CONSORTIUM AND THE ALLEGED EMANCIPATION OF THE MARRIED WOMAN

Perhaps there is no clearer example in English law of a legal doctrine having its roots in the long distant past than the rules relating to the tortious actions for loss of consortium and loss of servitium. The two actions, *per quod consortium amisit* and *per quod servitium amisit,* originated from the same basic conception of a proprietary or quasi-proprietary right and have had a very similar history and development, though in *Best v. Samuel Fox & Co. Ltd.*[1] their consanguinity would appear to have gone unperceived.

In mediaeval law if a person occupied a position of inferior status with regard to another, that latter was deemed to have such a proprietary or quasi-proprietary interest in the maintenance of that status that certain kinds of interference with it by third persons gave the superior an action of trespass. Thus the feudal conception of the family as a unit with the husband as its head, coloured by the ecclesiastical notion of man and wife being of one flesh, resulted in a status for the wife that made her for many purposes indistinguishable from her husband's chattels. That this is no exaggeration is shown by the fact that for an assault and battery on his wife *per quod consortium amisit* the husband brought an action of *trespass;*[2] likewise for adultery the former action of criminal conversation was originally considered to be founded in trespass.[3] And trespass lay because the husband had a property interest in his wife.[4]

The position of servants in the household was similar.[5] The courts recognised in the master for the abduction of his servant or for an assault on him by which he lost the servant's services a right of action for trespass for the disturbance of his proprietary or quasi-proprietary interest in a definite status.[6]

1 [1950] 2 All E.R. 798.

2 *Guy v. Livesey,* (1618) Cro. Jac. 501, 79 E.R. 428; *Smith v. Hixon,* (1734) 2 Strange 977, 978, 93 E.R. 979, 980.

3 See per McCardie J. in *Butterworth v. Butterworth and Englefield,* [1920] P. 126, 131.

4 See *Barham v. Dennis,* (1600) Cro. Eliz. 770, 78 E.R. 1001, where in an action by a father for trespass for taking away and imprisoning his daughter it was pointed out that a property right was the basis of such an action and although he failed because he had no such right in his daughter it is clear a husband did have in his wife.

5 See *Admiralty Commissioners v. S.S. Amerika,* [1917] A.C. 38, 44-45.

6 *Robert Marys's Case,* (1612) 9 Co. Rep. 111b at 113a, 77 E.R. 898; *Courtney v. Collet,* (1697) 1 Ld. Raym. 272 at 274, 91 E.R. 1079.

But a father did not have the same proprietary rights in his children except in his heir's marriage.[7] Accordingly, the courts, in order to protect the interests of the father in his children, were driven to the analogy of the rules relating to master and servant so as to give a parent who could show contractual, *de facto* or *de iure* service, a right of action against third persons who caused him a loss of services by the seduction of or other injury to his child.[8] Although, therefore, this branch of the law had not a proprietary concept as its basis, by borrowing from the principles of master and servant which had, it acquired blood ties with the latter and the similar rules covering husband and wife.

The proprietary basis of the actions *per quod consortium amisit* and *per quod servitium amisit* evidenced by their being founded in trespass is shown clearly by the cases already cited. But in their subsequent development the property idea gradually disappeared, the action for trespass gave way to an action on the case, and in both instances negligent interferences with consortium or servitium came to be covered as well as intentional disturbances. It is interesting and important to trace this growth. Reference has already been made in connection with the consortium action to the early seventeenth century case of *Guy v. Livesey*[9] which we can take as our starting point although it is quite apparent that the consortium action had a very much earlier origin. It was always brought in trespass and usually arose from intentional acts of hostility against the wife such as assaults. The first case that the writer has been able to discover in which a husband recovered for the "loss of comfort, fellowship and assistance" of his wife due to the *negligence* of the defendant is *Baker v. Bolton*[10] in 1808. Other cases since, such as *Brockbank v. The Whitehaven Junction Railway Co.*,[11] and *Mallett v. Dunn*,[12] clearly establish that the consortium action lies for negligent injuries to the wife just as much as for intentional ones and that at some stage in its history it was brought in case instead of in trespass.

