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Husband and Wife-Loss of Consortium

HUSBAND AND WIFE—LOSS OF CONSORTIUM—Appellant sued appellee for injuries inflicted upon the husband of appellant by an agent of appellee. Appellee operated a garage in the city of Indianapolis, storing automobiles for owners and users. Appellant alleged that while her husband was in said garage, a servant of appellee ran an automobile against him, seriously injuring him, in consequence of which appellant has lost the consort, companionship, society, affection, and support of her husband. Appellee's demurrer to the complaint was sustained. Appellant appealed. Held, demurrer was properly sustained, since a wife has no cause of action for loss of consortium of husband caused by the negligence of a third party.[1]

By the great weight of authority at common law and under modern statutes the husband may recover for the loss of his wife's consortium caused by a tort against the wife whether such injury was the result of negligence or not.[2] Apparently only four states have taken a different

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[1] Boden v. Del-Mar Garage, Supreme Court of Indiana, May 19, 1933, 185 N. E. 860.

[2] Brahan v. Meridian Light & Ry. Co. (1919), 121 Miss. 269, 83 So. 467; Tommee v. Pullman Co. (1922), 207 Ala. 511, 93 So. 462; Guevin v. Manchester Street Ry. (1916), 78 N. H. 289, 99 Atl. 298; Selleck v. City of Janesville (1899), 154 Wis. 570, 80 N. W. 944; Baltimore & O. R. Co. v. Glenn (1902), 66 Ohio St.

position.[3] However, the converse is not true. Neither at common law nor under modern statutes, does a wife have a cause of action for loss of her husband's consortium caused by the negligence of a third person.[4] Since a wife at common law was considered as of inferior legal status, this distinction sounds in logic, but under our present day conception of the equality of men and women what explanation exists for such a distinction? Upon an examination of the authorities it will be noticed that the courts have differentiated the rights of the two on four different grounds. 1. Where the husband sues for the loss of his wife's consortium, the gist of the action is the deprivation of his wife's services, and if he fails to show such, recovery will be denied; thus the wife should not be permitted to maintain an action where she does not have the same right in the husband.[5] 2. The husband by suing for his own injury recovers for the loss of consortium to his wife and to allow the wife to recover would permit double recovery.[6] 3. The injury to the wife is consequential and too remote.[7] 4. No such right existed at common law.[8]

The first contention is for the most part a modern idea, and has but a small following.[9] The few courts that sanction such a doctrine do so not because of authority, but because of lack of authority for the converse proposition. Yet, the very earliest authority indicates that while services are an element, they are in no sense predominant.[10] Consortium is defined as " the right of a husband to the conjugal fellowship of his wife, to her company, co-operation, and aid in every conjugal relation."[11] Probably no better statement of this can be found than in Guevin v. Manchester Street Railway,[12] where the husband was allowed recovery for loss of consortium even though he could not recover for loss of services. In that case the

396, 64 N. E. 438; Omaha & R. V. Ry. Co. v. Chollette (1894), 41 Nebr. 578, 59 N. W. 921. See also note 33 L. R. A. (N. S.) 1042. See Harper on Torts, Section 259.

[3] Marri v. Stamford St. R. Co. (1911), 84 Conn. 9, 78 Atl. 582; Bolger v. Boston Elevated Ry. Co. (1910), 205 Mass. 420, 91 N. E. 389; Blair v. Seitner Dry Goods Co. (1915), 184 Mich. 304, 151 N. W. 724 (here the court said if the right existed for one it should also for the other); Golden v. R. L. Greene Paper Co. (1922), 44 R. I. 231, 116 Atl. 579.

[4] Feneff v. N. Y. Central & H. R. R. Co. (1909), 203 Mass. 278, 89 N. E. 436; Bernhardt v. Perry (1919), 276 Mo. 612, 208 S. W. 462; Kosciolek v. Portland Ry. Light & Power Co. (1916), 81 Or. 517, 160 Pac. 132; Nash v. Mobile & O. R. Co. (1928), 149 Miss. 623, 116 So. 100; Cravens v. Louisville & N. R. Co. (1922), 195 Ky. 257, 242 S. W. 628; Smith v. Nicholas Bldg. Co. (1915), 93 Ohio St. 101, 112 N. E. 204; Emerson v. Taylor (1918), 133 Md. 192, 104 Atl. 538; Brown v. Kistleman (1912), 177 Ind. 692, 98 N. E. 631. The wife was allowed to recover in Hipp v. E. I. Dupont De Nemours & Co. (1921), 182 N. C. 9, 108 S. E. 318. This decision was practically overruled in Hinnant v. Tide Water Power Co. (1925), 189 N. C. 120, 126 S. E. 307.

