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Domestic Relations -- Loss of Consortium from Injury to Spouse

Marvin P. Hogan

It may be noted that the Supreme Court in the principal case did not mention the problem, but it did cite with approval a note on the development of declaratory judgments, which, on the very page cited by the Court, approves of federal jurisdiction of a suit for declaration of non-infringement and invalidity of defendant's patent.[28] The Supreme Court has had previous opportunities to review these declaratory actions by the alleged infringer, but has denied such review.[29]

Although the language of the principal case seems to withdraw from federal jurisdiction declaratory actions brought by an alleged infringer, it is suggested that they should retain jurisdiction of such actions. A suit to have a patent declared invalid is one arising under the patent laws in substance just as much as the ordinary suit for infringement since the validity of the patent is the immediate as well as the ultimate issue in the case.[30] The inadequacy of state remedies, and other factors previously considered, would seem to be sufficient for the federal courts to make an exception of these suits,[31] and to retain jurisdiction over them, although logically they fall within the language of the principal case.

WILLIAM E. GREENE.

Domestic Relations—Loss of Consortium from Injury to Spouse

Plaintiff brought suit to recover damages for loss of consortium resulting from the negligent injury of her husband. The United States Court of Appeals for the District of Columbia circuit in *Hitaffer v. Argonne Co.*,[1] allowed recovery, declining to align itself with unanimous authority to the contrary in other jurisdictions.

original cause of action which is directly based on the invalidity of the defendant's patent. . . ." Note, 45 YALE L. J. 1287, 1289. MOORE, COMMENTARY ON THE U. S. JUDICIAL CODE 149 (1949). TOULMIN, HANDBOOK OF PATENTS 506 (1949).

[28] Note, *Developments in the Law—Declaratory Judgments—1941-1949*, 62 HARV. L. REV. 787, 803 (1949).

[29] Jungersen v. Ostby & Barton Co., 335 U. S. 560 (1948) (jurisdiction not mentioned); Crosley Corp. v. Westinghouse Elec. & Mfg. Co., 130 F. 2d 474 (3rd Cir.), *cert. denied*, 317 U. S. 681 (1942); Edelmann & Co. v. Triple-A Specialty Co., 88 F. 2d 852 (7th Cir.), *cert. denied*, 300 U. S. 680 (1937); Petesimo Incubator Co. v. Bundy Incubator Co., 43 F. Supp. 446 (S. D. Ohio 1942), *aff'd*, 135 F. 2d 580, *appeal dismissed*, 320 U. S. 805 (1943).

[30] Zenie Bros. v. Miskend, 10 F. Supp. 779 (S. D. N. Y. 1935).

[31] A well settled exception to the rule that the plaintiff must assert a federal right which belongs to him is an action to remove a cloud upon plaintiff's title where the alleged cloud arises from a federal grant to the defendant. ". . . the existence and invalidity of the instrument or record sought to be eliminated as a cloud are essential parts of the plaintiff's cause of action and must be alleged in the bill." Hopkins v. Walker, 244 U. S. 486, 490 (1917).

[1] Hitaffer v. Argonne Co., 183 F. 2d 811 (D. C. Cir.), *cert. denied*, 71 Sup. Ct. 80 (1950).

Consortium has been variously defined[2] and confusion has arisen as to its exact meaning. In general terms it is an interest of a spouse in that relationship which exists between husband and wife who have been united by some form of marriage which the law recognizes. Consortium originated as an exclusive right of the husband.[3] The husband's interest in the marital relationship was the first to receive recognition and was based on his wife's services to him as his servant.[4] Over a period of time this interest grew into a broader concept including services, society, and the right to the exclusive sexual intercourse of the wife. Modern law has added the fourth element of conjugal affection, but the right to exclusive sexual intercourse may be properly thought of as being embraced within the meaning of the term conjugal affection. As the concept expanded, attempts were made to divide the component parts into services on the one hand and "sentimental" elements on the other, and to permit recovery for the former but not for the latter.[5] But in recent years there has been a shift in emphasis from loss of services which earlier was indispensable, and now in general interference with any one of these elements will give rise to a cause of action in a jurisdiction recognizing the interest. The married women's acts confronted courts with additional problems as to whether consortium had become a mutual right inherent in the relationship of marriage or had been destroyed altogether. Further complicating the question, attempts have been made to distinguish between invasions of the consortium classed as negligent (personal injury to the other spouse which concomitantly injures the marital interest) and intentional or direct invasions (alienation of affections and criminal conversation). Consequently the concept has become clouded with uncertainty.[6]

