Children: Chattels to Chums - Schockley v. Prier

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CHILDREN: CHATTELS TO CHUMS—SHOCKLEY V. PRIER

In Shockley v. Prier, the Wisconsin Supreme Court became the first court in the country to squarely confront the question of whether parents can recover damages for the loss of society and companionship of an injured minor child. The purpose of this comment is to analyze the Shockley decision and the state of the law in the other six jurisdictions in which such a recovery is allowed.

I. BACKGROUND

Recovery for loss of society and companionship is not new in the law generally or in Wisconsin, but the severe limitations on its application have until recently effectively made the husband the only person who could recover for such a loss in cases of personal injury. Even the Wrongful Death Statute, which was enacted in 1857, did not recognize the right of recovery for

1. 66 Wis. 2d 394, 225 N.W.2d 495 (1975). In Shockley the Supreme Court of Wisconsin established a rule which allows parents of an injured minor child to recover for the loss of the society and companionship of the child during the period of the child's minority if the parents join their suit for damages with that of the child.


3. Wis. STAT. § 895.03 (1973).

4. Wis. Laws 1857, ch. 71:
The people of the State of Wisconsin, represented in Senate and Assembly, do enact as follows:

s.1. That whenever the death of a person shall be caused by a wrongful act, neglect or default, and the act, neglect or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damage in respect thereof; then and in every such case, the person who, or the corporation which would have been liable, if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death may have been occasioned under such circumstances as constitute an indictable offense; Provided, That such action shall be brought for a death caused in this State, and in some court established by the constitution and laws of the same.

s.2. Every such action shall be brought by and in the name of the personal representative of such deceased person; and the amount recovered shall belong and be paid over to the husband or widow of such deceased person, if such relative survive him or her; but if no husband or widow survive the deceased, the amount recovered shall be paid over to his or her lineal descendants, and to his or her lineal ancestors in default of such descendants; and in every such action the jury may give such damages, not exceeding $5,000, as they shall deem fair and just in reference to the pecuniary injury resulting from such death to the relatives of the deceased specified in this section; Provided, Every such action shall be commenced within two years after the death of such deceased person.
loss of society and companionship until it was amended in 1931\textsuperscript{5} to allow recovery of up to $2500 for such loss.\textsuperscript{6} Prior to that time, recovery was expressly limited by the statute to pecuniary loss, with maximum recoveries that varied over the years until the limit was removed in 1971.\textsuperscript{7}

At common law, recovery was allowed only for loss of a wife's consortium.\textsuperscript{8} Wisconsin altered that rule in 1967 in Moran v. Quality Aluminum Casting Co.\textsuperscript{9} to allow a wife to recover for loss of her husband's consortium.

In Shockley, the Wisconsin Supreme Court has taken another step toward full recognition of the value of familial relationships by allowing parents to recover for the loss of society and companionship of their injured minor child.

II. Shockley v. Prier

The Shockley case was a suit by a minor and his parents to recover damages sustained by all three as a result of the alleged negligence of two doctors and a hospital. The child, Paul Shockley, was given an excessive amount of oxygen shortly after birth which, according to the complaint, caused retrolental fibroplasia resulting in blindness. The complaint sought damages on behalf of the child, but that cause of action was not involved in the appeal. In addition, it set forth a cause of action on behalf of the parents seeking recovery of damages for, among other things, the loss of the child's "'aid, comfort, society and companionship.'"\textsuperscript{10} A demurrer to the parents' complaint was sustained and an appeal was taken from that order.

Justice Day defined the scope of the opinion and the question confronting the court: "We therefore confine this opinion

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5. Wis. Laws 1931, ch. 263 § 2:
The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

   Section 1. Section 331.04 of the statutes is amended to read:

   (2) In addition to the benefits provided for in subsection (1), a sum not exceeding twenty-five hundred dollars for loss of society and companionship shall accrue to the parent or parents or husband or wife of the deceased.


8. Moran v. Quality Aluminum Casting Co., 34 Wis. 2d 542 at 546, 150 N.W.2d 137 at 138 (1967); Shockley v. Prier, 66 Wis. 2d at 397, 225 N.W.2d at 497 (1975).

9. 34 Wis. 2d at 558, 150 N.W.2d at 145.

10. 66 Wis. 2d at 395, 225 N.W.2d at 497, quoting from the complaint.
to the question of whether such damages are allowable to a parent during the minority of an injured child."

The opinion also discussed the fifty year old common law rule, then in effect in Wisconsin, which allowed the parents of an injured minor child to recover for the loss of the child's wages or earning capacity during minority (referred to as "services" by some courts), and for reasonable medical and nursing expenses incurred in effecting the child's cure.

