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Either Spouse May Recover for Negligent Impairment of Consortium.

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to be an asset of the professional practice its value must be considered in a property division upon divorce.[104]

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TORTS—Loss of Consortium—Either Spouse May Recover for Negligent Impairment of Consortium

Whittlesey v. Miller,
572 S.W.2d 665 (Tex. 1978).

Stewart Miller and David Whittlesey were involved in an automobile collision. In a subsequent settlement, Mr. Miller released Whittlesey from all claims for a consideration of $9,650. Several months later, Miller's wife sued Whittlesey alleging that Whittlesey's negligence had caused personal injury to her husband thereby depriving her of her husband's consortium.[1] At trial, Whittlesey was granted summary judgment on the ground that in Texas no cause of action existed for the negligent impairment of the wife's consortium.[2] The court of civil appeals reversed, holding that the common law had long recognized a cause of action for loss of the husband's consortium and that the Texas Equal Rights Amendment[3] mandated that the same cause of action now be given to the wife.[4] Whittlesey appealed to the Texas Supreme Court contending that no cause of action existed for either spouse and that a new cause of action could be created only by the legislature. Held—*Affirmed.* Either spouse has a cause of action for loss of

104. *See In re* Marriage of Lukens, 558 P.2d 279, 282 (Wash. Ct. App. 1976); *cf.* Berg v. Berg, 434 P.2d 1, 2 (Wash. 1967)(husband forced to buy wife's share in dental office, equipment, and accounts receivable).

1. Consortium has generally been defined as the right of one spouse to the affection, society, assistance, companionship, services, solace, sexual relations, and comfort of the other. *E.g.*, Rodriguez v. Bethlehem Steel Corp., 525 P.2d 669, 684, 115 Cal. Rptr. 765, 780 (1974) (en banc); Deems v. Western Md. Ry., 231 A.2d 514, 525 (Md. 1967); Millington v. Southeastern Elevator Co., 239 N.E.2d 897, 899, 293 N.Y.S.2d 305, 308 (1968); MacDonald v. Trammell, 356 S.W.2d 143, 145 (Tex. 1962).

2. In granting summary judgment the trial court relied on Garrett v. Reno Oil, Co., 271 S.W.2d 764, 766 (Tex. Civ. App.—Fort Worth 1954, writ ref'd n.r.e.), *disapproved in* Whittlesey v. Miller, 572 S.W.2d 665, 668 (Tex. 1978).

3. TEX. CONST. art. I, § 3a. The amendment reads in pertinent part: "Equality under the law shall not be denied or abridged because of sex, race, color, creed, or national origin . . . ." *See generally* Sampson, *The Texas Equal Rights Amendment and the Family Code: Litigation Ahead*, 5 TEX. TECH L. REV. 631 (1974); Comment, *The ERA and Texas Marital Law*, 54 TEXAS L. REV. 590 (1976).

4. Miller v. Whittlesey, 562 S.W.2d 904, 906 (Tex. Civ. App.—Tyler), *aff'd*, 572 S.W.2d 665 (Tex. 1978).

consortium when the other spouse has been negligently injured by a third party.[5]

At common law, the husband and wife were considered as one, and the wife's identity was completely merged into that of the husband.[6] Because of the subordinate role of the wife, the husband was considered to have a property right in his spouse, and the wife was treated as the servant of the husband.[7] Thus, the husband had a cause of action for any interference with his property rights.[8] Since the loss of things such as society, companionship, and solace were considered to be only sentimental intangible injuries that the law could not compensate,[9] the courts developed a master-servant relationship between husband and wife.[10] As the master, the husband could then measure his damages in terms of the loss of his wife's services. Because of the evolution of the master-servant concept of marital relations, it was held beyond question that the husband could maintain an action for loss of consortium,[11] for his wife's reduced earning capacity, and for his loss of her services from a third-party tortfeasor.[12] On the other hand, when the husband was injured the wife was unable to recover for loss of consortium.[13] Since the wife was the husband's servant, the wife was not

5. Whittlesey v. Miller, 572 S.W.2d 665, 668 (Tex. 1978).

6. *E.g.*, Wallach v. Wallach, 95 S.E.2d 750, 751 (Ga. Ct. App. 1956); Heckendorn v. First Nat'l Bank, 166 N.E.2d 571, 572 (Ill. 1960); Palmer v. Turner, 43 S.W.2d 1017, 1017-18 (Ky. 1931); Cerruti v. Simone, 179 A. 257, 258 (N.J. 1935); *see* Holbrook, *The Change in the Meaning of Consortium*, 22 MICH. L. REV. 1, 2 (1923); Comment, *The Negligent Impairment of Consortium—A Time for Recognition as a Cause of Action in Texas*, 7 ST. MARY'S L.J. 864, 866 (1976).

