260 (Conn. 1979); Lacy v. G.D. Searle & Co., 484 A.2d 527 (Del. Super. Ct. 1984); Romer v. District of Columbia, 449 A.2d 1097 (D.C. 1982); Gates v. Foley, 247 So. 2d 40 (Fla. 1971); Smith v. Tri-State Culvert Mfg. Co. 191 S.E.2d 92 (Ga. Ct. App. 1972); Yamamoto v. Premier Ins. Co., 668 P.2d 42 (Haw. Ct. App. 1983); Rindlisbaker v. Wilson, 519 P.2d 421 (Idaho 1974); Kolar v. City of Chicago, 299 N.E.2d 479 (Ill App. Ct. 1973); Troue v. Marker, 252

of consortium damages away from loss of services, based on the servile status of the wife at common law, to loss of companionship, comfort, love, solace and the like, as well as sexual relations.[16] In fact, according to one commentator: "it is arguable whether 'services' remain a part of consortium at all."[17]

Children were placed in a position similar to the wife's at common law, as they had no entitlement to their parents' services and could not recover for loss of society damages. This situation was condemned by noted commentators. As early as 1916, Dean Roscoe Pound of Harvard Law School wrote:

> As against the world at large a child has an interest . . . in the society and affection of the parent . . . . But the law has done little to secure these interests. At common law there are no legal rights which protect them.
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> . . . .

N.E.2d 800 (Ind. 1969); Childers v. McGee, 306 N.W.2d 778 (Iowa 1981); Kotsiris v. Ling, 451 S.W.2d 411 (Ky. 1970); ME. REV. STAT. ANN., tit. 19, § 167-A (West 1981); Deems v. Western Md. Ry., 231 A.2d 514 (Md. 1967); Olsen v. Bell Tel. Lab., Inc., 445 N.E.2d 609 (Mass. 1983); Montgomery v. Stephan, 101 N.W.2d 227 (Mich. 1960); Dawydowycz v. Quady, 220 N.W.2d 478 (Minn. 1974); Tribble v. Gregory, 288 So. 2d 13 (Miss. 1974); Novak v. Kansas City Transit, Inc., 365 S.W.2d 539 (Mo. 1963); Johnson v. United States, 496 F. Supp. 597 (D. Mont. 1980) (applying Montana law); Luther v. Maple, 250 F.2d 916 (8th Cir. 1958) (applying Nebraska law); General Elec. Co. v. Bush, 498 P.2d 366 (Nev. 1972); New Hampshire Ins. Co. v. Bisson, 449 A.2d 1226 (N.H. 1982); Ekalo v. Constructive Serv. Corp., 215 A.2d 1 (N.J. 1965); Romero v. Byers, 872 P.2d 840 (N.M. 1994); Millington v. Southeastern Elevator Co., 239 N.E.2d 897 (N.Y. 1968); Nicholson v. Hugh Catham Memorial Hosp., 266 S.E.2d 818 (N.C. 1980); Hastings v. James River Aerie No. 2337, 246 N.W.2d 747 (N.D. 1976); Clouston v. Remlinger Oldsmobile Cadillac, Inc., 258 N.E.2d 230 (Ohio 1970); Middlebrook v. Imler, Tenny & Kugler, Inc., 713 P.2d 572 (Okla. 1985); Snodgrass v. Gen. Tel. Co., 549 P.2d 1120 (Or. 1976); Hopkins v. Blanco, 320 A.2d 139 (Pa. 1974); Mariani v. Nanni, 185 A.2d 119 (R.I. 1962); S.C. CODE ANN. § 15-75-20 (Law Co-op 1976); Hoekstra v. Helgeland, 98 N.W.2d 669 (S.D. 1959); TENN. CODE ANN. § 25-1-106 (1980); Whittlesey v. Miller, 572 S.W.2d 665 (Tex. 1978); Whitney v. Fisher, 417 A.2d 934 (Vt. 1980); Lundgren v. Whitney's Inc., 614 P.2d 1272 (Wash. 1980); King v. Bittinger, 231 S.E.2d 239 (W. Va. 1976); Peeples v. Sargent, 253 N.W.2d 459 (Wis. 1977); Weaver v. Mitchell, 715 P.2d 1361 (Wyo. 1986).

A small minority of states, however, achieved equality between the spouses by abolishing the husband's cause of action. *See, e.g.*, Hackford v. Utah Power & Light, 740 P.2d 1281 (Utah 1987).

16. David P. Dwork, Note, *The Child's Right to Sue for Loss of A Parent's Love, Care and Companionship Caused by Tortious Injury to the Parent*, 56 B.U. L. REV. 722, 726-27 (1976).

17. *See* Mogill, *supra* note 10, at 1328.

> It will have been observed that legal securing of the interests of children falls far short of what general considerations would appear to demand.[18]

However, judges and the courts were slow to react to this apparent shortfall.

Nevertheless, with the changed definition of consortium between husband and wife, some courts began to change their conception of consortium in the parent-child relationship. The similarity between these relationships prompted these courts to recognize filial consortium claims. Defendants raised the objection, successful with some courts, that the parent-child relationship was fundamentally different from that between husband and wife and should be treated accordingly. These defendants based this objection on the presence of a sexual component in the husband-wife relationship that was absent from the parent-child relationship. However, the Michigan Supreme Court in *Berger v. Weber*,[19] a leading case in this area, effectively answered that objection: "Sexual relations are but one element of the spouse's consortium action. The other elements—love, companionship, affection, society, comfort, services and solace—are similar in both relationships and in each are deserving of protection."[20]

Similarly, some courts recognized that compensating parents and children for loss of society and companionship more accurately compensates them for the losses they suffer. These courts recognized that loss of a child's services no longer represented the major component of the parents' loss. For example, the Wisconsin Supreme Court in *Shockley v. Prier*[21] stated that "[i]n the majority of family situations, children are no longer an economic asset . . . ."[22] As a result, "[t]he 'remedy' of loss of [a] minor's earning capacity during minority is of diminishing significance. . . . Society and companionship between parents and their children are closer to our present day family ideal than the right of the parents to the 'earning capacity during minority' . . . ."[23]

The recognition of loss of companionship and society in the filial relationship began in the wrongful death area. Many state

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18. Roscoe Pound, *Individual Interests in the Domestic Relations*, 14 MICH. L. REV. 177, 185-86 (1916) (footnote omitted).