[5] Smith v. Nicholas Bldg. Co. (1915), 93 Ohio St. 101, 112 N. E. 204. See Harper on Torts, Section 259.

[6] Bernhardt v. Perry (1919), 276 Mo. 612, 208 S. W. 462.

[7] Kosciolek v. Portland Ry. Light Co. (1916), 81 Or. 517, 160 Pac. 132.

[8] Nash v. Mobile & O. R. Co. (1928), 149 Miss. 823, 116 So. 100.

[9] Golden v. R. L. Green Paper Co. (1922), 44 R. I. 231, 16 Atl. 579; Marri v. Stamford St. R. Co. (1911), 84 Conn. 9, 78 Atl. 582.

[10] Hyde v. Seyssor, Cro. Jac. 538; 3 Blackstone's Commentaries 140. See also Pound, Interests in Domestic Relations (1915), 14 Mich. L. Rev. 177.

[11] Ballentine's Law Dictionary.

[12] (1916), 78 N. H. 289, 99 Atl. 298.

court said: "Undoubtedly the term 'consortium' included service, but it also included society, comfort, and the sexual rights. In no early case is there a suggestion that any one of these is superior to any other as a basis for legal redress." Such has been the position of most of the courts,[13] and is the only possible explanation for a husband's recovery in those cases in which he cannot recover for the loss of her services.

The second reason seems even more illogical than the first one. It is well settled that husband and wife have reciprocal rights to the consortium of each other.[14] The right to maintain an alienation of affection suit by either is proof of this, since the gist of the action is the loss of consortium.[15] It being settled that each have separate rights, how can it be said that the husband who sues for his own personal injury may recover damages for the invasion of a right of another? The right belongs to the wife; she is the proper party to sue. If the wife sues for alienation of affections, she may recover, but if the injury to the same interest is caused by the negligence of a third party, her husband, and he only, can recover the damage. The result would seem to be that consortium as a legal right of the wife is a different kind of a right and means only a share in her husband's earnings. As heretofore noticed, consortium is much broader than that.

We pass now to the third objection to the maintenance of the action. It is upon this ground that the courts distinguish her right to maintain an alienation of affections suit from this type of an action.[16] If the injury to the wife is consequential and too remote, how do the courts sustain their holdings that the husband may recover in the same type of case? The causation question is the same in both instances. Any ordinary person can foresee that such physical injuries may totally disrupt the peace and comfort of the marital relation. In the days when the wife was more or less a superior domestic servant, such a dogma might be supported, but today our ideals give to the relation a somewhat higher status. Are not the courts interpreting this question against a background of a dark past? Furthermore, it is difficult to perceive why it should make any difference whether the right is invaded by an intentional or negligent act. In either case the wife's interest may be invaded to precisely the same extent. In fact, it is possible in some instances that the injury resulting from a negligent act, may be more direct than one caused by an intentional act.

The last reason given by the courts is probably the strongest of the four. Did the wife have this right at common law? The courts say no, and yet they admit that she had a right against alienation of affections, but simply couldn't enforce it.[17] As we have seen, the right protected in that case is the right of consortium. Apparently what the courts mean is

[13] Selleck v. City of Janesville (1899), 154 Wis. 570, 80 N. W. 944; Mowry v. Chaney (1876), 43 Iowa 609; Riley v. Liddise (1896), 49 Neb. 139, 68 N. W. 356; Denver Consol. Tramway Co. v. Riley (1899), 14 Col. App. 132, 59 Pac. 476. See also Colley, Torts (1906, 3rd ed.) pp. 471-2.

[14] Feneff v. N. Y. Central & H. R. R. Co. (1909), 203 Mass. 278, 89 N. E. 436.

