An Expanded Cause of Action in Texas - Whittlesey v. Miller: Either Spouse May Recover for the Negligent Impairment of Consortium

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dren. No excuse remains to perpetuate the ancient double standard by force of law."[96]

III. CONCLUSION

In its application of the equal protection clause to a state statute providing for inheritance by illegitimate children from intestate fathers, a plurality of the Supreme Court upheld the statute's requirement of a judicial order determining paternity before permitting inheritance by the child. Using a substantial relationship test, intermediate between minimal and strict scrutiny, the plurality found a substantial relationship between the statute's requirement and the state's interest in the orderly settlement of estates. With its marked deference to the New York Legislature, the plurality echoed the *Labine* logic supporting noninterference. Although ostensibly applying rigorous equal protection analysis, the plurality, by allowing New York to impose the strict requirement of a judicial decree declaring paternity before illegitimates can inherit from intestate fathers, upheld a statute that severely limits the rights of acknowledged illegitimate children by excluding forms of proof that do not compromise the state's interests. Compared to the decision in *Trimble*, the Court's action is a step backward in a movement toward granting equal protection to the illegitimate child.

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An Expanded Cause of Action in Texas—Whittlesey v. Miller: Either Spouse May Recover for the Negligent Impairment of Consortium

In 1974 Stewart Miller was injured when the vehicle he was driving was involved in a collision with a vehicle driven by David Whittlesey. In March 1976 Miller accepted a settlement offer from Whittlesey, thereby releasing Whittlesey from all liability in connection with the accident. Three months later, Miller's wife brought suit against Whittlesey, alleging that she had been deprived of her husband's consortium as the result of Whittlesey's negligence. The trial court granted Whittlesey's motion for summary judgment, declaring that a wife cannot recover for loss of consortium resulting from a negligent injury to her husband. The Tyler court of civil appeals reversed and remanded[1] on the ground that the Texas Equal Rights Amendment,[2] enacted in 1972, modified the common law to the

96. H. KRAUSE, *supra* note 7, at 151.

1. Miller v. Whittlesey, 562 S.W.2d 904 (Tex. Civ. App.—Tyler 1978).
2. TEX. CONST. art. I, § 3a.

extent that it is now improper to deny a cause of action on the basis of the sex of the party bringing the suit. Whittlesey appealed to the Texas Supreme Court. *Held, affirmed*: Either spouse has a cause of action for loss of consortium that might arise as a result of an injury caused to the other spouse by a third-party tortfeasor's negligence.[3] *Whittlesey v. Miller*, 572 S.W.2d 665 (Tex. 1978).

I. Loss of Consortium and Development of the Wife's Cause of Action

The action for loss of consortium[4] is the legal remedy provided for an impairment of the marital relationship, the primary familial interest recognized by the courts.[5] Although a wide range of definitions has been advanced by the courts, the concept of consortium may be described as including "the mutual right of the husband and wife to that affection, solace, comfort, companionship, society, assistance, and sexual relations necessary to a successful marriage."[6] Some jurisdictions recognize the right of the husband to the wife's services as an element of consortium;[7] Texas does not.[8] Regardless of which definition a jurisdiction adopts, the emo-

3. In the interest of fairness and sound administration, the court limited the applicability of this holding to the present case and those actions arising after Oct. 11, 1978, the effective date of the decision. It is not clear whether the court intended to limit the applicability of the holding to actions arising out of injuries suffered after the date of the decision, or to actions filed after that date. The former interpretation would seem to be the more equitable approach, since the latter interpretation would allow all actions not barred by the statute of limitations to be brought, including those already settled or litigated by the physically injured spouse.

4. "Loss of consortium" is more properly classified as an element of damages rather than a cause of action. Nevertheless, the term has been used so frequently to refer to actions in which the major element of damages is the impairment of consortium that loss of consortium has come to be known as a cause of action. Note, *Judicial Treatment of Negligent Invasion of Consortium*, 61 COLUM. L. REV. 1341, 1341 n.1 (1961).

5. Dini v. Naiditch, 20 Ill. 2d 406, 170 N.E.2d 881 (1960); Note, *supra* note 4, at 1341.

6. Whittlesey v. Miller, 572 S.W.2d 665, 666 (Tex. 1978). Other definitions include: "[A]ll of the elements of the conjugal unity deriving from the status of husband and wife bound in the closest entity recognized by society," Albert v. McGrath, 278 F.2d 16, 18 (D.C. Cir. 1960); "Conjugal fellowship of husband and wife, and the right of each to the company, co-operation, and aid of the other in every conjugal relation," McMillan v. Smith, 171 S.E. 169, 170 (Ga. 1933).

