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Domestic Relations: Denial of Recovery to Wife for Loss of Consortium Due to Negligent Injury to Her Husband

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further substantiating the circuit court test. As early as 1937, in the case of *In re Andrews' Tax Liability*,[23] the court required the Bureau of Internal Revenue to show more than a subjective belief of fraud before allowing investigation of the taxpayer's records. The fourth amendment served as the basis of the court's decision. It spoke in terms of a theory of democratic government that guarantees every citizen freedom from any unnecessary harassment.[24]

The test used in *In re Andrews' Tax Liability* was that of "probable cause for suspicion of fraud."[25] It is employed and further defined in *Martin v. Chandis Securities Corp.*[26] as a "showing of probable cause sometimes called reasonable grounds for suspicion of fraud."

Obviously more than a mere showing of deficiency is necessary to show "reasonable grounds for suspicion of fraud." Thus a mere comparison of the amount of taxes paid by O'Connor prior and subsequent to 1943, the year in controversy, could not constitute a sufficient showing of "reasonable grounds for suspicion of fraud." Yet the test does recognize the sufficiency of evidence short of actual proof of fraud.

The conflicting decisions of the courts indicate a need for a standard of some kind; one which would help reach a just result in cases where fraud removes the bar of the three year statute of limitations. Speaking for the circuit court in *O'Connor,* Judge Woodbury used the language of the *Martin* case to establish this greatly needed standard or test. Some earlier cases have reached a similarly just result but lack such a well reasoned basis for their decisions.[27] *O'Connor* has arrived at a just result using sound legal reasoning.

More case law will be necessary in order to adequately define the factual boundaries of the standard of "reasonable grounds for suspicion of fraud." Of more importance to the lawyer, however, is the fact that a just and soundly reasoned standard has emerged. This standard, properly applied, will prevent unreasonable harassment at the instance of the federal revenue authorities.

David C. Pierson

DOMESTIC RELATIONS: DENIAL OF RECOVERY TO WIFE FOR LOSS OF CONSORTIUM DUE TO NEGLIGENT INJURY TO HER HUSBAND

In California a wife has no cause of action against a third person who negligently deprives her of the marital companionship of her husband. While the husband may recover for his own injuries, the wife, who may be all but widowed, is unable to have her case heard.

The problem before the California Supreme Court in the case of *Deshotel v. Atcheson, Topeka and Santa Fe Ry. Co.*[1] was whether to allow the wife recovery

[23] 18 F. Supp. 804 (D.Md. 1937).

[24] *Id.* at 805.

[25] See note 23 *supra.*

[26] 128 F.2d 731 (N.D.Cal. 1942).

[27] *Accord,* Martin v. Chandis Sec. Co., 128 F.2d 731 (N.D. Cal. 1942) (relies on § 3631, INT. REV. CODE OF 1939 without additional policy arguments); *In re* Brooklyn Pawnbrokers, Inc., 39 F. Supp. 304, 305 (E.D.N.Y. 1941) (relies on 4th amendment without specifically mentioning it); *In re* Andrews' Tax Liability, 18 F. Supp. 804 (D. Md. 1937) (decision based solely on the 4th amendment to U. S. Constitution forbidding unreasonable searches and seizures).

[1] 50 Cal.2d ...., 328 P.2d 449 (1958).

for the loss of the conjugal comfort, society, sexual relationship, and affections of her husband. Plaintiff's husband had been made a hopeless invalid when the taxicab in which he was riding was struck by defendant's train. The husband was a young man, and due to the accident will be permanently hospitalized, needing a nurse in constant attendance. The husband recovered a judgment of $290,000[2] as damages to him. The wife subsequently sued for loss of consortium.

The Superior Court sustained defendant's demurrer without leave to amend, and the plaintiff appealed. The District Court of Appeals reversed the Superior Court's decision, holding that the wife had stated a cause of action. The California Supreme Court, however, affirmed the judgment of the Superior Court.