Isaacs J. indeed, in *Wright v. Cedzich*,[13] maintained that the new departure was made in 1745 in *Winsmore v. Greenbank*,[14] an action brought not in trespass but in case for enticing away the

7 *Barham v. Dennis, supra:* Holdsworth, *History of English Law*, viii, 427.
8 This action was also pleaded in trespass: *Tullidge v. Wade*, (1769) 3 Wils. K.B. 18, 95 E.R. 909.
9 *Supra*, note 2.
10 1 Camp. 493, 170 E.R. 1033.
11 (1862) 7 H. & N. 834, 158 E.R. 706.
12 [1949] 1 All E.R. 973.
13 (1930) 43 C.L.R. 493, 514-515.
14 (1745) Willes 577, 125 E.R. 1330.

plaintiff's wife. Being laid in case, no reliance could be placed on precedents such as *Smith v. Hixon,*[15] decided in trespass only eleven years previously, although it seems difficult to understand why *Winsmore v. Greenbank* was not founded on trespass, seeing that a loss of consortium through an intentional act such as malicious prosecution appears little different from a loss of consortium arising from another wilful act, enticement. But as pleaded, it was for all intents and purposes an action for which there was no precedent, a point that was strongly pressed by the defendant. But it proved of no avail and the husband's action was sustained. As is pointed out by Isaacs J.,[16] the case is obviously not founded on any dominion or right of possession by the husband over the wife and it is therefore a break with the previous consortium cases. No reason has been suggested why this vital change took place at this time; the analogous development in the servitium action did not eventuate until nearly a century later. But unless loss of consortium due to enticement is to be regarded as a tort *sui generis,* different and separate from loss of consortium due to other causes, for which there appear to be no adequate grounds, Isaacs J. must be regarded as correct in looking upon *Winsmore v. Greenbank* as marking the change in the basis of the general consortium action.

Returning for a moment to the servitium action, it has been seen that it, too, lay originally in trespass.[17] But as with consortium so here, though nearly a century later, trespass gave way to case. There were decisions in 1807 and 1814 in *Woodward v. Walton*[18] and *Ditchum v. Bond*[19] to the effect that for loss of servitium a master sued in trespass. In the judgment of Sir James Mansfield in the former case there is, perhaps, a hint of a change in practice and theory, for the learned judge is obviously puzzled as to why trespass should be brought inasmuch as there is no trespass to the master, the sole foundation of the action being the loss of service.[20] At length, in *Chamberlain v. Hazelwood*[21] in 1839 it was made clear that the servitium actions could be brought in case; true, *Chamberlain v. Hazelwood* was a seduction action but for reasons already explained the same principles apply to the general master and servant cases.

15 *Supra,* note 2.
16 (1930) 43 C.L.R. 493, at 515.
17 See *Robert Marys's Case,* cited in note 6, *supra.*
18 (1807) 2 B. & P. (N.R.) 476, 127 E.R. 715.
19 (1814) 2 M. & S. 436, 105 E.R. 443.
20 (1807) 2 B. & P. (N.R.) at 482, 127 E.R. at 717.
21 (1839) 5 M. & W. 515, 151 E.R. 218.

Following on *Martinez v. Gerber*[22] in which it was held that case *per quod servitium amisit* could be maintained by the master where the injury done to the servant was not direct but consequential, the action developed to the stage when it became plain that a suit would lie for both intentional and negligent interferences with the servitium, a position well exemplified by such modern cases as *Attorney-General v. Valle-Jones*[23] and *Mankin v. Scala Theodrome Co. Ltd.*[24] Moreover, as Winfield points out,[25] knowledge in the defendant of the existence of the relationship of master and servant is not essential to liability; indeed, in cases where the injury to the servant has been caused by negligence it is most unlikely that such knowledge could exist nor is there any trace in the reports that it is necessary. And the same remark applies to general consortium actions. Look at *Mallett v. Dunn*,[26] for example; there the plaintiff's wife was knocked down and injured by the defendant's car whilst she was walking along a lane. He obviously could not have had any idea as to whether she was married or not and yet the plaintiff succeeded in his action for loss of consortium.

