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Torts: Child May Recover for Loss of Parent's Society and Companionship. *Theama v. City of Kenosha*, 117 Wis. 2d 508, 344 N.W.2d 513 (1984)

Susan M. Knepel

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TORTS — Child May Recover for Loss of Parent's Society and Companionship. *Theama v. City of Kenosha*, 117 Wis. 2d 508, 344 N.W.2d 513 (1984).

In 1975, the Wisconsin Supreme Court recognized a parent's right to recover for the loss of a minor child's aid, comfort, society, and companionship when the child is negligently injured.¹ A child, however, had no reciprocal cause of action. "It was not easy to understand and appreciate [the] reluctance to compensate the child who has been deprived of the care, companionship and education of his mother, or for that matter his father, through the defendant's negligence."²

In *Theama v. City of Kenosha*³ the Wisconsin Supreme Court overcame this reluctance by creating a cause of action on behalf of a child for loss of a parent's society and companionship when the parent is negligently injured by a third party.⁴ This Note discusses the *Theama* decision and the possible procedural problems the court may face in the future as a result of the decision.

I. STATEMENT OF THE CASE

Robert Theama was seriously injured when the motorcycle he was driving struck a deep hole in the road.⁵ The injuries he sustained resulted in permanent brain damage, permanent impairment of visual, perceptual, motor, and speech functions, and other physical and emotional effects.⁶

Robert Theama commenced an action to recover pecuniary damages against the City of Kenosha and its insurer alleging that the city was negligent for failing to provide drivers sufficient street lighting.⁷ Patricia Theama, Robert's wife, brought a claim for loss of support, society, companionship, and consortium. Tracy and Terry Theama, Robert's minor children, brought individual claims for loss of

1. *Shockley v. Prier*, 66 Wis. 2d 394, 404, 225 N.W.2d 495, 501 (1975).

2. W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 125, at 896 (4th ed. 1971).

3. 117 Wis. 2d 508, 344 N.W.2d 513 (1984).

4. *See id.* at 519-20, 344 N.W.2d at 518.

5. *Id.* at 509, 344 N.W.2d at 513.

6. *Id.*

7. *Id.*

their father's "care, society, companionship, protection, training and guidance."⁸

The City of Kenosha and its insurer moved for summary judgment seeking a dismissal of the children's causes of action on the ground that the complaint failed to state a claim upon which relief could be granted. Relying on *Cogger v. Trudell*,⁹ the trial court held that a minor child has no independent cause of action under the wrongful death statute when one parent survives¹⁰ and granted summary judgment in favor of the city. The court of appeals summarily affirmed the trial court's order, but the Wisconsin Supreme Court reversed. The court held that a minor child may recover for "the loss of care, society, companionship, protection, training, and guidance of a parent due to the negligent acts of a third party,"¹¹ stating that the result "[was] mandated by [its] oath to do justice, as well as [its] conscience."¹²

II. DEVELOPMENT OF THE ACTION FOR LOSS OF SOCIETY AND COMPANIONSHIP

A. *The Father of a Family*

Early common law was governed by the doctrine of *paterfamilias* which vested all the family member's rights in the father.¹³ The father could recover the pecuniary value of services no longer provided by an injured family member and medical expenses.¹⁴ An action for loss of consortium originated in suits involving interference with the marital re-

8. *Id.* at 510, 344 N.W.2d at 513.

9. 35 Wis. 2d 350, 151 N.W.2d 146 (1967).

10. WIS. STAT. § 895.04(1) (1973) provided that "[a]n action for wrongful death may be brought by the personal representative of the deceased person or by the person to whom the amount recovered belongs."

11. *Theama*, 117 Wis. 2d at 510, 344 N.W.2d at 514.

12. *Id.* at 519-20, 344 N.W.2d at 518.

13. See generally Note, *The Child's Right to Sue for Loss of a Parent's Love, Care and Companionship Caused by Tortious Injury to the Parent*, 56 B.U.L. REV. 722, 724 (1976) [hereinafter cited as Note, *Child's Right to Sue*]; Note, *Negligent Injury to Parents — The Case for the Child's Right to Recover for Loss of Parental Society and Companionship*, 1982 S. ILL. L.J. 557, 558 [hereinafter cited as Note, *Negligent Injury to Parents*].

