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Wife's Right To Recovery For Loss Of Consortium Due To The Negligent Injury Of Her Husband

*Baldwin v. State*¹

Plaintiff's husband sustained injuries when the truck he was operating was struck by the defendant's railway locomotive. Plaintiff and her husband brought suit alleging that the defendant was negligent in the operation of the locomotive. The husband sought to recover for personal injuries sustained, while the plaintiff-wife sought to recover for the loss of the consortium of her husband. Upon motion of the defendants, the trial court dismissed the complaint of the plaintiff-wife. On appeal, the Supreme Court of Vermont affirmed the lower court and held that the plaintiff-wife had no right to recover for loss of consortium due to the negligent injury of her husband.²

Consortium is the "conjugal fellowship of husband and wife, and the right of each to the company, co-operation, affection, and aid of the other in every conjugal relation."³ Although this definition implies that this right is reciprocal between the spouses, the law has failed to accord husband and wife equal treatment where there has been a loss of consortium caused by a defendant's negligence. While a husband is allowed to sue for loss of consortium due to the negligent injury of his wife,⁴ the majority of the courts deny the wife the same cause of action when her husband has been negligently injured.⁵

1. 215 A.2d 492 (Vt. 1965).

2. *Id.* at 494.

3. BLACK, LAW DICTIONARY (4th ed. 1951).

4. See 27 AM. JUR. *Husband and Wife* §§ 501-02 (1940) ; 41 C.J.S. *Husband and Wife* § 401 (1944).

5. See 27 AM. JUR. *Husband and Wife* §§ 513-14 (1940) ; 41 C.J.S. *Husband and Wife* § 404 (1944).

Without reviewing any of the historical development of the law,⁶ the *Baldwin* court recognized that "There is no dispute that at common law a married woman had no right of action to sue for the loss of consortium of her husband."⁷ While a majority of the courts have accepted this interpretation of the common law,⁸ it has not been undisputed.⁹ Some courts which hold that the wife has no right of action base their conclusions on the fact that at common law, husband and wife were one, and "he was the one."¹⁰ All that belonged to the wife prior to the marriage became the husband's upon marriage.¹¹ In addition to not being able to enter into a contract,¹² the wife's services, like those of any servant, became the property of the husband, the loss of which he could recover from those responsible.¹³ In effect, the wife assumed the "degraded position . . . [of] a combination vessel, chattel, and household drudge. . . ."¹⁴ Consequently, the wife was not permitted to recover for the loss of her husband's services, the explanation being "that the inferior [has] 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."¹⁵ Despite the fact that consortium "includes, in addition to material services, elements of companionship, felicity and sexual intercourse, all welded into a conceptualistic unity,"¹⁶ these cases proceed on the theory that material services, not "sentimental injuries," are the predominant factor for which compensation is given. Thus, having found that the common law allowed the wife no property right in her husband's services, they conclude that the wife has no right of action for loss of consortium at common law.¹⁷

6. For a good discussion of the history of consortium, see Lippmann, *The Breakdown of Consortium*, 30 COLUM. L. REV. 651 (1930).

7. 215 A.2d at 493.

8. *E.g.*, Ripley v. Ewell, 61 So. 2d 420 (Fla. 1952); Potter v. Schafer, 161 Me. 340, 211 A.2d 891 (1965); Coastal Tank Lines, Inc. v. Canoles, 207 Md. 37, 113 A.2d 82 (1955); Nelson v. A. M. Lockett & Co., 206 Okla. 334, 243 P.2d 719 (1952); Page v. Winter, 240 S.C. 516, 126 S.E.2d 570 (1962); Ash v. S. S. Mullen, Inc., 43 Wash. 2d 345, 261 P.2d 118 (1953); Seagraves v. Legg, 127 S.E.2d 605 (W.Va. 1962); Nickel v. Hardware Mutual Casualty Co., 269 Wis. 647, 70 N.W.2d 205 (1955); see also RESTATEMENT, TORTS § 695 (1938).

