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# Ipock v. Gilmore: North Carolina's Refusal to Extend Recovery to the Infant Secondary Tort Victim

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# *Ipock v. Gilmore*: North Carolina's Refusal to Extend Recovery to the Infant Secondary Tort Victim

The history of recovery for interference with the family relationship has been one of almost continual extension. Presently, courts are demonstrating an increasing proclivity to recognize the viability of a cause of action by a minor child for loss of the society, care, support, and affection of a negligently injured parent. This trend is consistent with the greater amenability of courts and legislatures to recognize a cause of action for invasion of intangible, sentimental interests.

This Note examines the development of the right of a minor child to maintain a cause of action for loss of parental consortium and analyzes the North Carolina Court of Appeals' decision to deny recognition of such a claim in *Ipock v. Gilmore*[1] in light of the emerging recognition of rights and remedies for intangible injuries in the North Carolina judicial system. The Note concludes that the *Gilmore* court's refusal to recognize this cause of action is inconsistent with the propensity of modern courts and legislators to recognize a cause of action for indirect invasions of intangible interests.

In *Gilmore*, Judith Hill, a wife and mother, was admitted to a local hospital to undergo a minor sterilization procedure.[2] During the course of the procedure the attending physician, Dr. Gilmore, discovered a cystic mass and chronic infection. He determined that a total abdominal hysterectomy was required and performed the procedure immediately.[3]

Post-operatively, Mrs. Hill was noted to be dazed and confused; subsequently, she was diagnosed as having suffered hypoxic brain damage during the course of the hysterectomy.[4] Mrs. Hill, through her guardian ad litem, Barbara Ipock, and Mrs. Hill's husband and son, instituted an action against Dr. Gilmore and a number of other defendants, including an anesthesiologist, a nurse anesthetist, and Lenoir Memorial Hospital, for damages for the injuries suffered by Mrs. Hill and her family.[5] The trial court allowed Dr. Gilmore's subsequent motion for summary judgment. Plaintiffs excepted to this allowance and the case proceeded against the remaining defendants. The jury returned a verdict in favor of the plaintiff against these defendants.

Meanwhile, plaintiffs had appealed the trial court's order granting defendant Gilmore's motion for summary judgment. The North Carolina Court of

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1. 85 N.C. App. 70, 354 S.E.2d 315, *cert. denied*, 320 N.C. 169, 358 S.E.2d 52 (1987).

2. *Id.* Mrs. Hill was admitted to Lenoir Memorial Hospital for the purpose of undergoing an elective, permanent sterilization procedure known as a "laparoscopy." During the course of a laparoscopy, small incisions are made in the abdominal wall, a laparoscope is inserted in the incision, and the fallopian tubes are sealed with an electric current. The patient is generally released from the hospital on the same day. *See* THE AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS, STERILIZATION BY LAPAROSCOPY (Feb. 1978).

3. *Gilmore*, 85 N.C. App. at 71, 354 S.E.2d at 316.

4. *Id.* The brain damage was caused by a deprivation of oxygen to the brain during or immediately following the surgery.

5. *Id.*

Appeals vacated that order and remanded the case for further proceedings.[6] Thereafter, Dr. Gilmore filed a motion for partial summary judgment, alleging that no genuine issue of material fact existed with respect to the minor plaintiff's claim for loss of parental consortium.[7] The trial court allowed this motion and dismissed the minor's claim. Plaintiffs appealed from this judgment.

On appeal, the *Gilmore* court identified a number of factors justifying its decision affirming the trial court. First, the court reasoned that although the loss of parental consortium may be a tangible injury worthy of compensation, initial recognition of the cause of action would fall within the province of the legislature.[8] Second, the court asserted that it was not "constitutionally required,"[9] on either equal protection or due process grounds, to treat an action for loss of parental consortium in the same manner as it treated an action for loss of spousal consortium[10] or an action for wrongful death.[11] Finally, the *Gilmore* court was influenced by a number of policy arguments: (1) the possibility of overlapping recovery; (2) concern for potential increases in insurance costs; (3) the derivative nature and indirectness of the injury; (4) the uncertainty and remoteness of damage; and (5) concerns for a profusion of tort litigation.[12] Thus, the *Gilmore* court, although conceding the validity of the child's claim, disallowed recovery on the grounds that "there must be a line drawn which ends a tort-feasor's liability at some point."[13] The *Gilmore* court elected to draw that line short of recognition of a child's claim for loss of a parent's support and affection.

At common law, under the doctrine of *pater familias*, an injury to the family was an injury to the father; neither children nor wives could bring actions in their own names to recover for personal injury.[14] Actions for loss of consortium

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6. *Id.* Under the North Carolina Rules of Civil Procedure a motion for summary judgment can be sustained only when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. N.C. GEN. STAT. § 1A-1, Rule 56 (1983); *see* Gore v. Hill, 52 N.C. App. 620, 279 S.E.2d 102, *disc. rev. denied*, 303 N.C. 710, 296 S.E.2d 656 (1981). In deciding a motion for summary judgment, the court must construe the evidence most favorably to the opposing party. N.C. GEN. STAT. § 1A-1, Rule 56.

