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PROTECTION OF THE FAMILY UNDER TORT LAW

By LEON GREEN*

In *Deshotel v. A.T. & S.F. Ry. Co.*¹ plaintiff wife was denied recovery for her loss sustained on account of the physical injury of her husband through the negligence of defendant. Her loss was identified as consortium, *i.e.*, conjugal society, comfort, affections and companionship. The problem presented is but one of many problems involved in the protection of the family and its members through tort law. To individualize the injury to a particular member of the family and take it out of its family setting is to shut out many of the considerations which should bear on the solution of the problem.

Doctrinal Difficulties

In order to clear the ground of a troublesome non-essential it is well preliminarily to dispose of the doctrinal difficulty involved in such cases. As indicated in the court's opinion and in cases in which a contrary conclusion has been reached there is adequate doctrine to support or deny recovery in the specific case. In the *Hitaffer* case,² for example, Judge Clark had a field day demolishing the doctrines which courts have employed to deny a recovery, and had no difficulty in developing doctrine to support a recovery. The District Court of Appeal³ and the dissenting judge⁴ in the Supreme Court of California likewise found no trouble in providing doctrinal support for the recovery by the wife. The basis for recovery is comparatively simple, namely, the wife has an interest in her husband equal to that he has in her. The interest of each has its source in the marital or family relation. This interest is given recognition and protection in numerous cases and its injury by a negligent wrongdoer is as serious as in other cases, and the wrongdoer should be made to compensate her loss.

Courts and practitioners are fully aware that doctrines do not decide cases. Instead they know that doctrine is but a means of indicating at a glance the type of case and the policies that should determine its disposition. Doctrine may pose a problem, and its invocation may indicate the court's argument and its judgment. Good logical doctrine can ordinarily be found

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¹ 50 Cal. 2d , 328 P.2d 449 (1958), noted in 10 HASTINGS L.J. 214 (1958).

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

³ *Deshotel v. Atchison, T.&S.F. Ry.*, 319 P.2d 357 (Cal. App. 1958). Opinion may be found in 156 A.C.A. 325.

⁴ 50 Cal. 2d at , 328 P.2d at 452.

to support any end that ought to be reached, and, if a good quality of doctrine is not at hand, courts not infrequently take second or third grade doctrine as a basis of indicating their judgment. But the decision of cases must rest on something more substantial than doctrine unless the problem has already been resolved by prior litigation and reduced to pattern so that similar cases do not have to be fought out again.

The protection that courts have given the family and its members under tort doctrines has developed slowly. These doctrines have still not fully matured as is indicated by the case under discussion. To appeal to common law doctrine is to appeal to something still in process of formulation and growth. The California court was called upon to establish the doctrine for California in a new situation. It was presented with the opportunity to make any one of several choices. It made its choice but it is doubtful that it did so on the basis of doctrine. The doctrines mentioned, to say the least, are shopworn. The doctrinal difference between "direct" and "indirect"⁵ has little if any significance except in the lore of the forms of action. The difficulty of evaluating the loss in terms of money cannot be taken seriously when such evaluation is done every day for similar and even less tangible losses. The "extension of common law liability" as a limitation on a court that has given voice to so much that is good in modern tort law sounds a strange note of self-restraint.⁶

Policies

This does not mean that the court's decision does not rest on solid grounds, but if so, it is not because of its doctrinal arguments but because of the policies which support its decision. The chief policies disclosed by the opinion are the difficulty of "drawing a line," the probability of "double recovery," and the desirability for "legislative" rather than "judicial action."⁷ Whether the court considered other policies is not known but it is not unusual for courts to be moved by considerations which are not disclosed.

Drawing a Line

The fear of being unable to "draw a line" has been a strong and legitimate factor in limiting liability in numerous important tort cases. It deferred for a long time imposition of liability on the manufacturer or supplier of defective machinery,⁸ liability for injury received through nervous shock

⁵ *Id.* at, 328 P.2d at 451.

⁶ *Ibid.* See California cases cited note 24 *infra* for some of the many cases in which the California courts have made radical though needed changes in common law liability.