At common law, an injury to the person of the wife gave rise to two causes of action: (1) that of the wife individually for personal loss and injuries, enforced through the husband; and (2) that of the husband for damages to his marital interests such as loss of his wife's services,

[2] "The word consortium includes aid, society, companionship, assistance, and affection, and the law does not attempt to separate these elements of damages." Little Rock Gas & Fuel Co. v. Coppege, 116 Ark. 334, 172 S. W. 885 (1915); "The right of the husband and wife respectively, to the conjugal fellowship, company, cooperation and aid of the other."—Bouvier; "The companionship or society of a wife."—Black.

[3] BL. COMM. 142.

[4] See Warren, *Husband's Right to Wife's Services*, 38 HARV. L. REV. 421 (1925).

[5] Blair v. Seitner Dry Goods Co., 184 Mich. 304, 151 N. W. 724 (1915) (recovery according to pecuniary value of lost services only allowed). Golden v. R. L. Greene Paper Co., 44 R. I. 231, 116 Atl. 579 (1922) (testimony by husband that he could no longer have sexual intercourse with wife as a result of injuries sustained by her ruled inadmissible).

[6] See Holbrook, *The Change in the Meaning of Consortium*, 22 MICH. L. REV. 1 (1923); Lippman, *The Breakdown of Consortium*, 30 COL. L. REV. 651 (1930).

society, and earnings; or for damages by reason of his being put to expense. The wife had no corresponding right to sue for injury to her husband.

At common law, the wife had no right of action for either the intentional or the negligent invasion of the consortium.[7] The reasons for this are not altogether clear, but essentially it would seem to have been the result of the merger of her legal identity into that of her husband to such an extent that the right was extinguished; or the fact that she could not sue for any purpose except through her husband. This latter procedural impediment would have led to considerable difficulty. In cases of injury to him, he had his own cause of action for personal injury and if the wife had been permitted to sue for loss of consortium as a result of this injury, the husband would have been joined as plaintiff, and would have collected the damages in both actions. It would have been simpler merely to have allowed the husband to collect in one action rather than two. Furthermore, in suits based on alienation of affections or criminal conversation, the wife would have been forced to sue through the husband, who was himself a wrongdoer, and he would have been entitled to the proceeds of the suit and would have thus profited by his own wrong. On the other hand, the husband had an unlimited right of action for either the intentional or negligent injury to his consortium[8] because he was entitled to his wife's services and earnings as a matter of proprietary right and could recover for their loss.

The effect of the married women's acts and other equalizing and enabling legislation has necessarily influenced courts in their attempts to settle the present status of the right of recovery for injury to the consortium. The authorities have taken divergent views. The great weight of authority allows the husband to recover for either the negligent or the intentional injury to the consortium,[9] but allows the wife to recover only for the intentional or legally malicious injury to the

[7] ". . . the inferior hath no kind of property in the company, care, or assistance of the superior, . . . and therefore can suffer no loss or injury." 3 BL. COMM. 142.

[8] *E.g.*, Lindsey v. Kindt, 221 Ala. 169, 128 So. 143 (1930) (provided husband not contributorily negligent); Union Pac. Ry. v. Jones, 21 Colo. 340, 40 Pac. 891 (1895); Newhirter v. Hatten, 42 Iowa 288, 20 Am. Rep. 618 (1875); Blair v. Chicago & A. Ry., 89 Mo. 334, 1 S. W. 367 (1886); Bedell v. Mandel, 108 N. J. L. 22, 155 Atl. 383 (Sup. Ct. 1931); Robinson v. Lockridge, 230 App. Div. 389, 244 N. Y. S. 663 (4th Dep't 1930); Cook v. Atlantic Coast Line Ry., 196 S. C. 230, 13 S. E. 2d 1 (1941).