7. *E.g.*, Commercial Carriers v. Small, 126 S.W.2d 143, 146 (Ky. 1939); Swan v. F.W. Woolworth Co., 222 N.Y.S. 111, 112 (Sup. Ct. 1927); Martin v. Weaver, 161 S.W.2d 812, 818 (Tex. Civ. App.—El Paso 1941, writ ref'd w.o.m.). Even though the wife paid the rent and supported the husband he was considered the head of the house. Patterson v. State, 69 S.E. 591, 591 (Ga. Ct. App. 1910).

8. *See* Wright v. Schebler, Co., 37 F.R.D. 319, 320 (S.D. Iowa 1965) (applying Iowa law); Metropolitan St. R.R. v. Johnson, 16 S.E. 49, 50 (Ga. 1892); Acuff v. Schmit, 78 N.W.2d 480, 483-84 (Iowa 1956); Hoard v. Peck, 56 Barb. 202, 203-10 (N.Y. App. Div. 1867); Earl v. Tupper, 45 Vt. 275, 280 (1873).

9. *See* Commissioner's v. Legg, 93 Ind. 523, 531 (1883); Hawkins v. Front St. Cable Ry., 28 P. 1021, 1022 (Wash. 1892).

10. *See* Dini v. Naiditch, 170 N.E.2d 881, 889 (Ill. 1960); Montgomery v. Stephen, 101 N.W.2d 227, 229 (Mich. 1960). *See generally* Comment, *The Development of the Wife's Cause of Action for Loss of Consortium*, 14 CATH. LAW. 246, 249 (1968); 61 COLUM. L. REV. 1341, 1343 (1961).

11. *See* Dini v. Naiditch, 170 N.E.2d 881, 889 (Ill. 1960); Montgomery v. Stephen, 101 N.W.2d 227, 229 (Mich. 1960). *See generally* Comment, *The Development of the Wife's Cause of Action for Loss of Consortium*, 14 CATH. LAW. 246, 249 (1968); 61 COLUM. L. REV. 1341, 1343 (1961).

12. Martin v. Weaver, 161 S.W.2d 812, 818 (Tex. Civ. App.—El Paso 1941, writ ref'd w.o.m.); *see* Commercial Carriers v. Small, 126 S.W.2d 143, 146 (Ky. 1939); Swan v. F.W. Woolworth Co., 222 N.Y.S. 111, 112 (Sup. Ct. 1972).

13. *E.g.*, Criqui v. Blaw-Knox Corp., 318 F.2d 811, 814 (10th Cir. 1963) (construing

damaged because the husband owed her no services.[14] Consequently, the wife was denied a cause of action.[15] When the husband was injured the courts reasoned that the marriage was made whole by the husband's compensatory damages and any recovery by the wife would therefore result in a double recovery.[16] Even after the widespread passage of married women's statutes,[17] the courts continued to deny the wife's recovery.[18]

A profitable comparison can be made between the cause of action for the negligent impairment of consortium and similar actions based on intentional torts. At common law, intentional invasions of consortium engendered actions for alienation of affections and criminal conversation.[19] The action of alienation of affections was based upon any intentional act that deprived one spouse of the society, affection, and consortium of the other.[20] In this context, the loss of consortium was considered an element of damages[21] although the phrase was generally synonymous with the action.[22] An action for criminal conversation may be distinguished from alienation of

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Kansas law); Rush v. Great Am. Ins. Co., 376 S.W.2d 454, 459 (Tenn. 1964); Seagraves v. Legg, 127 S.E.2d 605, 608 (W. Va. 1962).

14. *E.g.*, Pinkerton Nat'l Detective Agency v. Stevens, 132 S.E.2d 119, 121-22 (Ga. Ct. App. 1963); Hoffman v. Dautel, 388 P.2d 615, 618 (Kan. 1964); State Farm Mut. Auto Ins. Co. v. Village of Isle, 122 N.W.2d 36, 42 (Minn. 1963).

15. *E.g.*, Albertson v. Travis, 576 P.2d 1090, 1091 (Kan. Ct. App. 1978); Krohn v. Richardson-Merrell, Inc., 406 S.W.2d 166, 167 (Tenn.), *cert. denied*, 386 U.S. 970 (1967); Ellis v. Hathaway, 493 P.2d 985, 986 (Utah 1972). *Compare* RESTATEMENT OF TORTS § 695 (1938) (married woman not entitled to recover for illness or bodily harm to husband) *with* RESTATEMENT (SECOND) OF TORTS § 693 (1977) (allowing either spouse to recover). At least one commentator has written that the rationale for this denial of the wife's recovery might have been the prevailing impression that sexual relations were to be enjoyed by the husband but endured by the wife and the deprivation of the wife's marital relations was therefore no great loss. Clark, *The Wife's Action for Negligent Impairment of Consortium*, 3 FAM. LAW Q. 197, 198 (1969).