19. 303 N.W.2d 424 (Mich. 1981)

20. *Id.* at 426.

21. 225 N.W.2d 495 (Wis. 1975).

22. *Id.* at 498.

23. *Id.* at 499.

legislatures amended their wrongful death acts[24] to include recovery for consortium damages where the victim suffers death. Currently, twenty-four states have done so, including Alaska.[25] In addition, courts in fourteen states liberally construed their wrongful death statutes to include filial consortium damages, even though these statutes traditionally had been interpreted to limit recovery to pecuniary loss.[26]

The next step was to extend loss of filial consortium recovery to negligent injury cases. At first, courts made this extension only in the case of serious, permanent injury. The rationale was that death and severe injury are often only separated by a mere fortuity.[27] Some courts expressly recognized, however, that the

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24. Wrongful Death Acts refer to statutes that confer a cause of action for designated survivors of a tort victim who is killed. At common law, civil actions against a tortfeasor died with the victim. The wrongdoer was only liable for nonfatal injuries. Consequently, he was better off if the victim was killed rather than injured. This anomalous situation was changed when Lord Campbell's Act was passed in England in 1846. Most states' statutes are modelled on this act. *See* KEETON, *supra* note 11, § 127 at 945.

25. ALASKA STAT. § 09.55.580 and 09.15.010 (1994); ARK. CODE ANN. § 16-62-102 (Michie 1987); FLA. STAT. ANN. § 768.21 (West 1986); HAW. REV. STAT. § 663.3 (1985); KAN. STAT. ANN. § 60-1904 (1983); KY. REV. STAT. ANN. § 411.135 (Baldwin 1991); LA. REV. STAT. ANN. § 2315 (West 1984); ME. REV. STAT. ANN. tit. 18-A, § 2-804 (West 1991); MD. CODE ANN. § 3-904(d) (1989); MASS. GEN. LAWS ANN. ch. 229, § 2 (West 1985); MICH. COMP. LAWS ANN. § 27A.2922 (West 1984); MO. ANN. STAT. § 537.090 (Vernon 1988); NEV. REV. STAT. § 41.085(4) (1991); N.C. GEN. STAT. § 28A-18-2 (Supp. 1994); OHIO REV. CODE ANN. § 2125-02 (Baldwin 1992); OKLA. STAT. ANN. tit. 12, § 1055 (West 1988); OR. REV. STAT. § 30.020 (1991); R.I. GEN. LAWS § 10-7-1.2 (1985); VT. STAT. ANN. tit. 14, § 1492(b) (1989); VA. CODE ANN. § 8-01.52 (1981); WASH. REV. CODE § 4.24.010 (1989); W. VA. CODE § 55-7-6 (1994); WIS. STAT. ANN. § 895.04 (West 1983); WYO. STAT. § 1-38-102 (1988).

26. *See* City of Tucson v. Wondergem, 466 P.2d 383 (Ariz. 1970); Krouse v. Graham, 562 P.2d 1022 (Cal. 1977); Volk v. Baldazo, 651 P.2d 11 (Idaho 1982); Elliot v. Willis, 412 N.E.2d 638 (Ill. App. Ct. 1980); American Car Loading Corp. v. Gary Trust & Sav. Bank, 25 N.E.2d 777 (Ind. 1940); Marceleno v. State Dep't of Highways, 367 So. 2d 882 (La. Ct. App. 1978); Fussner v. Andert, 113 N.W.2d 355 (Minn. 1961); Bouroughs v. Oliver, 85 So. 2d 191 (Miss. 1956); Swanson v. Champion Int'l Corp., 646 P.2d 1166 (Mont. 1982); Garwin v. Coover, 276 N.W.2d 225 (Neb. 1979); Green v. Bittner, 424 A.2d 210 (N.J. 1980); Nance v. State Bd. of Educ., 282 S.E.2d 848 (S.C. 1981); Anderson v. Lele, 216 N.W.2d 152 (S.D. 1974); Jones v. Carvell, 641 P.2d 105 (Utah 1982). *See generally* Mogill, *supra* note 10, at 1336.

27. *See, e.g.*, Howard Frank, M.D., P.C. v. Superior Ct., 722 P.2d 955, 957 (Ariz. 1986); Hay v. Medical Ctr. Hosp., 496 A.2d 939 (Vt. 1985); Ueland v.

degree of injury goes to the element of damages and not to whether recovery for filial consortium should be allowed.[28]

B. Developments in Alaska Law

Alaska law paralleled these common law reforms and, indeed, formed part of the avant garde in their formulation. In *Schreiner v. Fruit*,[29] a 1974 decision, the Alaska Supreme Court first adopted a wife's right to sue for loss of consortium damages resulting from injury to her husband. The court clearly recognized the conceptual shift in computing damages in consortium actions away from services toward sentimental interests:

> The interest to be protected [in loss of consortium actions] is personal to the wife, for she suffers a loss of her own when the care, comfort, companionship, and solace of her spouse is denied her. The basis for recovery is no longer the loss of services, but rather the injury to the conjugal relation.[30]

Subsequently, the Alaska Supreme Court adopted the minor child's cause of action for loss of parental consortium in *Hibpshman v. Prudhoe Bay Supply, Inc.*[31] The court pointed to the similarity between the child's cause of action and spousal consortium claims. It also cited Alaska's wrongful death statute, which provides for recovery by children for loss of consortium damages in wrongful death cases.[32] The court determined that "[p]recluding minor children from maintaining a cause of action for loss of parental consortium arising from their parent's injury would, in our view, be inconsistent with the legislature's authorization of such recovery when the parent dies . . . ."[33] Based on this determination, the court concluded that "[t]he claim for loss of parental consortium presented in this case is not sufficiently distinguishable from either

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Reynolds Metals Co., 691 P.2d 190, 192 (Wash. 1984); Berger v. Weber, 303 N.W.2d 424, 426 (Mich. 1981); Ferriter v. Daniel O'Connell's Sons, Inc., 413 N.E.2d 690 (Mass. 1980).

