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Torts: Consortium; Shades of the Hitaffer Case in California

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decision of the lower court in awarding $250 damages, saying that the plaintiff as a keeper of a boarding house did not qualify as a businessman, and a merchant's refusal to grant further credit to the plantiff was no injury. The analysis above shows very little support for the proposition that the banks were being "mulcted" for "imaginary" damages. The bank's reasons are also in direct conflict with the following court pronounced rules: the excessiveness or inadequacy of damages are determined by the principles of verdicts generally, although there is a tendency, as in all appellate cases, to sustain the jury's finding if there is evidence to support it;[36] courts will not hesitate to set aside the verdict when it is clearly excessive;[37] the damages must be reasonable in each case,[38] and in the natural course of things.[39]

The third reason presented in support of the banker's allegation of excessive damages is that such damages are given to:

> ". . . a customer who has been in the habit of making overdrafts, but who in the particular instance has a small balance to his credit."[40]

Most courts, however, protect the bank's interest by admitting evidence of previous overdrawals to mitigate damages.[41] A small or large credit balance cannot affect the bank's error, or its duty to depositors.

The above analysis does not support a reduction of the bank's pre-legislation liability on the basis of the reasons the bankers have given to the various state legislatures. The difficulty of the businessman in proving actual damages to his credit and reputation still remain. If a hardship upon the banks by the use of the presumption can be shown in other ways, it would seem that allowing at least an inference of damage to the businessman would be a more equitable solution.

—*Richard M. Barker.*

TORTS: CONSORTIUM; SHADES OF THE HITAFFER CASE IN CALIFORNIA.—The California District Court of Appeal was recently confronted with the malpractice case of *Gist v. French*,[1] in which the plaintiff husband was suing for damages resulting from a negligent injury to his wife, including the loss of her consortium. While in the course of operating on the plaintiff's wife for the removal of a tumor from her uterus, the defendant doctor unnecessarily removed an ovary and shortened her vaginal cavity to one and three-fourths inches. The operation left the wife nervous and upset and as a result of this condition, she created an atmosphere of unhappiness with her husband and children. The Appellate Court sustained the judgment of the lower court, which gave the plaintiff reasonable compensation for loss of services, consortium, companionship and society of his wife.

The interesting legal feature of this case is found in certain dictum:

> "The parties to a marriage are *each* entitled to the comfort, companionship, and affection of the other. Any interference with the right of *either spouse* to the enjoyment of the other is a violation of a natural right as well as a legal right arising from the marriage relation."[2] (Emphasis added.)

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[36] Commercial Nat'l Bank v. Latham, 29 Okla. 88, 116 Pac. 197 (1911).
[37] Galloway v. Vivian State Bank, 168 La. 691, 123 So. 126 (1929).
[38] Bank of Commerce v. Goos, 39 Neb. 437, 58 N.W. 84 (1894).
[39] See note 23 *supra.*
[40] See note 18 *supra.*
[41] First Nat'l Bank v. McFall & Co., 144 Ark. 149, 222 S.W. 40 (1920).

[1] 136 Cal.App.2d ——, 288 P.2d 1003 (1955).
[2] *Id.* at ——, 288 P.2d at 1009.

The origin of the court's dictum is found in *Hitaffer v. Argonne Co.*,[3] which was decided in 1950. In the *Hitaffer* case the wife sued her husband's employer for damages for loss of consortium resulting from a negligent injury to the person of her husband. The husband had previously received compensation under the applicable Workmen's Compensation Act, which provided that the liability of the employer "shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife. . . ." The trial court dismissed plaintiff's complaint by a summary judgment. This ruling was reversed by the United States Court of Appeals, District of Columbia Circuit. The Appellate Court felt that a wife, deprived of her husband's aid, assistance, enjoyment and sexual relations by an injury to his person resulting from defendant's negligence, has a cause of action for loss of consortium. The exclusive liability provision of the act only applied to persons suing in the employee's right and would not preclude the wife from recovery when she sues in her own right.

The weight of authority allows the husband to recover for loss of consortium resulting from a negligent injury to his spouse.[4] Since the *Hitaffer* case was decided in 1950, only two other jurisdictions[5] have extended a corresponding right to the wife to recover where she has sustained an injury to her right to consortium resulting from the negligence of a third party. There are a few states that deny relief to either party for this type of injury.[6]

The English Courts allow the husband to recover[7] for such an injury but the issue is in doubt whether the wife possesses a corresponding right. In *Best v. Samuel Fox & Co.*,[8] the wife was suing for a consortium infringement. The court held she could not maintain an action unless there was a complete loss of all the elements that make up consortium. In the *Best* case, the husband and wife were still living together and the court concluded from this fact that a complete loss of consortium had not been sustained even though the husband's injury had resulted in his emasculation. It would seem that with regard to the wife, the English Courts would require nothing short of death before a complete loss had been sustained.

