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TORTS—THE ACTION FOR LOSS OF CONSORTIUM IN NEW MEXICO

Justice Moise, speaking for the New Mexico Supreme Court in *Roseberry v. Starkovich,*[1] held a wife could not recover for loss of consortium resulting from the negligent injury of her husband by a third party. Mr. Roseberry, a uranium miner, was crushed beneath a large slab of rock, rendering him totally and permanently disabled by reason of paralysis. Mrs. Roseberry was denied recovery from defendant, a fellow-employee, the mine safety director, who negligently allowed her husband to enter the mine. What are the effects of this decision?

Consortium, in its broadest meaning, includes all incidents of the family relationship.[2] The common law tort action for loss of consortium is founded on the relational interest between the plaintiff and one or more third parties. The interests recognized as protectable from interference resulting in injury or incapacity were those between husband and wife and parent and minor child. These relationships were viewed more or less like those which existed between master, identified with the husband, and valuable, superior servants "and thus the loss of such services became the gist of the action, and remained indispensable to it until comparatively recent years."[3]

Two types of interference with the husband-wife relationship are recognized. Those which are intentional on the part of the tortfeasor, *i.e.,* criminal conversation, enticement and alienation of affections, and those resulting from the tortfeasor's negligence. Though the common law did not allow the wife to sue for interference with the domestic relationship because of her inferior position as a married woman, this impediment has been removed in the case of intentional interference in virtually all states.[4] However, no such unanimity in equality of treatment exists for negligent interference.[5]

1. 73 N.M. 211, 387 P.2d 321 (1963).
2. H. Clark, Law of Domestic Relations 261 (1968).
3. W. Prosser, Torts § 124, at 873 (4th ed. 1971).
4. Clark, *supra* note 2, at 263.
5. Several cases recognize the wife's claim for loss of consortium: *See, e.g.,* Missouri Pac. Transp. Co. v. Miller, 227 Ark. 351, 299 S.W.2d 41 (1957); Stenta v. Leblang, 55 Del. 181, 185 A.2d 759 (1962); Hightower v. Landrum, 109 Ga. App. 510, 136 S.E.2d 425 (1964); Dini v. Naiditch, 20 Ill.2d 406, 170 N.E.2d 881 (1960); Acuff v. Schmidt, 248 Iowa 272, 78 N.W.2d 480 (1956); Montgomery v. Stephan, 359 Mich. 33, 101 N.W.2d 227 (1960); Novak v. Kansas City Transit Co., 365 S.W.2d 539 (Mo. 1963); Ekalo v. Constructive Serv. Corp. of Am., 46 N.J. 82, 215 A.2d 1 (1966); Ross v. Cuthbert, 239 Or. 429, 397 P.2d 529 (1964); Hoekstra v. Helgeland, 78 S.D. 82, 98 N.W.2d 669 (1959); Moran v. Quality Aluminum Casting Co., 34 Wis.2d 542, 150 N.W.2d 137 (1967).

Other cases have rejected the wife's claim for loss of consortium: *See, e.g.,* Smith v.

The specific elements embodied in consortium have been summarized as the services of the wife, the financial support of the husband and the variety of intangible relationships prevailing between spouses living together in a going marriage.[6] These intangibles are usually expressed in terms of affection, society, companionship and sexual relations.

In *Roseberry,* Justice Moise accepted the following definition of consortium taken from Black's Law Dictionary:[7]

> Conjugal fellowship of husband and wife, and the right of each to *company, co-operation, affection* and *aid* of the other in every conjugal relation (emphasis added).

Though this may seem a simple choice among several alternative definitions, a closer examination shows a more thoughtful decision.

The notable omission from this definition is services. The elements included, though broad, are those generally considered non-economic in nature. An explanation for this exclusion lies in New Mexico's community property system.

The majority opinion in *Hittafer v. Argonne Co.,*[8] the leading case affording recovery to a wife for loss of consortium due to the negligent injury of her husband, asserted the absurdity of dividing consortium into services on the one hand and conjugal affection on the other. This may be arguably so in a jurisdiction governed exclusively by common law considerations, but not in New Mexico. This state adheres to the rule promoted by de Funiak[9] and McKay[10] who consider the loss of an injured spouse's services a loss to the community rather than to either party individually. The recovery for such losses belongs to the community; the husband, as its head, is the proper party to bring the action.[11]

