# WIFE'S RIGHT TO CONSORTIUM

*Montgomery v. Stephan*
*349 Mich. 33, 101 N.W.2d 227 (1960)*

Plaintiff's husband was left physically and psychologically disabled as a result of an automobile accident caused by defendant's negligence. His wife brought this action seeking recovery for loss of her husband's consortium, asserting deprivation of his society and comfort, aid and companionship, and of normal conjugal affection. The trial court, following established Michigan precedent, granted defendant's motion for dismissal due to plaintiff's failure to state a cause of action. The Supreme Court reversed, thus recognizing for the first time in Michigan a wife's right of action for loss of consortium arising from negligence.

This decision is of great importance as another indication of a growing trend in the law. Until 1950 a wife was unable to recover for such an injury in any jurisdiction.[1] In that year a Washington, D.C. court set a precedent by allowing her a cause of action.[2] Since that time an increasing number of states have adopted this view, long advocated by legal writers.[3] The majority view at the present time appears contra to this position, but in many jurisdictions the problem has not been recently re-examined. For instance, the most recent case in Ohio dates back to 1915.[4] It seems probable that the problem will arise in these jurisdictions in the near future in the light of this growing trend. Thus, an appraisal of the merits of such an action appears timely.

An appropriate starting point would seem to be with a discussion of the term "consortium." Consortium is defined as the conjugal fellowship of the husband and the wife and the right of each to the company, cooperation, and aid of the other in every conjugal relation.[5] It has also been defined as consisting of material services, love, affection, companionship and sexual relations all welded into a conceptualistic unity.[6]

At common law the husband had a cause of action for loss of the consortium of his wife,[7] but there appears to be no authority as to the existence

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[1] North Carolina had permitted a recovery in one decision, Hipp v. E. I. Dupont de Nemours & Co., 182 N.C. 9, 108 S.E. 318 (1921), but the case was promptly overruled in Hinnant v. Tidewater Power Co., 189 N.C. 120, 126 S.E. 307 (1925).

[2] Hitaffer v. Argonne Co., 183 F.2d 811 (D.C. Cir. 1950); 23 A.L.R.2d 1366 (1950), *cert. denied* 340 U.S. 852.

[3] Cooney v. Moomau, 109 F. Supp. 448 (Neb. 1953); Missouri Pacific Transportation Co. v. Miller, 227 Ark. 351, 299 S.W.2d 41 (1957); Brown v. Georgia-Tennessee Coaches, Inc., 88 Ga. App. 519, 77 S.E.2d 24 (1953); Delta Chevrolet Co. v. Waid, 211 Miss. 256, 51 So. 2d 443 (1951).

[4] Smith v. Nicholas Bldg. Co., 93 Ohio St. 101, 112 N.E. 204 (1915).

[5] Pratt v. Daly, 55 Ariz. 535, 104 P.2d 147 (1940).

[6] Hitaffer v. Argonne Co., *supra* note 2, at 814.

[7] Guevin v. Manchester St. Ry., 78 N.H. 289, 99 Atl. 298 (1916); 28 Ohio Jur. 2d "Husband and Wife," § 128 (1958); Holbrook, "The Change in the Meaning of Consortium," 22 Mich. L. Rev. 1 (1922).

of a corresponding cause of action for the wife.[8] The courts and legal writers have given three main views as to the reason for this difference.

The first view is based on the inferiority of the wife in the marriage relation. Under the marriage contract the legal existence of the wife was considered as being merged in that of her husband and an injury to her was thus legally an injury to her husband for which he alone could recover.[9]

According to another theory, even at common law a wife had rights in the enjoyment of her marriage including the right to her husband's consortium, but procedural difficulties prevented her from exercising this right.[10] A married woman was incapable of suing except when her husband was joined as plaintiff, the husband then being entitled to any proceeds recovered.[11] In suits based on alienation of affections or adultery, the husband also was a wrongdoer and the law does not allow one to benefit from his own wrong.[12] In the case of an injury to the husband, the wife could not recover for injuries to her personal rights resulting therefrom, since the moment recovery was granted, it would belong to him, thus giving him two recoveries for his injury.[13]

The advocates of the third view have argued that a husband could recover for loss of consortium only if he suffered a loss of the services of his wife. Since the wife had no legal right to the services of her husband, the argument continues, she could not recover for loss of consortium.[14] It is suggested by this writer that the common law courts espousing this theory limited it to negligence actions. In the first place, the procedural difficulties mentioned above would account for the absence of actions in other than negligence cases; and secondly, after these procedural limitations were removed, the courts following this theory used it in relation to negligence cases only.[15]

The married women's acts changed this picture extensively. Their purpose was to improve the position that the wife occupied at common law. Generally these acts provide that (1) a wife may hold property as her own,

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[8] Holbrook, *supra* note 7; Lippman, "The Breakdown of Consortium," 30 Col. L. Rev. 651 (1930).