⁷ Discussion of policies, *ibid.*

⁸ See *Carter v. Yardley & Co.*, 319 Mass. 92, 64 N.E.2d 693 (1946); *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050 (1916) for a review of earlier cases.

in absence of physical impact,⁹ liability for injury to unborn infants,¹⁰ liability for injury to infant intruders on a landowner's dangerous premises,¹¹ and liability in numerous other cases, until the courts found ways of drawing lines. Here the argument is that if the wife is given a recovery for loss of consortium then parents and children will also assert rights to recover for similar losses and the court sees no way to meet the argument. It is not a frivolous argument but it may be that the court did not put the interests of wife, children and parents in large enough perspective but focussed instead on the individual rights of the wife rather than upon the protection of the family—a basic social institution of great importance in its entirety.

Perhaps the "draw the line" argument is but a phase of the much more important policy beneath the "double recovery" argument which is believed to be the most substantial ground the court puts forth as a denial for recovery. It presents difficulties, but those difficulties are greatly lessened by the light shed by the development of tort law in this area and also by the power now well recognized on the part of courts through their decisions to determine practices incident to the proper handling of cases and also by rules of court.

History

The slow development of the protection of family relations by the English courts was due to several factors, namely: (1) the fact that power over the family institution was vested in the father and husband with slight legal protection for its members, except through the father and husband as head of the family; (2) the exactions of the common law forms of actions; (3) the ambiguity in the term "consortium." The American courts in the late 1800's and early 1900's made great strides in protecting the family interests of wife and children. This came about through expansion of the protection of wife and children through courts of equity and by statute, through the decline of the husband and father's almost despotic powers, and with the abolition of the forms of action and the spelling out of the conjugal relations included in "consortium." The English courts are still enmeshed in the difficulties created for them by common law history.¹²

⁹ *Spade v. Lynn & B. R.R.*, 168 Mass. 285, 47 N.E. 88 (1897); *Dulieu v. White & Sons*, [1901] 2 K.B. 669.

¹⁰ *Bonbrest v. Kotz*, 65 F. Supp. 138 (D.D.C. 1946); *Woods v. Lancet*, 303 N.Y. 349, 102 N.E.2d 691 (1951).

¹¹ *Kahn v. James Burton Co.*, 5 Ill.2d 614, 126 N.E.2d 836 (1955); *Bottum's Adm'r v. Hawks*, 84 Vt. 370, 79 Atl. 858 (1911).

¹² For a good review of the common law, see *Best v. Samuel Fox & Co.*, [1951] 2 K.B. 639, [1951] 2 All E.R. 116; [1952] A.C. 716, [1952] 2 All E.R. 394 (wife denied recovery for partial loss of consortium due to injury rendering husband impotent); Fisher, *Pater Familias—A Cooperative Enterprise*, 41 ILL. L. REV. 27 (1946).

In *Inland Revenue Comm'rs v. Hambrook*, [1956] 2 Q.B. 641, 664, Denning, L.J., quoting

The protection of the family under tort law was first given against intentional wrong to one of its members as the debauching or seduction of a daughter,¹³ abduction of an heir,¹⁴ alienation of the wife's affections,¹⁵ criminal conversation¹⁶ or simple assault and battery.¹⁷ While the actions were cast in terms of injury to the individual father or husband as head of the family, as fitted the political and social philosophy of the times, the protection was for the family group. Then and in fact until very recently, only two interests were recognized, namely that of person and property. The group or relational interests had not yet been identified, nor had it become of equal importance with person and property as is currently the case.¹⁸ The group interests were classified as "property" of the father or the husband and he maintained the suit, and while the particular member of the family as child or wife might have individual recoveries in some cases, the principal action was, and still is, that of the father or husband. As the family was an institution under the protection and rule of the father and husband with slight

from the first edition of Sir Frederick Pollock's book on Torts published in 1887, at page 194, says, "It seems natural enough that an action should lie at the suit of the head of a household for enticing away a person who is under his lawful authority be it wife, child or servant. . . . That the same rule should extend to any wrong done to a wife, child or servant, and follow as a proximate consequence by loss of their society or service is equally to be expected.' It is to be noted that in that passage and in its setting in the book, Pollock confines the action to the head of the household in respect to injuries in family relations. The passage has remained unchanged in every edition from that time to this."

