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Consortium is the conjugal fellowship of husband and wife, and the right of each to the company, cooperation, affection, and aid of the other.[1] The three most prominent elements in the unique consortium interest are services, sexual intercourse, and general companionship.[2] Notwithstanding the intangible value of the "sentimental" elements inherent in the consortium interest, the common law early recognized the husband's legal right to consortium.[3]

Adhering to the common law, most states initially recognized a separate and independent cause of action in the husband for loss of consortium as a result of a defendant's negligent injury to his wife.[4] A mutual cause of action was not afforded the wife because at common law she had no reciprocal proprietary rights in her husband.[5] The relationship of the wife to the husband was that of servant to master, and the servant had no interest in the master.[6] The wife could only recover for injuries to herself by bringing a suit in her husband's name, and since she had no property rights, any recovery inured to the benefit of her husband.[7]

With the advent of the Married Women's Acts, the wife was granted the right to sue, the right to be sued, the right to contract, and the right to own and control property.[8] At the turn of the twentieth century, courts began to recognize the wife's consortium interest by allowing her to

[1] BLACK'S LAW DICTIONARY 382 (4th ed. 1951). "In old English law, the term signified company or society, and in the language of pleading, as in the phrase *per quod consortium amisit*, it has substantially the same meaning, viz., the companionship or society of a wife . . . ." *Id.*

[2] "The concept of consortium includes not only loss of support, it also embraces such elements as love, companionship, affection, society, sexual relations, solace and more." Millington v. Southeastern Elev. Co., 22 N.Y.2d 498, —, 239 N.E.2d 897, 899, 293 N.Y.S.2d 305, 308 (1968).

[3] Hyde v. Scyssor, 79 Eng. Rep. 462 (K.B. 1620). *See generally* Note, *Case of the Lonely Nurse: The Wife's Action for Loss of Consortium*, 18 WES. RES. L. REV. 621 (1967).

[4] W. PROSSER, THE LAW OF TORTS § 119 (3d ed. 1964) [hereinafter cited as PROSSER].

[5] *Id.* at 916.

[6] Blackstone compared the relationship of the husband and wife to that of master and servant: "[T]he 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." 3 W. BLACKSTONE, COMMENTARIES 143 (Lewis ed. 1897).

[7] PROSSER § 111, at 881.

[8] *Id. See, e.g.*, N.C. GEN. STAT. § 52-10 (1953).

recover for an *intentional interference* with her marital relationship.[9] This recognition set the stage for the decision of the Supreme Court of North Carolina in *Hipp v. E.I. Dupont de Nemours & Co.*,[10] where the court allowed a wife to recover for loss of consortium as a result of a negligent injury to her husband. The court reasoned that the Married Women's Act was intended to give the wife separate legal remedies for the same rights and remedies allowed a husband. Thus, the court saw no reason to withhold from the wife the consortium action that the husband enjoyed. Five years later, however, in *Himant v. Tide Water Power Co.*[11] the court not only abolished such an action in the wife,[12] but also implied that the Married Women's Act extinguished this consortium right in the husband. Then, in *Helmstetler v. Duke Power Co.*[13] the husband's cause of action was expressly abolished.[14]

This issue remained dormant in most jurisdictions until the landmark decision of the District of Columbia Circuit in *Hitaffer v. Argonne Co.*,[15] which allowed the wife a reciprocal action for loss of consortium as a result of a negligent injury to her husband. Following the trend established by *Hitaffer*,[16] fifteen states now recognize a cause of action in

[9] PROSSER § 118, at 903. An intentional interference with the marital relations is the basis of actions such as criminal conversation, alienation of affections, or enticement. The damages recoverable in these actions are for loss of consortium, and courts have interpreted the Married Women's Acts or more specific statutes as recognizing a wife's mutual consortium interest in her husband.

[10] 182 N.C. 9, 108 S.E. 318 (1921). *See* Note, 3 N.C.L. REV. 98 (1925).