14. *Theama*, 117 Wis. 2d at 511, 344 N.W.2d at 514.

lationship.¹⁵ Eventually, services became one small part of the damages, and loss of consortium became the most important element.¹⁶ The husband or father could recover for loss of the society or services of a wife or child. However, at this same time, a wife or child could not recover if they were deprived of their husband's or father's loss of society or services. Even if the mother was widowed and supporting a child who was injured, she could not recover for the child's injuries because the right to recover was vested in the father.¹⁷ Only when the wife's interests were directly invaded, could she bring an action for loss of consortium.¹⁸

B. *Wife's Action*

In 1950, the District of Columbia became the first jurisdiction to recognize a wife's cause of action for recovery of the loss of her husband's consortium when he was negligently injured.¹⁹ In *Hitaffer v. Argonne Co.*²⁰ the District of Columbia Circuit Court of Appeals held that both the husband and the wife had equal rights to one another's love, and therefore, the wife should have the right to maintain an action for loss of consortium.²¹ The *Hitaffer* court defined consortium to include not only material services, but also "love, affection, companionship, sexual relations, etc., all welded into a conceptualistic unity."²² Other jurisdictions have followed the *Hitaffer* holding, and now, most jurisdictions recognize the wife's cause of action.²³

Some decisions, including the 1955 Wisconsin Supreme Court decision in *Nickel v. Hardware Mut. Casualty Co.*,²⁴

15. See Note, *Judicial Treatment of Negligent Invasion of Consortium*, 61 COLUM. L. REV. 1341, 1343 (1961).

16. See Note, *Negligent Injury to Parents*, *supra* note 13, at 558.

17. See, e.g., *DeSantis v. Yaw*, 290 Pa. Super. 535, ___, 434 A.2d 1273, 1274 (1981).

18. See Note, *Child's Right to Sue*, *supra* note 13, at 725. The wife's interests were directly invaded by seduction, enticement, or alienation of affections in the marital relationship.

19. See *Hitaffer v. Argonne Co.*, 183 F.2d 811, 819 (D.C. Cir.), *cert. denied*, 340 U.S. 852 (1950).

20. *Id.*

21. See *id.* at 816.

22. *Id.* at 814.

23. See, e.g., *Borer v. American Airlines, Inc.*, 19 Cal. 3d 441, 450, 563 P.2d 858, 864, 138 Cal. Rptr. 302, 308 (1977).

24. 269 Wis. 647, 70 N.W.2d 205 (1955).

refused to recognize a wife's cause of action on the basis that such a cause of action could lead to double recovery.²⁵ However, the reluctance to create a wife's cause of action for loss of consortium slowly declined. The Wisconsin Supreme Court in *Moran v. Quality Aluminum Casting Co.*,²⁶ decided twelve years after *Nickel*, recognized changing social conditions, overruled earlier precedent, and allowed the wife to recover.²⁷ However, the court retained a safeguard against the risk of double recovery by requiring that a wife's action be joined with her husband's action.²⁸

C. Parent's Action

The Wisconsin Supreme Court recognized a parent's cause of action for loss of a minor child's society and companionship in *Shockley v. Prier*.²⁹ The 1975 *Shockley* decision was the first to discuss the merits of the cause of action.³⁰ The *Shockley* court based its holding on the Wisconsin wrongful death statute³¹ and the "shattering effect" a child's injury can have on the parent-child relationship.³² Reasoning that the wrongful death statute allowed recovery for loss of society and companionship, the court concluded it was only reasonable to recognize the action when there has been an injury to a minor child.³³ The *Shockley* court also noted that the relationship between parents and children was, or at least should have been, more than that between master and servant,³⁴ and thus a parent's action should be recognized.³⁵

25. See *id.* at 652, 70 N.W.2d at 208.

26. 34 Wis. 2d 542, 150 N.W.2d 137 (1967).

27. See *id.* at 551-52, 150 N.W.2d at 141.

28. See *id.* at 558, 150 N.W.2d at 145.

29. 66 Wis. 2d 394, 404, 225 N.W.2d 495, 501 (1975).

30. See Note, *Cause of Action by Parents Sustained for Loss of Society and Companionship of Child Tortiously Injured*, 1976 Wis. L. REV. 641, 644.

31. Wis. STAT. § 895.04(4) (1981-82). Prior to 1951 only parents were allowed to recover under the statute. The legislature amended the statute in 1951 to allow children to recover under the wrongful death statute. See 1951 Wis. Laws 634.

32. *Shockley*, 66 Wis. 2d at 401, 225 N.W.2d at 499.