At common law consortium was used to designate a legal right in the husband to have performance by the wife of all the duties and obligations which she took upon herself by entering into marriage. Consortium as thus employed consisted of service, society and sexual relationship. The husband had a cause of action for a direct injury to these conjugal rights against anyone who abducted, seduced, beat, or otherwise ill-used his wife.[3] While the common law allowed the husband to maintain an action for loss of his wife's consortium caused by the tort of a third party (including acts of negligence), the early cases held that there must be a loss of service for the husband to maintain such an action. The judges felt that the husband must be deprived of some actual service, such as the wife's ability to clean house or cook, before any monetary loss could be shown. Once a deprivation of service was evidenced the husband could collect added damages for loss of society and sexual relationship. Although the *service rule* appeared to be otherwise steadfast, the husband had an action for adultery or criminal conversation which may or may not have involved a loss of service.[4]

At common law, the wife had no actions corresponding to those of the husband for interference with the family relation. Marriage merged the husband and wife into one person, the husband being the "one." This put her under a legal disability. Having no legal status of her own, she could not maintain a suit in her own name. The wayward husband was hardly the person to join as plaintiff in an action for adultery.[5] Further, the wife, being subservient, was not entitled to the services of her husband. Therefore, she could not maintain an action for loss of her husband's services.[6]

While the wife did not have an active interest in her husband's consortium at common law, there is a belief on the part of some that she had a dormant interest, which could not be enforced due to her disability under coverture. While the law courts did not allow her redress, the ecclesiastical courts recognized an inherent right of a wife in her husband's consortium. However this right was enforceable only against the deserting husband for restitution of conjugal affection. He was forced to receive her back into his home and treat her with conjugal kindness.[7]

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[2] Deshotel v. Atcheson, T. & S.F. Ry., 144 Cal. App. 2d 224, 300 P.2d 910 (1956).

[3] 3 BLACKSTONE, COMMENTARIES *139.

[4] PROSSER, TORTS 684, 698 (2d ed. 1955).

[5] *Id.* at 690.

[6] 1 JACOB, LAW DICTIONARY 267 (1st Am. ed. 1811).

[7] Orme v. Orme, 2 Addams Eccl. Rep. 382, 162 Eng. Rep. 335 (1824). See Dalrymple v. Dalrymple, 2 Hog. Con. 54 App. 1, 161 Eng. Rep. 665 (Consistory Ct. of London 1811); 3 BLACKSTONE, COMMENTARIES *94.

Today consortium is defined as: "The conjugal fellowship of husband and wife, and the right of each to the company, cooperation, and aid of the other in every conjugal relation."[8] This indicates an equality between husband and wife in the right to the other's consortium. Service is no longer considered indispensable, and is now only one element on which the action may be maintained.[9]

While most courts today allow the wife recovery for loss of consortium due to an *intentional* injury to the marital relations,[10] the great weight of authority still holds that the wife has no cause of action for such loss caused by *negligence.*[11]

In California the husband's right of action for loss of consortium was established by *Gist v. French.*[12] In that case the defendant negligently performed an operation on plaintiff's wife, resulting in the shortening of her vagina to one and one-half inches. The plaintiff recovered for loss of sexual relations. The court said that in view of the legislators' failure to forbid recovery for loss of sexual relations *either husband or wife* might recover from a negligent third party. This language indicating the wife could recover was, however, only dicta. Since the California Supreme Court denied a hearing in this case, it would seem a similar action could have been expected to be favorably decided for the wife.[13]

The *Deshotel* case was the first to come before the California Supreme Court on a suit by the wife for loss of consortium. The decision was based on five major points:

1. Granting relief to the wife where her husband was negligently injured by a third party would extend common law liability.

2. A husband might collect as part of his damages compensation for his future inability to participate in married life, *i.e.,* double recovery.

3. The harm to the wife is only indirect and consequential.

4. The measurement of damages would involve conjecture, since companionship and society are hard to measure in dollar value.

5. If a cause of action in the wife were recognized on the basis of intimate relationship the door might be opened to actions by children.

Point one seems to have been decided on rather tenuous legal ground. As previously stated it was believed that the wife had an interest at common law in her husband's consortium, although under a disability to assert it. The *Gist* case extended a common law right in the husband by allowing him to recover for the loss of the sentimental side of consortium where no loss of service was involved. Married women's statutes having removed the wife's legal disabilities,[14] it would seem logical that the wife's legal rights in the consortium would be equal to the husband's.[15] If the husband is allowed to recover for the negligent

[8] BLACK, LAW DICTIONARY (4th ed. 1951); 8A WORDS AND PHRASES 361 (Perm. ed. 1951).

