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Domestic Relations - Wife Note Allowed to Recover for Loss of Consortium Caused by Negligent Injury to Her Husband - Deshotel v. Atchison, T. & S.F. Ry. Co., 328 P. 2d 449 (Cal., 1958)

DePaul College of Law

Similarly, for the Supreme Court to find that Hoag was properly tried a second time although the facts indisputably showed that he could not have been guilty of the second charge without also being guilty of the first is apparently inconsistent with concepts of fair criminal procedure. If there had been ten victims, could the state have prosecuted Hoag ten times? The Court found that the state's determination to try Hoag again after the prosecuting witnesses' unexpected failure to identify him was neither arbitrary nor lacking in justification. The Court is apparently placing a premium on "unpreparedness."

In the *Ciucci* case, the state tried Ciucci three times and undoubtedly would have tried him a fourth if the death penalty had not already been obtained. Ostensibly there was no justification for not trying all four murders at one time except the prosecutor's desire to obtain a death sentence. The problem of whether the possible benefits to society from multiple trials outweigh the suppression of individual liberty was fairly summarized in the case of *In re Spier*, where the court said:

> In this case, the guilt or innocence of the prisoner is as little the subject of inquiry, as the merits of any case can be, when it is brought before this Court on a collateral question of law. Although the prisoner, if unfortunately guilty, may escape punishment, in consequence of the decision this day made in his favor, yet it should be the bulwark of safety to those, who more innocent, may become the subjects of persecution, and whose conviction, if not procured on one trial, might be secured on a second or third, whether they were guilty or not.[22]

[22] 12 N.C. 329, 331 (1828). In this case, after the jury had been sworn in and evidence presented, the court adjourned for the summer. The defendant was again brought to trial at the beginning of the new term.

DOMESTIC RELATIONS–WIFE NOT ALLOWED TO RECOVER FOR LOSS OF CONSORTIUM CAUSED BY NEGLIGENT INJURY TO HER HUSBAND

Plaintiff's husband was seriously injured when a taxicab in which he was a passenger collided with a train. He brought an action against the railway company, the taxicab company, the train engineer, and the cab driver, obtaining a judgment which was affirmed on appeal. During the pendency of that action his wife brought suit against these same defendants for loss of consortium[1] allegedly resulting from their negligence. The Superior Court sustained a general demurrer by the railroad and the engineer[2] without leave to amend, and the wife appealed. The Supreme

[1] This court defines consortium as "the non-economic aspects of marriage, including conjugal society, comfort, affection, and companionship."

[2] The taxicab company and its driver are not mentioned in the judgment or the notice of appeal, and the record does not disclose the status of this case with respect to them.

Court of California held that the wife could not maintain her action on the grounds that any departure from the common law rule that a wife cannot recover for the loss of consortium resulting from a negligent injury to her husband should be left to the legislature. *Deshotel v. Atchison, Topeka and Santa Fe Railway Co.*, 328 P.2d 449 (1958).

Thus the California Court refused to depart from the established limitation on recovery adhered to in England[3] and the vast majority of American jurisdictions that have been faced with this problem.[4] These courts, in spite of the fact that the common law disability of a wife to sue in her own behalf has been removed by the Married Women's Acts, have based their decision on various grounds: (1) The injury to the wife is too indirect and remote;[5] (2) A double recovery would be given if both husband and wife could sue for the same injury;[6] (3) The husband has the right to the services of his wife while she does not have the right to his services;[7] and (4) The wife was not entitled to relief at common law and the Married Women's Acts did not improve her standing.[8] Because of this

[3] Best v. Samuel Fox & Co. Ltd., [1952] A.C. 716.