33. See *id.* at 400, 225 N.W.2d at 499.

34. See *id.* at 402, 225 N.W.2d at 500.

35. See *id.* at 401, 225 N.W.2d at 499.

Prior to the *Shockley* decision, other jurisdictions had allowed parents to recover for loss of a child's society and companionship. However, these courts did not directly discuss the merits of the issue,³⁶ and several other courts have refused to recognize the cause of action.³⁷ The California Supreme Court, for example, stated that the policy reasons for refusing to recognize the child's claim are indistinguishable from those policy reasons which refuse to recognize the parent's claim.³⁸

III. DEVELOPMENT OF THE CHILD'S CAUSE OF ACTION

After examining the emerging rights of children and the magnitude of the child's loss, a child's action for loss of society and companionship was first recognized in 1978.³⁹ Currently, six jurisdictions—Florida, Iowa, Massachusetts, Michigan, Washington, and Wisconsin—allow a child's cause of action for loss of a parent's society and companionship.⁴⁰

However, the majority of jurisdictions that have examined the child's claim have denied recovery.⁴¹ Neverthe-

36. See Note, *supra* note 30, at 644.

37. See, e.g., *Hoskie v. United States*, 666 F.2d 1353, 1358 (10th Cir. 1981); *Smith v. Richardson*, 277 Ala. 389, ___, 171 So. 2d 96, 100 (1965); *Baxter v. Superior Court*, 19 Cal. 3d 461, 464, 563 P.2d 871, 872, 138 Cal. Rptr. 315, 316 (1977); *Butler v. Chrestman*, 264 So. 2d 812, 816-17 (Miss. 1972); *Brennan v. Biber*, 93 N.J. Super. 351, ___, 225 A.2d 742, 752 (1966).

38. See *Baxter v. Superior Court*, 19 Cal. 3d 461, 465, 563 P.2d 871, 874, 138 Cal. Rptr. 315, 318 (1977). For example, the *Baxter* court found that the intangibility of the loss, the difficulty in measuring damages, and the danger of double recovery are equally applicable to the parent's claim. *Id.*

39. *Berger v. Weber*, 82 Mich. App. 199, ___, 267 N.W.2d 124, 125 (1978) (limiting child's recovery for loss of society and companionship to instances when the parent is severely injured). However, in *Berger v. Weber*, 411 Mich. 1, ___, 303 N.W.2d 424, 427 (1981), the Michigan Supreme Court rejected the appellate court's limitation and no longer required that the parent be severely injured in order for the child to recover.

40. See *Rosen v. Zorzos*, 449 So. 2d 359 (Fla. Dist. Ct. App. 1984); *Audubon-Exira Ready Mix, Inc. v. Illinois Central Gulf R.R.*, 335 N.W.2d 148 (Iowa 1983), *overruling*, *Weitl v. Moes*, 311 N.W.2d 259 (Iowa 1981); *Ferriter v. Daniel O'Connell's Sons, Inc.*, 381 Mass. 507, 413 N.E.2d 690 (1980); *Berger v. Weber*, 411 Mich. 1, 303 N.W.2d 424 (1981); *Ueland v. Reynolds Metal Co.*, 103 Wash. 2d 131, ___, P.2d ___, (1984); *Theama v. City of Kenosha*, 117 Wis. 2d 508, 344 N.W.2d 513 (1984).

41. See, e.g., *Early v. United States*, 474 F.2d 756 (9th Cir. 1973); *Pleasant v. Washington Sand and Gravel Co.*, 262 F.2d 471 (D.C. Cir. 1958); *Hoelsing v. Sears, Roebuck & Co.*, 484 F. Supp. 478 (D. Neb. 1980); *Turner v. Atlantic Coast Line R.R.*,

less, these jurisdictions have recognized the magnitude of the child's loss and the impairment to the parent-child relationship which results when the parent is permanently injured.⁴² These courts "are keenly aware of the need of children for the love, affection, society and guidance of their parent; and any injury which diminishes the ability of a parent to meet these needs is plainly a family tragedy, harming all members of that community."⁴³ Yet, despite such a recognition, the claims have been denied.⁴⁴ The reasons given by these courts in refusing to recognize a child's claim have included: (1) it is an issue that should be addressed by the legislature;⁴⁵ (2) the damages are too remote and uncertain;⁴⁶ (3) there will be an increase in the defendant's liability;⁴⁷ (4) there will be multiple claims and an increase in litigation;⁴⁸ and (5) the plaintiff will enjoy double recovery.⁴⁹