7. *Gilmore*, 85 N.C. App. at 72, 354 S.E.2d at 316.

8. *Id.* at 73, 354 S.E.2d at 317.

9. *Id.* at 74, 354 S.E.2d at 317. Plaintiffs had asserted that to deny a child's independent cause of action for loss of a child's consortium, when North Carolina law otherwise permits a parent's separate action for loss of a child's consortium as well as an independent action for loss of spousal consortium, violates the equal protection and due process clauses of the fourteenth amendment. Brief for Appellant at 16-18, Ipock v. Gilmore, 73 N.C. App. 182, 326 S.E.2d 271, *disc. rev. denied*, 314 N.C. 116, 322 S.E.2d 481 (1985).

10. The court stated that the elements of "consortium" differed markedly in a spousal relationship and in a parent-child relationship; as such, it would not be anomalous to allow recovery to spouses and to deny recovery to children of an injured individual. *Gilmore*, 85 N.C. App. at 74, 354 S.E.2d at 317.

11. The court noted that the distinction between a wrongful death action and an action for loss of parental consortium was "not between kinds of children, but between a defendant's scope of liability for causing fatal as distinct from nonfatal injuries." *Id.*

12. *Id.* at 74-75, 354 S.E.2d at 318.

13. *Id.* at 75, 354 S.E.2d at 318.

14. *See, e.g.*, Williams, *The Legal Unity of Husband and Wife*, 10 MOD. L. REV. 16, 18 (1947) ([T]he main idea which governs the law of husband and wife is . . . that of the guardianship . . . which the husband has over the wife and over her property.").

developed at common law in the context of suits by a husband for damages for interference with the marital relationship.[15] Originally, courts considered the wife's position to be comparable to that of a servant; the analogy to loss of services was frequently employed to justify the husband's claim for compensation.[16] Eventually the services requirement was largely abandoned and recovery under a cause of action for loss of consortium was extended to include interferences with sentimental interests such as love, affection, society, and companionship.[17]

A married woman had no cause of action at common law for loss of consortium. The wife, considered an "inferior" being, was deemed to have no property right in the services or companionship of her spouse.[18] The advent of the Married Women's Acts in 1913 profoundly changed the wife's legal status.[19] Married women were relieved of their common-law disabilities and sanctioned to contract and maintain actions in their individual capacities.[20] It was not until 1950, however, in *Hittafer v. Argonne*[21] that a court recognized a wife's claim for loss of her husband's consortium resulting from the negligent acts of a third party. In *Hittafer* a woman brought an action against her husband's employer when her husband sustained severe and permanent injuries while in appellee's employ. The defendant-appellee moved for summary judgment on the grounds that the complaint failed to state a cause of action; the trial court granted this motion. The United States Court of Appeals for the District of Columbia, not-

15. *See, e.g.*, Young v. Pridd, 4 Cro. 89, 79 Eng. Rep. 679 (Ex. Ch. 1626); Hyde v. Scyssor, 3 Cro. 538, 79 Eng. Rep. 462 (K.B. 1619).

16. *See* Lippman, *The Breakdown of Consortium*, 30 COLUM. L. REV. 651, 653 (1930) ("[T]he very nature of the relationship and the duties which it imposed on the wife together with her inferiority and subservience easily gave to the husband proprietary interest in her, and in turn led to proprietary actions for the loss of her services."); *see also* 3 R. LEE, NORTH CAROLINA FAMILY LAW § 241 (4th ed. 1979) ("Since the wife, like a servant, was considered a chattel, the basis for the husband's action for interference in the marital relationship was one of trespass.").

17. *See, e.g.*, Hitaffer v. Argonne, 183 F.2d 811, 818 (D.C. Cir.) ("The loss of 'services' is an outworn fiction."), *cert denied*, 340 U.S. 852 (1950); Marri v. Stamford St. R.R., 84 Conn. 9, 12, 78 A. 582, 584 (1911) ("[services] not so much those which resulted in wages earned, or from the mere performance of labor, as those which found expression at the domestic fireside, and in all manner of aid, assistance and helpfulness in all the relations of domestic life.").

18. *See* 3 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 142-43 (4th ed. 1916) ("the inferior hath no kind of property in the company, care, or assistance of the superior, as the superior is held to have in those of the inferior; and therefore the inferior can suffer no loss or injury."). *See also* W. WADLINGTON, CASES AND OTHER MATERIALS ON DOMESTIC RELATIONS 199 (1984) ("For this viewpoint, the law had both the warrant of the Old Testament and the teachings of St. Paul respecting the hegemony of the man and the subjection of the wife.").