[11] 189 N.C. 120, 126 SE. 307 (1925). *See Note*, 3 N.C.L. REV. 98 (1925).

[12] The court apparently reasoned that the wife had no right to recover for the loss of her husband's domestic services since he recovered his loss to perform those services in his own action for personal injury. Since loss of services was the prominent, if not indispensable, element of a consortium action, the wife had no basis for her action. Without a loss of services, the other elements involved in loss of consortium were not a proximate result of the injury to the husband.

[13] 224 N.C. 821, 32 S.E.2d 611 (1945).

[14] The reasoning of the court was that, as a result of the Married Women's Act, the wife had to recover any loss of ability to perform domestic services in her own personal injury action; thus, since the husband did not have a right to recover for loss of his wife's services, a necessary element of his consortium action, he had no basis for the consortium action.

[15] 183 F.2d 811 (D.C. Cir. 1950), *cert. denied*, 340 U.S. 852 (1950). *See* Note, *Loss of Consortium from Injury to Spouse*, 29 N.C.L. REV. 178 (1951).

[16] *See, e.g.*, Jaffe, *Damages for Personal Injury: The Impact of Insurance*, 18 LAW & CONTEMP. PROB. 219 (1953); Payne, *Tortious Invasions of Right of Marital Consortium*, 8 J. FAM. LAW 41 (1968); Rossman & Allen, *What's New in the Law: Husband and Wife—Consortium*, 52 A.B.A.J. 492 (1966); Spero, *Wife's Action for Loss of Consortium*, 17 CLEV.-MAR. L. REV. 462 (1968); Note, 26 MD. L. REV. 361 (1966); Note, *Loss of Consortium from Injury to Spouse*, 29 N.C.L. REV. 178 (1951); Note, *Case of the Lonely Nurse: The Wife's Action for Loss of Consortium*, 18 WES. RES. L. REV. 621 (1967).

either spouse when the other is negligently injured.[17] Seventeen states, however, continue to confine such right to the husband,[18] and at least seven other states afford the action to neither spouse.[19]

In *Millington v. Southeastern Elevator Co.*,[20] New York became the fifteenth state to recognize this consortium action in either spouse as a result of a negligent injury to the other spouse. The plaintiff-wife asked the court to recognize that she had been deprived of definite rights involved in her marital relationship when her husband had been paralyzed from his waist down because of the defendant's negligence. The defendant raised at least five major arguments that, taken together, have been advanced in other courts to deny the wife's right to recover. But the reasoning of these arguments in fact "take[s] us on a tour similar to that of Minos in the labyrinth of Daedalus. Each path leads to a dead end of reasoning and logic."[21]

The first major argument offered for denying a consortium action to the wife is that the Married Women's Acts were not intended to give the wife any new rights, but were only to provide her with personal remedies for rights that she always had at common law, which did not include the right to her husband's consort. Thus, allowing the wife to bring an action for loss of consortium would not only be granting her a new right and remedy, contrary to the purpose of the Married Women's Acts, but also would be invading the legislative domain.[22] The critics of such logic assert that the wife did have a right to her husband's consort

[17] Arkansas, Delaware, Georgia, Idaho, Illinois, Iowa, Maryland, Michigan, Missouri, New Jersey, New York, Ohio, Oregon, South Dakota, and Wisconsin. The following federal decisions interpreting state law have allowed the action to either spouse in additional states: Luther v. Maple, 250 F.2d 916 (8th Cir. 1958) (interpreting Nebraska law); Owen v. Illinois Baking Corp., 260 F. Supp. 820 (W.D. Mich. 1966) (interpreting Indiana law); Dutton v. Hightower & Lubrecht Constr. Co., 214 F. Supp. 298 (D. Mont. 1963) (interpreting Montana law). *But see* Miskunas v. Union Carbide Corp., 399 F.2d 847 (7th Cir. 1968) (interpreting Indiana law *not* to allow the action to the wife).

