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Consortium as an "Interest" in the Law of Torts

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I

A recent writer[1] has expressed the view that the scope of liability for negligence depends, or should depend, upon the "interest" of the plaintiff which has been injured. When injury to such interest should have been foreseen by a reasonable man in the position of the defendant, then there is a duty to avoid acts or omissions which might produce the injury. But when a different interest is injured from the interest a reasonable man could foresee might be affected, then there is, or ought to be, no liability in respect of such interest, because no duty of care was owed in respect of it; consequently, however careless the defendant may have been, his carelessness has, or should have, no legal effect. This view provides another approach to the old problem of defining duties of care. For analytical purposes it is a view, which, in the present writer's submission, has much to commend it, because it can help to explain and simplify the law of negligence. It suffers however from one major difficulty. The problem it raises may be put thus: How is the law to distinguish between "interests" in such a way as

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[1] E. Anthony Machin: Negligence and Interest (1954), 17 Mod. L. Rev. 405. It is worthy of note that at p. 415 the learned writer included freedom from injury to consortium under the categories of "interest".

to make it clear that a *different interest* has been injured from that to which injury could have been foreseen, and not merely *a different feature* of the same interest?

When a defendant by his carelessness causes physical *and* mental injury to *X* he is not injuring two different interests; the same interest is being injured in two different ways. But when a defendant by his carelessness causes physical injury to *X*, and mental injury to *X*'s mother, who is standing by, watching, he is injuring two different interests. *X* has an "interest" in not being physically injured, his mother in not being shocked. These two examples are clear cut. But others could be put which present much more difficulty for anyone attempting to analyze the situation. In the present essay it is not proposed to examine this problem generally, but to discuss one such situation, a new feature of which has recently been presented in England, so far as the present writer is aware, for the first time. What I wish to discuss are the problems involved in the question whether a spouse should be allowed to recover damages for loss which he or she may have suffered in respect of injury to the other spouse, caused by the defendant's acts or omissions. Where a death has resulted from such acts or omissions the situation is covered (to some extent at least) by statutes.[2] But where the spouse is still alive, what rights does the uninjured spouse possess in respect of the loss of any of the advantages, amenities or privileges normally afforded by matrimony? In the light of Hilbery J.'s recent judgment in *Lampert* v. *Eastern National Omnibus Co. Ltd.*,[3] it is submitted that the question of consortium in modern law is deserving of reconsideration and that the case of *Best* v. *Samuel Fox & Co. Ltd.*[4] merits further discussion.

II

The common-law view of matrimony, as is well known, was that the wife was almost in the position of a chattel so far as rights of action were concerned. She was valuable to her husband largely because of her use as a servant: consequently any harm to her was regarded as necessarily causing him pecuniary loss. Moreover, he was bound to support and look after her. Hence if she were injured he would have to provide her with medical attention.

[2] Fatal Accidents Act (1846), 9 & 10 Vict., c. 93; Law Reform (Miscellaneous Provisions) Act (1938), 24 & 25 Geo. V, c. 41; and similar legislation elsewhere.

[3] [1954] 1 W.L.R. 1047; [1954] 2 All E.R. 719.

[4] [1952] A.C. 716.

Therefore, for any interference with the wife, causing injury to her, not only could she sue (joining her husband as co-plaintiff for procedural as well as substantive reasons) but the husband could sue independently for the loss which resulted to him from injury to his wife.[5] The right, or "interest", which he possessed, and which gave rise to a corresponding duty on the part of other people not to interfere with it, was compendiously styled his *consortium*. Interference with consortium gave rise to a cause of action distinct and separate from the action the wife had in respect of injuries to herself.[6]

The definition of consortium is a matter of some complexity. But it can be said to include what have been called[7] a material and a sentimental side. In the former came the obligations of the wife to serve and afford material assistance to her husband. Injury to her resulted in her inability to provide service and assistance. In the latter came the obligations to be a companion to her husband, and provide him with love, affection and sexual intercourse. Injury to, or interference with, her might deprive the husband of these advantages. Both these features of consortium were important. In one of the earliest cases,[8] for example, the loss the husband suffered, and for which an action would lie, was a loss of company, not a loss of services. There can be little doubt that in such actions the law was not entirely concerned with loss of services, as it was when the plaintiff was suing for injury to his servant. The true basis for the granting of an action was recently restated by an American court as follows:

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[5] *Guy* v. *Livesey* (1618), Cro. Jac. 501; *Hyde* v. *Scyssor* (1619), Cro. Jac. 538; *Todd* v. *Redford* (1710), 11 Mod. 264. *Winsmore* v. *Greenbank* (1745), Willes 577. For early American cases see annotation in (1922), 21 A.L.R. 1517, at pp. 1519-1520. Cp. *Mallett* v. *Dunn*, [1949] 2 K.B. 180, at p. 183.

[6] *Hyde* v. *Scyssor* (*supra*) which, according to Hilbery J. in *Mallett* v. *Dunn*, [1949] 2 K.B. at p. 184, was "direct authority for the statement . . . that the husband's cause of action is separate from that of the wife". See also *Young* v. *Pridd* (1627), Cro. Car. 89; and cp. the note to *Russell et Uxor* v. *Corne* (1704), 1 Salk. 119, where it is said: "Where the action is only maintainable on account of an injury to the husband, and the wife joins, it is ill, and not cured by the verdict".

[7] Prentice J. in *Marri* v. *Stamford St. R. R. Co.* (1911), 84 Conn. 9, at p. 14. See also *Feneff* v. *New York Central & Hudson River R. Co.* (1909), 203 Mass. 278.

[8] *Guy* v. *Livesey* (1618), Cro. Jac. 501: note the comparison there made between a husband's loss of his wife's company and a master's loss of his servant's service. But note also that it was only a *comparison;* these two causes of action were regarded as distinct, *pace* Lord Goddard in *Best* v. *Fox* (*infra* footnote 11). Cp. also actions for criminal conversation, in which the gist of the action was "loss of the comfort and society" of the wife: see *Weedon* v. *Timbrell* (1793), 5 T.R. 357, at p. 360, *per* Lord Kenyon C.J. and Ashurst J.