19. *See generally* Note, *Judicial Treatment of Negligent Invasion of Consortium*, 61 COLUM. L. REV. 1341 (1961) [hereinafter Note, *Judicial Treatment*] (examination of actionable injury to family relationships caused by negligently inflicted loss of consortium).

20. The married women's provision in the North Carolina Constitution of 1868 provided that a wife's property no longer automatically became that of her husband upon marriage. N.C. CONST. art. X, § 6. The legislature further clarified the wife's legal position in 1913, providing that any damage for her own personal injuries could be recovered by a wife suing alone. The General Assembly eventually adopted legislation which provided that

> [T]he earnings of a married woman by virtue of any contract for her personal services, and any damages for personal injuries, or other tort sustained by her, can be recovered by her suing alone, and such earnings or recovery shall be her sole and separate property as fully as if she had remained unmarried.

N.C. GEN. STAT. § 52-10 (1913), *amended*, N.C. GEN. STAT. § 52-4 (1965). *See* W. PROSSER, HANDBOOK ON THE LAW OF TORTS § 122, at 861 (4th ed. 1971).

21. 183 F.2d 811 (D.C. Cir.), *cert. denied*, 340 U.S. 852 (1950).

ing that the term "consortium" included not only material services but also love, affection, and companionship, "all welded into a conceptualistic unity," concluded that a wife was entitled to a cause of action for loss of her husband's consortium occasioned by a third person's negligent actions, notwithstanding the dearth of explicit authority allowing recovery under these circumstances.

The North Carolina courts did not definitively recognize a wife's cause of action for loss of her husband's consortium until 1980. In *Nicholson v. Memorial Hospital*[22] the North Carolina Supreme Court expressly overruled fifty-five years of established precedent which had consistently denied a wife's action on her own behalf for loss of her husband's consortium.[23] Arguing that those cases "stripped" both spouses of a right to recover for what was a very real injury to the marital partnership, the court determined that "[s]uch denuding contradicts the policy of modern law to expand liability in an effort to afford decent compensation as a measure to those injured by the wrongful conduct of others."[24] The *Nicholson* court rejected defendant's argument that any anomalies inherent in the previous decisions should be rectified by legislative action, reasoning that "[i]n view of [an extensive] history of judicial activity [in this area], we do not believe legislative fiat is necessary."[25]

The common law traditionally has recognized a parent's interest in freedom from tortious conduct harming his relationship with his child.[26] The analogy of the loss of services of a servant was utilized as the basis for a parent's right to recover for damages resulting from torts directed against the child.[27] As in the case of spousal consortium, however, most jurisdictions have abandoned the requirement that the loss of services underlie recovery for loss of consortium in the context of the parent-child relationship.

The parent's interest in maintaining a cause of action for the loss of a child's consortium against a negligent *third* party was initially recognized in the 1974 Wisconsin decision *Shockley v. Prier*.[28] In *Shockley* an infant was permanently blinded and disfigured as a result of defendant-physician's negligence.[29] The Wisconsin Supreme Court, in allowing the parents of that infant to bring an action for the loss of the injured child's aid, comfort, society, and companionship, reasoned that since Wisconsin's wrongful death statute "already recognizes

22. 300 N.C. 295, 266 S.E.2d 818 (1980).

23. *See* Hinnant v. Tidewater Power Co., 189 N.C. 120, 126 S.E. 307 (1925); *accord* Helmstetler v. Duke Power Co., 224 N.C. 821, 32 S.E.2d 611 (1945).

24. *Nicholson*, 300 N.C. at 300, 266 S.E.2d at 821 (citing Diaz v. Eli Lilly & Co., 364 Mass. 153, 302 N.E.2d 555 (1973)).

25. *Nicholson*, 300 N.C. at 304, 266 S.E.2d at 823. The court asserted that defendant's argument against the court's "activist" role "overlooks the fact that this entire area of the law has been developed by judicial decree." *Id.*

26. Note, *Judicial Treatment*, *supra* note 19, at 1346.

27. *See, e.g.*, W. PROSSER, *supra* note 20, § 124, at 882. ("In order to prevail [in an action for tortious injury to his child, a] father had to show actual loss of his child's services. In time, a doctrine of constructive loss of services developed. If a child was a minor and the father had a right to his or her services, the child was presumed to be a servant.")

28. 66 Wis. 2d 394, 225 N.W.2d 495 (1974).