28. The Alaska Supreme Court recognized this in Hibpshman v. Prudhoe Bay Supply, Inc., 734 P.2d 991, 994 n.10 (Alaska 1987); *see infra* text accompanying notes 31-34.

29. 519 P.2d 462 (Alaska 1974).

30. *Id.* at 465-66.

31. 734 P.2d 991 (Alaska 1987).

32. ALASKA STAT. § 09.55.580(c)(4) (1994).

33. *Hibpshman*, 734 P.2d at 994.

spousal consortium claims in injury cases or children's consortium claims in death cases to warrant non-recognition."[34]

Not long after the *Hibpshman* decision, the Alaska Supreme Court recognized parents' causes of action for loss of a negligently injured minor child's consortium in *Gillispie v. Beta Construction Co.*[35] Here the court's reasoning deviated from common law developments in the loss of filial consortium area. The problem was that Alaska's wrongful death statute did not (and currently does not) provide for individual recovery by a non-dependent parent for loss of a child's consortium.[36]

Rather than interpreting the common law as creating the cause of action, the court based its decision on Alaska Statutes section 09.15.010, which provides in pertinent part: "A parent may maintain an action as plaintiff for the injury or death of a child below the age of majority."[37] The statute apparently had its origins in a nineteenth century Oregon law that permitted parents to sue when their child was tortiously injured.[38] The court noted that the Oregon statute was deeply rooted in the master-servant view of the filial relationship and had been interpreted to limit recovery to pecuniary losses.[39] However, the court, recognizing the changed nature of consortium damages, permitted the parents to recover for loss of the minor child's society.[40] Then Chief Justice Rabinowitz, concurring in the result, would have extended the cause of action as logically following from the court's decisions

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34. *Id.* In addition to *Schreiner*, the court cited its decisions in Cramer v. Cramer, 379 P.2d 95 (Alaska 1963) and Hebel v. Hebel, 435 P.2d 8 (Alaska 1967) in which it rejected the doctrines of interspousal and parental immunity, respectively, in the context of negligence-based injury claims.

35. 842 P.2d 1272 (Alaska 1992).

36. The decedent's estate recovers the wrongful death damages. Such damages are limited to pecuniary losses and are distributed as other personal property of the deceased. *See* In re Estate of Pushruk, 562 P.2d 329 (Alaska 1977).

37. ALASKA STAT. § 09.15.010 (1994).

38. Large portions of Alaska's first civil code, enacted by Congress in 1900, were drawn verbatim from Oregon statutes. This included the predecessor of section 09.15.010. Therefore, the court interpreted the statute on the basis of early Oregon precedents. *Gillispie*, 842 P.2d at 1273 (citing City of Fairbanks v. Schaible, 375 P.2d 201, 208 (Alaska 1962) ("[I]t is presumed that [the statutes were] adopted with the interpretation that had been placed upon [them] by the Oregon Supreme Court prior to 1900.")).

39. *Id.*

40. *Id.* at 1273-74.

in *Schreiner* and *Hibpshman* rather than from section 09.15.010.[41] He would have further held that the state's wrongful death statute does not preclude recognition of the parent's loss of consortium claim under the common law of Alaska.[42]

Both the *Hibpshman* and *Gillispie* decisions limited their holdings to minor children. However, in a different context involving the parent-child relationship, the Alaska Supreme Court chose not to impose an age limitation. In *Tommy's Elbow Room v. Kavorkian*,[43] the court held that a parent bystander may maintain a cause of action for negligent infliction of emotional distress caused by injury to the parent's child. The court did not restrict the action to minor children, and indeed the age of the victim in the case itself was not discussed.

C. Extending Filial Consortium to Adult Children

Extending the cause of action for loss of filial consortium to adult children logically follows from the historical development outlined above. The rejection by the Alaska Supreme Court and other courts of the services theory in favor of a society, care and companionship theory in loss of filial consortium cases eviscerates the legitimacy of an arbitrary age cutoff. Such a cutoff is justifiable under a services theory because the service obligation between parents and children can be expected to terminate when the child reaches the age of majority. However, this is not the case with society, care and companionship. Parents and children can reasonably expect to enjoy these benefits throughout their lives. Accordingly, to reject services as the compensable element in loss of consortium cases in favor of society, care and companionship, and yet deny compensation for adult children, is fundamentally inconsistent. Likewise, it is inconsistent to permit a parent to recover negligent infliction of emotional distress damages for an injured adult child while not permitting that same parent to sue for loss of the adult child's consortium. The next section of this note focuses on authorities and evidence that support breaking the age barrier to extend loss of filial consortium claims to adult children.

41. *Id.* at 1274-75 (Rabinowitz, C.J., concurring); *see also* Scott v. United States, 884 F.2d 1280, 1282 (9th Cir. 1989).

42. *Gillispie*, 842 P.2d at 1275 (Rabinowitz, C.J., concurring).

43. 727 P.2d 1038 (Alaska 1986).

III. BREAKING THE AGE BARRIER

There are ample social scientific justifications for allowing adult children to recover for loss of consortium. Following an analysis of those justifications in section A of Part III, section B will set forth the states that have already extended the cause of action to adult children. Section C will then turn to an examination of Alaska's wrongful death statute and its application to this area of the law. Section D will consider and refute arguments against extending the cause of action.

A. Social Scientific Literature

The damages suffered by adult children and their parents when either an adult child or parent is injured are not illusory. A preponderance of the social scientific literature has concluded that the parent-child relationship remains important into the child's adulthood. In many cases, contact between parents and adult children is frequent. According to one study, over fifty percent of older parents saw one of their adult children either on the day they were interviewed or on the previous day.[44] Three-quarters of the parents surveyed had seen their adult children within the last week.[45]

Substantial evidence supports the conclusion that adult children remain of considerable importance in the lives of their parents.[46] Similarly, several studies have demonstrated the importance of parents in the lives of adult children. In one study, even the oldest members of the sample of adult children stated that they looked to their parents for guidance more than they looked to other people.[47] One researcher has asserted that the importance of the parent-child relationship increases as the child ages.[48]

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44. E. Shanas, *Older People and Their Families: The New Pioneers*, 42 J. MARRIAGE & FAM. 9, 12 (1980).