16. *See* Hitaffer v. Argonne Co., 183 F.2d 811, 814 (D.C. Cir.), *cert. denied*, 340 U.S. 852 (1950); Garrett v. Reno Oil Co., 271 S.W.2d 764, 767-68 (Tex. Civ. App.—Fort Worth 1954, writ ref'd n.r.e.), *disapproved in* Whittlesey v. Miller, 572 S.W.2d 665, 668 (Tex. 1978).

17. *See, e.g.*, ARIZ. REV. STAT. ANN. § 25-214 (1976); MICH. STAT. ANN. § 26.181 (1974); N.J. STAT. ANN. §§ 37:2-1 to 30 (West 1968). The term "married Women's statutes" refers to a series of legislative enactments that removed the wife's legal incapacity to contract, to sue, and to own property in her own right. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 122, at 861 (4th ed. 1971).

18. Carey v. Foster, 221 F. Supp. 185, 188 (E.D. Va. 1964), *aff'd*, 345 F.2d 772 (4th Cir. 1965); State Farm Mut. Auto Ins. Co. v. Village of Isle, 122 N.W.2d 36, 42 (Minn. 1963).

19. *See, e.g.*, Fennell v. Littlejohn, 125 S.E.2d 408, 412 (S.C. 1962); Smith v. Smith, 225 S.W.2d 1001, 1005 (Tex. Civ. App.—Amarillo 1949, no writ); Williams v. Rearick, 218 S.W.2d 225, 227 (Tex. Civ. App.— Amarillo 1949, no writ).

20. Red Eagle v. Free, 130 P.2d 308, 310 (Okla. 1942); *accord*, Collier v. Perry, 149 S.W.2d 292, 295 (Tex. Civ. App.—El Paso 1941, writ dism'd judgmt cor.).

21. Smith v. Smith, 225 S.W.2d 1001, 1005 (Tex. Civ. App.—Amarillo 1949, no writ); *see* Sharp v. Hayes, 50 A.2d 412, 414 (Del. Super. Ct. 1946).

22. *See* Collier v. Perry, 149 S.W.2d 292, 294 (Tex. Civ. App.—El Paso 1941, writ dism'd judgmt cor.).

affections by the requirement of illicit sexual relations.[23] Both of these actions were maintainable at common law[24] and are valid actions in many jurisdictions today.[25] At first only the husband was allowed an action for the intentional loss of consortium, but gradually, through the movement for equality for women, courts began to recognize a cause of action for the wife.[26] Even after the courts allowed the wife a recovery for intentional loss of consortium,[27] they still refused to allow her an action for the negligent injury to her husband.[28] Thus for many years the wife was refused recovery due solely to the absence of intent.

Hitaffer v. Argonne[29] was one of the first cases to allow a wife to recover for loss of consortium due to the negligent injury to her husband.[30] In *Hitaffer* the plaintiff's husband was compensated for injuries under the federal Longshoreman's and Harbor Worker's Compensation Act.[31] The court recognized the general rule barring a wife's recovery for loss of consortium due to the negligence of a third party.[32] Rejecting the various arguments against allowing such an action,[33] the court reasoned that since the

23. Hirschy v. Coodley, 253 P.2d 93, 94 (Cal. Dist. Ct. App. 1953); Fennell v. Littlejohn, 125 S.E.2d 408, 412 (S.C. 1962); Felsenthal v. McMillan, 493 S.W.2d 729, 729-30 (Tex. 1973).

24. Felsenthal v. McMillan, 493 S.W.2d 729, 730 (Tex. 1973); *see* Comment, *The Negligent Impairment of Consortium—A Time For Recognition as a Cause of Action In Texas*, 7 ST. MARY'S L.J. 864, 869 (1976); Comment, *Piracy on the Matrimonial Seas—The Law and the Marital Interloper*, 25 SW. L.J. 594, 598 (1971). The tort of criminal conversation has been abolished in Texas. TEX. FAM. CODE ANN. § 4.05 (Vernon Supp. 1978); McKnight, *Amendments and Commentary to Title 1, Texas Family Code*, 8 TEX. TECH L. REV. 1, 16 (1976).

25. *E.g.*, Sebastian v. Kluttz, 170 S.E.2d 104, 106-07, 109 (N.C. Ct. App. 1969) (criminal conversation and alienation of affections); Fennell v. Littlejohn, 125 S.E.2d 408, 412 (S.C. 1962) (criminal conversation); Kelsey-Seybold Clinic v. Maclay, 466 S.W.2d 716, 720 (Tex. 1971) (alienation of affections); Schneider v. Mistele, 158 N.W.2d 383, 384 (Wis. 1968) (criminal conversation and alienation of affections).