[18] Alabama, Florida, Indiana, Kansas, Kentucky, Maine, Minnesota, Mississippi, New Hampshire, New Mexico, North Dakota, Oklahoma, Pennsylvania, South Carolina, Tennessee, Vermont, and West Virginia.

[19] California, Connecticut, Louisiana, Massachusetts, North Carolina, Rhode Island, and Virginia. *See* Black v. United States, 263 F. Supp. 470 (D. Utah 1967) (interpreting Utah's law to allow neither spouse the action).

[20] 22 N.Y.2d 498, 239 N.E.2d 897, 293 N.Y.S.2d 305 (1968), *overruling* Kronenbitter v. Washburn Wire Co., 4 N.Y.2d 524, 151 N.E.2d 898, 176 N.Y.S.2d 354 (1959).

[21] Montgomery v. Stephan, 359 Mich. 33, 41, 101 N.W.2d 227, 231 (1959).

[22] *See, e.g.*, Hinnant v. Tide Water Power Co., 189 N.C. 120, 126 S.E. 307 (1925); Page v. Winter, 240 S.C. 516, 126 S.E.2d 570 (1962).

at common law, but no remedy, and that the very purpose of the Married Women's Acts was to grant remedies to the wife for rights such as consortium.[23]

Both of these arguments concerning whether the wife has a right without a remedy at common law seem meaningless in light of the Married Women's Acts. The general legislative intent behind the Acts was apparently that of affording the wife a legal status equal to her husband's.[24] Moreover, since the Acts are generally interpreted as giving the wife a new cause of action for an intentional interference with her marital relations, an action which she did not have at common law,[25] it is inconsistent to argue that the same Acts did not similarly give her a new consortium action for a negligent injury to her husband.[26]

A second argument advanced against permitting the wife a recovery under the consortium action is that the creation of a new cause of action and the subsequent extension of the defendant's liability should be left to the legislatures.[27] This argument is closely related to the first argument because it assumes that the legislature has not already spoken through the Married Women's Acts.[28] Yet, fear of invading the legislative domain is anomalous when a court asserts that the creation of a consortium action in the wife should be left for the legislature, but then abolishes the husband's action in order to achieve symmetry and equality.[29] "Thus a case

[23] *See, e.g.*, Page v. Winter, 240 S.C. 516, 519, 126 S.E.2d 570, 572 (1962) (dissenting opinion).

[24] *See, e.g.*, Knighten v. McClain, 227 N.C. 182, 44 S.E.2d 79 (1947); Karchner v. Mumrie, 398 Pa. 13, 156 A.2d 537 (1959). *See* PROSSER § 118, at 903.

[25] *Id.*

[26] *Compare* Hinnant v. Tide Water Power Co., 189 N.C. 120, 126 S.E. 307 (1925), *with* Knighten v. McClain, 227 N.C. 682, 44 S.E.2d 79 (1947); *compare* Neuburg v. Bobowicz, 401 Pa. 146, 162 A.2d 662 (1960), *with* Karchner v. Mumrie, 398 Pa. 13, 156 A.2d 537 (1959).

[27] *See, e.g.*, Smith v. United Constr. Workers, 271 Ala. 42, 122 So. 2d 153 (1960); West v. San Diego, 54 Cal. 2d 469, 353 P.2d 929, 6 Cal. Rptr. 289 (1960); Page v. Winter, 240 S.C. 516, 126 S.E.2d 570 (1962).

[28] Once a court realizes that the traditional arguments against the wife's consortium action stem from antiquated common law fictions, it becomes "as much the duty of this court to restore a right which has been erroneously withheld by judicial opinion as it is to recognize it properly in the first instance." Brown v. Georgia-Tenn. Coaches, Inc., 88 Ga. App. 519, 533, 77 S.E.2d 24, 32 (1953).