45. *Id.*

46. For a summary of this research, see Evan T. Peterson, *Elderly Parents and Their Offspring, in* AGING AND THE FAMILY 175, 179 (Stephen J. Bahr & Evan T. Peterson eds., 1989).

47. *Id.*

48. Timothy D. Ament, *Parents' Loss of Consortium Claims for Adult Children in Iowa: The Magical Age of Eighteen*, 41 DRAKE L. REV. 247, 259 (1992) (citing Victor G. Circirelli, *Adult Children and Their Elderly Parents, in* FAMILY RELATIONS LATER IN LIFE 31, 34 (T. Brubaker ed., 1st ed. 1983)).

Another study traced the relationship over time and found that the parent-child relationship is characterized by high dependency during young childhood, low dependency during adolescence, but increased dependency during young adulthood and middle-age.[49] That the relationship should increase in importance comports with common sense: the adult child's relationship with the parent is longer and characterized by more shared experiences than a younger child's.

The adverse consequences for minor children when they experience the loss of a parent's society has been well documented. Minor children who have been denied a parent's consortium due to illness or injury have been found to have higher rates of illness, higher rates of juvenile delinquency and a higher occurrence of psychiatric disorder.[50] A variety of other short-term and long-term effects have been noted, including separation anxiety, depression, substance abuse and suicidal tendencies.[51]

Although the impact on adult children of the loss of a parent's society is less well documented, a recent study indicates that the death of a parent after the child has reached adulthood can have adverse effects on this child in many cases.[52] The researchers compared a sample of adults who had lost a parent with a sample that had not. They found that the bereaved adult children experienced "a significant increase in psychological distress and alcohol consumption and a decline in physical health status."[53] It can easily be inferred from this finding that similar consequences would result in the case of a parent who is negligently injured.

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49. Robert A. Lewis, *The Adult Child and Older Parents, in* FAMILY RELATIONSHIPS IN LATER LIFE 68, 73-78 (T. Brubaker ed., 2d ed. 1990).

50. Michael Rutter, CHILDREN OF SICK PARENTS: AN ENVIRONMENTAL AND PSYCHIATRIC STUDY 13-16 (1966); *see also* Bernard L. Berelson & Gary A. Steiner, HUMAN BEHAVIOR: AN INVENTORY OF SCIENTIFIC FINDINGS 316-17 (1964); Judith Stillion & Hannelore Wass, *Children and Death, in* DEATH: CURRENT PERSPECTIVES 225 (E.S. Schneidman ed., 3d ed. 1984).

51. *See generally* Claudia L. Jewett, HELPING CHILDREN COPE WITH SEPARATION AND LOSS 22 (1982); *see also* Marian Osterweis & Jessica Townsend, UNDERSTANDING BEREAVEMENT REACTIONS IN ADULTS AND CHILDREN 18 (1989); Arnold Samuels, *Parental Death in Childhood, in* CHILDHOOD BEREAVEMENT AND ITS AFTERMATH 19, 22 (Sol Altschul ed., 1988).

52. Debra Umberson & Meichu D. Chen, *Effects of a Parent's Death on Adult Children: Relationship Salience and Reaction to Loss*, 59 AM. SOC. REV. 152 (1994).

53. *Id.* at 152.

The impact on parents of injuries to their adult children also has not been extensively examined. Nevertheless, a researcher from the University of Wisconsin has assessed the impact on parents of "major problems and strains" in the lives of their middle-aged children.[54] The problems and strains considered included divorce, long-term unemployment, health problems, alcohol or drug dependency, emotional problems and financial difficulties.[55] The study found that for mothers, but not for fathers, there was a significant relationship between those problems and the parents' emotional well-being.[56] In the qualitative interviews that followed, however, the fathers reported experiencing considerable personal distress as a result of their middle-aged children's problems.[57] Because parents' emotional and mental well-being can be so closely tied to the health and success of their adult child, negligent injury of that child will have a profound impact on the mental vitality of elderly parents.

B. Case Law From Other States

Contrary to sound reasoning, a large number of courts that have recognized filial consortium claims have limited them to minor children.[58] The claims have been limited even though these courts

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54. Jan R. Greenberg, *Problems in the Lives of Adult Children: Their Impact on Aging Parents*, 16 J. GERONTOLOGICAL SOC. WORK 149 (1991).

55. *Id.* at 153.

56. *Id.* at 154.

57. *Id.* at 155.

58. Courts have limited the child's cause of action for loss of parental consortium to minors in the following cases: Hibpshman v. Prudhoe Bay Supply, Inc., 734 P.2d 991 (Alaska 1987); Ferriter v. Daniel O'Connell's Sons, Inc., 413 N.E.2d 690 (Mass. 1980) (limited to dependents); Pence v. Fox, 813 P.2d 429 (Mont. 1991); Gallimore v. Children's Hosp. Medical Ctr., 617 N.E.2d 1052 (Ohio 1993); Hay v. Medical Ctr. Hosp. of Vermont, 496 A.2d 939 (Vt. 1985); Belcher v. Goins, 400 S.E.2d 830 (W. Va. 1990); Theama v. City of Kenosha, 344 N.W.2d 513 (Wis. 1984); Nulle v. Gillette-Campbell County. Joint Powers Bd., 797 P.2d 1171 (Wyo. 1990). Florida has limited the cause of action to minors by statute. FLA. STAT. ANN. § 768.0415 (West 1995).

The parent's cause of action for loss of an injured child's consortium has been limited to minors in the following cases: Gillispie v. Beta Construction Co., 842 P.2d 1272 (Alaska 1992); Davis v. Elizabeth Gen. Medical Ctr., 548 A.2d 528 (N.J. Super. Ct. Law Div. 1988); Gallimore v. Children's Hosp. Medical Ctr., 617 N.E.2d 1052 (Ohio 1993); Shockley v. Prier, 225 N.W.2d 495 (Wis. 1975).