26. *See* Pratt v. Daly, 104 P.2d 147, 153 (Ariz. 1940); Bennett v. Bennett, 23 N.E. 17, 18 (N.Y. 1889); Flandermeyer v. Cooper, 98 N.E. 102, 105-07 (Ohio 1912); Acchione v. Acchione, 101 A.2d 642, 644 (Pa. 1954); Moberg v. Scott, 161 N.W. 998, 1000-01 (S.D. 1917); Comment, *The Negligent Impairment of Consortium—A Time for Recognition as a Cause of Action in Texas*, 7 ST. MARY'S L.J. 864, 868 (1976).

27. *See* Albertson v. Travis, 576 P.2d 1090, 1091 (Kan. Ct. App. 1978); McAdam v. Wrisley, 349 A.2d 886, 887 (Vt. 1975); Bates v. Donnafield, 481 P.2d 347, 349 (Wyo. 1971).

28. *See, e.g.*, Cravens v. Louisville & N.R.R., 242 S.W. 628, 632 (Ky. 1922); Feneff v. New York Cent. & H.R.R., 89 N.E. 436, 438 (Mass. 1909); Tobiassen v. Polley, 114 A. 153, 154 (N.J. 1921). *See generally* Comment, *The Negligent Impairment of Consortium—A Time for Recognition as a Cause of Action in Texas*, 7 ST. MARY'S L.J. 864, 868-69 (1976).

29. 183 F.2d 811 (D.C. Cir.), *cert. denied*, 340 U.S. 852 (1950).

30. *Id.* at 819; *accord*, Glendale v. Bradshaw, 503 P.2d 803, 805 (Ariz. 1972) (en banc); Brown v. Georgia-Tennessee Coaches, Inc., 77 S.E.2d 24, 32 (Ga. Ct. App. 1953).

31. Hitaffer v. Argonne, 183 F.2d 811, 812 (D.C. Cir.), *cert. denied*, 340 U.S. 852 (1950).

32. *Id.* at 812.

33. *Id.* at 813-16. The court addressed and rejected the following arguments: (1) the wife had no right to her husband's services and therefore no cause of action; (2) the "emancipation

marriage partners stand on equal footing no justification existed for allowing the husband to recover and denying the same cause of action to the wife.[34] Although the *Hitaffer* decision was not immediately accepted,[35] a vast majority of jurisdictions now recognize the action either by statute[36] or judicial decision.[37]

In most jurisdictions that do not recognize a wife's action for loss of consortium the unity concept of husband and wife has served as the basis for refusing the wife a right of recovery.[38] In community property states, however, the entity theory has not been followed,[39] as these jurisdictions derive their law of marital relations from the civil rather than the common law.[40] Generally, in community property jurisdictions the marriage has the characteristics of a partnership,[41] with each spouse maintaining separate title to the property that he or she brought into the marriage[42] and acquiring a one-half undivided interest in all property obtained after marriage.[43] Thus, the concept of the wife having separate title to property, a concept foreign to common law, has always been the law in the community property states.[44]

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acts" denied a recovery for either spouse; (3) the injury to the wife was too indirect for compensation; (4) there was no proper measure of damages; (5) the wife had no cause of action at common law. *Id.* at 813-16.

34. *Id.* at 817.

35. *See, e.g.,* Jeune v. Del E. Webb Const. Co., 269 P.2d 723, 724 (Ariz. 1954); Franzen v. Zimmerman, 256 P.2d 897, 898 (Colo. 1953) (en banc); Nelson v. Lockett & Co., 243 P.2d 719, 721-22 (Okla. 1952) (per curiam).

36. *See, e.g.,* COLO. REV. STAT. § 14-2-209 (1974); MISS. CODE ANN. § 93-3-1 (1973); W. VA. CODE § 48-3-19a (1976).

37. *See, e.g.,* Swartz v. United States Steel Corp., 304 So. 2d 881, 887 (Ala. 1974) (overruling prior law denying wife's action); Novak v. Kansas City Transit, Inc., 365 S.W.2d 539, 542-44 (Mo. 1963) (en banc) (overruling prior law denying wife's action); Fitzgerald v. Meissner & Hicks, Inc., 157 N.W.2d 595, 599-600 (Wis. 1968) (wife's action independent from husband's).

38. See notes 6-8 *supra* and accompanying text.

39. The community property states are Arizona, California, Idaho, Louisiana, New Mexico, Nevada, Texas, and Washington. W. DE FUNIAK & M. VAUGHN, PRINCIPLES OF COMMUNITY PROPERTY § 37, at 56 (2d ed. 1971).