See PROSSER, TORTS 670-77 (2d ed. 1955). See also TIFFANY, LAW OF PERSONS AND DOMESTIC RELATIONS §§ 45-46, *Actions for Enticing, Harboring or Alienation of Affection*; § 47, *Action for Criminal Conversion*; §§ 131-33, *Action by Parent for Injuries to Child*; §§ 134-36, *Action by Parent for Seduction or Debauching of Daughter*; §§ 137-38, *Action by Parent for Abducting, Enticing, or Harboring Child* (1896); 3 VENIER, AMERICAN FAMILY LAWS § 158, at 85; 4 *id.* § 265, at 461 (1935).

¹³ *Bennett v. Allcott*, 2 Term Rep. 166, 100 Eng. Rep. 90 (K.B. 1787).

¹⁴ See *Magee v. Holland*, 27 N.J.L. 86 (1858); *Pickle v. Page*, 252 N.Y. 474, 169 N.E. 650 (1930) for a review of cases. See also PROSSER, TORTS 692 (2d ed. 1955).

¹⁵ *Adams v. Main*, 3 Ind. App. 232, 29 N.E. 792 (1892); *Bennett v. Bennett*, 116 N.Y. 584, 23 N.E. 17 (1889); *Winsmore v. Greenbank*, Willes 577, 125 Eng. Rep. 1330 (C.P. 1745); TIFFANY, *op. cit. supra* note 12, §§ 45, 46. In the *Bennett* case the wife was given an action for alienation of husband's affections.

¹⁶ *Oppenheim v. Kridel*, 236 N.Y. 156, 140 N.E. 227 (1923) (wife's action recognized); *Hargraves v. Ballou*, 47 R.I. 186, 131 Atl. 643 (1926).

¹⁷ *Trimble v. Spiller*, 23 Ky. (7 T.B. Mon.) 264 (1828) (assault and battery on wife); *Klingman v. Holmes*, 54 Mo. 304 (1873) (battery on son; compensatory and exemplary damages awarded); *Tidd v. Skinner*, 225 N.Y. 422, 122 N.E. 247 (1919) (actual damages for selling heroin to son, but no exemplary damages).

¹⁸ For development of relational interests see GREEN, MALONE, PEDRICK & RAHL, CASES ON INJURIES TO RELATIONS ch. 2 (1959); PROSSER, TORTS 682-86 (2d ed. 1955); Cowan, *Group Interests*, 44 VA. L. REV. 331 (1958); Green, *Persons, Property, Relations*, 24 A.B.A.J. 65 (1938); *Relational Interests*, 29 ILL. L. REV. 1041 (1935), 30 ILL. L. REV. 314 (1935); *The Right of Privacy*, 27 ILL. L. REV. 237, 254 (1932).

legal recognition of the interests of its members, the legal remedies quite appropriately ran to him as the head of the family.

But any reading of the cases will indicate that along with the "loss of services" or any other peg on which to support the form of action, other injuries became increasingly the losses that called the law's protection into play. These were the more substantial injuries of disgrace, dishonor, humiliation, physical and emotional suffering, loss of social standing, conjugal fellowship and other losses of the family so conveniently cloaked by the concept of "consortium."¹⁹ The thrust of the action differed only as the relations of the members of the family differed in the particular case. It need not be said in passing that as these actions came into the twentieth century and as the interests of the individual members of the family were given greater legal recognition, much of the social significance of the original actions has been forgotten if not lost. But it is believed that what is left of their significance is based primarily upon their protection of the family as a group and that for that purpose they serve a useful function.

The Death Acts

The first substantial recognition given to the protection of the family against physical injuries came with Lord Campbell's Act in 1846 in which an action for death was given the immediate members of the family, husband or wife, parent and child.²⁰ The courts had been so slow in recognizing the new industrial environment that they had defaulted in swinging the common law into line and had made it necessary for the more farsighted Lord Campbell to seek legislative aid. The retreat from the severe liability of medieval law had been so rapid and so far-flung that when cases under the death acts, during the second half of the 1800's, began to come to the courts of both England and America, liability was severely restricted at every point.²¹ No piece of legislation, although it merely provided a green light for the courts, has ever been so ignored in its purpose and certainly none other has been so weighted down with restrictions.²² In nearly all juris-

¹⁹ See notes 12-18 *supra* for cases and readings. Striking cases are: *Palmer v. Baum*, 123 Ill. App. 584 (1905) (defendant liable to father for assault through sexual intercourse with married adult daughter living in home of father; "The real gravamen of the action is the mortification and disgrace of the family and the wounded feelings of the plaintiff."); *Bolton v. Miller*, 6 Ind. 262 (1855) (this case marks the breakdown of the half slavery institution of apprenticeship of young girls).

