THE EQUAL RIGHTS AMENDMENT: A WOMAN'S RIGHT TO RECOVER FOR LOSS OF CONSORTIUM

Hopkins v. Blanco, 457 Pa. 90, 320 A.2d 139 (1974)

Plaintiff's husband developed bladder and bowel incontinence, paraplegia, and malfunction of his sexual organs after being a patient in the care of the defendants. Based on these injuries, plaintiff's husband brought an action in negligence and plaintiff sued for loss of consortium. The trial court dismissed plaintiff's complaint, holding that it failed to state an actionable injury. On appeal, the superior court reversed and remanded the issue for a consolidated trial with the husband's action.[1] After granting allocatur, the Supreme Court of Pennsylvania affirmed the superior court's decision and *held*: Under the Pennsylvania equal rights amendment,[2] a wife must be allowed a right to recover for loss of consortium equivalent to that which is enforced in favor of a husband.[3]

The development and expansion of the action for loss of consortium reflects the changing socio-legal role of women over the past three hundred years.[4] At common law, a wife was little more than a chattel belonging to her husband,[5] and, as the definition of consortium evolved, emphasis was placed on the domestic services she owed her husband.[6] Interference with a husband's right of consortium gave rise

1. Hopkins v. Blanco, 224 Pa. Super. 116, 302 A.2d 855 (1972).

2. PA. CONST. art. 1, § 27 provides: "Equality of right under the law shall not be denied or abridged in the Commonwealth of Pennsylvania because of the sex of the individual."

3. Hopkins v. Blanco, 457 Pa. 90, 320 A.2d 139 (1974).

4. The definition of consortium has always depended upon the social concept of marital roles. As societal standards have changed, the nature of the action has been altered. *See* Holbrook, *The Change in the Meaning of Consortium*, 22 MICH. L. REV. 1 (1923); Loppman, *The Breakdown of Consortium*, 30 COLUM. L. REV. 651 (1930).

5. At common law a woman's identity was incorporated into that of her husband or into the marriage entity. 1 W. BLACKSTONE, COMMENTARIES *442:

> [T]hat is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband . . . .

6. The analogy to the master-servant relationship was described in Guy v. Livesey, 79 Eng. Rep. 428, 428 (K.B. 1629) (footnote omitted):

> [T]he action is not brought in respect of the harm done to the wife, but it is brought for the particular loss of the husband, for that he lost the company of his wife, which is only a damage and loss to himself, for which he shall

to a cause of action distinct from any right to recover directly for injuries sustained by the wife.[7] Since the husband owed no reciprocal services to the wife, she was denied a corresponding cause of action.[8] In the nineteenth century, this service-centered conception of consortium gave way to a view emphasizing the more intangible characteristics of marriage.[9] This trend reflected the increasing equality of the social roles of women and men. After passage of the Married Women's Acts,[10] a husband was no longer the legal master of his wife, and the cause of action itself underwent a transition.[11] Increasingly,

---

have this action, as the master shall have for the loss of his servant's service.

See Boden v. Del-Mar Garage, Inc., 205 Ind. 59, 185 N.E. 860 (1933); Feneff v. New York Cent. & H.R.R.R., 203 Mass. 278, 89 N.E. 436 (1909); Jacobson v. Siddal, 12 Ore. 280, 7 P. 108 (1885); Hyde v. Scyssor, 79 Eng. Rep. 462 (K.B. 1620).

7. Originally, a husband could maintain his action only upon intentional interference with consortium. *See* Hyde v. Scyssor, 79 Eng. Rep. 462 (K.B. 1620). It was not until the expansion of negligence actions in the nineteenth century that negligent interference became actionable. *See* Skoglund v. Minneapolis St. Ry., 45 Minn. 330, 47 N.W. 1071 (1891); Blair v. Chicago & A. Ry., 89 Mo. 334, 1 S.W. 367 (1886); Leaphart & McCann, *Consortium: An Action for the Wife*, 34 MONT. L. REV. 75, 79 (1973).

8. A wife had no right to the services of her husband and was therefore denied any recovery. In Lynch v. Knight, 11 Eng. Rep. 854 (H.L. 1861), a third party wrongfully caused a husband to send his wife away from his home. The husband and wife sought recovery on the basis of the wife's loss of consortium. Denying recovery, the court stated:

> The loss of such service of the wife, the husband, who alone has all the property of the married parties, may repair by hiring another servant; but the wife sustains only the loss of the comfort of her husband's society and affectionate attention, which the law cannot estimate or remedy.

