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Parental Consortium: Assessing the Contour of the New Tort in Town

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PARENTAL CONSORTIUM: ASSESSING THE CONTOURS OF THE NEW TORT IN TOWN

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I. INTRODUCTION

A. Historical Development of Consortium

"The genius of the common law is its ability to adapt itself to the changing needs of society."[1] An excellent example of this genius is the cause of action sounding in loss of parental consortium.[2] The action for loss of parental consortium is a recent development having its genesis in the tort of loss of consortium. Loss of consortium seeks to protect the interest each spouse has in the marital relationship.[3] At early common

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[1] Moran v. Quality Aluminum Casting Co., 150 N.W.2d 137, 141 (Wis. 1967).

[2] Parental consortium is defined as the love, care, companionship and guidance given by a parent to a child. Williams v. Hook, 804 P.2d 1131, 1132 n.1 (Okla. 1990); Ueland v. Reynolds Metals Co., 691 P.2d 190, 191 (Wash. 1984); cf. TEXAS PATTERN JURY CHARGES 7.11A (2d ed. 1987) (defining "parental consortium" as "positive benefits flowing from parents' love, affection, protection, emotional support, services, companionship, care and society"). Texas' use of the word "services" seemingly causes its definition of parental consortium to be broader than that followed in Washington and Oklahoma. However, the word "services" does not broaden the elements of damages recoverable in a parental consortium claim because "services" has been construed to mean only a non-pecuniary loss. Reagan v. Vaughn, 804 S.W.2d 463, 464 (Tex. 1990); *see infra* note 143 and accompanying text.

[3] Loss of consortium is a separate and independent action that compensates one spouse for a negligent injury to the other. An all encompassing definition of loss of consortium does not exist. The term consortium, at early common law was used to describe the husband's right to his wife's assistance, services, society, companionship and sexual relations. *See infra* notes 4, 14.

law, the action for consortium protected only the economic interest that a husband had in his wife and children.[4] Con-

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> Today, consortium is no longer limited to injured spouses. It has come to represent losses suffered as a result of the injury or death of any family member. Nor is consortium concerned with simple loss of services; in essence, the lowest common denominator of the interest protected by the consortium claim is that of "lost society and companionship."

Michael A. Mogill, *And Justice for Some: Assessing the Need to Recognize the Child's Action for Loss of Parental Consortium*, 24 ARIZ. ST. L.J. 1321, 1324 (1992).

It is uniformly agreed that impairment of any "material" or "sentimental" aspects of the marital relation is compensable. Material aspects are viewed as economically quantifiable losses, while sentimental aspects correspond to those losses not susceptible to exact market valuation. Susan G. Ridgeway, Comment, *Loss of Consortium and Loss of Services Actions: A Legacy of Separate Spheres*, 50 MONT. L. REV. 349, 350 (1989). The notion that loss of consortium is concerned with material and sentimental losses is often obscured by jury instructions which state that the complaining spouse is entitled to recover damages for loss of the other's "society, companionship, affection, sexual relation and services." Further confusion arises from the use of the word "services" which is defined in a number of jurisdictions to include both the sentimental and material aspects of the action. "Regardless of how [jurisdictions] characterize consortium, all courts evaluate the same factors as proof of impairment of consortium." *Id.* at 351. *See generally* Evans Holbrook, *The Change in the Meaning of Consortium*, 22 MICH. L. REV. 1 (1923) (containing historical account of consortium); Jacob Lippman, *The Breakdown of Consortium*, 30 COLUM. L. REV. 651 (1930) (same).

In Whittlesey v. Miller, 572 S.W.2d 665 (Tex. 1978), the Texas Supreme Court stated that:

> The phrase loss of consortium is more accurately described as an element of damage rather than a cause of action. But courts have so frequently used the phrase to denote those actions in which loss of consortium is the major element of damage that loss of consortium has come to be referred to as a cause of action.

Whittlesey, 572 S.W.2d at 666 n.1.

[4] In Lynch v. Knight, 11 Eng. Rep. 854, 863 (Ex. Ch. 1861), Lord Wensleydale, writing for the court, observed that "[t]he 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." This passage was construed in America to mean that the action for loss of consortium encompassed only damages for services, which belonged exclusively to the husband, and not the intangible elements of harm to society and affectionate attention. *See infra* notes 14, 15.

Prior to the Married Women's Property Act, women were considered as one with their husbands. Women had no status to sue on their own behalf for wrongs done against them. The husband, however, had standing to sue for the damages

sequently, the wife had no standing to sue when her husband or child was negligently injured.[5] Despite obvious changes in the social, economic and legal status of women, the action for lost consortium retained most of its common law attributes until 1950.[6]

In that year, the United States Court of Appeals for the District of Columbia, in *Hitaffer v. Argonne Co.*,[7] became the first federal tribunal to unequivocally recognize a wife's right to assert an action for lost consortium. In *Hitaffer*, the plaintiff's husband was negligently injured while in the employment of the defendant.[8] The court, operating in a legal environment that had totally rejected the notion that a wife could sue for consortium, analyzed precedents from around the country and found the notion wanting in logic. The primary arguments against such an action were that: (1) the wife has no right as such to the husband's services, although the husband has always had a legal right to the wife's services; (2) the Emancipation Act gave the wife a right to the fruits of her own services and consequently, placed the husband in the

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and could join his wife in the action. WILLIAM S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 428-30 (1926); *see* W. PAGE KEETON ET AL., HANDBOOK OF THE LAW OF TORTS § 125, at 931 (5th ed. 1984). *See generally* O. Kahn-Freund, *Inconsistencies and Injustices in the Law of Husband and Wife*, 15 MOD. L. REV. 133 (1952).

[5] HOMER H. CLARK, THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES §§ 11.2-.3, at 385, 391 (2d ed. 1988).

[6] The early common law formulation of loss of consortium was borrowed from the much earlier Roman theory that the patriarch governed the household. Early English jurists applied this family law theory first to master-servant relationships to enable masters to recover for injury to servants. The theory was subsequently applied to familial relations to protect the husband's interest in the services of his wife and children. Recovery was subsequently extended to include damages to society, fellowship and affectionate relations. KEETON ET AL., *supra* note 4, at 931; *see also* Ridgeway, *supra* note 3, at 349.

[7] 183 F.2d 811 (D.C. Cir.), *cert. denied*, 340 U.S. 852 (1950), *overruled on other grounds by* Smitherand Co. v. Coles, 242 F.2d 220 (D.C. Cir. 1957). The *Hitaffer* court was not the first to actually recognize a wife's right to recover for loss of consortium. The Supreme Court of North Carolina had allowed a wife to recover for loss of her husband's consortium in Hipp v. E.I. Dupont de Nemours & Co., 108 S.E. 318 (N.C. 1921). Most jurisdictions which previously refused to recognize the wife's action adopted the *Hitaffer* opinion.

[8] *Hitaffer*, 183 F.2d at 812.

same position as the wife so that neither may bring an action for consortium; (3) in negligence actions the purpose of damages is to compensate the injured person for the direct consequences of the wrong (the injury to the wife is indirect and thus not compensable); (4) a wife's injury is too remote and inconsequential to be measured; (5) the common law recognized no cause of action for the sentimental elements of consortium; (6) the action for consortium has never been allowed where there was not some showing of loss of services and a wife is unable to show such a loss; (7) double recovery of damages would result; and (8) the number of law suits would increase significantly.[9] The court, rather than engaging in legal gymnastics used in previous cases, relied heavily on the marital relationship to justify the wife's right of action. Judge Clark, writing for the majority, observed that:

> The actual injury to the wife from loss of consortium, which is the basis of the action, is the same as the actual injury to the husband from that cause. His right to the conjugal society of his wife is no greater than her right to the conjugal society of her husband. Marriage gives each the same rights in that regard. Each is entitled to the comfort, companionship and affection of the other. The rights of the one and the obligations of the other spring from the marriage contract, are mutual in character, and attach to the husband as husband and wife as wife. *Any interference with these rights, whether of the husband or of the wife, is a violation, not only of a natural right, but also of a legal right arising out of the marriage relation.* . . . As the wrongs of the wife are the same in principle, and are caused by acts of the same nature, as those of the husband, the remedy should be the same.[10]

The holding in *Hitaffer* was initially rejected by a number of other courts. However, uniform condemnation of the old common law rule by legal scholars and commentators assisted in increasing the acceptance of the *Hitaffer* court's conclu-

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[9] *Id.* at 813-15.

[10] *Id.* at 816 (alteration in original) (quoting Bennett v. Bennett, 23 N.E. 17, 18-19 (N.Y. 1889)).

sion.[11] By 1958, the trend of recognition had begun. Today, the vast majority of jurisdictions allow loss of consortium actions to be instituted by either spouse.[12] Six jurisdictions have achieved equality between the spouses by abolishing consortium actions altogether.[13]

The development of the law in regard to interferences with the parent-child relationship parallels the development of actions for interference with the spousal relationship. Early common law recognized only the right of the father to recover damages for loss of his child's services. This right, like its spousal counterpart, was based upon the master-servant theory which entitled the father to compensation for the loss of the child's services.[14] The master-servant theory is still reflected in loss of consortium actions. Thus, where a parent seeks recovery for injury to his child, the law uniformly permits recovery for the loss of the child's fictional services or earnings.[15]

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[11] Law review articles and legal comments almost unanimously favored recovery by the wife. *See, e.g.*, 1 FOWLER V. HARPER & FLEMING JAMES, JR., THE LAW OF TORTS § 8.9 (1956); WILLIAM L. PROSSER, HANDBOOK ON THE LAW OF TORTS § 119 (3d ed. 1964); G.H.L. Fridman, *Consortium as an "Interest" in the Law of Torts*, 32 CAN. B. REV. 1065, 1073-80 (1954); Holbrook, *supra* note 3; Joseph J. Simeone, *The Wife's Action for Loss of Consortium—Progress or No?*, 4 ST. LOUIS U. L.J. 424, 431-41 (1957).

[12] The wife's right to recover for loss of consortium is recognized in 44 states and the District of Columbia. For a list of states recognizing the wife's right, see Mogill, *supra* note 3, at 1333 n.68.

[13] For a list of the six jurisdictions that deny this action see Mogill, *supra* note 3, at 1334 n.69.