But this would appear to apply only to general consortium actions, for it seems that in enticement actions it is necessary for the plaintiff to prove knowledge by the defendant of the existence of the marriage relationship. At least Croom-Johnson J. in *Best v. Samuel Fox & Co. Ltd.*[27] and McCardie J. in *Butterworth v. Butterworth and Englefield*[28] insist on this requirement. But it does seem inconsistent with the general principles of the consortium action and, if in fact *Winsmore v. Greenbank*[29] is in the line of the main cases as is here maintained and is not an action *sui generis*, knowledge of the marriage relationship should not be required. In fact in *Winsmore v. Greenbank* Willes C.J. specifically said that the injuria need not be wilful or malicious; though it be accidental, if it be tortious an action will lie.[30] Nor does the subsequent history of the action show anything to the contrary. Apart from the two cases of *Philp v. Squire*[31] and *Berthon v. Cartwright*[32] in which Lord Kenyon accepted

22 (1841) 3 Man. & G. 88, 133 E.R. 1069.
23 [1935] 2 K.B. 209.
24 [1947] K.B. 257.
25 *Textbook of the Law of Tort* (5th ed.), 601-2.
26 [1949] 1 All E.R. 973.
27 [1950] 2 All E.R. 798.
28 [1920] P. 126, 130.
29 *Supra*, note 14.
30 (1745) Willes 577, at 581, 125 E.R. at 1332.
31 (1791) Peake 114, 170 E.R. 99.
32 (1796) 2 Esp. 480, 170 E.R. 426.

the proposition that enticement does not lie where the defendant has received the wife on grounds of humanity, there seems[33] to be no further reported case until 1904 when *Smith v. Kaye*[34] came before Wright J., and neither that case nor such later decisions as *Place v. Searle*[35] are authority that knowledge is required. Indeed, the statement of principle by Scrutton L.J. in the latter case[36] would appear to support the opposite view. "At the present day," he said, "a husband has a right to the consortium of his wife and the wife to the consortium of her husband and each has a cause of action against a third party who, without justification, destroys that consortium." And the contention here put forward is borne out by statements in the earlier text books, such as Bigelow on Torts, that lack of knowledge of the existence of the marital relationship does not excuse the defendant.[37]

At this stage we have reached the following position:

1. The origin of both the action for loss of consortium and the action for loss of servitium depended upon the same basic conception: The proprietary or quasi-proprietary rights of the head of the household.
2. The two actions have had a similar history leading to many analogous developments. In particular, the actions, originally brought in trespass, were eventually founded in case, and negligent acts, as distinct from intentional infringements, were held to be sufficient to ground the suits.
3. The action for enticement is not a tort *sui generis* but comes under the general heading of actions for loss of consortium. Enticement is but one of many methods of unlawfully interfering with consortium.

Following on the change from trespass to case and the survival of the husband's action despite the disappearance of the idea of property as its basis the lower hierarchy of the English Courts has arrived at the logical and proper position that the action for enticement lies at the suit of either spouse. This was the opinion of Darling J. in *Gray v. Gee*[38] and of Swift J. in *Newton v. Hardy*,[39] although

33 See per McCardie J. in *Place v. Searle*, [1932] 2 K.B. 497, at 501.
34 (1904) 20 T.L.R. 261.
35 [1932] 2 K.B. 497. In the cases mentioned it was obvious that the defendant did know of the marriage and therefore it was unnecessary to consider the question.
36 At 512.
37 (2nd ed.) 130.
38 (1923) 39 T.L.R. 429.
39 (1933) 49 T.L.R. 522.

the House of Lords was divided on the question in *Lynch v. Knight*[40] and McCardie J. in *Butterworth v. Butterworth and Englefield*[41] doubted whether the wife had the action. However Scrutton L.J. in *Place v. Searle* was quite definite in an obiter dictum that the action was available to a wife[42] and there is an implied acceptance of that proposition by the same Lord Justice and by Maugham L.J. in *Elliott v. Albert*.[43] Furthermore, the existence of such an action in the wife has been inferentially recognised by the Law Reform (Miscellaneous Provisions) Act 1934 (24 & 25 Geo. V., c.41) in section 1 (1) which provides (inter alia) that a cause of action for inducing one spouse to leave or remain apart from the other shall not survive death.[43a]