29. *Id.* at 395, 225 N.W.2d at 496-97. Plaintiff had given birth to twins prematurely at defendant hospital. Only one child survived; he was placed in an infant care unit. The child was allegedly given excessive amounts of oxygen, which resulted in permanent blindness and disfigurement.

the loss of society and companionship as an element of damages in the case of death [it was reasonable] to recognize this same type loss where there has been injury to a minor child."[30]

In North Carolina, bodily injuries to an unemancipated minor automatically give rise to a cause of action by the parent to recover for loss of services of the child during minority. Although this cause of action was traditionally justified on the grounds that the parent had suffered a purely *pecuniary* loss as a result of the tortious conduct of another,[31] the parents' right of action today is based not only on the right to services of the child but also on their duty to care for and maintain the child.[32] Although no current authority explicitly repudiates the notion that a parent's loss is purely pecuniary in nature, the supreme court in *Nicholson* expressly rejected the notion that loss of services provides the totality of the measure of damages in a loss of consortium action and established that "the better view is that it embraces service, society, companionship, . . . [and other] tangible and intangible benefits."[33]

Significantly, in North Carolina a parent may maintain a tort action for damages against one who, without privilege to do so, abducts the minor or induces her to leave home without parental consent.[34] The "real" cause of action in these situations is deemed to be the interference with the parent-child relationship; no proof of loss of the services of the child is required.[35] In either of these actions the damages may include the parent's loss of society of his child and the consequent emotional distress. One court noted,

> The true ground of the action is the outrage and oppression; the injury the father sustains in the loss of his child; the insult offered to his feelings; the heartrending agony he must suffer in the destruction of his deepest hopes, and the irreparable loss of that comfort and society which may be the only solace of his declining age.[36]

Coincidentally, minor children have begun to enjoy status as independent legal entities and possess specific rights of their own.[37] The United States Supreme

30. *Id.* at 400, 225 N.W.2d at 499. *See also* Rodriguez v. Bethlehem Steel Corp., 12 Cal. 3d 382, 115 Cal. Rptr. 765, 525 P.2d 669 (1974) (No reasonable distinction can be drawn between the right of parents, in appropriate circumstances, to seek recovery for lost comfort, society, and companionship of an injured and totally helpless child and the right of a spouse, in similar circumstances, to recover for loss of consortium.).

31. *See* 3 R. LEE, *supra* note 16, § 241.

32. *See* R. LIGON, NORTH CAROLINA CASES AND MATERIALS ON FAMILY LAW 233 (1963).

33. *Nicholson*, 300 N.C. at 302, 266 S.E.2d at 822.

34. *See* R. LEE, *supra* note 16, §§ 242-43.

35. *See* Little v. Holmes, 181 N.C. 413, 107 S.E. 577 (1921); Howell v. Howell, 162 N.C. 283, 78 S.E. 222 (1913).

36. *Little*, 181 N.C. at 415, 107 S.E. at 580.

37. *See* Tinker v. Des Moines School Dist., 393 U.S. 503, 511 (1969); *In re* Gault, 387 U.S. 1, 17 (1967); West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624 (1943). In 1916 Dean Roscoe Pound wrote,

> As against the world at large a child has an interest . . . in the society and affection of the parent, at least while he remains in the household. But the law has done little to secure these interests. At common law there are no legal rights which protect them. . . . It will have been observed that legal securing of the interests of children falls far short of what general considerations would appear to demand.

Court has systematically recognized a minor's right to first amendment freedoms,[38] equal protection,[39] and due process of law.[40] In juvenile proceedings the Court has begun to apply the constitutional protections associated with adult criminal prosecutions.[41] This growing recognition that children "are entitled to assert individual interests in their own right, and to have fair consideration given to their claims" has led an increasing number of courts to recognize that a minor's claim for relief for invasions of intangible, sentimental interests "carr[ies] a logical and sympathetic appeal."[42] Consequently, these courts have been willing to abandon established precedent in order to conform their decisions to evolving conditions of society and more enlightened views as to the rights and privileges of its citizens.[43]

In North Carolina, courts uniformly permit an unemancipated minor child to recover directly for his mental and physical pain and suffering and the impairment of his future earning capacity.[44] Similarly, the North Carolina legislature, in its promulgation of the Wrongful Death Act, implied that children may recover damages for wrongful death of a parent.[45] Enumerated damages specifically include the "[s]ociety, companionship, comfort, guidance, kindly offices and advice of the decedent."[46] Thus, North Carolina courts and legislators have recognized that loss of "consortium" over and beyond loss of sexual services is a viable form of compensable damage for both adults and minors. As such, it would be an anomaly to allow a child to recover for such losses occasioned by the death of his parent but to deny recovery to a child who has suffered identical losses occasioned by a debilitating injury to his parent.

In spite of the growing inclination of the courts to extend recognition to claims of minors for invasion of intangible interests associated with the parent-child relationship, most courts have refused to recognize a child's claim for loss of consortium when that loss was caused by a third party's negligent behavior.[47]

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Pound, *Individual Interests in the Domestic Relations*, 14 U. MICH. L. REV. 177, 185-86 (1916). In 1971, Dean William Prosser commented:

> It is not easy to understand or appreciate this reluctance to compensate the child who has been deprived of the care, companionship and education of his mother, or for that matter, his father, through the defendant's negligence. This is surely a genuine injury, and a serious one, which has received a great deal more sympathy from the legal writers than from the judges.