[29] *See, e.g.*, West v. San Diego, 54 Cal. 2d 469, 353 P.2d 929, 6 Cal. Rptr. 289 (1960). *Compare* Hinant v. Tide Water Power Co., 189 N.C. 120, 126 S.E. 307 (1925), *with* Helmstetler v. Duke Power Co., 224 N.C. 821, 32 S.E.2d 611 (1945). These courts seem to be "legislating" unreasonably when they abolish the husband's action that has been established since early common law. Moreover, equality and symmetry in our laws are usually thought of as being attained by giving the deprived group the same rights as the more privileged group, not by eliminating the latter's rights.

predicated upon the theory that the court is bound to follow the common law rule becomes converted into a case holding that the court must now reverse a common law rule."[30] Admittedly, if a state's wrongful death statute restricts recovery of a surviving spouse to pecuniary loss,[31] the court could infer a legislative intent against the sentimental elements involved in the consortium action. On the other hand, the opposite inference is logical in those states that do allow recovery for loss of companionship and other sentimental elements under their wrongful death statutes.[32]

Similar arguments against courts creating new causes of action and thus legislating have been espoused to thwart recovery for prenatal injury,[33] mental distress,[34] and the right to privacy,[35] but the courts have had little trouble "enacting" these new torts. In fact, the law of torts is highly "judge-made," and perhaps its strength lies in this fact.[36]

The third major argument is based on the premise that the so-called "sentimental" elements of a husband's action for loss of consortium are parasitic to the basic and indispensable element of services, and since the wife has never had a reciprocal right to her husband's services, she cannot have a right to his consortium.[37] Those who oppose such reasoning claim that the loss of services element was never an indispensable element of the husband's action for loss of consortium, and that the wife's action should merely be limited to the other elements within the consortium interest.[38]

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[30] West v. San Diego, 54 Cal. 2d 469, 485, 353 P.2d 929, 939, 6 Cal. Rptr. 289, 299 (1960) (dissenting opinion).

[31] *E.g.*, Greene v. Nichols, 274 N.C. 18, 161 S.E.2d 521 (1968) (the pecuniary loss rule). The North Carolina pecuniary loss limitation has now been amended to allow recovery of consortium elements in a wrongful death action. *See* N.C. GEN. STAT. § 28-174 (*as amended* by S.B. 95, 1969 General Assembly).

[32] West v. San Diego, 54 Cal.2d 469, 487, 353 P.2d 929, 940, 6 Cal. Rptr. 289, 300 (1960) (dissenting opinion).

[33] PROSSER § 56, at 355. The initial "legislative" decision for this tort, which almost every state court has now recognized, came from the District of Columbia, as did the landmark decision allowing the wife a consortium action. Bonbrest v. Kotz, 65 F. Supp. 138 (D.D.C. 1946). *See* note 15 *supra*, and accompanying text.

[34] PROSSER § 55.

[35] *Id.* § 112.

[36] In Montgomery v. Stephan, 359 Mich. 33, 101 N.W.2d 227 (1960), the court answered the legislative argument very appropriately: "The obstacles to the wife's action were judge-invented and they are herewith judge-destroyed." *Id.* at 49, 101 N.W.2d at 235.

[37] *See, e.g.*, Hitaffer v. Argonne, 183 F.2d 811 (D.C. Cir. 1950); Ripley v. Ewell, 61 So. 2d 420 (Fla. 1952); Hoffman v. Dautel, 192 Kan. 406, 388 P.2d 615 (1964); Hinnant v. Tide Water Power Co., 189 N.C. 120, 126 S.E. 307 (1925).

[38] *See, e.g.*, Montgomery v. Stephan, 359 Mich. 33, 101 N.W.2d 227 (1960).

