a future date, the attempted gift is *in futuro* and fails.[15] On the other hand, if the condition does not necessarily precede the vesting of such right, but may accompany it or follow it, the condition is a condition subsequent[16] and the gift is valid. Though there is no implied-in-fact condition involved, nor does it appear that the law would imply one, there is the problem as to whether things given by a mother to her youngest daughter "in anticipation of marriage" makes the gift subject to an express condition precedent. The facts show that the daughter was unmarried at the time of placing the blanket in the chest, but do not disclose whether or not she was married at the time of her mother's death. Thus, the acts of the donor in the principal case are entirely consistent with the possibility that the mother made a gift subject to a condition precedent, yet the court easily found that such acts corroborated an intent to make an absolute gift inter vivos. It is submitted that the court placed too much emphasis on the statement by the mother, and that the facts, being open to an interpretation inconsistent with the statement, were not sufficient to validate a parol gift of the blanket, much less the money contained therein.

IRVING MALNIK

TORTS — A WIFE'S RIGHT TO RECOVER FOR LOSS OF CONSORTIUM DUE TO THE NEGLIGENT INJURY OF HER HUSBAND. Plaintiff's husband was negligently injured by one of defendant's employees. As a result of the severe bodily injuries sustained by her husband, the plaintiff was deprived of any future sexual relations with him.

She brought an action to recover for the negligent injury to her consortium. In reversing the lower court's dismissal of the complaint, the court recognized that all other jurisdictions denied recovery to the wife under such circumstances. Nevertheless, the Court of Appeals chose to disregard the numerous precedents holding the wife has no cause of action on the ground that those precedents were based on faulty reasoning. In a comprehensive opinion, Judge Clark exhaustively reviewed the cases denying recovery and rejected the reasons for the denial

15. Walden's Administrators v. Dixon, 5 T.B. Mon (Ky.) 176 (1827); Moore v. Layton, 147 Md. 244, 127 Atl. 756 (1925).

16. Beatty's Estate v. Western College, 177 Ill. 280, 52 N.E. 432 (1898).

as ill-founded. The essence of the court's opinion was that the so-called sentimental elements of consortium (i. e., affection, companionship, sexual relations, and the like)[1] are legally recognized interests protected by all courts against intentional invasion; that the injuries to the consortium of one spouse arising out of negligent injury to the other spouse are neither too remote nor consequential within the rules of proximate cause; and that it is utterly illogical and inconsistent to afford redress to the husband for injury to the sentimental aspects of his consortium arising out of negligent injury to his wife and to deny the same relief to the wife when her husband is negligently injured.[2]

Prior to the *Argonne* case the authorities were unanimous in denying a cause of action to the wife when her husband was negligently injured.[3] The *Restatement of Torts* denies any sort of recovery to the wife where the act of the defendant is not directed at the marriage relation itself.[4] On the other hand the legal writers, arguing for a recovery of the wife, have been almost unanimous in condemning the existing case law,[5] and

1. The courts commonly refer to all those other elements composing the consortium other than the right to material services as the *sentimental* elements of consortium.

2. Hitaffer v. Argonne Co., Inc., 183 F.2d 811 (D.C. Cir. 1950). An additional point involved in the case was whether the broadly worded workmen's compensation statute of the District barred an action of this kind. It was held that it did not.

3. See *infra* notes 8, 13, 14, 17 and 22. See Notes, 5 A.L.R. 1049 (1918); 59 A.L.R. 680 (1928). The only previous case permitting recovery by the wife for a negligent injury to her husband was Hipp v. E. I. Dupont de Nemours & Co., 182 N.C. 9, 108 S.E. 318 (1921). This case was overruled in Hinnant v. Tide Water Power Co., 189 N.C. 120, 126 S.E. 307 (1925). In a recent Georgia case the six man Court of Appeals split evenly on the issue whether a wife could recover. The discussion was necessarily dicta, however, for it was found that the defendant owed no duty of ordinary care to the injured husband. McDade v. West, 80 Ga. App. 481, 56 S.E.2d 299 (1949).

4. "A married woman is not entitled to recover from one who, by his tortious conduct against her husband has become liable to him for illness or other bodily harm caused thereby to any of her marital interests or for any expense incurred in providing medical treatment for her husband." RESTATEMENT, TORTS § 695 (1938). North Carolina appears to be the only state going so far as to allow a wife to recover medical expenses incurred in caring for her negligently injured husband. McDaniel v. Trent Mills, 197 N.C. 342, 148 S.E. 440 (1929).