Iowa has the anomalous situation where adult children may sue for loss of a parent's consortium, but parents may not sue for loss of an adult child's

have recognized that the master-servant analogy is no longer applicable to the parent-child relationship. For example, the Wisconsin Supreme Court stated in *Shockley v. Prier*[59] that "today's relationship between parents and children is, or should be, more than that between master and servant,"[60] but the court nevertheless limited its holding to minor children. In *Shockley* and similar cases, however, minor children were before the court. As noted earlier with the Alaska decisions, these cases may simply reflect the common law practice of limiting holdings to specific facts. Only a few courts have explicitly refused to extend the cause of action to adult children when faced with such facts.[61]

A number of courts have taken the logical next step and recognized that filial consortium claims should cover adult children.[62] The Arizona Supreme Court, in *Howard Frank, M.D., P.C. v. Superior Court,*[63] refused to limit a parent's loss of consortium action to minor children where an adult child suffered brain damage as a result of the negligent administration of anesthesia during surgery. The court stated that the "master-servant analogy is clearly antiquated and long overdue for judicial burial."[64] It noted, however, that filial consortium actions "continue to be haunted by the common law master-servant rationale," citing the reluctance of states to extend these actions to adult children.[65] The court rejected a pecuniary services theory for loss of a child's consortium, finding that "'the true significance of a parent's action under modern practice is that it compensates the parents' emotion-

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consortium. *See* Loftsgard v. Dorrian, 476 N.W.2d 730 (Iowa Ct. App. 1991).

59. 225 N.W.2d 495 (Wis. 1975).

60. *Id.* at 500.

61. *See, e.g.*, Loftsgard v. Dorrian, 476 N.W.2d 730 (Iowa Ct. App. 1991).

62. Two courts have permitted a parent to sue for loss of consortium of their adult child. *See* Howard Frank, M.D., P.C. v. Superior Court, 722 P.2d 955 (Ariz. 1986); Masaki v. General Motors, 780 P.2d 566 (Hawaii 1989).

Four courts have permitted an adult child to sue for loss of parental consortium. *See* Villareal v. Dept. of Transp. of Arizona, 774 P.2d 213 (Ariz. 1989); Audobon-Exira Ready Mix, Inc. v. Illinois Cent. Gulf R.R., 335 N.W.2d 148 (Iowa 1983); Reagan v. Vaughn, 804 S.W.2d 463 (Tex. 1991); Ueland v. Reynolds Metals Co., 691 P.2d 190 (Wash. 1984).

63. 722 P.2d 955 (Ariz. 1986).

64. *Id.* at 960.

65. *Id.* at 959-60.

al losses when their child is injured.'"[66] With regard to an age limitation, the court stated:

> It is irrelevant that parents are not entitled to the services of their adult children; they continue to enjoy a legitimate and protectible expectation of consortium beyond majority arising from the very bonds of the family relationship. Surely nature recoils from the suggestion that the society, companionship and love which compose filial consortium automatically fade upon emancipation . . . . The filial relationship, admittedly intangible, is ill-defined by reference to the ages of the parties and ill-served by arbitrary age distinctions.[67]

The Arizona court further noted that "to suggest as a matter of law that compensable consortium begins at birth and ends at age eighteen is illogical and inconsistent with common sense and experience."[68] Moreover, it found no age restriction in Arizona's wrongful death statute.[69] The court concluded that "we can find no reason for limiting the class of plaintiffs to parents of minor children when the parents of adult children may suffer equal or greater harm."[70]

In *Masaki v. General Motors Corp.*,[71] the Hawaii Supreme Court likewise rejected an argument against permitting parents to sue for loss of consortium of their negligently injured twenty-eight year-old son. It found the rule limiting the cause of action to minor children, "premised on the rationale that upon emancipation, parents are no longer entitled to the services and earnings of their children," both "outmoded and illogical."[72] The court, citing with approval the reasoning of the Arizona Supreme Court in *Howard Frank* and noting that there was no arbitrary age limit in Hawaii's wrongful death statute, held that parents may sue for loss of an adult child's consortium.[73]

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66. *Id.* at 959 (quoting Dwork, *supra* note 16, at 732).
67. *Id.* at 960; *accord* Masaki v. General Motors, 780 P.2d 566 (Hawaii 1989).
68. *Howard Frank*, 722 P.2d at 960.
69. *Id.*
70. *Id.* at 961.
71. 780 P.2d 566 (Hawaii 1989).
72. *Id.* at 577.
73. *Id.* at 577-78. The federal district court of Hawaii subsequently concluded as a matter of Hawaii law that a child could sue for loss of a parent's consortium in Marquardt v. United Airlines, 781 F. Supp. 1487 (D. Hawaii 1992), and imposed no age restriction based on the Hawaii Supreme Court's reasoning in *Masaki*.

In the context of the child's cause of action, the Washington Supreme Court refused, in *Ueland v. Reynolds Metals Co.*,[74] to limit to minor children recovery for loss of parental consortium. Even though the children involved in the action were minors, the court saw no reason to limit loss of parental consortium to minor children: "[a]lthough minors are the group most likely to suffer real harm due to a disruption of the parent-child relationship, we leave this to the jury to consider in fixing damages."[75] The *Ueland* court's approach is persuasive. The level of damages suffered by adult children is exactly the type of common-sense determination for which juries are well equipped. In some cases there will be a strong emotional bond evidenced by mutual caring and love between the parent and adult child and in some cases there will not. But this should be a jury determination; recovery should not be precluded as a matter of law.

