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THE NEGLIGENT IMPAIRMENT OF CONSORTIUM— A TIME FOR RECOGNITION AS A CAUSE OF ACTION IN TEXAS

JESS C. RICKMAN

A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and time in which it is used.

Oliver Wendell Holmes[1]

The marital relationship is the primary familial interest recognized by the courts.[2] The remedy for either a negligent or intentional impairment of this relationship is a tort action for loss of consortium.[3] Although consortium has been classified as one of the most fundamental rights,[4] its precise meaning has varied throughout the centuries, and attempts to define it have been legion.[5] Recently consortium has been variously defined as the mutual right of the husband and wife to the "comfort, companionship, and affection of the other,"[6] or as "[the] solace . . . and society incidental to the marital relation [including] the services of the wife,"[7] or finally, as "[the] aid of the other in every conjugal relation."[8] Consortium is not predicated solely

1. Towne v. Eisner, 245 U.S. 418, 425 (1918).

2. Dini v. Naiditch, 170 N.E.2d 881, 892 (Ill. 1960); Note, *Judicial Treatment of Negligent Invasion of Consortium*, 61 COLUM. L. REV. 1341 (1961).

3. J. STEIN, DAMAGES AND RECOVERY, PERSONAL INJURY AND DEATH ACTIONS § 203, at 418 (1972). The phrase "loss of consortium" describes an element of damage rather than an action such as negligence or alienation of affections. But courts have used the phrase "loss of consortium" to denote those actions in which injury to the consortium is the major element of damage and it will be so used in this comment. Note, *Judicial Treatment of the Negligent Invasion of Consortium*, 61 COLUM. L. REV. 1341 n.1 (1961).

4. Clark, *The Wife's Action for Negligent Impairment of Consortium*, 3 FAMILY LAW. Q. 197, 204 (1969).

5. *See* Montgomery v. Stephan, 101 N.W.2d 227, 228 (Mich. 1960).

6. Hitaffer v. Argonne Co., 183 F.2d 811, 816 (D.C. Cir.), *cert. denied*, 340 U.S. 852 (1950).

7. Smith v. Nicholas Bldg. Co., 112 N.E. 204, 205 (Ohio 1915), *overruled*, Clouston v. Remlinger Oldsmobile Cadillac, Inc., 258 N.E.2d 230 (Ohio 1970).

8. McMillan v. Smith, 171 S.E. 169, 170 (Ga. Ct. App. 1933). In Whitley v. Whitley, 436 S.W.2d 607, 609 (Tex. Civ. App.—Houston [14th Dist.] 1968, no writ) the Texas definition of consortium was held to be "the right to the affection, society, comfort and assistance of the [other]." A recent Mississippi decision, Tribble v. Gregory, 288 So. 2d 13 (Miss. 1974), in addition to the various combinations of the usual elements of consortium, added:

> [T]he right to live together in the same house, to eat at the same table and to participate together in the activities, duties and responsibilities necessary to make a home.

Id. at 16.

upon the "services" rendered by a wife to a husband[9] nor is it a euphemism for sexual relations.[10] As the foregoing definitions indicate, the modern definition of consortium consists primarily of the emotional or sentimental elements of the marital relationship although sexual relations and services of the wife may occasionally be included.[11] These elements have been referred to as a conceptualistic unity, and an injury to any one is an actionable injury to the consortium.[12]

The loss of consortium can arise from either the intentional[13] or negligent[14] conduct of a third party toward the marital relationship, and both were recognized as causes of action at common law.[15] This remedy, however, was reserved solely to the husband and it has only been within the past 25 years that the wife's cause of action for the negligent impairment of consortium has been recognized by law.[16] The Texas position in regard to this cause of ac-

9. *See* Clouston v. Remlinger Oldsmobile Cadillac, Inc., 258 N.E.2d 230, 231 (Ohio 1970); Note, *Judicial Treatment of Negligent Invasion of Consortium*, 61 COLUM. L. REV. 1341, 1343-44 (1961). The definition of services is equally as vast as that of consortium, but it is generally taken to include the performance by a wife of her household and domestic duties. Collier v. Collier, 32 A.2d 469, 472 (Md. Ct. App. 1943). *But see* Tribble v. Gregory, 288 So. 2d 13, 16 (Miss. 1974) (novel approach where husband also owes services to wife).

10. *See* Gates v. Foley, 247 So. 2d 40, 43 (Fla. 1971).

11. Hosford v. Hosford, 198 S.E. 289, 292 (Ga. Ct. App. 1938) (loss of services no longer essential element, merely matter of aggravation); Deems v. Western Md. Ry., 231 A.2d 514, 517 (Md. Ct. App. 1967) (sexual relations included in definition of consortium).

12. Hitaffer v. Argonne Co., 183 F.2d 811, 814 (D.C. Cir.), *cert. denied*, 340 U.S. 852 (1950); *see* Whitley v. Whitley, 436 S.W.2d 607, 610 (Tex. Civ. App.—Houston [14th Dist.] 1968, no writ). *Contra*, Best v. Samuel Fox & Co., 2 K.B. 639, 640 (1951).

13. The two types of conduct most frequently involved are: (1) enticing away of one of the spouse's affections, and, (2) a third party's sexual intercourse with one of the spouses. They result in the actions of alienation of affections and criminal conversation respectively. *See* Felsenthal v. McMillan, 493 S.W.2d 729, 730 (Tex. 1973) (criminal conversation); Whitley v. Whitley, 436 S.W.2d 607, 609 (Tex. Civ. App.—Houston [14th Dist.] 1968, no writ) (alienation of affections). *See also* RESTATEMENT OF TORTS § 685, at 477 (1938); Comment, *Piracy on the Matrimonial Seas—The Law and the Marital Interloper*, 25 SW. L.J. 594 (1971).

14. *See, e.g.*, City of Glendale v. Bradshaw, 503 P.2d 803, 804 (Ariz. 1972) (city negligently left dirt mound unmarked and vehicle struck it causing injury to husband); General Elec. Co. v. Bush, 498 P.2d 366, 367 (Nev. 1972) (defendant's negligent design of electrical control cabinet and bolts securing it caused cabinet to fall crushing plaintiff).

15. *See generally* J. STEIN, DAMAGES AND RECOVERY, PERSONAL INJURY AND DEATH ACTIONS § 208, at 427-28 (1972); Note, *Judicial Treatment of Negligent Invasion of Consortium*, 61 COLUM. L. REV. 1341 (1961).

16. The first decision which effectively overturned several centuries of common law precedent was Hitaffer v. Argonne Co., 183 F.2d 811, 819 (D.C. Cir.), *cert. denied*, 340 U.S. 852 (1950). By 1958 only four other jurisdictions had adopted the Hitaffer rationale. Cooney v. Moomaw, 109 F. Supp. 448, 450-51 (D. Neb. 1953) (federal court construed Nebraska law); Missouri Pac. Transp. Co. v. Miller, 299 S.W.2d 41, 48-49 (Ark. 1957); Brown v. Georgia-Tennessee Coaches, Inc., 77 S.E.2d 24, 28 (Ga. Ct. App. 1953); Acuff v. Schmit, 78 N.W.2d 480, 485-86 (Iowa 1956). Presently there appear to be only 13 jurisdictions denying the wife a cause of action. Carey v. Foster, 221

tion is rather unique. Not only has Texas aligned itself with the minority of jurisdictions by denying the wife recovery,[17] but it has also never ruled whether a husband may recover for the negligent impairment of consortium.[18]

This comment will examine the development of the wife's cause of action in light of the modern view of the meaning of consortium. It will reveal that the arguments offered by the minority are no longer tenable, and should be the subject of judicial or legislative attention so that *either* spouse may be permitted to bring a cause of action for the negligent impairment of consortium.

THE DEVELOPMENT OF THE CONSORTIUM ACTION

Under the common law the husband and wife were conceived as one and, upon marriage, the husband became entitled to the property, services, and conjugal affections of his wife.[19] Any interference with these interests of the husband entitled him to sue for loss of consortium;[20] the original basis of the action entailing the loss of the society and comfort of the wife.[21] Later, courts seized upon a master-servant analogy,[22] and "services" owed to the husband became both the predominant element of the action and a prerequisite thereto.[23] The evolution of the services concept occurred as a result of

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F. Supp. 185, 190 (E.D. Va. 1963), *aff'd*, 345 F.2d 772, 776 (4th Cir. 1965) (construing Virginia statute, disallowing recovery for either spouse); Lockwood v. Wilson H. Lee Co., 128 A.2d 330, 332 (Conn. 1956); Hoffman v. Dautel, 388 P.2d 615, 624-26 (Kan. 1964) (construing Kansas statute); Johnston v. Fidelity Nat'l Bank, 152 So. 2d 327, 329 (La. Ct. App. 1963); Roseberry v. Starkovich, 387 P.2d 321, 324 (N.M. 1963); Hinnant v. Tidewater Power Co., 126 S.E. 307, 310 (N.C. 1925); Martin v. United Elec. Ry., 42 A.2d 897, 899 (R.I. 1945); Garrett v. Reno Oil Co., 271 S.W.2d 764, 767 (Tex. Civ. App.—Fort Worth 1954, writ ref'd n.r.e.); Ellis v. Hathaway, 493 P.2d 985, 986 (Utah 1972) (construing Utah statute); Baldwin v. State, 215 A.2d 492, 493 (Vt. 1965); Ash v. S.S. Mullen, Inc., 261 P.2d 118, 119 (Wash. 1953); Bates v. Donnafield, 481 P.2d 347, 349 (Wyo. 1971). *But see* Mariani v. Nanni, 185 A.2d 119, 120 (R.I. 1962) (contradicts *Martin* case). The jurisdictions of Hawaii and North Dakota do not appear to have confronted the issue.