In Australia the authority of the decision of the Full Court of the New South Wales Supreme Court in *Johnson v. The Commonwealth*,[44] which allowed an action by a wife for loss of consortium arising out of the wrongful imprisonment of her husband, was swept away by the pronouncement of the High Court in *Wright v. Cedzich*,[45] in which the female plaintiff's action for enticement was by the majority of the Court rejected, wrongly in the view of the present writer for reasons now to be canvassed.[46]

It has already been shown that the proprietary basis of the action for loss of consortium disappeared by the middle of the eighteenth century and that a similar development occurred with relation to the action for loss of servitium in the nineteenth century. Logically speaking, once the right to consortium or servitium was no longer regarded as a property right their basis had gone and the actions should have fallen into decay; it is for this reason, it is suggested, that Lord Sumner in *Admiralty Commissioners*

40 (1861) 9 H.L.C. 577, 11 E.R. 854.
41 [1920] P. 126, 130.
42 [1932] 2 K.B. 497, 512.
43 [1934] 1 K.B. 650, 662, 663.
43a See Salmond on the Law of Torts (10th ed.), 369, note (e).
44 (1927) 27 S.R. (N.S.W.) 133.
45 (1930) 43 C.L.R. 493; noted in 48 L.Q.R. 322.
46 Moreover it is possible that the decision may have been inferentially affected by the provisions in State Acts similar to section 1 of the Law Reform (Miscellaneous Provisions) Act 1934 (England) mentioned above. See sec. 27 of the Administration and Probate Act 1935-47 (Tasmania); sec. 2 of the Survival of Actions Act 1942 (Victoria); sec. 2 of the Law Reform (Miscellaneous Provisions) Act 1944 (N.S.W.); sec. 2 of the Common Law Practice Act Amendment Act 1940 (Queensland); sec. 4 of the Law Reform (Miscellaneous Provisions) Act 1941 (Western Australia). The inference, no doubt, is not as strong as in the English case in view of the difference in the state of the common law at the time the sections were passed.

v. S.S. Amerika speaks of the latter as being anomalous.[47] But the actions survived as actions on the case and their subsequent history has on the one hand given to a husband a right of action for the deprivation of his wife's consortium whether by intentional acts, such as enticement or assault, or by negligent injury as in a running down case such as *Mallett v. Dunn*,[48] and on the other given to a master a right of action for loss of servitium caused either by wilful intent or by negligence. This being so, on what grounds is the right denied to the wife to sue for loss of consortium where her husband has been injured by the negligence of a third person as, indeed, it was denied by Croom-Johnson J. in *Best v. Samuel Fox & Co. Ltd.*[49] or where her husband has been wilfully enticed away by another woman as in *Wright v. Cedzich*?[50] Since from what has appeared above it is clear that enticement should be regarded as only an instance of the general action for loss of consortium and is not a tort *sui generis*[51] what is now to be stated will in most respects apply equally to both.

In the first place it is said that there is an absence of precedents for a loss of consortium action by a wife.[52] To this argument it is replied that the lack was due to the procedural difficulties of the common law in the way of the wife under which she was incapable of suing except by joining her husband. This she could not do in enticement actions because as the proceeds of any suit brought by the wife belonged to the husband and he was in such a case a wrongdoer along with the defendant, he could not be allowed to profit by his own wrongdoing.[53] In other cases such as assault and false imprisonment and the like the husband would of course have his own action and he alone could sue because the injury to his wife was regarded as a matter of aggravation and, further, it was simpler to award to the husband in one action all the damages rather than have two separate actions the proceeds of both of which would in any case go to the husband.[54]

But, it is said by those denying the wife's cause of action, this is not the explanation for the dearth of cases; it was really due to