[9] Holbrook, *The Change in the Meaning of Consortium,* 22 MICH. L. REV. 1 (1923); Lippman, *The Breakdown of Consortium,* 30 COLUM. L. REV. 651 (1930).

[10] Pratt v. Daly, 55 Ariz. 535, 104 P.2d 147 (1940) (Recovery by wife from third party who sold liquor to husband knowing that his refusal power destroyed); Work v. Cambell, 164 Cal. 343, 128 Pac. 943 (1922); Humphrey v. Pope, 122 Cal. 253, 54 Pac. 847 (1898) (Alienation of affections—action outlawed by CAL. CIV. CODE § 43.5); Hoard v. Peck, 56 Barb. 202 (N.Y. 1867) (Recovery by wife against third party who sold narcotics to husband).

[11] See 23 A.L.R.2d 1389 (1950).

[12] 136 Cal. App. 2d 247, 255, 288 P.2d 1003, 1008 (1955).

[13] 4 U.C.L.A. L. REV. 402 (1956).

[14] See CAL. CODE CIV. PROC. § 370.

[15] See also Best v. Samuel Fox & Co., [1951] 2 K.B. 634, [1951] 2 All E.R. 116; [1952] A.C. 716, [1952] 2 All E.R. 394. (Wife's rights in consortium equal with husband's, but no recovery for partial loss.)

invasion of the right to his wife's consortium[16] by the equal status in the marriage relation,[17] the wife should also be allowed recovery for negligent invasion of her right to her husband's consortium.[18]

Dean Prosser sums up this situation as follows:[19]

> The development of the remedy for direct attack upon the marital relation by alienation of affections, or criminal conversation, which took place toward the close of the nineteenth century found no parallel where the interference was indirect, through the negligence or even intentional injury to the husband . . . . There has been almost universal condemnation of such a result on the part of the legal writers. Obviously it can have no other justification than that of history, or of the fear of an undue extension of liability of the defendant, or of double recovery by wife and husband for the same damages. 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. Nor is any valid reason apparent for allowing her recovery for a direct interference . . . and denying it for more indirect harm through personal injury to the husband, where no such distinction is made in his action.

The second point of the opinion dealing with double recovery was carefully analyzed in *Hitaffer v. Argonne Co.*[20] This was the first case to allow the wife recovery for loss of her right to consortium where the husband was *negligently* injured by a third party. It was explained that there could be no double recovery if any money which the husband received in his award for support of his wife were deducted from her recovery for loss of consortium. Under the modern definition of consortium, loss of service is not a necessary element to recovery, and the wife's loss of conjugal relations is a loss for which the husband cannot collect.[21]

A husband's cause of action is based on his loss alone. He cannot recover for any injury to his wife. "The wrong done is a direct wrong to the valuable interests of the wife, whether intentional or not they are damages for which the husband cannot sue."[22]

In California a recent statute[23] makes all damages recovered by a married person the separate property of the injured spouse. If the recovery is to be separate property it seems logical that the husband could collect for his injuries only, getting no additional compensation for his inability to support his wife. While there is no case in point, a decision to this effect would prevent double recovery, as each spouse could collect only for actual injury done him.

The third point on which recovery was denied, is that the wife's harm is only indirect and consequential. This problem was met and disposed of in the *Hitaffer* case. It was unpersuasive for two reasons: 1. By the rule applied to negligence cases the wrongdoers will be liable for a result, whether it was foreseeable or not, if the injury was produced in the natural course of events unbroken by an outside intervening cause, and would not have happened but for

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[16] Gist. v. French, 136 Cal. App. 2d 247, 288 P.2d 1003 (1955).

[17] Folansbee v. Benzenberg, 122 Cal. App. 2d 466, 265 P.2d (1954). See CAL. CIV. CODE § 155.

[18] Hitaffer v. Argonne Co., 183 F.2d 811 (D.C. Cir. 1950).