17. Garrett v. Reno Oil Co., 271 S.W.2d 764, 767 (Tex. Civ. App.—Fort Worth 1954, writ ref'd n.r.e.).

18. *See* McKnight, *Matrimonial Property*, 26 Sw. L.J. 31, 49 (1972).

19. *See* Holbrook, *The Change in the Meaning of Consortium*, 22 MICH. L. REV. 1, 2 (1923).

20. *Id.* at 2.

21. Hyde v. Scyssor, 79 Eng. Rep. 462 (K.B. 1619) (husband could recover *per quod consortium amisit* [whereby he lost the company of his wife] in action separate from battery action); Guy v. Livesey, 81 Eng. Rep. 653 (K.B. 1618) (husband recovered for loss of wife's comfort and company).

22. *See* Note, *Judicial Treatment of Negligent Invasion of Consortium*, 61 COLUM. L. REV. 1341, 1343 (1961). The servant concept developed when the wife was considered a servant in that she had no legal rights under the common law and was subservient to the husband. As such it was believed that the husband was entitled to the wife's services in the home as if she were a servant in his employ. Dini v. Naiditch, 170 N.E.2d 881, 889 (Ill. 1960).

23. *See* Note, *Judicial Treatment of Negligent Invasion of Consortium*, 61 COLUM.

the ease by which the courts could use it as a basis to compute damages.[24] The intangible elements of society and comfort were considered too vague and uncertain to be measured,[25] therefore, the concept of services became entrenched as the essence of the consortium action for many years.[26]

A wife had no corresponding right for loss of consortium at common law since the courts' preoccupation with the services concept effectively reduced her to an inferior person, a servant to the husband in the eyes of the law.[27] Carrying the master-servant analogy to its limit, it has been stated that the husband owed no services to the wife,[28] and that a servant could not recover for injuries to his master.[29] The wife's action was further precluded by procedural disabilities which prevented her from bringing any type of action unless joined by her husband.[30] Even in the event of recovery, the proceeds became the property of the husband.[31]

During the latter half of the nineteenth century, the services concept began to lose support as a result of the move toward equality for both sexes.[32] As evidence of this trend, many states enacted Married Women's Acts designed to secure the married woman a separate legal identity and an estate in her own property.[33] These acts generally contained specific provisions allowing a wife the right to contract,[34] to own property,[35] and to sue or be sued without

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L. REV. 1341, 1343 (1961). The husband easily obtained a proprietary interest in his wife which, consequently, led to a proprietary action for the loss of her services because of the nature of the marital relationship and the inferiority and subservience of the wife. Lippman, *The Breakdown of Consortium*, 30 COLUM. L. REV. 651, 653 (1930).

24. Lynch v. Knight, 11 Eng. Rep. 854, 863 (K.B. 1861) (services of wife resemble hired domestic capable of estimation in money); *see* People's Home Tel. Co. v. Cockrum, 62 So. 86, 88 (Ala. 1913); J. STEIN, DAMAGES AND RECOVERY, PERSONAL INJURY AND DEATH ACTIONS § 205, at 422 (1972).

25. *See* Hawkins v. Front St. Cable Ry., 28 P. 1021, 1022 (Wash. 1892); Lynch v. Knight, 11 Eng. Rep. 854, 863 (K.B. 1861).

26. *See, e.g.*, People's Home Tel. Co. v. Cockrum, 62 So. 86, 87-88 (Ala. 1913); Boden v. Del-Mar Garage, Inc., 185 N.E. 860, 863 (Ind. 1933), *overruled*, Troue v. Marker, 252 N.E.2d 800 (Ind. 1969); Stout v. Kansas City Terminal Ry., 157 S.W. 1019, 1020-21 (Mo. Ct. App. 1913), *overruled*, Novak v. Kansas City Transit, Inc., 365 S.W.2d 539 (Mo. 1963).

27. In Turner v. Heavrin, 206 S.W. 23, 24 (Ky. 1918) the Kentucky Supreme Court stated that the husband had a property right in his wife's services which was the basis of his recovery. But, since the wife had no property right in her husband's services, she could not maintain a similar action. *Id.* at 24.

28. Lippman, *The Breakdown of Consortium*, 30 COLUM. L. REV. 651, 653 (1930). The law implied certain duties and rights to the marital contract. Among these were: (1) support of the wife by the husband; (2) consortium, *i.e.*, the mutual right to the society, comfort, and affection of each other, and the right of the husband to the services of his wife; and (3) sexual intercourse. *Id.* at 651.

29. *See* 3 W. BLACKSTONE, COMMENTARIES 142-43 (Cooley ed. 1879).

30. *See* Bennett v. Bennett, 23 N.E. 17, 20 (N.Y. 1889).

31. *See generally*, Holbrook, *The Change in the Meaning of Consortium*, 22 MICH. L. REV. 1 (1923).

32. Lippman, *The Breakdown of Consortium*, 30 COLUM. L. REV. 651 (1930).

33. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 122, at 861 (4th ed. 1971).

34. *E.g.*, N.J. Laws 1877, § 5, at 637, *as amended*, N.J. REV. STAT. § 37:2-16

the joinder of her husband.[36]

Since services of the wife constituted the primary element of the cause of action for the loss of consortium, the basis of the husband's action was theoretically removed by the acts granting equality to the wife. Only nine jurisdictions construed the acts in this manner, however, and denied the husband recovery.[37] The Married Women's Acts were thus judicially interpreted by most states as simultaneously expanding the rights of the wife, yet not contracting those of the husband.[38]

EMERGENCE OF THE WIFE'S ACTION THROUGH THE INTENTIONAL INVASION OF THE CONSORTIUM

Following the enactment of the Married Women's Acts, recoveries for the wife's loss of consortium began to arise in suits involving intentional intrusion into the marital relation.[39] The courts, however, drew a distinction between two situations; an indirect injury to the wife's consortium through negligent injury to her spouse, and a tort wherein the act could not have been aimed anywhere but directly at the wife's consortium interest.[40] Recoveries for the

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(1968); Tex. Laws 1911, ch. 52, § 4, at 92, *codified in* TEX. FAMILY CODE ANN. § 4.03 (1975).

35. *E.g.*, Minn. Laws 1869, ch. 56, § 1, *as amended,* MINN. STAT. ANN. § 519.02 (1969); TEX. FAMILY CODE §§ 5.01, 5.21 (1975).

36. *E.g.*, Ill. Laws 1874, § 1, at 576, *as amended,* ILL. REV. STAT. ch. 68, § 1 (1959); Tex. Laws 1911, ch. 52, § 4, at 92, *codified in* TEX. FAMILY CODE ANN. § 4.04 (1975).

37. The courts or legislatures of nine states concluded that since the husband and wife were equal, the services concept was invalid, and the husband had no basis for his action. Neither husband nor wife, therefore, had a cause of action. Carey v. Foster, 221 F. Supp. 185, 190 (E.D. Va. 1963), *aff'd,* 345 F.2d 772 (4th Cir. 1965); West v. City of San Diego, 6 Cal. Rptr. 289, 293 (1960), *overruled,* Rodriguez v. Bethlehem Steel Corp., 115 Cal. Rptr. 765, 783 (1974); Marri v. Stamford Street Ry., 78 A. 582, 586-87 (Conn. 1911); Clark v. Southwestern Greyhound Lines, 58 P.2d 1129, 1130 (Kan. 1936); Rodgers v. Boynton, 52 N.E.2d 576, 578 (Mass. 1943), *overruled,* Diaz v. Eli Lilly & Co., 302 N.E.2d 555, 561-62 (Mass. 1973); Helmstetler v. Duke Power Co., 32 S.E.2d 611, 613 (N.C. 1945); Martin v. United Elec. Ry., 42 A.2d 897, 899 (R.I. 1945); Ellis v. Hathaway, 403 P.2d 985, 986 (Utah 1972); Hawkins v. Front Street Cable Ry., 28 P. 1021, 1022 (Wash. 1892). The basis of the holdings in the seven remaining states, however, is theoretically unsound in light of the essence of the consortium action now being the protection of the sentimental elements for both spouses. It is suggested that the California and Massachusetts cases cited above represent the modern trend.

38. *See, e.g.*, Bennett v. Bennett, 23 N.E. 17, 18 (N.Y. 1889) (illustrating expansion of right in alienation of affections suit); Elling v. Blake-McFall Co., 166 P. 57, 58 (Ore. 1917) where the court stated that although legislation of modern times had granted the wife her equality, it was not to be construed as abridging any of the husband's common law rights to his wife's consortium. *See also* Holbrook, *The Change in the Meaning of Consortium*, 22 MICH. L. REV. 1, 8 (1923).