159 F. Supp. 590 (N.D. Ga. 1958); *Borer v. American Airlines, Inc.*, 19 Cal. 3d 441, 563 P.2d 858, 138 Cal. Rptr. 302 (1977); *Hinde v. Butler*, 35 Conn. Supp. 292, 408 A.2d 668 (1979); *Halberg v. Young*, 41 Hawaii 634 (1957); *Koskela v. Martin*, 91 Ill. App. 3d 568, 414 N.E.2d 1148 (1980); *Hoffman v. Dautel*, 189 Kan. 165, 368 P.2d 57 (1962); *McFarland v. Cathy*, 349 So. 2d 486 (La. Ct. App. 1977); *Salin v. Kloempken*, 322 N.W.2d 736 (Minn. 1982); *Bradford v. Union Elec. Co.*, 598 S.W.2d 149 (Mo. Ct. App. 1979); *General Electric v. Bush*, 88 Nev. 360, 498 P.2d 366 (1972); *Russell v. Salem Transp. Co.*, 61 N.J. 502, 295 A.2d 862 (1972); *DeAngelis v. Lutheran Medical Center*, 84 A.D.2d 17, 445 N.Y.S.2d 188 (1981); *Morgel v. Winger*, 290 N.W.2d 266 (N.D. 1980); *Gibson v. Johnston*, 75 Abs. 413, 144 N.E.2d 310 (Ohio Ct. App. 1956), *appeal dismissed*, 166 Ohio St. 288, 141 N.E.2d 767 (1957); *Norwest v. Presbyterian Intercommunity Hosp.*, 52 Or. App. 853, 631 P.2d 1377 (1981); *Erhardt v. Havens, Inc.*, 53 Wash. 2d 103, 330 P.2d 1010 (1958).

42. *See, e.g.*, *Hoffman v. Dautel*, 189 Kan. 165, ___, 368 P.2d 57, 59 (1962).

43. *Borer v. American Airlines, Inc.*, 19 Cal. 3d 441, 453, 563 P.2d 858, 866, 138 Cal. Rptr. 302, 310 (1977).

44. *See supra* note 41 and accompanying text.

45. *See, e.g.*, *Koskela v. Martin*, 91 Ill. App. 3d 568, ___, 414 N.E.2d 1148, 1150 (1980).

46. *See, e.g.*, *Block v. Piolet Bros. Scrap & Metal, Inc.*, 119 Ill. App. 3d 983, ___, 457 N.E.2d 509, 512 (1983).

47. *See, e.g.*, *Russell v. Salem Transp. Co.*, 61 N.J. 502, ___, 295 A.2d 862, 864 (1972).

48. *See, e.g.*, *Hoffman v. Dautel*, 189 Kan. 165, ___, 368 P.2d 57, 59-60 (1962).

49. *See, e.g.*, *Koskela v. Martin*, 91 Ill. App. 3d 568, ___, 414 N.E.2d 1148, 1151 (1980); *Hoffman v. Dautel*, 189 Kan. 165, ___, 368 P.2d 57, 60 (1962).

IV. THE COURT'S REFUTATION OF THE REASONS FOR DENYING THE ACTION

A. *Deference to the Legislature*

Some courts have refused to create a child's cause of action for loss of society and companionship on the basis that such a cause of action should be created by the legislature.⁵⁰ Supposedly, the legislature is better suited for making sure that all aspects of the issue are considered and protected.⁵¹ In other jurisdictions, the courts have held that they are prohibited from creating a cause of action because of existing legislation concerning loss of consortium.⁵² Judicial decisions which defer to the legislature to create a child's cause of action for loss of society and companionship are basically policy decisions to avoid the expansion of tort liability.⁵³

The *Theama* court refused to defer to the legislature. Since an action for loss of society and companionship was developed and created by the courts,⁵⁴ the Wisconsin Supreme Court believed that a deferral to the legislature would be a "shirking" of its responsibility.⁵⁵ The court further believed that "[t]he genius of the common law is its ability to adapt itself to the changing needs of society."⁵⁶ Accordingly, the supreme court concluded that it had the power to create a child's cause of action for loss of parental

50. See, e.g., *Koskela v. Martin*, 91 Ill. App. 3d at ___, 414 N.E.2d at 1151 (1962).

51. See *id.*

52. See, e.g., Comment, *Who Should Recover for Loss of Consortium?*, 35 ME. L. REV. 295, 311 (1983). In Maine, the wife's right to recover for loss of consortium was established by statute. See *id.* See also *Norwest v. Presbyterian Intercommunity Hosp.*, 52 Or. App. 853, ___, 631 P.2d 1377, 1378 (1981) (the law concerning the family relationships in Oregon, including the mother's right to bring an action for injury to her child, is based on the legislature's actions). Cf. *Theama*, 117 Wis. 2d at 512-13, 344 N.W.2d at 515 (the wife's and parents' causes of action for loss of society and companionship were created by the court).