7. *See, e.g.*, Miami Transit Co. v. Scott, 58 So. 2d 542 (Fla. 1952); Hrvatin v. Cleveland Ry., 69 Ohio App. 499, 44 N.E.2d 283 (1942).

8. The community property system in Texas operates to preclude the husband's recovery for loss of services in an action for loss of consortium. The community property system is based upon the concept of marital equality. 1 E. OAKES, SPEER'S MARITAL RIGHTS IN TEXAS § 92, at 120-21 (4th ed. 1961). *See also* Leake v. Saunders, 126 Tex. 69, 72-73, 84 S.W.2d 993, 994 (1935). The wife is not obliged to serve the husband; rather, each spouse has an equal duty to support the community, whether by earning a wage or by managing the domestic affairs. Gainsville, H. & W. Ry. v. Lacy, 86 Tex. 244, 24 S.W. 269 (1893). It is therefore the community, not the husband, that suffers when the wife's ability to perform services is impaired. The husband's loss of comfort and society, however, is a personal injury. Recovery for personal injury is treated as separate property, and therefore a husband may sue for loss of comfort and society in a separate action for loss of consortium. TEX. FAM. CODE ANN. § 5.21 (Vernon 1975); *see* McKnight, *Matrimonial Property, Annual Survey of Texas Law*, 26 SW. L.J. 31, 49 n.149 (1972); Comment, *The Negligent Impairment of Con-*

tional,[9] adjuvant,[10] and sexual[11] aspects of the marital relationship are properly treated as a "conceptualistic unity,"[12] the impairment of which affords a basis for recovery.[13]

Courts and commentators have traditionally distinguished between intentional and negligent impairment of consortium.[14] Intentional impairment of consortium is not synonymous with a loss of consortium caused by an intentional tort, but is characterized by the fact that the injurious conduct is directed against the marital relationship itself, rather than against one of the spouses.[15] Examples of intentional impairment of consortium are the common law torts of criminal conversation[16] and alienation of affections.[17] While Texas courts have recognized both of these torts,[18] the

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sortium—A Time for Recognition as a Cause of Action in Texas, 7 ST. MARY'S L.J. 864, 869-71 (1976).

9. The impairment of conjugal society and companionship plays a major role in the modern action for loss of consortium. These multifaceted marital interests may be impaired in a variety of ways. *Compare* Dehetre v. United States, 128 F. Supp. 161 (D. Me. 1955) (wife's injury made her nervous and difficult to live with), *with* Rodriguez v. Bethlehem Steel Corp., 12 Cal. 3d 390, 525 P.2d 669, 115 Cal. Rptr. 765 (1974) (husband totally paralyzed below the midpoint of chest).

10. The loss of services is one element of consortium for which an accurate calculation of damages may be available. *See* Miami Transit Co. v. Scott, 58 So. 2d 542 (Fla. 1952); J. STEIN, DAMAGES AND RECOVERY, PERSONAL INJURIES AND DEATH ACTIONS § 205, at 422 (1972). Although Texas does not recognize services as an element of consortium (*see* note 8 *supra*), the mutual assistance that accompanies the marital relationship is included within the Texas definition of consortium. Whitley v. Whitley, 432 S.W.2d 607, 609 (Tex. 1968).

11. While the sexual relationship is one element of consortium, consortium is by no means a euphemism for sexual relations, nor is evidence of a diminution of sexual activity required in order to establish loss of consortium. *See, e.g.*, Albert v. McGrath, 278 F.2d 16 (D.C. Cir. 1960); Samuel v. Sanner, 198 F. Supp. 609 (W.D. Pa. 1961); Deems v. Western Md. Ry., 247 Md. 95, 231 A.2d 514 (1967); J. STEIN, *supra* note 10, § 206, at 423-24; Comment, *supra* note 8, at 865.

12. Hitaffer v. Argonne Co., 183 F.2d 811, 814 (D.C. Cir.), *cert. denied*, 340 U.S. 852 (1950).

13. *Id.*

14. Comment, *supra* note 8, at 865.

15. Generally, actions for loss of consortium arising out of an intentional tort such as assault have been treated as actions for the negligent impairment of consortium. J. STEIN, *supra* note 10, § 211, at 438-40. Whether intentional, wanton, or negligent, only those torts that appear to be aimed at the marital relationship itself will give rise to an action for the intentional impairment of consortium. Comment, *The Development of the Wife's Cause of Action for Loss of Consortium*, 14 CATH. LAW. 246, 251 (1968).