39. *E.g.*, Bennett v. Bennett, 23 N.E. 17, 18 (N.Y. 1889) (enticement of husband); Flandermeyer v. Cooper, 98 N.E. 102, 105-107 (Ohio 1912) (defendant supplied drugs to plaintiff's husband knowing he was addict).

40. *See* Comment, *The Development of the Wife's Cause of Action for Loss of*

wife in this latter category included alienation of affections,[41] criminal conversation,[42] and to a lesser extent, addiction to drugs[43] and alcoholic beverages.[44] In these suits, the substance of the wife's action involved recovery for the loss of her husband's society and comfort.[45] Once the courts recognized a wife's cause of action for intentional impairment of consortium, they were reluctant to follow the obvious implication: if the same sentimental elements were protected from intentional impairment, they should likewise be protected from negligent impairment.

THE MARITAL RELATIONSHIP IN THE COMMUNITY PROPERTY STATES

At this point it is pertinent to discuss the development of the cause of action in the eight community property states because the marital relationship in these states was the antithesis of that at common law; it was the concept of equality which affected the development of the consortium action in the community property states.[46] Marital equality has always been the cardinal precept of the community property system.[47] In adopting the common law while retaining the community property aspect of the civil law, the legislative intent in these states was to dispense with the common law view that the wife

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Consortium, 14 CATHOLIC LAW. 246, 251 (1968). An intentional interference brings about the same type of injury that is brought about by negligent conduct except that the intentional conduct by the defendant is directed against the solidarity of the family group. Note, *Judicial Treatment of Negligent Invasion of Consortium,* 61 COLUM. L. REV. 1341, 1342 (1961). *See also* Pound, *Individual Interests in the Domestic Relations,* 14 MICH. L. REV. 177, 195 (1916). Pound recognized at the time of the writing that there was a definite difference in the courts recognizing the intentional infringements while not allowing recoveries for the negligent interference of the consortium for the wife.

41. *E.g.,* Acchione v. Acchione, 101 A.2d 642, 644 (Penn. 1954); Whitley v. Whitley, 436 S.W.2d 607, 609 (Tex. Civ. App.—Houston [14th Dist.] 1968, no writ); Rhodes v. Meloy, 289 S.W. 159, 162 (Tex. Civ. App.—Eastland 1926, writ dism'd); Comment, *Piracy on the Matrimonial Seas—The Law and the Marital Interloper,* 25 SW. L.J. 594, 600 (1971).

42. *E.g.,* Fennell v. Littlejohn, 125 S.E.2d 408, 412 (S.C. 1962); Felsenthal v. McMillan, 493 S.W.2d 729 (Tex. 1973); Comment, *Piracy on the Matrimonial Seas—The Law and the Marital Interloper,* 25 SW. L.J. 594, 598 (1971).

43. *E.g.,* Flandermeyer v. Cooper, 98 N.E. 102, 107 (Ohio 1912) (druggist continued to sell morphine to addicted husband over wife's protests until husband committed to asylum); Moberg v. Scott, 161 N.W. 998, 1000 (S.D. 1917) (opium sold to addicted husband over protests of wife).

44. *E.g.,* Pratt v. Daly, 104 P.2d 147, 150-53 (Ariz. 1940) (defendant sold liquor to plaintiff's husband with knowledge he was habitual drunkard); Swanson v. Ball, 290 N.W. 482, 483 (S.D. 1940).

45. *See generally* Comment, *Piracy on the Matrimonial Seas—The Law and the Marital Interloper,* 25 SW. L.J. 594 (1971).

46. The states presently under the community property system are Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas and Washington.

47. W. DE FUNIAK & M. VAUGHN, PRINCIPLES OF COMMUNITY PROPERTY § 1, at 2, § 105, at 262 (2d ed. 1971); *see* Leake v. Saunders, 126 Tex. 69, 72-73, 84 S.W.2d 993, 994 (1935).

was an inferior person.[48] The community property system recognized the wife's position as an equal and acknowledged her right of property ownership to the extent that each spouse retained his separate property and had a vested, undivided one-half interest in the community.[49] It was this theoretical difference between the civil and common law views of the marital relationship that was one of the principal reasons for the denial of the cause of action; four of these states, however, now hold that either spouse may recover for the negligent impairment of consortium.[50]

As previously discussed, the essence of the common law consortium action was the husband's recovery for the loss of his wife's services based on her inferior position. This view contemplated the husband's exclusive ownership of the award.[51] This was contrary, however, to the basic concepts of the community property system where the wife's services counterbalanced the duty of the husband to support the community with his earnings.[52] In community property states, the husband's suit for loss of the wife's services provided a recovery solely for the community estate, and was brought only in his capacity as an agent of the community.[53] Therefore, decisions in certain community property states, granting recovery for loss of the wife's services, should not be construed as a recovery for the loss of consortium comparable to the common law action.[54] Further, the wife's services in the community

48. 1 E. OAKES, SPEER'S MARITAL RIGHTS IN TEXAS § 385, at 560 (4th ed. 1961); *see* CAL. CIV. CODE ANN. § 22.2 (Deering 1971); 2 H. GAMMEL, LAWS OF TEXAS 177, 178 (1840).

49. W. DE FUNIAK & M. VAUGHN, PRINCIPLES OF COMMUNITY PROPERTY § 97, at 241 (2d ed. 1971); Vaughn, *The Policy of Community Property and Interspousal Transactions*, 19 BAYLOR L. REV. 20, 26-27 (1967).

50. City of Glendale v. Bradshaw, 503 P.2d 803, 805 (Ariz. 1972); Rodriguez v. Bethlehem Steel Corp., 115 Cal. Rptr. 765, 783 (1974); Nichols v. Sonneman, 418 P.2d 562, 568 (Idaho 1966); General Elec. Co. v. Bush, 498 P.2d 366, 370-71 (Nev. 1972).

51. *See* Lindsey v. Kindt, 128 So. 143 (Ala. 1930); Waller v. First Sav. & Trust Co., 138 So. 780, 789 (Fla. 1931).

52. The Texas Supreme Court in Gainesville, H. & W. Ry. v. Lacy, 86 Tex. 244, 24 S.W. 269 (1893) stated:

> The term service, as used at common law in relation to the labor performed and aid rendered by a wife, does not properly represent the dignity of the wife's work as a member of the matrimonial partnership in Texas. She no more owes services to the husband than he to her. Her duties are those of a wife, and are not to be valued as those of a servant or a hireling. The fruits of her labor belong to the community, as does that of the husband . . . .

Id. at 248-49, 24 S.W. at 271 (1893). Spanish law considered the husband to be the breadwinner and the wife to be the homemaker. *See* W. DE FUNIAK & M. VAUGHN, PRINCIPLES OF COMMUNITY PROPERTY § 133, at 329 (2d ed. 1971).

53. Lively v. State, 15 So. 2d 617, 620 (La. Ct. App. 1943); *see* Firence Footwear Co. v. Campbell, 406 S.W.2d 516, 517 (Tex. Civ. App.—Houston 1966), *rev'd on other grounds*, 411 S.W.2d 636 (Tex. Civ. App.—Houston 1967, writ ref'd n.r.e.).

54. Rollins v. Beaumont-Port Arthur Bus Lines, Inc., 88 F. Supp. 908, 909 (W.D. La. 1950); West v. City of San Diego, 6 Cal. Rptr. 289, 293 (1960) (husband allowed to recover for services on behalf of the community, but no recovery for consortium); Deshotel v. Atchinson, T. & S.F. Ry., 328 P.2d 449, 452 (Cal. 1958); Meek v. Pacific Elec. Ry., 164 P. 1117, 1118 (Cal. 1917) (husband could recover for services but not

property states were not equated with the definition of consortium as they were in the common law states. The services of the wife were recoverable as a damage to the community that was separate and distinct from that of consortium.[55] Consortium was not recognized as a valid cause of action because it was held to consist of only the sentimental elements of society—comfort and affection—which were not considered measurable.[56] Consequently, the community property states rejected the negligent impairment of consortium as a valid cause of action for either spouse and would continue to do so until the sentimental elements were recognized as measurable damages, and substituted for the services of the wife as the essence of the action in the common law states.

THE RIGHT OF THE WIFE TO SUE FOR THE NEGLIGENT IMPAIRMENT OF CONSORTIUM

Prior to 1950 there had been only one decision recognizing the wife's right to recover for loss of consortium where her husband had been negligently injured; it was subsequently overruled.[57] In 1950, however, in *Hitaffer v. Argonne Co.*,[58] the United States Court of Appeals for the District of Columbia held that the wife could recover for the negligent impairment of consortium.

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consortium). These three California decisions were subsequently overruled by Rodriguez v. Bethlehem Steel Corp., 115 Cal. Rptr. 765, 782 (1974), holding loss of consortium recoverable for *either* spouse. *See also* Lively v. State, 15 So. 2d 617, 620 (La. Ct. App. 1943); Martin v. Weaver, 161 S.W.2d 812, 818 (Tex. Civ. App.—El Paso 1941, writ ref'd w.o.m.) (husband could recover for community for impairment of wife's capacity to perform her domestic duties); City of Fort Worth v. Weisler, 212 S.W. 280, 281 (Tex. Civ. App.—Fort Worth 1919, no writ) (loss of services—held unnecessary to show loss with any mathematical accuracy; jury can estimate; damages need not be computed on basis of a hireling); City of Dallas v. Jones, 54 S.W. 606, 607-608 (Tex. Civ. App. 1898) (heard on remand from Supreme Court); Hawkins v. Front St. Ry., 28 P. 1021, 1022 (Wash. 1892).