Loss of services was a probable element of the husband's consortium action for a negligent injury to his wife at common law, but the courts did not feel compelled to assert it as indispensable until the wife attempted to bring a similar action when her husband was injured by a negligent defendant.[39] Moreover, the loss of services is not indispensable to a wife's action for an intentional interference with her marital relations.[40]

Judicial treatment of the "sentimental" elements of the consortium interest as parasitic to the service element is similar to the requirement at common law of an immediate impact to the person of the plaintiff in order for him to maintain an action for negligent infliction of mental distress.[41] Although few courts require this today, most courts do continue to require consequential physical effects to which the "parasitic" damages of mental distress may attach.[42] The apparent purpose behind this basic prerequisite to both a negligent infliction of mental distress action and the loss of consortium action is that of establishing tangible damages and preventing fictitious claims.[43] A more realistic approach, however, would be to recognize that the essence of recovery is for the damage to these intangible but important interests, and that the requirement of a superficial scratch[44] or

[39] In earlier cases from states purporting to follow the common law rule, where a husband brought an action for loss of consortium as a result of an injury to his wife, services are not mentioned as indispensable to his action. *See, e.g.*, Kimberly v. Howard, 143 N.C. 398, 55 S.E. 778 (1906) (husband can recover for loss of society *or* services of his wife); Holleman v. Howard, 119 N.C. 150, 25 S.E. 972 (1896) (same).

[40] *See, e.g.*, Litchfield v. Cox, 266 N.C. 622, 146 S.E.2d 641 (1966); Knighten v. McClain, 227 N.C. 682, 44 S.E.2d 79 (1947). See also PROSSER § 118, at 904.

[41] *See, e.g.*, Victorian Ry. Comm'r v. Coultas, 13 App. Cas. 222 (P.C. 1888). The "impact" not only was necessary to establish the tort action for trespass on the case, but it assured the court that damages of a physical nature were present, thus establishing the "piggyback" for the more subtle mental anguish or distress claims.

[42] *See* PROSSER § 55, at 350.

[43] *Id.* at 351. *See Recent Developments in North Carolina Statutory and Case Law—Torts*, 47 N.C.L. REV. 262, 280 (1968).

> The treatment of any element of damages as a parasitic factor belongs essentially to a transitory stage of legal evolution. A factor which is today recognized as parasitic will, forsooth, tomorrow be recognized as an independent basis of liability. It is merely a question of social, economic and industrial needs as those needs are reflected in the organic law.

PROSSER § 11, at 44 n.45 (quoting 1 T. STREET, FOUNDATIONS OF LEGAL LIABILITY 460, 470 (1906)). Although this transition has not completely occurred in the mental distress actions, courts will be more liberal in determining the basic physical injury to which the mental damages may attach where there is sufficient certainty that damages have resulted. *See, e.g.*, Crews v. Provident Fin. Co., 271 N.C. 684, 157 S.E.2d 381 (1967).

[44] *E.g.*, Tuttle v. Meyer Dairy Prod. Co., 100 Ohio App. 133, 138 N.E.2d 429 (1956) (plaintiff got a mouthful of broken glass, but received no cuts, and thus was denied recovery for his mental distress).

a subordinate loss of services often leads to an inequitable result when the only substantial damages are "parasitic."[45]

Even if the parasitic treatment of a negligent infliction of mental distress action may sometimes be justified on the basis of the subjective nature of the damages involved, there is no parallel justification for parasitic treatment of the consortium action. The consortium interests are obviously damaged when the marital relationship is disrupted because of an injury to the husband, just as the same consortium interests are damaged when there is an intentional interference[46] with the marital relations. The very nature of the consortium interests inherent in the legally recognized and protected marriage contract preclude any basis for fear of spurious claims.[47]

The absence of proximate cause is the fourth major argument advanced for denying the consortium action to the wife or either spouse.[48] Apparently the proximate causation problem was only recently discovered, for neither the common law courts nor those courts that allowed the husband to recover before the Married Women's Acts experienced difficulty in discerning proximate cause.[49] In fact, the courts that presently

[45] Courts allow recovery in circumstances especially likely to produce serious and genuine mental distress, without requiring an impact or resulting physical effects because there is little probability of a fictitious claim. *E.g.*, Russ v. Western Union Tel. Co., 222 N.C. 504, 23 S.E.2d 681 (1943) (recovery for mental distress caused by negligent transmission of a message announcing death).