[9] Lippman, *supra* note 8 at 653; 41 Geo. L.J. 443 (1953). A quote from Blackstone aptly states this position: "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." 3 Blackstone's Commentaries 142.

[10] Hitaffer v. Argonne, *supra* note 2; Bernhardt v. Perry, 276 Mo. 612, 208 S.W. 462 (1919); Flandermeyer v. Cooper, 85 Ohio St. 327, 98 N.E. 102 (1911); Holbrook, *supra* note 7; 23 U. Cinc. L. Rev. 108 (1954).

[11] Bernhardt v. Perry, *supra* note 10; 27 Am. Jur. "Husband and Wife," §§ 491, 513 (1940); Holbrook, *supra* note 7.

[12] Holbrook, *supra* note 7; 39 Mich. L. Rev. 820 (1941).

[13] Bernhardt v. Perry, *supra* note 10.

[14] Curry v. Board of Commissioners of Franklin County, 135 Ohio St. 435, 21 N.E. 2d 341 (1939); Kelley v. Bouche, 21 Ohio Op. 244 (C.P. 1911); Annot., 23 A.L.R.2d 1378 (1950); 15 Ohio St. L.J. 98 (1954).

[15] Curry v. Board of Commissioners of Franklin County, *supra* note 14; Smith v. Nicholas Bldg. Co., *supra* note 4.

free from control by her husband, or subject to lessoned control; (2) she may sue without joining him as plaintiff and may hold as her own property the proceeds of the suits; and (3) she is entitled to her own earnings.[16]

One result of the acts was the appearance of suits by married women to recover for loss of consortium resulting from alienation of affections.[17] Most courts allowed the action, following either of two theories. One held that consortium is a property right and since the wife now has a right to hold property she can bring an action to recover for an invasion of this property right. The other view held that with the removal of the procedural limitations on the wife she was able to exercise her pre-existing right.[18]

Practically all jurisdictions now allow this action;[19] but regardless of the path used to reach their decision, they have refused to carry the reasoning to its logical conclusion by allowing a wife an action for loss of consortium caused by negligence.[20]

Generally there are four arguments as to why a cause of action for negligently caused loss of consortium should not be granted to the wife. A careful analysis reveals that they are not convincing under present-day conditions.

The principal basis for denial is that the injury to the wife is too remote and indirect to merit a right of recovery. Negilgence cases, it is said, differ from alienation of affections and criminal conversation cases where there is a direct attack on the marital relation.[21] The lack of consistency in allowing the husband to recover for loss of consortium caused by a negligently inflicted injury while denying recovery to the wife destroys this first argument. If the proximate causation is provable in the former case, there is no valid reason why it should not be so in the latter.[22]

Some courts have argued that since the husband is bound to support his wife, she is benefited indirectly by his recovery and to allow an additional action would result in double recovery.[23] The malicious interference cases,

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16 Holbrook, *supra* note 7.

17 *Ibid.;* Actions for criminal conversation also appeared, Turner v. Heavin, 182 Ky. 65, 206 S.W. 23 (1918), as did actions based on intentional injuries to the husband; Flandermeyer v. Cooper, *supra* note 10.

18 Holbrook, *supra* note 7.

19 Emerson v. Tayeor, 133 Md. 192, 104 Atl. 538 (1918); 27 Am. Jur. "Husband and Wife," § 513 (1940); 28 Ohio Jur. 2d "Husband and Wife," § 128 (1958); 39 Mich. L. Rev. 820 (1941); 57 Col. L. Rev. 902 (1957).

20 Annot., 23 A.L.R.2d 1378 (1950); 27 Am. Jur. "Husband and Wife," § 514 (1940); 28 Ohio Jur. 2d "Husband and Wife," § 142 (1958).

21 Hitaffer v. Argonne Co., *supra* note 2; Annot., 23 A.L.R.2d 1378 (1950); 17 Ohio St. L.J. 153 (1956).

22 *Ibid.*

23 Annot., 23 A.L.R.2d 1378 (1950); 39 Mich. L. Rev. 820 (1941). The court in Bernhardt v. Perry, *supra* note 10 at 466, stated this view clearly, "In the first place her husband would recover full compensation for all injuries he sustained . . . and in addition he would recover for all injuries to his 'vital organs' and for being incapacitated to care for, associate with and protect her, as well as being deprived of his right to consort with her. This would make him whole as much as it would be possible to do

allowing the cause of action, have been distinguished in two respects: first, the impossibility of double recovery because of the participation of the husband in the wrong[24] and secondly, the need for punishing the defendant.[25] So far as material services are included within the concept of consortium, the double recovery fear is real and requires special care, but not total abandonment of the wife's rights. To do so approaches a return to the common law principle that the husband has the only rights in the marital relation.[26] A solution would be "to determine the damages to the wife's consortium in exactly the same way as those of the husband are measured in a similar action, and subtract therefrom the value of any impairment of his duty to support."[27] The distinction between suits based on malice and suits arising from negligence, emphasizing the punitive nature of the former action, fails because exemplary damages cannot be grounded on an injury that could not be actionable if the claim for exemplary damages were omitted.[28]