[14] G.A. Owens, *Interference with Trade: The Illegitimate Offspring of an Illegitimate Tort?*, 3 MONASH U. L. REV. 41, 45 (1976). In Guy v. Livesey, 79 Eng. Rep. 428 (K.B. 1619), a court, for the first time, observed the analogy between husband and wife and master and servant. In that case the plaintiff sued the defendant for the battery of himself and for the battery of his wife, who had went with the defendant and lived in a "suspicious manner." *Guy*, 79 Eng. Rep. at 428. The court held that the plaintiff did not have an action for battery to his wife. However, the court observed

> that the action was well brought; for the action is not brought in respect of the harm done to the wife, but is brought for the particular loss of the husband, for that he lost the company of his wife, . . . for which he shall have this action, as the *master shall have for the loss of his servant's service.*

Id. (emphasis added); *see also supra* note 4; *infra* note 15.

[15] The theory of loss of services was first endorsed by American courts around

By 1970, consortium began to take on a different gloss. Society began asking courts whether consortium actions should be expanded to protect parental interest in a child's society and companionship. Initially, courts, in the absence of statutory law,[16] were most reluctant to reevaluate the principles underlying the law of consortium to allow either parents or children to recover for the loss of companionship, society, and affection of their negligently injured loved one.

In 1975, Wisconsin became the first jurisdiction to effectuate a change in its common law to recognize the right of a parent to recover for loss of an injured child's companionship and society.[17] In *Shockley v. Prier*,[18] the Wisconsin Supreme

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the turn of the century. Loss of services became a technical requirement of an action for consortium. The loss of services theory is from a practical perspective obsolete because modern minor children have little, if any, service value or present earning capacity. Children today are valued wholly for sentimental reasons, not for their earnings and labor. Lost service still exists as an acknowledged fiction of the modern law of lost consortium. "Nevertheless, the 'modern' loss of services action is no different than the early loss of service action, and the majority of jurisdictions continues to limit the damages a parent may recover to those for loss of a child's services." Ridgeway, *supra* note 3, at 363-64; *see also* Mogill, *supra* note 3, at 1328.

Courts throughout the country have muddled the concepts of services, society, companionship and affection into a mass of confusion. The term "services" has over time acquired a meaning synonymous with society and companionship. Consequently, the majority view is clearly that loss of society and companionship as well as services are recoverable where a child has been tortiously injured. *See infra* note 24. The confusion is not, however, as great as it may seem because all courts, regardless of the language used, evaluate the same factors as proof of loss of consortium.

[16] Washington had a statute, and Iowa promulgated a rule of procedure, that allowed for the recovery of lost companionship and society. *See* WASH. REV. CODE ANN. § 4.24.010 (West 1988); IOWA R. CIV. P. 8; *cf.* Hayward v. Yost, 242 P.2d 971, 977 (Idaho 1952) (construing §§ 5-310 to -311 of Idaho Code to allow parents to recover for loss of child's society and companionship).

[17] Several jurisdictions addressed the issue and declined to create a cause of action for loss of a child's society and companionship prior to 1975. *See* Smith v. Richardson, 171 So. 2d 96 (Ala. 1965); Butler v. Chrestman, 264 So. 2d 812 (Miss. 1972); Ekalo v. Constructive Serv. Corp., 215 A.2d 1 (N.J. 1965); Gilbert v. Santon Brewery, 67 N.E.2d 155 (N.Y. 1946); Kalsow v. Grob, 237 N.W. 848 (N.D. 1931), *overruled by* Hopkins v. McBane, 427 N.W.2d 85 (N.D. 1988); Quinn v. City of Pittsburg, 90 A. 353 (Pa. 1914); McGarr v. National & Providence Worsted Mills, 53 A. 320 (R.I. 1902).

[18] 225 N.W.2d 495 (Wis. 1975).

Court was confronted with the issue of whether the parents of Paul Shockley, a minor allegedly injured by the negligence of two physicians, could recover for loss of Paul's aid, comfort, society and companionship during the minority of the child.[19]

Justice Day, writing for the majority, observed that courts were obligated to make changes in the law "if the common-law rule no longer fits the social realities of the present day."[20] Children, Justice Day noted, rather than being the economic asset of past decades, were usually sources of great expenditures.[21] Consequently, the injury sustained by parents upon the death or injury of a child is not primarily economic. Rather, "[s]ociety and companionship between parents and their children are closer to our present day family ideal than the right of the parents to the 'earning capacity during minority,' which once seemed so important when the common law was originally established."[22] As the law currently stands in a majority of jurisdictions, parents may recover only for additional expenses incurred in caring for the child and for any loss of the child's services;[23] some courts, however, also allow parents to recover for the tortiously caused loss of a nonfatally injured child's society, companionship and affection.[24] Ingenious lawyers, en-

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[19] *Shockley*, 225 N.W.2d at 496-97.

[20] *Id.* at 497.

[21] *Id.* at 498.

[22] *Id.* at 499.

[23] 59 AM. JUR. 2D *Parent and Child* §§ 103-06 (1987); *see also* Mark L. Johnson, Note, *Compensating Parents for the Loss of their Nonfatally Injured Child's Society; Extending the Notion of Consortium to the Filial Relationship*, 1989 U. ILL. L. REV. 761, 763-64.

[24] *See, e.g.*, Frank v. Superior Ct. of Ariz., 722 P.2d 955, 956 (Ariz. 1986); Yordeo v. Savage, 279 So. 2d 844, 845 (Fla. 1973); Masaki v. General Motors Corp., 780 P.2d 566, 577 (Haw. 1989); Hayward v. Yost, 242 P.2d 971, 976 (Idaho 1952); Handeland v. Brown, 216 N.W.2d 574, 579 (Iowa 1974); Lee v. USAA Casualty Ins. Co., 540 So. 2d 1083, 1090 (La. Ct. App. 1989); Davis v. Elizabeth Gen. Medical Ctr., 548 A.2d 528, 528-30 (N.J. Super. Ct. Law Div. 1988); First Trust Co. v. Scheels Hardware & Sports, 429 N.W.2d 5, 9-11 (N.D. 1988); Gallimore v. Children's Hosp. Medical Ctr., 617 N.E.2d 1052, 1053-55 (Ohio 1993); Jannette v. Duprez, 701 S.W.2d 56, 61 (Tex. Ct. App. 1985); Harbeson v. Parke-Davis, Inc., 656 P.2d 483, 492-93 (Wash. 1983); Shockley v. Prier, 225 N.W.2d 495, 499-500 (Wis. 1975). While the Texas court in *Jannette v. Duprez* recognized a parent's right to recover for loss of consortium of a nonfatally injured child, the

couraged by *Hitaffer* and *Shockley*, sought further expansion of the law of consortium to protect the legal interest of children of negligently injured parents. Judicial response to expansion was initially discouraging despite the fact that children possessed rights and interests commensurate with parents in the familial relationship. Consequently, in the first wave of cases to address this issue, courts all over the country uniformly rejected the notion that a child could recover for loss of companionship, affection and aid of a negligently injured parent.[25]

In refusing to allow the action for parental consortium, courts have found that compensation for the loss or injury to children was often included in the damages award the tortfeasor was required to pay the injured parent as a direct result of the personal invasion. Consequently, there existed a substantial likelihood of double recovery for the same injury.[26]

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court limited that right of recovery only to instances when the parent actually witnessed the child's injury. *Jannette*, 701 S.W.2d at 58.

[25] *See* Pleasant v. Washington Sand & Gravel Co., 262 F.2d 471, 473 (D.C. Cir. 1958); Jeune v. Del E. Webb Constr. Co., 269 P.2d 723, 724 (Ariz. 1954), *overruled by* Villareal v. Arizona Dep't of Transp., 774 P.2d 213 (Ariz. 1988); Borer v. American Airlines, Inc., 563 P.2d 858, 866 (Cal. 1977); Zorzos v. Rosen, 467 So. 2d 305, 308 (Fla. 1985); Clark v. Suncoast Hosp., Inc., 338 So. 2d 1117, 1119 (Fla. Dist. Ct. App. 1976); Halberg v. Young, 41 Haw. 634, 647 (1957); Hankins v. Derby, 211 N.W.2d 581, 585-86 (Iowa 1973), *overruled by* Weitl v. Moes, 311 N.W.2d 259 (Iowa 1981); Mueller v. Hellrung Constr. Co., 437 N.E.2d 789, 792 (Ill. 1982); Hoffman v. Dantel, 368 P.2d 57, 59-60 (Kan. 1962); Kelly v. United States Fidelity & Guar. Co., 353 So. 2d 349, 351 (La. Ct. App. 1977); Durepo v. Fishman, 533 A.2d 264, 265 (Me. 1987); Gaver v. Harrant, 557 A.2d 210, 218 (Md. 1989); Miller v. Monsen, 37 N.W.2d 543, 545-46 (Minn. 1949); Powell v. American Motors Corp., 834 S.W.2d 184, 191 (Mo. 1992); Guenther v. Stollberg, 495 N.W.2d 286, 289 (Neb. 1993); General Elec. Co. v. Bush, 498 P.2d 366, 371 (Nev. 1972); Russell v. Salem Transp. Co., 295 A.2d 862, 864 (N.J. 1972); Wilson v. Galt, 668 P.2d 1104, 1112 (N.M. Ct. App.), *cert. quashed*, 668 P.2d 308 (N.M. 1983); DeAngelis v. Lutheran Medical Ctr., 449 N.E.2d 406, 407 (N.Y. 1983); Vaughn v. Clarkson, 376 S.E.2d 236, 237 (N.C. 1989); Morgel v. Winger, 290 N.W.2d 266, 267 (N.D. 1980); High v. Howard, 592 N.E.2d 818, 820 (Ohio 1992), *overruled by* Gallimore v. Children Hosp. Medical Ctr., 617 N.E.2d 1052 (Ohio 1993); Norwest v. Presbyterian Intercommunity Hosp., 652 P.2d 318, 332-33 (Or. 1982); Steiner v. Bell Tel. Co., 517 A.2d 1348, 1354-55 (Pa. Super. Ct. 1986), *aff'd*, 540 A.2d 266 (Pa. 1988); Erhardt v. Havens, Inc., 330 P.2d 1010, 1012 (Wash. 1958), *overruled in part by* Ueland v. Reynolds Metal Co., 691 P.2d 190 (Wash. 1984).