16. Criminal conversation is the civil action for adultery. "The essential injury to the husband consists in the defilement of the marriage-bed,—in the invasion of his exclusive right to marital intercourse with his wife, and to beget his own children." Bigaouette v. Paulet, 134 Mass. 123, 125 (1883). *See also* Stark v. Johnson, 43 Colo. 243, 95 P. 930 (1908); Johnston v. Disbrow, 47 Mich. 59, 10 N.W. 79 (1881). For a history of this action, see Lippman, *The Breakdown of Consortium*, 30 COLUM. L. REV. 651, 654-60 (1930). *See generally* W. PROSSER, LAW OF TORTS § 124, at 875-76 (4th ed. 1971); Comment, *Piracy on the Matrimonial Seas—The Law and the Marital Interloper*, 25 SW. L.J. 594 (1971).

17. When a third party entices one spouse away from the marriage relationship, the remaining spouse has an action for alienation of affections. Unlike criminal conversation, alienation of affections does not require adulterous conduct. *See* Rheudasil v. Clower, 197 Tenn. 38, 270 S.W.2d 345, 346 (1954). *See generally* Sullivan v. Valiquette, 66 Colo. 170, 180 P. 91 (1919); Grobart v. Grobart, 5 N.J. 161, 74 A.2d 294 (1950); W. PROSSER, *supra* note 16, § 124, at 876; Lippman, *supra* note 16, at 654-60. Courts have also recognized an action for intentional impairment of consortium when the defendant supplies a spouse with addictive drugs. *See* Flandermeyer v. Cooper, 85 Ohio St. 327, 98 N.E. 102 (1912) (morphine);

Texas Legislature abolished the action for criminal conversation in 1975 with the adoption of a so-called "anti-heart balm" statute.[19]

Negligent impairment of consortium results from a physical injury to one spouse caused by the tortious conduct of a third party. The direct victim, or "impaired spouse,"[20] may recover for damages normally associated with physical injury, such as pain and suffering, medical expenses, and loss of earnings.[21] The "deprived spouse," or husband or wife of the impaired spouse, may bring a separate action for loss of consortium against the third-party tortfeasor. This action does not compensate the deprived spouse for the physical injury suffered by the impaired spouse, but rather permits recovery for any impairment of the marital relationship that directly results from that injury.[22] As each spouse suffers a distinct loss, their respective causes of action are viewed as independent.[23] At the same time, the action for loss of consortium is considered derivative of the impaired spouse's action,[24] inasmuch as the establishment of the third-party's liability for the injury to the impaired spouse is a prerequisite to the deprived spouse's recovery.[25]

While the common law recognized both intentional and negligent im-

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Moberg v. Scott, 38 S.D. 422, 161 N.W. 998 (1917) (opium). *See also* Swanson v. Ball, 67 S.D. 161, 290 N.W. 482 (1940) (liquor supplied to known drunkard).

18. Felsenthal v. McMillan, 493 S.W.2d 729 (Tex. 1973) (criminal conversation); Kelsey-Seybold Clinic v. Maclay, 446 S.W.2d 716 (Tex. 1971) (alienation of affections).

19. TEX. FAM. CODE ANN. § 4.05 (Vernon Supp. 1978-1979) reads in full:

> Action of Alienation of Affection and Criminal Conversation not Authorized.
>
> A right of action by one spouse against a third party for criminal conversation is not authorized in this state.

Since TEX. REV. CIV. STAT. ANN. art. 5429b—2, § 3.04 (Vernon Supp. 1978-1979) provides that "section captions do not limit or expand the meaning of any statute," this curiously drafted statute abolishes only the action for criminal conversation and not the action for alienation of affections. *See* McKnight, *Husband and Wife, Texas Family Code Symposium Supplement*, 8 TEX. TECH L. REV. 16 (1976).

A number of states have statutorily abolished the actions of criminal conversation and alienation of affections. *See, e.g.*, N.J. REV. STAT. § 2A:23-1 (1951); N.Y. CIV. RIGHTS LAW § 80a (McKinney 1976); PA. STAT. ANN. tit. 48, § 170 (Purdon 1965). These acts have been commonly termed "anti-heart balm" or "heart balm" statutes, based on the incorrect premise that they were enacted to eliminate the jury's highly speculative task of assessing damages for hurt feelings. Actually, the actions were abolished because of the high potential for blackmail and malicious prosecution that accompanied them. *See* Comment, *supra* note 8, at 882; Note, *supra* note 4, at 1345.

20. RESTATEMENT (SECOND) OF TORTS § 693, Comment a (1969) uses the term "impaired spouse" to identify the spouse who suffered the bodily harm as a result of the negligent act. "Deprived spouse" refers to the spouse who brings the action for loss of consortium.