[46] Sentimental elements are not treated as parasitic to loss of services in this type of consortium action because the damages to the marital relationship are obvious. But resulting physical damage is not required by most courts today as essential in an action for intentional infliction of mental distress, not because the damages are as obvious as those in an intentional interference with the marital relationship, nor because the damages are more obvious than those in an action for negligent infliction of mental distress, but because of the aggravated circumstances of the tort, which usually assure the court that damages are more probable and that there is less chance of a spurious claim.

[47] The requirement of a causal connection should not be confused with the need for proof that there have been damages in fact. Intangible damages are not treated as parasitic in intentional torts while the same type of damages are treated as parasitic in negligent torts because damages are more certain to follow. Whether a defendant has usurped the affections of plaintiff's husband or whether he has paralyzed her husband for life, the plaintiff-wife suffers an obvious loss of consortium.

[48] West v. San Diego, 54 Cal. 2d 469, 353 P.2d 929, 6 Cal. Rptr. 289 (1960); Gallagher v. Pequot Spring Water Co., 2 Conn. Cir. 354, 199 A.2d 172 (1963). *But see* Montgomery v. Stephan, 359 Mich. 33, 101 N.W.2d 227 (1960); Durham v. Gabriel, 16 Ohio App. 2d 51, 241 N.E.2d 401 (1968).

[49] *Compare* Bailey v. Long, 172 N.C. 661, 90 S.E. 809 (1916), *with* Hinnant v. Tide Water Power Co., 189 N.C. 120, 126 S.E. 307 (1925) *and* Helmstetler v. Duke Power Co., 224 N.C. 821, 32 S.E.2d 611 (1945).

allow only the husband the consortium action do not offer this argument against allowing the wife to recover in a mutual action.[50]

This reluctance to apply a proximate cause analysis is obviously based on a policy consideration against further extension of a defendant's liability for a single negligent act. Undoubtedly an incalculable influence on this policy determination is the fear of a future extension of a similar cause of action to other members of the family, especially the children, once the consortium action is allowed to either or both spouses.[51] However, the consortium interest should be confined to the unique relationship between the husband and wife, and not extended to the products of that relationship. While there are some similar interests within the parent-child relationship, such interests are less important and more temporary, as the child is expected eventually to leave his home and family.[52]

This policy determination on which the courts base their proximate cause argument becomes even less convincing when the defendant has committed a battery or other intentional tort on the husband or wife resulting in a loss of consortium to the other spouse.[53] The moral fault of the defendant should encourage the court to cast aside its fear of extending the defendant's liability in favor of a derivative consortium action in the spouse of the injured husband or wife.[54]

A useful analogy may once again be drawn to the development of an action for the negligent infliction of mental distress, although a sole action for the negligent,[55] or even intentional,[56] infliction of mental distress, unlike an action for loss of consortium, was not recognized at common law. The reasons offered for preventing the development of such an action were that the damages were too speculative and outside the boundaries of any reasonable "proximate" connection with

[50] Courts contending that a wife's loss of consortium is too remote from the defendant's negligent injury to her husband do not use a proximate cause analysis.

[51] *E.g.*, West v. San Diego, 54 Cal. 2d 469, 353 P.2d 929, 6 Cal. Rptr. 289 (1960).

[52] Neuburg v. Bobowicz, 401 Pa. 146, 160, 162 A.2d 662, 668 (1960) (dissenting opinion).

[53] *E.g.*, Smith v. United Constr. Workers, 271 Ala. 42, 122 So. 2d 153 (1960) (the defendant committed a battery on plaintiff's husband, but the court denied her an action for loss of consortium).