[26] *See supra* note 25; *see also* Robert J. Cooney & Keven J. Conway, *The*

Courts also articulated the difficulty of measuring damages suffered by a child for loss of such intangibles as love, affection and attention. Some of these difficulties included: administrative concern for the likelihood of increased litigation; a child's historical lack of entitlement to his parents' society and services; and lack of precedence as factors which counsel against recognition of such a cause of action.[27]

Continued efforts slowly eroded many of the traditional arguments relied upon for denial of parental consortium. In response, many courts launched a final defensive against recognition of the action for parental consortium. Many jurists asserted the view that the debate over parental consortium was one for the legislature to resolve, and, in the absence of a statute, no action for parental consortium would lie.[28] State legislatures have all but expressly rejected the judicial invitation to legislate in this area.[29]

State legislatures, however, have uniformly recognized the right of children to recover damages caused by the wrongful killing of a parent. Wrongful death statutes typically provide that, in all cases in which the decedent, had he lived, would have had a cause of action against the tortfeasor, certain named beneficiaries could sue in their own name and receive such damages as resulted from the decedent's demise. Damages which are ordinarily recoverable under wrongful death statutes include: (1) the pecuniary loss sustained by survivors with reference to the probable earnings of the decedent in view of

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Child's Right to Parental Consortium, 14 T. MARSHALL L. REV. 341, 342-51 (1981); Mogill, *supra* note 3, at 1379.

[27] *See supra* note 26; *see also* Annotation, *Child's Action—Loss of Parental Attention*, 11 A.L.R. 4TH 549 (1982); Allan E. Korpela, Annotation, *Child's Right of Action for Loss of Support, Training, Parental Affection, or the Like, Against a Third Person Negligently Injuring Parent*, 69 A.L.R. 3D 528 (1976).

[28] *See, e.g.*, Gray v. Suggs, 728 S.W.2d 148, 149 (Ark. 1987) (holding that creation of cause of action was for legislature); Nix v. Preformed Line Prod., 216 Cal. Rptr. 581, 584-85 (Cal. Ct. App. 1985) (declining to recognize cause of action); Zorzos v. Rosen, 467 So. 2d 305, 307 (Fla. 1985) (recognizing legislatively created cause of action for parental consortium). For additional discussion, see *infra* note 37.

[29] *See infra* note 38 and accompanying text (noting that only two states have legislatively adopted cause of action).

his age, health, livelihood and experience; (2) loss of the decedent's care, society and attention; and (3) an additional monetary award deemed fair and just by way of solace and comfort for the sorrow, suffering and mental anguish caused his survivor.[30] Several courts have asserted that wrongful death statutes are manifestations of legislative intent to limit a child's right to recover for injury to a parent. The utilization of wrongful death statutes and deference to the legislature as persuasive evidence against lost consortium, however, are contrary to the historical precepts of the common law process. Consequently, undaunted by the lack of judicial response, legal scholars and practitioners alike continued in the struggle to gain judicial recognition of the action for parental consortium.[31]

The first major inroad came in 1980 in the case of *Ferriter v. Daniel O'Connell's Sons, Inc.*[32] Therein, the Massachusetts Supreme Court became the first tribunal to recognize a common law action for loss of parental consortium.[33] Since then, a significant number of jurisdictions have followed Massachusetts' lead and recognized the action.[34] Though legal

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[30] KEETON ET AL., *supra* note 4, § 127, at 951-52.

[31] *See* Roscoe Pound, *Individual Interests in the Domestic Relations*, 14 MICH. L. REV. 177, 181 (1916). As early as 1916, Dean Pound criticized the common law's failure to protect the familial rights of children. Pound observed:

> As against the world at large a child has an interest . . . in the society and affection of the parent, at least while he remains in the household. But the law has done little to secure these interests. . . . It will have been observed that legal securing of the interests of children falls far short of what general considerations would appear to demand.

Id. at 185-86. Dean Prosser also joined in this cause, observing that "[i]t is not easy to understand and appreciate this reluctance to compensate the child who has been deprived of the care, companionship and education of his mother, or for that matter his father, through the defendant's negligence." WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS § 125, at 896 (Jesse H. Choper et al. ed. 1971); *see also* CLARK, *supra* note 5, § 12.4, at 670-71; Jean C. Love, *Tortious Interference with the Parent-Child Relationship: Loss of an Injured Person's Society and Companionship*, 51 IND. L.J. 590, 595-615 (1976); KEETON ET AL., *supra* note 4, at 924.

[32] 413 N.E.2d 690 (Mass. 1980).

[33] *Ferriter*, 413 N.E.2d at 703.

[34] Several states currently judicially recognize a cause of action for parental

commentaries and periodicals continue to assert that a *substantial* number of jurisdictions still deny the action,[35] this statement is slightly inaccurate because it does not reflect the fact that of the thirty-eight jurisdictions which have addressed the issue, fifteen[36] recognize the cause of action. Among these fifteen jurisdictions are six jurisdictions that have reversed previous positions denying the existence of the tort of loss of parental consortium.[37] In addition, two state legislatures have changed the common law of their jurisdictions statutorily,[38]

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consortium. *See* Hibpshman v. Prudhoe Bay Supply, Inc., 734 P.2d 991, 994-97 (Alaska 1987); Villareal v. Arizona Dep't of Transp., 774 P.2d 213, 216-20 (Ariz. 1989); Weitl v. Moes, 311 N.W.2d 259, 261-73 (Iowa 1981), *overruled by* Audubon-Exira Ready Mix, Inc. v. Illinois Cent. G.R.R., 335 N.W.2d 148, 151-53 (Iowa 1983); Berger v. Weber, 303 N.W.2d 424, 425 (Mich. 1981); Keele v. St. Vincent Hops. & Health Care Ctr., 852 P.2d 574, 576-78 (Mont. 1993); Williams v. Hook, 804 P.2d 1131, 1133-38 (Okla. 1990); Reagan v. Vaughn, 804 S.W.2d 463, 465-66 (Tex. 1990); Hay v. Medical Ctr. Hosp., 496 A.2d 939, 946 (Vt. 1985); Ueland v. Reynolds Metals Co., 691 P.2d 190, 195 (Wash. 1984); Belcher v. Goins, 400 S.E.2d 830, 841 (W. Va. 1990); Theama v. City of Kenosha, 344 N.W.2d 513, 522 (Wis. 1984); Nulle v. Gillette-Campbell County Joint Powers Fire Bd., 797 P.2d 1171, 1176 (Wyo. 1990); *see also* Reighley v. International Playtex, Inc., 604 F. Supp. 1078, 1083-84 (D.C. Colo. 1985) (construing Colorado state law). Additionally, two states have statutorily changed their common law positions. *See* FLA. STAT. ANN. § 768.0415 (West Supp. 1994); LA. CIV. CODE ANN. art. 2315 (West Supp. 1994).

[35] *See, e.g.*, Ridgeway, *supra* note 3, at 349; *Child's Action—Loss of Parental Attention*, *supra* note 27, at 552; Korpela, *supra* note 27, at 530-31. The majority view provides that "[o]ne who by reason of his tortious conduct is liable to a parent for illness or other bodily harm is not liable to a minor child for resulting loss of parental support and care." RESTATEMENT (SECOND) OF TORTS § 707A (1977).

[36] *See supra* note 34.

[37] *See supra* note 25.

[38] Section 768.0415 of the Florida Statutes Annotated provides that "[a] person who, through negligence, causes significant permanent injury to the natural or adoptive parent of an unmarried dependent resulting in a permanent total disability shall be liable to the dependent for damages, including damages for permanent loss of services, comfort, companionship, and society." FLA. STAT. ANN. § 768.0415 (West Supp. 1994); *see also* United States v. Dempsey, 635 So. 2d 961, 962-65 (Fla. 1994) (construing statute to protect consortium interest of parent in child and to provide for elements of damage in action brought by parent for injury to child). Similarly, the Louisiana Civil Code states:

> Every act whatever of man that causes damages to another obliges him by whose fault it happened to repair it. Damages may include loss of

thus bringing the number of jurisdictions protecting the child's interest to seventeen of thirty-eight. Furthermore, the vast majority of jurisdictions that deny the action recognize the undeniability of the fact that:

> It is common knowledge that a parent who suffers serious physical or mental injury is unable to give his minor children the parental care, training, love and companionship in the same degree as he might have but for the injury. Hence, it is difficult for the court, on the basis of natural justice, to reach the conclusion that this type of action will not lie. Human tendencies and sympathies suggest otherwise. Normal home life for a child consists of complex incidences in which the sums constitute a nurturing environment. When the vitally important parent-child relationship is impaired and the child loses the love, guidance and close companionship of a parent, the child is deprived of something that is indeed valuable and precious. No one can seriously contend otherwise.[39]

Similar sentiments were articulated in California, a jurisdiction which denies the action. The California Supreme Court in the case of *Borer v. American Airlines, Inc.*[40] observed:

> Plaintiff's claim, viewed in the abstract and divorced from its surroundings, carries both logical and sympathetic appeal . . . . Certain aspects of [the] spousal relationship are similar to those of the parent-child relationship, and there can be little question of the reality of the loss suffered by a child deprived of the society and care of its parent.[41]

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consortium, service, and society, and shall be recoverable by the same respective categories of persons who would have had a cause of action for wrongful death of an injured person.

LA. CIV. CODE ANN. art. 2315 (West Supp. 1994). Louisiana courts have yet to construe this statute as giving rise to an action for parental consortium. The statute certainly suggests by way of implication, however, that a child can bring an action for loss of consortium.

[39] *See* Still v. Baptist Hosp., Inc., 755 S.W.2d 807, 812 (Tenn. Ct. App. 1988) (quoting Theama v. City of Kenosha, 344 N.W.2d 513, 516 (Wis. 1984)); *see also*, Susan J.G. Alexander, *A Fairer Hand: Why Courts Must Recognize the Value of a Child's Companionship*, 8 COOLEY L. REV. 273, 274-78 (1991).

[40] 563 P.2d 858 (Cal. 1977).