The court cited authority on its power to change the common law, focusing particularly on tort cases concerning the family relationship. Noted in this review was Moran v. Quality Aluminum Casting Co. The court also noted the ruling in Goller v. White that abrogated the common law tort immunity between parent and child. After this review, the court stated the fallacy in the modern application of what had once been the primary theory and ground of recovery for parents of an injured child — the concept of a child as an economic asset whose injury caused pecuniary loss to the parents and family:

In the majority of family situations, children are no longer an economic asset but on the contrary are usually sources of great expenditure on the part of parents. Wisconsin's lowering of the age of majority from twenty-one to eighteen years has made the possibility of a parent acquiring the earnings of a child even more remote.

This statement was followed by citation of cases and commentators for the following conclusion:

The 'remedy' of loss of minor's earning capacity during minority is of diminishing significance. Since our court last

11. Id. at 396, 225 N.W.2d at 497.
12. Id. at 396-97, 225 N.W.2d at 497:

There is no statute defining what damages may be recovered by a parent for injuries to a child. The law in that area is common law and was enunciated 50 years ago in the case of Callies v. Reliance Laundry Co., (1925), 188 Wis. 376, 380, 206 N.W. 198. In that case, this court said:

"But when a minor child is injured by the negligence of another . . . the parent can recover (1) for loss of the minor's earning capacity during minority and (2) for reasonable medical and nursing expenses during minority."

13. 34 Wis. 2d 542, 150 N.W.2d 137 (1967).
15. 66 Wis. 2d at 399, 225 N.W.2d at 498.
17. 43 WASH. L. REv. 654 (1967); Katz, Schroeder and Sidman, Emancipating Our Children — Coming of Legal Age in America, 7 FAMILY LAW QUARTERLY 211 (1973).
laid down the rule in 1925, the family relationship has changed. Society and companionship between parents and their children are closer to our present day family ideal than the right of parents to the ‘earning capacity during minority,’ which once seemed so important when the common law was originally established.

In the case at bar one needs little imagination to see the shattering effect that Paul’s blindness will have on the relationship between him and his parents. The loss of the enjoyment of those experiences normally shared by parents and children need no enumeration here.

We conclude that the law should recognize the right of parents to recover for loss of aid, comfort, society and companionship of a child during minority when such loss is caused by the negligence of another.\(^\text{18}\)

For practical implementation, the court suggested two presently used jury instructions as models for this type of case.\(^\text{19}\)

\(^{18}\) 66 Wis. 2d at 400-01, 225 N.W.2d at 499.

\(^{19}\) Wis. JI — Civil:

1895 Death of Child: Parent’s Loss of Society and Companionship

Subdivision — of Question — makes inquiry as to what sum will reasonably compensate the plaintiff (father) (mother) for loss of society and companionship of the child.

You will carefully consider all of the credible evidence and reasonable inferences therefrom, bearing on this inquiry, and in answer, name such sum as will fairly and reasonably compensate (him)(her) for the loss of the society and companionship of (his)(her) deceased (son)(daughter).

You should take into consideration the ages of both the deceased child and the parent. You should also consider the relationship of the parent and the child; the love and affection and conduct of each towards the other; the society and companionship that was afforded to the parent by the child; the personality, disposition, and character of the child; the disposition and susceptibility of the parent to suffer from such loss; and name an amount which will in your judgment reasonably compensate the parent for such loss as (he)(she) sustained by being deprived of such society and companionship as the child afforded (him) (her) during (his)(her) lifetime and which you are reasonably certain would have continued during the natural life of the parent except for the death of the child.

1816 Injury to Husband: Services, Society, and Companionship: Past and Future

In answer to Question — with respect to loss of services, society, and companionship of her husband, your should name such sum as you feel will fairly and reasonably compensate (name) for such loss as she has sustained by being deprived of his aid, assistance, comfort, society and companionship during such period as he was unable to render such services because of his injuries. In considering the amount to be awarded, you will bear in mind the evidence as to the relationship which existed between the husband and wife before his injury.

If you are satisfied to a reasonable certainty that for any appreciable time in the future he will be unable to render such services and/or provide such
Wisconsin Jury Instructions — Civil, Section 1895 is used in Wisconsin wrongful death cases involving children and suggests the following factors for consideration by a jury: (1) the ages of the child and parent(s); (2) the relationship of the parent and child; (3) the love, affection and conduct of each toward the other; (4) the society and companionship afforded the parent by the child; (5) the disposition and susceptibility of the parents to suffer from the loss. Wisconsin Jury Instructions — Civil, Section 1819 deals with the loss of society suffered by a wife when her husband is injured. It suggests wording appropriate for determining past and future loss of society and companionship by asking the jury to consider an award to the wife for injuries she "has" suffered and, if the disability of her husband still exists, to make an award for future loss "for the period such disability will exist." A combination of the appropriate sections of these two instructions might give an instruction, and a list of the appropriate elements of proof, as follows:

Injury to Child: Parents’ Loss of Society and Companionship
Subdivision ____ of Question ____ makes inquiry as to what sum will reasonably compensate the plaintiff (father) (mother) for loss of society and companionship of the child.