[15] Buchanan v. Foster (1897), 48 N. Y. S. 732; Reading v. Gazzam (1901), 200 Pa. St., 49 Atl. 889; McGregor v. McGregor (1909), 115 S. W. 802; Adams v. Main (1891), 3 Ind. App. 232, 29 N. E. 792. See also Madden, Persons and Domestic Relations (1931) pp. 166-7; Harper on Torts, Section 256.

[16] Bernhardt v. Perry (1919), 276 Mo. 612, 208 S. W. 462; Kosciolek v. Portland Ry. Light & Power Co. (1916), 81 Or. 517, 160 Pac. 132.

[17] Foot v. Card (1889), 58 Conn. 1, 18 Atl. 1027; Bennett v. Bennett (1889), 116 N. Y. 584, 23 N. E. 17; Betser v. Betser (1900), 186 Ill. 537, 58 N. E. 249;

that she never had a common law right against the loss caused by the negligence of a third person. But such a doctrine seems to be more or less gratuitous. Since the wife was under disabilities to sue for loss of consortium in any case, there is little basis for the assumption. In other words, it is assumed that if she could have maintained any action at all, the courts would have distinguished between a direct attack on her right of consortium and a loss which resulted from negligence.

From the standpoint of logic, the distinction seems unsound. The courts denying to both the cause of action are by far more logical.[18] It is hard to conceive of any public policy against such an action.[19] This basic principle, however, is so firmly intrenched that if any change is to be made it will probably be the result of legislation. It might be noticed that in the principal case the appellant alleged that the injuries were inflicted wantonly and with malice. A few recent cases have allowed recovery in such a case.[20] The Indiana court, however, disposes of this argument with but little comment. Logically it should make no difference, but it may give the courts something to tie to, in case they decide to give the wife her just relief. C. M.

TORT CLAIMS AS OPERATING EXPENSES GIVEN PRIORITY OVER MORTGAGE LIENS AS TO EARNINGS OF A STREET RAILWAY COMPANY IN RECEIVER'S HANDS—Appellants filed claims based on injuries to persons and damages to property arising out of the operation of the Union Traction Company prior to the appointment of a receiver. Appellants claimed a right to preference and priority of payment as a part of the usual, natural and ordinary operating expense of the railroad, and that the mortgagees took their mortgages with the understanding that all railroad operating expenses were to be paid out of current revenues before such mortgages had any claim upon such revenues. Held, claims against the railway company for injuries to persons and damages to property before, as well as after, appointment of receiver therefor are "operating expenses" entitled to priority over mortgages in payment.[1]

While there is no precedent in Indiana law for this decision, upon analysis of other authority and of the principles involved, it seems to be a desirable result.

That operating expenses constitute a preferred claim on moneys received from such operation is well settled.[2] As to just what claims shall constitute

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Holmes v. Holmes (1893), 133 Ind. 386, 32 N. E. 932; Dietyman v. Mullin (1900), 108 Ky. 610, 57 S. W. 247; Smith v. Smith (1897), 98 Tenn. 101, 33 S. W. 439; Hodgkinson v. Hodgkinson (1895), 43 Neb. 269, 61 N. W. 577.

[18] These states are Michigan, Massachusetts, Connecticut, and Rhode Island. See Marri v. Stamford St. R. Co. (1911), 84 Conn. 9, 78 Atl. 582; Bolger v. Boston Elevated Ry. Co. (1910), 205 Mass. 420, 91 N. E. 389; Blair v. Seitner Dry Goods Co. (1915), 184 Mich. 304, 151 N. W. 724; Golden v. R. L. Green Paper Co. (1922), 44 R. I. 231, 116 Atl. 579.

[19] Holbrook, The Change in the Meaning of Consortium (1923), 22 Mich. L. Rev. 1.

[20] Flandermeyer v. Cooper (1912), 85 Ohio St. 327, 98 N. E. 102; Moberg v. Scott (1917), 38 S. D. 422, 161 N. W. 998.

[1] McCullough v. Union Traction Co. of Indiana, Supreme Court of Indiana, 1933, 186 N. E. 300.

[2] Jones, Mortgages, Sec. 827; Clark v. Central Railroad & Banking Co. of Georgia (1895), 66 Fed. 803 (C. C. A., 5th); Texas & Pacific Railway Company v. Johnson (1890), 16 Tex. 421, 13 S. W. 463, 18 Am. St. Rep. 60.