[54] There is a general attitude of the courts to impose greater responsibility upon an intentional wrongdoer, upon the obvious basis that it is better for losses caused by the defendant's act to fall upon the intentional wrongdoer than upon the innocent victim. PROSSER § 9, at 37.

[55] *Id.* § 55, at 346. *See, e.g.*, Lynch v. Knight, 11 Eng. Rep. 854 (1861).

[56] PROSSER § 11, at 41-42.

the defendant's act,[57] and were grounded in fear of unlimited liability in the defendant and a multiplicity of fictitious suits arising from the defendant's negligent or intentional act.[58] But these arguments have deterred few courts from recognizing independent mental distress actions, apart from any other tort involved in the defendant's act.

The final argument against an action in the wife for loss of consortium concerns the danger of double recovery.[59] Since the injured husband recovers for his own loss of services in his separate action for personal injury, any recovery by the wife for the loss of her husband's services in her consortium action would be a double recovery.[60] The court in *Millington v. Southeastern Elevator Co.*,[61] and two other courts,[62] have alleviated this danger of double recovery by requiring the wife to join her derivative consortium action with her husband's personal injury action. Thus, if the injured husband's action has been terminated either by judgment, settlement or otherwise, this would bar the wife's action for consortium.

Other courts that recognize reciprocal consortium actions in either spouse for an injury to the other spouse treat the consortium action as a separate and independent cause of action, which derives from the injured spouse's action.[63] Thus, the consortium action need not be joined with the injured spouse's suit, and a judgment in either action is not binding in the other action, nor does it bar recovery in the other action. The danger of double recovery is avoided by eliminating the loss of services element from the wife's consortium action. A special verdict may be employed to disclose any mistake by the jury in allowing the wife to recover for loss of her husband's services. No matter what procedure is followed in allowing either spouse the consortium action, all the courts treat the action as derivative of the injured spouse's action; thus, any defense

[57] *Id.* § 55, at 346-48.

[58] *Id.* at 351-52.

[59] It could be claimed that technically the husband is made "whole" again when he recovers for his injuries from the defendant; thus the wife could suffer no future loss of consortium. But such a fiction begs the question of whether the wife has suffered a loss of consortium in fact.

[60] *See, e.g.*, West v. San Diego, 54 Cal. 2d 469, 353 P.2d 929, 6 Cal. Rptr. 289 (1960); Millington v. Southeastern Elev. Co., 22 N.Y.2d 498, 239 N.E.2d 897, 293 N.Y.S.2d 305 (1968).

[61] 88 N.Y.2d 498, 239 N.E.2d 897, 293 N.Y.S.2d 305 (1968).

[62] Deems v. Western Md. Ry., 247 Md. 95, 231 A.2d 514 (1967); Ekalo v. Constructive Serv. Corp. of America, 46 N.J. 82, 215 A.2d 1 (1965).

[63] *E.g.*, State Farm Mut. Auto. Ins. Co. v. Jiles, 115 Ga. App. 193, 154 S.E.2d 286 (1967); Wolff v. Du Puis, 233 Ore. 330, 378 P.2d 707 (1963); Fitzgerald v. Meissner & Hicks, Inc., 38 Wis. 2d 571, 157 N.W.2d 595 (1968).

available to the defendant against the injured spouse is applicable to prevent recovery in the consortium action.[64]

An additional damages problem is that of evaluating the loss of consortium.[65] Admittedly, damages for loss of consortium are not readily subject to exact assessment, nor can any monetary recovery realistically replace the loss. However, courts refuse to allow similar problems to prevent recovery for loss of consortium when there has been an intentional interference with the plaintiff's marital relations; nor do the intangible aspects of the damages prevent evaluation of pain and suffering or mental distress in other tort actions.