You will carefully consider all of the credible evidence and the inferences therefrom, bearing on this inquiry, and in answer, name such sum as will fairly compensate (him)(her) (them) for the loss (he)(she)(they)(has)(have) sustained by being deprived of the aid, comfort, society and companionship of (his)(her)(their) child during such time as the child was unable to render such services due to (his)(her) injuries.

If you are satisfied to a reasonable certainty that for any appreciable time in the future (he)(she) will be unable to render such services and/or provide such aid, comfort, society and companionship, you should make allowance therefor for the period such disability will exist up until, but no longer than, the time the child reaches (his)(her) majority.

You should take into consideration the ages of both the injured child and the parent(s). You should also consider the relationship of the parent and child; the love and affection and conduct of each towards the other; the society and com-

society and companionship, you should make a proper allowance therefor for the period such disability will exist.

You will not include in your finding any sum, which you are required to determine in any other question, representing loss of earning capacity sustained by (name), the husband, by reason of his injuries. To do so would be to allow double damages for such loss of earning capacity, which you must not do.
companionship that was or may, in the case of future disability, be afforded to the parent by the child; the disposition and susceptibility of the parent to suffer from such loss.

The court closed its opinion by making the new rule applicable only to cases of action arising on or after February 4, 1975, the filing date of the opinion, excepting the case at bar. An important condition was also attached to the parents' right to bring suit:

In summary, this court concludes that a parent may maintain an action for loss of aid, comfort, society and companionship of an injured minor child against a negligent tort-feasor provided, and on the condition, that the parent's cause of action is combined with that of the child for the child's personal injuries.\(^2\)

III. Quaere

In Shockley, as in the cases of other states in which recovery is allowed for loss of society and companionship, the injuries to the child have been relatively severe. There is no limitation in Shockley, however, on either the type of injury that will cause a compensable loss of society and companionship or on the amount of recovery. Presumably this is a question for the jury based upon proof submitted at trial, and the court has held that difficulty in determining damages will not relieve a jury of the burden.\(^2\) Even so, the room for speculation is great, especially in cases of serious or permanent injury to a very young child.

For instance, the elements to be considered by a jury in determining parents' recovery under Shockley may be present and capable of relatively clear proof when an older child is injured. In such cases, the relationship between the parent and child has been subject to observation and development. The love and affection or lack of it, displayed by each for the other will have been manifested to persons who know the individuals. Based on their testimony, the jury can make a rational determination of the value of the society and companionship of the child to the parent and fix a sum compensating them. The situation is not unlike that in which a spouse attempts to recover for loss of consortium. There is an established relation-

\(^{20}\) 66 Wis. 2d at 404, 225 N.W.2d at 501.

\(^{21}\) Cameron v. Union Automobile, Inc., 210 Wis. 659, 246 N.W. 420 (1933).
ship capable of at least some objective proof to afford a jury a basis for determining the proper compensation for any loss suffered.

On the other hand, when the child is very young, as in Shockley, and no substantial relationship has been established between parent and child, the problem is considerably more difficult. This is especially true in the case of very serious and permanent injury, where the relationship will never develop as it might otherwise have. In a situation like Shockley, the relationship of the parent and child is largely one-sided. The only matters capable of substantial proof are the relationship of the parent toward the child, the love and affection of the parent toward the child, and the conduct of the parent toward the child. While this has a bearing on the likelihood that the parent will suffer from the loss of the child’s society, it is no proof of the character of the relationship flowing in the opposite direction, the very thing for which the parent seeks to be compensated. While the example presented here is extreme and the problem tends to diminish as the child grows older, the problem of speculation and sympathy playing a great role in some verdicts remains and must be dealt with.

In death cases, the problem has been mitigated to a certain extent under the Wrongful Death Statute, which limits the maximum recovery for loss of society and companionship. A persuasive argument could be made for limiting the maximum recovery for loss of society and companionship in personal injury cases to the $5,000 maximum set in the Wrongful Death Statute. Unless the court reconsiders its position on this point, such a possibility is foreclosed except by legislative action:

The right recognized in this decision may be enlarged by the legislature, as was done by the Washington legislature following the decision in Lockhart v. Besel, supra, or it may abolish the cause of action or may limit the amount recoverable, as it has in the wrongful death statute.