²⁰ Fatal Accidents Act, 1846, 9 & 10 Vict., ch. 93.

²¹ For a brief development of negligence law with its numerous immunities, see GREEN, *TRAFFIC VICTIMS: TORT LAW AND INSURANCE*, chs. 1, 2 (1958) (reviewed in 10 *HASTINGS L.J.* 233 (1958)).

²² For a brief sketch of the early cases interpreting the act, see *Buckley v. Chadwick*, 45 Cal.2d 183, 288 P.2d 12 (1955). See also PROSSER, *TORTS* 705-07 (2d ed. 1955); Killion, *Wrongful Death Actions in California, Some Needed Amendments*, 25 CALIF. L. REV. 170 (1937); Green, *Injuries Resulting in Death*, 38 ILL. L. REV. 248 (1944); *The Texas Death Act*, 26 TEXAS L. REV. 133, 461 (1947-48).

dictions liability was restricted to economic losses. In many cases the difficulty of assessing economic loss, as for example in the case of a young child, an aged parent, invalid father or other person without some sort of earning history, was very great, and the courts showed little imagination in finding ways to indicate the loss. Instead numerous restrictive formulas were developed. The action was fettered by all the immunities which had been developed to relieve the enterpriser from liability in personal injury cases, and this is still true in many jurisdictions.

Notwithstanding this attitude, today the recoveries in death cases of every character have risen greatly. The difference in the value of money can account for only a small part of the increase. Both judges and juries are refusing to pay too much attention to the restrictions which grew out of the earlier environments and have found ways to avoid them.²³ What is now happening in the death cases is paralleled by what has taken place in personal injury litigation and indeed all tort litigation. The immunities developed during the 1800's against liability for both negligent and intentional injuries have been greatly modified and in many instances wholly removed and liability today over almost the entire field of tort law is much broader and recoveries are far greater.²⁴

Double Recovery

The *death action* was explicitly designed for the protection of the family. The *survival of personal injury actions* serves a like purpose. Is there any reason to believe that the action for personal injury of a member of the family is any less so? Does the fact that the members of the family may have their own actions for personal injuries eliminate the interests of the

²³ Good examples are found in *Poff v. Penn. R.R.*, 327 U.S. 399 (1946); *Van Beeck v. Sabine Towing Co.*, 300 U.S. 343 (1937); *Nudd v. Matsoukas*, 7 Ill.2d 608, 131 N.E.2d 525 (1956); 42 VA. L. REV. 687 (1956).

²⁴ *I.N.S. v. A.P.*, 248 U.S. 215 (1918) (news service); *President and Directors of Georgetown College v. Hughes*, 130 F.2d 810 (D.C. Cir. 1942); *Bonbrest v. Kotz*, 65 F. Supp. 138 (1946) (unborn child; liability now imposed in many states); *Jensen v. Minard*, 44 Cal.2d 325, 282 P.2d 7 (1955) (firearms); *State Rubbish Collection Ass'n v. Siliznoff*, 38 Cal.2d 330, 240 P.2d 282 (1952) (emotional distress); *Hale v. Depaoli*, 33 Cal.2d 228, 201 P.2d 1 (1948) (contractors); *Summers v. Tice*, 33 Cal.2d 80, 199 P.2d 1 (1948) (firearm); *Orloff v. Los Angeles Turf Club*, 30 Cal.2d 110, 180 P.2d 321 (1947) (civil rights); *Ybarra v. Spangard*, 25 Cal.2d 486, 154 P.2d 687 (1944) (physicians); *Green v. General Petroleum Corp.*, 205 Cal. 328, 270 Pac. 952 (1928) (oil well blowout); *Hagy v. Allied Chem. & Dye Corp.*, 122 Cal. App.2d 361, 265 P.2d 86 (1953) (hearing denied by supreme court) (traveler-industrial landowner); *Noel v. Menninger Foundation*, 175 Kan. 751, 267 P.2d 934 (1954) (charitable hospital); *Inman v. Binghampton Housing Authority*, 2 N.Y.2d 137, 143 N.E.2d 895 (1957) (builder); *Mayer v. Temple Properties*, 307 N.Y. 559, 122 N.E.2d 909 (1954) (the last in a long line of litigated cases to recognize the liability of landowners to infant intruders on dangerous industrial premises); *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050 (1916) (manufacturer).