21. *See* J. STEIN, *supra* note 10, §§ 8-29, at 11-45, §§ 58-97, at 93-161.

22. Hitaffer v. Argonne Co., 183 F.2d 811, 815 (D.C. Cir.), *cert. denied*, 340 U.S. 852 (1950).

23. *See* Schwartz v. City of Milwaukee, 54 Wis. 2d 286, 195 N.W.2d 480 (1972); J. STEIN, *supra* note 10, § 215, at 446.

24. *See* Gates v. Foley, 247 So. 2d 40, 45 (Fla. 1971); Thill v. Modern Erecting Co., 284 Minn. 508, 170 N.W.2d 865 (1969); Comment, *supra* note 8, at 880.

25. *See* Swartz v. United States Steel Corp., 293 Ala. 429, 304 So. 2d 881 (1974); Milington v. Southeastern Elevator Co., 22 N.Y.2d 498, 239 N.E.2d 897, 293 N.Y.S.2d 305 (1968).

pairments of consortium,[26] the cause of action was reserved solely for the husband.[27] Two factors contributed to the wife's inability to recover for an impairment of consortium. First, the wife was essentially a nonentity in the eyes of the common law.[28] When a woman married, her legal rights merged with those of her husband.[29] She could no longer own property, enter into contracts, or sue without the joinder of her husband.[30] It is frequently remarked that under the common law man and wife were one, and "he was that one."[31] Secondly, the historical development of the concept of consortium created additional obstacles to the wife's recovery. While the husband's right to recover was originally based on the loss of the wife's society, comfort, and affection,[32] courts also allowed the husband to recover for the loss of the wife's services, drawing an analogy to the action allowed a master when his servant was injured.[33] The impairment of the husband's interest in the wife's services eventually became the principal and essential element of the action,[34] primarily because damages for loss of services could easily be calculated.[35] The establishment of loss of services as an essential element of an action for loss of consortium operated to deny the wife's action under the master-servant analogy, since a servant could not sue for the loss of his master's services.[36]

The wife's legal status was altered dramatically in the mid-nineteenth century when many states enacted legislation designed to secure a separate legal identity for the married woman.[37] These Married Woman's Acts[38] evinced a changing view of the marital relationship, which was reflected in the judicial treatment of the cause of action for loss of consortium.[39] Reasoning that the wife's new legal status undermined the rationale behind the

26. *See, e.g.*, Fuller v. Naugatuck Ry., 21 Conn. 557 (1852); Blair v. Chicago & A. Ry., 89 Mo. 334, 1 S.W. 367 (1886); Sherman v. James, 32 How. Pr. 142 (N.Y. 1866). *See generally* STEIN, *supra* note 10, § 208, at 427-28; Note, *supra* note 4, at 1341.

27. *See generally* J. STEIN, *supra* note 10, § 208, at 427-28; Lippman, *supra* note 16, at 656; Comment, *supra* note 15, at 247; Comment, *supra* note 8, at 865-68; Note, *supra* note 4, at 1343-44.

28. 1 W. BLACKSTONE, COMMENTARIES *442.

29. W. PROSSER, *supra* note 16, § 122, at 859.

30. *Id.*

31. Acuff v. Schmit, 248 Iowa 272, 278, 78 N.W.2d 480, 484 (1956); W. PROSSER, *supra* note 16, § 122, at 859.

32. Hyde v. Scyssor, 79 Eng. Rep. 462 (K.B. 1619); Guy v. Livesey, 81 Eng. Rep. 653 (K.B. 1618); *see* Note, *supra* note 4, at 1343. *Contra*, Lippman, *supra* note 16, at 653 (consortium originally based on loss of services alone).

33. *See, e.g.*, Hyde v. Scyssor, 79 Eng. Rep. 462 (K.B. 1619). *See generally* Comment, *supra* note 8, at 866-67; Note, *supra* note 4, at 1343.

34. *See, e.g.*, People's Home Tel. Co. v. Cockrum, 182 Ala. 547, 62 So. 86 (1913); Mead v. Baum, 76 N.J.L. 337, 69 A. 962 (1908). *See generally*, Note, *supra* note 4, at 1343. Texas, however, has never recognized loss of services as an element of consortium. *See* note 8 *supra*.

35. *See* note 10 *supra*.

36. 3 W. BLACKSTONE, COMMENTARIES *142-43.

37. W. PROSSER, *supra* note 16, § 122, at 861.

38. These acts generally provide that a wife has the right to contract, to own property, and to sue and be sued without the joinder of her husband. *See, e.g.*, ALA. CODE § 30-4-1 to -11 (1977); ARK. STAT. ANN. § 55-401 (1971); TEX. FAM. CODE ANN. § 4.03-.04 (Vernon 1975).