> *Consortium*, although it embraces within its ambit of meaning the wife's material services, also includes love, affection, companionship, sexual relations, etc, all welded into a conceptualistic unity. And, although loss of one or the other of these elements may be greater in the case of any one of the several types of invasions from which *consortium* may be injured, there can be no rational bases for holding that in negligent invasions suability depends on whether there is a loss of services. It is not the fact that one or other of the elements of *consortium* is injured in a particular invasion that controls the type of action which may be brought but rather that *consortium* as such has been injured at all.[9]

It is therefore strange to find that in *Best* v. *Fox*, although in the Court of Appeal Birkett L.J. spoke of companionship, love, affection, comfort, material services and sexual intercourse as all belonging to the married state, so that, "taken together, they make up the consortium",[10] Lord Goddard, in the House of Lords, said that the action given to a husband for loss of consortium "is founded on the proprietary right which from ancient times it was considered the husband had in his wife. It was in fact based on the same ground as gave a master a right to sue for an injury to his servant if the latter was thereby unable to perform his duties. It was an action of trespass for an invasion of the proprietary right which, arising from the status of villeinage or serfdom, a master had in his servant." [11]

The better view, it is submitted, is that adopted by Lord Reid, who said, speaking of the way to describe the husband's loss or damage:

> He has . . . lost his wife's services, assistance, comfort, society, etc. . . . it would seem that there was only one single cause of action in respect of loss in all these matters. There was not one action for loss of consortium and another for loss of servitium, and in the same cause of action loss or damage under any of these heads could properly be taken into account, though often the main emphasis might be on the value of the services or assistance which the husband had lost. . . . I do not think that consortium was an abstraction: it seems to me rather to be a name for what the husband enjoys by virtue of a bundle of rights, some hardly capable of precise definition [12]

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[9] *Hitaffer* v *Argonne Co.* (1950), 87 App. D.C. 57; 183 F. 2d 811; (1952), 23 A.L.R. 2d 1366, at p. 1370.

[10] [1951] 2 K.B. 639, at p. 665. Cp *Guevin* v. *Manchester St. R. Co.* (1916), 78 N.H 289.

[11] [1952] A.C 716, at pp. 731-732

[12] *Ibid.*, pp. 735-736 But it might be added that in some cases the loss of services is the element most stressed, *e g.*, *Golden* v. *Greene Paper Co.* (1922), 116 Atl. 579; 21 A.L R. 1514; in others, services are taken to include the other elements: see *Indianapolis Traction & Terminal Co.* v. *Menze* (1909), 173 Ind. 31; *Indianapolis & M Rapid Transit Co.* v. *Reeder* (1912) 51 Ind. App. 533; *Denver Consol. Tramway Co* v *Riley* (1899), 14 Colo. App. 132; *Reeves* v *Lutz* (1913), 179 Mo. App. 61.

Thus the husband had a separate interest in the safety and well-being of his wife, just as she had an interest in her own safety and well-being. For a wrongful interference with his interest he could sue: and although originally his right to sue was in respect of intentional, deliberate or malicious interference,[13] at least by 1855 it had become extended to cases where the interference was wrongful (that is, tortious) without being intentional, even where the harm to him could not have been foreseen.[14]

His right of action embraced a claim for damages for definite, measurable loss, such as the amount of money he had to spend on medical expenses, or for the loss of his wife's company for a length of time. But it seems to be a matter of some discussion whether a husband could impute in such an action a claim for mere *impairment* of his consortium, as opposed to absolute loss for any period of time. In *Golden* v. *Greene Paper Co.*,[15] for example, it was held by the Rhode Island Supreme Court that a husband could not include in his claim for loss of consortium damages which he alleged resulted from the fact that, due to the defendant's negligence, his wife could no longer have sexual intercourse.[16] This would seem to have been the *ratio decidendi* of Birkett L.J.'s judgment in the Court of Appeal in *Best* v. *Fox*; and it was the view which was upheld, *obiter*, by the House of Lords. But Lord Reid suggested that an impairment of the consortium, which deprived the husband to a large extent of his wife's comfort and society, but at no time wholly deprived him of it, might be sufficient, and destruction of a wife's capacity for sexual intercourse might well be regarded as such an impairment.[17] Moreover there are a number of cases which suggest that any substantial diminution of the value or advantage of a wife, even though the husband is not totally deprived of her society, can found an action for loss of consortium.[18] At this stage of the discussion, therefore

[13] For a more modern illustration see *Place* v. *Searle*, [1932] 2 K.B. 497. Cp. cases where the defendant deliberately sold drugs to the plaintiff's wife, *e.g.*, *Holleman* v. *Harward* (1896), 119 N.C. 150; *Hoard* v. *Peck* (1867), 56 Barb. (N.Y.) 202.

[14] *Stone* v. *Jackson* (1855), 16 C.B. 199, where the husband was claiming for negligent injury to his wife. The action failed on another point: cp. annotations in (1922), 21 A.L.R. 1517, at p. 1520, and (1941), 133 A.L.R. 1156-1157. Whether this should still be valid will be discussed later.

[15] (1922), 116 Atl. 579; 21 A.L.R. 1514.

[16] Contrast *Baldwin* v. *Kansas City R. Co* (1921), 231 S. W. 280.

[17] [1952] A.C. 716, at p. 736: cp. the *Hitaffer* case, discussed *infra* under part IV.

[18] Thus McClellan C.J. in *Birmingham Southern R. Co* v. *Lintner* (1904), 141 Ala. 420, said: "The husband . . . has a legal right to the society of the wife involving all the amenities and conjugal incidents of the

(the point will be further developed later), it is submitted that there are strong grounds for arguing that intentional or negligent interference with any important strand in the "bundle of rights" which makes up the fabric of consortium is sufficient to give a husband the right of action.

