Torts: Recovery by Child for Loss of Consortium

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Torts—Recovery by Child for Loss of Consortium—In this action plaintiff, by her stepfather, sought relief for the deprivation of comfort, aid, kindness and assistance of her mother as a result of defendant's negligent injury to the mother. On defendant's motion to dismiss, Held: that a child is not entitled to recover such damages. *Hill et al. v. Sibley Memorial Hospital, 108 F.Sup. 739 (D.C. 1952).*

The Court of Appeals of the District of Columbia has recognized,¹ in the face of contrary rulings of practically every court in the nation,² the right in a wife to recover for the loss of the consortium of her husband. The court, in the instant case, deemed that two holdings³ of said Court of Appeals, denying permission to a child to sue for alienation of its parent's affections, controlled the present action.

The action on the case by the husband for the loss of the consortium of his wife (trespass *per quod consortium amisit*), or by the father or master for the loss of the services of his child or servant (trespass *per quod servitium amisit*), was well known to the common law.⁴ The wife, however, was denied the right to recover for the loss of the consortium of her husband,⁵ though her injury was undeniable; and the child—in the similarly disadvantageous position of possessing recognized, though legally unenforceable, rights—had, as Blackstone said, "no property in his father."⁶ In the absence of statute the situation today is, with a few scattered exceptions,⁷ practically the same.

The argument most commonly advanced to justify the denial of the child's action is the difficulty of assessment of damages, along with the concomitant danger of double recovery.⁸ The efforts of a jury to estimate the damages to the child, caused by the absence of the parent, would obviously be merely conjectural, especially since the parent has his own action against the tortfeasor, and is, at least theo-

¹ *Hitaffer v. Argonne Co., 183 F.2d 811 (D.C. Cir. 1950).*
² Cases are collected in Note, 23 A.L.R. 1378 (1952).
³ *McMillan v. Taylor, 160 F.2d 221 (D.C. Cir. 1946); Elder v. MacAlpine-Downie, 180 F.2d 385 (D.C. Cir. 1950).*
⁴ *Selleck v. City of Janesville, 104 Wis. 570, 80 N.W. 944 (1899).*
⁵ "... the inferior hath no kind of property in the company, care, or assistance of the superior, as the superior is held to have in those of the inferior; and therefore the inferior can suffer no loss or injury. The wife cannot recover damages for beating her husband, for she hath no separate interest in anything during her coverture." 3 Bl. Comm. *143. These words apply with equal emphasis to the child.
⁶ Ibid.
⁷ The wife has recently been allowed an action for loss of her husband's consortium in some jurisdictions. See, *Hitaffer v. Argonne Co., supra,* note 1; *Cooney v. Moomaw, 109 F. Supp. 448 (D. Neb. 1953).*
⁸ *Pound, Individual Interests in the Domestic Relations, 14 Mich. L. Rev. 177, 194 (1916).*
retically, in no worse a position to fulfill his duty to support the child than before. The Minnesota court has taken this precise position and has held that the child may not recover; the sole remedy being in an action by the parent against the wrongdoer.9 The double recovery argument is a particularly cogent one, but much is to be said for the suggestion10 that statutes permitting the child to bring an action against the tortfeasor might be advisable when the parent neglects or refuses to sue.

Another argument is that of increased litigation,11 which is particularly effective in these days of overcrowded court calendars. The thought of every case of negligence resulting in the absence of a parent from his child, creating a cause of action not only in the parent but also in each of his children, is especially appalling. This objection would probably lose its force if, as has been suggested12 with respect to cases involving alienation of a parent’s affections, compulsory joinder of all the parties plaintiff were required.