A final argument in favor of the wife's recovery in those states that allow only the husband a consortium action is that this policy discriminates against the wife in violation of the equal protection clause of the fourteenth amendment.[66] In *Levy v. Louisiana*,[67] the Supreme Court held unconstitutional a Louisiana wrongful death statute forbidding a suit by illegitimate children for the wrongful death of their mother. The Court held that the "[l]egitimacy or illegitimacy of birth has no relation to the nature of the wrong allegedly inflicted on the mother,"[68] and that the

[64] *See, e.g.*, Tjaden v. Moses, 94 Ill. App. 2d 361, 237 N.E.2d 562 (1968); Patusco v. Prince Macaroni, Inc., 50 N.J. 365, 235 A.2d 465 (1967). Recovery for the loss of consortium is limited to the estimated life of the joint relationship after the injury. The diminution of the husband's life expectancy as a result of the injury is not significant. When the injured spouse dies, his action or right to recovery dies with him and is a valid defense against any recovery for loss of consortium after the husband's estimated time of death. In those states that allow the surviving spouse to recover consortium elements in a subsequent wrongful death action, where the actions can complement each other, the possibility of an inequitable recovery by the wife is slight. But in those states that allow the surviving spouse only a pecuniary loss recovery in a wrongful death action, there may be inequitable and conflicting results. *E.g.*, *compare* Walden v. Coleman, 105 Ga. App. 242, 124 S.E.2d 313 (1962) (wife allowed to bring a consortium action for the two hours that her husband survived his injury), *with* Lampe v. Lagomarcino-Grupe Co., 251 Iowa 204, 100 N.W.2d 1 (1959) (wife not allowed a consortium action for the hour that her husband survived his injuries).

[65] *See, e.g.*, West v. San Diego, 54 Cal. 2d 469, 353 P.2d 929, 6 Cal. Rptr. 289 (1960) (injury hard to express in monetary terms); Gallager v. Pequot Spring Water Co., 2 Conn. Cir. 354, 199 A.2d 172 (1963) (damages too speculative).

[66] *E.g.*, Owen v. Illinois Baking Corp., 260 F. Supp. 820 (W.D. Mich. 1966) (interpreting Indiana law); Durham v. Gabriel, 16 Ohio App. 2d 251, 241 N.E.2d 40 (1968). *But see* Miskunas v. Union Carbide Corp., 399 F.2d 847 (7th Cir. 1968) (Indiana law not an impermissible discrimination violative of the fourteenth amendment, but a permissible classification to prevent double recovery); Krohn v. Richardson-Merrell, Inc., 219 Tenn. 37, 406 S.W.2d 166 (1966), *cert. denied*, 386 U.S. 970 (1967) (not an impermissible discrimination but a permissible classification).

[67] 391 U.S. 68 (1968).

[68] *Id.* at 72.

statute, therefore, violated the equal protection clause. Like reasoning would seem applicable to those decisions that allow only the husband the consortium action. The court in *Millington* assumed that such a practice did violate the fourteenth amendment, but refused to base its opinion on a constitutional mandate. It chose instead considerations of policy and fairness.[69]

Ultimately, in deciding whether to allow the wife a cause of action for loss of consortium as a result of a negligent injury to her husband, there must be a balancing of interests. Although the wife may be indisputably deprived of the mutual consortium of her husband as a result of the negligent injury to him, to permit recovery the liability of a defendant must be extended. The realities and enlightment of our age, however, seem to weigh more heavily in favor of judicial recognition of the damage that can be done by a negligent defendant to the mutual rights within the unique consortium relationship.[70]

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[69] 22 N.Y.2d at —, 239 N.E.2d at 903, 293 N.Y.S.2d at 313.

[70] Note, *Husband and Wife, Parent and Child—Punitive Damages Disallowed In Husband's Cause of Action Arising Out of Injuries to His Wife and Minor Child*, 19 S.C.L. REV. 871 (1967) (punitive damages should not be allowed even if such damages are allowed the injured spouse). *See Note*, 28 U. PITT. L. REV. 366 (1966) (discussing the need for the mitigation of damages on behalf of the defendant where there is a lack of conjugal regard and affection between the spouses).