40. *See* Barkley v. Dumke, 99 Tex. 150, 150, 87 S.W. 1147, 1147 (1905); Comment, *The Negligent Impairment of Consortium—A Time for Recognition as a Cause of Action in Texas,* 7 ST. MARY'S L.J. 864, 869-70 (1976).

41. R. BALLINGER, BALLINGER ON COMMUNITY PROPERTY §§ 15, 16 (1895).

42. TEX. FAM. CODE ANN. § 5.01(a)(1) (Vernon 1975); W. DE FUNIAK & M. VAUGHN, PRINCIPLES OF COMMUNITY PROPERTY § 82, at 200 (2d ed. 1971); H. PLATT, PROPERTY RIGHTS OF MARRIED WOMEN §§ 10-11, at 11-13 (1885).

43. All property acquired after marriage is presumed to be community unless shown affirmatively to be otherwise. *E.g.,* Kingsbery v. Kingsbery, 379 P.2d 893, 895 (Ariz. 1963); Mounsey v. Stahl, 306 P.2d 258, 259 (N.M. 1957); Tarver v. Tarver, 394 S.W.2d 780, 783 (Tex. 1965); *see* TEX. FAM. CODE ANN. § 5.02 (Vernon 1975); W. DE FUNIAK & M. VAUGHN, PRINCIPLES OF COMMUNITY PROPERTY, § 60, at 116-20 (2d ed. 1971).

44. *Cf.* Leake v. Saunders, 126 Tex. 69, 72-73, 84 S.W.2d 993, 994 (1935); Dickson v. Strickland, 114 Tex. 176, 201-04, 265 S.W. 1012, 1021-23 (1924).

The first case in Texas to consider the wife's cause of action for loss of consortium was *Garrett v. Reno Oil Co.*, decided in 1954.[45] In *Garrett* the Fort Worth Court of Civil Appeals relied on the inherent unfairness of a double recovery for the community estate.[46] In refusing to follow the minority rule of *Hitaffer v. Argonne*,[47] the court chose to follow the majority rule at that time and rejected the wife's cause of action for loss of consortium due to the negligence of a third party tortfeasor.[48] The court reasoned that tort damages recovered by a spouse were community property in Texas[49] and allowing the wife to recover would therefore result in a double recovery to the community estate.[50]

Until 1972, Texas cases had held tort compensation for injuries sustained during marriage to be community property because it failed to meet the constitutional definition of separate property,[51] but in *Graham v. Franco*[52] the Texas Supreme Court held that recovery for personal injuries, other than for loss of earning capacity, was separate property.[53] In so holding the court stated that by adopting section 15 of article 16 of the Texas Constitution, the legislature never intended to make a cause of action a community asset.[54] Rather there could be no right greater than the security of one's person,[55] and the reason for holding recovery for personal injuries as separate property is because of the constitutional definition of separate

45. 271 S.W.2d 764 (Tex. Civ. App.—Fort Worth 1954, writ ref'd n.r.e.), *disapproved in* Whittlesey v. Miller, 572 S.W.2d 665, 668 (Tex. 1978). The other community property jurisdictions allowing the wife a recovery are Arizona, California, Idaho, and Nevada. *See* Glendale v. Bradshaw, 503 P.2d 803, 805 (Ariz. 1972) (en banc); Rodriguez v. Bethlehem Steel Corp., 525 P.2d 669, 686, 115 Cal. Rptr. 765, 782 (1974) (en banc); Nichols v. Sonneman, 418 P.2d 562, 568 (Idaho 1966); General Elec. Co. v. Bush, 498 P.2d 366, 371 (Nev. 1972).

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

47. 183 F.2d 811, 814 (D.C. Cir.), *cert. denied*, 340 U.S. 852 (1950).

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

49. *Id.* at 767; *accord*, Northern Texas Traction Co. v. Hill, 297 S.W. 778, 780 (Tex. Civ. App.—El Paso 1927, writ ref'd), *overruled by* Graham v. Franco, 488 S.W.2d 390, 396 (Tex. 1972).

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

51. *See, e.g.*, Blair v. Stewart, 49 F.2d 257, 258 (5th Cir. 1931) (applying Texas law); Moore v. Moore, 192 S.W.2d 929, 930 (Tex. Civ. App.— Fort Worth 1946, no writ); Moss v. Reverra, 40 S.W.2d 854, 857 (Tex. Civ. App.—Texarkana 1931, no writ). Separate property is that property owned or claimed by the spouse prior to marriage, or property acquired during marriage by gift, devise, or descent. TEX. FAM. CODE ANN. § 5.01(a)(1)(2) (Vernon 1975); *see* TEX. CONST. art. 16, § 15.

52. 488 S.W.2d 390 (Tex. 1972).

53. *Id.* at 396; *see* TEX. FAM. CODE ANN. § 5.01(a)(3) (Vernon 1975).