53. See, e.g., *Borer v. American Airlines, Inc.*, 19 Cal. 3d 441, 447, 563 P.2d 858, 862, 138 Cal. Rptr. 302, 306 (1977); *Morgel v. Winger*, 290 N.W.2d 266, 267 (N.D. 1980).

54. Note, *Child's Right to Sue*, *supra* note 13, at 729.

55. See *Theama*, 117 Wis. 2d at 521, 344 N.W.2d at 519.

56. *Id.* at 513, 344 N.W.2d at 515 (citing *Moran v. Quality Aluminum Casting Co.*, 34 Wis. 2d 542, 551, 150 N.W.2d 137, 141 (1967)). See also *Salin v. Kloempken*, 322 N.W.2d 736, 741 (Minn. 1982) (court refused to recognize the child's action, but stated that the court had a duty to keep the common law in accordance with the changing society).

society and companionship.⁵⁷ After determining that it had the power to create the cause of action, the *Theama* court discussed and rejected various arguments employed by other courts for declining to create a child's cause of action for loss of society and companionship.

B. Remoteness and Uncertainty of Damages

One argument rejected by the *Theama* court was the remoteness and uncertainty of damages.⁵⁸ Loss of society and companionship is considered to be an intangible, nonpecuniary loss⁵⁹ which makes assessment of pecuniary damages difficult.⁶⁰ One court has questioned whether the loss can even be compensated. In *Borer v. American Airlines, Inc.*⁶¹ the California Supreme Court said, "[compensation] will simply establish a fund so that upon reaching adulthood, when plaintiffs will be less in need of material guidance, they will be unusually wealthy men and women."⁶² The *Theama* court found this argument unpersuasive because damages for loss of consortium are allowable in other actions such as for pain and suffering in personal injury claims, wrongful death claims, and in spouses' and parents' claims when the other spouse or a child is injured.⁶³ The court also stated that monetary compensation was the only solution our system has found. It said that even if it cannot compensate for the loss, such compensation is preferable to completely denying recovery.⁶⁴

57. See *Theama*, 117 Wis. 2d at 521, 344 N.W.2d at 519.

58. See, for example, the discussion in *Hoffman v. Dautel*, 189 Kan. 165, —, 368 P.2d 57, 58 (1962).

59. See *Borer v. American Airlines, Inc.*, 19 Cal. 3d 441, 449, 563 P.2d 858, 863, 138 Cal. Rptr. 302, 307 (1977).

60. See, e.g., *Koskela v. Martin*, 91 Ill. App. 3d 568, —, 414 N.E.2d 1148, 1151 (1980).

61. 19 Cal. 3d 441, 563 P.2d 858, 138 Cal Rptr. 302 (1977).

62. *Id.* at 448, 563 P.2d at 862, 138 Cal. Rptr. at 306. "To say that plaintiffs have been 'compensated' for their loss is superficial; in reality they have suffered a loss for which they can never be compensated; they have obtained, instead, a future benefit essentially unrelated to that loss." *Id.* Cf. *Theama*, 117 Wis. 2d at 523, 344 N.W.2d at 520. The court stated that money can ease the child's adjustment to the loss without making the child wealthy. *Id.*

63. See *Theama*, 117 Wis. 2d at 522, 344 N.W.2d at 519-20. See also *Sanchez v. Schindler*, 651 S.W.2d 249, 253 (Tex. 1983) (recovery for loss of consortium is not too uncertain to deny recovery).

64. *Theama*, 117 Wis. 2d at 523, 344 N.W.2d at 520.

C. Increase in Defendant's Liability

The *Theama* court also addressed the argument of the inevitable increase in defendant's liability upon recognition of the child's action.⁶⁵ Some courts have stated that there appears to be a trend for widening the circle of justice to all family members who have claims.⁶⁶ In fact, "[t]hose courts that refuse to recognize a parent's or child's action know that brothers and sisters, grandparents and grandchildren, as well as aunts, uncles, nieces and nephews are waiting in the wings."⁶⁷ However, the *Theama* court found no difficulty in limiting the action to the persons most likely to be severely affected by the injury.⁶⁸ Any burden placed on society because of the child's action would be offset by the benefit received by the child.⁶⁹ Ideally, the child would become a normal adult.⁷⁰