5. PROSSER, HANDBOOK OF THE LAW OF TORTS 948 (1941); Holbrook, *The Change in the Meaning of Consortium*, 22 MICH. L. REV. 1 (1923); Lippman, *The Breakdown of Consortium*, 39 COL. L. REV. 651 (1930); Notes, 5 CORNELL L. Q. 171 (1920); 9 IND. L. J. 182 (1937); 35 KY. L. REV. 220 (1947); 1 MERCER L. REV. 316 (1949); 14 ST. JOHN'S L. REV. 345 (1940). The lone attempt to justify the state of the case law is to be found in

the weight of authority permits the husband to recover for injury to the sentimental elements of his consortium when his wife is negligently injured.[6]

The cases have assigned various reasons for the inability of the wife to recover. A reason sometimes advanced is that the action by the husband for injury to his wife is essentially one for loss of the material services of his wife, and that since the wife has no corresponding right to the services of her husband there is no corresponding basis for her recovery.[7] However, the recovery of the husband was never limited to the value of the material services; the amount of injury to the sentimental elements is included in calculating the damages due the husband. Lippman[8] states that the right to material services, society, affection, and companionship is an amalgamation of individual rights all bound up in "one big inseparable package" called consortium. He says that, although the action of the husband was spoken of as one for loss of services; affection, intercourse, etc. were included within the concept of services—they were services to be rendered the husband by the wife. Indeed, to an action by the husband for injury to the sentimental elements alone a plea that he alleged no loss of material services has been held no defense.[9]

Judge Clark dealt with this argument in his opinion. He attributed the misconception that the loss of material services is essential to a cause of action to the redundancy of common law pleading, an allegation of the loss of services being almost invariably included in the declaration. He then said:

> Consortium, although it embraces within its ambit of meaning the wife's material services, also includes love, affection, companionship, sexual relations, etc. all welded into a con-

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Pound, *Individual Interests in the Domestic Relations*, 14 MICH. L. REV. 177, 194 (1916).

6. See Notes, 21 A.L.R. 1517 (1922); 133 A.L.R. 1156 (1941). Some of the majority profess to base recovery solely on loss of services but in reality allow compensation of the sentimental elements.

7. Boden v. Del-mar Garage, 205 Ind. 59, 185 N.E. 860 (1933); Fenff v. New York Cent. R.R., 203 Mass. 278, 89 N.E. 436 (1909); Stout v. Kansas City Terminal Ry. Co., 172 Mo. App. 113, 157 S.W. 1019 (1913); Smith v. Nicholas Bldg. Co., 93 Ohio St. 101, 112 N.E. 204 (1915).

8. *The Breakdown of Consortium*, 22 MICH. L. REV. 651, 667 (1930).

9. "The action was per quod consortium amisit, not per quod servitum. . . . In no early case is there a suggestion that any of these [elements] is superior to any other as a basis for legal redress." Guevin v. Manchester St. Ry., 78 N.H. 289, 292, 99 Atl. 298, 300 (1916).

> ceptualistic unity. . . . It is not the fact that one or the other of the elements of consortium is injured in a particular invasion that controls the type of action that may be brought but rather that the consortium as such has been injured at all.[10]

If a showing of loss of material services was ever essential to a cause of action that is no longer true today, and the requirement of alleging such a loss which survives in some jurisdictions is an outmoded fiction.[11] The principal case appears correct in holding that the loss of services argument should not be employed to bar a recovery by the wife.

A second reason sometimes advanced is that the husband recovers for all the harm done in his action and that to permit the wife to maintain an additional action would result in a double recovery for the same tort.[12] This argument proceeds on the theory that the wife indirectly benefits from a recovery by the husband. It is pointed out that he is under a duty to support her and that the tort-feasor indemnifies the husband for any loss of earnings so that his ability to support his wife is undiminished. But the wife does not seek compensation for loss of support; she seeks redress for her loss of companionship and affection. One case said, "Her indirect loss has already been compensated for by the recovery of the husband. There was only one injury and that was to the husband. There can be no double recovery for the same wrong."[13] The fallacy in this statement lies in the fact that there was not only one injury—there were two. The husband has suffered his physical incapacitation and loss of earnings and has been compensated therefor, but the injuries to the sentimental elements of the consortium of the wife were not redressed in his action.