[4] Filice v. United States, 217 F. 2d 515 (C.A. 9th, 1954); Josewski v. Midland Constructors, Inc., 117 F. Supp. 681 (D.D.C., 1953); Jeune v. Del E. Webb Construction Co., 77 Ariz. 226, 269 P.2d 723 (1954); Franzen v. Zimmerman, 127 Colo. 381, 256 P.2d 897 (1953); Giggey v. Gallagher Transp. Co., 101 Colo. 258, 72 P.2d 1100 (1937); Ripley v. Ewell, 61 So. 2d 420 (Fla. 1952); Brown v. Kistleman, 177 Ind. 692, 98 N.E. 631 (1912); Cravens v. Louisville & Nashville Ry. Co., 195 Ky. 257, 242 S.W. 628 (1922); Coastal Tank Lines v. Canoles, 207 Md. 37, 113 A.2d 82 (1955); Emerson v. Taylor, 133 Md. 192, 104 Atl. 538 (1918); Hartman v. Cold Spring Granite Co., 247 Minn. 515, 77 N.W. 2d 651 (1956); Stout v. Kansas City Terminal Ry. Co., 172 Mo. App. 113, 157 S.W. 1019 (1913); Bernhardt v. Perry, 276 Mo. 612, 208 S.W. 462 (1918); Larocca v. American Chain & Cable Co., 23 N.J. Super. 195, 92 A. 2d 811 (1952); Tobiassen v. Polley, 96 N.J.L. 66, 114 Atl. 153 (1921); Don v. Benjamin M. Knapp, 281 App. Div. 893, 119 N.Y.S. 2d 801, affirmed 306 N.Y. 675, 117 N.E. 2d 128 (1954); Smith v. Nichols Bldg. Co., 93 Ohio 101, 112 N.E. 204 (1915); Nelson v. A. M. Lockett & Co., 206 Okla. 334, 243 P. 2d 719 (1952); Howard v. Verdigris Valley Electric Co-operative Inc., 201 Okla. 504, 207 P. 2d 784 (1949); Garrett v. Reno Oil Co., 271 S.W. 2d 764; Nickel v. Hardware Mutual Casualty Co., 269 Wis. 647, 70 N.W. 2d 205 (1955).

[5] Brown v. Kistleman, 177 Ind. 692, 98 N.E. 631 (1912); Smith v. Nicholas Bldg. Co., 93 Ohio 101, 112 N.E. 204 (1915). It has also been held that a wife's inability to bear children brought about by negligent injury to her husband was an inadequate basis for an action for loss of consortium. Landwehr v. Barbas, 241 App. Div. 769, 270 N.Y. Supp. 534 (2d Dept., 1934).

[6] Eschenbach v. Benjamin, 195 Minn. 378, 263 N.W. 154 (1935); Giggey v. Gallagher Transp. Co., 101 Colo. 258, 72 P. 2d 1100 (1937); Barnhardt v. Perry, 276 Mo. 612, 208 S.W. 462 (1918).

[7] Boden v. Del-Mar Garage, 205 Ind. 59, 185 N.E. 860 (1933); Smith v. Nicholas Bldg. Co., 93 Ohio 101, 112 N.E. 204 (1915); Stout v. Kansas City Terminal Ry. Co., 172 Mo .App. 113, 157 S.W. 1019 (1913).

[8] Ash v. S. S. Mullen, Inc., 43 Wash. 2d 345, 261 P. 2d 118 (1953); Franzen v. Zimmerman, 127 Colo. 381, 256 P. 2d 897 (1953); Howard v. Verdigris Valley Electric Co-operative, 201 Okla. 504, 207 P. 2d 784 (1949).

reasoning only one decision,[9] which was later expressly overruled,[10] allowed a wife to recover for loss of consortium caused by negligence until the year 1950; although each of these reasons was severely criticized by legal scholars and text writers.[11]

In the case of *Hitaffer v. Argonne Co.*[12] in 1950, the Court of Appeals for the District of Columbia refused to follow the American rule because they were unable to disclose any substantial rationale on which to predicate a denial of a wife's action. The court then discarded all of the legal gymnastics engaged in by other courts which denied relief and convincingly shattered the reasons as either illogical or not legal.[13] The court employed the reasoning of the Court of Appeals of New York in stating:

> The actual injury to the wife from loss of *consortium*, which is the basis of the action, is the same as the actual injury to the husband from that cause. His right to the conjugal society of his wife is no greater than her right to the conjugal society of her husband. Marriage gives each the same rights in that regard. Each is entitled to the comfort, companionship, and affection of the other. The rights of one and the obligations of the other spring from the marriage contract, are mutual in character, and attach to the husband as husband, and to the wife as wife. Any interference with these rights, whether of the husband or of the wife, is a violation, not only of a natural right, but also of a legal right, arising out of the marriage relation.[14]

Although the reasoning of this decision commends itself on the basis of logic, only four decisions have followed which have allowed the wife relief in negligence cases.[15] Certain states have recognized the incongruity of allowing the husband to sue for loss of his wife's consortium and not allowing the wife to do so by denying his cause of action and thus affirming the equality of rights theory[16] pertaining to the marriage rela-

[9] Hipp v. E. I. Dupont de Nemours & Co., 182 N.C. 9, 108 S.E. 318 (1921).