[19] PROSSER, TORTS 704 (2d ed. 1955). See 2 ARMSTRONG, CALIFORNIA FAMILY LAW 1505, 1506 (1953). See also 27 AM. JUR. *Husband & Wife* § 492 (1940).

[20] 183 F.2d 811 (D.C. Cir. 1950).

[21] See Landwehr v. Barbas, 241 App. Div. 769, 270 N.Y.S. 534 (1934).

[22] McDade v. West, 80 Ga. App. 481, 486, 56 S.E.2d 299, 302 (1949).

[23] See CAL. CIV. CODE § 163.5.

the negligence of the defendant.[24] 2. If such a rule were valid it would apply to the husband as well as the wife, but the husband's action has *not* been found too remote and consequential to allow him recovery under similar circumstances.[25]

The fourth point raised was in regard to the difficulty of measuring, in dollars, the loss suffered by a wife in being deprived of her right of consortium. Should the loss to the wife be more difficult to determine than the injury to the husband under similar circumstances? While the California Supreme Court did not render a decision in the *Gist* case, as previously mentioned, it did deny a hearing, and the husband was allowed recovery. The case posed no particular problems in determining the amount. Also the courts have found no difficulty in determining damages in an alienation of affections suit,[26] or where the wife's consortium was injured intentionally through the sale of habit-forming drugs to her husband.[27] "Like actions for pain and suffering, no definite rule can be prescribed for the measurement of the loss of his wife's society. The value of such loss must be determined by the triers of fact in the exercise of a sound discretion in the light of their own experiences, observations, and reflections."[28]

Finally the court feels that the door to recovery would be thrown open to anyone having a close relationship to the parents. The definition of consortium is the *conjugal* relation between husband and wife. It appears, therefore, that the court is allowing fears of future and unascertained "interests" to stand in the way of a wife who has a present interest[29] which should be legally protected.[30]

The present law in California denies the wife recovery for loss of consortium when her spouse is negligently injured by a third person. The husband's right of action for the same loss had seemed to be secured in California when the Supreme Court denied a hearing in the *Gist* case. However, the Court in the *Deshotel* case said his right to such an action had not been settled.[31]

The court thus indicates that the incongruity in the California law as now found may be harmonized at the expense of the husband's heretofore legally protected interest. A few other jurisdictions have ended this anomaly in their law by not allowing either husband or wife to collect for loss of consortium due to negligent injury of the spouse by a third party.[32] While this is one way of bringing uniformity to the law, it is submitted this is a poor solution to the dilemma.[33]

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[24] 183 F.2d at 815. See Moseley v. Arden Farms Co., 26 Cal.2d 213, 157 P.2d 372 (1945). See also CAL. CIV. CODE § 3333.

[25] 183 F.2d at 815. See Gist v. French, 136 Cal. App. 2d 247, 288 P.2d 1003 (1955).

[26] Humphrey v. Pope, 122 Cal. 253, 54 Pac. 847 (1898).

[27] Hoard v. Peck, 56 Barb. 202 (N.Y. 1867).

[28] 50 Cal.2d at ...., 328 P.2d at 454 (dissenting opinion). See Robison v. Lockridge, 230 App. Div. 389, 390, 244 N.Y.S. 663, 664 (1930).

[29] See Hitaffer v. Argonne Co., 183 F.2d 811 (D.C. Cir. 1950).

[30] Cooney v. Moomaw, 109 F. Supp. 448 (1953); Brown v. Georgia Tennessee Coaches, 88 Ga. App. 519, 77 S.E.2d 24 (1953). Both of these cases held that a wife has a cause of action for loss of constortium against a negligent third party, as her interests as well as her husband's are equally protected.

[31] 50 Cal.2d at ...., 328 P.2d at 450.

[32] Marri v. Stamford St. Ry., 84 Conn. 9, 78 Atl. 582 (1911); Harker v. Bushouse, 254 Mich. 187, 236 N.W. 222 (1931); Helmstetler v. Duke Power Co., 224 N.C. 821, 32 S.E.2d 611 (1945).

[33] See 1 HARPER & JAMES, TORTS 641–43 (1956); PROSSER, TORTS 703 (2d ed. 1955).