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DOMESTIC RELATIONS-RIGHT OF WIFE TO CONSORTIUM-NEGLIGENT INJURY TO HUSBAND

DOMESTIC RELATIONS—RIGHT OF WIFE TO CONSORTIUM—NEGLIGENT INJURY TO HUSBAND — Plaintiff sued for loss of the opportunity to bear children by her husband resulting from his emasculation caused by defendant's negligence. The court below dismissed the complaint. *Held* (one judge dissenting), judgment affirmed. Such a cause of action has never been recognized. It cannot be said that the wrong is the proximate cause of the loss because of the many elements of doubt and conjecture in connection with the birth of children. *Landwehr v. Barbas*, 241 App. Div. 769, 270 N. Y. S. 534 (1934).

Most courts hold that a husband may sue a third party for loss of consortium resulting from a negligent injury to his wife.[1] And it is generally held that a

[1] Omaha & R. V. Ry. v. Chollette, 41 Neb. 578, 59 N. W. 921 (1894); Selleck v. City of Janesville, 104 Wis. 570, 80 N. W. 944 (1899); Baltimore & Ohio Ry. v. Glenn, 66 Ohio St. 395, 64 N. E. 438 (1902); Tomme v. Pullman Co., 207 Ala. 511, 93 So. 462 (1922); 2 COOLEY, TORTS, 4th ed., sec. 168 (1932); HARPER, LAW OF

wife, freed from her common law disabilities by the Married Women's Acts, may sue a third party for the alienation of her husband's affections.[2] These two legal principles are used by way of argument in many of the cases to support the right of the wife to sue for loss of consortium caused by an injury to her husband by the negligence of a third party. But all states agree in refusing a wife such a cause of action.[3] It is said that in case of the suit for alienation of affections the Married Women's Acts have given the wife the opportunity to exercise a right which, though unable to enjoy,[4] she had at common law, while she never had such a right in the case of a negligent injury to her husband, and the Married Women's Acts have given her no new cause of action.[5] This distinction seems to be an arbitrary assumption made to reach a desired result. It is said that the wife is allowed to recover for the alienation of her husband's affections because the injury to the consortium is direct and wilful, and the damages are of a punitive nature;[6] while it is said that giving the husband alone full compensation for the negligent injury to him adequately satisfies the indirect and consequential loss to the wife and prevents double liability.[7] It would appear that these dis-

TORTS, sec. 259 (1933); 9 IND. L. REV. 182 (1933); 47 HARV. L. REV. 1443 (1934).

[2] Foot v. Card, 58 Conn. 1, 18 Atl. 1027 (1889); Nolin v. Pearson, 191 Mass. 283, 77 N. E. 890 (1906); Sims v. Sims, 79 N. J. L. 577, 76 Atl. 1063 (1910); Price v. Price, 91 Iowa 693, 60 N. W. 202 (1894). 2 COOLEY, TORTS, 4th ed., sec. 170 (1932); HARPER, LAW OF TORTS, sec. 256 (1933); MADDEN, PERSONS AND DOMESTIC RELATIONS, sec. 56, p. 172 (1931); 17 MINN. L. REV. 93 (1932); Brown, "The Action for Alienation of Affections," 82 UNIV. PA. L. REV. 472 (1934).

[3] Emerson v. Taylor, 133 Md. 192, 104 Atl. 538 (1918), 5 A. L. R. 1045 at 1049 n. (1920); Bernhardt v. Perry, 276 Mo. 612, 208 S. W. 462 (1918), 13 A. L. R. 1320 at 1344 n. (1921); Hinnant v. Tidewater Power Co., 189 N. C. 120, 126 S. E. 307 (1925), 37 A. L. R. 889 at 897 n. (1925); Nash v. Mobile & Ohio Ry., 149 Miss. 823, 116 So. 100, 59 A. L. R. 676 at 680 n. (1928); 2 COOLEY, TORTS, 4th ed., sec. 169 (1932). Apparently the only authority permitting such an action is Hipp v. Dupont de Nemours & Co., 182 N. C. 9, 108 S. E. 318 (1921), following the dissenting opinion in Bernhardt v. Perry, 276 Mo. 612, 208 S. W. 462 (1918). This case was overruled by Hinnant v. Tidewater Power Co., 189 N. C. 120, 126 S. E. 307 (1925).

[4] Lynch v. Knight, 9 H. L. C. 577, 11 Eng. Rep. 854 (1861).