54. Graham v. Franco, 488 S.W.2d 390, 395 (Tex. 1972).

55. *Id.* at 395.

property.[56] Since a spouse brings his person into the marriage, the constitutional definition of separate property could be construed to include the spouse's body or person.[57] A tort recovery is meant to make a person whole by compensatory damages, thus this recovery is a "replacement" of separate property and not the "acquisition" of an asset by the community.[58] Therefore, recoveries designed to compensate a person for physical or emotional loss are now separate property.[59]

In *Whittlesey v. Miller*[60] the Texas Supreme Court considered whether either spouse has an independent cause of action against a third party tortfeasor for the negligent impairment of consortium.[61] The court recognized that the marital interests embodied in the concept of consortium should be protected from the negligence of third parties.[62] The court expressly disapproved *Garrett* to the extent it conflicted with the court's holding,[63] and joined the majority of jurisdictions which have remedied the common law anomaly allowing the husband a cause of action for negligent impairment of consortium but denying the wife the same right.[64]

The tortfeasor's argument that allowing the cause of action would result in a double recovery was rejected by the court. It was noted that the

56. *See, e.g.*, Blair v. Stewart, 49 F.2d 257, 258 (5th Cir. 1931) (applying Texas law); Moore v. Moore, 192 S.W.2d 929, 930 (Tex. Civ. App.—Fort Worth 1946, no writ); Moss v. Reverra, 40 S.W.2d 854, 857 (Tex. Civ. App.—Texarkana 1931, no writ).

57. *See* Cade v. Dudney, 379 S.W.2d 370, 373 (Tex. Civ. App.—Eastland 1964, writ ref'd n.r.e.); Steele v. Caldwell, 158 S.W.2d 867, 869 (Tex. Civ. App.—Eastland 1942, no writ). *See also* TEX. FAM. CODE ANN. § 5.01(a)(1) (Vernon 1975).

58. Graham v. Franco, 488 S.W.2d 390, 394 (Tex. 1972); *see* Chapman v. Allen, 15 Tex. 278, 283 (1855) (separate property that has changed form remains separate); Rose v. Houston, 11 Tex. 324, 326 (1854) (property received in exchange for separate property is separate property); Love v. Robertson, 7 Tex. 6, 9 (1851) (property bought with proceeds of separate property is separate). *See generally* Huie, *The Texas Constitutional Definition of the Wife's Separate Property*, 35 TEXAS L. REV. 1054, 1061 (1957).

59. *Compare* Graham v. Franco, 488 S.W.2d 390, 396 (Tex. 1972) (recovery for personal injury is separate property) *with* Whittlesey v. Miller, 572 S.W.2d 665, 669 (Tex. 1978) (damages to emotional interests are separate property). Loss of consortium is generally held to be an emotional loss. *See, e.g.*, Williams v. Schwartz, 131 Cal. Rptr. 200, 202 (Ct. App. 1976); Whittlesey v. Miller, 572 S.W.2d 665, 669 (Tex. 1978); Hawkins v. Front St. Cable Ry., 28 P. 1021, 1022 (Wash. 1892).

60. 572 S.W.2d 665 (Tex. 1978).

61. *Id.* at 665.

62. *Id.* at 668.

63. *Id.* at 668.

64. *See id.* at 668. Eight jurisdictions still do not recognize the action: Connecticut, Kansas, New Mexico, North Carolina, Utah, Virginia, Washington, and Wyoming. *See* Carey v. Foster, 221 F. Supp. 185, 188 (E.D. Va. 1963), *aff'd*, 345 F.2d 772, 776 (4th Cir. 1965); Lockwood v. Wilson H. Lee Co., 128 A.2d 330, 332 (Conn. 1956); Hoffman v. Dautel, 388 P.2d 615, 626 (Kan. 1964); Roseberry v. Starkovich, 387 P.2d 321, 326-27 (N.M. 1963); Cozart v. Chapin, 241 S.E.2d 144, 145 (N.C. Ct. App. 1978); Ellis v. Hathaway, 493 P.2d 985, 986 (Utah 1972); Ash v. S.S. Mullen, Inc., 261 P.2d 118, 118 (Wash. 1953); Bates v. Donnafield, 481 P.2d 347, 349 (Wyo. 1971).

damages to the injured spouse were distinct from those damages attributable to injury to the deprived spouse.[65] The court also stated that the recovery for loss of consortium was to be the separate property of the deprived spouse.[66] This consortium recovery can be distinguished on this basis from any recovery for loss of earnings, which would inure to the benefit of the community.[67]