[41] *Borer*, 563 P.2d at 862 (quoting Suter v. Leonard, 45 Cal. App. 3d 744, 746

The law of consortium is firmly entrenched in the common law. The preceding observations, however, demonstrate that contemporary courts are slowly coming to grips with the fact that the original underpinnings of the law of consortium have all but withered away. Consequently, a substantial likelihood exists that courts which address this issue in the future will be influenced by the relational interests of children in a modern society. The existence of the action for parental consortium can no longer be questioned. Rather, what remains is for courts to identify the ideas and policies that will influence the development of substantive rules and remedies for violation of this new substantive right.

B. Policy Considerations

The issue of whether a child has a substantive claim for the negligent injury of a parent cannot be severed or considered in isolation from that of which remedy is most appropriate for the protection of that claim. Remedy is significant because this concept encompasses the means for achieving or carrying out the policy envisioned by the recognition of the substantive right. Courts, as nearly as possible, seek to maintain a careful and delicate balance between substantive rights and corresponding remedies. Ideally, a remedy should be neither narrower nor broader than the substantive right that invokes it.[42] The congruence between rights and remedies is important both in the selection of a remedy and in its measurements. Thus, it has been observed:

> The idea that remedies and substance must match presents many of the challenges of remedial law, but the idea is not an absolute one. It is qualified, sometimes quite substantially, by the further idea that remedies must be capable of practical administration and reasonable measurement. . . . Just as the remedy is to be selected and measured to carry out the sub-

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(1975)).

[42] DAN B. DOBBS, REMEDIES: DAMAGES-EQUITY-RESTITUTION § 1.2, at 3 (Jesse H. Choper et al. ed., 1973).

> stantive goals, the substantive rules should be formulated with the possible remedies in mind.[43]

The remedy most appropriate for interference with a child's substantive right to parental consortium is damages. Nevertheless, courts that have refused to recognize the action have criticized the effectiveness of a monetary award to the child.[44] The essence of the criticism is best illustrated by the following, frequently cited passage:

> Loss of consortium is an intangible, nonpecuniary loss; monetary compensation will not enable plaintiffs to regain the companionship and guidance of a mother; it will simply establish a fund so that upon reaching adulthood, when plaintiffs will be less in need of maternal guidance, they will be unusually wealthy men and women. To say that plaintiff has been "compensated" for their loss is superficial; in reality they have suffered a loss for which they can never be compensated; they have obtained instead, a future benefit essentially unrelated to that loss.[45]

The logic underlying this observation is dubious. The practical counter response is that compensation or monetary damages is the only manageable way our system of jurisprudence has found to ease personal loss—pecuniary and nonpecuniary. Furthermore, compensation, especially where a cognizable loss has occurred, is clearly preferable to denying recovery.

This line of criticism developed and persists because the policy considerations which underlie loss of parental consortium have never been clearly articulated. As noted earlier, even courts that refuse to recognize loss of parental consortium actions appreciate the fact that a genuine injury is inflicted upon the child as a result of the defendant's negligent conduct.[46] It is no longer doubted that children are persons with legal rights

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[43] *Id.* § 1.2, at 4-5.

[44] Hoesing v. Sears, Roebuck & Co., 484 F. Supp. 478, 479 (D. Neb. 1980); *Borer*, 563 P.2d at 862.

[45] *Borer*, 563 P.2d at 862. For counterargument from jurisdictions recognizing parental consortium, see *infra* note 104.

[46] *See supra* notes 39, 41.

and entitlements. Likewise, it is beyond dispute that minor children have an interest in the familial relationship that is as important, if not more so, than that of husband and wife. These truths, combined with the legal protection common law courts have historically accorded other familial interests, suggest that the child's interest in consortium is legitimate.[47]

Common law courts have traditionally expressed reluctance to recognize a new substantive action only where the asserted action does not fit precisely within a traditional analytical framework. For example, where a new substantive right such as parental consortium is asserted, common law courts, more frequently than not, look to the underlying theory of culpability to determine the merits of the assertion. In the context of parental consortium the underlying theory of culpability is negligence. Consequently, the initial inquiry is whether the substantive claim for parental consortium defies traditional negligence analysis.

The traditional negligence analysis requires proof of duty, breach, proximate cause and damages. The legal concepts of duty and proximate cause are, however, most often cited as the factors limiting the development of new substantive tort claims. While duty and proximate cause are often treated as distinct analytical inquiries, such is not always the case.[48] "[D]uty is not sacrosanct in itself, but only an expression of the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection."[49] The same policy concerns and considerations which are examined in the context of whether a duty is owed are more often than not duplicated in the proximate cause inquiry. The significant distinction between duty and proximate cause is the role each concept plays in the analysis of a negligence action. The duty inquiry is traditionally utilized to determine whether a rela-

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[47] *See* Ralph S. Petrilli, *A Child's Right to Collect for Parental Consortium Where Parent is Seriously Injured*, 26 J. FAM. L. 317, 319-20, 346-47 (1987-88); *see also* Johnson, *supra* note 23, at 774-75.

[48] *See* KEETON ET AL., *supra* note 4, § 42, at 273.

[49] WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS § 53, at 331-34 (3d ed. 1964).

tionship exists that imposes upon the defendant a legal obligation for the benefit of the plaintiff.[50] Proximate cause, on the other hand, is concerned with confining the defendant's liability to a reasonable limit.[51]

Parental consortium is consistent with the traditional negligence analysis. It does not strain the concept of proximate cause to say that a negligent tortfeasor should foresee harm to children resulting from permanent injury to a parent. This fact has never been questioned. What then has caused courts such grave concerns with regards to parental consortium claims?

Judicial attempts to balance the congruence between rights and remedies can lead to unexplainable results. Courts that have entertained the issue and denied recovery have all based their decisions on administrative and remedial concerns. Such reasoning is analogous to the brain teaser, "which came first, the chicken or the egg?" In essence, courts that have denied recovery have utilized the means (the difficulty of fashioning a remedy) to defeat the ends (the recognition of a legitimate substantive interest).

Whether to recognize a new common law substantive claim has traditionally been determined by ascertaining whether the complaining person has an interest "entitled to" and "capable of" legal protection. As discussed above, children are persons with a legal interest in the familial relationship. That interest is consistent with traditional negligence analysis. Administrative and remedial concerns should not determine whether a new common law substantive action should be recognized. Rather, these concerns should be addressed in and incorporated into that part of the common law process which concerns itself with fashioning the prima facie requirements, the measure of damages, and limitations to recovery. To illustrate, the rule that a child can assert a parental consortium claim only where the parent has suffered severe, serious, and permanent injury acts as a limitation which diminishes both administrative and

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[50] KEETON ET AL., *supra* note 4, § 53, at 356.

[51] *Id.*

remedial concerns. This rule has been adopted by a substantial number of the jurisdictions which recognize claims for loss of parental consortium. This rule also demonstrates that the proper place for administrative and remedial concerns is not in an inquiry dealing with whether to recognize a new substantive common law right, but rather in fashioning the prima facie requirements and other judicial limitations to the action. What remains, however, is to demonstrate that interference with a child's interest in parental consortium leads to both real and significant harm not only to the relationship, but also to the child.

As noted earlier, the vast majority of jurisdictions which deny the existence of the substantive right to parental consortium recognize that actual harm results from the negligent injury of the parent. A close examination of these cases, however, suggests that the harm referred to is harm to the relationship as contrasted with harm to the child.[52] The reality is that children often suffer mentally and emotionally where there has been serious and permanent injury to the parent. The harm done to a child where a parent, due to the negligence of the defendant, is totally and permanently paralyzed, is probably as great as where the parent is killed.

The major policy consideration underlying tort law is the compensation of wrongfully injured persons. The common law commitment to this policy is strong and is manifested in the number of exceptions to the traditional tort analysis recognized by common law courts.[53] Public policy, though articulated by jurists and legislators, is considered to be the

> [c]ommunity common sense and common conscience, extended and applied throughout the state to matters of public morals, health, safety, welfare and the like; it is that general and well-settled public opinion relating to man's plain, palpable

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[52] *See supra* notes 39, 41 and accompanying text.

[53] Two of the most well known common law exceptions to the traditional negligence analysis are res ipsa loquitur and the rule of *Summers v. Tice*. Both developed out of public policy concerns that many wrongfully injured persons would go uncompensated if adjustment in the law were not made.

> duty to [mankind], having due regard to all circumstances of each particular relation and situation.[54]

The policy considerations underlying loss of parental consortium are bolstered by the high priority given to the idea of the traditional family. Though historically male dominated and biased, the idea of the traditional family has influenced the development of the vast majority of civic institutions whether social, political or religious.

Most people who have children hope to enjoy the experience of raising a child in a normal happy relationship, which will result in a bond existing throughout their lives. The pros and cons of parenthood have been the subject of countless articles and books. The psychological joys derived from this experience are believed to surpass any other.[55] One renowned psychologist stated that "most Americans think of their families as the most important things in their lives," and that Americans derive much of their pleasure from their families.[56] For many Americans who have decided to commit their finances, time and emotions to parenthood, the loss of the opportunity to enjoy a normal experience is a devastating blow. Children, who are the intended and direct beneficiaries of a healthy parenting experience, are expected to return to the parents the fruits of their parents' labor when mom and dad are old. Consequently, if the parenting process is culpably disturbed, the probability of harm to all is extremely likely.

This article will explore the contours of the cause of action for parental consortium. It is intended to create awareness and give direction. Section A examines the issue of who can be a plaintiff in a loss of parental consortium action. Section B discusses the nature and quality, both temporary and permanent, of the injury necessary to support the action. This section also

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[54] BLACK'S LAW DICTIONARY 1231 (6th ed. 1990).

[55] *See* LOUIS GENEVIE & EVA MARGOLIES, THE MOTHERHOOD REPORT: HOW WOMEN FEEL ABOUT BEING MOTHERS 55-69 (1987).