39. Note, *supra* note 4, at 1345.

husband's cause of action for loss of consortium, a few jurisdictions abolished the action altogether.[40] The majority of jurisdictions, however, reacted to the Married Woman's Acts by recognizing the wife's cause of action for intentional impairment of consortium.[41] Yet even in these jurisdictions, wives retained their common law status to the extent that they still were denied the action for negligent impairment of consortium available to husbands.[42]

In justification for the denial of the wife's action for negligent impairment of consortium, courts expressed a variety of rationales. A number of courts feared that recognition of the wife's action would result in double recovery insofar as the wife's recovery would include the husband's loss of earning capacity, an element of damages that the husband could recover on his own behalf.[43] Many courts found the wife's loss too remote and indirect to support an action in negligence.[44] Others were reluctant to extend recovery beyond the physically injured party, fearing that each close relative would seek compensation, resulting in a multiplicity of suits arising from a single negligent act.[45] Frequently, denial of the wife's recovery was accompanied by the assertion that any change must come from the legislature, not the courts.[46]

With the exception of one short-lived ruling,[47] this unanimity continued until 1950, when the District of Columbia Court of Appeals decided the case of *Hitaffer v. Argonne Co.*[48] Judge Clark, writing for the *Hitaffer*

40. At least one court reasoned that the wife's ability to sue on her own behalf removed the rationale behind the husband's common law action for loss of consortium, which was seen merely as a device to secure recovery for the legally powerless wife. *See* Marri v. Stamford St. Ry., 84 Conn. 9, 78 A. 582 (1911). Other jurisdictions abolished the action for loss of consortium on the basis that the legal equality of the husband and wife invalidated the services concept. *See, e.g.*, West v. City of San Diego, 54 Cal. 2d 469, 353 P.2d 929, 6 Cal. Rptr. 289 (1960); Helmstetler v. Duke Power Co., 224 N.C. 821, 32 S.E.2d 611 (1945); Comment, *supra* note 8, at 868 n.37.

41. *See* Note, *supra* note 4, at 1345.

42. Comment, *supra* note 8, at 871.

43. *See, e.g.*, Giggey v. Gallagher Transp. Co., 101 Colo. 258, 72 P.2d 1100 (1937); Eschenbach v. Benjamin, 195 Minn. 378, 263 N.W. 154 (1935); Bernhardt v. Perry, 276 Mo. 612, 208 S.W. 462 (1919).

44. *See, e.g.*, Gambino v. Manufacturers' Coal & Coke Co., 175 Mo. App. 653, 158 S.W. 77 (1913); Feneff v. New York Cent. & H.R.R., 203 Mass. 278, 89 N.E. 436 (1909); Hinnant v. Tide Water Power Co., 189 N.C. 120, 126 S.E. 307 (1925).

45. *See, e.g.*, Hoffman v. Dautel, 192 Kan. 406, 388 P.2d 615 (1964); McKey v. Dow Chem. Co., 295 So. 2d 516, 518 (La. Ct. App. 1974).

46. Justice Smith of the Michigan Supreme Court spoke harshly of the injustice that may accompany improvident adherence to the doctrine of stare decisis in this situation:

> Were we to rule upon precedent alone, were stability the only reason for our being, we would have no trouble with this case. We would simply tell the woman to begone, and to take her shattered husband with her, that we need no longer be affronted with a sight so repulsive. In so doing we would have vast support from the dusty books. But dust the decision would remain in our mouths through the years ahead, a reproach to law and conscience alike. Our oath is to do justice, not to perpetuate error.

Montgomery v. Stephan, 359 Mich. 33, 37, 101 N.W.2d 227, 229 (1960).

47. Hipp v. E.I. DuPont de Nemours & Co., 182 N.C. 9, 108 S.E. 318 (1921) (*overruled in* Hinnant v. Tide Water Power Co., 189 N.C. 120, 126 S.E. 307 (1925)).