To be sure the danger of a double recovery does exist to some extent. The jury might have a tendency to include within the damages granted the wife such items as medical expenses which

10. Hitaffer v. Argonne Co., Inc. 183 F.2d 811, 814 (D.C. Cir. 1950).
11. See PROSSER, HANDBOOK OF THE LAW OF TORTS, 940ff.
12. Giggey v. Gallagher Transportation Co., 101 Colo. 258, 72 P.2d 1100 (1937); Bernhardt v. Perry, 276 Mo. 612, 208 S.W. 462 (1918); Gambino v. Manufacturer's Coal & Co., 175 Mo. App. 653, 158 S.W. 77 (1913); Goldman v. Cohen, 30 Misc. 336, 63 N.Y. Supp. 459 (Sup. Ct. 1900). See Pound, *Individual Interests in the Domestic Relations*, 14 MICH L. REV. 177, 194 (1916).
13. Giggey v. Gallagher Transportation Co., 101 Colo. 258, 261, 72 P.2d 1100, 1101 (1937).

were recoverable in the action by the husband himself. However, the administrative machinery of the courts should be capable of alleviating this danger. The judge by proper instructions and a close supervision of the jury could fairly insure that the jury return a verdict giving damages for only those injuries personal to the wife. The reduction of excessive verdicts in other cases is not an uncommon practice. Moreover, the judge might well direct a verdict when the consortium of the wife did not appear to have been appreciably injured. For example, the wife should not be entitled to compensation where her husband suffered no more than a broken wrist, but she should certainly be considered injured to an extent necessitating recovery if her husband suffered emasculation or permanent hospitalization.

As was pointed out in the *Argonne* case, the same possibility of overlapping recovery exists when the husband brings his action for negligent injury to the wife, and yet the great majority of the courts permit him to recover. The logical inconsistency of denying the right to the wife for this reason while granting it to the husband is thus apparent. The *Argonne* case appears correct in holding that this argument should not be permitted to prevent compensation of the wife where the facts indicate she has suffered an appreciable injury.

A third reason sometimes advanced is a proximate cause limitation. The injury to the wife is said to be too remote, indirect, and inconsequential to be compensable in damages.[14] It would appear that the rules of proximate cause prevailing in most jurisdictions can not be said to bar the action for redress of the wife's injury. There is no intervening force involved, and

14. "Were we to sustain plaintiff's contentions . . . then carried to its logical conclusions, there would, in many accident cases, be litigation almost without end all based on a single tort and with only one individual physically involved in the accident itself." Eschenbach v. Benjamin, 195 Minn. 378, 380, 263 N.W. 154, 155 (1935). ". . . In a case involving mere negligence, after the husband had recovered for all that his injury included if there was yet in the background another claim by the wife so indefinite and so immeasurable as possibly to drain the resources of him who was so unfortunate through himself or his servant as to have become careless, if this could be, industrial hazard would be widened beyond reason." Stout v. Kansas City Terminal Ry., 172 Mo. App. 113, 123, 157 S.W. 1019, 1022 (1913). Tyler v. Brown-Service Funeral Home Co., 250 Ala. 295, 34 So.2d 203 (1948); Brown v. Kistleman, 177 Ind. 692, 98 N.E. 631 (1912); Landwehr v. Barbas, 241 App. Div. 769, 270 N.Y. Supp. 534 (2d Dept. 1934).

certainly the results can not be said to be highly extraordinary under the circumstances. Nor would the wife appear to be an unforeseeable plaintiff within the usual meaning of that term. The principal case dealt with the proximate cause limitation in this way, ". . . we are committed to the rule in negligence cases that where in the natural-sequence, unbroken by any intervening cause, an injury is produced which, but for the negligent act would not have occurred, the wrongdoer will be held liable."[15]

Assuming, arguendo, that the proximate cause limitation is apropos and that a court is justified in limiting recovery to the person physically injured, the difficulty remains that the same proximate cause limitation should be applicable to the husband when he brings an action for injury to the sentimental elements of his consortium. As has been repeatedly asked:[16] How can the injury to the wife be more remote and inconsequential than that to the husband? Thus the logical inconsistency of denying the right to the wife while according it to the husband is again apparent.

A fourth commonly urged reason for denying the right of the wife to recover is that she had no such right at common law, and that the Married Women's Acts conferred no new rights but merely permitted the assertion of those that did exist.[17] Perhaps the courts are correct in saying that no right whatever to the consortium existed in the wife at common law. Blackstone intimates that it did not.[18] Moreover, Holbrook points out that the chancery never attempted to protect these sentimental interests and says from this it might be inferred that the wife was considered to have no right in them.[19] On the other hand it might be argued that so far as equity is concerned it was generally loath to interfere in such personal relations anyway, and that at law the right existed latently but was simply unen-

15. Hitaffer v. Argonne Co., Inc., 183 F.2d 811, 815 (D.C. Cir. 1950).

16. *See* Bernhardt v. Perry, 276 Mo. 612, 632, 208 S.W. 462, 467 (1918) (dissenting opinion); Landwehr v. Barbas, 241 App. Div. 769, 771, 270 N.Y. Supp. 534, 535 (2nd Dept. 1934) (dissenting opinion).