[56] Patrick Reardon, *Top Threat to Family: No Time For the Kids*, CHICAGO TRIBUNE, Oct. 10, 1989, § 1, at 1 (quoting Dr. Lee Salk, nationally recognized child and family psychologist).

examines the derivative nature of loss of consortium and the effect of an injured parent's contributory negligence on the child's claim. Section C scrutinizes the various methods of assessing damages in a loss of parental consortium action. This section concludes that many of the rules for assessing damages may be borrowed from other substantive areas of the law such as wrongful death and spousal consortium. Section D attempts to illustrate the various prima facie case requirements which have developed in response to the view taken by courts of the substantive rules articulated in Sections A, B, and C. Finally, Section E observes that further attempts to expand the law of consortium to protect filial relationships other than the marital relationship, are inevitable.

II. PARENTAL CONSORTIUM

A. Plaintiffs

The issue of who can be a plaintiff in a parental consortium action has a standard answer. Because dependent minor children are the group most likely to suffer real harm due to the disruption of the parent-child relationship, all jurisdictions agree that a claim can be asserted on behalf of these parties.[57] Several jurisdictions, such as Arizona,[58] Texas,[59] Washington,[60] and Iowa,[61] do not limit the action solely to minor children. These jurisdictions, while recognizing that minors are the group most likely to suffer real and severe injury due to the disruption of the parent-child relationship, leave the issue of whether children other than minors have standing to sue to the jury in fixing damages.[62] In essence, when the plaintiff is an

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[57] *See supra* note 31; *see also* ALASKA PATTERN CIVIL JURY INSTRUCTION 20.09 cmt. (1990) ("[M]inor children have a cause of action for loss of parental consortium. Whether such a cause of action exists for non-minors is an open question, although the *Hibpshman* court referred to case law restricting the cause of action to minors. . . .") (citations omitted).

[58] Villareal v. State Dep't of Transp., 774 P.2d 213, 220 (Ariz. 1989).

[59] Reagan v. Vaughn, 804 S.W.2d 463, 466 (Tex. 1990).

[60] Ueland v. Reynolds Metals Co., 691 P.2d 190, 195 (Wash. 1984).

[61] Audubon-Exira Ready Mix, Inc. v. Illinois Cent. G.R.R., 335 N.W.2d 148, 152 (Iowa 1983).

[62] *See, e.g., Reagan*, 804 S.W.2d at 466; *Ueland*, 691 P.2d at 195. The ratio-

emancipated adult child, the trier of fact can consider the nature of the relationship between the child and injured parent in determining the award. The standing rule followed in a given jurisdiction will also affect the measure of damages in parental consortium actions.[63]

Some, but not all, jurisdictions have concluded that, in addition to minor children, handicapped[64] or incapacitated[65] children also qualify as plaintiffs. The further delineation of "minor children" into distinct groups suggests that courts are genuinely seeking to protect the essential elements of the parent-child relationship. Those elements are the children's need for parental care, love, companionship and support. The delineations also have in common the element of dependency. Therefore, in the vast number of jurisdictions that recognize the action, any child, other than an adult emancipated child, who is primarily dependent on the parent for love, care and support, can be a plaintiff. It is essential that dependency be rooted not only in the economic needs but also in emotional and psychological requirements of the child.[66] A minor child who does not live in the home is not automatically barred from bringing suit for parental consortium.[67] Rather, where the child is not in the home, the trier of fact must be presented with evidence of the filial relationship and of needs that are not met due to the injury to the parent.[68]

Relatives other than children of "adoptive or natural parents"[69] are not entitled to assert a claim for parental consor-

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nale behind this view is that adult children are allowed to recover under both the Texas and Washington wrongful death statutes. *Reagan*, 804 S.W.2d at 466; *Ueland*, 691 P.2d at 195.

[63] *See infra* note 130 and accompanying text.

[64] *See, e.g.*, Belcher v. Goins, 400 S.E.2d 830, 841 (W. Va. 1990) (dependency on parent is controlling factor in determining standing).

[65] *See, e.g.*, Williams v. Hook, 804 P.2d 1131, 1138 (Okla. 1990).

[66] Ferriter v. Daniel O'Connell's Sons, Inc., 413 N.E.2d 690, 696 (Mass. 1980).

[67] Barbosa v. Hopper Feeds, Inc., 537 N.E.2d 99, 104 (Mass. 1989).

[68] *Barbosa*, 537 N.E.2d at 104-05.

[69] In *Villareal*, the court observed, "A proper plaintiff is a child whose parent has been injured. We limit our definition of parent to include biological and adoptive parents." Villareal v. Arizona Dep't of Transp., 774 P.2d 213, 219 (Ariz. 1989). This definition is consistent with the law of other jurisdictions recognizing

tium. As Justice Gonzalez observed in *Reagan v. Vaughn*:[70]

> The distinction between the interests of children and those of other relatives is rational and easily applied. Most children are dependent on their parents for emotional sustenance. This is rarely the case with more remote relatives. Thus, by limiting the plaintiffs in the consortium action to the victim's children, the courts would ensure that the losses compensated would be both real and severe.[71]

The issue of who can be a plaintiff in a loss of parental consortium action is initially determined by examining whether a parent-child relationship exists. Thereafter, dependency, which encompasses the economic, emotional and psychological needs of the child, becomes the primary factor in determining whether the victim's child has a cause of action[72] and in calculating the amount of recovery in that action.[73]

This analytical framework is useful in determining novel questions such as whether illegitimate children, step-children, foster children or fetuses have a right of action for parental consortium. The logical answer, at least with regard to illegitimate children who are involved in a dependent, filial relationship with the natural parent, should be in the affirmative.

Step-children and foster children, for policy reasons, may engender recognition of a special exception to this analytical framework. Such an exception would be analogous to the rule in *Dillon v. Legg*,[74] which allows a bystander in relational

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loss of parental consortium. For a list of jurisdictions recognizing loss of parental consortium, see *supra* note 34. "Parent" does not include grandparent, siblings, other relatives or friends, and may not include a stepparent who has not adopted the child. 2 JACOB STEIN, STEIN ON PERSONAL INJURY DAMAGES § 13.20, at 178 (2d ed. 1991).

[70] 804 S.W.2d 463 (Tex. 1990).

[71] *Reagan*, 804 S.W.2d at 466 (quoting Theama v. City of Kenosha, 344 N.W.2d 513, 521 (Wis. 1984)). This view is consistent with case law in each jurisdiction that recognizes the action.

[72] *See, e.g, Villareal*, 774 P.2d at 220; Belcher v. Goins, 400 S.E.2d 830, 842 (W. Va. 1990).

[73] *See, e.g., Villareal*, 774 P.2d at 220; *Reagan*, 804 S.W.2d at 467; Ueland v. Reynolds Metals Co., 691 P.2d 190, 194-95 (Wash. 1984).

[74] 441 P.2d 912 (Cal. 1968).

proximity to the injured person to recover for emotional distress caused by witnessing the injury.[75] *Dillon* disavows the rule of law, once followed in a substantial majority of jurisdictions, which precluded bystanders from recovering for emotional distress unless they themselves were in the zone of danger.[76]

The *Dillon* court's rejection of the zone-of-danger rule was in part due to the overly restrictive effect of the test. By balancing physical proximity, relational proximity and temporal proximity, the court devised a standard which not only operated as a limitation to recovery but also as a guarantor of the genuineness of claims. This extended legal protection to include a larger number of genuine claims for emotional distress, which previously could not have been brought.

Relational proximity is certainly consistent with the policy considerations underlying loss of parental consortium. The major attraction of the relational proximity standard is its flexibility. It does not require the creation of an immutable rule precluding certain groups of children from asserting a cause of action. Rather, it embodies the philosophy that a child's standing to sue for loss of parental consortium should be determined on a case-by-case basis. This is much more attractive than a strict rule precluding step-children and foster children from asserting an action. Step-children and foster children should not be denied recovery; especially, where they can prove by a preponderance of the evidence the existence of a strong filial relationship and emotional and financial dependency upon the injured step or foster parent.

The development of the tort law of fetal protection—prenatal injury— has been slow and controversial. Prior to 1946, legal actions seeking compensation for prenatal injury were uniformly rejected.[77] That rejection focused on two reasons: (1) the defendant could owe no duty to a person not in

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[75] *Dillon*, 441 P.2d at 921.

[76] *Id.* at 915. This view has been adopted by the RESTATEMENT (SECOND) OF TORTS § 313 (1965).

[77] KEETON ET AL., *supra* note 4, § 55, at 367-68.

existence at the time of the injury; and (2) the difficulty of proving causal relationship was so tenuous that the danger of fictitious claims was too great.[78] Presently, every jurisdiction recognizes that a child injured inter-utero and born alive can maintain an action for prenatal injury, and if he dies as a result of such injuries after birth, an action will lie for wrongful death. Many jurisdictions, however, have limited the right to recover to cases where the child is viable or quick at the time of the injury.[79]

The rights of fetuses pose a particular problem in the context of loss of parental consortium since the emotional aspect of the parent-child relationship, which is the essence of a parental consortium claim, is obviously lacking. It can hardly be said that a fetus has an emotional attachment to the negligently injured parent. Likewise, the degree of fetal dependency on the injured parent for care, society and support is tenuous at best.

B. Nature of the Injury

The action for parental consortium contemplates a single tortious act which injures the parent and consequently the child by virtue of their relationship to each other. The injured parent sustains direct personal injuries for which he or she has the exclusive right to recover. The child suffers damages to emotional interests emanating from the parent-child relationship and has the right to bring an action for loss of parental consortium to recover for these damages.

Not only must there be an injury to a parent, but in a substantial number of jurisdictions, that injury must be compensable; that is, an injury for which the defendant is liable.[80] Accordingly, in Arizona, Montana, Texas, Washington, Wisconsin, West Virginia, and Vermont, the child's consortium claim is barred as a matter of law when the jury finds for the defendant on the injured parent's personal injury claim.[81] If the

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[78] *Id.*

[79] *Id.*

[80] *See, e.g., Villareal*, 774 P.2d at 220; *Reagan*, 804 S.W.2d at 467; *Ueland*, 691 P.2d at 192.