9. See, *e.g.*, Hitaffer v. Argonne Co., 183 F.2d 811, 816 (D.C. Cir. 1950), 23 A.L.R.2d 1366 (1958).

10. Acuff v. Schmit, 248 Iowa 272, 78 N.W.2d 480, 484 (1956).

11. 2 BLACKSTONE, COMMENTARIES §§ 433-36 (Lewis ed. 1898).

12. 1 BISHOP, MARRIED WOMEN § 39 (1873).

13. Hyde v. Scysson, Cro. Jac. 538, 79 Eng. Rep. 462; Guy v. Livesey, Cro. Jac. 501, 79 Eng. Rep. 438; 8 HOLSWORTH, A HISTORY OF ENGLISH LAW 429, 430 (2d ed. 1937).

14. Montgomery v. Stephan, 359 Mich. 33, 101 N.W.2d 227, 230 (1960).

15. 3 BLACKSTONE, COMMENTARIES § 143 (Lewis ed. 1898).

16. Dini v. Naiditch, 20 Ill. 2d 406, 170 N.E.2d 881, 891, 86 A.L.R.2d 1184 (1960).

17. See Boden v. Del-Mar Garage, 205 Ind. 59, 185 N.E. 860 (1933); Brown v. Kistleman, 177 Ind. 692, 98 N.E. 631 (1912); Stout v. Kansas City Term. Ry. Co., 172 Mo. App. 113, 157 S.W. 1019 (1913). *But see* Novak v. Kansas City Transit, Inc., 365 S.W.2d 539 (Mo. 1963), *aff'd*, Shepard v. Consumers Cooperative Ass'n, 384 S.W.2d 635 (Mo. 1964), where the court said that loss of services was only one of the elements of consortium and that the husband's society itself was a right worthy of legal protection.

In addition to acknowledging the common law doctrines, the *Baldwin* court also dismissed the plaintiff-wife's action because she failed to allege "a breach of duty owing to her alone."¹⁸ The defendant's duty to use reasonable care was only owing to the plaintiff's husband, and "a right to a recovery in negligence does not accrue to a plaintiff derivatively."¹⁹ Some courts have denied a wife recovery for loss of consortium on the ground that injury to the wife is too indirect and, therefore, not compensable in negligence.²⁰ This rationale has been rejected by other courts for two reasons: first, this statement of causation may not be the general rule in the particular jurisdiction; second, the same rule, if valid, would deny the husband a similar action and, thereby, conflict with the common law.²¹ The Vermont court, which permits a husband to recover in a similar action, justified its inconsistent position and refusal to grant the wife an equivalent recovery in the instant case on the grounds that survival of the husband's cause of action since the enactment of the Married Women's Act (Married Women's Property Act) has been by "acquiescence and not because it has withstood critical analysis."²² Quoting Justice Schaefer's dissent in *Dini v. Naiditch*,²³ the *Baldwin* court refused to grant the wife a cause of action merely to be consistent with an "outworn common-law cause of action." While those who favor judicial restraint may commend the Vermont court's reluctance to grant the wife a cause of action, the inconsistency still exists. Some courts have resolved the problem by also denying the husband a cause of action.²⁴

Until 1950, all of the American courts which had been confronted with this question, except for two which were subsequently reversed,²⁵ held that a wife has no cause of action for loss of consortium resulting from a negligent injury to her husband.²⁶ In that year the Court of Appeals for the District of Columbia Circuit in *Hitaffer v. Argonne Co.*²⁷ rendered a lengthy opinion which reviewed and analyzed all the case law on this question and held that despite "the unanimity of authority elsewhere denying the wife recovery,"²⁸ "a wife has a cause of action for loss of consortium due to a negligent injury to her

18. 215 A.2d at 493.

19. *Ibid.*

20. See, e.g., *Coastal Tank Lines v. Canoles*, 207 Md. 37, 113 A.2d at 87 (1955); *Feneff v. New York Central & Hudson R.R. Co.*, 203 Mass. 278, 89 N.E. 436 (1909); *Howard v. Verdigris Valley Elect. Co-op.*, 201 Okla. 504, 207 P.2d 784 (1949).

21. *Hitaffer v. Argonne Co.*, 183 F.2d 811, 815 (D.C. Cir. 1950); *Acuff v. Schmit*, 248 Iowa 272, 78 N.W.2d 480, 485 (1956).