This statement leaves the question of potential damage recoveries wide open. Why, though, should a parent be allowed to recover more for the loss of an injured child’s society than for the society of a child who is killed? Does the court intend to allow the parents of an injured child to recover more because

23. 66 Wis. 2d at 403-04, 225 N.W.2d at 501.
they must live with, view and experience the effects of the injuries? If that is the court's feeling, it made no expression to that effect. Indeed, if that is what the court intends, it has gone considerably further than any other court. In *Lockhart v. Besel*, cited by Mr. Justice Day in his opinion in *Shockley*, the court expressly limited the rule of recovery to loss of the child's society and companionship and held that the award should be made "without giving any consideration for grief, mental anguish or suffering of the parents." The same rule was applied in similar cases in Idaho, Florida, and California. For now, the question of damages is completely open, and lawyers and the courts must keep constantly in mind the great possibility for verdicts based on jury speculation and sympathy in all cases where recovery for loss of a child's society is sought. Vigilance is most important in cases like *Shockley*, where the child is very young and there is little or no objective relationship on which to base an award.

A procedural question that arises is the application of the statute of limitations to the parents' cause of action for loss of a child's society in view of the requirement that they join their suit for damages with that of the child. Is their cause of action barred after three years, as is normally the case in actions based on personal injuries, or is it governed by the statute applicable to a minor's cause of action? That is, may they bring their suit with the child at any time until a year after the child reaches majority?

There is no statement by the court in *Shockley* as to the nature of the parents' cause of action for this purpose. An analogy may be drawn to the situation in *White v. Lunder*, where the court held that the cause of action of one spouse for loss of consortium is derivative in nature for purposes of applying the comparative negligence statute, and thus subject to the defenses which may be interposed against the injured spouse. There

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25. Id. at —, 426 P.2d at 609.
31. 66 Wis.2d 563, 225 N.W.2d 442 (1975).
32. Id. at 574, 225 N.W.2d at 449.
is no apparent reason why the parents' cause of action under *Shockley* is not also derivative. If this is the case, it could be argued that the same rule should be applied for purposes of determining the statute of limitations, and that the parents' cause of action, which must be joined with the child's under *Shockley*, may be so joined at any time within which the child may bring suit. On the other hand, holding that the three-year statute is applicable to the parents' suit, and thus forcing the child to litigate to preserve the parents' rights, would thwart the intent of the law to allow the child to bring suit until a year after reaching majority. Such action may be detrimental to the child where the full extent of compensable injuries are not known until after attaining majority age. To the contrary, it might be said that policy dictates allowing as few claims of long duration as possible, thus favoring application of the three year statute. The court's direction is currently unclear. Counsel on both sides should be aware of the issue.

Another most interesting question raised by the *Shockley* decision is its potential extension to other family relationships. If a parent can recover for loss of a child's society, why not allow recovery in the opposite situation? Nowhere in *Shockley* is the possibility of a child's recovery for loss of a parent's society and companionship excluded. The loss to the child in some cases might be greater than the loss to the parent when the child suffers injury. This is particularly true when the potential for learning and personal growth afforded the child by association with his or her parents is considered. The Wisconsin Wrongful Death Statute recognizes the right of a child to recover such damages and it would seem, in light of *Shockley*, that there is no longer any logical basis for denying recovery in personal injury cases. The same argument holds true for brothers and sisters. Siblings are often in each other's company more than in the company of their parents. When a child is injured, it is as clear that his or her brothers and sisters stand to suffer loss just as the parents do. Again, recovery is recognized by the Wrongful Death Statute, and there would seem no more logical basis for denying recovery in this situation than when a parent is injured.

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33. 66 Wis. 2d at 404, 225 N.W.2d at 501.
36. *Id.*
The argument can be extended up and down the family tree \textit{ad infinitum} and a policy determination would have to be made to cut off recovery at some point. There does not seem to be any good reason, however, why recovery for loss of society of an injured person could not be extended within the nuclear family unit. Such recovery is expressly allowed under the Wrongful Death Statute in Wisconsin, and it would seem no less capable of proof in cases of personal injury than in cases of wrongful death.

Notwithstanding the potential problems, the \textit{Shockley} decision is a good one. It recognizes the real contribution of a child to the family and removes the child from the servant category shared so long with the wife. Wisconsin now considers the child an individual whose presence and relationship has intrinsic value to the family. The real value of the decision, however, lies in the court's reasoning and analysis. As will be shown, the cases preceding \textit{Shockley} in other states often failed to discuss the policy of the rule. In some cases, the rule seems to have been set by a slip of the judicial quill and followed without comment.

IV. Recovery by Statute

Washington and Iowa are the only states which allow statutory recovery for loss of society and companionship of an injured minor child. Each had well reasoned decisions allowing such recovery in cases of wrongful death of a child which were followed by legislative action modifying the pertinent statute to allow recovery in cases of injury as well.

A. Washington

The Washington Supreme Court, in \textit{Lockhart v. Besel},\textsuperscript{37} construed their statute giving parents a cause of action for the injury or death of a minor child\textsuperscript{38} to include a recovery for the loss of the child's society and companionship. In \textit{Lockhart} the plaintiff's son, a high school senior, was killed in a collision

\textsuperscript{37} Id.

