

January 1965

## Torts - Damages - Negligent Injury to Husband Does Not Give Wife Action for Loss of Consortium. *Rush v. Great American Ins. Co.*, 376 S.W.2d 454 (Tenn. 1964)

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### Repository Citation

James L. Tucker, *Torts - Damages - Negligent Injury to Husband Does Not Give Wife Action for Loss of Consortium. Rush v. Great American Ins. Co.*, 376 S.W.2d 454 (Tenn. 1964), 6 Wm. & Mary L. Rev. 97 (1965), <https://scholarship.law.wm.edu/wmlr/vol6/iss1/12>

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not essential in finding liability.<sup>11</sup> It appears that the reasoning behind the majority is to curtail to the same reasonable extent the defendant's privilege to act as he sees fit without care for the protection of others.<sup>12</sup>

*Gus James II*

**TORTS—DAMAGES—NEGLIGENT INJURY TO HUSBAND DOES NOT GIVE WIFE ACTION FOR LOSS OF CONSORTIUM.**—In *Rush v. Great American Ins. Co.*<sup>1</sup> the plaintiff sued to recover damages for loss of consortium resulting from injuries negligently inflicted upon her husband by the defendant. The defendant demurred, alleging that no such action could be maintained by the wife under common law and that there was no state statute permitting such an action. The trial court sustained the demurrer and dismissed the case. Affirming, the Supreme Court of Tennessee ruled that the common law was, and continues to be, in full force and effect,<sup>2</sup> except, of course, where expressly changed by statute.<sup>3</sup> In its strict adherence to a common law rule which was originally based upon the inequality of the sexes, this decision stands in direct opposition to modern social pressures which demand complete legal equality for the married woman. It is obviously of great importance to understand why, in the face of desirable reform, this court has decided to support that ancient common law principle.

Although there is no universally accepted definition of the word "consortium,"<sup>4</sup> it generally refers to "conjugal fellowship; and the term embraces love, companionship, affection, society, comfort, sexual

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11. With the exception of Virginia, West Virginia, PROSSER AND SMITH, TORTS 492 (3rd Ed. 1962) and New York, Weisbein, *The Attractive Nuisance Doctrine and Its Status in New York*, 8 N.Y.U. INTRAMURAL L. REV. 224 (1953), who purport to reject the whole theory of attractive nuisance and find liability under certain exceptions, the remaining states follow the *Best* case, *supra*, note 5, and the RESTATEMENT, TORTS, § 339 (1934) and hold that enticement and allurement are not necessary before liability.

12. Wilson, *Limitations on the Attractive Nuisance Doctrine*, 1 N.C.L. REV. 162 (1923); James, *Tort Liability of Occupiers of Land*, 63 YALE L.J. 144 (1953).

1. 376 S.W.2d 454 (Tenn. 1964).

2. *Accord*, *Cogburn v. State*, 198 Tenn. 431, 281 S.W.2d 38 (1955).

3. TENN. CONST. ART. XI, § 1; *accord*, *Henley v. State*, 98 Tenn. 665, 41 S.W. 352, 39 L.R.A. 126 (1897).

4. *E.g.*, *Igneri v. Cie de Transports Oceaniques*, 323 F.2d 257, 260 (2d Cir. 1963); *Hitaffer v. Argonne Co.*, 183 F.2d 811, 23 A.L.R. 1366 (D.C. Cir. 1950), *cert. denied*, 340 U.S. 852, (1950); *Acuff v. Schmit*, 248 Iowa 272, 78 N.W.2d 480, 481 (1956); *Roseberry v. Starkovich*, 387 P.2d 321, 322 (N.M. 1963); *Hinnant v. Tide Water Power Co.*, 187 N.C. 120, 126 S.E. 307, 37 A.L.R. 889 (1929). See generally BLACK, LAW DICTIONARY 382 (4th ed. 1957).

relations, services, solace and more.”<sup>5</sup> Under the earlier common law, whatever the particular definition used, no right of consortium ever belonged to the wife. This right was considered a property right, and, as such, it belonged exclusively to the husband.<sup>6</sup> Its invasion gave the husband a right of action in trespass for loss of the services of his wife (*trespass per quod consortium amisit*).<sup>7</sup> In regard to the right of consortium, the common law view has existed practically unchanged down to modern times. The first reported American case in which a wife sued a third party for loss of consortium was *Welsh v. Morrison*<sup>8</sup> in 1887, and not until 1950 did any American court ever allow the wife to recover such damages.