D. Multiple Claims and Increase in Litigation

The *Theama* court summarily disposed of the issue of multiple claims by holding that the issue was not before the court since the *Theama* children's claims were joined with the parent's claims.⁷¹ However, the court did address the argument that the child's action will cause an increase in litigation.⁷² Every permanent injury to a parent creates the

65. See *id.* at 524-25, 344 N.W.2d at 521.

66. See, e.g., *Koskela v. Martin*, 91 Ill. App. 3d 568, ___, 414 N.E.2d 1148, 1150 (1980).

67. See Love, *Tortious Interference with the Parent-Child Relationship: Loss of an Injured Person's Society and Companionship*, 51 IND. L.J. 509, 605 (1976). The "ultimate question" is where the line should be drawn between liability and nonliability. *Id.*

68. See *Theama*, 117 Wis. 2d at 524, 344 N.W.2d at 521.

69. *Id.* at 525, 344 N.W.2d at 521.

70. *Id.*

71. *Id.* at 526, 344 N.W.2d at 521. However, in *Shockley v. Prior*, 66 Wis. 2d 394, 404, 225 N.W.2d 495, 501 (1975), the court required mandatory joinder of the parent's action for the loss of a child's society and companionship.

72. See, e.g., *Russell v. Salem Transp. Co.*, 61 N.J. 502, ___, 295 A.2d 862, 864 (1972).

possibility of a claim on the behalf of each child.⁷³ Thus, settlements may be hindered, and litigation in each case could become quite expensive.⁷⁴ Moreover, injuries to both parents would further increase litigation which can be multiplied by the number of minor children in the family.⁷⁵ In response, the *Theama* court simply answered that the fear of increased litigation argument was always raised when a new cause of action was created, and thus, the argument had no merit.⁷⁶

E. Double Recovery

The final argument addressed by the *Theama* court was the fear of double recovery.⁷⁷ Courts that have refused to recognize a child's action argue that juries will consider the child's situation when assessing the parent's damages.⁷⁸ The *Theama* court analogized the child's cause of action to the spouse's cause of action. It noted that the possibility for double recovery exists in a spouse's action, and, hence, dismissed this argument.⁷⁹ Moreover, the court gave a possible solution to the problem "by limiting the injured parent's recovery to the child's loss of the parent's pecuniary ability to support the child."⁸⁰ Thus, the court found none of the reasons for denying recovery persuasive.

V. THE COURT'S REASONS FOR CREATING THE ACTION

The *Theama* court created a child's cause of action for loss of society and companionship because it was "logical"

73. See *Garza v. Kantor*, 54 Cal. App. 3d 1025, 1026, 127 Cal. Rptr. 164, 165 (1976) (three children seeking to recover \$250,000 each); *Borer v. American Airlines, Inc.*, 19 Cal. 3d 441, 445, 563 P.2d 858, 861, 138 Cal. Rptr. 302, 305 (1977) (nine children seeking \$100,000 each); *Hoffman v. Dautel*, 189 Kan. 165, —, 368 P.2d 57, 58 (1962) (three children seeking to recover \$50,000 each).

74. See, e.g., *Koskela v. Martin*, 91 Ill. App. 3d 568, —, 414 N.E.2d 1148, 1151 (1980).

75. See, e.g., *Russell v. Salem Transp. Co.*, 61 N.J. 502, —, 295 A.2d 862, 864 (1972).

76. *Theama*, 117 Wis. 2d at 526, 344 N.W.2d at 521.

77. See, e.g., *Koskela v. Martin*, 91 Ill. App. 3d 568, —, 414 N.E.2d 1148, 1151 (1980); *Hoffman v. Dautel*, 189 Kan. 165, —, 368 P.2d 57, 58 (1962).

78. See, e.g., *Hoffman v. Dautel*, 189 Kan. 165, —, 368 P.2d 57, 58-59 (1962).

79. See *Theama*, 117 Wis. 2d at 526, 344 N.W.2d at 522.

80. *Id.* Likewise, the child's cause of action can also be limited to just the loss of the parent's society and companionship. *Id.*

and "mandated by [its] oath to do justice, as well as [its] conscience."⁸¹ First, the court recognized the hierarchical development of the action. The husband-wife relationship was first protected; then the parents' interests were protected; and now "[i]t is only logical that the next step in this progression is to protect the child's interest in the parent-child relationship."⁸² Secondly, the court recognized the magnitude of the child's loss. The court stated that the *Theama* children were deprived of more than the enjoyment of shared experiences with their father and that "a child may be virtually helpless in seeking out a new companion."⁸³ Finally, the court recognized that the status of children has changed. Children are "persons deserving of legal rights and protections."⁸⁴ Thus, the court held that the reasons for recognizing the minor child's action outweighed the reasons for refusing to recognize the action.⁸⁵

