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Torts--Loss of Consortium--Wife May Recover for Negligent Injury to Husband (Hitaffer v. Argonne Co., 183 F.2d 811 (D.C. Cir. 1950))

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on the supplier to inspect the chattel may be anticipated by the supplier so that he knows the supplied party will not normally inspect so as to protect those third persons who come in contact with it. The last argument is especially applicable here because the chattel was leased for immediate use; therefore, it was not reasonable for the lessor to expect that the lessee would make a thorough inspection. The lessor should have realized that safe use of the chattel can be secured only by taking precautions before turning the chattel over to the lessee.[24]

TORTS—LOSS OF CONSORTIUM—WIFE MAY RECOVER FOR NEGLIGENT INJURY TO HUSBAND.—The plaintiff brought this action for the loss of her consortium caused by the negligence of the defendant in injuring her husband. The District Court for the District of Columbia found for the defendant. *Held,* reversed and a new trial granted. The wife may maintain an action for the loss of her consortium caused by the negligence of a third party. *Hitaffer v. Argonne Co.,* 183 F. 2d 811 (D. C. Cir.), *cert. denied,* 340 U. S. 852 (1950).

Consortium has been defined in many ways; substantially it includes the right of a husband or a wife to the material and sentimental services [1] of the other. At common law prior to the Emancipation Acts for women, a husband could recover for his loss of consortium whether the injury to his wife was negligent [2] or intentional; [3] whether the damage was to the material services [4] or to the companionship, love and conjugal relation.[5] The wife, on the other hand, could not maintain an action in her own name, whether for assault

[24] "One who leases a chattel as safe for immediate use is subject to liability to those whom he should expect to use the chattel, or to be in the vicinity of its probable use, for bodily harm caused by its use in a manner for which . . . it is leased, if the lessor fails to exercise reasonable care. . . ." RESTATEMENT, TORTS § 408 (1934).

[1] Pratt v. Daly, 55 Ariz. 535, 104 P. 2d 147 (1940); Ramsey v. Ramsey, 4 W. W. Harr. 576, 156 Atl. 354 (Super. Ct. Del. 1931); Feneff v. N. Y. Central and Hudson River R. R., 203 Mass. 278, 89 N. E. 436 (1909); see COOLEY, TORTS 266, 267 (2d ed. 1888).

[2] Little Rock Gas & Fuel Co. v. Coopedge *et ux.,* 116 Ark. 334, 172 S. W. 885 (1915); Commercial Carriers, Inc. v. Small, 277 Ky. 189, 126 S. W. 2d 143 (1939); Kelly v. N. Y., N. H. & Hartford R. R., 168 Mass. 308, 38 L. R. A. 631 (1897); Guevin v. Manchester St. Ry., 78 N. H. 289, 99 Atl. 298 (1916).

[3] McMillan v. Smith, 47 Ga. App. 646, 171 S. E. 169 (1933); Clouser v. Clapper, 59 Ind. 548 (1877).

[4] See Lippman, *The Breakdown of Consortium,* 30 COL. L. REV. 651 (1930).

[5] Clouser v. Clapper, 59 Ind. 548 (1877); Pierce v. Crisp, 260 Ky. 519, 86 S. W. 2d 293 (1935); Root v. Goehring, 33 N. D. 413, 157 N. W. 293 (1916); Smith v. Hochenberry, 138 Mich. 129, 101 N. W. 207 (1904).

and battery, trover or loss of consortium, but this inability did not preclude the existence of the right,[6] although the remedy for its enforcement may have been lacking.[7]

When the limitations of coverture were removed no recourse was made to the Emancipation Acts to create this right in a wife to sue for the loss of her consortium caused by an intentional wrong to the husband[8] or by a direct interference with the marriage relation,[9] thus substantiating to some degree the prior existence of the right at common law. Damages assessed in these actions were based upon the invasion of any of the elements of consortium; and a violation of the right to material services was not essential to recovery.[10]

While recognizing the right in intentional torts,[11] the courts comprising the weight of authority have arbitrarily denied[12] it to the wife[13] in all[14] cases where the injury was the result of a negligent act. This limitation is the result of the application of archaic and ill-founded notions of the unity of husband and wife and the erroneous

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[6] *See* Lynch v. Knight, 9 H. L. Cas. 577, 586, 11 Eng. Rep. 854, 858 (1861), wherein Lord Campbell intimated that an action by a wife for loss of consortium could be maintained by the wife in the husband's name.

[7] *See* McDade v. West, 81 Ga. App. 481, 56 S. E. 2d 299 (1949) (dissenting opinion); Bennett v. Bennett, 116 N. Y. 584, 23 N. E. 17 (1899) (concurring opinion).

[8] Flandermeyer v. Cooper, 85 Ohio 327, 98 N. E. 102 (1912) (direct invasion with the marriage relation).

[9] Foot v. Card, 58 Conn. 1, 18 Atl. 1027 (1889) (criminal conversation); Wolfe v. Frank, 92 Md. 138, 48 Atl. 132 (1900) (alienation of affections); Bigaouette v. Paulet, 134 Mass. 123 (1883) (criminal conversation).

[10] The Emancipation Acts for Women divested the husband of his right to the material estate of his wife.

[11] The writer has found no cases allowing or denying a recovery for a loss of consortium aside from criminal conversation (Foot v. Card, 58 Conn. 1, 18 Atl. 1027 (1899)), alienation of affections (Wolfe v. Frank, 92 Md. 138, 48 Atl. 132 (1900)), the selling of noxious drugs (Moberry v. Scott, 38 S. D. 422, 161 N. W. 998 (1917)) and liquors (Pratt v. Daly, 55 Ariz. 535, 104 P. 2d 147 (1940)) to the husband, malicious threats causing the insanity of the husband (Clark v. Hill, 69 Mo. App. 541 (1897)), and slanderous remarks made to the husband of the wife causing him to put her out (Work v. Campbell, 164 Cal. 343, 128 Pac. 943 (1912)).