55. *See* West v. City of San Diego, 6 Cal. Rptr. 289, 293 (1960), *overruled*, Rodriguez v. Bethlehem Steel Corp., 115 Cal. Rptr. 765, 782 (1974); Meek v. Pacific Elec. Ry., 164 P. 1117, 1118 (Cal. 1917) (dictum), *overruled*, Rodriguez v. Bethlehem Steel Corp., 115 Cal. Rptr. 765, 782 (1974); Hawkins v. Front St. Ry., 28 P. 1021, 1022 (Wash. 1892).

56. Cases cited note 55 *supra*.

57. Hipp v. E.I. DePont DeNemours & Co., 108 S.E. 318, 322 (N.C. 1921), *overruled*, Hinnant v. Tide Water Power Co., 126 S.E. 307, 311-12 (N.C. 1925).

58. 183 F.2d 811 (D.C. Cir.), *cert. denied*, 340 U.S. 852 (1950). The *Hitaffer* opinion consisted of two parts. The first part dealt with the right of the wife to sue for negligent impairment of consortium. The second part of the opinion concerned the allowance of the wife to recover after the husband's claim had been settled under workmen's compensation insurance proceeds. The court stated that the wife could still maintain her action despite the exclusive remedy provision of the employer's workmen's compensation coverage. In Smither & Co. v. Coles, 242 F.2d 220, 223 (D.C. Cir.), *cert. denied*, 354 U.S. 914 (1957), however, the same court overruled *Hitaffer* but only as to the exclusive remedy provision.

The court first refuted the premise that loss of services was the predominant element in the consortium cause of action.[59] Next it criticized cases which allowed the husband to recover for loss of the sentimental elements in a negligence action while refusing to grant the wife a similar recovery because such elements were too remote and consequential to be capable of measurement. The court reasoned that injury to the consortium was the natural and proximate consequence of the tortfeasor's negligent act, and if damage to the sentimental elements was not considered incapable of measurement when the husband brought the action, then there should be no reason why such elements could not be measured to support the wife's action. In dismissing the argument that a physical injury to the husband only indirectly harms the wife, the court stated that "[i]nvasion of the consortium is an independent wrong directly to the spouse so injured."[60] Therefore, the invasion of consortium was recognized as an equal but separate damage from that of physical injury to the other spouse. Further, the court dismissed the premise that the husband's recovery in his negligence action would also encompass a recovery for the wife's loss of consortium so that the allowance of the wife's consortium action would lead to a double recovery.[61] The court concluded that to deny either spouse a cause of action for loss of consortium would require an "exercise in legal gymnastics."[62]

The *Hitaffer* decision was not readily accepted, and it was three years before the import of the decision was first recognized in another state,[63] and later by a federal court applying Nebraska law.[64] Moreover, 11 years after *Hitaffer* only six other jurisdictions had adopted its rationale.[65] A compari-

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59. Hitaffer v. Argonne Co., 183 F.2d 811, 813 (D.C. Cir.), *cert. denied*, 340 U.S. 852 (1950). The court also stated:

> Consortium, although it embraces within its ambit of meaning the wife's material services also includes love, affection, companionship, sexual relations . . . all welded into a conceptualistic unity. . . . There is more to consortium than the mere services of the spouse. Beyond that there are the so-called sentimental elements to which the wife has a right for which there should be a remedy.

Id. at 814.

60. *Id.* at 815.

61. *Id.* at 814. Although the *Hitaffer* opinion admitted the possibility of a double recovery, it held that it was a matter of "simple mathematics" to determine the damages to the wife's consortium and deduct that from the value of his duty of support which he recovers from loss of earnings compensation. *Id.* at 819.

62. *Id.* at 816; *see* 1 F. HARPER & F. JAMES, THE LAW OF TORTS § 8.9, at 643 (1956) where the authors referred to the *Hitaffer* decision as "a realistic approach to the problem . . . ."

63. Brown v. Georgia-Tennessee Coaches, Inc., 77 S.E.2d 24, 28 (Ga. Ct. App. 1953).

64. Cooney v. Moomaw, 109 F. Supp. 448, 450-51 (D. Neb. 1953).

65. Duffy v. Lipsman-Fulkerson & Co., 200 F. Supp. 71, 74 (D. Mont. 1961); Missouri-Pac. Transp. Co. v. Miller, 299 S.W.2d 41, 48 (Ark. 1957); Dini v. Naiditch, 170 N.E.2d 881, 893 (Ill. 1960); Acuff v. Schmit, 78 N.W.2d 480, 485-86 (Iowa 1956); Montgomery v. Stephan, 101 N.W.2d 227, 235 (Mich. 1960); Hoekstra v. Helgeland, 98 N.W.2d 669, 672 (S.D. 1959).

son of the minority of jurisdictions which recognized the wife's cause of action at that time, with the majority that currently recognize it, indicates rapid acceptance of the wife's cause of action for loss of consortium founded on the sentimental elements.

In 1954 the Fort Worth Court of Civil Appeals confronted the same issue in *Garrett v. Reno Oil Co.*[66] Mrs. Garrett brought suit against her husband's employer to recover for loss of consortium sustained as a result of her husband's injuries and disabilities. Her husband was totally disabled and the employer made a settlement through its workmen's compensation insurer. Following the settlement the wife brought suit joined by her husband. In that suit the court reasoned that the common law majority concept was so well settled that Texas would follow it by denying the wife's action until the legislature effected a change.[67] Damages recovered for personal injuries belonged to the community estate, and it was implied that a possibility of a double recovery might exist if the wife were allowed a cause of action.[68] In conclusion, it held that the husband's workmen's compensation insurance provided an exclusive remedy against the employer, which precluded any further suit by the wife.[69] Even today *Garrett* remains the precedent in Texas. The decision, however, relied on the common law concept of the marital relationship which derives its validity entirely from five basic arguments. These arguments, when placed in the light of present day social realities, are unfounded and antiquated.

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66. 271 S.W.2d 764 (Tex. Civ. App.—Fort Worth 1954, writ ref'd n.r.e.).

67. Garrett v. Reno Oil Co., 271 S.W.2d 764, 767 (Tex. Civ. App.—Fort Worth 1954, writ ref'd n.r.e.). *But see* Kirkpatrick v. Hurst, 472 S.W.2d 295, 304 (Tex. Civ. App.—Texarkana 1971), *rev'd on other grounds,* 484 S.W.2d 587, 589 (Tex. 1972) (dictum).

68. Garrett v. Reno Oil Co., 271 S.W.2d 764, 767-68 (Tex. Civ. App.—Fort Worth 1954, writ ref'd n.r.e.).

69. TEX. REV. CIV. STAT. ANN. art. 8306, § 3a (1967) (exclusive remedy provision of Texas Workmen's Compensation Law). The majority of decisions hold that workmen's compensation is an exclusive remedy and bars any further action on the part of either spouse. *See* Annot., 36 A.L.R.3d 900, 929-31 (1971); 2 A. LARSON, THE LAW OF WORKMEN'S COMPENSATION § 66, at 12-20 (1975). There are generally three types of exclusive remedy provisions depending upon the statutory phrasing regarding whose rights have been precluded: (1) The "Massachusetts type" has been held to bar only the employee's suit and not the wife's action. MASS. ANN. LAWS ch. 152, § 24 (1965); American Asbestos Textile Corp. v. American Mut. Liab. Ins. Co., 330 A.2d 451, 453 (N.H. 1974). (2) The "Michigan type" occurs when the statute states that the employer's liability is "exclusive." *See* MICH. STAT. ANN. § 17.237(131) (Supp. 1975). This type of provision has been construed to bar any other actions by the employee's spouse or other relatives. 2 A. LARSON, THE LAW OF WORKMEN'S COMPENSATION § 66.10 (1975). (3) The "New York type" results when the statutory language specifically provides for the exclusive remedy provisions to be effective against parents, spouses, personal representatives and other relations of the employee. *See* N.Y. WORKMEN'S COMP. LAWS § 11 (McKinney 1965); TEX. REV. CIV. STAT. ANN. art. 8306, § 3a (1967). *See also* Fritzson v. City of Manhattan, 528 P.2d 1193, 1195 (Kan. 1974); Nichols v. Benco Plastics, Inc., 469 S.W.2d 135, 138 (Tenn. 1971).

TRADITIONAL ARGUMENTS FOR THE DENIAL OF THE WIFE'S ACTION

The five arguments normally given for denying a wife's cause of action are: (1) the action for loss of consortium is an anachronism and has no place in modern society; (2) the loss of consortium is too indirect and remote from the wrongful act to the physically injured spouse; (3) the allowance of the action would lead to a double recovery; (4) the allowance of the action would lead to a multiplicity of suits; and (5) it is for the legislature to grant the cause of action, not the judiciary.