VI. ANALYSIS

Since the action for loss of consortium was created by the courts, they have the power to determine whether a society and companionship cause of action for the child exists.⁸⁶ However, just because the courts may have the power to create the cause of action does not compel them to do so. The *Theama* decision should have "taken into account [public policy] considerations in addition to logical symmetry and sympathetic appeal."⁸⁷ Before the new cause of action was created, its possible effect on the judicial system should have been addressed. The *Theama* court failed to consider not only the consequences its decision will have on the judicial system, but it also failed to address key procedural issues.

81. *Id.* at 520, 344 N.W.2d at 518.

82. *Id.* at 519, 344 N.W.2d at 518.

83. *Id.* at 516, 344 N.W.2d at 516. See also Note, *Child's Right to Sue*, *supra* note 13, at 742. An adult is capable of developing new relationships to remedy the deprivation of "emotional warmth." *Id.*

84. *Theama*, 117 Wis. 2d at 516, 344 N.W.2d at 517. See also *supra* notes 39-40 and accompanying text.

85. 117 Wis. 2d at 527, 344 N.W.2d at 522.

86. See *supra* text accompanying notes 54-55.

87. *Suter v. Leonard*, 45 Cal. App. 3d 744, 747, 120 Cal. Rptr. 110, 111 (1975).

A. Consequences on the Judicial System

First, the *Theama* court's statement that it had no difficulty limiting the action for loss of society and companionship to the husband-wife relationship and the parent-child relationship fails to rebut the argument that there will be an accompanying increase in the defendant's liability.⁸⁸ Any court can enlarge the cause of action to other family members by employing the "limiting" language. For example, a sibling can suffer a severe loss when its brother or sister is permanently injured. Thus, a court presented with the sibling issue can simply hold that it is limiting the action to the already recognized causes of action and to the sibling. However, such reasoning fails to prevent a further enlarging of the circle of recovery. A continuation of this reasoning will lead to a further recognition of other family members' actions for loss of society and companionship. After all, each court that is faced with the action can "limit" the action.

Second, the *Theama* court completely failed to address the issue of multiple claims. It stated that it did not have to address this issue since the *Theama* children's claims were joined with the parent's claims.⁸⁹ Thus, it is conceivable that nine children could have nine separate lawsuits. No joinder of claims was required in *Theama*.⁹⁰ In addition, minors can bring a cause of action two years after gaining the age of majority.⁹¹ Thus, these nine separate lawsuits have the possibility of being brought over a long period of time. Such a burden on an already overburdened judicial system should have been addressed and resolved before the child's action was created.

Moreover, by simply asserting that fears of increased liti-

88. See *supra* notes 65-70 and accompanying text.

89. "Because each child of an injured parent would possess his or her own cause of action, multiple lawsuits could potentially arise from one occurrence." *Theama*, 117 Wis. 2d at 525-26, 344 N.W.2d at 521. See *supra* text accompanying note 75.

90. In *Shockley v. Prier*, 66 Wis. 2d 394, 404, 225 N.W.2d 495, 501 (1975), the supreme court required joinder of the parent's cause of action for loss of the child's society and companionship with the child's action for damages.

91. WIS. STAT. § 893.18 (1981-82), Wisconsin's disability tolling statute, provides that "[i]f a person entitled to bring an action is, at the time the cause of action accrues . . . under the age of 18 years . . . the action may be commenced within 2 years after the disability ceases"

gation are always raised with new causes of action,⁹² the *Theama* court failed to rebut the argument that recognition of a child's action will not increase litigation. Just because "wolf" has been cried before does not mean we should disregard the warning. Because the *Theama* court failed to examine and resolve this issue, nine children with two injured parents can bring eighteen claims. Clearly this is an increase in litigation. The *Theama* court failed to properly address these very important issues. The *Theama* court did not analyze how the decision would affect public policy. The court's opinion implied sympathy for the *Theama* children and was aimed at a result rather than at a fair examination and resolution of the issue. Perhaps if these three major reasons for refusing to recognize a child's action had been examined, a child's action may not have been created.