The questions now arise whether (1) a wife has reciprocal rights in respect of consortium, and (2) if she has not, she should have such rights.[19]

III

So far as intentional interference with consortium is concerned, the position is not really clear. In *Lynch* v. *Knight*,[20] where the wife was sent away by her husband because of the defendant's slander, Lords Campbell and Cranworth thought a wife could sue, but Lord Wensleydale took the opposite view. All the opinions were obiter, however, since the case was decided on the issue of remote-

relationship. This right of society may be invaded by an act which, while leaving to the husband the presence of the wife, yet incapacitates her for the marital companionship and fellowship; and such incapacity may be deprivation of her society, differing in degree only from total deprivation by her death. For such impairment, . . .—such deprivation of the aid and comfort which the wife's society, as a thing different from mere services, is supposed to involve—he is entitled to recover." See also *Furnish* v. *Missouri P.R Co.* (1890), 102 Mo. 669: "By the term 'society' . . . is meant such capacities for usefulness, aid, and comfort as a wife, which she possessed at the time of the injury. Any diminution of these capacities by the acts or negligent omissions of defendant constituted a just basis for an award of compensatory damages therefor". Cp. *Corkill* v. *Recreation Parks* (1933), 46 B.C. 532 (nervous condition which, while the wife was not absent from home, rendered it impossible for her to fulfil her household duties, and made her a very different person from the standpoint of companionship and society), and *Pandjiris* v. *Oliver Cadillac Co.* (1936), 339 Mo. 726 (wife became silent, sad, nervous, lost interest in everything, lost art of piano playing, grew obese from inability to exercise, and was unable to perform any wifely functions or do housework), and *Robenson* v. *Turner* (1925), 206 Ky. 742. Cp. *Cullar* v. *Missouri K. & T. R. Co.* (1900), 84 Mo. App. 347: "One may be deprived of the society of another in greater or less degree though they be in each other's presence".

[19] It should be noted that in *Best* v. *Fox* Lord Asquith and Cohen L.J. in the Court of Appeal, and Lord Goddard in the House of Lords, thought that the husband's right of action, where the defendant had acted negligently, was anomalous and might not have been allowed at all if the matter were now *res integra*. Lord Porter would have preferred to abolish the husband's right. In some American states, after the passing of what the court in the *Hitaffer* case called "Emancipation Acts", which changed the interrelation of the spouses so far as law suits are concerned, it was held that neither husband nor wife could sue in respect of consortium. What Lord Porter felt desirable has therefore actually been accomplished by some courts without legislation, *e g.*, *Bolger* v. *Boston Elevated R. Co.* (1910), 205 Mass. 420; *Marri* v. *Stamford St. R. Co* (1911), 84 Conn. 9; *Blair* v. *Seitner Dry Goods Co.* (1915), 184 Mich. 304; *Helmstetler* v. *Duke Power Co.* (1945), 224 N.C. 821; *Martin* v. *United Electric R. Co.* (1945), 71 R.I. 137.

[20] (1861), 9 H.L.C. 577. See also *Davies* v *Solomon* (1871), L.R. 7 Q.B. 112.

ness. Lord Goddard in *Best* v. *Fox*[21] said that a wife could certainly sue for the enticement of her husband. This was also the view of Scrutton and Maugham L.JJ. in *Elliott* v. *Albert*[22] and Darling J. in *Gray* v. *Gee*.[23] But McCardie J., in the earlier case of *Butterworth* v. *Butterworth*,[24] expressed some doubt as to the validity of the proposition; and the majority of the High Court of Australia in *Wright* v. *Cedzich*[25] (notwithstanding a decision of Ferguson J. of the Supreme Court of New South Wales in a case involving the false imprisonment of the plaintiff's husband[26]) took the view that a wife could not sue, even where the intentional interference she alleged amounted to a deliberate enticement of her husband.

The American cases appear to present an equally unsettled picture. In some it has been held that for an intentional wrong causing loss of consortium a wife could sue.[27] This is especially so where the wrong alleged involves alienation of affections[28] and criminal conversation.[29] There are also cases of recovery arising under statutes which give rights of action to a wife against someone who sells liquor to her husband, though some cases base such a right of action on common-law principles.[30] But in many, if not most, of the cases in which the wife has claimed for loss of consortium because of the defendant's intentional or malicious wrongdoing, recovery has been denied,[31] a distinction seeming to be

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[21] [1952] A.C. 716, at p. 729.
[22] [1934] 1 K.B. 650, at pp. 659, 663.
[23] (1923), 39 T.L R. 429.
[24] [1920] P. 126, at p. 130.
[25] (1930), 43 C L.R. 493.

[26] *Johnson* v *Commonwealth* (1927), 27 S R (N.S.W.) 133—the facts were exactly those of the hypothetical case put by Lord Wensleydale, and seemingly dismissed by him as untenable, in *Lynch* v. *Knight* (1861), 9 H.L.C. 577, at p. 597.

[27] *Clark* v. *Hill* (1897), 69 Mo App 541 (threats of violence which drove the husband insane); *Cravens* v. *Louisville & N.R Co.* (1922), 195 Ky. 257.

[28] *Foot* v. *Card* (1889), 58 Conn. 1; *Bennett* v. *Bennett* (1889), 116 N.Y. 584; *Gernerd* v. *Gernerd*, 185 Pa. 233; *Wolf* v. *Frank*, 92 Md. 138; *Sims* v. *Sims*, 79 N. J. L. 577; *Clew* v. *Chapman* (1894), 125 Mo. 101. *Contra: Duffies* v. *Duffies*, 76 Wis. 374; *Lonstorf* v. *Lonstorf*, 118 Wis. 159. Cp. *Lellis* v. *Lambert* (1897), 24 O.A.R. 653.