[12] Brown v. Kistleman, 177 Ind. 692, 98 N. E. 631 (1912); Feneff v. N. Y., N. H. & Hartford R. R., 203 Mass. 278, 89 N. E. 436 (1909); Landwehr v. Barbas, 241 App. Div. 769, 270 N. Y. Supp. 534 (2d Dep't 1934); Goldman v. Cohen, 30 Misc. 336, 63 N. Y. Supp. 459 (Sup. Ct. 1900); Hinant v. Tide Water Power Co., 189 N. C. 120, 126 S. E. 307 (1925).

[13] Only one previous case allowed a recovery by a wife where the injury to the husband was the result of a negligent act, Hipp v. E. I. Dupont de Nemours Co., 182 N. C. 9, 108 S. E. 318 (1921), but this decision was overruled in Hinant v. Tide Water Power Co., *supra* note 12.

[14] The following jurisdictions have solved this inconsistency by denying both the husband and the wife a recovery where the injury was due to a negligent act. Marri v. Stamford St. R. R., 84 Conn. 9, 78 Atl. 582 (1911); Bolger v. Boston Elevated Ry., 206 Mass. 420, 91 N. E. 389 (1910); Blair v. Seitner Dry Goods Co., 184 Mich. 304, 151 N. W. 724 (1915); Golden v. R. L. Green Paper Co., 44 R. I. 231, 116 Atl. 579 (1922).

concept that consortium consists only of material services.[15] This concept stems from the common law rule which regarded a wife as a chattel of the husband since her individuality was merged into the unity of marriage. Its application today is anachronistic in light of our present statutes and holds no position in logic worthy of any merit.

Courts are constrained to limit a recovery by a wife to intentional tort cases, defending their position with various inconsistent reasons. Recovery is denied in negligence cases because the damage is too indirect or remote to be compensable.[16] This premise collapses with the successful maintenance of the same action by the husband.[17] "His right to the conjugal society of his wife is no greater than her right to the conjugal society of her husband. Marriage gives to each the same right in that regard. . . . 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." [18] The violation of the wife's right in both cases is identical; the invasion is direct whether it is intentional or negligent and the distinction between the two is one of refinement holding a highly regarded position in the realm of the abstract, but of no worth in the administration of justice.

A similar defense upholding this circumlocution of justice is the admission that recovery is granted in the intentional tort cases only as a punitive treatment [19] for the wrongdoer. But in order to assess exemplary damages there must exist a cause of action upon which to attach these damages and the latter cannot be used to create the former.[20]

Recovery is also denied the wife on the theory that since the husband has been fully compensated in his own action for the injury to his wife, compensating the wife for her loss of consortium would be effecting a double recovery.[21] It is true that each spouse is

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[15] Feneff v. N. Y., N. H. & Hartford R. R., 203 Mass. 278, 89 N. E. 436 (1909); Stout v. Kansas City Terminal Ry., 172 Mo. App. 113, 157 S. W. 1019 (1913); Hinant v. Tide Water Power Co., 189 N. C. 120, 126 S. E. 307 (1925).

[16] Feneff v. N. Y., N. H. & Hartford R. R., *supra* note 15; Landwehr v. Barbas, 241 App. Div. 769, 270 N. Y. Supp. 534 (2d Dep't 1934) (but see dissenting opinion); Kosciolek v. Portland Ry., Light and Power Co., 81 Ore. 517, 160 Pac. 132 (1916).

[17] See note 2 *supra*.

[18] Bennett v. Bennett, 116 N. Y. 584, 590, 23 N. E. 17, 18 (1899).

[19] Brown v. Kistleman, 177 Ind. 692, 98 N. E. 631 (1912); Goldman v. Cohen, 30 Misc. 336, 63 N. Y. Supp. 459 (Sup. Ct. 1900); Kosciolek v. Portland Ry., Light and Power Co., 81 Ore. 517, 160 Pac. 132 (1916).

[20] ". . . the first inquiry must be, does the complaint state a cause of action if the allegations relied upon solely to support the claim for exemplary damages be disregarded? If it does not, it is insufficient, and the claim for exemplary damages collapses with the rest of the case." McCormick, Damages 293 (1935).

[21] Giggey v. Gallagher Transp. Co., 101 Col. 258, 72 P. 2d 1100 (1937); Stout v. Kansas City Terminal Ry., 172 Mo. App. 113, 157 S. W. 1019 (1913).

entitled to his own estate and that one cannot recover for an injury to the other's; but it is also true that consortium consists of something more than material services and a loss of such services is not a necessary element to the successful maintenance of a cause of action for the loss of consortium.[22]

It is also to be noted that the husband in the principal case recovered for his injury under the Employer's Compensation Act for the District of Columbia, the court holding this recovery no bar to a subsequent action by the wife for her loss of consortium.[23]

Justice Clark, in the instant case, clearly illustrates the fallacious reasoning used to deny the wife the protection which is afforded the husband under the same circumstances. The decision is an attempt to shake off the fetters of the common law rule which has become inadequate, unjust and inapplicable in order to meet the exigencies of modern society.

[22] See note 5 *supra*.

[23] In New York it has been held that an action by the husband for damages for loss of consortium is absolutely barred by a recovery of the wife under Workmen's Compensation Act. Swan v. F. W. Woolworth Co., 129 Misc. 500, 222 N. Y. Supp. 111 (Sup. Ct. 1927).