47 [1917] A. C. 38, at 60.
48 [1949] 1 All E.R. 973.
49 [1950] 2 All E.R. 798.
50 (1930) 43 C.L.R. 493.
51 See per Rich J. in *Wright v. Cedzich*, (1930) 43 C.L.R. at 522.
52 See *Wright v. Cedzich*, (1930) 43 C.L.R. at 499, 522, and per Lord Wensleydale in *Lynch v. Knight*, (1861) 9 H.L.C. at 597-8, 11 E.R. at 862-3.
53 Per Isaacs J. in *Wright v. Cedzich*, (1930) 43 C.L.R. at 515-516; and see Holbrook, 22 Mich. L.R. 1, 3.
54 *Ibid.*

the fact that she had no right because she became a legal nonentity on marriage. "The wife," said Blackstone, "cannot recover damages for beating her husband for she hath no separate interest in any thing during her coverture."[55] Against this view are the opinions of Isaacs J. in *Wright v. Cedzich*[56] and Darling J. in *Gray v Gee*,[57] and if it ever was correct it is submitted that after the Married Women's Property Acts it no longer had any validity.[58]

Secondly, the argument is advanced that the husband's action arose out of his status as head of the household and his dominion over his wife and that the wife never had any such dominion over the husband.[59] But it has already been made clear that although this was the original basis of the action, the proprietary concept had disappeared even long before the Married Women's Property Acts.

It is contended, thirdly, that the injuries to the wife are too remote. But the American courts which uphold this contention when the wife's action is based on an injury to her husband caused by negligence allow her an action where the injury to the husband is wilful.[60] English courts it is clear pay no heed to this argument for otherwise how could a husband succeed in such cases as *Mallett v. Dunn*[61] and *Brockbank v. The Whitehaven Junction Railway Co.*?[62]

A further reason that has been put forward for refusing the wife's action is that to grant it to her would have the effect of a double recovery because "our modes of trial are such and our mode of assessment of damages by the verdict of a jury is necessarily so crude that if husband and wife were each allowed to sue, instead of each recovering an exact reparation, each would be pretty sure to recover what would repair the injury to both."[63] To deny the existence of a right on such a ground seems well nigh unbelievable coming from such a source for although in some cases the result may well be what is here predicated, yet in others, as, for instance, in *Best v. Samuel Fox & Co. Ltd.*,[64] where clearly the wife had suffered severe mental and physical stress and sickness as a consequence of her husband's injury, it will inflict great injustice. The fact is that

55 3 Comm. 143.
56 (1930) 43 C.L.R. at 516.
57 (1923) 39 T.L.R. 429, 431.
58 See (1930) 43 C.L.R. at 502.
59 Knox C.J. and Gavan Duffy J. in *Wright v. Cedzich*, (1930) 43 C.L.R. at 500.
60 See J. M. Kinnaird in (1947) 35 Kentucky L.J. 220, 222.
61 [1949] 1 All E.R. 973.
62 (1862) 7 H. & N. 834, 158 E.R. 706.
63 Pound, 14 Mich. L.R. 177, 194.
64 [1950] 2 All E.R. 798.

there are two distinct and separate wrongs to two different persons,[65] the physical injury to the husband and the loss of consortium by the wife with its well nigh disastrous results in cases like *Best v. Samuel Fox & Co. Ltd.* for which the husband would have no cause of action.[66] And obviously the argument against double recovery can have no possible application to an enticement action by a wife, the husband being *particeps criminis.*

A fifth argument for restricting the consortium action to the husband is based upon a narrow view of the definition of the action. It is said that the gist of the husband's action is the loss of services used in the same sense as in the servitium actions and that as the wife had no right to the services of her husband (except that he is bound to support her) she had no analogous remedy.