\textsuperscript{38} WASH. REV. CODE § 4.24.010 (1965):

\textit{Action for injury or death of child.}

A father, or in case of his death or desertion of his family, the mother may maintain an action as plaintiff for the injury or death of a minor child, or a child on whom either is dependent for support, and the mother for the injury or death of an illegitimate minor child, or an illegitimate child on whom she is dependent for support.
with the defendant's auto as the defendant was passing another car. The evidence indicated that the young man was a good student, an athlete, and "a leader in his class." He helped his father with a hog raising business and janitorial work at a local school, both of which the father had to give up after the boy's death. Judgment was for the parents who appealed, claiming that the trial court erred in failing to instruct the jury that "[y]ou may also consider the loss of companionship to the parents occasioned by the death of said child."

The parents admitted that the instruction was a departure from the then existing rule which, they contended, "... fails to recognize that economic benefit from children is no longer a matter of parental concern, and that the modern parental attitude is one of sacrifice for the success of children." The law in Washington at that time limited the damages recoverable by a parent to "pecuniary" loss resulting from a child's injuries. The court noted that the argument had been advanced that in the absence of special proof it was "speculative to say that the earnings of a minor child exceed the cost of his support." The court agreed, stating "[w]e must now conclude that to award more than nominal damages in every case where we limit damage to the loss of a minor child's earnings above the cost of his support and maintenance, is an affront to reason and logic."

The issue was resolved thus:

We hold that the measure of damages under RCW 4.24.010, supra, should be extended to include the loss of companionship of a minor child during his minority without giving any consideration for grief, mental anguish or suffering of the parents by reason of such child's wrongful death.

The case was remanded for a new trial on all issues.

Lockhart was couched in terms of wrongful death and, arguably, that was the extent of its application. The point was clarified by the Washington legislature in 1967 when it amended the Washington Revised Code to allow the recovery of damages for loss of society and companionship of an injured child just as in wrongful death cases.

40. Id. at ____., 426 P.2d at 607.
41. Id. at ____., 426 P.2d at 607.
42. Id. at ____., 426 P.2d at 608.
43. Id. at ____., 426 P.2d at 609.
44. Id. at ____., 426 P.2d at 609.
B. Iowa

Until 1971, Rule 8 of the Iowa Rules of Civil Procedure allowed a father to recover for medical expenses and "actual" loss of services resulting from the death of or injury to a child. In 1971, the Iowa Supreme Court decided the case of Wardlow v. City of Keokuk, in which the parents were allowed to recover for the loss of society and companionship of their four deceased children. The children drowned when they were swept into a storm sewer owned by the City of Keokuk. The trial court struck claims of the parents for (1) loss of society, companionship and affection of their children and (2) for mental anguish suffered by them as a result of the death of the children. The parents appealed. Referring to the Lockhart decision, the court noted: "[t]he statute considered in Lockhart created a right of action for injury or death of a minor child but prescribed no measure of recovery. It differs from Rule 8, RCP, in this respect." Nevertheless, the court concluded, after a review of the authorities on the wrongful death of children:

The pronouncements in Fussner v. Andert [(1962), 261 Minn 347, 113 N.W. 2d 355] and Lockhart v. Besel, both supra, support our conclusion that to hold no recovery beyond nominal damages plus medical and funeral bills can be had in actions for wrongful death when there is competent substantial evidence in the record of loss of companionship and so-

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   The mother or father or both may maintain an action as plaintiff for the injury or death of a minor child, or a child on whom either, or both, are dependent for support: Provided, That in the case of an illegitimate child the father cannot maintain or join as a party an action unless paternity has been duly established and the father has regularly contributed to the child's support.

46. Iowa Code Ann. R.C.P. 8:
   Injury or Death of Minor
   A father, or if he be dead, imprisoned or has deserted the family, then the mother, may sue for the expense and actual loss of services resulting from injury to or death of a minor child.

47. 190 N.W.2d 439 (Iowa 1971).
ciety of a deceased minor would render nugatory Rule 8 granting the father a cause of action for the death of his deceased unemancipated minor child.

Rule 8, insofar as it provides a remedy for wrongful death, is remedial in character and it is the court's duty to construe it in the light of current social conditions.\(^\text{49}\)

The court held that in wrongful death cases involving minor children brought under Rule 8, RCP, the jury could consider "loss of companionship and society of the minor during his minority" but that they could not include "grief, mental anguish or suffering of the parents by reason of such child's wrongful death."\(^\text{50}\)

In 1973, the Iowa General Assembly followed the lead of the Washington legislature and amended Rule 8, RCP, to read as follows:

**Rule 8. Injury or Death of A Minor**

A parent, or the parents, may sue for the expense and actual loss of services, companionship and society resulting from injury to or death of a minor child.\(^\text{51}\)

V. RECOVERY BY CASE LAW

Illinois, Idaho, Florida and California allow the recovery of damages for the loss of society and companionship of an injured minor child by court decision. In reading the cases, however, it is apparent that the rule evolved more by accident than by design.