Anachronism of the Action

The timeliness of the consortium action should be examined as a matter of public policy to determine whether the law should provide such a remedy for largely non-pecuniary and psychological losses suffered by one spouse due to the negligent injury of the other. Although it has been suggested that the action is anachronistic[70] and a "fossil from an earlier era,"[71] consortium must be viewed in light of modern tort law which has been expanded to allow recovery for such injuries as emotional distress.[72] Consequently, since the consortium action consists primarily of the sentimental and emotional elements it would follow that recovery for impairment of these elements should be allowed.

It is also important to note that each spouse has an equal interest in the marriage, and the action for loss of consortium is the means of protecting that relationship from injury. As such, it affords a degree of legal protection commensurate with the value society attaches to the relationship.[73] Clearly, the cause of action for loss of consortium is not an anachronism.

Loss Too Indirect and Remote from the Wrongful Act

The second argument traditionally advanced for the denial of the wife's consortium recovery in negligence actions was that her loss was too indirect

70. Igneri v. Cie. de Transports Oceaniques, 323 F.2d 257, 264 (2d Cir. 1963); Kronenbitter v. Washburn Wire Co., 176 N.Y.S.2d 354, 355 (1958), *overruled*, Millington v. Southeastern Elevator Co., 293 N.Y.S.2d 305 (1968).

71. Jaffe, *Damages for Personal Injury: The Impact of Insurance*, 18 LAW & CONTEMP. PROB. 219, 229 (1933). *Contra*, Millington v. Southeastern Elevator Co., 293 N.Y.S.2d 305 (1968).

72. Ekalo v. Constructive Serv. Corp., 215 A.2d 1, 7 (N.J. 1965); *accord*, Diaz v. Eli Lilly & Co., 302 N.E.2d 555, 562 (Mass. 1973); *see* Millington v. Southeastern Elevator Co., 293 N.Y.S.2d 305, 311 (1968). The fall of the "impact" doctrine has led to broad judicial recognition on a wide scale to purely emotional interests such as in the cases involving "bystanders." Dillon v. Legg, 69 Cal. Rptr. 72, 76-77 (1968); Toms v. McConnell, 207 N.W.2d 140, 144 (Mich. Ct. App. 1973); Dave Snelling Lincoln-Mercury v. Simon, 508 S.W.2d 923, 924-26 (Tex. Civ. App.—Houston [1st Dist.] 1974, no writ). *See also* Diaz v. Eli Lilly & Co., 302 N.E.2d 555 (Mass. 1973) (impairment of marital interest may be equivalent to mental or psychic injury which can be basis for recovery).

73. Note, *Judicial Treatment of Negligent Invasion of Consortium*, 61 COLUM. L.

to be compensated.[74] Only intentional invasions were considered to be of such direct consequence as to permit recovery.[75] This argument was met by a charge of judicial obfuscating,[76] that it was contrary to the basic principles of negligence and causation, and was incongruent with the allowance of the husband's action.[77]

The fallacy of the indirect loss argument is revealed by contrasting the possible effects on an intentional versus negligent injury to the wife's consortium interest. Assume that in one instance, a woman diverts the husband's affections away from his wife; alternatively assume that the husband has been rendered an invalid for life as the proximate result of a third party's negligent operation of a vehicle. Using the indirect-loss reasoning, a wife is able to recover monetary damages for the alienation of her husband's affections, but in the latter assumption, where her consortium interest was negligently invaded and the character of harm more lasting and severe, the wife would be denied a recovery. She would not have the opportunity in most instances to start her life anew by means of divorce,[78] but would be changed from a "loving wife to a lonely nurse."[79] Nevertheless, the injury to the wife is as immediate and direct as if she had been the victim of the accident;[80] the character of harm to the sentimental elements is not illusory.[81] One court has even noted that "[t]he mental and emotional anguish as a result of seeing a healthy, loving, companionable mate turned into a shell of a person is real enough."[82] Thus the indirect-loss argument fails when it is realized that if a spouse is injured to such an extent that he is incapable of being a companion, of providing love, society, and comfort to the partner, a direct and personal loss has been inflicted upon his partner.[83]

Nor should the loss be considered too remote from the wrongful act. By

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REV. 1341, 1353 (1961). The American Law Institute reversed its position on the wife's cause of action in 1969. RESTATEMENT (SECOND) OF TORTS § 695 (Tent. Draft No. 14, Apr. 15, 1969), adopted May 21, 1969:

> One who by reason of his tortuous conduct is liable to a husband for illness or other bodily harm is also subject to liability to his wife for resulting loss of his society, including any impairment of his capacity for sexual intercourse . . . .

Id. at 148. *Compare id.* at 148, *with* RESTATEMENT OF TORTS § 695 (1938).

74. *See, e.g.*, Lockwood v. Wilson H. Lee Co., 128 A.2d 330, 331 (Conn. 1956); Feneff v. New York Cent. & H. Ry., 89 N.E. 436, 437 (Mass. 1909), *overruled*, Diaz v. Eli Lilly & Co., 302 N.E.2d 555, 559 (Mass. 1973); Hinnant v. Tide Water Power Co., 126 S.E. 307, 310-12 (N.C. 1925).

75. *See* Roseberry v. Starkovich, 387 P.2d 321, 324 (N.M. 1963).

76. Diaz v. Eli Lilly & Co., 302 N.E.2d 555, 559 (Mass. 1973).

77. Ekalo v. Constructive Serv. Corp., 215 A.2d 1, 5 (N.J. 1965).

78. *See generally* Diaz v. Eli Lilly & Co., 302 N.E.2d 555, 559 (Mass. 1973); Comment, *Judicial Treatment of Negligent Invasion of Consortium*, 61 COLUM. L. REV. 1341, 1354 (1961).

79. Ekalo v. Constructive Serv. Corp., 215 A.2d 1, 2 (N.J. 1965).

80. *Id.* at 5.

81. *See* General Elec. Co. v. Bush, 498 P.2d 366, 370-71 (Nev. 1972).

82. Millington v. Southeastern Elevator Co., 293 N.Y.S.2d 305, 308 (1968).

83. *See* Rodriguez v. Bethlehem Steel Corp., 115 Cal. Rptr. 765, 777 (1974).

utilizing the "direct consequences" approach of *Hitaffer v. Argonne Co.*,[84] or the "foreseeable plaintiff" concept as used in *Rodriguez v. Bethlehem Steel Corp.*,[85] the courts have encountered few difficulties in bringing the spouse's consortium interests within the scope of protection from the negligent acts of a defendant.

Allowing the Wife's Action Would Lead to a Double Recovery

One of the primary reasons for the denial of a wife's cause of action for loss of consortium was the fear that the defendant may be liable twice for the same injury. This reasoning stressed the loss of the husband's support while completely ignoring the wife's interests in the sentimental elements. It was thought that when the husband sued in his own right and recovered for his physical injuries, doctor bills and loss of earnings, his compensation would be complete.[86] If the wife brought a separate action against the defendant, the sole basis of her action would have been for loss of support, because she was not entitled to his services and sentimental elements had not yet been recognized. Since the support obligation had already been satisfied in the husband's suit, her action would have amounted to double compensation.[87]

Early support for the double recovery argument was found in an article by Roscoe Pound where he questioned not only the ability of the jury to award separate damages for each spouse in the event of separate actions,[88] but also their ability to estimate the sentimental elements of the consortium

84. 183 F.2d 811, 815 (D.C. Cir.), *cert. denied*, 340 U.S. 852 (1950). Under the direct consequences approach, foreseeability of the risk may be important in determining whether the defendant was negligent in the first place, but is not at all decisive in determining the extent of the consequences for which he will be liable once negligent. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 43, at 260 n.3 (4th ed. 1971).

85. 115 Cal. Rptr. 765, 776 (1974). The court relied on a statistical abstract compiled by the federal government to show that as of 1972, approximately 75% of all men and 69% of all women over the age of 18 were married. *Id.* at 776 n.19. Using these figures the court stated:

> [O]ne who negligently causes a severely disabling injury to an adult may reasonably expect that the injured person is married and that his or her spouse will be adversely affected by that injury. In our society the likelihood that an injured adult is a married man or woman is substantial.

Id. at 776. *See also* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 43, at 254-57 (4th ed. 1971).

86. Bernhardt v. Perry, 208 S.W. 462, 466 (Mo. 1918), *appeal dismissed*, 254 U.S. 662 (1920), *overruled*, Novak v. Kansas City Transit, Inc., 365 S.W.2d 539, 542 (Mo. 1963).

87. Bernhardt v. Perry, 208 S.W. 462, 466 (Mo. 1918).

88. *See* Pound, *Individual Interests in the Domestic Relations*, 14 MICH. L. REV. 177 (1916) where Pound stated:

> [O]ur modes of trial are such and our mode of assessment of damages by the verdict of a jury is . . . 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. . . .