The mitigating effect of this interpretation on the decision to deny

United Constr. Workers, 271 Ala. 42, 122 So.2d 153 (1960); Jeune v. Del E. Webb Co., 77 Ariz. 226, 269 P.2d 723 (1954); Lockwood v. Wilson H. Lee Co., 144 Conn. 155, 128 A.2d 330 (1956); Ripley v. Ewell, 61 So.2d 420 (Fla. 1952); Miller v. Sparks, 136 Ind. App. 148, 189 N.E.2d 720 (1963); Potter v. Schafter, 161 Me. 340, 211 A.2d 891 (1965); Coastal Tank Lines v. Canoles, 207 Md. 37, 113 A.2d 82 (1955); Hartman v. Cold Spring Granite Co., 247 Minn. 515, 77 N.W.2d 651 (1956); Snodgrass v. Cherry-Burrell Corp., 103 N.H. 56, 164 A.2d 579 (1960); Nelson v. A. M. Lockett & Co., 206 Okl. 334, 243 P.2d 719 (1952); Neuberg v. Bobowicz, 401 Pa. 146, 162 A.2d 662 (1960); Page v. Winter, 240 S.C. 516, 126 S.E.2d 570 (1962); Rush v. Great Am. Ins. Co., 213 Tenn. 506, 376 S.W.2d 454 (1964); Baldwin v. State, 125 Vt. 317, 215 A.2d 492 (1965); Ash v. S. S. Mullen, Inc., 43 Wash.2d 345, 261 P.2d 118 (1953).

6. Prosser, *supra* note 3, at 881-82.
7. Black's Law Dictionary 382 (rev. 4th ed. 1968).
8. 183 F.2d 811 (D.C. Cir. 1950).
9. 1 de Funiak, Principles of Community Property § 82, at 231 (1943).
10. G. McKay, Community Property § 379, at 249 (2d. ed. 1925).
11. Soto v. Vandeventer, 56 N.M. 483, 245 P.2d 826 (1952).

recovery for loss of consortium is important. Other jurisdictions which deny recovery for loss of consortium but which do not have a separate conjugal community, or the community property states that hold loss of services equally personal to the injured spouse as loss of society, affection, etc., do not have a separate entity to which damages for loss of services may or will be attributed. Therefore, they may also deny recovery for this possibly substantial element of consortium.

There have been no appellate court decisions in New Mexico determining the status of the husband's action for loss of consortium resulting from negligent injury. When the question does arise, two courses are available to the court. They may adhere to the common law rule providing relief only to the husband or deny recovery to the husband as they have to the wife.

Following a review of the cases holding pro and con on the issue presented in *Roseberry,* Justice Moise recognized the logical difficulties that would result should a later decision follow the common law rule. He concluded:

> It is readily apparent that the majority adhere to the rule denying the wife a recovery. A variety of reasons are advanced for doing so. However, none deny the logic of the writers to the effect that in our present day society in which the wife is an equal partner with the husband, and neither a servant nor a chattel, no discernable reason exists for allowing the husband recovery while persisting in denying relief to the wife. Some courts have met the problem by denying recovery to the wife, while suggesting that the basis for allowing recovery to the husband is outworn, and a preferable solution would be to deny it to both. . . .[12]

This dicta alone does not preclude the present or a future court from reaching an opposite conclusion, however.

The equal protection clause[13] also militates against adhering to the common law rule:

> Many jurisdictions upon reconsideration of the issue after the *Hitaffer* decision still reiterate their earlier positions. However, one new argument has been interjected which may force the jurisdictions now allowing the husband's action either to grant the same action to the wife, or deny it to both. Several courts have recently held that the simultaneous denial of the wife's action and allowance of the husband's constitutes a violation of the wife's rights as guaranteed by the equal protection clause of the fourteenth amendment.[14]

12. Roseberry v. Starkovich, 73 N.M. 211, 214, 387 P.2d 321, 324 (1963).
13. U.S. Const. amend. XIV, § 1.
14. 54 Iowa L. Rev. 510, 511 (1968).

To allow the husband recovery, then, would require the Supreme Court of New Mexico to either overrule *Roseberry* or subject the rule announced there to renewed attack.

The obvious way out of these problems is to accept the second alternative denying the husband recovery in cases of negligent injury to the wife. Not only does this approach avoid the equal protection argument and logical difficulties but has another facet to recommend it.