But such a view of consortium runs counter to the cases from the very earliest times. In *Hyde v. Scyssor*[67] in 1619 it was stated that the action was brought for "the loss and damage of the husband, for want of her company and aid", and Isaacs J. in *Wright v. Cedzich* showed that in consortium actions the gist was never servitium and that when the word services was used it had no relation to servitium.[68] From what appears above it is clear, it is submitted, that whilst the consortium and servitium actions had their origin in the common conception of the baron as the head of the household entitled to proprietary or quasi-proprietary rights over his feme and servants and whilst they had an analogous history and development, the servitium action cannot be regarded as the parent of the consortium action so as to confine the latter to loss of services in the same sense as in the former.[69] Consortium, it is submitted, includes services in that sense but also a right to the other spouse's comfort, society, affection and companionship, so that the view put forward by Dean Roscoe Pound[70] that the action for loss of consortium can lie without any loss of service would certainly seem to be correct. Accordingly, this argument, based on a restricted meaning of the husband's right, falls to the ground.

Sixthly, against the wife it is claimed that whilst the right of the husband is of material value and capable of being estimated in

65 *Hyde v. Scyssor,* (1619) Cro. Jac. 538, 79 E.R. 462.
66 See on this point (1951) 67 L.Q.R. 37, 40-1.
67 (1619) Cro. Jac. 538, 79 E.R. 462.
68 (1930) 43 C.L.R. at 514. And see *Baker v. Bolton,* (1808) 1 Camp. 493, 170 E.R. 1033; *Norris v. Seed,* (1849) 3 Ex. 782, 791, 154 E.R. 1061, 1065.
69 [redacted] a contrary view that the master's action is the genus of which the claim by a husband is a species, see (1949) 27 Can. Bar Rev. 710.
70 14 Mich. L.R. at 188. See also per Isaacs J. in *Wright v. Cedzich,* (1930) 43 C.L.R. 510-511, and authorities there considered.

money because "the assistance of the wife in the conduct of the household of the husband, and in the education of his children, resembles the service of a hired domestic, tutor or governess,"[71] the right of the wife is no more than the right to the comfort of the husband's society and attention which the law cannot estimate. This argument runs parallel with that mentioned in the previous paragraph and depends entirely upon the legal meaning given to consortium. But it has been shown that the husband's right to the action has long ceased to depend upon the basis contended for in the words quoted and it is submitted that nowadays the rights of husband and wife are mutual and equal and arise from the status of marriage, in which the wife is a *partner* in the common undertaking.[72] If there is no difficulty at the present time in measuring or estimating the damage to a husband arising from the loss of his wife's consortium, and *Mallett v. Dunn*[73] shows that there is not, then there should be none in the case of the wife, particularly in such clear instances of real injury as in *Best v. Samuel Fox & Co. Ltd.*[74]

These are the reasons that have been given from time to time by courts throughout the Anglo-American jurisdiction for denying the wife's action for loss of consortium. In considering these, the grounds for resisting such a denial have been to some extent covered and now it remains to consider the rest of her case.

From the point of view of general principle there is at the present day no possible justification for not placing a wife on a footing of equality with her husband. We have already seen that the husband's action, originally brought in trespass and based on a proprietary concept, eventually lay in case bringing within its ambit both intentional and negligent acts of interference with his right to his wife's consortium, the historical basis of the action being ignored. When it was no longer based on a property right, it became impossible to say that the husband could bring the action because the wife was his property and that she could not because her husband was not her property. This change in basis took place even before the Married Women's Property Acts made it perfectly clear firstly, that a wife could no longer be regarded as the chattel of her husband, and secondly, that henceforth she was to be looked upon by the law as a distinct and independent person with the right to own her own property, bring

71 Per Lord Wensleydale in *Lynch v. Knight*, (1861) 9 H.L.C. at 598, 11 E.R. at 863. See, too, per Knox C.J. and Gavan Duffy J. in *Wright v. Cedzich*, (1930) 43 C.L.R. at 500.

72 Per Isaacs J. in *Wright v. Cedzich*, 43 C.L.R. at 510. Italics are his.

73 [1949] 1 All E.R. 973.