[81] *See Villareal*, 774 P.2d at 220; Keele v. St. Vincent Hosp. & Health Care

injured parent's contributory negligence bars his or her recovery, it also bars the child's claim for lost parental consortium.[82] The same rule applies under the comparative negligence rule where the injured parent is precluded from recovering because his or her negligence was greater than that of the defendant.[83] Likewise, the injured parent's settlement or release of the action may operate to dislodge the child's action.[84]

The remaining jurisdictions which recognize the action, but have not expressly ruled on this issue, may or may not follow the common law as discussed above. These jurisdictions, Alaska, Iowa, Massachusetts, Michigan, Oklahoma, and Wyoming, may choose to follow the spousal consortium rule which prohibits reduction of the non-injured spouse's consortium award for the contributory negligence of the injured spouse.[85] Surprisingly, Iowa and Massachusetts, both jurisdictions which allow actions for loss of parental consortium, prohibit the reduction of spousal consortium awards for the contributory negligence of the injured spouse.[86] It would not be surprising for these states, along with others, to apply this rule to their common law of parental consortium. Conversely, Alaska, Oklahoma, and Wyoming view consortium as derivative and allow spousal consortium awards to be reduced by the contributory negligence of the injured spouse.[87] Our legal system's preoccupation with

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Ctr., 852 P.2d 574, 577 (Mont. 1993); *Reagan*, 804 S.W.2d at 467; Hay v. Medical Ctr. Hosp., 496 A.2d 939, 942-43 (Vt. 1985); *Ueland*, 691 P.2d at 192; *Belcher*, 400 S.E.2d at 841; *Theama*, 344 N.W.2d at 522.

[82] *Villareal*, 774 P.2d at 220; *Reagan*, 804 S.W.2d at 467.

[83] *Villareal*, 774 P.2d at 220; *Reagan*, 804 S.W.2d at 467.

[84] *See, e.g.*, Belcher v. Goins, 400 S.E.2d 830, 842 (W. Va. 1990).

[85] *See* Hibpshman v. Prudhoe Bay Supply Inc., 734 P.2d 213, 213 (Alaska 1987); Weitl v. Moes, 311 N.W.2d 259, 259 (Iowa 1981), *overruled by* Audubon-Exira Ready Mix Inc. v. Illinois Cent. G.R.R., 335 N.W.2d 148 (Iowa 1983); Ferriter v. Daniel O'Connell's Sons Inc., 413 N.E.2d 690, 690 (Mass. 1980); Williams v. Hook, 804 P.2d 1131, 1131 (Okla. 1990); Nulle v. Gillette-Campbell County Joint Powers Fire Bd., 797 P.2d 1171, 1171 (Wyo. 1990).

[86] *See* Schwennen v. Abell, 430 N.W.2d 98, 101 (Iowa 1988); Handeland v. Brown, 216 N.W.2d 574, 579 (Iowa 1974); Morgan v. Lalaniere, 493 N.E.2d 206, 212 (Mass. App. Ct. 1986).

[87] *See* Eggert v. Working, 599 P.2d 1389, 1391 (Alaska 1979); McKee v. Neilson, 444 P.2d 194, 197 (Okla. 1968); Weaver v. Mitchell, 715 P.2d 1361, 1369

uniformity and certainty of law supports the conclusion that these jurisdictions will probably apply the same rule to parental consortium claims.

1. Derivative vs. Independent Claims

The different views existing in regard to "compensable injury" are the consequence of the dual nature of consortium claims. Consortium claims have historically been viewed as derivative since they are dependent on the injured spouse or parent having a valid cause of action. They are also generally considered to be separate and independent claims. Courts that view consortium claims as derivative adhere to the rule that they must stand or fall with the main claim.[88] As William Prosser explained:

> The conflict that appears to be developing in the cases, however, suggests the need for basic explanations, of which there has been something of a shortage. Courts have commonly said that the consortium action is derivative and must fall with the main claim, but as they could as well have said that it was independent, this sounds more like a conclusion than a reason, and indeed the courts which hold that the injured person's contributory negligence does not reduce damages in the consortium claim have said exactly that. But it must also be observed that the label "independent action" for the consortium claim is equally a conclusion. In the end the reasons for adopting one line of cases or another may turn less on logic than on perceptions of social needs and justice to the parties.[89]

The absence of a rational explanation for choosing either approach over the other suggests that courts have broad discretion in shaping this aspect of consortium. A major criticism of the derivative approach is its all-or-nothing nature. In states which still adhere to common law contributory negligence, the

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(Wyo. 1986).

[88] KEETON ET AL., *supra* note 4, § 125, at 938.

[89] *Id.* § 125, at 938-39.

child's claim completely terminates along with that of the injured parent. Thus, the tortfeasor receives a windfall and completely escapes the legal consequences of his tortious conduct. The abolition of common law contributory negligence and the adoption by a majority of states of some variant of comparative fault diminishes the frequency with which a complete forfeiture of the child's claim will occur. However, adherence to the derivative view will still cause a diminution in value of the child's claim. Consequently, the issue should be resolved by taking into consideration the equity of the matter, especially where injury of a permanent nature is required to support the child's claim.

2. Workers' Compensation Laws

Workers' compensation benefits are in the nature of a compromise by which the worker receives limited compensation, usually less than that which could have been awarded by a jury, in return for an extended liability and assurance of payment from the employer. Ordinarily, when an injury to an employee occurs in the scope of employment, it is compensable under the workers' compensation laws. Consequently, courts uniformly hold that the statutorily prescribed compensation is the sole remedy and that any common law action against the employer is barred. When a parent is negligently injured while acting within the scope of his employment, the issue is whether the exclusivity provisions of the workers' compensation statutes operate as a bar to claims for loss of consortium.

Logic would suggest that the derivative/independent claim dichotomy would be a useful analytical tool in determining whether exclusivity provisions preclude loss of parental consortium actions against employers where an injured parent is entitled to receive workers' compensation benefits. However, this is not the case. Rather, the majority of courts reason that exclusive remedy provisions, which abolish other civil remedies for injuries to workers and provide that compensation under the act is in lieu of other common law rights, evidence legisla-

tive intent to prohibit common law actions against employers.[90]

Currently, three jurisdictions, Iowa, Massachusetts and Washington, view loss of consortium as an independent claim.[91] Massachusetts recognized that the exclusive remedy provision of its workers' compensation laws did not bar a child's action for loss of parental consortium.[92] This position, however, has subsequently been statutorily modified by the Massachusetts Legislature, which amended its laws to bar consortium claims unless the employee reserved his common law rights at the time of hire.[93] On the other hand, the Washington Supreme Court in *Provost v. Puget Sound Power & Light Co.*[94] clearly utilized the statutory interpretation approach to conclude that loss of parental consortium actions are barred by the state's exclusive remedy statute.

3. *Permanent vs. Temporary Injury*

The tort of loss of parental consortium, unlike spousal consortium,[95] is concerned with significant interference with the parent-child relationship. Some courts, therefore, have gone to great lengths to define the nature of the injury for which the action intends to compensate. All jurisdictions which recognize loss of parental consortium agree that the child has a right of

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[90] ARTHUR LARSON, THE LAW OF WORKMEN'S COMPENSATION §§ 66.10-.21 (1993).

[91] *See* Huber v. Hovey, 501 N.W.2d 53, 57 (Iowa 1993); Eyssi v. City of Lawrence, 618 N.E.2d 1358, 1363 (Mass. 1993) (quoting Feltch v. General Rental Co., 412 N.E.2d 67, 70 (Mass. 1981)); Cornejo v. Washington, 788 P.2d 554, 563 (Wash. Ct. App. 1990).

[92] Ferriter v. Daniel O'Connell's Sons, Inc., 413 N.E.2d 690, 702 (Mass. 1980).

[93] MASS. GEN. LAWS ANN. ch. 152, § 24 (West. Supp. 1994); *see also Eyssi*, 618 N.E.2d at 1361 (discussing amendment and its affect).

[94] 696 P.2d 1238, 1240-41 (Wash. 1985).

[95] In a spousal consortium action the injured spouse must have suffered an injury which deprives the non-injured spouse of some benefit which formerly existed in the marriage. Consequently, the consortium claim of the non-injured spouse can be based on non-impact injury to the injured spouse, such as emotional distress suffered by the spouse in a zone of danger situation or the injured spouse's emotional distress caused by observing their seriously injured child at the scene of an accident. *See* STEIN, *supra* note 69, § 13.13, at 155.

action when the injured parent has suffered a serious, severe and permanent physically or mentally disabling injury.[96] In jurisdictions where the sole basis for parental consortium is permanent injury and the extent of the parent's injury is in dispute, the trier of fact must make a threshold finding that the injury to the parent satisfies this characterization prior to resolution of the consortium damages issue.

A number of jurisdictions, including Wyoming,[97] Wisconsin,[98] Massachusetts[99] and Michigan[100] seemingly allow recovery for mere negligent injury to a parent regardless of the degree or extent of harm. It should be noted, however, that the seminal cases from these jurisdictions all involved severe and permanent physical or mental injury to the parent.[101] Jurisdictions which adhere to this rule will probably allow recovery where there has been temporary as contrasted with permanent injury to the parent. These jurisdictions treat consortium as a unitary concept embracing all the familial aspects of the parent-child relationship, so that an interference with any of the rights, duties or obligations thereof constitutes a basis for an action for parental consortium.

Temporary injury, as a grounds for a parental consortium claim, is arguably inconsistent with the traditional negligence analysis which, unlike intentional tort analysis, requires proof of actual damages. In essence, compensation for temporary injury unnecessarily assumes that the child will suffer injury from every act of negligent harm to the parent, no matter how slight. There is a substantial likelihood, therefore, that awards based on temporary injuries violate the prohibition against awarding uncertain or speculative damages.[102]

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[96] *See supra* note 34.

[97] *See* Nulle v. Gillette-Campbell County Joint Powers Fire Bd., 797 P.2d 1171, 1176 (Wyo. 1990).

[98] *See* Theama v. City of Kenosha, 344 N.W.2d 513, 522 (Wis. 1984).

[99] *See Ferriter*, 413 N.E.2d at 692-93.

[100] *See* Berger v. Weber, 303 N.W.2d 424, 427 (Mich. 1981).

[101] *See Ferriter*, 413 N.E.2d at 691; *Berger*, 303 N.W.2d at 424; Williams v. Hook, 804 P.2d 1131, 1131 (Okla. 1990); *Theama*, 344 N.W.2d at 513; *Nulle*, 797 P.2d at 1171.