[29] *Seaver* v. *Adams* (1889), 66 N H. 142; *Waynes* v. *Nowlin*, 129 Ind. 581; *Nolin* v. *Pearson* (1906), 191 Mass. 283. *Contra: Kroessin* v. *Keller* (1895), 60 Minn. 372: *Doe* v. *Roe* (1890), 82 Me. 503.

[30] *E g.*, sale of drugs to husband—*Flandermeyer* v. *Cooper* (1912), 85 Ohio St. R. 327; *Moberg* v. *Scott* (1917), 38 S.D. 422; *Emerson* v. *Taylor* (1918), 133 Md. 192: sale of liquor—*Pratt* v. *Daly* (1940), 55 Ariz. 535; *Swansen* v. *Ball* (1940), 67 S.D. 161 (note that although the husband died the complaint was for damages suffered by the wife by reason of the wrongful conduct of the defendant before the husband's death).

[31] *Anderson* v. *McGill Club* (1928), 51 Nev 16 (certiorari denied, 278 U.S. 557); *Bevis* v. *Armco Steel Corp.* (1951), 156 Ohio St. 295; *Harris* v. *McDermott* (1939), 53 York Leg. Rec. 75 (Penn.); *Nieberg* v. *Cohen* (1914), 88 Vt. 281.

drawn between intentional harm to the husband and intentional attack on the marriage relation.[32]

This, it is submitted, is a rational ground for distinction, and might also explain some of the difficulties felt in the English and Australian cases referred to. For if rights of action in tort depend upon the invasion of, or interference with the plaintiff's interests, so far as intentional wrongs are concerned, a wife should only be allowed to sue for loss of consortium when the defendant was intending to disrupt the matrimonial relationship by his conduct. For that would amount to intentional infringement of the wife's interest in the maintenance of that relationship. This would mean that, on the principle of reciprocity, a husband should have a similar right only in similar circumstances. So, actions for enticement and the like should be allowed; but other wrongs should only give rise to an action at the suit of the indirectly affected spouse if they were intended to cause that spouse harm or (one could add) if the natural consequences of the defendant's conduct, which as a reasonable man he must have foreseen and intended, was the causing of harm to the other spouse.[33] Without prejudice to anything to be said later on the subject of negligence, it is submitted that actions of the type now under consideration, whether at the suit of husband or wife, are far from anomalous. If the matrimonial relationship is of any social value—which nobody would deny in the common-law world—both parties to that relationship have an interest in its maintenance and freedom from external interference, deliberately indulged in for the purpose of disruption. That being so, their interest should be protected by the law in the appropriate way, by granting rights of action where such interference has occurred.

IV

The issues are much more difficult and complex, however, when it comes to considering the desirability of allowing actions for negligent (or otherwise unintentional) interference with the matrimonial relationship looked at in terms of consortium. It is here that the conflict between *Best* v. *Fox* and *Hitaffer* v. *Argonne Co.*, and the decision in *Lampert* v. *Eastern National Omnibus Co. Ltd.*, are of interest.

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[32] See *Boden* v. *Del-Mar Garage* (1933), 205 Ind. 59; *Commercial Carriers* v. *Small* (1939), 277 Ky. 189.

[33] The present writer therefore agrees with the notewriter in (1912), 26 Harv. L. Rev. 74, at p 75.

In *Best* v. *Fox*[34] the Court of Appeal[35] and a unanimous House of Lords decided that a wife could not sue employers who had negligently caused her husband to become incapable of having sexual intercourse. It was laid down categorically that a wife could not sue for any loss of consortium when the loss was caused unintentionally, by the defendant's careless breach of a duty owed to the husband. In *Hitaffer* v. *Argonne Co.*,[36] however, on similar facts, the United States Court of Appeals, on appeal from the United States District Court for the District of Columbia, held that recovery could be allowed to the wife. The court took the view that, since both husband and wife can recover for intentional interference with consortium, and a husband can recover for unintentional interference, a wife might be similarly entitled. Any other decision would involve "legalistic gymnastics". Since the wife had a "legally protected and hence actionable interest" in her consortium when it is injured by intentional invasion, it must equally be protected against negligent interference.

This courageous and, it is submitted, preferable decision is all the more remarkable because most cases in the United States in which the problem has been raised have denied the wife a remedy. Only in dissenting opinions,[37] and in the North Carolina case of *Hipp* v. *E. I. Dupont de Nemours & Co.*,[38] which was subsequently overruled,[39] had a similar view been taken. But the court in the

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[34] [1951] 2 K.B. 639; [1952] A.C. 716.

[35] But note that Birkett L.J. denied the wife's right of recovery on the narrower ground that total loss of consortium had to be shown, not merely impairment.

[36] (1950), 87 App. D.C. 57; (1952), 23 A.L.R. 2d 1366 (certiorari denied, 340 U.S. 852). The decision was followed by the lower court in *Passalacqua* v. *Draper* (1951), 104 N.Y.S. 2d 973, but reversed without opinion by the Appellate Division which, apparently feeling that a final determination of the question should be had, granted leave to appeal to the Court of Appeal (1951), 107 N.Y.S. 2d 812. Other New York decisions are also against the ruling of the *Hitaffer* case: see *Fishbach* v. *Auto Boys Inc.* (1951), 106 N.Y.S. 2d 416; *Lurie* v. *Mammone* (1951), 107 N.Y.S. 2d 182; *Don* v. *Benjamin M. Knapp Inc.* (1953), 281 App. Div. 893; *Tenebruso* v. *Cunningham* (1952), 115 N.Y.S. 2d 322: *Cook* v. *Synder* (1953), 119 N.Y.S. 2d 481. The Supreme Court of Oklahoma rejected the *Hitaffer* case in *Nelson* v. *A. M. Lockett & Co.* (1952), 243 P. 2d 719; cp. *Ripley* v. *Ewell* (1952), 61 So. 2d 420 (Florida). But a *federal* court held that the law of Nebraska allowed such an action: *Cooney* v. *Moomaw* (1953), 109 F. Supp. 448.