22. 215 A.2d at 494.

23. 20 Ill. 2d 406, 170 N.E.2d 881, 893, 86 A.L.R.2d 1184 (1960).

24. See, e.g., *Lockwood v. Wilson M. Lee Company*, 144 Conn. 155, 128 A.2d 330 (1956); *Rodgers v. Boynton*, 315 Mass. 279, 52 N.E.2d 576 (1943); *Helmstetler v. Duke Power Co.*, 224 N.C. 821, 32 S.E.2d 611 (1945); *Martin v. United Electric Sys. Co.*, 71 R.I. 137, 42 A.2d 897 (1945).

25. *Hipp v. E. I. DuPont de Nemours & Co.*, 182 N.C. 9, 108 S.E. 318 (1921), *overr'd*, *Hinnant v. Tide Water Power Co.*, 189 N.C. 120, 126 S.E. 307 (1925); *Griffen v. Cincinnati Realty Co.*, 27 Ohio 585 (Super. Ct. 1913), *overr'd*, *Smith v. Nicholas Bldg. Co.*, 93 Ohio St. 101, 112 N.E. 204 (1915).

26. See generally Annot., 23 A.L.R.2d 1378 (1952).

27. 183 F.2d 811 (D.C. Cir. 1950), *overr'd on other grounds*, *Smither & Co. v. Coles*, 242 F.2d 220 (D.C. Cir. 1957), *cert. denied*, 354 U.S. 914 (1957).

28. *Id.* at 812.

husband."²⁹ Since *Hitaffer*, the courts have not been unanimous in denying a wife a cause of action. Two federal courts³⁰ and eight states³¹ have adopted the *Hitaffer* result. On the other hand, twenty-three jurisdictions have continued to deny recovery to a wife.³² However, many of the courts which reject the *Hitaffer* result admit the inadequacy of the common law rule but leave any necessary change to their legislatures.³³

Proponents of the common law rule defend their position on various grounds. They state that at common law the wife had no right to the services of her husband, irrespective of her incapacity to sue; therefore, the passing of the Married Women's Act did not create a new right in the wife, but merely removed certain common law disabilities.³⁴ In effect, she still cannot sue for loss of consortium. They argue that granting the wife a right of action will result in "double-recovery." The husband, when negligently injured, may sue for all the injuries he has sustained, including his inability to provide for and associate with his wife. Allowing the wife to sue will permit her to "recover from the same wrongdoer the damages she has sustained for the same injuries which her husband may recover for and out of which recovery he is presumed to support and care for her."³⁵ They point out that the wife's injuries, which they label "sentimental," are too remote and consequential to be capable of measure, as opposed to the husband's injuries (loss of services), which are material and measurable.³⁶ They stress the point that to recognize a wife's right to recovery at this late date would be a usurpation of the legislative

29. *Id.* at 819.

30. See *Luther v. Maple*, 250 F.2d 916 (8th Cir. 1958) (applying Nebraska law); *Duffy v. Lipsman-Fulkerson & Co.*, 200 F. Supp. 71 (D. Mont. 1961).

31. *Missouri Pacific Transportation Co. v. Miller*, 227 Ark. 251, 299 S.W.2d 41 (1957); *Stenta v. Leblang*, 185 A.2d 759 (Del. 1962); *Brown v. Georgia-Tennessee Coaches, Inc.*, 88 Ga. App. 519, 77 S.E.2d 24 (1st Div. 1953), and *Bailey v. Wilson*, 100 Ga. App. 405, 111 S.E.2d 106 (2d Div. 1959), both affirmed in *Walden v. Coleman*, 105 Ga. App. 242, 124 S.E.2d 313 (1962); *Dini v. Naiditch*, 20 Ill. 2d 406, 170 N.E.2d 881 (1960); *Acuff v. Schmit*, 248 Iowa 272, 78 N.W.2d 480 (1956); *Montgomery v. Stephan*, 359 Mich. 33, 101 N.W.2d 227 (1960); *Novak v. Kansas City Transit, Inc.*, 365 S.W.2d 539 (Mo. 1963); *Hoekstra v. Helgeland*, 78 S.D. 82, 98 N.W.2d 669 (1959).