[10] Hinnant v. Tidewater Power Co., 189 N.C. 120, 126 S.E. 307 (1925).

[11] Holbrook, The Change in the Meaning of Consortium, 22 Mich. L. Rev. 1 (1923); Harper , Law of Torts, 566 (1933); Prosser, Torts 948 (1941); 3 Vernier, American Family Laws 158 (1935).

[12] 183 F. 2d 811 (App. D.C., 1950).

[13] Simeone, The Wife's Action for Loss of Consortium–Progress or No?, 4 St. Louis Univ. L. Journ. 424 (1957).

[14] Bennett v. Bennett, 116 N.Y. 584, 590, 23 N.E. 17, 18 (1889).

[15] Cooney v. Moomaw, 109 F. Supp. 448 (D.C. Neb., 1953); Missouri Pacific Transp. Co. v. Miller, 227 Ark. 351, 299 S.W. 2d 41, (1957); Brown v. Georgia-Tennessee Coaches, Inc., 88 Ga. App. 519, 77 S.E. 2d 24 (1953); Acuff v. Schmit, 248 Iowa 272, 78 N.W. 2d 480 (1956).

[16] In his dissent in the instant case, Mr. Justice Carter concluded that the opinion of the majority "is a denial of the equal protection of the laws guaranteed by both the federal and state Constitutions." 328 P. 2d 449, 455 (1958).

tion.[17] Other courts have allowed the wife recovery where the injury to her husband was intentional[18] but have generally proceeded on the basis of exemplary damages due to the character of the defendant's act.[19]

The reasoning of the instant case aligns itself with three recent decisions[20] in holding that any change in precedent should come from the legislature. This view, which was also taken by an Illinois court,[21] fails to acknowledge a principle of the common law which gives a remedy wherever a right is violated. Consortium is a valuable property right which does not stand on subrogation but arises directly from the tort.[22] Although there is an almost total lack of precedent in the recognition of this right in negligence cases, the Supreme Court of Iowa recently reasoned:

> We deem precedent to be worthy of support only when it can stand the scrutiny of logic and sound reasoning in the light of present day standards and ideals.[23]

The concepts to which the courts have reverted in denying a wife recovery for the loss of the consortium of her husband seem to be unsound as well as antiquated. Since a husband and wife have mutual rights and obligations in the marriage relation, if one has a remedy for the invasion of a co-existent right, the other should have the same remedy.

[17] Helmstetler v. Duke Power Co., 224 N.C. 821, 32 S.E. 2d 611 (1945); Martin v. United Electric Ry., 71 R.I. 137, 42 A. 2d 897 (1945); Blair v. Seitner Dry Goods Co., 184 Mich. 304, 151 N.W. 724 (1915); Marri v. Stamford Street Ry. Co., 84 Conn. 9, 78 Atl. 582 (1911); Bolger v. Boston Elevated RR. Co., 205 Mass. 420, 91 N.E. 389 (1910).

[18] Actions for alienation of affections, criminal conversation and selling habit-forming drugs to the spouse are included within this group.

[19] Hinnant v. Tidewater Power Co., 189 N.C. 120, 126 S.E. 307 (1925); Cravens v. Louisville & Nash. RR. Co., 195 Ky. 257, 242 S.W. 628 (1922).

[20] Hartman v. Cold Spring Granite Co., 77 N.W. 2d 651 (Minn., 1956); Nickel v. Hardware Mutual Casualty Co., 269 Wis. 647, 70 N.W. 2d 205 (1955); Ripley v. Ewell, 61 So. 2d 420 (Fla., 1952).

[21] Patelski v. Snyder, 179 Ill. App. 24 (1913).

[22] Hitaffer v. Argonne Co., 183 F. 2d 811 (App. D.C., 1950).

[23] Acuff v. Schmit, 248 Iowa 272, 78 N.W. 480 (1957).

DRAMSHOPS ACT—WIFE PERMITTED TO RECOVER DAMAGES FOR LOSS OF SUPPORT AS CONSEQUENCE OF INTOXICATION AND DEATH OF HUSBAND WHOM SHE SHOT IN SELF-DEFENSE

Decedent was a habitual drunkard who, while under the influence of liquor, would become abusive to his wife, the plaintiff, beating her, and threatening her on occasion with a knife. He had been drinking heavily for about ten days when plaintiff went to defendants' liquor store and