An affirmative reason advanced for this approach was articulated in *Kronenbitter v. Washburn Wire Co.*[15] The court denied a husband's recovery for loss of consortium as "based on an outworn theory" that allowed the husband damages for injuries to his wife in much the same way that it allowed damages for loss or injury to one of his domestic animals.[16]

However persuasive one may find the historical argument, it has not gone without criticism. In fact, the same court that decided *Kronenbitter* denounced its reasoning there only ten years later in *Millington v. Southeastern Elevator Co.*[17] It quoted approvingly the following language from *Montgomery v. Stephan:*

> Her (the wife) duties and and responsibilities in respect of the family unit complement those of the husband, extending only to another sphere. In good times she lights the hearth with her own inimitable glow. But when tragedy strikes it is a part of her unique glory that, forsaking the shelter, the comfort, the warmth of her home, she puts her arm and shoulder to the plow. We are now at the heart of the issue. In such circumstances, when her husband's love is denied her, his strength sapped, and his protection destroyed, in short, when she is forced by the defendant to exchange a heart for a husk, we are urged to rule that she has suffered no loss compensable at law.[18]

Yet, to afford equal treatment to the husband's action for negligently caused loss of consortium does not avoid the basic question: Is the negligent injury to the company, cooperation, aid, affection, society and sexual relations existing between marital partners worthy of protection by the law? The uncertain and indefinite nature of a wife's claim for negligent interference with her right of consortium and the possibility of double recovery if the right is recognized, considerations relied upon by Justice Moise, are not persuasive.

As to the uncertain and indefinite nature of the wife's claim, a

15. 4 N.Y.2d 524, 151 N.E.2d 898, 176 N.Y.S.2d 354, 355 (1958).

16. *See* Jaffe, *Damages for Personal Injury: The Impact of Insurance,* 18 Law & Contemp. Prob. 219, 229 (1953).

17. 22 N.Y.2d 498, 239 N.E.2d 897, 293 N.Y.S.2d 305 (1968).

18. 359 Mich. 33, 101 N.W.2d 227, 234 (1960).

distinction is made between the direct injury in case of intentional interference and indirect injury in the case of negligence. But is this a valid difference? Clark countered the argument very well:

> What is the relevant distinction between the case where the husband's affections are alienated by the "other woman" and the case where he becomes a human vegetable? Actually the wife is worse off in the second case than in the first. In the first she may get a divorce and remarry more happily. In the second she can look forward to a lifetime as a combined nurse and breadwinner. There is the additional factor in the alienation of affections case that substantial responsibility for the harm belongs to the husband himself, perhaps also the wife.[19]

The problem with double recovery can be solved. The only element for which double recovery is possible is services and earnings and as previously noted, loss of services and earnings in New Mexico is a community loss recoverable only by the husband acting in his role as head of the community.[20] The other non-economic elements are personal to the spouse of the injured party and not recoverable in his separate action. However, Dean Pound expressed further reservations:

> The reason for not securing the interest of wife or child in these cases seems to be that our modes of trial are such and our mode of assessment of damages by the verdict of a jury is necessarily so crude that if husband and wife were each allowed to sue, instead of each recovering an exact reparation, each would be pretty sure to recover what would repair the injury to both.[21]

Wouldn't this difficulty be overcome by requiring joinder of the claims in a single action as suggested by Judge Keating in *Millington v. Southeastern Elevator Co.*?[22]

The effects of *Roseberry* are to deny recovery to wives for loss of consortium resulting from third party negligence, to seemingly commit the New Mexico Supreme Court to the rule announced there and to place the husband's action for loss of consortium in serious jeopardy.

The *Roseberry* opinion demonstrates thorough research and consideration. So thorough that it is improbable Justice Moise was unaware of the possible solutions to the problems posed by extending relief to the wife who has been deprived of the affection, aid,

19. Clark, *supra* note 2, at 277.
20. *See* p. 108 *supra*.
21. Pound, *Individual Interests in the Domestic Relations,* 14 Mich. L. Rev. 177, 194 (1916).
22. 22 N.Y.2d 498, 239 N.E.2d 897, 293 N.Y.S.2d 305 (1968).

company, cooperation and sexual relations of her husband through the negligence of another. Unless greater weight was given to a need for legislative pronouncement than is indicated by its passing mention,[23] the opinion is founded primarily on reasoning which concludes a wife's relational interests in her marriage should not be compensable at law. This author believes the conclusion is unfortunate. It is submitted that loss of consortium is a very real personal loss to the spouse of one injured by a negligent third party and should be afforded protection.

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23. Roseberry v. Starkovich, 73 N.M. 211, 218, 387 P.2d 321, 327 (1963).