17. Sobolewski v. German, 2 Harr. 540, 127 Atl. 49 (Super. Ct. Del. 1924); Cravens v. L & N R.R., 195 Ky. 257, 242 S.W. 628 (1922); Emerson v. Taylor, 133 Md. 192, 104 Atl. 538 (1918); Nash v. Mobile & O. R.R., 149 Miss. 823, 116 So. 100 (1928); Bernhardt v. Perry, 276 Mo. 612, 208 S.W. 462 (1918); Tobiassen v. Polley, 96 N.J.L. 66, 114 Atl. 153 (Sup. Ct. 1921).

18. 3 BL. COMM. 142.

19. Holbrook, *The Change in the Meaning of Consortium*, 22 MICH. L. REV. 1, 3 (1923).

forceable. The issue is best dismissed as moot, for it would appear to be a useless excursion into Hohfeldian terminology to attempt a determination of whether a right could ever be said to exist without any means of enforcing it. Furthermore, whether the right existed at common law should be considered immaterial. Certainly a rule resting solely on an historical basis would have little to commend it. The view of the *Argonne* case was that the proper question should not be whether the right existed at common law, but rather whether it should exist. It was said that in this enlightened age the primary concern should be whether an injury has occurred which is in need of redress.

It is also pointed out in the principal case that the interests of the wife in the marriage relation cannot now be said to be legally incognizable. The existence of causes of action for alienation of affections and criminal conversation testify to the fact that at least under certain circumstances the wife's consortium is considered worthy of legal protection. Some jurisdictions have extended the protection of the wife's consortium to some types of intentional conduct not directed at the marriage relation itself. Thus the defendant has been held liable for supplying drugs to the husband[20] or for furnishing intoxicating liquor to an alcoholic husband over the repeated protests of the wife though no Dramshop Act existed in the juridiction.[21] The next step would appear to be obvious. If the wife is considered to have an interest worthy of protection against intentional invasion the question arises as to why that interest should not be protected against negligent injury. It is obvious that one wife may suffer as great a loss of her husband's society because of his being negligently injured as another may suffer because her husband has been induced to desert her.

One argument might appear to be sufficient answer to the above line of reasoning. Some cases employ the frequently quoted phrase that "the interest in the husband's life and companionship lies in a region into which the law does not enter except when necessity compels."[22] They reason that the senti-

20. Flandermeyer v. Cooper, 85 Ohio St. 327, 98 N.E. 102 (1912); Moberg v. Scott, 38 S.D. 422, 161 N.W. 998 (1917).

21. Pratt v. Daly, 55 Ariz. 535, 104 P.2d 147 (1940); Swanson v. Ball, 67 S.D. 161, 290 N.W. 482 (1940).

22. Brown v. Kistleman, 177 Ind. 11, 98 N.E. 631 (1912); Stout v.

mental elements of the consortium are too intangible and vague to be capable of pecuniary measurement for the purpose of giving compensation. It is said that the damages given in the case of intentional interference with the marriage relation are not given by way of compensation but rather as punishment. They are to serve as a deterrent to future similar tortious acts. It is then said that though the law reluctantly assesses damages as a penalty in the case of intentional wrong such action is not necessary in the case of a mere negligent injury.

The *Argonne* case points out, however, that the allowance of exemplary damages does not widen the range of actionable wrong, that the basic function of civil damages is that of compensation, not punishment. Hence, the basis of actions for alienation of affection and the like must be considered the providing of redress, and there can therefore be no reason for distinguishing between intentional and negligent injuries on this ground, for in either case an injury has been inflicted.

The *Argonne* case might have added that the inability to measure accurately the amount of injury inflicted in other negligence cases has never been considered a bar to an attempt at complete redress. For example, it is probably no more difficult to place a value upon the pain from a broken leg than it is to evaluate the loss of the pleasure of sexual relations with one's husband, yet the former is undertaken without misgivings.

An additional difficulty remains with the reasoning of the majority. Again we detect the logical inconsistency of denying to the wife the action for negligent injury to her consortium while according it to the husband when his is injured, as the majority does. The above reason for denying the right to the wife would be equally applicable where the right of the husband to the intangible elements was involved.

