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Damages — Loss of Consortium — Recovery by Either Spouse

As a result of an assault and battery committed upon *P*'s husband by *D*, *P* brought an action seeking damages for loss of consortium arising out of her husband's injuries. *Held*, affirming judgment for *D*, the wife of a man injured by the tortious act of a third person may not maintain an action for loss of consortium. *Smith v. United Constr. Workers*, 122 So. 2d 153 (Ala. 1960).

There has been great controversy among the courts in recent years over the legal existence of the right of a wife to the consortium of her husband. The focal point of this issue appears to be the inability of the courts to reconcile the common law denial of this right in the wife with the status of the married woman in modern-day society. Germinating with the inception of the Married Women's Emancipation Acts, the problem did not precipitate until the middle of the present century, when a multi-split of authority occurred in this area.

The concept of consortium originated in the early common law as a right in the husband to the companionship, society, and intimacy of his wife. This right was considered a property right, for the impairment of which the husband had an action against the tort-feasor. 3 BLACKSTONE, COMMENTARIES * 140. Of course, until the passage of the married women's acts, the wife had no action in any event. This state of affairs in regard to consortium persisted until 1950, recovery by husbands being practically universal upon proper proof, Annot., 133 A.L.R. 1156 (1941), and denial of wives' recovery receiving the same unanimity, Annot., 59 A.L.R. 681 (1929). The courts reasoned that "a right may exist in the husband, which, notwithstanding the [Married Women's Act], is without a correlative right in the wife." *Emerson v. Taylor*, 133 Md. 192, 195, 104 Atl. 538, 539 (1918).

The complacency of the courts revealed in these cases was shattered somewhat abruptly by the celebrated case of *Hittaffer v. Argonne Co.*, 183 F.2d 811 (D.C. Cir. 1950), which held that husband and wife have equal rights in the marriage relation, and any interference with these rights, whether of the husband or of the wife, is a violation, not only of a natural right, but also of a legal right arising out of the marriage relation. In granting recovery to the wife in this instance, the court cited very little authority and relied almost solely upon logical reasoning. The *Hit-*

affer decision, *supra*, immediately became the subject of heated controversy, many courts citing it for persuasive authority, and many others for purposes of vilification. In any event, litigation in this area suddenly increased, seemingly owing to the encouragement of the *Hitaffer* case. See Annot., 23 A.L.R.2d 1378, 1386 (1952). The courts, in reevaluating their positions, reached every conceivable result, and in some cases the particular holding was defended with emotional vehemence. See *Neuberg v. Bobowicz*, 401 Pa. 146, 162 A.2d 662 (1960).

It appears that a majority of courts still adheres to the common law tradition that the wife's rights are not coextensive with those of the husband. See PROSSER, TORTS 705 (2d ed. 1955). In *Burk v. Anderson*, 232 Ind. 77, 109 N.E.2d 407 (1952), the court expressed feelings that the wife should recover, but bowed instead to the weight of authority in that state denying recovery. The traditional viewpoint is defended, however, in *Coastal Tank Lines, Inc. v. Canoles*, 207 Md. 37, 113 A.2d 82 (1955), where the court denied recovery to the wife and repudiated any effect of the Married Women's Property Act, stating that if the action were possible, recovery might have been had by the wife, even prior to the Act, by simple joinder of the husband. No discussion was given of joinder possibilities where the wrongful death of the husband was the basis for the action.

Another argument was advanced in *Jeune v. Del. E. Webb Constr. Co.*, 77 Ariz. 226, 269 P.2d 723 (1954), where it was observed that the court had no power to remake the common law. Other courts have stated that these married women's statutes merely removed existing disabilities of the wife, and did not create any new rights or causes of action. *Ash v. S. S. Mullen, Inc.*, 43 Wash. 2d 345, 261 P.2d 118 (1953). It has been suggested that an alteration in the established law be sought by application to the legislature, rather than to the courts. *Hartman v. Cold Spring Granite Co.*, 247 Minn. 515, 77 N.W.2d 651 (1956). This court, however, did not discuss the possibilities of an effective statehouse lobby of housewives deprived of their husbands' consortia. Hesitation to extend the right of recovery to the wife has also been based upon a fear of an inordinate expansion of liability arising out of the "new" right of action. *Larocca v. American Chain & Cable Co.*, 23 N.J. Super. 195, 92 A.2d 811 (1952). However, this opinion did not declare that the courts' prime purpose is to minimize litigation.

However unyielding these courts may be, a small but growing minority of jurisdictions allows either spouse to recover in damages for loss of consortium. One court appeared to base its decision, granting recovery to the wife, primarily "in light of the specious and fallacious reasoning" employed by the majority of jurisdictions. *Bailey v. Wilson*, 100 Ga. App. 405, 408, 111 S.E.2d 106, 108 (1959). Relying upon the logic of the *Hitafter* case, *supra*, the court in *Missouri Pac. Transp. Co. v. Miller*, 227 Ark. 351, 299 S.W.2d 41 (1957), observed that the parties to a marriage are each entitled to the comfort, companionship, and affection of the other, that the historical distinction between recovery by husband but not by wife is an outworn fiction, and that the wife's interest in the undisturbed relation with her consort is no less worthy of protection than that of her husband. A less sentimental viewpoint was expressed in *Acuff v. Schmit*, 248 Iowa 272, 78 N.W.2d 480 (1956), which held that as consortium is a valuable property right when due to the husband, it must be so regarded when due to the wife.