Similarly, the Iowa Supreme Court in *Audubon-Exira Ready Mix, Inc. v. Illinois Central Gulf Railroad*[76] declined to limit damages for loss of consortium to the child's minority. As has been noted, the court stated that even adult children should have the right to expect the society and guidance of their parents.[77] The court further concluded that "[t]he finder of fact should be able to evaluate the extent of the children's loss of parental consortium. The loss will normally be less as the child gets older; but it is not a matter to be decided solely on the basis of the child's date of birth."[78] Based on this reasoning, the Iowa court, in *Nelson v. Ludovissey*,[79] permitted adult children to maintain a cause of action. The court made the children's claims subject to the requirement that parents must bring the claim in the child's name if not impracticable.[80]

In *Hibpshman*, the Alaska Supreme Court used reasoning similar to that applied in *Ueland* and *Audubon-Exira* when it

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74. 691 P.2d 190 (Wash. 1984).

75. *Id.* at 195; *accord* Reagan v. Vaughn, 804 S.W.2d 463, 465-66 (Tex. 1991) (adult or minor children may recover for the loss of a parent's consortium); Nelson v. Ludovissey, 368 N.W.2d 141 (Iowa 1985) (adult child may assert loss of parental consortium claim if parent does not bring child's claim); Berger v. Weber, 303 N.W.2d 424 (Mich. 1981) (no explicit age limitation).

76. 335 N.W.2d 148 (Iowa 1983).

77. See *supra* text accompanying note 7.

78. *Audobon-Exira Ready Mix*, 335 N.W.2d at 152.

79. 368 N.W.2d 141 (Iowa 1985).

80. *Id.* at 146.

refused to limit the child's cause of action for loss of parental consortium to cases of severe injury.[81] The court stated: "[T]he amount of loss of consortium damages will reflect the degree of the child's loss."[82] Consequently, a jury should determine the amount of damages based on the extent of the injury to the child. Just as the jury should not be precluded from determining loss of consortium damages where the injury is not severe, so too should the jury not be precluded where the child is an adult.

The Texas Supreme Court, in *Reagan v. Vaughn*,[83] also declined to limit to minors the child's cause of action for loss of parental consortium. The court cited with approval the reasoning of the courts in *Ueland* and *Audobon-Exira*.[84] Moreover, the court determined that it would be "[c]onsistent with our prior recognition that adult children may recover for the wrongful death of a parent" to extend the loss of parental consortium action to adult children.[85] As will be seen in the next section of this note, a similar conclusion can be drawn from Alaska's wrongful death statute.

C. Alaska's Wrongful Death Statute

Support for extending recovery for loss of filial consortium to adult children comes not only from the reasoning applied in the decisions of other state courts but also from Alaska's wrongful death statute.[86] The Alaska statute imposes no age requirement to sue for wrongful death damages.[87] Subsection (a) of Alaska

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81. *See supra* notes 28, 31-34 and accompanying text.

82. Hibpshman v. Prudhoe Bay Supply, Inc., 734 P.2d 991, 994 n.10 (Alaska 1987).

83. 804 S.W.2d 463 (Tex. 1990).

84. *Id.* at 466.

85. *Id.*

86. ALASKA STAT. § 09.55.580 (1994).

87. The Alaska wrongful death statute provides in part:

> (a) [W]hen the death of a person is caused by the wrongful act or omission of another, the personal representatives of the former may maintain an action therefor against the latter, if the former might have maintained an action, had the person lived, against the latter for an injury done by the same act or omission. . . . The amount recovered, if any, shall be exclusively for the benefit of the decedent's spouse and children when the decedent is survived by a spouse or children, or other dependents.
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> . . . .
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> (c) In fixing the amount of damages to be awarded under this section, the court or jury shall consider all the facts and circumstances and from

Statutes section 09.55.580 includes as beneficiaries children without regard to age. Moreover, subsection (c)(4) gives those children the right to sue for loss of consortium.

The Alaska Supreme Court implicitly recognized that adult children may recover under the statute in *Horsford v. Estate of Horsford*.[88] The court declined to adopt the appellants' theory that damages under the statute should be apportioned according to the rules of intestate succession. The court noted that under the appellants' theory, "[a] totally dependent widow who has suffered great loss by the death of her husband and a *totally independent adult child* who has suffered no loss, would share equally."[89]

It is true that the *Horsford* court approved a formula whereby pecuniary losses under the wrongful death statute would be limited to the child's minority, despite the language of subsection (c)(1), which awards pecuniary losses to the statutory beneficiaries "without regard to the age thereof."[90] Arguably, this could be taken as supporting a limitation to minors of a child's cause of action for loss of parental consortium in injury cases. However, this argument fails for two reasons. First, the court expressly limited its approval of the formula to the facts before it.[91] In any event, the court stressed that, "if there is evidence of circumstances indicating a longer period of dependency or evidence furnishing a basis for finding a continued expectation of pecuniary contributions

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them fix the award at a sum which will fairly compensate for the injury resulting from the death. In determining the amount of the award, the court or jury shall consider but is not limited to the following:

(1) deprivation of the expectation of pecuniary benefits to the beneficiary or beneficiaries, without regard to age thereof, that would have resulted from the continued life of the deceased and without regard to probable accumulations or what the deceased may have saved during the lifetime of the deceased;

(2) loss of contributions for support;

(3) loss of assistance or services irrespective of age or relationship of decedent to the beneficiary or beneficiaries;

(4) *loss of consortium*;

(5) loss of prospective training and education;

(6) medical and funeral expenses.

ALASKA STAT. § 09.55.580(a), (c) (1994) (emphasis added). For a complete history and analysis of the wrongful death statute, see Millard F. Ingraham, *Damages for Wrongful Death in Alaska*, 5 ALASKA L. REV. 293 (1988).

88. 561 P.2d 722 (Alaska 1977).

89. *Id.* at 727 n.10 (emphasis added).

90. *Id.* at 727-28.

91. *Id.*

beyond the age of majority, then the formula can be adjusted or, if necessary, abandoned."[92]

Second, the court approved the formula limiting losses to the children's minority because "the reasonable expectations of a child for pecuniary contributions from his parents terminates under ordinary circumstances at about [the age of majority]."[93] However, no such expectation is supportable with consortium damages because parents and children can reasonably expect to enjoy the benefits of each other's society for their lifetimes. In addition, if the legislature chose not to impose an age restriction on pecuniary losses, which can be expected to terminate at majority, certainly no age restriction should be applied to loss of consortium damages that do not have a similar expectation.