W. PROSSER, *supra* note 20, § 25, at 896.

38. *See, e.g.*, Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503 (1969).

39. *See, e.g.*, *In re* Winship, 397 U.S. 358 (1970); Levy v. Louisiana, 391 U.S. 68, 70 (1968).

40. *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205, 243 (1972).

41. *See, e.g.*, Breed v. Jones, 421 U.S. 519 (1975); *In re* Gault, 387 U.S. 1 (1967).

42. Suter v. Leonard, 45 Cal. App. 3d 744, 745, 120 Cal. Rptr. 110, 111 (2d Dist. 1975).

43. *See* Comment, *The Child's Claim for Loss of Consortium Damages: A Logical and Sympathetic Appeal*, 13 SAN DIEGO L. REV. 231, 239-40 (1975).

44. *See, e.g.*, White v. Holding, 217 N.C. 329, 7 S.E.2d 825 (1940).

45. N.C. GEN. STAT. § 28A-18-2(b)(4) (1983).

46. N.C. GEN. STAT. § 28A-18-2(b)(4)(b) to (c) (1983).

47. *See, e.g.*, Hill v. Sibley Memorial Hosp., 108 F. Supp. 739, 741 (D.D.C. 1952) ("This court confesses that it has been difficult for it on the basis of natural justice to reach the conclusion that this type of an action will not lie."); Hankins v. Denby, 211 N.W.2d 581 (Iowa 1973); Hoffman v. Dautel, 189 Kan. 165, 368 P.2d 57 (1962); Russell v. Salem Transp. Co., 61 N.J. 502, 295 A.2d 862 (1972).

Many of the courts refusing to recognize this cause of action do not consider the claim to be entirely without merit; rather, they are convinced that compelling policy concerns militate against the child's right of action.[48]

In *Borer v. American Airlines*,[49] the seminal 1977 case addressing this cause of action, the California Supreme Court rejected the contention that "logical symmetry" compelled it to recognize a cause of action for loss of affection and society between a parent and a child simply because it had recognized such a cause of action in the context of the marital relationship. The *Borer* court conceded that "there can be little question of the reality of the loss suffered by a child deprived of the society and care of its parents."[50] Nevertheless, the court concluded that

> taking into account all considerations which bear on this question, including the inadequacy of monetary compensation to alleviate [a family] tragedy, the difficulty of measuring damages, and the danger of imposing extended and disproportionate liability, we should not recognize a non-statutory cause of action for the loss of parental consortium.[51]

For many years, variations on the arguments advanced in *Borer* were utilized in every court addressing the issue of a child's recovery for loss of parental consortium.[52]

Recently, however, some courts have begun to take an increasingly activist role in shaping the rights and interests of minors. In the 1980 case *Ferriter v. Daniel O'Connell's Sons, Inc.*[53] the Massachusetts Supreme Court decided, as a matter of first impression, that a child was entitled to recover for loss of parental consortium brought about by a third party's negligence. In *Ferriter* an employee of a construction company was injured when a wood beam fell from a poorly constructed nylon sling. His wife and children, in their individual capacities, brought an action to recover for loss of his consortium and society.[54] The court, considering the case comparable to both a wrongful death action and an action for loss of spousal consortium, found itself "virtually compelled" to recognize the children's interest in parental society, affection, and companionship.[55]

Since the *Ferriter* decision an increasing number of courts have recognized a child's claim for loss of parental consortium. In so doing they have considered

48. The most frequently cited grounds for denial of a child's cause of action for loss of parental consortium include: (1) danger of double recovery, (2) remoteness or speculativeness of damages, (3) increasing litigation and multiplicity of actions, (4) possible adverse effect on family harmony, (5) absence of a legally recognized right on the part of minor children to their parent's society and companionship, and (6) the inadequacy of the judicial system to compensate for such a loss. Annotation, *Child's Action—Loss of Parental Attention*, 11 A.L.R. 4th 550 (1982).

49. 19 Cal. 3d 441, 138 Cal. Rptr. 302, 563 P.2d 858 (1977).

50. *Id.* at 453, 138 Cal. Rptr. at 314, 563 P.2d at 842.

51. *Id.*

52. *See, e.g.*, Pleasant v. Washington Sand & Gravel Co., 262 F.2d 471 (D.C. Cir. 1958); Meredith v. Scruggs, 244 F.2d 604 (9th Cir. 1957); Suter v. Leonard, 45 Cal. App. 3d 744, 120 Cal. Rptr. 110 (2d Dist. 1975).

53. 381 Mass. 507, 413 N.E.2d 690 (1980).

54. *Id.* at 510, 413 N.E.2d at 693.