The great majority of legal writers had long advocated giving the wife the right to sue for loss of consortium;<sup>9</sup> nevertheless, not until *Hitaffer v. Argonne*<sup>10</sup> bestowed judicial recognition upon this view did the courts earnestly begin to scrutinize the concept of consortium. The *Hitaffer* case was the impetus for a great increase in litigation concerning the rights of a married woman to consortium, and it has given rise to a small, but strong, minority which grants such rights to the wife.<sup>11</sup> Although the *Hitaffer* decision admittedly contains sound and logical reasoning and even though the majority of courts do grant a remedy

5. *Montgomery v. Stephan*, 359 Mich. 33, 101 N.W.2d 227, 228 (1960).

6. See 3 BLACKSTONE, COMMENTARIES 143.

7. *Hyde v. Scysson*, Cro. Jac. 538, 79 Eng. Rep. 462 (1621); *Guy v. Livesay*, Cro. Jac. 501, 79 Eng. Rep. 428 (1620).

8. 9 Ohio Dec. Repr. 852, 17 W.L.B. 370 (1887).

9. E.g., PROSSER, TORTS 948 (1941); Holbrook, *The Change in the Meaning of Consortium*, 22 MICH. L. REV. 1 (1923); Lippman, *The Breakdown of Consortium*, 30 COLUM. L. REV. 651 (1930). But see, Pound, *Individual Interests in Domestic Relations*, 14 MICH. L. REV. 177, 194 (1916).

10. *Supra*, note 4. Partially overruled in matters not concerning the present discussion by *Smith & Co. v. Cole*, 242 F.2d 220 (D.C. Cir. 1957), *cert. denied*, 354 U.S. 914 (1957).

11. Nine state courts and the federal courts of two other states presently follow the pro-wife view of the *Hitaffer* case and grant the wife recovery for loss of consortium resulting from negligent injury to her husband: Ark.—*Missouri Pacific Transp. Co. v. Miller*, 227 Ark. 351, 229 S.W.2d 241 (1957); Del.—*Stenta v. Leblang*, 185 A.2d 759 (Del. 1962); Ga.—*Walden v. Coleman*, 105 Ga. App. 242, 124 S.E.2d 313 (1962); Ill.—*Dini v. Naiditch*, 20 Ill.2d 406, 170 N.E.2d 881, 86 A.L.R.2d 1184 (1960); Iowa—*Lampe v. Lagomarcino-Grupe Co.*, 251 Iowa 204, 100 N.W.2d 1 (1959); Mich.—*Montgomery v. Stephan*, 359 Mich. 33, 101 N.W.2d 227 (1960); Miss.—*Delta Chevrolet Co. v. Ward*, 211 Miss. 256, 51 So. 443 (1957); Mo.—*Novak v. Kansas City Transit Inc.*, 365 S.W.2d 539 (Mo. 1963); Mont.—*Dutton v. Hightower & Lubrecht Constr. Co.*, 214 F.Supp. 298 (D.C. Mont. 1963) (applying Mont. law); Neb.—*Guyton v. Solomon Dehydrating Co.*, 302 F.2d 283 (8th Cir. 1962) (applying Neb. law); S.D.—*Hoekstra v. Helgeland*, 78 S.D. 82, 98 N.W.2d 669 (1959).

for a *direct* attack by a third party upon the marital relation,<sup>12</sup> the great majority of courts still steadfastly refuse to give the wife any right of action where the interference is *indirect* and is the result of negligence.<sup>13</sup>

The majority view, relying upon the time-honored common law and upon the principle of *stare decisis*, explicitly declares that any change in the present law of consortium must be made by the legislature and not by the courts.<sup>14</sup> One of the principal arguments used in denying recovery to the wife is that her injury, if any, is too remote, consequential, speculative, and too infused with sentimental elements; thus, her damages are incapable of reasonable ascertainment.<sup>15</sup> Another reason why the courts refuse to allow recovery by the wife stems from their appre-

12. *I.e.*, enticement, alienation of affections, and criminal conversation. See PROSSER, *TORTS* 691 (2d ed. 1955).