[37] *Per* Bond C.J. and Williams J. in *Bernhardt* v. *Perry* (1918), 276 Mo. 612; *per* Scudder J. in *Landwehr* v. *Barbas* (1934), 270 N.Y.S. 534; *McDade* v. *West* (1949), 80 Ga. App. 481.

[38] (1921), 182 N.C. 9, citing with approval Cooley's argument based on reciprocity, Torts (3rd ed.) p. 477.

[39] *Hinnant* v. *Tidewater Power Co.* (1925), 189 N.C. 120. Cp. also *Griffen* v. *Cincinnati Realty Co.* (1913), 27 Ohio Dec. 585, and *Smith* v. *Nicholas Bldg. Co.* (1915), 93 Ohio St 101.

Hitaffer case examined the various reasons for denying a wife recovery and argued against them.

In the first place there were cases which argued that the claim for loss of consortium is based on loss of material services. Therefore, since at common law a wife has no right to her husband's services, as he had to hers, she has no basis for a claim. Any change which "Emancipation Acts" may have made, by giving a wife a right to the fruits of her own services, has been to the effect that neither can sue for loss of consortium.[40] But, as has already been argued,[41] the right to servitium was only part of the "bundle of rights" called consortium; it was never coterminous with consortium. As Prosser rightly says: "The loss of 'services' is an outworn fiction";[42] and, to quote the language of the court in the *Hitaffer* case, "the development of the fiction has been attributed to the use of words". The division of consortium into services, on the one hand, and conjugal affection and so on, on the other, is arbitrary and absurd, as well as being fictitious.[43] No argument against the wife's recovery could be based on this ground.

Secondly, there were cases which stressed the danger that there would be double recovery for the same wrongdoing. The husband already has a claim for the injury he has suffered. Moreover he is bound to support his wife; therefore, in claiming damages for injury to himself, he can include a claim for his diminished ability to support her.[44] This danger of "duplicating elements of damage" was stressed as one of his arguments against the *Hitaffer* case by Professor Jaffe of Harvard.[45] But in the *Hitaffer* case it is made quite clear that the wife is suing for the injury to *her* particular interest, which is not based on any notion of loss of service. It is based upon her interest in the unimpaired continuance of her marital relationship,

[40] *Boden* v. *Del-Mar Garage Co.* (1933), 205 Ind. 59; *Brown* v. *Kistleman* (1912), 177 Ind. 692; *Stout* v. *Kansas City Terminal Co.* (1913), 172 Mo. App. 113; *Smith* v. *Nicholas Bldg Co.* (*supra*, footnote 39). This was also a view expressed by Lord Goddard in *Best* v. *Fox*, [1952] A.C. 716, at p. 733.

[41] See part II *supra*.

[42] Torts (1941) p. 948.

[43] Lippman: The Breakdown of Consortium (1930), 30 Col. L. Rev. 651, at p. 668, quoted with approval in the *Hitaffer* case, 23 A.L.R. 2d at p. 1370.

[44] *E.g.*, *Goldman* v. *Cohen* (1900), 63 N.Y.S 459; *Stout* v. *Kansas City Terminal R. Co.* (*supra*, footnote 40); *Bernhardt* v. *Perry* (1918), 276 Mo. 612; *Tobiassen* v. *Polley* (1921), 96 N.J.L. 66; *Giggey* v. *Gallagher Transp. Co.* (1951), 101 Colo. 258.

[45] Damages for Personal Injury (1953), 18 Law and Contemp. Prob. 219, at pp. 228-230. The same view is expressed by Pound in, Individual Interest in the Domestic Relation (1913), 14 Mich. L. Rev. 177, at p. 194, and by Lord Porter in *Best* v. *Fox*, [1952] A.C. 716, at p. 728.

which is a different thing entirely.[46] So long as care is taken to avoid the inclusion of the husband's loss in assessing the damages the wife has suffered, there is no danger of double recovery.[47]

The same answer, that a different interest is being invaded, was one of those given to the cases which argued that the wife could not recover because her injuries were too remote a consequence of the defendant's act.[48] It was also said by the court, citing a number of authorities, that in negligence cases the rule is that damage resulting in a natural and continual sequence unbroken by any intervening cause will be attributable to the wrongdoer, whether it was foreseeable or not. Moreover, if remoteness is to be taken into consideration in this way, it could be argued that both for husband and wife the damage to sentimental elements is too remote and consequential. Since it is clear that the husband can sue for such damage, which in his case is not considered to be too remote, the same consideration should apply for the wife. It is submitted that the remoteness argument is really irrelevant: the better argument is that the wife's cause of action (like her husband's when the situations are reversed) is not founded upon the breach of a duty owed to him—in which case, if it were, the damage would be too remote, on the basis of the *Palsgraf* case[49]—but on the separate duty owed to her, as will be further argued later on in this essay.

The remaining arguments contained in the cases against recovery were that there could be no remedy for merely sentimental loss without proof of loss of services and that the wife's interest in the marital relation was not a right of property, lying in an area into which the law could not enter except of necessity.[50] These arguments the court brushed aside, for reasons which have already been outlined or will be further developed later.

As a result of this refusal to engage in "legal gymnastics" for

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[46] See further later.

[47] Cp. the note in (1912), 26 Harv. L. Rev. 74, at p. 75: "the practical difficulties with which the jury system sometimes confronts the administration of justice are not in this case sufficient to overcome the desirability of protecting the right".

[48] *Feneff* v. *New York Central and Hudson R. Co.* (1909), 203 Mass. 278; *Brown* v. *Kistleman* (1912), 177 Ind. 692; *Stout* v. *Kansas City Terminal R. Co.* (1913), 172 Mo. App. 113; *Gambino* v. *Manufacturers Coal & Coke Co.* (1913), 175 Mo. App. 653; *Landwehr* v. *Barbas* (1934), 270 N.Y.S. 534; *Eschenbach* v. *Benjamin* (1935), 195 Minn. 378; *Maloy* v *Foster* (1938), 8 N.Y.S. 2d 605.