48. 183 F.2d 811 (D.C. Cir.), *cert. denied*, 340 U.S. 852 (1950).

court, criticized the logic underlying the reasons traditionally advanced in favor of retaining the common law rule that denies the wife's cause of action for negligent impairment of consortium. Reasoning that the husband and wife have equal rights in the marriage relation,[49] Judge Clark first rejected the contention that the loss of services is the predominant component of consortium. The court recognized that the many ingredients of the conjugal relationship are properly treated as a unity and that it is an injury to that unity through the impairment of any or all of its elements that affords a basis for recovery.[50] The cases predicating recovery on the loss of services utilize a distinction that is " 'arbitrary and, in the main, fictitious.' "[51] The court then dismissed the argument that the loss was too indirect to be compensable in tort, asserting that "[i]nvasion of the *consortium* is an independent wrong directly to the spouse so injured."[52] Furthermore, the ability of the husband to recover eviscerates such an argument since the husband's loss of consortium is no more of a direct injury than the wife's loss.[53]

The *Hitaffer* court also rejected the contention that recognition of the wife's cause of action would allow double recovery of the husband's loss of earning capacity. Since loss of services is only one element of consortium, the court refused to deny the wife recovery on this basis, reasoning that the danger of double recovery could be averted by simply subtracting the amount recovered by the husband for his loss of earning capacity from the wife's total award for loss of consortium.[54] Finally, the court focused on the incongruity of allowing the wife to recover for intentional invasions of consortium but not for negligent invasions.[55] This situation has often been criticized on the basis that the damage caused by a negligent impairment is usually more severe and deserving of a remedy than the loss suffered through an intentional impairment.[56]

Despite the persuasive logic of Judge Clark's opinion, *Hitaffer* was generally ignored or rejected in subsequent years.[57] By 1960, only seven jurisdictions had followed the lead of the District of Columbia Court of Appeals.[58] In 1954, a Texas court of civil appeals considered the issue in

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49. *Id.* at 816.
50. *Id.* at 813-14.
51. *Id.* (quoting Lippman, *supra* note 16, at 668).
52. *Id.* at 815 (footnote omitted; emphasis in original).
53. *Id.*
54. *Id.* at 814, 819.
55. *Id.* at 816-17.
56. The argument of Professor Clark typifies the criticism of this situation:
> What is the relevant distinction between the case where the husband's affections are alienated by the "other woman" and the case where he is so seriously injured by the defendant's negligence that he becomes a human vegetable? Actually, his wife is worse off in the second case than the first. In the first she may get a divorce and remarry more happily. In the second case she can look forward to a lifetime as a combined nurse and breadwinner.

H. CLARK, LAW OF DOMESTIC RELATIONS IN THE UNITED STATES § 10.5, at 277 (1968).
57. *See* J. STEIN, *supra* note 10, § 210, at 434-38.
58. Cooney v. Moomaw, 109 F. Supp. 448 (D. Neb. 1953); Missouri-Pacific Transp. Co. v. Miller, 227 Ark. 351, 299 S.W.2d 41 (1957); Brown v. Georgia-Tennessee Coaches, 88 Ga.

the case of *Garret v. Reno Oil Co.*[59] The court followed the prevailing rule and held that a Texas wife could not recover for the negligent impairment of consortium. The opinion of Chief Justice Massey cited *Hitaffer* and expressed a partial agreement with the principles espoused in that case.[60] The Fort Worth court succumbed to the weight of precedence, however, reasoning that "Texas should follow the majority rule until such time as legislation might effect a change."[61] The *Garret* decision was simplified by the fact that Mr. Garret was injured on the job and had accepted a settlement from Reno Oil Company's worker's compensation insurer. The court ruled that even if the denial of the wife's cause of action was an error, under the Texas Worker's Compensation Act[62] there could be no suit against an employer arising out of a tort occurring in the workplace after the claim of the injured employee had been disposed of or settled.[63]

Despite the initial rejection of *Hitaffer*, after 1960 a trend toward allowing the wife's action became firmly established.[64] In 1969, the American Law Institute reversed its position that the wife did not have a cause of action for harm caused by a tort against the husband, aligning the *Restatement (Second) of Torts* with the *Hitaffer* rule.[65] By 1978, Texas was one of only ten states that did not allow both spouses to recover for loss of consortium.[66]

II. WHITTLESEY V. MILLER

In *Whittlesey v. Miller* the Texas Supreme Court aligned Texas with the

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App. 519, 77 S.E.2d 24 (1953); Dini v. Naiditch, 20 Ill. 2d 406, 170 N.E.2d 881 (1960); Acuff v. Schmit, 248 Iowa 272, 78 N.W.2d 480 (1956); Montgomery v. Stephan, 359 Mich. 33, 101 N.W.2d 227 (1960); Hoekstra v. Helgeland, 78 S.D. 82, 98 N.W.2d 669 (1959).

59. 271 S.W.2d 764 (Tex. Civ. App.—Fort Worth 1954, writ ref'd n.r.e.).

60. *Id.* at 766-67.

61. 271 S.W.2d at 767.

