Michigan Law Review

Volume 55 | Issue 5

1957

Husband and Wife - Right of Wife to Sue for Loss of Consortium Due to Negligent Injury to Husband

James M. Porter S.Ed.
University of Michigan Law School

HUSBAND AND WIFE—RIGHT OF WIFE TO SUE FOR LOSS OF CONSORTIUM DUE TO NEGLIGENT INJURY TO HUSBAND—Plaintiff brought an action for loss of consortium with her husband, allegedly due to defendant's negligent injury of the husband. In a prior suit the husband's cause of action against the defendant had been settled and dismissed with prejudice. The trial court dismissed the present suit for failure to state a cause of action. On appeal, *held,* reversed. The wife has a valuable property right of consortium. Iowa statutes pertaining to the rights of married women[1] clearly indicate the intent of the legislature to remove the common law bar of coverture that prevented a wife from maintaining an action for loss of consortium. *Acuff v. Schmit,* (Iowa 1956) 78 N. W. (2d) 480.

It has long been the rule at common law[2] and has been held under modern statutes[3] that negligent injury of the husband gives the wife no cause of ac-

1 Iowa Code Ann. (1950) §§597.1, 597.18, 613.11. Every state has adopted statutes, popularly known as married women's acts, which modify the harsh common law rules relating to the status of wives.

2 Sobolewski v. German, 32 Del. (2 W. W. Harr.) 540, 127 A. 49 (1924). See collection of authorities in 5 A.L.R. 1049 (1920); 59 A.L.R. 680 (1929).

3 Cravens v. Louisville & N. R. Co., 195 Ky. 257, 242 S.W. 628 (1922); Feneff v. New York Central & H. R. R. Co., 203 Mass. 278, 89 N.E. 436 (1909).

tion for her loss of consortium. Most courts permit the husband, however, to recover for his loss of consortium.[4] The roots of this distinction can be traced to the common law concept of husband and wife as a single legal entity. Only the husband could sue for an interference with the marital relation, and to recover for her own personal injuries the wife had to sue jointly with the husband.[5] Initially, the husband's recovery for loss of consortium was limited to the value of the wife's services and society.[6] Once such a loss was proved, recovery could be extended to the more intangible elements[7] of the marital relationship. Inasmuch as the wife had no right to the services of the husband,[8] the courts rationally denied her substantive cause of action for loss of her consortium. The married women's acts have removed the common law disability of coverture from the wife and give her the right to sue in tort.[9] The courts have not construed this legislation so as to give her a cause of action generally for loss of consortium.[10] Many courts, viewing the spirit of the legislation, have taken a half-step in this direction, however, by permitting the wife to maintain such an action when the conduct producing the injury to consortium is intentional or malicious.[11] It is difficult to determine why the courts would extend her rights this far,[12] but stop

4 Tomme v. Pullman Co., 207 Ala. 511, 93 S. 462 (1922); Hansen v. Costello, 125 Conn. 386, 5 A. (2d) 880 (1939).

5 MADDEN, DOMESTIC RELATIONS §54, p. 156 (1931). Any judgment recovered could be kept by the husband as his own, since he was entitled to the wife's chattels that he reduced to his possession.

6 Hall v. Hollander, 4 B. & C. 660, 107 Eng. Rep. 1206 (1825). Services were broadly defined to include her general usefulness, industry, frugality and attentions in the home. The cases are in conflict as to whether the loss of sexual relations was an element of society. See MCCORMICK, DAMAGES §92, p. 331 (1935). It appears that the foundation of the husband's right of action was originally based on the idea that his wife was his servant and interference with the service of a servant was an actionable trespass. See Lippman, "The Breakdown of Consortium," 30 COL. L. REV. 651 at 653 (1930).

7 These elements are frequently described as the "sentimental version" of consortium. See principal case at 482. See also note 1 supra.

8 Blackstone summed it up as follows: ". . . [T]he 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. . . ." 3 BLACKST. COMM. *143.

9 MADDEN, DOMESTIC RELATIONS §55, p. 159 (1931).

10 Nash v. Mobile & O. R. Co., 149 Miss. 823, 116 S. 100 (1928); Howard v. Verdigris Valley Electric Co-op., 201 Okla. 504, 207 P. (2d) 784 (1949).

11 Flandermeyer v. Cooper, 85 Ohio St. 327, 98 N.E. 102 (1912) (defendant sold a habit-forming drug to the husband); Roberts v. Roberts, 230 Ky. 165, 18 S.W. (2d) 981 (1929) (criminal conversation); Rott v. Goehring, 33 N.D. 413, 157 N.W. 294 (1916) (alienation of affections); Clark v. Hill, 69 Mo. App. 541 (1897) (defendant drove the husband to insanity by willful threats); Pratt v. Daly, 55 Ariz. 535, 104 P. (2d) 147 (1940) (sale of intoxicants to the husband despite wife's protests).