Id. at 863. Even at that early date, Lord Chancellor Campbell, dissenting, argued that the wife had presented a valid cause of action and that if the alienation was a direct consequence of the defendant's act, recovery should be permitted. *Id.* at 860. *See* 3 W. BLACKSTONE, COMMENTARIES, *142.

9. This expanded concept of consortium included considerations seemingly relevant to both husband and wife, such as conjugal society, companionship, and sexual relations. *See, e.g.*, Woodson v. Bailey, 210 Ala. 568, 98 So. 809 (1924); Foot v. Card, 58 Conn. 1, 18 A. 1027 (1889); Comment, *A Wife's Right to Recover for the Loss of Consortium*, 2 CUMBER.-SAM. L. REV. 189 (1971).

10. The so-called Married Women's Acts or Emancipation Acts were enacted by most jurisdictions in the late nineteenth century. They were intended to abolish restrictions placed upon married women by the common law, but were generally interpreted as creating no new rights. Holbrook, *supra* note 4, at 4, stated:

> The different Married Women's Acts are almost infinitely various in their specific provisions. But they agree in their general purpose to ameliorate the disadvantageous position in which the woman was placed by common law.

In some states the acts had a profound effect on the previously controlling definition of consortium. *See, e.g.*, Price v. Price, 91 Iowa 693, 60 N.W. 202 (1894); Westlake v. Westlake, 34 Ohio St. 621 (1878).

11. In some instances, claims by husbands based on loss of consortium were no

the courts came to view consortium as the marital rights of each party,[12] and some states began to allow wives to recover for willful or malicious interference with consortium.[13] It was not until 1950, however, in *Hitaffer v. Argonne Co.*,[14] that the wife's right to recover for loss of consortium based on negligent injury to her husband was recognized.[15]

A majority of jurisdictions have followed *Hitaffer* on the ground that the law should no longer tolerate discrimination based on an archaic conception of human rights.[16] Other jurisdictions have refused to rec-

---

longer limited to the traditional "services-due" argument. In Bigaouette v. Paulet, 134 Mass. 123 (1883), the plaintiff, alleging that the defendant had raped his wife, based his action upon loss of consortium even though he had suffered no loss of services. Allowing recovery, the court stated:

> A husband is not the master of his wife, and can maintain no action for the loss of her services as his servant. His interest is expressed by the word *consortium*,—the right to the conjugal fellowship of the wife, to her company, cooperation and aid in every conjugal relation.

Id. at 124 (emphasis original). *See* Little Rock Gas & Fuel Co. v. Coppedge, 116 Ark. 334, 172 S.W. 885 (1915).

12. In some instances when wives sought to recover for loss of consortium, courts simply abolished the action rather than adjust to the changing social standards. *See* Marri v. Stamford St. R.R., 84 Conn. 9, 78 A. 582 (1911); Blair v. Seitner Dry Goods Co., 184 Mich. 304, 151 N.W. 724 (1915).

13. In Lockwood v. Wilson H. Lee, 144 Conn. 155, 158, 128 A.2d 330, 331 (1956), the court held that when injury to the spouse was the result of *negligence*, there could be no recovery for loss of consortium. The court distinguished cases permitting recovery for loss of consortium in an action for alienation of affection, an intentional tort. This distinction paralleled the earlier development of the husband's action. *See* note 7 *supra*. *See also* Henley v. Rockett, 243 Ala. 172, 8 So. 2d 852 (1942); Foot v. Card, 58 Conn. 1, 18 A. 1027 (1889); Reppert v. Reppert, 40 Del. 492, 13 A.2d 705 (1940); Ramsey v. Ramsey, 34 Del. 576, 156 A. 354 (1931); Holmes v. Holmes, 133 Ind. 386, 32 N.E. 932 (1893); Westlake v. Westlake, 34 Ohio St. 621 (1897).

14. 183 F.2d 811 (D.C. Cir.), *cert. denied*, 340 U.S. 852 (1950).