32. Nineteen of these jurisdictions are cited in *Igneri v. Cie. de Transports Oceaniques*, 323 F.2d 257, 261 n.9 (2d Cir. 1963). The other four jurisdictions are *Potter v. Schafter*, 161 Me. 340, 211 A.2d 891 (1965); *State Farm Mutual Auto. Ins. Co. v. Village of Isle*, 122 N.W.2d 236 (Minn. 1963); *Roseberry v. Starkovich*, 73 N.M. 211, 387 P.2d 321 (1963); *Rush v. Great American Insurance Company*, 213 Tenn. 506, 376 S.W.2d 454 (1964).

33. See, e.g., *Smith v. United Construction Workers*, Dist. 50, 271 Ala. 42, 122 So. 2d 153 (1960); *Deshotel v. Atchison, Topeka & Santa Fe Railway Co.*, 50 Cal. 2d 664, 328 P.2d 449, 452 (1958); *Ripley v. Ewell*, 61 So. 2d 420 (Fla. 1952); *Hoffman v. Dautel*, 192 Kan. 406, 388 P.2d 615 (1964); *Garrett v. Reno Oil Co.*, 271 S.W.2d 764 (Tex. Civ. App. 1954); *Ash v. S. S. Mullen, Inc.*, 43 Wash. 2d 345, 261 P.2d 118 (1953); *Seagraves v. Legg*, 127 S.E.2d 605 (W.Va. 1962).

34. See, e.g., *Rush v. Great American Insurance Company*, 213 Tenn. 506, 376 S.W.2d 454 (1964); *Ash v. S. S. Mullen, Inc.*, 43 Wash. 2d 345, 261 P.2d 118 (1953); *Nickel v. Hardware Mutual Casualty Co.*, 269 Wis. 647, 70 N.W.2d 205, 208 (1955).

35. *Nickel v. Hardware Mutual Casualty Co.*, 269 Wis. 647, 70 N.W.2d 205, 208 (1955). See also *Deshotel v. Atchison, Topeka & Santa Fe Railway Co.*, 50 Cal. 2d 664, 328 P.2d 449, 451 (1958); *Kronenbitter v. Washburn Wire Company*, 4 N.Y.2d 524, 151 N.E.2d 898 (1958).

36. See, e.g., *Feneff v. New York Central & Hudson R.R. Co.*, 203 Mass. 278, 89 N.E. 436 (1909); *Gambino v. Mfgs. Coal & Coke Co.*, 175 Mo. App. 653, 158 S.W. 77 (1913); *Stout v. Kansas City Term. Ry. Co.*, 172 Mo. App. 113, 157 S.W. 1019 (1913).

function.³⁷ Lastly, they argue that to permit the wife a right of recovery will broaden a defendant's scope of duty and liability to persons to whom his actions were not directed.³⁸ Not only will the defendant now be liable to the wife for damages, but the "door may be opened" to children and other members of the family.³⁹

The jurisdictions which permit the wife a cause of action remain unconvinced that the common law rule should be followed and criticize the "specious and fallacious reasoning"⁴⁰ employed by those courts which uphold it. They reject the contention that the wife has no right of consortium since the passing of the Married Women's Act, because this contention is based on the premise that loss of services is the predominant factor in an action for loss of consortium.⁴¹ Consortium, while including material services, "also includes love, affection, companionship, sexual relations, etc., all welded into a conceptualistic unity."⁴² The argument then advanced is that the wife had no cause of action at common law only because she lacked a capacity to sue, and with the passing of the Married Women's Acts, she now has the capacity to sue.⁴³ One court even urges that the Married Women's Acts have placed husband and wife on an equal plane so that "it is immaterial to her action today whether her cause of action existed at the early common law or not."⁴⁴ Consistently maintaining that consortium constitutes more than material services,⁴⁵ the "double-recovery" argument is discarded as "merely a convenient cliché for denying the wife's action for loss of consortium."⁴⁶ That material services are an element of consortium is not denied, but the "simple mathematics" of deducting from the wife's damages any compensation given to the husband in his action for the impairment of his ability to support will prevent double-recovery.⁴⁷