Defining the term "consortium" simply as "conjugal fellowship," the court in *Montgomery v. Stephan*, 359 Mich. 33, 34, 101 N.W. 2d 227, 228 (1960), after relating that husband and wife stood together at the altar and jointly entered into this conjugal relationship, assuming commensurate rights and duties, asked rhetorically, "Where, along the line, did it all become onesided, so that the law will grant recompense to one, on the theory that he has suffered a loss, but not to the other?" After discussing the inequalities of medieval, and even early Roman, law, the court granted recovery to the wife.

The "no new right of action" theory was rebutted in *Hoekstra v. Helgeland*, 98 N.W.2d 669 (S.D. 1959), with the observation that it is the boast of the common law that its flexibility permits its ready adaptability to the changing nature of human affairs. The court reasoned that when the wife's disabilities are removed, the common law should afford her the remedies it grants to the husband where the wrongs of either party are the same in principle. The decision concluded that there was no question of extension of common law liability here, since this was common law liability.

In at least two major jurisdictions, California and New York, the advocacy of equality of women's rights produced the opposite result. In *Deshotel v. Atchison, T. & S.F. Ry.*, 50 Cal.2d 664, 328 P.2d 449 (1958), the complaining wife argued that courts denying

such relief relied upon medieval concepts of the marriage relation and the married women's acts changed all that; therefore, either husband or wife should be allowed recovery. The court agreed with her premises, but disagreed with her conclusion, granting her no relief, and declaring by way of dictum that the common law notion of a property right of the husband was obsolete and the right to recovery by either party was doubtful. The court followed its own dictum in *West v. City of San Diego*, 6 Cal. Rptr. 289, 353 P.2d 929 (1960), and denied recovery to the husband as well, stating that this common law right was based upon the wife's subservient position in the marriage relationship, whereas, under present-day law, spouses are generally regarded as equals.

The same result was reached in *Kronenbitter v. Washburn Wire Co.*, 4 N.Y.2d 524, 151 N.E.2d 898 (1958), where the court, denying relief to the husband, regarded neither spouse as the chattel of the other, and felt that the emancipation of women argued for the restriction or abolition of these actions rather than their extension.

Few courts express the candor of the common pleas court which granted the wife recovery and declared that "[w]hat is sauce for the gander is sauce for the goose." *Hayes v. Swenson*, 106 Pittsb. Leg. J. 141 (Pa. C.P. 1959). However, this small voice was stifled in *Neuberg v. Bobowicz*, 401 Pa. 146, 162 A.2d 662 (1960), which called that opinion itself "sauce," and held that the common law prevails until altered by legislation.

The West Virginia court studied the problem of husbands' recovery for the first time in *Shreve v. Faris*, 111 S.E.2d 169 (W. Va. 1959), and held that the husband has a common law right to the consortium of his spouse and may recover for the loss thereof. In reaching its decision the court discussed both the great weight of authority and the prior West Virginia cases regarding loss of services and pecuniary expenses incurred by the husband as a result of the wife's injury. See *Normile v. Wheeling Traction Co.*, 57 W. Va. 132, 49 S.E. 1030 (1905). However, the court defined "consortium" as "a right . . . in a husband, arising from the marital union. . . ." 111 S.E.2d at 173. Moreover, there is a complete absence of any dicta indicating a possible corresponding right of the wife in this state. These factors may forewarn a denial of such rights in this court, but, other than the court's definition of "consortium," which speaks only in terms of the husband's right,

there is no language in the decision to militate against wifely recovery were a proper case to be submitted for consideration.

At present, this area of damage and tort law is typified by many cases denying recovery to the wife, citing voluminous authority, and a few cases granting such recovery, with a reevaluation of these principles of law. There are also New York and California. It appears that to achieve clarity in this field and to obtain equality of legal status for the wife, recognition of her right may have to come by way of legislative action. It is felt, however, that justice will be better served in this area when the courts free themselves from the intellectually inhibiting remnants and pristine legalistics of the medieval common law and recognize the basic rights of all humanity in its most intimate relationship.

Orton Alan Jones

Income Tax — Jurisdiction of Federal District Court to Grant Refund of Partial Income Tax Payment

P, for the taxable year 1950, reported certain losses as ordinary losses. The Commissioner of Internal Revenue treated them as capital losses and levied a deficiency assessment in the amount of \$28,908.60. *P* paid \$5058.54 and then filed a claim with the Commissioner for refund of that amount. The claim was disallowed and *P* sued for refund in the District Court. The District Court stated that the *P* "should not maintain the action because he had not paid the full amount of the assessment", but still entered judgment in favor of the Government. The Court of Appeals of the Tenth Circuit agreed with the District Court upon the jurisdictional issue, and remanded with directions to vacate the judgment and dismiss the complaint. The United States Supreme Court affirmed in 1959.

Held, affirmed on re-hearing. The statute giving district courts jurisdiction of any civil action against the United States for recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under internal-revenue laws, considered in the light of the language used therein and the legislative history of the statute and the historical background and the harmony of the statutory system of tax litigation