55. *Id.* at 512, 413 N.E.2d at 695.

and rejected many of the traditional objections to recognition of this cause of action.[56] In *Berger v. Weber*[57] the Michigan Supreme Court dismissed the argument that it would be "anomalous" to allow a child to recover for negligent invasion of his family interest when he would be specifically prohibited from recovery for intentional, direct invasion of the family interest under a Michigan statute that barred suits for alienation of affections, asserting that "[w]e are satisfied that the real anomaly is to allow a child's recovery for the loss of a parent's society and companionship when the loss attends the parent's death but to deny such recovery when the loss attends the parent's injury."[58]

Similarly, in *Weitl v. Moes*[59] the Supreme Court of Iowa rejected the contention that it would be paradoxical to protect against negligent interference with a child's interest in parental companionship when Iowa law did not protect that interest from intentional interference by way of an alienation of affections action.[60] The court reasoned that "[t]he distinction [between the two situations] is not between intentional and negligent torts . . . [but between] recovery when the consortium is lost because the spouse *voluntarily* abandons the marital relationship, with the encouragement of a third party . . . [and when] the spouse is *involuntarily injured* by a third party."[61] Recently in *Reighley v. Playtex*[62] the United States District Court in Colorado held that the existence of wrongful death legislation which provided that children had a statutory right to share in any judgment recovered demonstrated that the state legislature had declared its responsibility to protect and foster the parent-child relationship.[63] The court concluded that "[a] parent's interest to be free from tortious conduct harming his spouse or child is equally that of the child who looks to his parents for care, security, nurture and guidance."[64]

*Ipock v. Gilmore* presented the North Carolina Court of Appeals with the opportunity to consider a minor's claim for the wrongful loss of a parent's care, guidance, society, and training. The *Gilmore* court, in denying recognition of a cause of action for loss of parental consortium, identified and was persuaded by a number of classic objections to recognition of this cause of action. The *Gilmore* court's decision ostensibly was consistent with established case law. The North Carolina courts had directly addressed the issue of recognition of a claim for loss of parental consortium in two prior decisions. In both cases the courts

56. *See, e.g.*, Reighley v. Playtex, 604 F. Supp. 1078 (D. Colo. 1985); Berger v. Weber, 411 Mich. 1, 303 N.W.2d 424 (1981).

57. 411 Mich. 1, 303 N.W.2d 424 (1981).

58. *Id.* at 3, 303 N.W.2d at 426.

59. 311 N.W.2d 259 (Iowa 1981).

60. *Id.* at 270.

61. *Id.* at 266-67.

62. 604 F. Supp. 1078 (D. Colo. 1985).

63. *Id.*

64. *Id.* at 1081. *See also* Kelly v. T.L. James Co., 603 F. Supp. 390 (W.D. La. 1985) (children of seaman allowed to recover for loss of society of injured parent under maritime law); Glicklich v. Spievach, 16 Mass. App. 488, 452 N.E.2d 287 (minor son allowed to sue for injury to mother), *appeal denied*, 390 Mass. 1103, 454 N.E.2d 1276 (1983); Theama v. Kenosha, 117 Wis. 2d 508, 344 N.W.2d 514 (1984) (minor child may recover for loss of parent's society caused by negligent injury to parent).

refused to recognize the cause of action. Those cases, however, are readily distinguishable from *Gilmore*.

Initially the *Gilmore* court relied on the supreme court's rejection of a claim for alienation of affections and criminal conversation in *Henson v. Thomas*[65] to augment its decision to deny the minor's cause of action for loss of parental consortium. In *Henson* two minor children, acting through their father as "next friend," instituted an action against a third party for damages for wrongfully disrupting the family circle, which had deprived the children of the affection, companionship, guidance, and care of their parents.[66] The supreme court refused to entertain the action, reasoning that because the cause of action was unknown to the common law, and was not created by any statute, the court could not "[create] a cause of action."[67] The *Gilmore* court, in relying on *Henson*, however, failed to address a number of vital distinctions between an action for loss of parental consortium in which an injury has occurred because of a third party's negligence and an action for loss of parental consortium in a suit for alienation of affections. Alienation of affections is a disfavored cause of action; strong public policy concerns dictate that tort litigation among family members be minimized. Conversely a cause of action for loss of parental consortium does not encourage family disharmony; on the contrary, family members are united in a cause of action against a negligent or reckless third party. Also, the *Henson* court rejected the cause of action for loss of parental consortium partially on the rationale that a parent's decision whether or not to provide love and comfort to a child "are matters within [a parent's] keeping. The measure of [a parent's] contribution is controlled by [his or her] willingness and capacity."[68] The court reasoned that "[t]o hold otherwise would mean that every time a person persuades or induces a mother to engage in [time-consuming activities], that person commits a tort for which he may be compelled to respond in damages."[69] However, this concern about prospective frivolous litigation would be of no significance in the context of a suit for loss of parental consortium when a parent has been injured by a negligent third party. The nature of a personal injury claim requires that a final legal judgment be obtained for the harm inflicted. Thus recovery under a cause of action for loss of parental consortium would be limited to a single judgment or settlement. Finally, the *Henson* decision antedates the recent movements in the North Carolina courts and legislature toward recognizing equal rights for minors. A principal reason in *Henson* for denying the children's claim was that the children had no legal entitlement to their parent's society and companionship. This argument is no longer tenable in light of the North Carolina General Assembly's enactment of a wrongful death statute under which the children of a deceased individual are entitled, presumably, to recover damages for loss of the elements of "comfort, society, compan-