The principal case concedes that mere absence of precedent does not prove that an action cannot be maintained, and that when a child loses the love and companionship of a parent, it is deprived of something of value, but hesitates to lay down a completely new rule. This question of the authority of the courts, to create a cause of action without precedent therefor has been differently treated by the various courts. Some courts, like the one in the instant case, have held that the common-law should constantly be re-examined and revised by the courts to meet changing circumstances.13 As shown by the principal case, a favorable attitude on this matter of changing the common-law judically need not necessarily result in the recognition of a new cause of action.14 On the other hand, some courts have held that their position is merely to interpret the common and statutory law, and that any changes must come from the legislature.15

The principal case bases its ruling on precedents16 denying recovery for alienation of a parent’s affections. This question of the right of the child to recover for alienation of its parent’s affections first arose in 1934, when the New York Supreme Court ruled that

10 See 4 VERNIER, AMERICAN FAMILY LAWS 479 (1936).
13 Morrow v. Yannantuono, supra, note 11. "A process of judicial lawmaking has always gone on and still goes on in all systems of law, no matter how completely in their juristic theory they limit the function of adjudication to the purely mechanical." POUND, THE SPIRIT OF THE COMMON LAW, 172 (1931). This "judical lawmaking" is Dean Pound’s "Judical empiricism." see ibid, 166-192.
14 See also Morrow v. Yannantuono, supra, note 11.
16 See supra, note 2.
no such right existed or should be granted judicially.\textsuperscript{27} There have been innumerable decisions\textsuperscript{28} declaring that a child has the right to the support of its parent, and there is also a line of authority which allows a suit by the child itself against the parent for support.\textsuperscript{29} It has nevertheless, been stated in a case,\textsuperscript{30} also involving alienation of a parent’s affections, that a child has no legal right to the personal presence and care of a parent. This type of decision has its roots in the view that the gist of an action for alienation of affections is the loss of consortium, which is a property right growing out of the marriage relation,\textsuperscript{31} involving Prosser’s “alliterative trio” of sex, services and society, to which may be added the element of conjugal affection.\textsuperscript{32} Since the child obviously has no right to any of the elements of consortium mentioned, it cannot recover in an action for alienation of its parent’s affections.\textsuperscript{33}

This settled state of the law was disturbed in 1945 by the case of Daily v. Parker,\textsuperscript{24} involving the enticement of a parent away from his children. It was held that a child is entitled to the society, companionship, economic, social and moral support, guidance and protection of its father, and that these rights are protected against interference from third parties by a provision of the Illinois constitution.\textsuperscript{25} Since 1945 the doctrine of Daily v. Parker was followed in three cases,\textsuperscript{26} but the child’s right of recovery was denied in eleven cases.\textsuperscript{27}

The question was recently decided by the Wisconsin Court\textsuperscript{28} which agreed with the majority, that the child has no cause of action. In construing a constitutional provision substantially the same as that in Daily v. Parker,\textsuperscript{29} the court held that the provision pertains only

\textsuperscript{27} Morrow v. Yannantuono, supra, note 11.
\textsuperscript{28} 67 C.J.S., PARENT AND CHILD, §15.
\textsuperscript{31} Taylor v. Keefe, 134 Conn. 156, 56 A.2d 768 (1947).
\textsuperscript{32} See Prosser, Torts §101, p. 917 (1941).
\textsuperscript{33} Morrow v. Yannantuono, supra, note 11.
\textsuperscript{24} 152 F.2d 174 (7th Cir. 1945).
\textsuperscript{25} “Every person ought to find a certain remedy in the laws for all injuries and wrongs which he may receive...” Ill. Const. Art. II, §19.
\textsuperscript{28} Scholberg v. Itnyre, supra, note 27.
\textsuperscript{29} See supra, note 25; Wis. Const. Art. I, §9.
to injuries such as result from an invasion or an infringement of a legal right or a failure to discharge a legal duty. Since the right in question was not recognized by the common-law or created by statute, it is not a legal right; and it was, therefore, held that the provision had no application. It was further pointed out that the creation of new rights is a task for the legislature, not the court.30