family from consideration in the determination of damages where a member is injured? In case of an injury to the child, aside from the child's action, the parent has an action for the family loss although it is brought in the name of the father or in his absence the wife or guardian. If the wife is injured the husband has his action also and that it is for the benefit of the family no one can doubt. Why not like actions by child and wife when the father and husband is injured? *Is it not because the action by husband and father carries with it the losses incurred by the family?* The very argument of "double recovery" concedes as much. All the cases reflect this argument as does the case under discussion. *What then would be more rational than in the husband and father's action to make explicit provision for the family losses?*

There is little if any disagreement among lawyers that juries in personal injury actions not only consider the earning capacity of the father or mother who is injured and his or her economic obligations to the family, but also consider all the values incident to the marital or parental relation in the determination of damages. Jurors look to the ability of the defendant to make money reparation. They likewise look to the family obligations of the victim, and the family is cared for in so far as the jury can do so within the limits of its verdict. And unless outrageous the judge will acquiesce though he may exercise his power to trim the verdict. Even though not a word is said in the court room beyond the letter of the law and even though the decorum of the jury room is legally perfect, no juror and no judge can put out of his mind and heart what he has learned about the defendant. Nor what he has learned about the needs of the family and the victim's obligations to its members. He has heard the evidence, observed the parties and their attendants, and has been keenly aware of all the undertones and overtones of the trial.

What happens in death cases explicitly takes place even in greater degree in suits for the personal injury of a member of a family and especially so if the victim is essential to the economic, emotional and spiritual life of the family. The family environment is made even more vivid by the appearance of the victim in person along with the members of his family. Whatever the letter of the law there is nothing that can divert twelve laymen, and the judge also, from doing what they think is justice as full as the defendant's financial position will permit. This is openly recognized in suits for seduction, alienation and criminal conversation. While the courts have continued to talk in the language of the individualism of the 1800's, the suits themselves have become family actions in the name of the victim, or the father or husband as the case may be.²⁵ All that needs to be done in

²⁵ See notes 12-19 *supra*. One of the most significant new extensions of tort law in the family field is the recognition of the child's interest in the integrity of the home through suit against a third person who "alienates the affections" of mother or father and thus breaks up

personal injury actions is to re-align and restate the rules of law with what takes place in the courthouse.

In the action for the injury to Mr. Deshotel,²⁶ the husband, there can be little doubt that the jury in awarding \$290,000.00 considered his whole family environment, whether permitted to do so by the letter of the law or not. The blackboard calculations of the husband's losses were by no means conclusive on what was read into them. In the wife's case her counsel clearly recognized that the family's economic losses had been included in the recovery for her husband by not seeking further recovery for that loss. This was good sense. Probably even better judgment would have been displayed by not bringing a second suit to recover for the injury to her marital relations.²⁷ The jury in the husband's suit in allowing recovery for the family's economic loss could make no such nice demarcation between her economic loss and loss of companionship, comfort, and the other values of the marital relation. They too are matters of substance and lend themselves to no sharp discrimination in measuring the joint losses of husband, wife, and children. They are community losses and should be recovered in the husband's action as in other actions brought by him for protection of the family's interests. And here lies the heart of the court's policy of refusing the wife's action on the basis of "double recovery." To allow another jury in her case to go about assessing her losses individually would necessarily include what was common to the family and what the former jury must have considered in giving so large a recovery in the husband's suit.