[9] *E.g.*, Southern Ry. v. Crowder, 135 Ala. 417, 33 So. 335 (1902) (that wife must sue alone for personal injury does not prevent husband recovering for loss of consortium); Louisville & N. R. v. Kinman, 182 Ky. 597, 206 S. W. 880 (1918) (wife's right of action for injuries personal to her does not preclude husband's right for loss of consortium); Mageau v. Great Northern Ry., 103 Minn. 290, 115 N. W. 651 (1908); Omaha & R. V. Ry. v. Chollette, 41 Neb. 578, 59 N. W. 921 (1894); Booth v. Manchester St. Ry., 73 N. H. 529, 63 Atl. 578 (1906); Baltimore & O. Ry. v. Glenn, 66 Ohio St. 395, 64 N. E. 438 (1902); Elling v. Blake-McFall Co., 85 Ore. 91, 166 Pac. 57 (1917).

consortium.[10] Since the trend in legislation has been toward legal equality between husband and wife, it would seem to follow that if the husband is allowed the right, the wife ought also be allowed it. But courts which are not inclined to accept this view point out the following distinctions between the husband and wife which were not altered by the married women's statutes: the husband is still the head of the household and represents its interests; he has the legal duty to support his wife and children; he still has a limited though substantial right to his wife's services; and she is entitled to his support and will profit indirectly by any recovery he may have. The married women's acts are strictly construed as being in derogation of the common law; and since the wife did not have the right at common law and since it has not been conferred upon her by statute, she does not now have the right. Courts which emphasize the service element of consortium point out that the wife still has no right to her husband's services.

Other courts follow the same reasoning as to the wife's right, but in deference to the intent of the legislature to put both husband and wife on an equal basis, now deny the husband's right for negligent injury also,[11] upon the premise that his common law right was based upon loss of services, and while the other elements of consortium might be considered in aggravation of damages, standing alone they do not constitute a cause of action. Therefore, since the married women's acts secure to the wife the right to her earnings from services outside the household or business of the husband, the true basis of his former right is now removed.

The majority of courts, however, which allow the husband to recover take two approaches: (1) the theory that loss of services is not the essential element of consortium and the husband can recover whether the invasion involved one or the other elements because the action itself was *per quod consortium amisit*, not *per quod servitum*; (2) even if loss of services were considered essential, the husband is still entitled to his wife's services rendered in his household or business, just as she is entitled to his support, and since the enabling and equalizing statutes do not deal with the remedies of which the husband may avail himself, he has all the remedy he ever had, in so far as his right still exists.[12]

In North Carolina, the Constitution of 1868 and subsequent statutes[13] wiped away the conception of ownership of the wife by the

[10] Emerson v. Taylor, 133 Md. 192, 104 Atl. 538 (1918).

[11] Marri v. Stamford St. Ry., 84 Conn. 9, 78 Atl. 582 (1911); Whitcomb v. New York, etc. Ry., 215 Mass. 440, 102 N. E. 663 (1913); Blair v. Seitner Dry Goods Co., 184 Mich. 304, 151 N. W. 724 (1915).

[12] Guevin v. Manchester St. Ry., 78 N. H. 289, 99 Atl. 298 (1916).

[13] N. C. CONST. Art. X, §6.

N. C. GEN. STAT. §52-1 (1943): "The real and personal property of any female in this state, acquired before marriage, and all property, real and personal, to

husband. They provided that the wife could own real and personal property; that she was entitled to earnings from her services; that damages for personal injuries belonged to her; and that damages for torts against her could be recovered by her suing alone.[14] Therefore the husband cannot sue to recover damages for torts committed on the wife, nor can the wife sue for damages for torts committed on the husband.