62. TEX. REV. CIV. STAT. ANN. art. 8306, §§ 3-3a (Vernon 1967) (exclusive remedy and waiver of common law action provisions of Texas Worker's Compensation Law).

63. 271 S.W.2d at 767.

64. *E.g.*, Duffy v. Lipsman-Fulkerson & Co., 200 F.2d 71 (D. Mont. 1961); Yonner v. Adams, 53 Del. 229, 167 A.2d 717 (1961); Dini v. Naiditch, 20 Ill. 2d 406, 170 N.E.2d 881 (1960); Montgomery v. Stephan, 359 Mich. 33, 101 N.W.2d 227 (1960).

65. RESTATEMENT (SECOND) OF TORTS § 693 (1976). Subsection 1 provides:

> One who by reason of his tortious conduct is liable to one spouse for illness or other bodily harm is subject to liability to the other spouse for the resulting loss of the society and services of the first spouse, including impairment of capacity for sexual intercourse, and for reasonable expense incurred by the second spouse in providing medical treatment.

The proposal to adopt a section allowing the wife recovery was highly controversial. *See* RESTATEMENT (SECOND) OF TORTS § 695, Note to Institute at 13 (Tent. Draft No. 14, 1969).

66. The nine other states not recognizing the action were: *Connecticut*: Lockwood v. Wilson H. Lee Co., 144 Conn. 155, 128 A.2d 330 (1956); *Kansas*: Hoffman v. Dautel, 192 Kan. 406, 338 P.2d 615 (1964); *Louisiana*: Bourque v. American Mut. Liab. Ins. Co., 345 So. 2d 237 (La. Ct. App. 1977); *New Mexico*: Roseberry v. Starkovitch, 73 N.M. 211, 387 P.2d 321 (1963); *North Carolina*: Cozart v. Chapin, 35 N.C. App. 254, 241 S.E.2d 144 (1978); *Utah*: Ellis v. Hathaway, 27 Utah 2d 143, 493 P.2d 985 (1972); *Virginia*: Carey v. Foster, 221 F. Supp. 185 (E.D. Va. 1963); *Washington*: Ash v. S.S. Mullen, Inc., 43 Wash. 2d 345, 261 P.2d 118 (1953); *Wyoming*: Bates v. Donnafield, 481 P.2d 347 (Wyo. 1971). Connecticut is the only state other than Texas that has adopted the *Hitaffer* position since 1978. *See* Hopson v. St. Mary's Hospital, 40 C.L.J. 30 (Conn. Jan. 23, 1979).

majority of jurisdictions, holding that either spouse has a cause of action for the negligent impairment of consortium. This ruling rectified Texas's paradoxical position that had previously allowed recovery for intentional invasions of consortium, yet had refused to recognize a cause of action for negligent invasions of the same interest.[67]

The defendant in *Whittlesey* advanced the traditional arguments previously accepted by courts in denying the wife recovery.[68] Nevertheless, the supreme court rejected the claim that the elements of consortium are too conjectural to be translated into pecuniary relief, noting that damages for pain and suffering are compensable, although they are equally conjectural.[69] As to the contention that a new cause of action should be created by the legislature rather than the courts, the court refused to adhere to the doctrine of stare decisis that had controlled *Garret*,[70] asserting that "[s]uch an abdication of judicial responsibility is no longer called for in light of present social realities."[71] The court stated that legislative authorization for the cause of action was unnecessary even though marital rights in Texas are governed by the community property system of the civil law, since the right to recover for loss of consortium is an action recognized at common law.[72] The supreme court avoided adopting the reasoning of the court of civil appeals,[73] which focused on the Texas Equal Rights Amendment[74] and the impropriety of denying a right to recovery on the basis of sex. The fact that, prior to *Whittlesey*, no reported Texas decision had held that a husband could recover for the *negligent* impairment of consortium possibly explains the supreme court's reluctance to follow the court of civil appeals' reasoning, since, without such precedent, a refusal to allow either spouse a right to recovery equally would satisfy the Texas Equal Rights Amendment.

The court rejected the defendant's argument that the wife's cause of action would allow double recovery, stressing that each spouse sustains distinct injuries, and may only recover his or her own losses.[75] Finally, the court refused to bar the wife's recovery on the basis that her husband had accepted a settlement from the defendant. Under Texas law each spouse has "sole management, control, and disposition of his or her separate property."[76] Since loss of consortium is a personal injury,[77] and personal

67. Prior to *Whittlesey*, no reported Texas decision had ruled on whether a husband had a cause of action for negligent impairment of consortium. The recognition of intentional impairment is logically incongruous to the denial of the action for negligent impairment. *See* notes 55 & 56 *supra*.