It will be noticed that the court did not rule out the recovery of the wife's losses, or that of their children, if any, in the husband's action. The court's argument of "double recovery" speaks otherwise. It merely refused to recognize a separate action on the part of other members of the family for

the home. Liability to the child by the third person was first recognized in *Daily v. Parker*, 152 F.2d 174 (7th Cir. 1945). The doctrine has been approved in several states. See *Miller v. Monsen*, 228 Minn. 400, 37 N.W.2d 543 (1949) (mother enticed to leave home). The doctrine is rejected in *Henson v. Thomas*, 231 N.C. 173, 56 S.E.2d 432 (1949) (see dissent of Justice Seawell for a masterpiece of judicial writing), and more recently rejected in *Whitcomb v. Huffington*, 180 Kan. 340, 304 P.2d 465 (1956); *Scholberg v. Itnyre*, 264 Wis. 211, 58 N.W.2d 698 (1953). In the cases that reject the doctrine it would seem that the courts narrow their perspectives too strictly. If the family and home are not entitled to protection in these cases there would seem little basis for protecting them against any other danger or injury, for here nothing can be said in behalf of the defendant. It may be added that the suit is ordinarily for the innocent spouse, and in such cases the children's losses should be included in his or her suit for alienation, criminal conversation or whatever the action may be. In cases in which the other spouse is for some reason disqualified from bringing the suit, then it should be the child's suit.

²⁶ *Deshotel v. Atchison, T.&S.F. Ry.*, 144 Cal. App.2d 224, 300 P.2d 910 (1956).

²⁷ One may speculate what the attitude of the supreme court would have been had the husband's recovery been very small, say \$25,000. In the *Hitaffer* case no doubt the court was influenced by the fact that the husband was limited by the wholly inadequate provisions of Workmen's Compensation.

the family and community losses. The question now is why did not the court explicitly recognize the right of recovery for the family losses as part of the husband's recovery and make explicit by its decision that hereafter such losses may be expressly included in the husband's recovery? The court had the power to make explicit through decision what has heretofore been concealed under existing procedures and practices, and it also had the power to say that in the future such items of recovery must be sought once for all in the suit of the victim or be forever barred.²⁸ If the court had so said its decision would no doubt have been accepted and applauded by the profession. Doubtless one of the reasons for not taking this step was because the instructions of the trial court did not permit the jury to go so far afield from the husband's individual injuries, and the supreme court would have had doctrinal difficulty in supporting its holding that the jury had included the losses of the family in its verdict. Thus the posture of the wife's case as well as the posture of the husband's case made such a step embarrassing for the court.

But the court's denial of the wife's separate suit does not end the matter. Should some trial court hereafter by express instructions in a suit for the personal injury of husband, wife or child include the losses to the family community as items of recovery the supreme court would be given the opportunity to approve such instructions without embarrassment. Such a method of dealing with the family interests would preserve the policy of the common law that vested all such rights of suit in the father as head of the family. With the recognition of separate rights of suit in recent years by any member of the family who suffers personal injury, there would be no departure from this policy by vesting the right of suit for the family losses in the injured member. In one action all matters growing out of the injury would be litigated and all interests given protection. This would be wholly consistent with the objectives of modern procedure. Nor would it be necessary that all members of the family be formally joined as parties. The suit would be in the nature of a class action.

Legislative or Judicial Function

Courts not infrequently refuse to go forward in tort law until legislative sanctions have been given. There is no doubt about the legislative function and power in such cases. But also there is no doubt as to the function and power of the courts for tort law is particularly the court's own domain. The only question is whether in the particular case it is good policy to await legislative action. Tort law has been and will continue to be developed primarily through the judicial process in case by case litigation. Probably most

²⁸ See *Great No. Ry. v. Sunburst Oil & Ref. Co.*, 287 U.S. 358 (1932); Kocoureb, *Retro-spective Decisions and Stare Decisis and a Proposal*, 17 A.B.A.J. 180 (1931).

lawyers would agree this is the best way to develop tort law. It is sometimes called "judicial legislation" but only so by those who do not like what the court does or those who are ignorant of the procedural and historical differences between decisional law and the legislative process. There are many arguments against awaiting legislative action in the common law area of torts. Legislatures are not so expert in tort law and tort law policies as are judges. The legislative record in this area is extremely discordant and discouraging.²⁹ Legislation usually covers too much or too little and is frequently couched in restrictive or ambiguous terms which the courts must modify and refashion to meet their needs. Moreover it is more rigid and less subject to modification in view of change in either transactional or environmental facts.