As has been seen, Alaska's wrongful death statute was one of the bases by which the *Hibpshman* court recognized the minor child's cause of action for loss of parental consortium.[94] Clearly, if the legislature imposes no restriction on adult children's ability to sue for loss of consortium under the wrongful death statute, it is illogical to limit the loss of consortium action in negligent injury cases to minor children.

On the other hand, Alaska Statutes section 09.15.010, which is the mechanism by which the Alaska Supreme Court permitted parents to sue for loss of their child's consortium in *Gillispie*, specifically states that the parent may only maintain the cause of action for a child "below the age of majority."[95] This limitation clearly reflects the master-servant origins of the statute. The Alaska Supreme Court specifically rejected these origins when it permitted parents to sue for loss of a child's society: "[A] parent's action for injury or death of a child can no longer justly be limited to its master servant origins. Thus we conclude that a parent's right of action under [section] 09.15.010 includes the right to recover loss of society damages."[96]

Unfortunately, the court failed to recognize that the age limitation is likewise grounded in the statute's master-servant origins. The court should recognize the flaw in its reasoning and either repudiate *Gillispie* to the extent it relies on section 09.15.010

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92. *Id.* at 728.
93. *Id.*
94. *See supra* text accompanying note 32.
95. ALASKA STAT. § 09.15.010 (1994).
96. Gillispie v. Beta Constr. Co., 842 P.2d 1272, 1273-74 (Alaska 1992).

or hold that the limitation to minor children in the statute is unconstitutional on equal protection grounds.[97]

D. Arguments Against Breaking the Age Barrier

Arguments similar to those used against recognizing loss of consortium claims in the first instance will probably be used to support rejecting the extension of filial consortium actions to adult children: namely, that litigation will increase, money damages will be inadequate, insurance costs will rise and defendants will be subjected to multiple claims. As to the first argument, the Michigan Supreme Court cogently stated that "the rights of a new class of tort plaintiffs should be forthrightly judged on their own merits, rather than engaging in gloomy speculation as to where it will all end."[98] The Arizona Supreme Court also rejected fears of litigation, likening such fears to "the fabled cry of wolf" that often prove groundless.[99] Even if litigation should increase, the court noted that "'the existence of a multitude of claims merely shows society's pressing need for ... redress [of filial consortium damages].'"[100]

The alleged inadequacy of money damages has likewise been rejected by courts that have adopted filial consortium claims. In *Theama by Bichler v. City of Kenosha*,[101] for example, the Wisconsin Supreme Court stated:

> Although a monetary award may be a poor substitute for the loss of a parent's society and companionship, it is the only workable way that our legal system has found to ease the injured party's tragic loss. We recognize this as a shortcoming of our society, yet we believe that allowing such an award is clearly preferable to completely denying recovery.[102]

Moreover, the damage award could be used to obtain psychiatric treatment to help parents and adult children cope with their losses. In any event, such an award will help offset the impact of the loss.[103]

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97. *See* discussion *infra* part IV.B.

98. Berger v. Weber, 303 N.W.2d 424, 426 (Mich. 1981) (citation omitted).

99. Howard Frank, M.D., P.C. v. Superior Court, 722 P.2d 955, 960 (Ariz. 1986) (citation omitted).

100. *Id.* (quoting Dillon v. Legg, 441 P.2d 912, 917 n.3 (1968)).

101. 344 N.W.2d 513 (Wis. 1984).

102. *Id.* at 520.

103. *See* Ueland v. Reynolds Metals Co., 691 P.2d 190, 194 (Wash. 1984).

The alleged speculative nature of the loss has also been rejected as a bar to recovery. Juries are often called upon to assess intangible injuries, including pain and suffering. As the Alaska Supreme Court noted in *Hibpshman*, "[w]e see no reason to consider the calculation of damages for a child's loss of parental consortium any more speculative or difficult than that necessary in other consortium, wrongful death, emotional distress, or pain and suffering actions."[104]

The Alaska Supreme Court also rejected the third argument—that insurance costs will rise—in *Hibpshman*: "a person's liability in our law still remains the same whether or not he has liability insurance; properly, the provision and cost of such insurance varies with potential liability under the law, not the law with the cost of insurance."[105] The last argument—that defendants will be exposed to multiple claims—is easily disposed of by requiring joinder where feasible. The Alaska Supreme Court required joinder for minor children in *Hibpshman* as a "practical and fair solution to the problem [of multiple claims]."[106]

It may also be argued that if filial consortium claims involving adult children are recognized, disruptions to other relationships, such as between grandparent and grandchild, should also be recognized, thus exposing defendants to unlimited liability. However, this argument lacks merit because "the parent-child relationship is undeniably unique and the wellspring from which other family relationships derive. It is the parent-child relationship which most deserves protection and which, in fact, has received judicial protection in the past."[107] Parents and children exhibit greater emotional dependency than more distant relationships. As one commentator has suggested:

> The distinction between the interests of children and those of other relatives is rational and easily applied. Most children are dependent on their parents for emotional sustenance. This is rarely the case with more remote relatives. Thus, by limiting the plaintiffs in the consortium action to the victim's children, the

104. Hibpshman v. Prudhoe Bay Supply, Inc., 734 P.2d 991, 996 (Alaska 1987).

105. *Id.* at 997 (quoting Norwest v. Presbyterian Intercommunity Hosp., 652 P.2d 318, 323 (Or. 1982)).

106. *Id.*

107. Howard Frank, M.D., P.C. v. Superior Court, 722 P.2d 955, 956 n.3 (Ariz. 1986).

> courts would ensure that the losses compensated would be both real and severe.[108]

The social scientific literature proves this point. Moreover, as the same author noted, the courts have "demonstrated [their] ability to draw lines in order to protect a particular interest without leaving the defendant open to unlimited liability."[109]

In addition, rejecting an arbitrary age distinction simply increases the number of potential plaintiffs within that relationship; it does not extend it to others. Furthermore, it is not a valid argument to deny recovery for a recognized injury merely because others in the future may wish to assert similar claims. Those claims should be decided on the merits when the occasion arises.[110]

IV. CONCLUSION AND RECOMMENDATIONS

The master-servant analogy with the parent-child relationship is "long overdue for judicial burial,"[111] and the Alaska Supreme Court should see to it that it is permanently interred. An outdated master-servant analogy that cuts off recovery at age eighteen has no place in loss of filial consortium claims. Rather, it is the injury to the "relation"[112] and the expectations of the parties to each other's society and companionship that should be compensated.