A. Illinois

In Illinois, the rule is based on *Stephens v. Weigel*,\(^\text{52}\) a decision of the Illinois Court of Appeals. The case involved personal injuries to a child and her mother while they were passengers in a car driven by the defendant, Weigel. The girl, through her father, and her father in his own right, brought suit to recover their respective damages. The primary issue in the case was the application of the Illinois Guest Statute and whether the defendant's conduct could be classed as "wilful and wanton," thus negating statutory control. The trial court held that the con-

\(^{49}\) Wardlow v. City of Keokuk, 190 N.W.2d 439 at 445 (Iowa 1971).

\(^{50}\) Id. at 448.

\(^{51}\) Id.

duct of the defendant was such as to deny him the protection of the statute and submitted the question to the jury with an instruction that included as an element of the father’s damages “the loss of the services and society of his wife and daughter.”

On appeal from a verdict and judgment for the plaintiffs, the Appellate Court of Illinois affirmed the finding on the application of the Guest Statute, stating as follows in reference to the father’s recovery:

Inasmuch as plaintiffs Ruth Stephens [the wife] and Maxine Stephens [the daughter] are not barred under the Guest Statute from recovering damages for personal injuries sustained by them the plaintiff Howard Stephens, as father of Maxine and husband of Ruth, is properly entitled to assert a claim for consequential damages arising from his payment of medical and hospital expenses, and for the loss of the services and society of his wife and daughter.

Thus the rule was established in Illinois. The court made the statement without any discussion or citation of authority.

B. Idaho

In the Idaho case of Hayward v. Yost a somewhat different situation created a similar result. In that case, the Idaho Supreme Court extended the rule of recovery for the wrongful death of a child, stated in Checketts v. Bowman, to include cases of negligent injury.

In the Hayward case a minor, through his father, and his parents in their own right brought suit against the driver of a car which struck the seven year old boy. The jury returned a verdict for the parents and the son. On appeal, issues were raised regarding the alleged agency between the driver of the car, a man named Speer, and the co-defendants Yost and his business partner. A finding of insufficient evidence to support the allegation of agency resulted in reversal and dismissal of both verdicts against the partnership. The verdict for the parents against Speer, the driver, was reversed and remanded for a new trial, on the grounds of error in the jury instructions. The verdict for the child against Speer individually was affirmed.

54. Id. at 42, 82 N.E.2d at 700.
55. Id. at 41-42, 82 N.E.2d at 700.
56. 72 Idaho 415, 242 P.2d 971 (1952).
The defendants argued that the damages of $10,000 for the boy and $3,605 for the parents, which included $605 in medical expenses, were excessive. After discussing the extent of the boy’s injuries the court stated:

The parents may maintain an action for the injury of a minor child. Sec. 5-310, Idaho Code; in every such action damages may be given as under all the circumstances of the case may be just. Sec. 5-311, Idaho Code. Elements which enter into the determination of such damages include contributions which the parents might reasonably have expected to receive from the earnings of such minor child until his majority, for which there is no precise measure, Richmond v. Moore, 103 Cal. App. 173, 284 P. 681, as well as the loss of protection, comfort, society and companionship. Checketts v. Bowman, 70 Idaho 463, 220 P.2d 682.57

Neither verdict was held to be excessive, but the jury instructions which had permitted the jury to consider the parents’ “worry or mental distress” were held prejudicial.58

The case of Checketts v. Bowman,59 cited as authority for the recovery in Hayward v. Yost, was a wrongful death case not involving tortious injury to a child. There, a nine year old child was killed while attempting to cross a highway. The jury returned a verdict of $40,000 for the parents. They appealed from the order of the trial court granting the defendants a new trial on the grounds of an excessive verdict. After noting that the applicable section of the statutes allowed for recovery of such damages “‘as under all the circumstances of the case may be just,’”60 the court listed the traditional elements of damages and included “. . . comfort, society and companionship deceased would have afforded them had he lived. Golden v. Spokane and I.E.R. Co., 20 Idaho 526, 118 P. 1076.”61 No other discussion of policy was made, and the judgment was affirmed on the condition of remittitur of $20,000, held to be the amount of the excess in the verdict.

The Checketts62 court simply cited the Golden case63 as au-

57. 70 Idaho 463, 220 P.2d 682 (1950).
58. Hayward v. Yost, 72 Idaho at ____, 242 P.2d at 977.
59. Id. at ____, 242 P.2d at 978.
60. 70 Idaho 463, 220 P.2d 682 (1950).
63. 20 Idaho 526, 118 P. 1076 (1911).
authority for allowing the recovery of damages for loss of a deceased child’s society and companionship. The court in Golden merely affirmed a verdict rendered in a suit brought under a complaint in which such damages were sought under the general heading of “services.” The decision is very unclear on the point, but clarification was provided in the Checketts case where the recovery for loss of society of a deceased child’s society and companionship was allowed. This rule was subsequently extended by Hayward to include tortious injury which, as has been pointed out, stands as the law in Idaho today.