The time of legislatures is so absorbed with public affairs, budgets, police problems, provision for and regulation of public enterprises, taxation, and a score of other pressing problems that there is neither time, energy or interest left for the everyday problems of tort law. It is rare that tort legislation gets either the legislative ear or its approval unless it be supported by strong pressure groups who come with statutes already prepared and supported by persuasive advocates. It is hard to reduce the refinements of tort doctrine to statute form. About all that can be safely done is to give the courts direction by general terms and leave the refinements to be worked out through the litigation process. More frequently legislation in the tort field gives the courts more trouble than it gives assistance. The judicial history of guest statutes and of some of the provisions of traffic codes weigh heavily against the intrusion of legislatures into the law of torts.

Legislative Examples

The three important instances in which legislatures have attempted to give direction to tort law in the family relations area are the death acts, dram shop acts and the abolition of actions for breach of promise, seduction, alienation and criminal conversation.³⁰ The first was rendered abortive by the courts as above discussed. But it is to be noted that the legislatures have done little to correct the errors of the courts and at present the courts themselves are for the most part having to clear the acts of most of the crippling doctrines by which their purpose was so largely defeated. The second again

²⁹ No better examples are found than in the death and survival statutes. See PROSSER, TORTS 705-19 (2d ed. 1955). Parallels of the story told in *Cort v. Steen*, 36 Cal.2d 437, 224 P.2d 723 (1950) and *Hunt v. Authier*, 28 Cal.2d 288, 169 P.2d 913 (1946) can be found in nearly all jurisdictions. The California Legislature finally enacted a rational survival statute in 1949 which is now found in CAL. CIV. CODE § 956, CAL. CODE CIV. PROC. §§ 376-77. See also the piecemeal legislation reflected in 3 VERNIER, AMERICAN FAMILY LAWS 87-89; 4 *id.* 461-77 (1935).

³⁰ See CAL. CIV. CODE § 43.5.

filled a gap that should have been filled by the courts themselves.³¹ The third was the result of the propaganda of certain groups that had special interests to serve by the abolition of the actions. The legislation was ill conceived and is creating far more difficulties for the courts than it settled. Moreover, its essential unjustness is more and more becoming apparent and the courts must spend a great deal of time whittling away at the provisions of the legislation in order to give the family protection at its most vulnerable point.³²

Now and then the legislature is very helpful on specific points where the courts have become so entangled in their doctrines that they seem unable to work themselves free. The recent California legislative act³³ declaring that damages awarded a married person for personal injuries are the separate property of such person achieves a good result, but only so in view of the court's inability to allow such recovery as community property against the defense of contributory negligence of the other spouse.³⁴ No doubt the impulse that made the court hold such damage to be community property in the first instance was a recognition of the fact that the loss was one suffered by the whole family rather than merely the individual. But the contributory negligence doctrine of one of the spouses as a defense to the action was permitted to cancel out the benefits of the doctrine and defeated recovery for

³¹ The California court attempted to meet the problem as a matter of common law in *Cole v. Rush*, 271 P.2d 47 (Cal. 1954), but later vacated its judgment and reverted to orthodox common law. *Cole v. Rush*, 45 Cal.2d 345, 289 P.2d 450 (1955). The common law rule is orthodoxly stated in *State v. Hatfield*, 197 Md. 249, 78 A.2d 754 (1951). For excellent treatment of Illinois Dram Shop Act see 51 Nw. U. L. REV. 775 (1957); *Kiriluk v. Cohn*, 148 N.E.2d 607 (Ill. App. 1958) (wife killed drunken husband in self defense, \$100,000 recovery for loss of support against sellers of liquor). See Olgive, Moran, Voelker, Appleman, Horsley, Gambill and Bliss (symposium), *Actions under the Illinois Dram Shop Act*, ILLINOIS LAWS FORUM 175-284 (1958).

³² It is interesting to notice how the courts are falling back on their equitable powers to protect the family in absence of adequate legal remedies. In *Henley v. Rockett*, 243 Ala. 172, 8 So. 2d 852 (1942), the statute having abolished the action for alienation the court granted an injunction against defendant. See *Webber v. Gray*, 307 S.W.2d 80 (Ark. 1957), in which the Arkansas court granted injunction against the aggressions of a woman who was making life miserable for the husband and the family.

In some states the statute abolishing the common law remedies has produced a rash of litigation. See *Morris v. MacNab*, 25 N.J. 271, 135 A.2d 657 (1957); *Grobart v. Grobart*, 5 N.J. 161, 74 A.2d 294 (1950); *Magierowski v. Buckley*, 39 N.J. Super. 534, 121 A.2d 749 (1956); *Stickles v. Manss*, 36 N.J. Super. 95, 114 A.2d 771 (1955). See PROSSER, TORTS 697 (2d ed. 1955).