65. 231 N.C. 173, 56 S.E.2d 432 (1949).
66. *Id.* at 174, 56 S.E.2d at 433.
67. *Id.* at 176, 56 S.E.2d at 434.
68. *Id.* at 175, 56 S.E.2d at 434.
69. *Id.*

ionship, and affection."[70] *Henson* was decided many years prior to the present acknowledgement that minor children are entitled to most of the due process and constitutional privileges accorded to adults. The court's reliance on the *Henson* court's justification for denying recognition of a loss of consortium action by a minor child was misplaced, as that rationale has been largely abrogated by subsequent judical and legislative action.

The *Gilmore* court also found persuasive the court of appeals' recent refusal to recognize a cause of action for loss of parental consortium in *Azzolino v. Dingfelder*.[71] In *Azzolino* minor siblings of a Down's Syndrome child brought an action to recover for the damages allegedly suffered by them as a result of the "wrongful birth" of that child.[72] The siblings claimed that they had been damaged by their brother's birth in that they would suffer financial and emotional hardship by having a Down's Syndrome child in the family.[73] They argued that they were deprived of the full measure of the society, comfort, care and protection of their parents because of the extraordinary demands placed on them by the Down's Syndrome child.[74] The *Azzolino* court rejected this claim on the rationale that "[t]here is no 'proportional' share of their parents' worldly goods to which the children are entitled . . . ."[75] *Azzolino*, however, is readily distinguishable from *Gilmore* in that the children in *Azzolino* still had full access to their parent's society and affection. Conversely, the *Gilmore* minor, as the child of a parent who has been "rendered but a spectre of [his or her] former self" has suffered an irretrievable loss.

The *Gilmore* court also categorically rejected a number of substantive arguments advanced by plaintiffs. The court summarily dismissed plaintiffs' contention that it would be a denial of both due process and equal protection to recognize a cause of action for loss of consortium for a spouse but to deny that same cause of action to a child.[76] The court asserted that because "companionship, service, responsibility, love and affection differ in both degree and kind" between spouses and parent and child, the law is not "constitutionally required" to treat these relationships as identical.[77] This argument overlooks the prevailing rationale for extending recognition to claims for loss of intangible interests in the first place: the loss is a "definite injury to a legitimate interest"; as such, victims are entitled to redress by due process of law. Arguably it is far more debilitating for a child to experience abrupt disruption of a filial relationship than it is for an adult. The child will not have had comparable opportunities to develop emotional mechanisms to cope with unexpected loss; consequently the effect of the deprivation may hinder significantly the child's emotional and psy-

70. N.C. GEN. STAT. § 28A-18-2(b)(4)(b) to (c) (1983).

71. 71 N.C. App. 289, 322 S.E.2d 567 (1984), *aff'd in part, rev'd in part*, 315 N.C. 103, 337 S.E.2d 528 (1985) (supreme court found no cause of action for the siblings' claim).

72. *Id.* at 303, 322 S.E.2d at 571.

73. *Id.*

74. *Id.*

75. *Id.* at 305, 322 S.E.2d at 572.

76. *Gilmore*, 85 N.C. App. at 74, 354 S.E.2d at 572.

77. *Id.* at 75, 354 S.E.2d at 317.

chological development. Thus children may have a measurably greater need for compensation designed to mitigate the effects of emotional deprivation.[78]

Similarly the *Gilmore* court rejected the equal protection and due process arguments in the context of North Carolina's Wrongful Death Act.[79] The court maintained that "[t]he distinction is not between kinds of children but between a defendant's scope of liability for causing fatal as distinct from non-fatal injuries to the people who are the immediate victims of his or her negligence."[80] In making this distinction the court again failed to consider the rationale for recognizing a cause of action for loss of consortium it espoused in *Nicholson*: the belief that the "awesome permanent deprivation" stemming from the loss of an immediate family member's consortium caused by a defendant's negligence should be compensated.[81] The child of a brain-damaged parent suffers no less devastating deprivation than the child of a deceased parent. Both are denied the loss of a parent's support and care during critical formative years.