The principal case specifically recognizes that there is a difference between actions brought for damages that result from alienation of affections on the one hand, and those that result from loss of consortium on the other, but nevertheless holds, without further discussion, that the cases denying the child recovery for alienation of his parent's affections are controlling.31 If cases involving husband and wife may be deemed analogous, the child should probably not be allowed to recover for loss of consortium even in a jurisdiction permitting it recovery for alienation of affections. The wife has generally32 been denied recovery for loss of the consortium of her husband, but it is almost everywhere recognized that she may recover for the alienation of her husband's affections, or for criminal conversation—the distinction having been drawn that in cases involving loss of consortium the husband has his own action by which the wife would benefit, while in cases of alienation of affections or criminal conversation, the husband is obviously in no position to sue.33 The position of the child should be similar, and the danger of double recovery should prevent the action.

The legislature of the various states have seen fit to create causes of action allowing a child, under certain circumstances, to recover for what amounts to loss of consortium. Especially noteworthy are the statutes in twenty-six jurisdictions, which grant a child a cause of action against any person causing it injury in "person, property or means of support" by illegally furnishing its parent with intoxicating liquor.34 The death statutes, under certain circumstances, afford a remedy to the child for loss of its parent's consortium when the act of the defendant has resulted in the death of the parent. In Wisconsin, when no spouse survives, the amount recovered belongs and is paid to the deceased's lineal heirs, which may be his children.35 When a widow survives, however, with more than two dependent children under fifteen years of age, the maximum amount recoverable

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30 For more detailed discussions of the child's action for loss of its parent's affections, see Comments, 39 CALIF. L. REV. 294 (1951); 32 B.U.L. REV. 82 (1952).
31 See supra, note 2.
32 See, however, supra, note 7.
34 4 VERNIER, op. cit. supra, note 10, at 479.
35 WIS. STATS. (1951), §331.04(2); the lineal heirs are determined by the descent statute, WIS. STATS. (1951), §237.01.
for pecuniary loss ($15,000) is increased $1500 on account of each child in excess of two, but not exceeding a total increase of $7500. It has been said that such pecuniary loss may include counsel and advice, in addition to support and such contributions as may have been made to the child had the parent lived. It should be noted, however, that the Wisconsin statute limits recovery for loss of the society and companionship of the deceased to his spouse or parents.

The tendency of modern law, as reflected in the alienation of affections decisions discussed above, seems to be away from recognizing judicially any new rights in children, but the vigorous minority in those cases, characterized by Daily v. Parker, and the recognition in some jurisdictions of the right of the wife to sue for loss of the consortium of her husband, are factors difficult to evaluate. In Wisconsin, in view of the stand taken by the court, against extending to the child the right to sue for alienation of affections, and especially the stand on judicial lawmaking, it seems safe to say that an action like the one in the principal case would receive similar treatment.

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Negligence—Foreseeability—Plaintiff was injured when her husband lost control of a truck, in which they were riding, due to severe corrugations in the floor covering of a bridge maintained by the defendant. The uneven corrugated surface was caused when a gravel mixture, which the defendant's employees had used to cover the bridge flooring, sifted between cracks of the flooring. Defendant maintained that the development of the dangerous condition was unforeseeable. HELD: The defense that one is not liable for unforeseeable consequences of an act is inapplicable to relieve the actor who negligently sets into motion a chain of circumstances leading to the final resultant injury. Pruett v. State through Department of Highways et al., 62 So. 2d 686 (La. 1953).

The court in the principal case has placed itself with the majority of courts regarding the effect of the foreseeability test upon the causation issue. This position is: the duty of care owed a plaintiff is determined with reference to the reasonably anticipated or foreseen injury to that plaintiff. Once the defendant's breach of duty is estab-

35 Wis. Stats. (1951), §331.04(4).
36 Wis. Stats. (1951), §331.04(4).
37 Green, Relational Interests, 29 Ill. L. Rev. 460, 484-485 (1934).
38 See supra, note 27.
39 See supra, note 26.
40 See supra, note 26.
41 See supra, note 24.
42 See supra, note 7.
43 Scholberg v. Itnyre, supra, note 27.