B. Procedural Questions

Furthermore, several procedural issues will arise as a result of this decision. First, there must be a creation of an applicable statute of limitation for a child's action and a determination of when the child's cause of action accrues.⁹³ Similarly, in the case of the parent's cause of action for loss of a child's society and companionship, the Wisconsin Supreme Court had to determine whether a parent, like a child, would also receive the benefit of the disability statute. Four years after the parent's action was created,⁹⁴ the parents were also granted the benefit of the disability tolling statute.⁹⁵ A further question presented is whether the child's action accrues when the injury is sustained by the parent or

92. See *supra* text accompanying notes 72-76.

93. For loss of parental society and companionship in Massachusetts, the statute of limitations does not begin to run until the child reaches majority. See MASS. GEN. LAWS ANN. ch. 260, § 7 (West 1979).

94. In 1975, the parents' cause of action was created. *Shockley v. Prier*, 66 Wis. 2d 394, 404, 225 N.W.2d 495, 501 (1975). The determination of the applicable statute of limitation was made in 1983. See *Korth v. American Family Ins. Co.*, 115 Wis. 2d 326, 334, 340 N.W.2d 494, 497 (1983).

95. See *Korth v. American Family Ins. Co.*, 115 Wis. 2d 326, 334, 340 N.W.2d 494, 497 (1983). The Wisconsin court granted the parents the benefit of the disability statutes because "no great burden [was] imposed on the defendants since they . . . had to preserve evidence or maintain their readiness to defend the minor's claim." *Id.* at 333, 340 N.W.2d at 497. See *supra* note 91 for Wisconsin's disability statute provisions.

when the child realizes or should have realized the loss.⁹⁶ If the cause of action accrues when the child realized or should have realized the loss, it will be difficult to ascertain the day a three month old child felt the loss of his or her father's or mother's society and companionship.⁹⁷

Additionally, there is the question of whether an unborn child at the time of a parent's injury has a cause of action.⁹⁸ The resolution of this issue in Wisconsin will depend on the legal status of a fetus at the time the cause of action arises.⁹⁹

Moreover, a system for the apportionment of damages must be created. The apportionment of damages could have a "shattering effect" on the family. If the damages are not evenly apportioned, one child may feel that another sibling was unfairly compensated, creating resentment and disharmony in the family. The awards could be evenly apportioned, but this method would be unfair to a two year old child who has to develop without the normal parent whereas a seventeen year old child has had the benefit of a normal parent during childhood. Furthermore, an even apportionment would be unfair to a child who had a "close" relationship with the parent and will thus experience a deeper loss than a child who had a distant relationship. There is also the question of whether there should be an even apportionment for natural and step children. If natural and step children have the same relationship with the parent, an uneven apportionment based on their legal status may disrupt the

96. One court has held that because the child's cause of action arose out of the same accident as the parent's action, the child's action is also barred if the statute of limitations has already run on the parent's claim. *See* *Armstrong v. Carlyle Constr. Co.*, 532 F. Supp. 939, 941 (D. Mass. 1982).

97. *Cf.* *Hoskie v. United States*, 666 F.2d 1353, 1359 (10th Cir. 1981). A two and one-half year old child was given an overdose of a sedative at a medical center which resulted in permanent physical and mental impairments. The court held that "it is impossible to establish a precise standard for measuring damages." *Id.*

98. *See* *Salin v. Koempken*, 322 N.W.2d 736, 737 (Minn. 1982) (one of the children seeking to recover for loss of parental society was born twelve weeks after the parent's accident).

99. The legal status of a fetus has not yet been determined. In *Kwaterski v. State Farm Mut. Ins. Co.*, 34 Wis. 2d 14, 22, 148 N.W.2d 107, 112 (1967), the supreme court held that a viable fetus is a "person" within the meaning of WIS. STAT. § 331.03 (1963) (now WIS. STAT. § 895.03 (1981-82)), which described who is entitled to bring a wrongful death action. However, the *Kwaterski* court refused to decide whether a nonviable fetus was also a "person." *Id.*

family unit. This issue must be resolved when there is more than one child seeking to recover.

VII. CONCLUSION

The Wisconsin Supreme Court created a cause of action based on its conscience. It failed to address and rebut some of the most important reasons for refusing to recognize the child's loss of society and companionship action. This decision failed to take into account public policy and improperly balanced the rights and duties of the *Theama* parties with society as a whole. The court has created a cause of action which has the possibility of placing an unreasonable burden on the courts and disrupting the family relationship which it so desired to protect. If these problems manifest themselves, the Wisconsin Supreme Court may find itself limiting the *Theama* holding in future decisions.

SUSAN M. KNEPEL