[102] Damages which are uncertain, contingent or speculative in nature cannot be

The severe and permanent injury requirement, on the other hand, does not assume injury to the parent-child relationship. It combats frivolity and legitimizes the child's allegation of injury by requiring not only proof of the parental relationship before and after the injury, but also evidence of the extent of the parent's injury. The severe, serious and permanent injury rule also furnishes a natural barometer with which to gauge the inadequacy or excessiveness of the damages award.

C. Assessing Damages Generally

"Damages" has been defined as "a pecuniary compensation or indemnity, which may be recovered in the courts by any person who has suffered loss, detriment, or injury whether to his person, property, or rights, through the unlawful act, omission or negligence of another."[103] Damages are given as compensation for injury. The purpose of a damages award is to place the plaintiff in the same position, as far as money can, as he would have been in had there been no breach of duty or injury.[104] The lack of a standard with which to measure damages for loss of parental consortium is a recurrent justification for the refusal by many jurisdictions to recognize the action. In essence, these courts are concerned that the difficulty in defin-

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made the basis of a recovery. Damages may be uncertain, either as to their existence or their nature, or in respect of the cause from which they result. 25 C.J.S. *Damages* § 26 (1966).

[103] BLACK'S LAW DICTIONARY 389 (6th ed. 1990). One court has defined damages as "the word which expresses in dollars and cents the injury sustained by a plaintiff." Washburn v. Pearson, 226 So. 2d 758, 760 (Miss. 1969) (quoting Fidelity & Casualty Co. v. Huse & Carleton, Inc., 172 N.E. 590, 593 (Mass. 1930)).

[104] *See* Lee v. Southern Homes Sites Corp., 429 F.2d 290, 293 (5th Cir. 1970). One justification for denying the action for parental consortium is that money cannot fairly compensate the child. Jurisdictions which recognize the action have typically responded to this argument in the following manner:

> Although a monetary award may be a poor substitute for the loss of a parent's society and companionship, it is the only workable way that our legal system has found to ease the injured party's tragic loss. We recognize this as a shortcoming of our society, yet we believe that allowing such an award is clearly preferable to completely denying recovery. . . .

Theama, 344 N.W.2d at 520.

ing and quantifying damages may lead to double recovery. This justification, however, is without merit. While there are established measures of damages for particular situations, the measure to be used in any given case should depend on the principles of fairness and the individual facts of the case, including the pleadings, evidence, theories and arguments selected. The fact that damages cannot be computed without difficulty or with demonstrable accuracy is not enough to deny the plaintiff's cause.[105] Rather, the jury is entrusted with the difficult task of determining the damage award.[106]

Much of the law in regards to parental consortium can be borrowed from other well established and accepted areas of the law. For example, the proper standard with which to measure damages in loss of parental consortium actions is the standard currently used in cases involving wrongful death actions.[107] Wrongful death statutes uniformly allow children to recover for the loss of companionship and society of a tortiously killed parent.[108] Here, as with other intangible losses such as pain

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[105] The uncertainty of proving damages should not preclude the granting of relief. As one commentator stated:

> Where the tort itself is of such a nature as to preclude the ascertainment of the amount of damages with certainty, it would be a perversion of fundamental principles of justice to deny all relief to the injured person, and thereby relieve the wrongdoer from making any amend for his acts.

CHARLES T. MCCORMICK, HANDBOOK ON THE LAW OF DAMAGES § 27 (1935).

[106] *See, e.g.*, Beagle v. Vasold, 417 P.2d 673, 675 (Cal. 1966) ("[T]he jury is asked to evaluate in terms of money a detriment for which monetary compensation cannot be ascertained with any demonstrable accuracy."); Alamo Rent-A-Car, Inc. v. Clay, 586 So. 2d 394, 395 (Fla. 1991) (examining Florida's wrongful death statute and observing that monetary value of intangible losses to child of his father's companionship and parental influence is compensation which may be properly assessed only by jury).

[107] Both parental consortium and wrongful death actions are concerned with providing recovery for intangible losses. While wrongful death actions did not exist at common law, they have been statutorily recognized in every jurisdiction. Furthermore, courts have utilized common law precepts to fill in the gaps left by legislatures. Dobbs, *supra* note 42, § 8.2. Borrowing from the law of wrongful death also assures uniformity and certainty in the law and its application.

[108] *See* KEETON, ET AL., *supra* note 4, § 127, at 952-53; Petrilli, *supra* note 47, at 328. Twenty-five jurisdictions allow recovery for loss of consortium through

and suffering, the issue may be resolved by the impartial conscience and judgment of the jurors who are expected to act reasonably and intelligently in light of the evidence presented.[109]

A basic premise of the law of compensation is that a plaintiff can receive only one satisfaction for damages arising out of the same facts.[110] Consequently, the different methods of ascertaining damages in a particular situation should not be applied in such a manner as to give double compensation for the same injury. The prohibition against double recovery grew out of the rule that the law should not permit a person to realize a profit or put him in a better position than he would have been in had there been no injury.[111] The concern that the plaintiff will receive double recovery because the child and parent will receive compensation for the same injuries is a legitimate one. Nevertheless, this concern can be alleviated with the use of the procedural devices of joinder of actions, appropriate jury instructions and special verdicts.[112]

1. Joinder

A joinder requirement is essential to the continued vitality of parental consortium. A mandatory joinder rule alleviates the majority of concerns articulated as grounds for denying the action.[113] Mandatory joinder negates the possibility of a multi-

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wrongful death statutes, while an additional fourteen jurisdictions allow similar recovery under statutes containing language that initially had been construed as limiting recovery to pecuniary loss. For a list of cases and citations, see Mogill, *supra* note 3, at 1331 nn.79-81.

[109] *See supra* note 106 and accompanying text.

[110] DOBBS, *supra* note 42, § 1.5.

[111] 25 C.J.S. *Damages* § 3 (1966).

[112] *See* Borer v. American Airlines, Inc., 563 P.2d 858, 866-70 (Cal. 1977) (Mosk, J., dissenting).

[113] Multiplicity of suits and likelihood of double recovery have been cited by the courts as among the major reasons for denying the action. A number of jurisdictions have conditioned recognition of the action "on a requirement that the child's claims be joined with his injured parent's claim. If a child's consortium claim is brought separately, the burden will be on the plaintiff to show why joinder was not feasible." Weitl v. Moes, 311 N.W.2d 259, 270 (Iowa 1981), *overruled by* Audubon-Exira Ready Mix, Inc. v. Illinois Cent. G.R.R., 335 N.W.2d 148 (Iowa

plicity of suits, diminishes administrative concerns and also lessens the likelihood of duplicitous recoveries. In essence, a joinder rule assures that all the claims and parties, those of children included, are before the court in the same instance. This provides courts with an opportunity to examine each element of damage and utilize pre-trial procedure to dispose of untenable claims. Joinder also provides courts with an opportunity to determine eligibility and to equitably apportion the damages award among the children.[114]

Every jurisdiction has specific periods of limitation within which every civil action must be brought or otherwise forfeited. One rationale for statutes of limitation is that it is fundamentally unfair and prejudicial to the defendant if the plaintiff is allowed an infinite period within which to seek legal recourse for interference with a protected interest. It is uniformly agreed, however, that fairness must also be shown to the plaintiff operating under a disability at the time of the invasion. Consequently, periods of limitation are ordinarily tolled for certain legislatively prescribed reasons.

The disability of minority is one of the more common reasons for tolling the operation of statutes of limitation. Mandatory joinder eliminates multiple lawsuits by removing parental consortium claims from the ambit of ordinary tolling statutes. Were this not the case, siblings could decide to forego litigation of their claims until the disability is removed from each child, respectively. Thus, due to the different ages and number of children, the defendant is put in the unfair position of having to bear the expense of multiple suits over an indefinite period of time.

1983); *see also* Hay v. Medical Ctr. Hosp., 496 A.2d 939, 943-44 (Vt. 1985); Ueland v. Reynolds Metals Co., 691 P.2d 190, 194-95 (Wash. 1984); Belcher v. Goins, 400 S.E.2d 830, 838-39 (W. Va. 1990); Nulle v. Gillette-Campbell County Joint Powers Fire Bd., 797 P.2d 1171, 1175-76 (Wyo. 1990).

[114] All agree that there must be some limits on tort recovery. Parental consortium is not an exception to this rule. The decision where the limitation exists is essentially political. But in the context of loss of parental consortium it revolves around such considerations as age, maturity, and physical and mental disabilities.

One alternative to mandatory joinder is to allow the defendant to require joinder. This view, followed in only one jurisdiction currently recognizing loss of parental consortium, is merely a modification of the mandatory joinder rule.[115] The rationale for this view is that because minority ordinarily tolls the statute of limitations, it is unfair to the defendant to allow claimants to wait until after their eighteenth birthday to bring their consortium claims.[116] This rationale is identical to that which underlies the mandatory joinder rule. The strict rule requiring joinder unless infeasible, however, negates placing this burden on the defendant who may inadvertently fail to exercise it. Under mandatory joinder, the plaintiff bears the burden of proving the infeasibility of joinder.[117] Additionally, mandatory joinder also encourages settlement.

Joinder also lessens the likelihood that the defendant will pay twice for the same element of damages. For example, an injured parent and non-injured spouse bring an action against a tortfeasor and recover for loss of earnings. Counsel for the child of the injured parent subsequently seeks compensation for the child's loss of "support and maintenance, care, society, affection and kindness." Arguably, the claim for parental "support and maintenance" gives rise to the objection that compensation of such loss would cause the defendant to pay twice for the same element of damage.[118] The claim for "support and maintenance" should be severed from the child's action while the claims for loss of care, society, affection and kindness

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[115] *See* Villareal v. Arizona Dep't of Transp., 774 P.2d 213, 220 (Ariz. 1989).

[116] *Villareal*, 774 P.2d at 220.

[117] *See, e.g.*, *Weitl*, 311 N.W.2d at 270; WASHINGTON PATTERN JURY INSTRUCTIONS (CIVIL) 32.05 cmt. (3d ed. 1989).