C. Florida

The oldest case in the country to allow parents to recover for the loss of their injured child’s society and companionship is Wilkie v. Roberts,64 decided by the Florida Supreme Court in 1926. In that case, a ten year old boy was struck and seriously injured by a truck driven by the defendant, Wilkie. Judgment for the plaintiff was appealed on the grounds that the verdict was not sustained by the evidence. The Florida court agreed, finding that there was no evidence as to “the value of the services of Waller Roberts to his father” and ordered a new trial. In discussing the elements of damages recoverable by a parent the court was, like the courts of other states, unclear. It first stated that there was a statute allowing recovery of “loss of services and mental pain in the event of the death of a minor child” but none in cases of injury. It concluded that the plaintiff-father’s recovery must be based on common law65 and continued:

The common law recognized no right of civil action for causing the death of a human being; such right, as it now exists in the various states of the Union, being purely statutory, and is not based on the right to the child’s services. The father’s right to custody, companionship, services, and earnings of his minor child are valuable rights constituting a species of property in the father, a wrongful injury to which by a third person will support an action in favor of the father. This is in addition to the right of action the child may have for the personal injury received, with the resulting pain, disfigurement, or permanent disability if such results follow. 20 R.D.L. 614.66 [Emphasis added.]

64. 91 Fla. 1064, 109 So. 225 (1926).
65. Id. at ———, 109 So. at 227.
66. Id. at ———, 109 So. at 227.
The court defined the child's personal cause of action and then described the parents' cause of action:

He could recover [under common law] only his pecuniary loss as a result of the injury, and such loss was limited to two elements: (1) the loss of the child's services and earnings, present and prospective, to the end of the minority; and (2) medical expenses in effecting or attempting to effect a cure.67

The two statements are prima facie inconsistent in that the first refers to "companionship" as an aspect of the compensable injury and the second reiterates the traditional elements of recovery. The court stressed the "services" aspect in its opinion, reversing for lack of proof on the value of the lost "services."68

Just as the opinion in the Wilkie case was equivocal, so too were subsequent cases. In 1956, the Florida court considered the case of Youngblood v. Taylor,69 in which a father sought to recover damages for injuries to his son. The primary issue on appeal was whether a father who brought suit on behalf of his son to recover for the personal injuries to the boy could later bring suit separately for his own damages. The defendants argued estoppel, and the trial court agreed. The supreme court reversed that decision and touched on the issue of damages in passing, stating that "[t]he father could recover for loss of the child's services and earnings and for medical expenses incurred in treatment of the child's injuries."70 Wilkie v. Roberts was cited specifically for the proposition that the father's cause of action was independent of the child's and, apparently, as general authority for the above quoted damages rule.

In 1973, the court took another swing at the rule in Yordon v. Savage.71 In that case, a child and his parents brought a three count complaint against a pediatrician for treatment allegedly resulting in the child's blindness. The first was for the child's own damages; the second by the parents jointly for their own damages; and the third for punitive damages. A motion to strike the mother as an improper party in the second count was granted, and the plaintiffs appealed on the grounds that the

67. Id. at ——, 109 So. at 227.
68. Id.
69. 89 So. 2d 503 (Fla. 1956).
70. Id. at 506.
71. 279 So. 2d 844 (Fla. 1973).
statutory provision making the father the only proper party plaintiff was unconstitutional. The Florida court reversed, holding that the mother was a proper party plaintiff under the Florida and United States Constitutions. The following statement was made on the elements of a parent's recovery:

In *Wilkie v. Roberts*, this court held that the parent, or guardian, of an unemancipated minor child, injured by the tortious act of another, has a cause of action in his own name for medical, hospital, and related expenditures, indirect economic losses such as income lost by the parent in caring for the child, and for the loss of the child's companionship, and society, and services including personal services to the parent and income which the child might earn for the direct and indirect benefit of the parent.\(^7\)

Such a clear statement of the law even without a discussion of policy implications would certainly seem to settle the matter; however, Florida lawyers were not to be that fortunate.