[49] (1928), 248 N Y. 339.

[50] Cp. the argument that the "Emancipation Acts" did not give wives any new rights: see *Cravens* v. *Louisville & N. R. Co.* (1922), 195 Ky. 257; *Nash* v. *Mobile & O.R. Co.* (1928), 149 Miss 823; *Howard* v. *Verdigris Valley Electric Co-op.* (1949), 201 Okla. 504.

the purpose of inventing reasons against the wife's right of action, the court was enabled to conclude that the wife could have a remedy.

V

The importance of the decision in the *Hitaffer* case lies in the recognition by the court of the wife's interest in consortium, an interest which was protected by a number of legal rights, giving rise to corresponding duties to be observed by the world at large. One of those duties was to avoid intentional interference so as to cause the complete destruction of the wife's consortium. Another was to avoid acting carelessly, so as to cause the impairment of any element in that consortium.

As already seen, Professor Jaffe of Harvard expressed strong criticism of this decision. This was based on two grounds. In the first place, he took the view that there was a great difference between an accidental loss of the opportunity for sexual intercourse and the deliberate destruction of the whole marital relationship. "It is almost unthinkable", he wrote,[51] "that a court should reduce consortium to the bare element of the opportunity for sexual intercourse". This, with all respect, was not quite what the court was doing in the *Hitaffer* case. It was simply stating that it was unnecessary to show a deprivation of all the elements involved in consortium. This was something which had been mooted before.[52] Although it was denied by the Court of Appeal and Lord Goddard in *Best* v. *Fox*, Lord Reid took the opposite view. Impairment of the consortium, in his lordship's opinion, was enough.[53]

It is submitted that this is the better view. For, in the present writer's submission, it seems manifestly absurd only to permit an action (in those states of the United States which will, or may approve of the *Hitaffer* case,[54] at the suit of either husband or wife; in England, now, unless and until statute intervenes, at the suit of the husband only) where there is a total loss of the benefits resulting from the matrimonial relationship, no matter for however short a time — which would seem to be the present situation — yet refuse an action for an impairment which will, or may, last throughout the marriage. The safeguard against the "rather overwhelming prospects" envisaged by Birkett L.J.[55] is that the im-

[51] *Op. cit.* footnote 45.
[52] See the cases cited in footnote 18 *supra.*
[53] [1952] A.C. 716, at p 736.
[54] See the citations in footnote 36 *supra.*
[55] *Best* v. *Fox*, [1951] 2 K.B. 639, at p. 665.

pairment must be serious and substantial, as it was in *Best* v. *Fox* and the *Hitaffer* case. That is not "to reduce consortium to the bare element of the opportunity for sexual intercourse". It is to view the matrimonial relationship in realistic terms. For there can be little doubt[56] that, if sexual intercourse is not a vital element in matrimony, the procreation of children is. Any activity on the part of a defendant which prevents the fulfillment of this purpose ought certainly to be regarded as an interference with the matrimonial relationship, of sufficient gravity to enable an action for loss of consortium to be brought. For the failure to have children may lead to the disruption of that relationship, which event is at the root of the modern law on consortium, if not the older law. For this reason, it is respectfully suggested that Lord Goddard was being unrealistic when he spoke of age, illness or disinclination impairing the potency of either of the spouses, who continue to live together as man and wife.[57] In such a case, if one of the spouses was injured in the way the husband in *Best* v. *Fox* or the *Hitaffer* case was, there would be no impairment of consortium *so far as those spouses were concerned.* But that should not mean that, in other cases, where the spouses are living a normal (or more usual) life, the same rule should apply. In normal cases the type of injury inflicted in *Best* v. *Fox* would produce serious interference with the matrimonial relationship.

The second argument of Professor Jaffe against the *Hitaffer* case has already been mentioned. It relates to the duplication of damages. But this view is strongly criticized by Prosser[58] in a passage which was cited with approval by the court on the *Hitaffer* case. He wrote that: "The loss of 'services' is an outworn fiction, and the wife's interest in the undisturbed relation with her consort is no less worthy of protection than that of the husband". A similar opinion was expressed in the Harvard Law Review by a note-writer who said:[59] "The marital relationship is as advantageous for the wife as for the husband: it is also the basis of social organisation, and therefore would seem deserving of comprehensive protection".

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[56] Despite, it is submitted, decisions in divorce which deny that refusal to procreate is either desertion or a ground for annullment of marriage. But contrast American cases dealing with the right to petition for divorce on the ground of fraud, where a spouse, who before marriage agreed to have children, afterwards resiled from his or her promise; and note that in some English cases it has been held that refusal to procreate could amount to cruelty, allowing of a decree of divorce.

[57] *Best* v. *Fox*, [1952] A.C. 716, at pp. 733-734.

[58] Torts (1941) p. 948.

[59] (1951), 64 Harv. L. Rev. 672, at p. 673.

With these expressions of opinion the present writer finds himself in complete agreement. It is the vital point of the present discussion. For the answer which is given to the question, Shall the wife be allowed to recover? depends upon the view that is taken of the wife's interest in the matrimonial relationship. It was well said in the already cited note in the Harvard Law Review[60] that the various tests or labels applied by the courts to refuse recovery to a wife were used to avoid discussion of the policy considerations for or against extending the negligence liability. This is indeed a "policy" issue. It is not surprising, therefore, that such "policy" arguments as "double recovery" and "remoteness of damage" have been involved.[61] For the issue is not really whether there is a danger that a defendant will have to pay damages twice for the same injury. That is, in this context at least, an excuse, not a valid legal reason. In the *Hitaffer* case the court realized the possibility that this might happen, but gave the solution in these words:

> Simple mathematics will suffice to set the proper quantum. For inasmuch as it is our opinion that the husband in most cases does recover for any impairment of his duty to support his wife, and since a compensable element of damages must be subject to measure, it is a simple matter to determine the damages to the wife's *consortium* in exactly the same way as those of the husband are measured in a similar action and subtract therefrom the value of any impairment of his duty of support.[62]