74 [1950] 2 All E.R. 798.

actions in her own name and keep their proceeds. No longer was she a woman whose property became her husband's on marriage, whose body the law deemed to belong to him, whose liberty he could restrain, and to whom he could administer physical punishment. The general effect, and it is contended the policy, of the Married Women's Property Acts was to recognise the married woman's right to equality in the marriage relationship and in general to place her in that position of equality. Accordingly, when the law recognises in a husband a right to consortium, no longer based on a property conception, it should and must treat the wife in a reciprocal fashion with co-extensive rights. Both *Wright v. Cedzich*[75] and *Best v. Samuel Fox & Co. Ltd.*[76] must be regarded as wrongly decided, if the married woman is to be deemed to have been emancipated by the Married Women's Property Acts.

A contrast of the case law in England, Australia, Canada and America shows the extent to which this principle of equality has not been met. First of all, the English position. So far as the action for enticement is concerned, although there is no decision of a higher court on the point,[77] it would appear that the wife has been placed on the same footing as the husband. However, this sign of her emancipation is offset by the decision of Croom-Johnson J. in *Best v. Samuel Fox & Co. Ltd.*,[78] which denied her an action for loss of consortium due to a negligent injury to her husband. The wife's position in Australia is worse still unless the effect of *Wright v. Cedzich*,[79] which denied even the action of enticement to a wife, has been inferentially affected in the States whose legislatures have passed statutes in identical terms with section 1 of the English Law Reform (Miscellaneous Provisions) Act 1934. In Canada, Ontario seems to have been the only province that has had cause to consider the wife's right of action and there it has had a topsy-turvy history: It was first of all decided in 1893 that she had an action for enticement and then in a series of cases extending from 1897 that she had not.[80] However, in *Applebaum v. Gilchrist*[81] in 1946 a majority of the Ontario Court of Appeal returned to the viewpoint of the 1893 decision, the Court preferring the dissenting judgment of Isaacs J. in

75 (1930) 43 C.L.R. 493.
76 [1950] 2 All E.R. 798.
77 The authorities are set forth *supra*. The inference from section 1 (1) of the Law Reform (Miscellaneous Provisions) Act 1934 is also noted there.
78 *Supra*, note 76.
79 (1930) 43 C.L.R. 493.
80 See (1936) 1 Alberta L.Q. 275, 277.
81 [1946] 4 D.L.R. 383; noted in 20 Aust. L.J. 387.

Wright v. Cedzich to that of the majority and accepting the emancipation of married women brought about by the legislature and changed social and economic conditions.

In America a very interesting position has been reached. The rights of the husband seem to be fairly well established. Besides his action for alienation of affections the great majority of American tribunals allow him an action for loss of consortium caused either by intentional or negligent injuries to his wife. The Connecticut case of *Marri v. Stamford Street R.R.*,[82] for example, was a successful action by a husband for loss of consortium due to negligent injuries to his wife. But there have been some State decisions which have denied a husband an action in such circumstances. Of these the better known ones are *Hinnant v. Tidewater Power Co.*[83] and *Helmstetler v. Duke Power Co.*[84] of the Supreme Court of North Carolina, *Blair v. Seitner Dry Goods Co.*[85] of the Supreme Court of Michigan, and *Bolger v. Boston Elevated Railway*[86] of the Supreme Court of Massachusetts. Despite these, however, the great weight of authority in America is to the contrary and this is borne out by paragraph 693 of Volume 3 of the *Restatement of the Law of Torts* which reads as follows: "One who by reason of his tortious conduct is liable to a married woman . . . is subject to liability to her husband for the resulting loss of her services and society, including any impairment of her capacity for sexual intercourse . . . . . ."

But what of the wife? With respect to actions for the alienation of the affections of her husband the American courts are now almost unanimously in her favour.[87] Here there cannot be said to be any inequality as between the spouses. Furthermore, the wife's position seems to be equally good in relation to her action for loss of consortium due to other intentional acts. For example, in the Ohio case of *Flandermeyer v. Cooper*[88] a wife recovered for loss of consortium due to the defendant's deliberately selling the habit-forming drug morphine to her husband despite her repeated protests. A similar but more recent case is *Pratt v. Daly*[89] in which a wife recovered in like circumstances except that it was intoxicating liquor and not morphine which the defendant was supplying to her husband