³³ CAL. CIV. CODE § 163.5. See Comment, 9 HASTINGS L.J. 291 (1958).

³⁴ *Kesler v. Pabst*, 43 Cal.2d 254, 273 P.2d 257 (1954). If the husband is dead then his contributory negligence does not defeat action: *Flores v. Brown*, 39 Cal.2d 622, 248 P.2d 922 (1952); Comment, *The Impact of the Community Property System on Tort Suits*, 42 CALIF. L. REV. 486 (1954); Note, 42 CALIF. L. REV. 310 (1954). Also see Green, *Texas Death Act*, 26 TEXAS L. REV. 461, 485 (1948) and *Soto v. Vandeventer*, 56 N.M. 483, 245 P.2d 826 (1952) (repudiates defense).

anyone. It would probably have been much better for the court to have held that the injured spouse could recover for the community but because of the negligence of the other spouse any loss to him must not be included.³⁵ By not meeting the situation, the courts practically forced the legislature to make the recovery the separate property of the spouse though in fact the whole family is concerned. Incidentally the logic of the situation thus created should compel the court to recognize the right of the wife to recover for her loss of consortium as her separate property, and the refusal to do so is logically in conflict with the legislative judgment expressed in this provision of the Civil Code.

Recognition of the Family Loss

But logic neither more than doctrine decides cases though neither should be needlessly offended. The court saw in the *Deshotel* case what it considered injustice—permitting the wife to recover for her loss of consortium which necessarily is a product of the community marital relations. It refused to countenance the injustice of a second suit covering much if not all the same ground the jury must have considered in her husband's action. The problem now awaits legislative action which will be slow if it ever comes. Why would not the easier and more rational conclusion be simply to enlarge the coverage of the victim's suit to include the whole of the family loss? There could be no injustice here. The family has suffered from the victim's hurt. His obligations to the family and the family's obligations to him are both greatly affected. Why not openly and avowedly give the law's recognition to the fact? Especially so when the call of the family environment cannot be kept out of the picture? But inasmuch as the court has remitted the problem to the legislature, why should it not clarify this problem by providing that in all suits based on the injury to any member of the family the interests of the family shall be taken into account and damages, if any, shall be awarded for the family's loss as well as for the injuries to the individual? In cases where the two can be separated the jury can be instructed to make separate awards to the individual and to the community. In this way the family's interests would be given the protection they deserve without further litigation. All that would seem to be required is for either

³⁵ In the death cases many jurisdictions simply deny any recovery for the negligent beneficiary even though the recovery is in gross. *Nudd v. Matsoukas*, 7 Ill.2d 608, 131 N.E.2d 525 (1956) (repudiating its doctrine to the contrary as stated in *Hazel v. Hoopston-Danville Motor Bus Co.*, 310 Ill. 38, 141 N.E. 392 (1923)); *Lindley v. Sink*, 218 Ind. 1, 30 N.E.2d 456 (1940). For exhaustive discussion of contributory negligence as defense to death action see *Buckley v. Chadwick*, 45 Cal.2d 183, 288 P.2d 12 (1955). See dissent by Carter, J., *id.* at 203, 288 P.2d at 24; Nourse, *Is Contributory Negligence of Deceased a Defense to a Wrongful Death Action?*, 42 CALIF. L. REV. 310 (1954).

the court or the legislature to lift its eyes so as to see the problem in perspective.

Indeed, a very recent decision would seem to indicate that the Supreme Court of Washington has already lifted up its eyes. In *Erhardt v. Havens, Inc.*,³⁶ decided on October 30, 1958, the infant appellants sued respondent hospital for their loss due to negligence resulting in the permanent paralysis of their mother. The court in denying their action concluded:

“With commendable forthrightness appellants’ counsel concedes that this action is not sanctioned by the common law but that the court should extend the common law and create it. This we might do under compelling necessity, but we find no occasion to do so here because the father himself, who is the guardian of the infant appellants, may maintain that action in his own name, and, by the respondent’s concession, recover every item of damage claimed by the appellants.”

³⁶ Wash., 330 P.2d 1010 (1958).