The issue is also not one of "remoteness of damage"; for such an inquiry, at least in the English use of that phrase, can only arise when (in a case of negligence) there has been a breach of a duty owed to the plaintiff. A person cannot found a right of action upon the breach of a duty owed to *someone else*. Hence a wife who wishes to sue for loss or impairment of consortium due to injury to her husband must be able to show that the injury to her husband also involved the breach of a separate duty owed to her. As was shown earlier, from the very beginnings of this kind of action the husband's right to sue in respect of damage to his consortium arising from injury to the wife was based on *an entirely separate* interest, which was the object of *an entirely separate* duty on the part of the defendant. The wife, it is submitted, should also be allowed to have such an interest, so that a duty of care should be admitted to exist, not only in respect of *X*, but also where the

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[60] *Ibid.*

[61] On the concept of remoteness as a policy-shaping idea see Fleming, Remoteness and Duty (1953), 31 Can. Bar Rev. 471.

[62] (1952), 23 A.L.R. 2d at p. 1376.

defendant, as a reasonable man, should have foreseen that harm caused to *X* would, or might, also produce harm to *X*'s wife, in the form of destroying or impairing her consortium. There is no reason in modern times for distinguishing between husband and wife in this matter. It was said in the once discredited, now presumably resuscitated case of *Hipp* v. *Dupont de Nemours & Co.*:[63] "Why should the husband be allowed a recovery in cases of this character and the wife, who suffers in the identical same way, be denied a remedy? They stand before the same altar; they enter into the same contract? Necessarily their rights are the same at the bar of justice." If liability for negligence depends upon the appreciation of risk to a specific interest of the plaintiff,[64] then foresight of harm to the wife's right of consortium should give rise to a duty to take care not to interfere with that right. The same, of course, would be true in respect of a husband's right to sue for negligent interference with *his* consortium.[65]

But to allow all this would involve the recognition that both husband and wife have an "interest" in consortium capable and deserving of being protected. To postulate such an "interest" would result in the necessary creation of duties of care in respect of it. Hence, in part, the decision of Lord Goddard in *Best* v. *Fox*. For his lordship voiced the fear that if the wife had an action in that case, so must the wife of any man run over in the street by a careless driver.[66] With all respect, however, the problem is different. It is more akin to the "nervous shock" cases, in which, as was seen,[67] the problems sometimes involved[68] relate to the recognition by the law of *different* interests, which are capable and deserving of protection by the law. The legal difficulties created by the "nervous shock" cases have not yet been settled. But it is submitted that they turn upon the issue whether there is a legal interest not to be shocked by harm caused, or the threat of harm to someone else. This is an issue of the same order as we are now discussing here. For the question of policy is: Should causing harm to one spouse, the result of which is to produce a substantial interference

[63] (1921), 182 N.C. 9, at p. 15. But note the cases cited in footnote 36 *supra*.

[64] See (1950), 63 Harv. L. Rev. 671, and Machin in (1954), 17 Mod. L. Rev. 405. Cp. also cases like *Latimer* v. *A. E. C. Ltd.*, [1952] 2 Q.B. 701, [1953] A. C. 643; *Watt* v. *Hertfordshire County Council*, [1954] 1 W.L.R. 835; and *Roe* v. *Minister of Health*, [1954] 2 W.L.R. 915.

[65] Which would meet the objection raised in *Best* v. *Fox* (see footnote 19 *supra*) to the present anomalous situation.

[66] [1952] A.C. 716, at p. 731.

[67] In part I *supra*.

[68] As in *King* v. *Phillips*, [1953] 1 Q.B. 429.

with *both* spouse's matrimonial life, be actionable by *both* spouses, each suing for the respective loss he or she has suffered? Should not a separate duty be owed to the spouse not directly, physically injured, in the same way as it can be argued that a separate duty should be owed to avoid emotional shock to those not in any personal, physical danger?

This, it is submitted, is a pure question of social and legal policy and, despite what was said in *Best* v. *Fox*, the suggestion is made that the point was open for the House of Lords to deal with along the lines argued in this essay. The argument in favour of the social desirability of such a duty, arguments which seem cogent enough to the present writer, were accepted by the American court in the *Hitaffer* case. But in the House of Lords, the respectful submission is made, too much attention was paid to apparent anomalies produced by the uneven development of legal history and not enough to the need for rounding off that development in a way to suit modern requirements and modern views. If this had been done, the law relating to interference with family relationships could have been re-stated and reshaped in a consistent and feasible manner.

The failure of the House of Lords to accept such an argument is curious in view of the provisions of such statutes as the Fatal Accidents Act[69] and the Law Reform (Miscellaneous Provisions) Act.[70] These, either directly or indirectly, give a wife the right to sue for damage suffered as a result of the death of her spouse. In England there does not seem to be any indication that injuries to consortium can be included in claims for damages under these acts. Indeed the authorities would seem to go the other way.[71] But in the United States, under similar legislation to the Fatal Accidents Acts, there are conflicting decisions on the issue whether damages can be allowed for loss of society, companionship and other items which are closely related to consortium.[72] It is submitted that, if a wife can recover damages for the death of her husband, she ought to have a claim where she has in effect lost some substantial benefit or advantage of her matrimonial life through the defendant's intentionally or unintentionally wrongful act, although her husband has not been killed.

But this right of action, it is conceded, must be limited to cases where the defendant intended to cause the harm suffered—as in

[69] 9 and 10 Vict, c. 93. [70] 24 and 25 Geo. V, c. 41.
[71] Salmond on Torts (11th ed.) pp. 397-8.
[72] The cases are cited in (1952), 23 A.L.R. 2d 1382, note 13.

enticement cases—or could have expected such harm as a natural consequence of his acts, or should otherwise have foreseen that such harm might be a consequence of his acts, or omissions.[73]

So far as the law of negligence is concerned, therefore, a defendant should only be liable for injuring a spouse's consortium where he knew, or should have foreseen that the person likely to be physically or mentally injured through his carelessness was married, and could have foreseen that by his carelessness he might cause the destruction or substantial impairment of the other spouse's consortium.