Id. at 194.

itself.[89] Today this skepticism of a jury's capabilities is no longer valid, as reasonable compensation for injury to the marital relation is "well within the reach of the experience and judgment of the . . . jury."[90]

Once the meaning of consortium was held to consist primarily of the sentimental elements, double recovery became merely an excuse for denying the wife's action.[91] The present action for loss of consortium contemplates a single tortious act which injures both spouses by virtue of their relationship to each other.[92] While one spouse sustains direct physical injuries, the other sustains damage to emotional interests stemming from their relationship. In the respective causes of action, the physically injured spouse would have the exclusive right to recover for medical expenses, pain and suffering, and for loss of earnings. The other spouse could bring an action for loss of consortium, and recover on the basis of the sentimental elements.[93]

Treating the consortium action as separate and distinct from the personal injury action raises the question as to the procedural handling of the two suits to prevent the possibility of double recovery. The first measure to preclude a double recovery is to insure that each element of damage is made separate and distinct so that the jury will not, in considering one spouse's recovery, award damages to which the other would be entitled. The trial court can accomplish this by carefully drafting jury instructions describing and distinguishing the different elements of the compensable damages.[94] Yet an inherent danger may arise if the court instructs broadly, with the undesirable result of the jury considering the total damages sustained by the marital entity, rather than those sustained by the plaintiff spouse.[95] To avoid such a possibility, most states use the special verdict or send interrogatories to the jury.[96]

89. When discussing the sentimental elements it was said "they are so peculiarly related to the mental and spiritual life of the individual as to involve in the highest degree the difficulties incident to all legal reparation of injuries to the person." *Id.* at 196.

90. Deems v. Western M. Ry., 231 A.2d 514, 525 (Md. 1967). In Millington v. Southeastern Elevator Co., 293 N.Y.S.2d 305, 312 (1968), in response to a contention that sentimental elements were too personal, intangible, and conjectural to be measured by a jury, the court stated that "[t]he logic of [that argument] would . . . hold a jury incompetent to award damages for pain and suffering." *Id.* at 312. *See also* Clouston v. Remlinger Oldsmobile Cadillac, Inc., 258 N.E.2d 230, 234 (Ohio 1970) (jury never had problem estimating damage for sentimental elements when wife sued for loss of consortium in intentional action).

91. Dini v. Naiditch, 170 N.E.2d 881, 891 (Ill. 1969) where the court stated that the double recovery argument was merely a cliche for denying the wife's recovery.

92. General Elec. Co. v. Bush, 498 P.2d 366, 371 (Nev. 1972).

93. *E.g.*, Kotsiris v. Ling, 451 S.W.2d 411, 412 (Ky. 1970); Tribble v. Gregory, 288 So. 2d 13, 17 (Miss. 1974); Hoekstra v. Helgeland, 98 N.W.2d 669, 680-81 (S.D. 1959).

94. *E.g.*, Gates v. Foley, 247 So. 2d 40, 45 (Fla. 1971); General Elec. Co. v. Bush, 498 P.2d 366, 371 (Nev. 1972); Clouston v. Remlinger Oldsmobile Cadillac, Inc., 258 N.E.2d 230, 234 (Ohio 1970).

95. *See* Diaz v. Eli Lilly & Co., 302 N.E.2d 555, 560 (Mass. 1973).

96. *See* Swartz v. United States Steel Corp., 304 So. 2d 881, 889 (Ala. 1974); Moran v. Quality Aluminum Casting Co., 150 N.W.2d 137, 145 (Wis. 1967).

The Texas special issues practice comports with these states,[97] and would have the effect of limiting the spectre of double recovery by requiring the jury to distinguish the amount of damages awarded for physical injury as opposed to loss of consortium.

As an additional protective measure some states require joinder of the negligence and consortium actions.[98] This not only results in judicial economy,[99] but both actions are simultaneously before the jury so that full and fair instructions as to the nature and limits of the independent demands for recovery can be given.[100] There is equal authority to the contrary, however, that the spouses may bring separate actions.[101] Under this view it is felt that little or no danger of duplication of damages exists because the negligence action is separate and distinct from the consortium action, and, with proper jury instructions, each party would recover only those damages to which he is entitled.[102]

Based upon the operation of Rule 39 of the Texas Rules of Civil Procedure,[103] Texas apparently would not require joinder of the negligence and consortium actions. While the spouse suing for loss of consortium may permissively join in the negligence action,[104] a problem arises where the spouse does not wish to assert a claim jointly with the negligence action. In this event, the defendant could insist by way of a plea in abatement that the two actions be joined under rule 39(a)(2)(ii) so that he would not, as a result of the outstanding claim, be exposed to the possibility of a dual recovery. If the spouse asserting the consortium claim refused to join, the court would have to determine, in equity and good conscience, whether it should dismiss the action for lack of an indispensable party, or proceed with the negligently in-

97. TEX. R. CIV. P. 277; *see* Members Mut. Ins. Co. v. Muckleroy, 523 S.W.2d 77, 80 (Tex. Civ. App.—Houston [1st Dist.] 1975, writ granted) (special issue no. 4 illustrates submission for elements of damage). *See generally* Symposium—*Survey of Special Issue Submission in Texas Since Amended Rule 277*, 7 ST. MARY'S L.J. 345 (1975).

98. *E.g.*, Schreiner v. Fruit, 519 P.2d 462, 466 (Alas. 1974); Deems v. Western M. Ry., 231 A.2d 514, 525 (Md. 1967); Thill v. Modern Erecting Co., 170 N.W.2d 865, 869 (Minn. 1968); General Elec. Co. v. Bush, 498 P.2d 366, 371 (Nev. 1972); Ekalo Constructive Serv. Corp., 215 A.2d 1, 6 (N.J. 1965); Millington v. Southeastern Elevator Co., 293 N.Y.S.2d 305, 312 (1968); Hopkins v. Blanco, 302 A.2d 855, 858-59 (Pa. 1973).

99. *See* Schreiner v. Fruit, 519 P.2d 462, 466 (Alas. 1974).

100. *See* Ekalo v. Constructive Serv. Corp., 215 A.2d 1, 6 (N.J. 1965).

101. Those jurisdictions holding that joinder is not mandatory are: Swartz v. United States Steel Corp., 304 So. 2d 881, 886 (Ala. 1974); City of Glendale v. Bradshaw, 503 P.2d 803, 805 (Ariz. 1972); Rodriguez v. Bethlehem Steel Corp., 115 Cal. Rptr. 765, 781-82 (1974); Gates v. Foley, 247 So. 2d 40, 45 (Fla. 1971); Kotsiris v. Ling, 451 S.W.2d 411, 413 (Ky. 1970); Diaz v. Eli Lilly & Co., 302 N.E.2d 555, 560-61 (Mass. 1973); Tribble v. Gregory, 288 So. 2d 13, 17 (Miss. 1974); Fitzgerald v. Meissner & Hicks, Inc., 157 N.W.2d 595, 600 (Wis. 1968).

102. *See* Kotsiris v. Ling, 451 S.W.2d 411, 413 (Ky. 1970).

103. TEX. R. CIV. P. 39 (Joinder of Persons Needed for Just Adjudication).

104. TEX. R. CIV. P. 40 (Permissive Joinder).

jured spouse as sole plaintiff.[105] In construing rule 39, the Texas courts have determined that in actions involving spouses it is rare to have an indispensible party that would prevent the court from proceeding with the litigants already parties to the suit.[106] Thus the spouse bringing the consortium action would not be considered an indispensible party under rule 39; it follows that Texas would not require a mandatory joinder of the negligence and consortium actions.[107]

Personal injury recoveries in the community property states may either be the separate property of the plaintiff spouse[108] or may belong to the community.[109] In those jurisdictions where the personal injury recovery is considered community property, the consortium recovery might appear to have aspects of a double recovery. In an Arizona decision, however, the state supreme court was not persuaded that the problem of double recovery existed.[110] As pointed out by the court, the only relevant consideration was to insure that each element of damages was separate and distinct from all others.[111] Ownership of the proceeds of the recovery, therefore, should not enter into a consideration of the existence of a double recovery as implied by the *Garrett v. Reno Oil Co.* decision.[112]

In connection with double recovery, it should be noted that any defense

105. TEX. R. CIV. P. 39(b).

106. *See* Cooper v. Texas Gulf Indus., Inc., 513 S.W.2d 200, 202-203 (Tex. 1974) (judgment in a suit involving joint management community property not res judicata to wife where she was not joined), *noted in* 6 ST. MARY'S L.J. 933 (1974); Williams v. Saxon, 521 S.W.2d 88, 91 (Tex. Civ. App.—San Antonio 1975, writ ref'd n.r.e.) (wife not indispensable party in action against husband for specific performance of earnest money contract to convey community property); *cf.* City of Dumas v. Sheehan, 514 S.W.2d 819, 821 (Tex. Civ. App.—Amarillo 1974, no writ) (failure to join contractor and landowner in temporary injunction proceedings did not deprive court of jurisdiction because of lack of indispensable party); Sherrill v. Estate of Plumley, 514 S.W.2d 286, 298 (Tex. Civ. App.—Houston [1st Dist.] 1974, writ ref'd n.r.e.).

107. Rule 39 was derived from Rule 19 of the Federal Rules of Civil Procedure. By examining decisions in several other states that have adopted joinder provisions patterned after rule 19, additional support for the proposition that Texas would not require a mandatory joinder can be found. These decisions hold that the spouse asserting the consortium action is not an indispensable party, and therefore no mandatory joinder was required upon bringing the action. Swartz v. United States Steel Corp., 304 So. 2d 881, 886 (Ala. 1974); Rodriguez v. Bethlehem Steel Corp., 115 Cal. Rptr. 765, 781-82 (1974); Diaz v. Eli Lilly & Co., 302 N.E.2d 555, 561 (Mass. 1974).