In some jurisdictions, double recovery is avoided procedurally by requiring joinder of the actions of both spouses.[68] In *General Electric Co. v. Bush*[69] for example the Nevada Supreme Court noted that the danger of double recovery was not onerous because an action for loss of consortium was an example of a single tortious act that harmed two people by virtue of their relationship with each other.[70] Even though there can be no duplicate recovery since each spouse's recovery is a singular recovery for an injury peculiar to that spouse, the court required a mandatory joinder to safeguard against a double recovery.[71] In Texas, however, mandatory joinder is impeded under the present procedural rules.[72] In *Cooper v. Texas Gulf Industies, Inc.*[73] the Texas Supreme Court held that the necessity of joinder was merely "a question of whether the court ought to proceed with those who are present."[74] A defendant in Texas who is confronted with both a negligence and a consortium action may attempt to join the spouses pursuant to Rule 39 of the Texas Rules of Civil Procedure.[75] Under this

65. Whittlesey v. Miller, 572 S.W.2d 665, 669 (Tex. 1978).

66. *Id.* at 669; *see* Graham v. Franco, 488 S.W.2d 390, 396 (Tex. 1972). Injuries to the wife were considered separate under the Spanish and Mexican law from which the Texas system of marital property is derived. *Id.* at 394. *See generally* W. DE FUNIAK & M. VAUGHN, PRINCIPLES OF COMMUNITY PROPERTY §§ 81-82, (2d ed. 1971); *see also id.* § 66 (acquisitions, earnings, and gains during marriage).

67. *See* TEX. FAM. CODE ANN. § 5.01(a)(3) (Vernon 1975). In making the wife's action for loss of consortium a separate action, the court has in effect rendered a right growing out of the community relation separate. *See* Whittlesey v. Miller, 572 S.W.2d 665, 669 (Tex. 1978) (recovery for loss of consortium is separate property). *See also* Vazquez v. State, 350 So. 2d 1094, 1097 (Fla. Dist. Ct. App. 1977) (consortium is essential characteristic of marriage relationship); Riggs v. Smith, 11 P.2d 358, 360 (Idaho 1932) (consortium is right growing out of marriage); Thill v. Modern Erecting Co., 170 N.W.2d 865, 867 (Minn. 1969) (consortium a right inherent in marital relationship).

68. *See, e.g.*, Schreiner v. Fruit, 519 P.2d 462, 466 (Alaska 1974); Thill v. Modern Erecting Co., 170 N.W.2d 865, 869 (Minn. 1969); General Elec. Co. v. Bush, 498 P.2d 366, 371 (Nev. 1972); Moran v. Quality Aluminum Casting Co., 150 N.W.2d 137, 145 (Wis. 1967).

69. 498 P.2d 366 (Nev. 1972).

70. *Id.* at 371; *accord*, Whittlesey v. Miller, 572 S.W.2d 665, 667 (Tex. 1978).

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

72. *See* Comment, *The Negligent Impairment of Consortium—A Time for Recognition as a Cause of Action in Texas*, 7 ST. MARY'S L.J. 864, 878 (1976).

73. 513 S.W.2d 200 (Tex. 1974).

74. *Id.* at 204; *see* TEX. R. CIV. P. 39; 1 R. MCDONALD, TEXAS CIVIL PRACTICE, § 3.08.1 (Supp. 1978).

75. *See* TEX. R. CIV. P. 39(a).

rule, it seems that the spouses should be joined if feasible,[76] but the trial court may also decide to proceed without joinder.[77]

In addition to the procedural safeguard against double recovery provided by joinder rules, defendants may seek further protection with special jury instructions.[78] As Texas uses the special issue system of charging the jury,[79] a special instruction given with the issue on the amount of the wife's damages would remind the jurors what should be considered in computing the wife's damages,[80] and yet not prejudice the wife.[81]

Since a cause of action for loss of consortium is derivative of the other spouse's action for negligence,[82] it appears that the physically injured spouse must establish his cause of action first in order for the other spouse to establish a recovery for loss of consortium.[83] This is particularly true when the injured spouse is precluded from recovery under the Texas system of comparative negligence.[84] If the injured spouse was found to be more than fifty percent negligent, his recovery would be barred.[85] Since the

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76. *See id.*

77. *See* TEX. R. CIV. P. 39(a); Comment, *The Negligent Impairment of Consortium—A Time for Recognition as a Cause of Action in Texas*, 7 ST. MARY'S L.J. 864, 878-79 (1976).

78. *See* General Elec. Co. v. Bush, 498 P.2d 366, 371 (Nev. 1972). The court in *Bush* noted that a double recovery could be safeguarded against by including in the jury charge an instruction admonishing the jury not to consider loss of support in arriving at the damages for loss of consortium. *Id.* at 371. *See also* Gates v. Foley, 247 So. 2d 40, 45 (Fla. 1971); Deems v. Western Maryland Ry., 231 A.2d 514, 525 (Md. 1967).