A review of the cases and the reasons supporting them reveals that the present state of the law in the majority of the jurisdictions has little to commend it. If we disregard the ultimate question of whether anyone should be permitted to recover for negligent injury to the sentimental elements of his consortium, one thing remains clear—it is logically inconsistent to permit a recovery by the husband while denying it to the wife.

Kansas City Terminal Ry. Co., 172 Mo. App. 113, 157 S. W. 1019 (1913); Goldman v. Cohen, 30 Misc. 336, 63 N.Y. Supp. 459 (Sup. Ct. 1900).

Leaving aside the rather specious argument that since the wife did not have a cause of action at common law and that since the Married Women's Acts conferred no new rights upon her, she does not have it now, those reasons advanced to defeat recovery by the wife would, whatever their merit, be equally applicable to an action by the husband to recover for negligent injury to the sentimental, as distinguished from the material, elements of his consortium. There is evidence that the courts are becoming aware of the incongruous state of the law and that the trend is to correct it.

Six jurisdictions have taken a different approach from that of the *Argonne* case in bringing symmetry to the law. Rather than extend the cause of action for negligence to the female spouse, these courts have chosen to deny reparation to the male for injury to the sentimental elements.[23] The cases have proceeded on the theory that the Married Women's Acts have taken away the husband's right to the material services of his wife so that he stands on precisely the same footing as she. They have then applied the same reasons advanced to deny recovery by the wife to the husband. These decisions do at least have the merit of ending the logical inconsistency still prevailing in the majority of jurisdictions.

The *Argonne* case has supplied rather persuasive answers to the objections ordinarily interposed against the wife's recovery. The problem, however, is essentially one of policy of the same general kind normally subsumed under the guise of "proximate cause" or "duty" in negligence cases. It is clear that the wife has an interest in the sentimental elements of consortium which is accorded legal protection against interference through some kinds of conduct. Thus, if the defendant acted "maliciously" (*i.e.*, with foresight of the likelihood that consequences such as these will follow), he has been held liable to the wife. If the conduct is only intentional, (*i.e.*, there is a substantial certainty of injury to the husband but no real foresight of the likelihood that consequences such as these will follow) the cases have

23. Marri v. Stamford St. R. Co., 84 Conn. 9, 78 Atl. 582 (1911); Helmstetler v. Duke Power Co., 224 N.C. 821, 32 S.E.2d 611 (1945); Bolger v. Boston Elevated Ry. Co., 205 Mass. 420, 91 N.E. 389 (1910); Clark v. Southwestern Greyhound Lines, 144 Kan. 344, 58 P.2d 1128 (1936); Blair v. Seitner Dry Goods Co., 184 Mich. 304, 151 N.W. 724 (1915); Golden v. R. L. Greene Paper Co., 44 R.I. 231, 116 Atl. 579 (1923).

denied recovery, and, as indicated, they have denied recovery in cases where the defendant's conduct could be characterized only as negligence. This suggests that while the interference may be as serious in one case as in the other, the moral character of the defendant's conduct varies the result.

In the instant case the court apparently felt that in view of the modern attitude toward the value of the wife's interest in the sentimental elements of consortium, even conduct which is only negligent is sufficiently legally blameworthy, so that the balance of interests is in favor of recovery. This means, of course, that the court thinks it not unfair to hold the defendant liable for these consequences, simply because the wife's interest which was interfered with is sufficiently important to justify such an extension of liability. In reaching its conclusion the court took into consideration the inherent unfairness of treating a husband's interest in the sentimental elements of consortium differently from that of a wife, certainly a valid factor. It is not necessary to agree with the ultimate conclusion reached by the court in order to recognize the inherent value of the opinion. The court has gone far toward cutting down the forest of verbiage surrounding the earlier decisions, and toward recognizing clearly the real nature of the problem presented to it.

WARREN MAICHEL

JURY TRIAL — NECESSITY OF JUDGE RECEIVING THE VERDICT. In a recent Tennessee case,[1] condemnation proceedings were begun by the plaintiff. The trial court judge was unavoidably detained, so he called a member of the local bar and asked him to receive the verdict of the jury. Plaintiff objected to this procedure and immediately made a motion for a mistrial. The motion was overruled and the verdict received. In sustaining plaintiff's contention upon appeal, the court said that receipt of the jury's verdict under these circumstances was a nullity and void; that no consideration of public policy would justify the conclusion that a member of the bar, by merely assuming the judge's position, could clothe himself with the powers of a judge.

Whether a trial court judge can delegate his duty of receiv-

1. Tennessee Gas Transmission Co. v. Vineyard *et ux.*, 232 S.W.2d 403 (Tenn. 1950).