[5] Kosciolek v. Portland Ry., Light & Power Co., 81 Ore. 517, 160 Pac. 132 (1916); Goldman v. Cohen, 30 Misc. 336, 63 N. Y. S. 459 (1900); Patelski v. Snyder, 179 Ill. App. 24 (1913); Cravens v. Louisville & N. Ry., 195 Ky. 257, 242 S. W. 628 (1922). Nash v. Mobile & Ohio Ry., 149 Miss. 823, 116 So. 100 (1928).

[6] Goldman v. Cohen, 30 Misc. 336, 63 N. Y. S. 459 (1900); Smith v. Nicholas Bldg. Co., 93 Ohio St. 101, 112 N. E. 204 (1915). Likewise the wife may recover damages from a third party who, with knowledge of their injurious effects upon the husband, sells drugs to the latter over the protests of the wife. Flandermeyer v. Cooper, 85 Ohio St. 327, 98 N. E. 102 (1912); Moberg v. Scott, 38 S. D. 422, 161 N. W. 998 (1917). But there is some authority that the wife may not recover even when the injury to the husband is intentional where the malice or purpose is not directed to the wife. See Nieberg v. Cohen, 88 Vt. 281, 92 Atl. 214 (1914); Boden v. Del-Mar Garage, 205 Ind. 59, 185 N. E. 860 (1933).

[7] Feneff v. New York Central & H. Ry., 203 Mass. 278, 89 N. E. 436 (1909); Kosciolek v. Portland Ry., Light & Power Co., 81 Ore. 517, 160 Pac. 132 (1916);

tinctions would be as applicable to the right of the husband to sue for loss of consortium from a negligent injury to his wife. But most courts have refused to assimilate the two causes of action, holding that the husband's right to damages is founded upon his right to his wife's services, which corresponding right the wife never had, her claim being merely sentimental or non-pecuniary.[8] A few courts, however, have been able to find no logical distinction between the two causes of action, but have been influenced by the wife's inability to recover so as to deny the husband a similar action.[9] From the standpoint of the social status of the modern wife it is difficult to see any reason why the husband should have any greater rights in the consortium than the wife. And in view of the reluctance of the courts to allow recovery for sentimental and intangible losses in the absence of physical injury, it would seem that equality should be achieved by cutting down the rights of the husband, rather than by extending those of the wife.[10] In the instant case, although the exact nature of the injury is not entirely clear, it would seem that the court was influenced more by a desire to restrict the field of protection of a person injured by a negligent act, than by its professed difficulties with proximate cause.[11]

C. P. H.

Goldman v. Cohen, 30 Misc. 336, 63 N. Y. S. 459 (1900); Bernhardt v. Perry, 276 Mo. 612, 208 S. W. 462 (1918).

[8] Stout v. Kansas City Terminal Ry., 172 Mo. App. 113, 157 S. W. 1019 (1913); Smith v. Nicholas Bldg. Co., 93 Ohio St. 101, 112 N. E. 204 (1915). But see Guevin v. Manchester St. Ry., 78 N. H. 289, 99 Atl. 298 (1916), to the effect that the husband's right of action for loss of consortium is not dependent upon his proof of loss of services.

[9] Marri v. Stamford St. Ry., 84 Conn. 9, 78 Atl. 582 (1911); Bolger v. Boston Elevated Ry., 205 Mass. 420, 91 N. E. 389 (1910); Blair v. Seitner Dry Goods Co., 184 Mich. 304, 151 N. W. 724 (1915); Golden v. Greene Paper Co., 44 R. I. 231, 116 Atl. 579 (1922). See Lippman, "The Breakdown of Consortium," 30 COL. L. REV. 651 (1930).

[10] The usual inability of a plaintiff to recover from a third person for a wrongful act to a person with whom the plaintiff has a contract would seem to lend support to this view. See Connecticut Mut. Life Ins. Co. v. New York and New Haven Ry., 25 Conn. 265 (1856). But most legal writers, it seems, favor giving the wife the same cause of action that the husband has in most jurisdictions. See HARPER, LAW OF TORTS, sec. 259 (1933); Holbrook, "The Change in the Meaning of Consortium," 22 MICH. L. REV. 1 (1923); 31 LAW NOTES 65 (1927); 9 N. Y. UNIV. L. Q. REV. 235 (1931).

[11] See 20 CORN. L. Q. 106 (1934) for an excellent comment upon the instant case, especially on the question of proximate cause.