108. Meagher v. Garvin, 391 P.2d 507, 511 (Nev. 1964); Soto v. Vandeventer, 245 P.2d 826, 832 (N.M. 1952); LA. CIV. CODE ANN., art. 2402 (West's 1971); TEX. FAMILY CODE ANN. § 5.01(a)(3) (1975).

109. ARIZ. REV. STAT. ANN. § 25-213 (1956); CAL. CIV. CODE ANN. § 5109 (Deering 1972) (unless recovery proceeds are paid by or for one spouse to other spouse, recovery will be considered a community recovery); IDAHO CODE ANN. § 32-903 (1963); WASH. REV. CODE ANN. § 26.16.020 (1961); *see* Dawson v. McNaney, 223 P.2d 907, 910 (Ariz. 1950); Perez v. Perez, 523 P.2d 455, 456 (Wash. Ct. App. 1974).

110. City of Glendale v. Bradshaw, 503 P.2d 803, 805 (Ariz. 1972).

111. *Id.* at 805.

112. Garrett v. Reno Oil Co., 271 S.W.2d 764, 767-68 (Tex. Civ. App.—Fort Worth 1954, writ ref'd n.r.e.). It is interesting to note that recovery for the negligent impairment of consortium has been recognized in three of four states where injury recoveries

which bars an action of the physically injured spouse will also bar an action for loss of consortium. Although the consortium suit is independent of the claim for personal injuries, a majority of jurisdictions regard it as derivative of the negligence suit.[113] Examples of defenses operating as a bar include limitation, consent, failure to establish a cause of action against the defendant for negligence,[114] and contributory negligence.[115] In the comparative negligence states, the contributory negligence of the injured spouse would not be a bar unless it equaled or exceeded the defendant's negligence.[116] Further, an adverse judgment in the negligence action operates to bar the consortium action,[117] while a recovery would not, of course, operate as a bar.[118]

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are considered community property. City of Glendale v. Bradshaw, 503 P.2d 803, 805 (Ariz. 1972); Rodriguez v. Bethlehem Steel Corp., 115 Cal. Rptr. 765, 783 (1974); Nichols v. Sonneman, 418 P.2d 562, 568 (Idaho 1966). In states where injury recoveries are the separate property of the plaintiff spouse, only one out of four states has recognized the cause of action. General Elec. Co. v. Bush, 498 P.2d 366, 370-71 (Nev. 1972). Although Texas has yet to rule on the issue, the loss of consortium should be characterized as the separate property of the plaintiff spouse, while a recovery for loss of earnings or a wife's services should remain community in nature. McKnight, *Matrimonial Property*, 26 Sw. L.J. 31, 49 n.149 (1972). *See also* Graham v. Franco, 488 S.W.2d 390, 396 (Tex. 1972) (personal injuries are separate property and services are community in nature).

113. *See, e.g.*, Gates v. Foley, 247 So. 2d 40, 45 (Fla. 1971); Thill v. Modern Erecting Co., 170 N.W.2d 865, 870 (Minn. 1969); Rieke v. Brodof, 501 S.W.2d 66, 67 (Mo. Ct. App. 1973). *But see* Fenster v. Gulf States Ceramic, 182 S.E.2d 905, 908 (Ga. Ct. App.), *rev'd on other grounds*, 185 S.E.2d 801 (Ga. 1971).

114. *See* Kolar v. City of Chicago, 299 N.E.2d 479, 481 (Ill. Ct. App. 1973) (limitations and failure to establish a cause of action); Rieke v. Brodof, 501 S.W.2d 66, 67 (Mo. Ct. App. 1973) (failure to establish a cause of action); Herko v. Uviller, 114 N.Y.S.2d 618, 619 (S. Ct. 1952).

115. *See* Resmondo v. International Builders, Inc., 265 So. 2d 72, 73-74 (Fla. Dist. Ct. App. 1972); Deskins v. Woodward, 483 P.2d 1134, 1135-36 (Okla. 1971). *But see* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 125, at 892-93 (4th ed. 1971); Comment, *The Development of the Wife's Cause of Action for Loss of Consortium*, 14 CATHOLIC LAW. 246, 257 (1968).

116. *E.g.*, ARK. STAT. ANN. § 27-1730.1 (1962) (equals); MASS. GEN. LAWS ANN. ch. 231, § 83 (1974) (exceeds); TEX. REV. CIV. STAT. ANN. art. 2212(a) (Supp. 1974) (exceeds); WIS. STAT. ANN. § 895.045 (Supp. 1975) (exceeds). Texas should follow the lead of Wisconsin on this issue. The Wisconsin court held that the consortium action was derivative and would be barred if the physically injured spouse's contributing negligence was greater than that of the defendant. White v. Lunder, 225 N.W.2d 442, 449-50 (Wis. 1975). There is an added dimension to the problem which exists in Texas. In Graham v. Franco, 488 S.W.2d 390, 397 (Tex. 1972) the supreme court held that personal injury recoveries are the separate property of the plaintiff-spouse and as such, the contributory negligence of one spouse would not be imputed to the other spouse to bar that spouse's recovery. However, in light of the subsequent adoption of comparative negligence, the latter proposition of the holding would no longer appear to be valid, at least to the extent that one spouse's negligence is not greater than that of the defendant. If such an approach is taken, then a Texas decision similar to that of White v. Lunder, 227 N.Y.2d 442, 449-50 (Wis. 1975) would not only adhere to the basic principles of comparative negligence, but would not conflict with any community property principles; the consortium recovery would still be separate property subject only to the other spouse's negligence exceeding that of the defendant.

117. *See* Swartz v. United States Steel Corp., 304 So. 2d 881, 889 (Ala. 1974); Millington v. Southeastern Elevator Co., 293 N.Y.S.2d 305, 312 (1968).

118. *See* Sove v. Smith, 311 F.2d 5, 7 (6th Cir. 1962); Scudder v. Seaboard Coast Line Ry., 247 So. 2d 46 (Fla. 1971).

Multiplicity of Suits

The fourth argument presented for the denial of a wife's consortium action was the fear that recovery for loss of the sentimental elements would be sought by other members of the family or close relatives.[119] In *Ekalo v. Constructive Service Corp.*,[120] the New Jersey Supreme Court indicated the position of the majority of jurisdictions when it stated:

> The law has always been more solicitous of the husband and wife relationship, perhaps more so than the parent-child relationship. In any event, policy rather than logic is the determinative factor . . . .[121]

The policy consideration concerns the number of suits arising out of a single transaction against a tortfeasor. The assertion of a spouse's demand for loss of consortium involves the joining of only a single companion claim with that of the negligence action. But if it were extended to other members of the family, it would entail adding as many companion claims as the injured parent had children, with each such claim entitled to a separate appraisal and award.[122] In addition to limiting the number of claims, the courts felt that the right of consortium grows out of the marriage relationship, and a recovery based on damage to that relationship should not be extended to those not within it.[123]

The Need for Legislative Change

Outside of the double recovery argument, the most frequently cited reason for denial of the wife's action is that the change should come from the legislature, not the judiciary.[124] This argument ignores the fact that courts have been the primary instruments for changing the common law.[125] Such abdication of judicial responsibility has been severely criticized in recent decisions overruling cases which denied a wife's consortium action.[126] These cases indicate that the law is not static, that it must keep pace with society through continual judicial re-evaluation of common law concepts in light of present

119. Hoffman v. Dautel, 388 P.2d 615, 625-26 (Kan. 1964); *see* McKey v. Dow Chem. Co., 295 So. 2d 516, 518 (La. Ct. App. 1974).

120. 215 A.2d 1 (N.J. 1965).

121. *Id.* at 6-7.

122. Russell v. Salem Transp Co., 295 A.2d 862, 864 (N.J. 1972).

123. Swartz v. United States Steel Corp., 304 So. 2d 881, 887 (Ala. 1974); General Elec. Co. v. Bush, 498 P.2d 366, 371 (Nev. 1972). *See generally* W. PROSSER, THE HANDBOOK OF THE LAW OF TORTS § 124, at 882 (4th ed. 1971).

124. Garrett v. Reno Oil Co., 271 S.W.2d 764, 766 (Tex. Civ. App.—Fort Worth 1954, writ ref'd n.r.e.); Bates v. Donnafield, 481 P.2d 347, 349 (Wyo. 1971). *See also* Chilcote & McBride, *The Wife's Claim for Loss of Consortium: A Survey of the Last Decade*, 27 INS. COUNSEL J. 384, 387 (1960).

125. *See* Rodriguez v. Bethlehem Steel Corp., 115 Cal. Rptr. 765, 772 (1974).

126. *Id.* at 772-73; Gates v. Foley, 247 So. 2d 40, 43 (Fla. 1971); *see* Millington v. Southeastern Elevator Co., 293 N.Y.S.2d 305, 313 (1968).

day realities by fostering change, whenever reason and equity demand.[127] Therefore, the argument presented in *Garrett v. Reno Oil Co.*, that the change should come from the legislature, is no longer tenable.[128]

The Texas courts should not construe the Texas Legislature's abolition of the action of criminal conversation to be a legislative repudiation of the concept of consortium.[129] In recent years, other states have also enacted similar "heart-balm" statutes abolishing the actions of alienation of affections and criminal conversation.[130] The abolition of either of these intentional invasions of consortium resulted from circumstances surrounding the two actions. Both of the intentional actions were considered to be the subject of spurious litigation, and were often a fertile field for blackmail because of a defendant's rapid capitulation to settlement in order to avoid public embarrassment.[131] The "heart-balm" statutes, therefore, were meant only to remedy abuses of the intentional invasion of consortium, not to abolish the concept of consortium itself. The negligent impairment of consortium involves none of the elements of blackmail that attach to the "heart-balm" actions; hence, no abuse of consortium is present and courts should not hesitate to provide the proper remedy. At least three other jurisdictions have taken this position and have judicially adopted the cause of action for the negligent impairment of consortium, despite legislative abolition of the intentional, "heart-balm" actions;[132] Texas courts should follow their lead.