68. For a detailed examination of each of the traditional reasons for denying the wife recovery, see Comment, *supra* note 8.

69. 572 S.W.2d at 667.

70. *See* note 61 *supra* and accompanying text.

71. 572 S.W.2d at 668.

72. *Id.* at 668-69.

73. Miller v. Whittlesey, 562 S.W.2d 904 (Tex. Civ. App.—Tyler 1978).

74. TEX. CONST. art. I, § 3a.

75. 572 S.W.2d at 669. *See also* note 8 *supra*.

76. TEX. FAM. CODE ANN. § 5.21 (Vernon 1975).

77. 572 S.W.2d at 669.

injury recovery is considered separate property,[78] a husband may not contract away his wife's claim for loss of consortium without her authority.[79]

The court's view of the effect of the impaired spouse's settlement on the deprived spouse's cause of action eliminated the possibility that Texas would adopt a strict mandatory joinder rule. In the interests of judicial economy[80] and the equitable calculation of damages,[81] several jurisdictions have held that a claim for the negligent impairment of consortium will not be recognized unless it accompanies the action of the impaired spouse.[82] This rule is harsh, inasmuch as it denies recovery for loss of consortium when the impaired spouse settles his own claim, or simply refuses to file suit. Although *Whittlesey* established that a spouse may sue for loss of consortium without the joinder of the impaired spouse when the impaired spouse has accepted a settlement offer,[83] Texas may still opt to require joinder of the consortium action once the claim of the impaired spouse reaches the trial stage. Such a requirement would further judicial economy and protect the defendant from the threat of multiple litigation, while avoiding the harsh effects of the typical mandatory joinder rule.[84]

The supreme court expressly disapproved *Garret* to the extent that it conflicted with *Whittlesey*.[85] This limited disapproval apparently leaves intact *Garret*'s ruling that an action for loss of consortium may not be brought against the employer of an impaired spouse insured under a worker's compensation plan.[86] The issue of how the exclusive remedy provisions of the Worker's Compensation Law[87] affects an action for loss of consortium was not before the *Whittlesey* court, however, and the viability of the *Garret* rule that denies recovery for loss of consortium to the spouse

78. TEX. FAM. CODE ANN. § 5.01(a)(3) (Vernon 1975).

79. 572 S.W.2d at 669. The court did not specify what type of evidence of authority would be sufficient to bar a claim for loss of consortium after the impaired spouse has settled. Given the emphasis that the court placed on the categorization of recovery for loss of consortium as separate property, it is possible that only evidence of express authority will suffice for this purpose. In the future, therefore, defense counsel would be well advised to secure the signatures of both spouses to any settlement agreement.

80. *See* Schreiner v. Fruit, 519 P.2d 462, 466 (Alaska 1974).

81. *See* Thill v. Modern Erecting Co., 284 Minn. 508, 170 N.W.2d 865 (1968).

82. *E.g.*, Schreiner v. Fruit, 519 P.2d 462 (Alaska 1974); Thill v. Modern Erecting Co., 284 Minn. 508, 170 N.W.2d 865 (1968); General Elec. Co. v. Bush, 88 Nev. 360, 498 P.2d 366 (1972); Ekalo v. Constructive Serv. Corp., 46 N.J. 82, 215 A.2d 1 (1965); Hopkins v. Blanco, 224 Pa. Super. Ct. 116, 302 A.2d 855 (1973). *But see* Rodriguez v. Bethlehem Steel Corp., 12 Cal. 3d 390, 525 P.2d 669, 115 Cal. Rptr. 765 (1974); Diaz v. Eli Lilly & Co., 364 Mass. 153, 302 N.E.2d 555 (1973); Gates v. Foley, 247 So. 2d 40 (Fla. 1971) (cases holding joinder not mandatory).

83. 572 S.W.2d at 669; *see* text accompanying notes 76-79 *supra*.

84. RESTATEMENT (SECOND) OF TORTS § 693(2) (1976) reflects a similar motive: "Unless it is not possible to do so, the action for loss of society and services is required to be joined with the action for illness or bodily harm, and recovery for loss of society and services is allowed only if the two actions are so joined." The *Restatement* uses the word "possible" to refer to situations where the deprived spouse has a full opportunity to join in the impaired spouse's action. It is not possible to join where, for example, the impaired spouse's cause of action is abated by death, or where the impaired spouse refuses to sue. *Id.* Comment g.

85. 572 S.W.2d at 669.

86. 271 S.W.2d at 767-68; *see* text accompanying notes 62 & 63 *supra*.

87. TEX. REV. CIV. STAT. ANN. art. 8306, §§ 3-3a (Vernon 1967).