California allows a husband to recover[9] in this situation but has failed to recognize any right in the wife to recover where her consortium has been impaired due to another's negligence.[10] The dictum in the *French* case is the first indication that the Hitaffer doctrine may have its foot in the California Courts.

There are various doctrines propagated which allow the husband relief and negative relief in the wife. They are: Husband has a right to his wife's services but no corresponding right in the wife, fear of double recovery, wife's injury is indirect and remote, the wife had no right to relief at common law, and the Married Women's Act

[3] 183 F.2d 811 (D.C. Cir. 1950).

[4] Lindsey v. Kindt, 221 Ala. 169, 128 So. 143 (1930); Aderhold v. Stewart, 172 Okla. 77, 46 P.2d 346 (1935); MacLeavy v. Beckwith Machinery Co., 131 Pa.Super. 338, 200 Atl. 124 (1938).

[5] Cooney v. Moomaw, 109 F.Supp. 448 (1953); Brown v. Georgia-Tennessee Coaches, Inc., 88 Ga.App. 519, 77 S.E.2d 24 (1953). In Hipp v. Dupont, 182 N.C. 19, 108 S.E. 318 (1921), the wife recovered for loss of consortium where the husband had been negligently injured but this was overruled four years later by Hinnant v. Tide Water Power Co., 189 N.C. 120, 126 S.E. 307 (1925).

[6] Marri v. Stamford Street R. Co., 84 Conn. 9, 78 Atl. 582 (1911); Bolger v. Boston Elevated R. Co., 205 Mass. 420, 91 N.E. 389 (1910); Blair v. Seitner Dry Goods Co., 184 Mich. 304, 151 N.W. 724 (1915); Helmstetler v. Duke Power Co., 224 N.C. 821, 32 S.E.2d 611 (1945); Martin v. United Electric Ry., 71 R.I. 137, 42 Atl. 897 (1945).

[7] Baker v. Bolton, 1 Camp. 493 (1808); Brockbank v. Whitehaven Junction Railway Co., 7 H.&N. 834 (1862).

[8] [1951] 2 K.B. 639.

[9] Hale v. San Bernardino Valley Traction Co., 156 Cal. 713, 106 Pac. 83 (1909).

[10] Felice v. U.S., 217 F.2d 515 (9th Cir. 1954).

did not improve her position. These doctrines have been criticized by legal text writers[11] and by the *Hitaffer* case.

Some jurisdictions attempt to create a division of consortium into the components of service and conjugal relations.[12] It is contended that the husband's right to consortium at common law was based on his loss of services.[13] The other elements of consortium were considered in aggravation of damages but in themselves were not sufficient to constitute a cause of action; that unless loss of service was shown, no recovery could be had.[14]

In denying the wife relief it is felt she did not have a right to her husband's services at common law[15] and consequently she lacked a right to recover for an invasion of her consortium. No one would doubt that service is an element of consortium but consortium also includes society, comfort, companionship, and the sexual rights.[16] Each element is an important part of the consortium and no one element is superior to another as a basis for legal redress.[17] The husband's right to his wife's conjugal society is no greater than her right to his society in that both spring from the same marriage contract.[18]

The law imposes a legal obligation upon the husband to support his wife.[19] The husband's earnings and other income are to be channeled to the fulfillment of his duty. Where the husband has been injured and he has recovered a judgment for such injuries, the wife as a member of the household is supposedly benefited by his recovery. It is felt that if the wife were allowed to sue, the defendant would be subjected to double damages for the same injury.[20]

It is a legal maxim in California that, "no one should suffer by the act of another"[21] and "for every wrong there is a remedy."[22] A husband is allowed to sue for loss of consortium of his wife when she is injured but it is difficult to conceive how he can sue for loss of his society to his wife when he is injured.

The principal theory for denying the wife relief is that her injury is indirect and too remote to subject the defendant to liability.[23] This is incompatible with modern day tort law. Here the wife has suffered an impairment of a right arising from the marriage relation which would not have occurred but for another's negligence. Where a party has suffered an injury proximately caused by a third party's negligence and there has been no intervening force, the injured party should recover for the injuries sustained.[24]

The husband is allowed to recover where the wife has been injured and if it is not indirect nor too remote for his recovery then the same should be true where the

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[11] Holbrook, *The Change in the Meaning of Consortium*, 22 MICH. L. REV. 1 (1923); Lippman, *The Break Down of Consortium*, 30 COL. L. REV. 651 (1930); PROSSER, TORTS 703-705 (2d Ed. 1955).