The Supreme Court of North Carolina has furnished some landmark decisions on this question. Three cases[15] recognized the common law right of the husband to recover even though based on negligence and the implication of these cases seems to be that injury to the non-service elements of consortium should be recognized as giving rise to a cause of action. It is significant that one of these[16] was decided after the 1913 statute (N. C. GEN. STAT. §52-10) to which no reference was made. And in an epic opinion written by Chief Justice Clark in *Hipp v. Dupont*,[17] the first decision of its kind to be reported, the wife recovered damages for loss of consortium resulting from the negligent injury of her husband. The important distinction was made between recovery by one spouse for torts committed on the other, and recovery by either spouse for injury to the consortium arising out of this tortious injury. The cause of action was not for injury to the husband, but for injury to the wife which she suffered as a member of the marital union and as a result of the injury received by the husband. It was said that the wife sustained damages which, though flowing from the injury to her husband, are entirely separate and distinct, personal and direct, and not remote or consequential, arising out of the nature of the mar-

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which she may, after marriage, become in any manner entitled, shall be and remain the sole and separate estate and property of such female, and shall not be liable for any debts, obligations or engagements of her husband, and may be devised and bequeathed, and, with the written assent of her husband, conveyed by her as if she were unmarried."

[14] N. C. GEN. STAT. §52-10 (1943): "The earnings of a married woman by virtue of any contract for her personal service, 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."

[15] Bailey v. Long, 172 N. C. 661, 90 S. E. 809 (1916) (wife contracted pneumonia and died due to negligence of defendant, husband recovered for expenses, mental sufferings and injury to his feelings in witnessing wife's suffering, ". . . and in the act and article of death resulting therefrom."); Kimberly v. Howland, 143 N. C. 399, 55 S. E. 778 (1906). (If injury to wife is such that the husband receives a separate loss or damage, as where he is put to expense, *or* is deprived of the society or the services of his wife, he is entitled to recover); Holleman v. Harward, 119 N. C. 150, 25 S. E. 972 (1896) (defendants, druggists, sold laudanum to wife, knowing that she was using it as a beverage, over the warnings and protests of the husband, as a result of which she became a mental and physical wreck, causing loss to husband of her companionship and services; *held*, husband may recover).

[16] Bailey v. Long, 172 N. C. 661, 90 S. E. 809 (1916).

[17] Hipp v. Dupont, 182 N. C. 9, 108 S. E. 318 (1921).

riage relationship. They were damages for which the husband could not recover.

Three years later, after the death of Chief Justice Clark, and with two new justices on the court, the question was faced again in a case identical in all important particulars with the *Hipp* case. Yet recovery unfortunately was denied in *Hinnant v. Tidewater Power Co.*[18] The court held that under the doctrine of marital equality, either husband or wife may sue only for loss of consortium due to direct and intentional invasion. It is not made clear why this was thought to be so, except that the court felt that the husband had been deprived by statute of his common law right, presumably the right arising from the negligent injury alone. As to recovery for loss of consortium by the wife, the *Hipp* case was overruled. The *Hipp* case distinction as to the nature of the injury involved was not dealt with; the court refusing to recognize that loss of consortium is a direct injury to either spouse. In the latest North Carolina decision[19] it was held that N. C. GEN. STAT. §52-10 had the effect of depriving the husband of his common law cause of action for loss of the consortium due to negligent injury to the wife. This equalizes the rights of the spouses, the wife having been denied an action in the *Hinnant* case.[20]

The *Hitaffer* case asserts that the separation of consortium into services and companionship and the emphasis upon services, which some jurisdictions have seized upon to deny recovery, is a result of redundant common law pleading rather than conscious, reasoned division; the separation being without precedent in common law decisions. It discounted the reasoning of courts which hold that the sentimental or non-service elements (essentially the only ones remaining after the married women's acts) are too indirect and consequential to be compensable under the law of damages in negligence cases, pointing out that this reasoning is not followed where the husband is allowed the right of action for loss of consortium, or in actions for alienation of affections and criminal conversation where loss of services is not involved.

Two views can be fairly taken on this question. Either both husband and wife must be denied the action on the grounds that there is no such protectable interest as consortium, or the interest must be recognized as being protectable and *mutual*, allowing both the cause of action.

MARVIN P. HOGAN.

[18] 189 N. C. 120, 126 S. E. 307 (1924).

[19] Helmstetler v. Duke Power Co., 224 N. C. 821, 32 S. E. 2d 611 (1945) (the court regarded the statute as controlling, yet cited Bailey v. Long, 172 N. C. 661, 90 S. E. 809 (1916) which was decided after the statute was passed).

[20] 189 N. C. 120, 126 S. E. 307 (1924). The *Hipp* case was cited only for the proposition that "the two are on a parity in respect to such suits" (p. 825).