The proponents of the third argument consider loss of services necessary before an action for loss of consortium can be brought. The argument amounts to a continuation of the common law view previously explained.[29] Again, the malicious interference cases are distinguished on the basis of a need for punishment. This is Ohio's present position.[30] The great weight of authority will not accept the premise of this argument, such being the emphasis on the service element of consortium. According to this majority, the question is not whether any particular element of consortium has been injured, but whether consortium has been injured at all.[31]

The last major reason rests on the proposition that the married women's acts created no new rights but merely removed existing disabilities. Since the wife had no such right at common law, it is argued, none exists under the statutes.[32] Various explanations have been offered to rationalize the apparent inconsistency in allowing an action by the wife for alienation of affections and criminal conversation while denying it in negligence cases.[33]

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within the contemplation of the law. . . If she is authorized to recover from the defendant in this action, then she would recover from the same wrongdoer the damages she had sustained for the same injuries her husband had recovered for and out of which he is bound to support, maintain, and care for her."

[24] Brown v. Kistleman, 177 Ind. 692, 98 N.E. 631 (1912); Holbrook, *supra* note 7; 57 Col. L. Rev. 902 (1957).

[25] Hitaffer v. Argonne Co., *supra* note 2; Brown v. Kistleman, *supra* note 24; Bernhardt v. Perry, *supra* note 10; Stout v. Kansas City Term Ry., 172 Mo. App. 113, 157 S.W. 1019 (1913).

[26] Hitaffer v. Argonne Co., *supra* note 2; 39 Mich. L. Rev. 820 (1941).

[27] Hitaffer v. Argonne Co., *supra* note 2.

[28] Schumacher v. Siefert, 35 Ohio App. 405, 172 N.E. 420 (1930); McCormick, Damages, § 83 (1935).

[29] *Supra* note 14.

[30] 15 Ohio St. L.J. 98 (1954).

[31] Hitaffer v. Argonne Co., *supra* note 2; Annot., 23 A.L.R.2d 1378 (1950).

[32] Cravene v. Louisville and M. Ry., 195 Ky. 257, 242 S.W. 628 (1922); Nash. v. Mobile & O. Ry., 149 Miss. 823, 116 So. 100 (1928); Annot., 23 A.L.R. 1378 (1950).

[33] The wife is entitled to the society and affection of her husband but is allowed

The failure of this argument lies in this attempted rationalization as explained in the analysis of the first and second arguments.

The most important reason for granting the wife this cause of action is the reason upon which the primary emphasis was placed in the principal case. The married women's acts were intended to place husband and wife in positions of legal equality.[34] The very purpose of this legislation is thwarted by denying the wife a cause of action in cases of negligence and only allowing the legislative purpose to prevail in cases of malicious invasion of the right of consortium.[35]

It is suggested that Ohio adopt the position of the Michigan court with special care being given not to allow double recovery for the service element of consortium. Possibly an instruction to the jury could accomplish the desired result.[36] The Ohio Supreme Court has not been reluctant to overrule its holdings in other areas where changes were needed in order to keep up with the developments in the law and should extend the same philosophy into this area of the law.[37]

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to bring an action to recover for an injury to this right only when it results from a wrong committed directly against her. The removal of the procedural limitations on her right to sue made this action possible but did not make possible a suit for loss of consortium resulting from an indirect injury, Bernhardt v. Perry, *supra* note 10 at 465. The need to punish the wrongdoer was emphasized as another reason.

[34] Acuff v. Schmit, 248 Iowa 272, 78 N.W.2d 480 (1956); Lippman, *supra* note 8; 39 Mich. L. Rev. 820 (1941).

[35] Some courts realizing this inconsistency have "solved" the problem by denying both husband and wife an action for either intentional or negligent invasions of the right of consortium, Annot., 23 A.L.R.2d 1378 (1950); Holbrook, *supra* note 7. This appears to leave a legitimate interest unprotected, however.

There are statutes in ten or twelve states abolishing action for interference with domestic relations which carry an accusation of sexual misbehavior. Prosser, Torts, § 103 (1955).

[36] Perhaps a statute providing for compulsory joinder of the husband's and the wife's action in negligence cases would furnish an answer. Provision would have to be made, however, for cases in which antagonism developed between husband and wife after the accident or where one spouse was out of the jurisdiction.

[37] Avellone v. St. John's Hosp., 165 Ohio St. 467, 135 N.E.2d 410 (1956); Damm v. Elyria Lodge, 158 Ohio St. 107, 107 N.E.2d 337 (1952); Williams v. Marion Rapid Transit Inc., 152 Ohio St. 114, 87 N.E.2d 334 (1949).