VI

This approach to the problem would seem to be barred in England by the decision in *Best* v. *Fox*, although it is clearly open in those jurisdictions which are not bound by the House of Lords. But in England a narrow path around the barrier put up by the House of Lords was found by Hilbery J. in *Lampert* v. *Eastern National Omnibus Co.*,[74] even though the learned judge said that questions of consortium were not in issue.

Here the plaintiffs, who were husband and wife, claimed damages for injuries sustained by the wife as a result of a collision between her car and the defendant's omnibus. At the time of the accident the husband was driving the car. Hilbery J. held that the husband was the wife's servant at that moment, hence his carelessness was her carelessness, so that she was partly responsible for the accident. After the accident, which resulted in the wife suffering facial and bodily disfigurement, the huband deserted the wife. In her action[75] she claimed, not only damages for physical injury, but also damages for the loss of her husband, which she said was a direct consequence of the negligence of the defendants.

It will be seen that this could be regarded as a problem not directly involving consortium. It could be treated as a problem of remoteness of damage, not of the scope or existence of a duty. For the defendant clearly owed Mrs. Lampert a duty of care, *in respect of her safety and health*, since she was a co-user of the highway. But the submission is made that it was a case for investigating the issue of remoteness along the lines suggested by Mr. Machin,[76]

[73] Cp. what was said in relation to intentional interference in part III *supra*.

[74] [1954] 2 All E.R 719; [1954] 1 W.L.R. 1047.

[75] The husband's claim seems to have been abandoned and does not enter into the discussion.

[76] (1954), 17 Mod. L. Rev. 405.

that is, by deciding whether the duty of care owed pertained to a specific interest of the plaintiff, being the specific interest damaged. In other words, the problem involved was whether a duty of care in respect of Mrs. Lampert's safety extended to cover the unimpaired continuance of her matrimonial relationship. This is not quite the same problem as the one already dealt with. There the present writer was dealing with *D*'s negligence causing harm to the "interest" of *X* and *Y*; here the problem is *D*'s negligence causing harm to *two separate* "interests" of *X*.

But Hilbery J. did not look at the question in this light. Had he done so he might have realized that he was really dealing with two separate duties of care, though the language of English law has tended to obscure this. The learned judge approached the case from the standpoint of whether the loss of the husband was direct, consequential damage flowing from the tortious act done towards the wife.[77]

In the event his lordship found that the wife had probably not lost anything of value as a result of the desertion of her husband. Moreover, he considered that the husband had deserted her "more because of his own failure of character than because of the disfigurement". This act of desertion, it is submitted, was a *novus actus interveniens*, unforeseeable by the defendants; therefore, either it could be said that the damage was too remote, or it could be said that the defendants were under no duty to guard against such consequences of their acts, since they could not appreciate the risk involved.[78] The wife's claim for this particular loss failed.

The case could be cited as authority for the proposition that loss of a husband caused through the breach of *some* duty owed to the wife—and presumably this applies vice-versa—can be subsumed under the head of damages, so long as the loss is directly caused by the defendant's tortious act or omission. On this view it would appear to be irrelevant that such a result was neither intended by the defendant nor could have been foreseen by him, since he did not know and could not reasonably have known or foreseen that the person he was injuring was married. It is submitted, however, that the better view would have been to regard the case from the standpoint of a duty of care along the lines already suggested. If it had been, the case could still have been decided as it was for, as Denning L.J. has shown,[78] in negligence cases there is always the

[77] [1954] 2 All E.R. at p. 702; [1954] 1 W.L.R. at p. 1049.

[78] Cp. Denning L.J. in *Roe* v. *Minister of Health*, [1954] 2 W.L.R at pp. 924-925.

problem of causation, and that is as much a question of foresight as questions of duty and remoteness.

The argument of this essay may be summarized in the following conclusions:

(a) *both husband and wife should be entitled to sue for loss caused by intentional acts or omissions designed to interfere with their matrimonial relationship, that is, consortium;*

(b) *both husband and wife should be entitled to sue for loss caused by unintentional acts or omissions where the defendant knew, or as a reasonable man should have foreseen, that their matrimonial relationship was endangered by such acts or omissions;*

(c) *the loss which gives rise to an action need not be complete destruction of the consortium, so long as the impairment of the matrimonial relationship resulting from the defendant's intentional or unintentional interference is substantial.*

State Legal Aid

Pass to another point. In the old days the Courts could exert a fairly effective control over unjustifiable delays and improper use of process by the expedient of adverse awards of costs applicable to the whole or part of the litigation. It was not an ideal expedient, but up to a point it worked. One of the expected but undesirable consequences of the introduction of Legal Aid is that the Courts have been left substantially powerless in this matter. If one of the parties to an action is an 'assisted person' (and both of them quite commonly are), what can the Court do to prevent amendment of the pleadings after amendment, requests for continuations and postponements, and all the other expedients which increase the expense, gravely delay the despatch of business, dislocate the judicial arrangements, and are unquestionably inimical to the proper administration of justice? Short of professional misconduct and a report to the Discipline Committee, we are literally powerless. I am far from suggesting that improper motives are consciously allowed to creep in, but the blunt truth is that under the new system the parties' advisers have a financial interest in making the litigation as slow and as complicated as possible; and I find it difficult to believe that such considerations do not have some unconscious effect in producing the slowing down of litigation which is already marked, and which, together with the great rise in costs, and the risk of being dragged from court to court to the House of Lords, is undoubtedly acting as a deterrent to every litigant who cannot litigate as an 'assisted person' on the basis of a nil contribution—in other words, who cannot litigate at your expense and mine. (The Rt. Hon. Lord Cooper, Defects in the British Judicial Machine (1953), 2 J. Soc. Public Teachers of Law (N.S.) 91, at p 96)