Although judicial recognition in Texas of a right of action by either spouse for the negligent impairment of consortium is suggested, this should not prevent the legislature from acting on the matter. Nine states presently have statutes recognizing the action for either the wife or both spouses.[133] The

127. *See* Gates v. Foley, 247 So. 2d 40, 43 (Fla. 1971); Dini v. Naiditch, 170 N.E.2d 881, 892 (Ill. 1960).

128. Garrett v. Reno Oil Co., 271 S.W.2d 764, 766 (Tex. Civ. App.—Fort Worth 1954, writ ref'd n.r.e.).

129. Tex. Laws 1975, ch. 637, § 1, at 1942. H.B. No. 109, also introduced this past legislative session, proposed to amend the Texas Wrongful Death Statute, TEX. REV. CIV. STAT. ANN. art. 4671-73 (1952), by allowing either spouse to recover for the loss of consortium resulting from the death of the other spouse. The bill passed the House of Representatives on May 16, 1975 by a vote of 94 to 41, but failed a hearing in the Senate by one vote on the last day of the session.

130. *E.g.*, CONN. GEN. STAT. ANN. § 52-572(b), (f) (Supp. 1975); N.Y. CIV. RIGHTS LAW § 80a (McKinney Supp. 1974); PA. STAT. ANN. tit. 48, § 170 (1965).

131. Felsenthal v. McMillan, 493 S.W.2d 729, 732 (Tex. 1973); *see* Comment, *Piracy on the Matrimonial Seas—The Law and the Marital Interloper*, 25 SW. L.J. 594, 613-14 (1971); Note, *Judicial Treatment of Negligent Invasion of Consortium*, 61 COLUM. L. REV. 1341, 1345 (1961).

132. *E.g.*, Millington v. Southeastern Elevator Co., 293 N.Y.S.2d 305, 313 (1968) (intentional actions abolished by N.Y. CIV. RIGHTS LAW § 80a [McKinney Supp. 1974]); Ekalo v. Constructive Serv. Corp., 215 A.2d 1, 6 (N.J. 1965) (intentional actions abolished by N.J. REV. STAT. § 2A:23-1 [1952]); Hopkins v. Blanco, 302 A.2d 855, 858-59 (Penn. 1973) (intentional actions abolished by PA. STAT. ANN. tit. 48, § 170 [1965]).

133. COLO. REV. STAT. ANN. § 14-2-209 (1973); ME. REV. STAT. ANN. tit. 19, § 167-A (Supp. 1975); MISS. CODE ANN. § 93-3-1 (1972); N.H. REV. STAT. ANN. § 507:8-

Texas Legislature would not be without precedent were it to enact legislation recognizing the right of either spouse to recover, while at the same time retaining its "heart-balm" statute. Both Colorado and Maine have enacted successful statutes to this effect.[134] The simultaneous maintenance of these two dissimilar provisions concerning consortium does not present an incongruity; rather, it reflects a legislative preference for the distinct differences between the intentional and negligent invasions of the consortium.

PROPOSED LEGISLATION

Due to the inadequate treatment by the Texas judiciary of the negligent impairment of consortium issue, an obvious necessity exists to protect this interest of either spouse. This protection could easily be accomplished by drafting an addition to Section 4 of the Texas Family Code. In drafting such a statute, the following considerations might be taken into account. First, the statute should operate prospectively in order to preclude a spouse from initiating a consortium action while still within the limitations period where the action of the other spouse has been concluded by settlement or judgment. Second, since the Texas "heart-balm" statute extends only to criminal conversation,[135] the suggested statute should provide a remedy for any other type of intentional impairment of consortium in order to deal conclusively with all consortium injuries.[136] The real significance of the statute, however, would lie in providing a remedy for the negligent invasion of consortium. The statute would thereby protect the consortium interest from its most frequent manner of injury.[137] Such a statute would not violate public policy since the cases have indicated a trend toward providing a remedy for largely nonpecuniary and psychological losses,[138] and any effect on automobile liability insurance premiums appears to be negligible.[139]

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a (1968) (allows either husband or wife); OKLA. STAT. ANN. tit. 32, § 15 (Supp. 1974); ORE. REV. STAT. § 108.010 (Supp. 1973); S.C. CODE ANN. § 10-2593 (Supp. 1974) (allows either husband or wife); TENN. CODE ANN. § 25-109 (Supp. 1974); W. VA. CODE ANN. § 48-3-19a (Supp. 1975).

134. COLO. REV. STAT. ANN. § 13-20-202 (1973) (breach of promise to marry, alienation of affections, criminal conversation); ME. REV. STAT. ANN. tit. 19, § 167 (Supp. 1974) (alienation of affections).

135. *See* Tex. Laws 1975, ch. 637, § 1, at 1942.

136. *Contra,* Felsenthal v. McMillan, 493 S.W.2d 729, 732 (Tex. 1973).

137. *See generally* H. CLARK, HANDBOOK OF THE LAW OF DOMESTIC RELATIONS § 10.5, at 276 (1968) (most cases arise from automobile accidents).

138. *See generally* cases and text cited note 72 *supra.*

139. *See* H. CLARK, HANDBOOK OF THE LAW OF DOMESTIC RELATIONS § 10.5, at 277 (1968) (belief that the effect of allowing recovery for loss of consortium has little effect on insurance premiums). Professor Clark's view appears to be correct as one major insurance company had no quantitative data collected in those states presently allowing the cause of action. The general claims consultant felt that very little would be added to the average claim costs. Letter from State Farm Mutual Automobile Insurance Company to Jess C. Rickman, October 27, 1975.

The following provision is recommended as an addition to Section 4 of the Texas Family Code, and is drawn primarily from statutory enactments of various other jurisdictions:[140]

Texas Family Code Section 4.06: *Action for Loss of Consortium.*

(a) Either a husband or wife may maintain an action for damages for the loss or impairment of the right of consortium, whether caused by a third party's negligent act, or an intentional act, unless otherwise limited by statute.

(b) This action shall not be retroactive but shall be effective only as to causes of action arising after its adoption.

This proposed statute provides a combination of comprehensive coverage and flexibility to deal with all types of injuries to the consortium interest. It is flexible enough to allow the legislature, for public policy reasons, to also abolish alienation of affections without impairing the broad treatment of any other type of negligent or intentional interferences with the marital relation.

CONCLUSION

The fact that Texas courts have never decided the issue of whether a husband might recover for the loss of his wife's consortium, in conjunction with the *Garrett v. Reno Oil Co.* decision denying a wife recovery, raises the implication that Texas denies both spouses a cause of action.[141] Although legislative action is recommended, this should not preclude positive response by the Texas courts when confronted with the consortium issue. An Arizona court was recently faced with a similar argument; that because there were no decisions recognizing the right of consortium for the husband, therefore none existed in Arizona, and further, neither spouse should have a cause of action.[142] The court dismissed the arguments and granted either spouse the right to recover for the negligent impairment of consortium.

As indicated by Mr. Justice Holmes' quotation at the beginning of this comment, the meaning of a word is often a product of the era in which it is used.[143] Such is the case with the meaning of consortium. From initial representation of the sentimental elements in early English law, to a meaning of wherein the material services of the wife become predominant, the interpretation has come full circle to once again represent protection of the sentimental elements of the marriage. Consortium, therefore, can be considered as the "skin of a living thought"[144] which allows the courts to keep pace with modern society by recognizing that the emotional interests of the marriage rela-

140. *See* N.H. REV. STAT. ANN. § 507:8-a (1968); S.C. CODE ANN. § 10-2593 (Supp. 1974).

141. Garrett v. Reno Oil Co., 271 S.W.2d 764, 767 (Tex. Civ. App.—Fort Worth 1954, writ ref'd n.r.e.).

142. City of Glendale v. Bradshaw, 503 P.2d 803, 805 (Ariz. 1972).

143. Towne v. Eisner, 245 U.S. 418, 425 (1918).

144. *Id.* at 425.

tionship are as worthy of protection from negligent invasion as are other legally protected interests. In this light, a thorough re-examination of the Texas position is urged and it is recommended that Texas adopt the majority view of allowing either spouse a cause of action for the negligent impairment of consortium. Whether this is accomplished by the courts or by statute, it is essential that an adequate remedy be provided for this type of often tragic and long term injury that has so long been ignored as a valid area of compensation.

Note: After this comment went to press, a California court on remand from Rodriquez v. Bethlehem Steel Corp., 115 Cal. Rptr. 765 (Sup. Ct. 1974), awarded damages of $4,735,996. The amount of the award allocated to the wife's loss of consortium was $500,000.—Ed.