13. Of the states which have considered the question since 1950, the following refuse to allow the wife to recover: *Ala.*—*Smith v. United Constr. Workers*, 271 Ala. 42, 122 So.2d 153 (1960); *Ariz.*—*Jeune v. Del E. Webb Constr. Co.*, 77 Ariz. 226, 269 P.2d 723 (1954); *Cal.*—*West v. San Diego*, 54 Cal.2d 469, 6 Cal. Rptr. 289, 353 P.2d 929 (1960); *Colo.*—*Johnson v. Enlow*, 132 Colo. 101, 286 P.2d 630 (1955); *Conn.*—*Lockwood v. Wilson H. Lee Co.*, 144 Conn. 155, 128 A.2d 330 (1956); *Fla.*—*Wilson v. Redding*, 145 So.2d 252 (Fla. App. 1962); *Ind.*—*Miller v. Sparks*, 189 N.E.2d 720 (Ind. App. 1963); *Kan.*—*Hoffman v. Dautel*, 192 Kan. 406, 388 P.2d 615 (1964); *Ky.*—*Baird v. Cincinnati, N. O. & T. P. Ry.*, 368 S.W.2d 172 (Ky. 1963); *Md.*—*Coastal Tank Lines, Inc. v. Candes*, 207 Md. 37, 113 A.2d 82 (1955); *Minn.*—*State Farm Mutual Ins. Co. v. Village of Isle*, 122 N.W.2d 36 (Minn. 1963); *N.H.*—*Snodgrass v. Cherry-Burrell Corp.*, 103 N.H. 56, 164 A.2d 579 (1960); *N.J.*—*Larocca v. American Chain & Cable Co.*, 23 N.J. Super. 195, 92 A.2d 811 (1952); *N.M.*—*Roseberry v. Starkovich*, 387 P.2d 321 (N.M. 1963); *N.Y.*—*Heller v. Spyridon*, 37 Misc.2d 474, 235 N.Y.S.2d 168 (1962); *Okla.*—*Nelson v. A.M. Lockett & Co.*, 206 Okla. 334, 243 P.2d 719 (1952); *Pa.*—*Neuberg v. Bobowicz*, 401 Pa. 146, 162 A.2d 662 (1960); *S.C.*—*Page v. Winter*, 240 S.C. 516, 126 S.E.2d 570 (1962); *Wash.*—*Ash v. S.S. Mullen, Inc.*, 48 Wash.2d 345, 261 P.2d 118 (1953); *W. Va.*—*Seagraves v. Legg*, 127 S.E.2d 605 (W. Va. 1962); *Wis.*—*Sestito v. Knop*, 297 F.2d 257 (7th Cir. 1961) (applying Wis. law).

14. “[W]e can but say that it is not our function to change the law, but to determine what it is. The former is vested totally in the legislature.” *Smith v. United Constr. Workers*, *supra* note 13, at 155; *Ripley v. Ewell*, 61 So.2d 420 (Fla. 1952). “The primary function of this court is to interpret and apply the law to given situations. To legislate is wholly foreign to our duty.” *Rush v. Great American Ins. Co.*, *supra* note 11, at 458. *But see* 15 AM. JUR. 2d § 2, p. 795 (1964).

15. *Deshotel v. Atchison, Topeka & Sante Fe Ry.*, 50 Cal. 2d 664, 328 P.2d 449 (1958); *Marri v. Stamford Street R.R.*, 84 Conn. 9, 78 Atl. 582, 33 L.R.A. (n.s.) 1042, Ann. Cas. 1912B 1120 (1911); *Brown v. Kistleman*, 177 Ind. 692, 98 N.F. 631, 40 L.R.A. (n.s.) 236 (1912); *Feneff v. New York C. & H. Ry.*, 203 Mass. 278, 89 N.E. 436, 24 L.R.A. (n.s.) 1024, 133 Am. St. Rep. 291 (1909); *Landwehr v. Barbas*, 241 App. Div. 769, 270 N.Y.S. 534 (1934). See Annot., 23 A.L.R.2d 1378, 1380 (1952). *Contra*, *Hitaffer v. Argonne Co.*, *supra* note 4.

hension of a double recovery for a single injury.<sup>16</sup> Technically, the minority view is correct in stating that the respective damages of the husband and wife are separable; however, from a practical viewpoint, and because such actions are generally allowed to go before the jury, there is a real possibility of overlapping recoveries.<sup>17</sup>

The majority of courts do not consider their denial of the wife's action inconsistent with allowing the husband to recover for loss of consortium resulting from a negligent injury to his wife. This position is based generally upon the premise that the husband has a common law right to his spouse's services, whereas the wife has no corresponding right to her husband's services.<sup>18</sup> Thus, the husband has a base upon which the sentimental elements of damage may attach, while the wife does not.<sup>19</sup>

Neither can the wife find refuge in the various married women's acts, for in the great majority of jurisdictions these acts are interpreted as merely having removed the liabilities which were formerly imposed upon females, and not as having created any new rights which were unknown to the common law.<sup>20</sup> Nor can the married woman gain her right of action in those few states which, in view of the married women's acts, recognize the incongruity of denying such an action to the wife while granting it to her husband. These states, either by

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16. *Giggey v. Gallagher Transp. Co.*, 101 Colo. 258, 72 P.2d 1100 (1937); *Eschenbach v. Benjamin*, 195 Minn. 378, 263 N.W. 154 (1935); *Tobiassen v. Polley*, 96 N.J.L. 66, 114 Atl. 153 (1921); *Helmststler v. Duke Power Co.*, 224 N.C. 821, 33 S.E.2d 611 (1945). See Jaffe, *Damages for Personal Injury: The Impact of Insurance*, 18 LAW & CONTEMP. PROB. 219, 229 (1953).