In 1975, the Florida Court of Appeals decided *City Stores Co. v. Langer.*\(^3\) A girl and her father brought suit against City Stores for assault and battery, false imprisonment and malicious prosecution in connection with an alleged shoplifting incident. The girl recovered $45,006.24 in compensatory damages and $26,000 in punitive damages. Her father recovered $13,000 for expenditures and loss of services of his daughter. On appeal, the girl's recovery was affirmed, while the father's was reversed and remanded for a new trial. Noting that the father had had actual expenditures of only $280, the court stated the damages rule as follows:

A parent can recover only his pecuniary loss as a result of injury to his minor child, and such loss was limited to two elements: (1) the loss of the child's services, and (2) medical expenses in effecting or attempting to effect a cure. *Wilkie v. Roberts*, 91 Fla. 1064, 109 So. 225 (1920). In addition, it has been recognized that there can be no recovery by a parent in action for injuries to his minor child, for the suffering, pain, embarrassment and/or humiliation caused the parent by the injuries of the child. See Annot., 32 A.L.R.2d 1060 at 1078 (1953); *Wilkie v. Roberts*, supra; *Miami Paper Co. v. Johnston*, Fla. 1952, 58 So. 2d 869; *Youngblood v. Taylor*, Fla. 1956, 89 So. 2d 503.\(^7\)
The court concluded that the excess of the father's award above the $280 of expenditures proved was for his "inconvenience and humiliation" and that he could not be allowed to recover such damages.

The controlling law of Florida is found in their Supreme Court's decision in *Yordon v. Savage* and not in the Court of Appeals decision in *City Stores Co. v. Langer*, but the latter opinion, in completely ignoring the *Yordon* decision, leaves the state of the law in Florida in doubt. While *City Stores Co.*, involving an intentional tort which gave rise to no appreciable injury to the parent, can be distinguished from *Yordon*, which involved negligence, there is no reason to ignore so recent and definitive a case as *Yordon*. There may have been no loss of society and companionship on the part of the father in *City Stores Co.*, but the rule should have at least been recognized.

**D. California**

The most recent case on recovery of damages for loss of society and companionship of a child is the California case of *Hair v. County of Monterey*. The plaintiffs were the parents of a nine year old boy who brought suit to recover for injuries to the child including blindness, brain damage, quadriplegia and petit and grand mal seizures suffered as a result of oral surgery performed at the defendant hospital. The parents sought recovery for:

... the extraordinary care and attention they would provide for the child; the diminution of the time, care and attention available for each other and their remaining children; emotional shock and injury to the parents' nervous systems sustained after witnessing the child's injuries; and for the lost society, companionship, comfort and society of their child.

The trial court sustained a demurrer to the parents' cause of action and was affirmed on appeal by the California Court of Appeals, which held (1) that the parents could recover only the pecuniary value of additional nursing services; (2) that no recovery could be had for affection expended; (3) that there could be no recovery for mental shock in the absence of physical injury; and, drawing an analogy to the allowance of recovery for loss of consortium by a wife, (4):

76. Id. at 340, 119 Cal. Rptr. at 640.
that no reasonable distinction can be drawn between the right of parents, in appropriate circumstances, to seek recovery of lost comfort, society and companionship of an injured and totally helpless child and the right of a spouse, in similar circumstances, to seek recovery for loss of consortium as authorized by Rodriguez v. Bethlehem Steel Corp. (1974), 12 Cal.3d 382, 115 Cal. Rptr. 765, 525 P.2d 669.]

The trial court's decision to dismiss was affirmed because the parents had not joined their action with the child's suit, which had been concluded in favor of the child before the decision in the Rodriguez case. In Rodriguez, the California Supreme Court held that for a wife to recover for the loss of her husband's consortium she had to join her suit with his and, in addition, that the rule of Rodriguez would not apply to cases concluded prior to the decision therein. The California Court of Appeals held that since the child's action in Hair was concluded prior to the Rodriguez decision, the parents' action was barred.

The Hair decision does not make a great deal of sense in that the California Court of Appeals seems to have arbitrarily adopted a limitation that was not meant for the case at bar. The Wisconsin Supreme Court's limitation in Shockley v. Prier is more reasonable in that it limits application of its rule to cases arising after the decision date in the case then at bar. Additionally, the Court of Appeals' statement of the rule gives rise to questions regarding the scope of its application. What are "appropriate circumstances" for a parent's recovery? Is the rule limited to "an injured and totally helpless child?" The court in Hair is not at all clear on these points.

Unlike most courts that have allowed recovery for loss of an injured child's society and companionship, the California Court of Appeals at least alluded to a rationale by way of its references to the Rodriguez case, likening the recovery in the case of a child to that of a wife for loss of her husband's consortium. Hayward v. Yost was discussed briefly in favor of the rule but the main emphasis was on the Rodriguez case.

77. Id. at 545, 119 Cal. Rptr. at 644.
78. 66 Wis. 2d at 404-05, 225 N.W.2d at 501.
79. 72 Idaho 415, 242 P.2d 971 (1952).
Conclusion

The *Shockley* case is the first in the country to make any real attempt to discuss fully the policy and rationale in favor of allowing parents to recover for the loss of the society and companionship of their injured minor child. In this it stands as a model to the rest of the nation. There are problems on proof of damages and the avoidance of jury speculation and sympathy verdicts, and there is the question of the application of the statute of limitations to the parents’ cause of action if it must be joined with that of the child. These remain to be settled and undoubtedly will be in time. For now, the first step is taken and children, after centuries, are finally becoming fully recognized persons in the law.

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