82 (1911) 84 Conn. 9; cited in 14 St. John's L.R. at 347.
83 (1925) 126 S.E. 307; noted 12 Notre Dame Lawyer at 333.
84 (1945) 244 N.C. 821; 32 S.E. (2d) 611; cited (1950) 1 Mercer L.R. 316.
85 (1915) 184 Mich. 304; noted 14 St. John's L.R. at 351, note 39.
86 (1910) 205 Mass. 420; noted 1 Mercer L.R. 316.
87 Paragraph 690 of Vol. 3 of the *Restatement of the Law of Torts* provides for such an action under the same conditions as a husband's.
88 (1912) 98 N.E. 102; noted 12 Notre Dame Lawyer at 331, note 14.
89 (1940) 55 Ariz. 535; noted 1 Mercer L.R. 316.

It is when a wife's loss of consortium is due to injuries inflicted on her husband by the negligence of a third person that it becomes necessary to question once more her emancipation. The only case until very recently in which the wife was successful under these conditions was *Hipp v. Dupont de Nemours & Co.*,[90] the whole effect of which was undermined by the later decisions of the same court of North Carolina in *Hinnant v. Tidewater Power Co.*,[91] and *Helmstetler v. Duke Power Co.*[92] Also, other States have given decisions along the same lines as this later view of the Court of North Carolina, Massachusetts in *Bolger v. Boston Elevated Railway*,[93] Michigan in *Blair v. Seitner Dry Goods Co.*[94] and New York in *Landwehr v. Barbas.*[95] The latter was a case very similar to *Best v. Samuel Fox & Co. Ltd.*, the New York Court refusing a wife's action for loss of consortium where her husband had been emasculated owing to the negligence of the defendant. At this stage American law appears fairly well settled against the wife,[96] but some indication of a possible change of heart was shown in 1949 by an equal division of opinion in the Supreme Court of Georgia in *McDade v. West*,[97] and support is given to this possibility by the very recent decision in *Hitaffer v. Argonne Co.*[98] in which it was held that a wife's suit for loss of her husband's "aid, assistance, and enjoyment, specifically sexual intercourse," resulting from injuries caused by the defendant's negligence, stated a good cause of action. Reference to the very similar facts in *Best v. Samuel Fox & Co. Ltd.*, in which an identical claim was made, discloses the gulf between these two contemporary decisions of an American court on the one hand and an English tribunal on the other.

As we have seen, the denial of the claims of the married woman to the right of non-interference with marital consortium has been supported on many grounds, the validity of all or most of which is subject to great doubt, but there can be no doubt as to the injustice of the result and its injurious social effect. When there is a disturbance of her consortium, whether intentional or negligent, the married

90 108 S.E. 318 (N.C. 1921); discussed in 12 Notre Dame Lawyer at 332-3, and 14 St. John's L.R. at 352.
91 *Supra*, note 83.
92 *Supra*, note 84.
93 *Supra*, note 86.
94 *Supra*, note 85.
95 (1934) 270 N.Y.S. 534; noted in 12 Notre Dame Lawyer, 334.
96 Further evidenced by the rejection of such actions by her in paragraph 695 of Vol. 3 of the *Restatement of the Law of Torts.*
97 56 S.E. (2d) 299; discussed in 1 Mercer L.R. 316.
98 (1950) 183 F. (2d) 811; noted in (1951) 64 Harv. L.R. 672.

woman suffers a loss which is just as important to her and to the marriage as is the husband's when it is he who is suing. In *Best v. Samuel Fox & Co. Ltd.* the effect of the husband's injuries was not only to undermine the plaintiff's health but because of his impotency and sterility to shake the marriage to its foundations. Some compensation and consolation to her, some buttressing of the marriage, would have eventuated had the law been able to recognise that a married woman's status is one of mutuality and equality with her husband and that her emancipation from a position of inferiority and dependence is now complete.[99]

R. W. BAKER.*

[99] Since this was written the judgment of Croom-Johnson J. in *Best v. Samuel Fox & Co. Ltd.* has been affirmed by the Court of Appeal ([1951] 2 All E.R. 116). In many respects the main judgment of Birkett L.J. upholds what has here been contended for though the decision itself is adverse.

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