17. "Adjectives, adverbs and epithets can neither solve nor eliminate the problem. When two overlapping causes of action are made to grow where one has grown before, the possibility of a double recovery is real." *Dini v. Naiditch*, *supra* note 11, at 895 (dissenting opinion).

18. *Kronenbitter v. Washburn Wire Co.*, 4 N.Y.2d 524, 176 N.Y.S.2d 354, 151 N.E.2d 898 (1958); *Smith v. Nicolas Bldg. Co.*, 93 Ohio St. 101, 112 N.E. 204, L.R.A. 1916E 700, Ann. Cas. 1918D 206 (1915); *accord*, *Best v. Samuel Fox & Co.*, [1951] 2 K.B. 639. *Contra*, *Dini v. Naiditch*, *supra* note 11.

19. See Annot., 23 A.L.R.2d 1378, 1380 (1952).

20. "A right may exist in the husband, which, notwithstanding the statute, is without a correlative right in the wife." *Emerson v. Taylor*, 133 Md. 192, 195, 104 Atl. 538, 539 (1918). "The Act which removed the married women's disabilities of coverture in 1913, T.C.A. § 36-601, did not confer any substantive rights of action upon women but merely removed their common law disabilities. . . ." *Rush v. Great American Ins. Co.*, *supra* note 1. "The statute . . . being in derogation of the common law, was to be strictly construed and read as if the common law remained unchanged unless the purpose to change it appeared expressly or by necessary implication." *Furey v. Furey*, 193 Va. 727, 729, 71 S.F.2d 191 (1952). *Contra*, *Acuff v. Schmidt*, 248 Iowa 272, 78 N.W.2d 480 (1956).

statute,<sup>21</sup> or by decision,<sup>22</sup> solve the whole problem by denying the action to the husband also, thereby placing both parties to the marital relationship upon more or less equal terms.

The common law denial of the wife's right to sue for loss of consortium is admittedly incompatible with the modern concept of legal equality for the married woman; however, in order to bring any semblance of uniformity and effectiveness to the solution of this problem, and in order to give true and complete equality to the wife, legislative action is imperative.<sup>23</sup> Until such action materializes, the courts will continue to resist any complete breach of the long-established doctrines of the common law.<sup>24</sup> Certainly, without statutory directives it would be extremely difficult and time-consuming for the courts to agree upon what elements such an action by the wife should include and upon what limits should be imposed upon the action. Considering the nonpecuniary nature of the interests involved, the allowance of such action would involve the unsystematic inclusion and exclusion of the various elements of damage by means of slowly evolving court-made doctrines whose rules would be subject to change with each new decision.<sup>25</sup>

One must bear in mind the fact that, regardless of the desirability of changing a particular facet of the common law, the courts are extremely reluctant to invade the province of the legislators and become lawmakers.<sup>26</sup> Although pressured by a society which demands equality for women, it appears that the majority view continues to hold sway

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21. VA. CODE 1950, § 55-36, as construed in *Carey v. Foster*, 221 F. Supp. 185 (E.D. Va. 1963).

22. *Rogers v. Boynton*, 315 Mass. 279, 52 N.E.2d 576 (1943); *Helmstetler v. Duke Power Co.*, *supra* note 16; *accord*, *Best v. Samuel Fox & Co.*, *supra* note 18.

23. See note 14, *supra*.

24. "We have given careful consideration to the able arguments advanced in the *Hitafter* case, many of which are founded on sound reasoning and which logically support the conclusion reached if considered as an argument of what the law *should* be. They might appeal to the Legislature. But we find them wholly unconvincing when viewed from the only angle from which our jurisdiction permits us to consider them, namely a determination of what the law of Florida *is*. . . ." *Ripley v. Ewell*, 61 So.2d 420, 423 (Fla. 1952).

25. "Clarification by statute as to both the husband and wife would, of course, be preferable to piecemeal determination of the problems by judicial decision." *Hoffman v. Dautel*, 388 P.2d 615, 626 (Kan. 1964).

26. *E.g.*, "We are mindful of the critical comments of the law writers and some of the courts against adhering to a static principle long embedded in our jurisprudence, but much can be said on either side of the question and we think it sound to adhere to the legal concept so long established in this jurisdiction." *Ex parte Hammett*, 259 Ala. 240, 243, 66 So.2d 600, 602 (1953).

over the courts and is continually being re-examined, clarified, and strengthened by decisions such as *Rush v. Great American Ins. Co.*<sup>27</sup> Such decisions do not refute the logical reasoning of the opposition, nor do they ignore the pressures of social change—indeed, courts of law thrive on logic and welcome desirable change. These decisions merely propose that such a change should come from the legislature; until such change is forthcoming, the time-proven common law will govern.

*James L. Tucker*

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27. *Supra* note 1.