A. Extending the Child's Cause of Action

There would be no difficulty for the Alaska Supreme Court to extend to adult children the child's cause of action for loss of parental consortium. As the court noted in *Hibpshman*, "loss of consortium has been repeatedly recognized as a cause of action created and developed by the courts."[113] Thus, it can be judicially altered. As the court explained in *Kaatz v. State*,[114] "a rule which is judicial in origin can be, and appropriately should be, altered by the institution which was its creator."[115] Indeed, courts have a duty to change the common law to meet existing social conditions.

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108. Dwork, *supra* note 16, at 738.

109. *Id.*

110. *See, e.g.*, Berger v. Weber, 303 N.W.2d 424, 427 (Mich. 1981) ("The need for and extent of limitations beyond those attendant upon the comparable cause of action by a spouse should await demonstration.").

111. *Howard Frank*, 722 P.2d at 960.

112. Schreiner v. Fruit, 519 P.2d 462, 465 (Alaska 1974).

113. Hibpshman v. Prudhoe Bay Supply, Inc., 734 P.2d 991, 995 (Alaska 1987).

114. 540 P.2d 1037 (Alaska 1975).

115. *Id.* at 1049.

The *Hibpshman* court stated: "We have long recognized our responsibility to adapt the common law to the needs of society as justice requires where the legislature has not spoken."[116]

B. Extending the Parent's Cause of Action

Extending the parent's cause of action to cover adult children is rendered problematic by the court's decision in *Gillispie* to base the parent's loss of consortium claim on Alaska Statutes section 09.15.010,[117] which specifically limits the parent's cause of action for the injury of a child below the age of majority.[118]

The court could simply repudiate *Gillispie* insofar as it rests the parent's cause of action on section 09.15.010 and follow the reasoning stated in the concurring opinion of Justice Rabinowitz. As discussed above, Justice Rabinowitz would have held as a matter of common law interpretation, "rather than attempting to resuscitate [Alaska Statutes] 09.15.010,"[119] that parents have a cause of action for loss of a child's society. He cited with approval the conclusion of the Ninth Circuit in *Scott v. United States*:

> Following Alaska law and based on the reasoning of the *Hibpshman* case, the district court could reasonably have concluded that a parent's claim for damage to the parent-child relationship is not sufficiently distinguishable from spousal or children's consortium claims to warrant nonrecognition.[120]

Even the majority in *Gillispie* noted that holding that a parent did not have a cause of action for loss of a minor child's consortium would run counter to the court's precedents in *Hibpshman* and *Schreiner*.[121] Nevertheless, the *Gillispie* court insisted that section 09.15.010 was the "appropriate vehicle" for recognizing the parents' cause of action.[122]

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116. 734 P.2d at 995.

117. *See* Gillispie v. Beta Constr. Co., 842 P.2d 1272 (Alaska 1992).

118. *See supra* text accompanying note 95.

119. 842 P.2d at 1274 (Rabinowitz, C.J., concurring).

120. *Id.* at 1282 (Rabinowitz, C.J., concurring) (quoting Scott v. United States, 884 F.2d 1280, 1282 (9th Cir. 1989)). It is notable that the Ninth Circuit did not limit the parent's cause of action to minor children when interpreting Alaska law. 884 F.2d at 1288.

121. *Gillispie*, 842 P.2d at 1274 ("To now hold that a parent is not entitled to recover loss of society for the death of his or her child would run counter to this line of precedent [in *Schreiner* and *Hibpshman*].").

122. *Id.*

Basing the parent's cause of action on the common law of Alaska would permit the court to amend the law to cover adult children in spite of the wording of the statute. The inclusion of adult children would logically follow from the court's precedents in *Hibpshman* and *Schreiner.* Moreover, this approach would be consistent with the court's ruling in *Kavorkian*, where the court imposed no age restriction when the bystander parent sues for negligent infliction of emotional distress.[123]

Alternatively, the court could simply invalidate the minority limitation of section 09.15.010 on equal protection grounds. The United States Supreme Court, in *Levy v. Louisiana*,[124] rejected the constitutionality of Louisiana's wrongful death statute. As construed by the Louisiana Supreme Court, the statute excluded recovery by illegitimate children for the death of their mother. Applying rational basis review, the Court determined that the restriction violated the Equal Protection Clause of the United States Constitution.[125] The Court stated:

> The rights asserted here involve the intimate, familial relationship between a child and his own mother. When the child's claim of damage for loss of his mother is in issue, why, in terms of "equal protection," should the tortfeasors go free merely because the child is illegitimate? Why should the illegitimate child be denied rights merely because of his birth out of wedlock?[126]

By analogy, in the filial consortium context, the Alaska Supreme Court should similarly apply rational basis review. It should ask the question posed by the Arizona Supreme Court in *Howard Frank, M.D., P.C. v. Superior Court*: "Why should the parents of an injured seventeen-year-old be allowed to recover for loss of consortium, but not the parents of an injured eighteen-year-old?"[127] The Arizona court answered the question by saying "[w]e can divine no adequate answer based on law or logic."[128] Certainly a restriction not based on law or logic has no rational basis. If the Alaska Supreme Court chooses not to repudiate *Gillispie*, it should conclude that confining filial consortium claims

123. *See supra* note 43 and accompanying text.
124. 391 U.S. 68 (1968).
125. *Id.* at 72.
126. *Id.* at 71.
127. 722 P.2d at 961.
128. *Id.*

to minors has no rational basis and strike down the age restriction in Alaska Statutes section 09.15.010 as unconstitutional.

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