The contention that the wife's injuries, which courts label "sentimental" since they do not include loss of material services, are too remote and consequential to be capable of measure is regarded as unsupported when one recognizes that the husband is allowed a recovery for the same type of injuries. The husband's recovery in his action for loss of consortium includes "sentimental injuries" as well as material services. Were the contention correct, "in both cases the damages for the sentimental elements would be too remote and con-

37. See cases cited note 3 *supra*; but *cf.* note 61 *infra* and accompanying text.

38. See, *e.g.*, *Giggley v. Gallagher Transportation Co.*, 101 Colo. 258, 72 P.2d 1100 (1937); *Emerson v. Taylor*, 133 Md. 192, 104 Atl. 538 (1918); *Hinnant v. Tidewater Power Co.*, 189 N.C. 120, 126 S.E. 307 (1925).

39. See, *e.g.*, *Coastal Tank Lines v. Canoles*, 207 Md. 37, 113 A.2d 82 (1955).

40. *Hitaffer v. Argonne Co.*, 183 F.2d 811, 819 (D.C. Cir. 1950).

41. See, *e.g.*, *Hitaffer v. Argonne Co.*, 183 F.2d 811, 813 (D.C. Cir. 1950); *Montgomery v. Stephan*, 359 Mich. 33, 101 N.W.2d 227, 231-32 (1960); see also *Lippman, The Breakdown of Consortium*, 30 COLUM. L. REV. 651, 668 (1930).

42. *Hitaffer v. Argonne Co.*, 183 F.2d 811, 814 (D.C. Cir. 1950).

43. See, *e.g.*, *Acuff v. Schmit*, 248 Iowa 272, 78 N.W.2d 480, 484 (1956).

44. *Montgomery v. Stephan*, 359 Mich. 33, 101 N.W.2d 227, 233 (1960).

45. See note 41 *supra*.

46. *Dini v. Naiditch*, 20 Ill. 2d 406, 170 N.E.2d 881, 891 (1960).

47. See, *e.g.*, *Hitaffer v. Argonne Co.*, 183 F.2d 811, 819 (D.C. Cir. 1950); *Dini v. Naiditch*, 20 Ill. 2d 406, 170 N.E.2d 881, 891 (1960); *Montgomery v. Stephan*, 359 Mich. 33, 101 N.W.2d 227, 231 (1960).

sequential; and yet we do not apply such a rule in the husband's action."⁴⁸

Most of these arguments for and against the wife's right to recovery for loss of consortium have been propounded *ad infinitum*. Recently, however, a new argument based on the Constitution of the United States has been presented by the courts to support the position for allowing the wife the right to recover. In *Clem v. Brown*,⁴⁹ Judge Hitchcock's bitter and sarcastic opinion held that the common law rule, which denies a wife a cause of action for loss of consortium but allows her husband the same cause of action, is a violation of the equal protection clause⁵⁰ of the Constitution. The rationale of Judge Hitchcock was as follows: equal protection of the laws requires that all persons similarly situated be treated alike, although differences in treatment are permissible where there is a basis for those differences reasonably related to the purpose which state laws, rules and regulations seek to accomplish. The underlying premise upon which the common law rule existed, a husband's superiority or proprietary interest in his wife, no longer exists. To continue to disallow the wife's cause of action would be to violate the Constitution.⁵¹ Although the tone of Judge Hitchcock's opinion reflected his dissatisfaction with the Supreme Court's recent interpretations of the fourteenth amendment concerning federal-state authority, the legal implications of *Clem v. Brown* are far reaching. While not applicable in those states which have also denied the husband's right to sue, the equal protection clause may be the catalyst which eventually compels acceptance of the *Hitaffer* result in a majority of states.