15. A wife's right to recovery for negligently-caused loss of consortium was first recognized in Hipp v. E.I. Dupont de Nemours, Inc., 182 N.C. 9, 108 S.E. 318 (1921). That case, however, was overruled four years later. Hinnant v. Tidewater Power Co., 189 N.C. 120, 126 S.E. 307 (1925). It is interesting to note that Holbrook, *supra* note 4, written in the period between the two decisions, found *Hipp* to be very persuasive and predicted it would lead to another development in the law of consortium.

16. Twenty-nine jurisdictions have affirmed a wife's right to recover. *See* Luther v. Maple, 250 F.2d 916 (8th Cir. 1958) (applying Nebraska law); Hitaffer v. Argonne Co., 183 F.2d 811 (D.C. Cir.), *cert. denied*, 340 U.S. 852 (1950); Duffy v. Lipsman-Fulkerson & Co., 200 F. Supp. 71 (D. Mont. 1961) (applying Montana law); Swartz v. United States Steel Corp., 293 Ala. 439, 304 So. 2d 881 (1974); Schreiner v. Fruit, 519 P.2d 462 (Alas. 1974); Glendale v. Brodshaw, 108 Ariz. 582, 503 P.2d 803 (1972); Missouri Pac. Transp. Co. v. Miller, 227 Ark. 351, 299 S.W.2d 41 (1957); Crouch v. West, 29 Colo. App. 72, 477 P.2d 805 (1970); Yonner v. Adams, 53 Del. 229, 167 A.2d 717 (1961); Gates v. Foley, 247 So. 2d 40 (Fla. 1971); Smith v. Tri-State Culvert Mfg. Co., 126 Ga. App. 508, 191 S.E.2d 92 (1972); Nichols v. Sonneman, 91 Idaho 199, 418

ognize any right of action in the wife equivalent to that vested in the husband.[17] Infrequent efforts to enforce the wife's claims by recourse to the equal protection clause of the Federal Constitution have gained limited support.[18]

In 1960, the Supreme Court of Pennsylvania noted that the justification for the husband's action for loss of consortium had disappeared with the common law concept of the marriage relationship and determined that the action should not be extended to the wife.[19] The court, however, viewed abolition of the action as a legislative responsibility,[20]

P.2d 562 (1966); Dini v. Naiditch, 20 Ill. 2d 406, 170 N.E.2d 881 (1960); Troue v. Marker, 253 Ind. 284, 252 N.E.2d 800 (1969); Accuff v. Schmit, 248 Iowa 272, 78 N.W. 2d 480 (1956); Johnson v. Lohre, 508 S.W.2d 785 (Ky. 1974); Deems v. Western Md. Ry., 247 Md. 95, 231 A.2d 514 (1966); Montgomery v. Stephan, 359 Mich. 33, 101 N.W.2d 227 (1960); Thill v. Modern Erecting Co., 284 Minn. 508, 170 N.W.2d 865 (1969); Novak v. Kansas City Transp., Inc., 365 S.W.2d 539 (Mo. 1963); General Elec. Co. v. Bush, 88 Nev. 360, 498 P.2d 366 (1972); LaBonte v. National Gypsum Co., 110 N.H. 314, 269 A.2d 634 (1970); Ekalo v. Constructive Serv. Corp., 46 N.J. 82, 215 A.2d 1 (1965); Millington v. Southeastern Elevator Co., 22 N.Y.2d 498, 239 N.E.2d 897, 293 N.Y.S.2d 305 (1968); Clouston v. Remlinger Oldsmobile-Cadillac, Inc., 22 Ohio St. 2d 65, 258 N.E.2d 230 (1970); Ross v. Cuthbert, 239 Ore. 429, 397 P.2d 529 (1965); Hopkins v. Blanco, 457 Pa. 90, 320 A.2d 139 (1974); Hoekstra v. Helgeland, 78 S.D. 82, 98 N.W.2d 669 (1959); Moran v. Quality Aluminum Casting Co., 34 Wis. 2d 542, 150 N.W.2d 137 (1967).

17. Some courts have justified their refusal to recognize the wife's action by reasoning that such a break with the common law should occur only as result of legislative action. *See, e.g.*, Smith v. United Constr. Workers, 271 Ala. 42, 122 So. 2d 153 (1960); Potter v. Schafter, 161 Me. 340, 211 A.2d 891 (1965); Nelson v. A.M. Lockett & Co., 206 Okla. 334, 243 P.2d 719 (1952); Page v. Winter, 240 S.C. 516, 126 S.E.2d 570 (1962).