[12] Lippman, *The Break Down of Consortium*, 30 COL. L. REV. 651 (1930).

[13] Marri v. Stamford St. Ry. Co., note 6 *supra*.

[14] See note 3 *supra*.

[15] PROSSER, *op. cit. supra* note 11 at 703.

[16] Guevin v. Manchester St. Ry., 78 N.H. 289, 99 Atl. 289 (1916).

[17] *Id.*

[18] See note 3 *supra*.

[19] CALIF. CIV. CODE § 174.

[20] Giggey v. Gallagher Transp. Co., 101 Colo. 258, 72 P.2d 1100 (1937); Stout v. Kansas City Terminal R. Co., 172 Mo.App. 113, 157 S.W. 1019 (1913).

[21] CALIF. CIV. CODE § 3520.

[22] CALIF. CIV. CODE § 3523.

[23] Feneff v. New York Cent. & H. R. Co., 203 Mass. 278, 89 N.E. 436 (1909).

[24] See note 3 *supra*.

wife seeks redress for her injury.[25] The husband and wife are supposed to be on a parity and any deviation from this equality would result in an infringement of a legal right.

The effect of the Married Women's Act invariably enters into the discussion when dealing with the wife's right to consortium. As we have seen, the common law courts allowed the husband to recover in this instance but denied a corresponding right in the wife.[26] The courts agree that the Married Women's Act did not create any new rights in the wife but merely relieved her of the disability of not being allowed to hold separate property or to sue alone.[27] Therefore, it is contended that since she did not have a right to relief under the common law, and no new rights were created by the Married Women's Act, she does not have a right to consortium relief under the present day laws.[28]

Since the passage of the Married Women's Act, the wife has been allowed to recover damages where there has been an intentional and malicious invasion of her consortium. She has recovered judgments for alienation of affections,[29] criminal conversation,[30] selling habit-forming drugs to the spouse[31] and, in some instances, selling liquor to the spouse.[32] In each of these cases the action was based on an invasion of her consortium. This right to relief must be predicated on some enforceable legal interest of the wife in the consortium. If the Married Women's Act failed to create any new rights, this right to relief must have existed at common law but was unenforceable due to the wife's disability. In the *Hitaffer* case the court held the husband and wife had equal rights in the marriage relation which would receive equal protection under the law. These rights existed prior to the Married Women's Act and the Act removed the wife's disability to envoke the law's protection. With the removal of the disabilities, it is only just that the wife be allowed to enforce her rights to their fullest extent to give bone and sinew to the equality that the Act was designed to bestow upon her.

It will be interesting to observe how the California Courts will react in light of the dictum in the *French* case when confronted with a controversy in which the wife seeks relief for an invasion of her consortium based on her "natural right as well as her legal right arising from the marriage relation."[33] There is nothing in the California Codes which prohibits this type of relief where she has suffered an injury due to the negligence of another.[34] Our legal system is based on progressive modification and with the removal of the archaic disabilities of a married woman, she should be elevated to her rightful status in all of our human institutions. Logic fails to support the arguments denying the married women relief in this instance and when the reason of the rule ceases to exist, so should the rule itself.[35]

—*Lloyd Hinkelman.*

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[25] Cooney v. Moomaw, 109 F.Supp. 448 (1953).
[26] Patelski v. Snyder, 179 Ill.App. 24 (1913).
[27] Nash v. Mobile & O. R. Co., 149 Miss. 823, 116 So. 100 (1928).
[28] Howard v. Verdigris Valley Electric Co-op., 201 Okla. 504, 207 P.2d 784 (1949).
[29] Cravens v. Louisville & N.R. Co., 195 Ky. 257, 242 S.W. 628 (1922). But alienation of affections and criminal conversation abolished in Calif. in 1939. CALIF. CIV. CODE § 43.5.
[30] Turner v. Heavrin, 182 Ky. 65, 206 S.W. 23 (1918).
[31] Flandermeyer v. Cooper, 85 Ohio St. 327, 98 N.E. 102 (1912); Moberg v. Scott, 38 S.D. 422, 161 N.W. 998 (1917).
[32] Pratt v. Daly, 55 Ariz. 535, 104 P.2d 147 (1940).
[33] 136 Cal.App.2d at ——, 288 P.2d at 1009.
[34] Felice v. U.S., 217 F.2d 515 (9th Cir. 1954).
[35] CALIF. CIV. CODE § 3510.