The Maryland Court of Appeals is in direct accord with the *Baldwin* court in the principal case. In *Coastal Tank Lines v. Canoles*,⁵² the court rejected the *Hitaffer* holding and affirmed an earlier Maryland decision, *Emerson v. Taylor*,⁵³ denying the wife a cause of action for loss of her husband's consortium due to the defendant's negligence. The rationale of the court is quite susceptible to attack by those who advocate allowing the wife her cause of action. The court mentioned that *Hitaffer* had not been followed by any court of last resort.⁵⁴ This is no longer true⁵⁵ and, as recently recognized by the court in *Nicholson v. Blanchette*,⁵⁶ "while this statement was true when written, Prosser tells us that 'around 1958 something of a current of support for the *Hitaffer* case set in, and since that date the trend has been definitely in the direction of approval.'"⁵⁷

48. *Hitaffer v. Argonne Co.*, 183 F.2d 811, 815 (D.C. Cir. 1950).

49. 207 N.E.2d 398 (Ct. Comm. Pl. Ohio 1965).

50. "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV.

51. *But see* *Seagraves v. Legg*, 127 S.E.2d 605 (W.Va. 1962), where the court said there was no violation of the equal protection clause since the constitution of West Virginia preserves the common law and the wife has no cause of action for such loss of consortium at common law.

52. 207 Md. 37, 113 A.2d 82 (1955), cited with approval, *Nicholson v. Blanchette*, 239 Md. 168, 210 A.2d 732 (1965).

53. 133 Md. 192, 104 Atl. 538 (1918).

54. *Coastal Tank Lines v. Canoles*, 207 Md. 37, 47, 113 A.2d 82, 87 (1955).

55. See notes 20 and 31 *supra* and accompanying text.

56. 239 Md. 168, 210 A.2d 732 (1965).

57. *Id.* at 186 n.5, 210 A.2d at 742 n.5.

The *Canoles* court felt that the earlier Maryland decision, even "if not correctly decided on principle, is supported by the overwhelming weight of authority, ancient and modern."⁵⁸ Bound by *Emerson* and impressed by the scarcity of divergent authority, the court refused to give much weight to "arguments based on abstract theory and logical symmetry."⁵⁹ Today, however, the authorities are in fact significantly divided, such that "arguments based on abstract theory and logical symmetry" should be given a higher degree of consideration.

The *Canoles* court's reluctance to give any weight to the logical arguments was undoubtedly caused by its adherence to the doctrine of *stare decisis*. While few question the importance of *stare decisis*, it seems equally important to prevent today's law from being decided upon bygone principles.⁶⁰ The female today is no longer in the "degraded position . . . [of] a combination vessel, chattel, and household drudge. . . ."⁶¹ Her common law disabilities have long been abolished. She is, in effect, equal before the eyes of the law, and she should be given equal treatment. To have reversed earlier decisions and allowed the wife a cause of action in *Canoles* would not have been a new legal technique for the court. As the Court of Appeals has stated on prior occasions, "when the reason behind a rule ceases to exist, the rule itself will no longer apply."⁶²

The *Canoles* court relied heavily on the case of *Best v. Samuel Fox, Ltd.*,⁶³ an English decision, which, in denying the wife a cause of action, employed the reasoning that a negligent defendant's duty does not extend to remote consequences affecting third parties. Maryland's negligence law supports the same results concerning a defendant's liability to remote third persons.⁶⁴ But the court failed to satisfactorily deal with the inconsistency of not limiting the defendant's liability where the wife is the negligently injured party and the husband is suing.⁶⁵ Instead, the Maryland court quotes Lord Porter's comment in *Best* that "the common law is a historical development rather than a logical whole, and the fact that a particular doctrine does not logically accord with another or others is no ground for its rejection."⁶⁶ Actually, however, Lord Porter's broad statement could have been just as easily used to justify allowing the wife a cause of action in spite of

58. 207 Md. 37, 49, 113 A.2d 82, 88 (1955).

59. *Ibid.*

60. "Social, political, and legal reforms had changed the relations between the sexes, and put woman and man upon a plane of equality. Decisions founded upon the assumption of bygone inequality were unrelated to present-day realities and ought not to be permitted to prescribe a rule of life." CARDOZO, *THE GROWTH OF THE LAW* 105-06 (1924).

61. See note 14 *supra*.

62. See, e.g., *State v. Cohen*, 166 Md. 682, 687-88, 172 Atl. 274, 277 (1934); *Barker v. Ayers*, 5 Md. 202, 209 (1853).