79. *See* TEX. R. CIV. P. 277; 3 R. MCDONALD, TEXAS CIVIL PRACTICE § 12.04, at 279 (rev. 1970). *See generally* G. HODGES, SPECIAL ISSUE SUBMISSION IN TEXAS § 1 (1959).

80. A suggested instruction and issue would be: "You are reminded that a wife is entitled to compensation for her loss of affection, solace, comfort, companionship, society, assistance, and sexual relations. What amount of money, if any, do you find from a preponderance of the evidence will compensate Mrs. _____ for her loss of consortium? $ _____ (answer in dollars and cents). In arriving at this amount you are instructed not to consider the loss of her husband's support or services." *See* Gates v. Foley, 247 So. 2d 40, 45 (Fla. 1971); Deems v. Western Maryland Ry. Co., 231 A.2d 514, 525 (Md. 1967); Whittlesey v. Miller, 572 S.W.2d 665, 666 n.2 (Tex. 1978).

81. *See* G. HODGES, SPECIAL ISSUE SUBMISSION IN TEXAS § 6, at 15 (1959); 3 R. MCDONALD, TEXAS CIVIL PRACTICE § 12.14.2 (rev. 1970).

82. Whittlesey v. Miller, 572 S.W.2d 665, 667 (Tex. 1978); *accord*, Jansen v. Harmon, 164 N.W.2d 323, 324-25 (Iowa 1969); Mariani v. Nanni, 185 A.2d 119, 120 (R.I. 1962).

83. *See, e.g.*, Folk v. York-Shipley, 239 A.2d 236, 238 (Del. 1968); Gates v. Foley, 247 So. 2d 40, 42 (Fla. 1971); Jones v. Slaughter, 220 N.W.2d 63, 65 (Mich. Ct. App. 1974).

84. *See* TEX. REV. CIV. STAT. ANN. art. 2212a (Vernon Supp. 1978-1979). *See generally* Fisher, Nugent & Lewis, *Comparative Negligence: An Exercise in Applied Justice*, 5 ST. MARY'S L.J. 655, 658-59 (1974).

85. *See* TEX. REV. CIV. STAT. ANN. art. 2212a (Vernon Supp. 1978-1979); *cf.* Dixon v. Wright, 214 So. 2d 787, 788 (Fla. Dist. Ct. App. 1968) (contributory negligence); Douberly v. Okefenokee Rural Elec. Membership Corp., 246 S.E.2d 708, 709 (Ga. Ct. App. 1978) (issue of proximate cause); Mariani v. Nanni, 185 A.2d 119, 120 (R.I. 1962) (pure comparative negligence statute).

consortium action is derivative of this action it would be barred as well.[86] If the injured spouse was fifty percent negligent or less, the action would not be barred.[87] If the injured spouse was found to be thirty-five percent negligent, under article 2212a he would be entitled to recover from those tortfeasors who were more than thirty-five percent negligent.[88] Presumably, the consortium action, being derivative of the negligence action, would be proportionately reduced.[89]

By its decision in *Whittlesey*, the Texas Supreme Court has left the minority of jurisdictions and recognized a valid cause of action for loss of consortium.[90] Although some jurisdictions require a joinder to safeguard against a double recovery,[91] the safeguards in the Texas special issue submission system protect the tortfeasor from being burdened with an unfair jury award. Since the consortium recovery is derivative of the negligence action, there are considerations to be made in the event of negligence on the part of the injured spouse. Nevertheless, through proper jury instruction and permissive joinder when feasible, the court has assured that all rights in the marriage will be protected in the event of an injury to a spouse because of a third party's negligence.

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86. *See* Fisher, Nugent & Lewis, *Comparative Negligence: An Exercise in Applied Justice*, 5 ST. MARY'S L.J. 655, 657-58 (1974); *cf.* Nelson v. Busby, 437 S.W.2d 799, 803 (Ark. 1969).

87. Fisher, Nugent & Lewis, *Comparative Negligence: An Exercise in Applied Justice*, 5 ST. MARY'S L.J. 655, 657-58 (1974); TEX. REV. CIV. STAT. ANN. art. 2212a (Vernon Supp. 1978-1979).

88. *See* Nelson v. Busby, 437 S.W.2d 799, 803 (Ark. 1969). The Arkansas Supreme Court stated that when the injured spouse was found to be 35% negligent the recovery for loss of consortium was properly reduced from $5,000 to $3,250. *Id.* at 803.

89. *Id.* at 803.

90. *See* Whittlesey v. Miller, 572 S.W.2d 665, 668 (Tex. 1978).

91. *See, e.g.*, Schreiner v. Fruit, 519 P.2d 462, 466 (Alaska 1974); Thill v. Modern Erecting Co., 170 N.W.2d 865, 869 (Minn. 1969); General Elec. Co. v. Bush, 498 P.2d 366, 371 (Nev. 1972).