12 The wife's right to recovery when the injury is intentionally inflicted has been explained as resting on the necessity of punishing the wrongdoer. The husband is clearly disqualified from bringing suit because of his participation in the act complained of, so, of necessity, the wife must have the right. Brown v. Kistleman, 177 Ind. 692, 98 N.E.

short of giving her a recovery against unintentional injury. A few courts, recognizing this inconsistency, have equalized the rights of husband and wife, with dubious justice, by denying the husband a right to recover.[13] The reasons most often advanced to justify denying the wife a cause of action for loss of consortium are a lack of statutory authorization, the difficulty of measuring her damages because they are indirect and inconsequential, and a fear of double recovery.[14] Despite the absence of specific legislative authority, it is evident that the married women's acts were intended to place husband and wife in positions of legal equality. The very purpose of the legislation is thwarted by denying her the identical rights enjoyed by the husband.[15] The argument that her damages are remote, indirect and difficult to measure is sharply contradicted by numerous decisions allowing the husband to recover for similar injuries.[16] The problem of double recovery can be removed by taking into account the compensation received by the husband in his action.[17] It is not rational to deny the wife's claim[18] for her separate injuries because of a fear they will duplicate her husband's recovery in his action for negligent injury. To so hold would approach a return to the long-discarded common law principle that the husband alone has the primary right in the marital relation and he and the wife are but one legal entity. The decision in the principal case, though not without significant precedent,[19] is a bold step forward in the ultimate renunciation of a well-entrenched but vulnerable rule. It is to be hoped that the criticism of

631 (1912); Kosciolek v. Portland Ry. Light & Power Co., 81 Ore. 517, 160 P. 132 (1916). Nevertheless, it must be remembered that a court cannot award punitive damages in a civil action except as incidental to an actionable civil wrong. MCCORMICK, DAMAGES §83, p. 293 (1935). See also Hitaffer v. Argonne Co., (D.C. Cir. 1950) 183 F. (2d) 811 at 814, cert. den. 340 U.S. 852 (1950. [The overruling of this case in Smither & Co. v. Coles, (D.C. Cir., Feb. 21, 1957) left undisturbed the point here in question.]

[13] Taylor v. S. H. Kress & Co., 136 Kan. 155, 12 P. (2d) 808 (1932); Helmstetler v. Duke Power Co., 224 N.C. 821, 32 S.E. (2d) 611 (1945); Floyd v. Miller, 190 Va. 303, 57 S.E. (2d) 114 (1950).

[14] Many courts have agreed with the logic of the decision in the principal case, but feel it is only proper for the legislature to grant the right. Jeune v. Del E. Webb Const. Co., 77 Ariz. 226, 269 P. (2d) 723 (1954); Franzen v. Zimmerman, 127 Colo. 381, 256 P. (2d) 897 (1953); Nelson v. A. M. Lockett Co., 206 Okla. 334, 243 P. (2d) 719 (1952).

[15] See principal case at pp. 484-485.

[16] See note 5 supra. The injury to the wife has been assessed when the conduct producing it was intentional. Note 13 supra.

[17] PROSSER, LAW OF TORTS, 2d ed., §104, p. 704 (1955).

[18] Dean Pound concludes that the wife's suit is not secured because of the crude method of assessing damages. See Pound, "Individual Interests in the Domestic Relations," 14 MICH. L. REV. 177 at 194 (1916).

[19] Hitaffer v. Argonne, note 13 supra; Hipp v. E. I. du Pont de Nemours & Co., 182 N.C. 9, 108 S.E. 318 (1921) [which was later overruled, however, in Hinnant v. Tidewater Power Co., 189 N.C. 120, 126 S.E. 307 (1925)].

legal writers[20] and dissenting judges[21] has finally had a telling effect on a discriminatory rule, commendable only for its age and habit of judicial recognition.

James M. Porter, S. Ed.

[20] Lippman, "The Breakdown of Consortium," 30 COL. L. REV. 651 (1930); Holbrook, "The Change in the Meaning of Consortium," 22 MICH. L. REV. 1 (1923); Kinnaird, "Right of Wife to Sue for Loss of Consortium Due to a Negligent Injury to Her Husband," 35 KY. L. J. 220 (1947); PROSSER, LAW OF TORTS, 2d ed., §104, p. 704 (1955); HARPER, LAW OF TORTS, §259, p. 566 (1933).

[21] Bernhardt v. Perry, 276 Mo. 612 at 632, 208 S.W. 462 (1919); Landwehr v. Barbas, 241 App. Div. 769, 270 N.Y.S. 534 (1934) (dissent of Scudder, J.); McDade v. West, 80 Ga. App. 481 at 484, 56 S.E. (2d) 299 (1949).