63. [1952] A.C. 716, *affirming* [1951] 2 K.B. 639.

64. See, e.g., *Resavage v. Davies*, 199 Md. 479, 86 A.2d 879 (1952); *State v. Baltimore Transit Co.*, 197 Md. 528, 80 A.2d 13 (1951).

65. See note 48 *supra* and accompanying text.

66. *Best v. Samuel Fox, Ltd.*, [1952] A.C. 716, *affirming* [1951] 2 K.B. 639.

the Maryland negligence rule.⁶⁷ For example, the Georgia courts⁶⁸ agree with the Maryland negligence rule but also allow the wife a cause of action for loss of consortium due to the negligent injury of her husband.⁶⁹

Authors of treatises and articles, as well as the courts, are in disagreement as to whether the wife's cause of action for loss of consortium due to the negligent injury of her husband should be allowed, but the majority support allowing the wife the action.⁷⁰ While the arguments advanced are impressive for both sides, the better result is to allow the wife to recover. Those who agree with *Hitaffer*, but await legislative action,⁷¹ must remember that it is within the tradition of the courts to create additional legal remedies without waiting for the legislature.⁷²

But in Maryland the possibility of judicial change on this issue has been made difficult. In order to change the law today the Court of Appeals would not only have to overrule the 1918 case of *Emerson v. Taylor*,⁷³ but also the 1955 *Canoles* decision. While one might well argue that due to significant changes in the social status of women since 1918 *stare decisis* need no longer be heeded regarding the *Emerson* case, the change since 1955 has certainly not been substantial enough to warrant a complete reversal in policy. To overrule *Canoles* now would threaten the vitality of *stare decisis* in Maryland.⁷⁴ Perhaps, therefore, relief at this point should only come from the legislature. The reason supporting the wife's right of recovery should be as persuasive to the legislature as they have been to some courts. Consequently, it is suggested to the Maryland legislature that it change the law and make "what is sauce for the gander . . . sauce for the goose."⁷⁵ However, if the argument that the common law rule constitutes a denial of equal protection is valid, the *Canoles* decision must be reversed, notwithstanding the principle of *stare decisis*.⁷⁶

67. Establishment of a defendant's duty to a wife can easily be accomplished:

There is a duty if the court says there is a duty; the law, like the Constitution, is what we make it. Duty is only a word with which we state our conclusion that there is or is not to be liability; it necessarily begs the essential question. When we find a duty, breach and damage, everything has been said. The word serves a useful purpose in directing attention to the obligation to be imposed upon the defendant, rather than the causal sequence of events; beyond that it serves none. In the decision whether or not there is a duty, many factors interplay: the hand of history, our ideas as to where the loss should fall. In the end the court will decide whether there is a duty on the basis of the mores of the community, "always keeping in mind the fact that we endeavor to make a rule in each case that will be practical and in keeping with the general understanding of mankind."

Prosser, *Palsgraf Revisited*, 52 MICH. L. REV. 1, 15 (1953).

68. See *Blanchard v. Reliable Transfer Co.*, 71 Ga. App. 843, 32 S.E.2d 420 (1944).

69. See Georgia cases cited note 31 *supra*.

70. See *Igneri v. Cie. de Transports Oceaniques*, 323 F.2d 257, 261, 262 n.11, 12 (1963), where the commentator vote is listed.

71. See note 33 *supra*.

72. See Simeone, *The Wife's Action for Loss of Consortium — Progress or No?*, 4 ST. LOUIS U.L.J. 424, 439 (1957), which discusses how the courts have created additional legal remedies for wrongs such as pre-natal injuries, etc.

73. 133 Md. 192, 104 Atl. 538 (1918).

74. *But see Nesbit v. Riesenman*, 298 Pa. 475, 483, 148 Atl. 695, 697 (1930), cited in McKay, *Is a Wife Entitled to Damages for Loss of Consortium?*, 64 DICK. L. REV. 57, 63 (1959).

75. *Hayes v. Swenson*, 108 P.L.J. 141 (C.P. Allegheny County, Pa. 1958).

76. See note 49 *supra* and accompanying text.