Other courts have argued that such a right might result in double recovery. *See, e.g.*, Deshotel v. Atchinson, T. & S.F. Ry., 50 Cal. 2d 664, 328 P.2d 449 (1958); Hoffman v. Dautel, 192 Kan. 406, 388 P.2d 615 (1964); Roseberry v. Starkovich, 73 N.M. 211, 387 P.2d 321 (1963). Given the present understanding of consortium, this argument is unconvincing—if it applies to the wife, it should apply equally to the husband.

18. Where the constitutional issue has been raised, it has sometimes prevailed. *See* Karczewski v. Baltimore & O.R.R., 274 F. Supp. 169 (N.D. Ill. 1967); Owen v. Illinois Baking Corp., 260 F. Supp. 820 (W.D. Mich. 1966); Gates v. Foley, 247 So. 2d 40 (Fla. 1971); Leffler v. Wiley, 15 Ohio App. 2d 67, 239 N.E.2d 235 (1968). *But see* Miskunas v. Union Carbide Corp., 399 F.2d 847 (7th Cir. 1968), *cert. denied*, 393 U.S. 1066 (1969); Krohn v. Richardson-Merrill, Inc., 219 Tenn. 37, 406 S.W.2d 166 (1966), *cert. denied*, 386 U.S. 970 (1967).

19. Neuberg v. Bobowicz, 401 Pa. 146, 162 A.2d 662 (1960). The wife sought recovery for loss of consortium, arguing that there was no longer any justification for allowing the action to the husband while denying it to the wife. The court acknowledged that the husband was allowed recovery in Pennsylvania, but expressed its disapproval of the action for loss of consortium, describing the action as an anachronism belonging to an earlier day and age. *Id.* at 151-52, 162 A.2d at 664-65.

20. *Id.* at 157-58, 162 A.2d at 667. Many courts have similarly justified their refu-

and Pennsylvania therefore remained in the position of allowing the action to one spouse and denying it to the other.[21] The equal rights amendment to the Pennsylvania constitution,[22] effective in 1971, provided that the determination of individual rights arbitrarily on the basis of sex was no longer permissible in the state.

In *Hopkins v. Blanco*,[23] the plaintiff made three distinct arguments for extending the action to the wife.[24] First, she argued that on the basis of the equality of the sexes, the court should adopt a new definition of consortium that would allow either spouse to recover for injury to his or her marital interests.[25] Although this reasoning was implicit in the decision, it was not, in the court's opinion, the compelling consideration. Second, plaintiff argued that extension of the action to the wife was mandated by the equal protection clause of the fourteenth amendment of the Federal Constitution. This position had been rejected previously by the Pennsylvania Supreme Court,[26] and was not

---

sal to extend the right to the wife. *See* note 17 *supra*. To date, at least four states have enacted legislation dealing with the issue. *See* COLO. REV. STAT. ANN. § 14-2-209 (1973); KY. REV. STAT. § 411.145(2) (Supp. 1974); N.H. REV. STAT. ANN. § 507:8-a (1968); ORE. REV. STAT. § 108.010 (1973).

21. This position was twice reaffirmed by the Pennsylvania Supreme Court. Brown v. Glenside Lumber & Coal Co., 429 Pa. 601, 240 A.2d 822 (1968); Pacewicz v. Young, 401 Pa. 191, 163 A.2d 91 (1960).

After the decision in Neuberg v. Bobowicz, 401 Pa. 146, 162 A.2d 622 (1960), *see* note 19 *supra*, support for preserving the husband's right of action increased. *See* Link v. Highway Express Lines, Inc., 444 Pa. 447, 282 A.2d 727 (1971); Brown v. Philadelphia Transp. Co., 437 Pa. 348, 263 A.2d 423 (1970).

22. PA. CONST. art. 1, § 27, *quoted in* note 2 *supra*.

23. 457 Pa. 90, 320 A.2d 139 (1974).

24. Brief for Appellee at 4, Hopkins v. Blanco, 457 Pa. 90, 320 A.2d 139 (1974).

25. Most courts that extended the action to women reasoned that rights and duties under the law must not offend contemporary social standards. *See* cases cited note 16 *supra*. As was stated in B. CARDOZO, THE GROWTH OF THE LAW 105-06 (1927):

> Social, political and legal reforms had changed the relations between the sexes, and put woman and man upon a plane of equality. Decisions founded upon the assumption of a bygone inequality were unrelated to present-day realities, and ought not be permitted to prescribe a rule of life.