The *Gilmore* court recited a litany of practical considerations supporting its denial of recognition for a child's loss of parental consortium. These include (1) the possibility of multiplicity of suits,[82] (2) potential increase in insurance costs,[83] (3) inability of the jury to cope adequately with the question of damages because of the uncertainty and remoteness of the damages and because of the injury's derivative and indirect nature, and (4) the possibility of overlapping recovery between the uninjured spouse and the child.[84] However, an increasing number of courts are considering and rejecting these "practical" arguments, arguing that these problems can be dealt with "in a fashion less draconian than [total denial of] a cause of action for loss of consortium."[85] For example, compulsory joinder of suits could be required of immediate family members.[86] Alternatively, potential problems of overlapping recovery could be resolved by use of explicit jury instructions specifying that children are entitled to an independent cause of action, or strict criteria could be instituted mandating early dismissal of spurious suits on summary judgment grounds. Juries have proved themselves capable of grappling with the uncertainties associated with conjec-

78. *See generally* Johnson and Rosenblatt, *Grief Following Childhood Loss of a Parent*, 35 AM. J. PSYCHOTHERAPY (July 1981) (linking early parent death to later adult depression, schizophrenia, and sociopathic behavior).

79. *Gilmore*, 85 N.C. App at 74, 354 N.C. at 317.

80. *Id.* at 75, 354 S.E.2d at 317.

81. *Nicholson*, 300 N.C. at 302, 266 S.E.2d at 820.

82. *Gilmore*, 85 N.C. App. at 74-75, 354 S.E.2d at 318.

83. The possibility that recognition of consortium claims would adversely impact on insurance costs was soundly dismissed by the *Berger* court. The court noted:

> Compensating a child who has suffered emotional problems because of the deprivation of a parent's love and affection may provide the child with the means of adjustment to the loss. The child receives the immediate benefit of the compensation, but society will also benefit if the child is able to function without emotional handicap. This may well offset any increase in insurance premiums.

Berger v. Weber, 411 Mich. 1, 3, 303 N.W.2d 424, 426 (1981).

84. *Gilmore*, 85 N.C. App. at 75, 354 S.E.2d at 318.

85. *Nicholson*, 300 N.C. at 303, 266 S.E.2d at 822.

86. *Id.* Compulsory joinder or limiting the cause of action to immediate family members are among the alternatives advanced by a number of courts.

tural damages in wrongful death and spousal consortium suits; they are equally capable of managing comparable problems in the context of a child's claim for recovery for loss of parental consortium. The danger of massive increases in litigation has been raised as an objection to almost every new cause of action. The inevitable response to this argument is that "the existence of a multitude of claims merely shows society's pressing need of legal redress." Administrative difficulties "must not frustrate the principle that there be a remedy for every substantive wrong."[87]

The *Gilmore* court concluded that recognition of a minor's cause of action for loss of parental consortium would fall strictly within the province of the legislature.[88] In the common-law system, however, action for loss of consortium has been created and developed by the judiciary.[89] The courts have been instrumental in recognizing and defining justiciable issues in actions involving relational interests. Furthermore, the *Gilmore* court's rationale is inconsistent with the North Carolina Supreme Court's reasoning in *Nicholson* that "in view of [the fact that the primary instrument of evolution in the common law system is the judiciary and not the legislature] we do not believe legislative fiat is necessary."[90] This reasoning applies with equal force to a situation in which children are irreparably harmed by the loss of a parent's consortium.

Courts cannot abdicate their role as arbiters of justice merely because recognition of a new cause of action would involve administrative difficulties. When an inestimable interest of a child is directly involved, the child's rights should be recognized and enforced, and lack of precedent in a particular jurisdiction cannot absolve a court from responsibility for adjudicating each claim that comes before it on its merits. A child who has been deprived of the care and companionship of a parent through the negligent actions of a third party has been severely injured. As such, the child is entitled to compensation from the wrongdoer. The North Carolina Court of Appeals' refusal to recognize this cause of action and the North Carolina Supreme Court's subsequent denial of certiorari in *Gilmore* simply serve to ensure that the loss to children of the support, aid, and companionship of a parent during crucial formative years will not be redressed. One can only hope that if the General Assembly does not right this injustice, the Supreme Court will fully reconsider their position in a future case.

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87. Dillon v. Legg, 68 Cal. 2d 728, 739, 69 Cal. Rptr. 72, 79, 441 P.2d 912, 919 (1968). *See also* Borer v. American Airlines, 19 Cal. 3d 441, 452, 138 Cal. Rptr. 302, 314, 563 P.2d 858, 870 (Mosk, J., dissenting) ("The rights of a proposed new class of tort plaintiff should be forthrightly judged on their own merits, rather than by indulging in gloomy speculation on where it will all end.").

88. *Gilmore*, 85 N.C. App. at 73, 354 S.E.2d at 317.

89. *See* Love, *Tortious Interference with the Parent-Child Relationship: Loss of an Injured Person's Society and Companionship*, 51 IND. L.J. 590, 601-02 (1976).

90. *Nicholson*, 300 N.C. at 304, 266 S.E.2d at 823.