26. Although the issue was apparently not raised by the parties, the dissent in Brown v. Glenside Lumber & Coal Co., 429 Pa. 601, 605, 240 A.2d 822, 823 (1968), emphasized the constitutional argument:

> [T]o determine eligibility for relief on the basis of the sex of the party seeking recovery creates a totally irrational classification and thus denies equal protection. Simply, I believe that the time has come for this Court to "fish or cut bait"—either to permit both the husband and wife to bring the action or to deny the right to both.

The argument has prevailed in other jurisdictions. *See* cases cited note 18 *supra*.

The Supreme Court's ruling in Reed v. Reed, 404 U.S. 71 (1971) established that a

addressed in the opinion. The third argument, based on the Pennsylvania equal rights amendment, convinced the court that, since the action was available to the husband, the amendment required that it be equally available to the wife.

The proposed equal rights amendment to the Federal Constitution closely resembles the Pennsylvania amendment, and may be expected to have similar consequences.[27] One court has noted that the amendment will have little effect on the law of marriage and divorce, except to move it more expeditiously in the direction it is already heading.[28] As the court in *Hopkins* observed:

> The obvious purpose of the Amendment was to put a stop to the invalid discrimination which was based on the sex of the person. The Amendment gave legal recognition to what society had long recognized, that men and women must have equal status in today's world.[29]

Indeed, though modern society may recognize the equality of men and women, remnants of the common law still deny equal legal rights. To the exent that the law of marriage and divorce reflects that bias, an equal rights amendment would remedy the inconsistency between society's values and the law.[30] As the history of consortium shows, an equal rights amendment may not always be necessary, but when inequity lingers long after it has lost any social justification, constitutional amendment provides an immediate, compelling remedy. Although

---

statute which arbitrarily discriminated on the basis of sex is unconstitutional. This ruling, however, does not seem to have resulted in any direct inroads into the law of domestic relations. The *Reed* decision and others should encourage some equalization of marital rights. *See* Frontiero v. Richardson, 411 U.S. 677 (1973); Brenden v. Independent School Dist., 477 F.2d 1292 (8th Cir. 1973); Eslinger v. Thomas, 476 F.2d 225 (4th Cir. 1973); Green v. Waterford Bd. of Educ., 473 F.2d 629 (2d Cir. 1973).

27. *See generally Symposium—The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 YALE L.J. 871 (1971); Note, *Sex Discrimination and Equal Protection: Do We Need a Constitutional Amendment?*, 84 HARV. L. REV. 1499 (1971).

28. Corso v. Corso, 59 Pa. D. & C.2d 546, 555 (C.P. Allegheny County 1972).

29. 457 Pa. at —, 320 A.2d at 140.

30. Although the law of domestic relations has made adjustments as the premises underlying the common law have changed, these adjustments have occurred only after a substantial time-lag. Other areas of Pennsylvania law were also affected by the Pennsylvania equal rights amendment. *See, e.g.*, Conway v. Dana, 456 Pa. 536, 318 A.2d 324 (1974) (support of minor children); Wiegand v. Wiegand, 226 Pa. Super. 278, 310 A.2d 426 (1973) (alimony for men); DeRosa v. DeRosa, 60 Pa. D. & C.2d 71 (C.P. Delaware County 1972) (counsel fees for wife); Corso v. Corso, 59 Pa. D. & C.2d 546 (C.P. Allegheny County 1972) (alimony for men); Kehl v. Kehl, 57 Pa. D. & C.2d 164 (C.P. Allegheny County 1972) (counsel fees for wife).

courts in Pennsylvania had previously spoken of the equal position of wife and husband,[31] it was not until the amendment supplied the conclusive argument that the courts acknowledged equal rights for loss of consortium. While the law was moving in that direction, it had been doing so for three hundred years. The equal rights amendment injected enforceable legal significance into the words uttered by the court when it declared that arbitrary discrimination in marriage on the basis of sex was unjust: "Today a husband and wife are equal partners in a marital relationship, and, as such, should be treated equally under the law with respect to that relationship."[32]

31. *See, e.g.*, Neuberg v. Bobowicz, 401 Pa. 146, 162 A.2d 662 (1960).
32. Hopkins v. Blanco, 457 Pa. 90, —, 320 A.2d 139, 140 (1974).