[118] Lawyers should exercise great care in drafting parental consortium claims. As illustrated in the text, the claim for lost earnings by the parents and lost support and maintenance by the child are identical. Given the novelty of parental consortium, it is probably better to assert claims which are clearly unrelated to claims already asserted by either parent. For example, the objections raised by the defendant alleging double payment could be avoided by merely seeking recovery of damages for loss of care, affection and kindness. *See, e.g.*, Pleasant v. Washington Sand & Gravel Co., 262 F.2d 471, 473 (D.C. Cir. 1958); Russell v. Salem Transp. Co., 295 A.2d 862, 864 (N.J. 1972).

should be allowed to continue to the jury.[119] Thus, mandatory joinder gives the court an opportunity to scrutinize each aspect of the child's claim against those of the injured parent.

2. *Damages Recoverable*

Pecuniary damages, such as lost income, which are likely to be used for the benefit of the child are recoverable in the parent's action but not in the child's claim.[120] As observed by Justice Kauger, writing for the court, in *Williams v. Hook*:[121]

> The entire sum which would have been available as a resource for the parent to provide support and benefits to the child, be they essential or recreational, is recovered by the parent. A cause of action for loss of parental consortium is limited primarily to an award based on the emotional suffering of the child, and recovery is limited to loss of the parent's society and companionship.[122]

Economic losses are not recoverable in a loss of parental consortium action under circumstances where a parent is negligently injured rather than killed.[123] This rule precludes the child from recovering for the "value of nursing, domestic or household services provided by the minor child to the injured parent."[124] The value of services, other than those of the parent to the child,[125] like economic losses, are recoverable by the

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[119] *See supra* note 118.

[120] *See* Hibpshman v. Prudhoe Bay Supply, Inc., 734 P.2d 991, 997 (Alaska 1987); Reagan v. Vaughn, 804 S.W.2d 463, 467 (Tex. 1990); Belcher v. Gains, 400 S.E.2d 830, 843 (W. Va. 1990); Theama v. City of Kenosha, 344 N.W.2d 513, 521 (Wis. 1984).

[121] 804 P.2d 1131 (Okla. 1990).

[122] *Williams*, 804 P.2d at 1135.

[123] *Id.* In *Williams*, the issue of whether economic losses can ever be recovered in a parental consortium claim was expressly reserved by the Oklahoma Supreme Court. *Id.* at 1135 n.13.

[124] *See Belcher*, 400 S.E.2d at 843.

[125] Weitl v. Moes, 311 N.W.2d 259, 269 (Iowa 1981), *overruled by* Audubon-Exira Ready Mix, Inc. v. Illinois Cent. G.R.R., 355 N.W.2d 148 (Iowa 1983). The value of the parent's services to the child are economic in nature. *Weitl*, 311 N.W.2d at 269. However, because this element of damages is not recoverable in the parent's action, it is allowed in the child's. *Id.*; *see, e.g.*, MICHIGAN STANDARD

injured parent. A rule to the contrary would certainly lead to the defendant paying double compensation for the same injury.[126] Factors which should be considered in assessing damages include the severity of the injury to the parent and its actual effect upon the parent-child relationship, the child's age, the nature of the child's relationship with the parent, the child's emotional and physical characteristics and whether other consortium providing relationships are available to the child.[127]

The measure of damages in a loss of parental consortium claim is also affected by the standing rule followed in a particular jurisdiction. Where standing is limited to minor children and injury of a permanent nature occurs, the measure of damages is limited to the number of years remaining until majority. This limitation is inapplicable where standing is not limited to minority. Where such is the case, damages for permanent consortium loss are based on the shorter of the injured parent's or child's life expectancies.[128]

JURY INSTRUCTIONS—CIVIL 52.02 (2d ed. 1990). The Michigan instruction provides in pertinent part:

> In this case [plaintiff] is claiming that [he/she] sustained damages as a result of injury to [his/her] [father/mother]. If you find that [plaintiff] [is/would be] entitled to damages, then it is your duty to determine the amount of money which will reasonably, fairly and adequately compensate [plaintiff] for any of the following elements of damage [he/she] has sustained to the present time as a result of injury to [his/her] [father/mother].
>
> a. the reasonable value of the services of [his/her] [father/mother] of which [he/she] has been deprived.

Id. Regarding determination of a damage award, Prosser explains that "[d]ifficult problems remain, however. Since the injured husband (for example) is entitled to recover for his own diminished earning capacity, the wife's consortium claim for loss of services must not be allowed to include lost services that are also part of that diminished capacity." KEETON ET AL., *supra* note 4, § 125, at 933.

[126] *But cf.* Villareal v. Arizona Dep't of Transp., 775 P.2d 213, 220 (Ariz. 1989) (including "support" among elements of damages for which child can recover); *Williams*, 804 P.2d at 1135 n.13 (declining to address issue of whether economic loss is ever recoverable in parental consortium action).

[127] *See Villareal*, 774 P.2d at 220-21; Reagan v. Vaughn, 804 S.W.2d 463, 467 (Tex. 1990); *Belcher*, 400 S.E.2d at 842.

[128] *See* Audubon-Exira Ready Mix, Inc. v. Illinois Cent. G.R.R., 335 N.W.2d 148, 152 (Iowa 1983).

Parental consortium also seeks to protect the child's interest in mental and psychological well being. Accordingly, damages for emotional distress are recoverable separate and apart from an action for negligent infliction of emotional distress.[129]

3. *Jury Instructions*

There are four basic models for drafting parental consortium instructions. The first model consists of one very broad instruction which merely mentions certain aspects of the action. Illustrative of this model is Alaska's model instruction which provides:

> The (first, second, etc.) item of non-economic loss is claimed not by (name of principal plaintiff(s)) but by (his/her/their) (child/children). The child(ren) claim(s) that an injury to the (name of principal plaintiff) legally caused by the defendant(s) has damaged the relationship between parent and child.
>
> You may make an award for the fair value of the loss of the enjoyment, care, guidance, love and protection that the child(ren) have suffered or are reasonably probable to suffer in the future. In deciding whether such a loss has occurred and the amount of any award, you may consider, among other things, evidence relating to the nature of the relationship between parent(s) and child(ren).
>
> If you decide to make an award to the child(ren) for this claimed loss, your award must not include any amount that duplicates any award to (name of principal plaintiff). For example, you should not make an award to the child(ren) for any loss of financial support from their parent, because that amount would already be included in the parent's right to recover for loss of earnings or loss of (his/her) ability to earn money.[130]

This instruction does not attempt to define for the jury the interests that parental consortium protects. Neither does it

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[129] *See, e.g., Villareal*, 774 P.2d at 220; *Williams*, 804 P.2d at 1135; Hays v. Medical Ctr. Hosp., 496 A.2d 939, 942 (Vt. 1985).

[130] ALASKA CIVIL PATTERN JURY INSTRUCTIONS 20.09 (1990).

articulate a prima facie case upon which the damages award is based. This model in all likelihood will lead to jury confusion and questionable awards due to the absence of a prima facie requirement and basic articulation of the interests protected by parental consortium.

The second model consists of several instructions. The first instruction defines parental consortium and/or sets out the prima facie case. Thereafter, a separate instruction detailing the measure of damages and the effect of the injured parent's comparative negligence is given. Oklahoma's parental consortium instructions are excellent examples of this model. That instruction provides:

> [Plaintiff] has sued [Defendant] for loss of parental consortium as a result of the injury to [Parent]. Parental consortium is defined as the love, care, companionship, and guidance given by a parent to a minor child. For [Plaintiff] to recover on this claim you must find all the following:
> A. [Parent] is entitled to recover damages from [Defendant] for [his/her] injuries.
> B. [Parent]'s injury is permanent.
> C. [Plaintiff] was a minor [or incapacitated dependent] child of [Parent] at the time [Parent] sustained the injuries.
> D. As a result of the injuries sustained by [Parent], [Plaintiff] sustained a loss of parental consortium.[131]

The measure of damages instruction provides:

> If you decide for [Plaintiff] on the question of liability, you must then determine the amount of money which will reasonably and fairly compensate [him/her] for the value of the parental consortium [he/she] has lost, and for the value of the loss of parental consortium [he/she] is reasonably certain to sustain until [he/she] reaches the age of eighteen.
>
> You are instructed that if you use the White Verdict Form, you should determine the full value of the loss of consortium. Whatever dollar amount you determine will be re-

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[131] OKLAHOMA UNIFORM JURY INSTRUCTIONS (CIVIL) 4.7 (2d ed. 1993); *cf.* MICHIGAN STANDARD JURY INSTRUCTIONS—CIVIL 52.02 (2d ed. 1990) (consisting of only one instruction on measure of damages).

duced by the Court by that percentage of negligence which you have attached to [Parent].[132]

This model suffers no major shortcomings. It is informative and avoids prolixity. Thus, this model enhances the likelihood that the jury will understand the rules for carrying out its responsibilities.

The third model, utilized in Texas, consists of a combination of instructions. The first instruction defines the concept of parental consortium. Thereafter, the jury is given a series of questions. Each question must be answered in the affirmative in order to reach the issue of damages. The Texas instructions provide:

> If you have answered Question(s)[questions establishing liability of one or more defendants] "Yes," then answer the following Question. Otherwise, do not answer the following question.
>
> QUESTION
>
> Was the physical injury to [Plaintiff] a serious, permanent, and disabling injury?
>
> Answer "Yes" or "No"
>
> Answer:[133]
>
> If you answered Question [7.10] "Yes," then answer the following question. Otherwise, do not answer the following question.
>
> QUESTION
>
> What sum of money, if paid now in cash, would fairly and reasonably compensate [Plaintiff] for the loss, if any, of parental consortium that resulted from the physical injury to [Parent].
>
> "Parental consortium" means the positive benefits flowing from the parent's love, affection, protection, emotional support, services, companionship, care and society.
>
> In considering your answer to this question, you may consider only the following factors: the severity of the injury to parent and its actual effect on the parent-child relation-

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[132] OKLAHOMA UNIFORM JURY INSTRUCTIONS (CIVIL) 4.8 (2d ed. 1993).

[133] TEXAS PATTERN JURY CHARGES 7.10 (1987).

> ship, the child's age, the nature of the child's relationship with the parent, the child's emotional and physical characteristics, and whether other consortium-giving relationships are available to the child.
>
> Do not include interest on any amount of damages you find. Do not reduce the amounts, if any, in your answer because of the negligence, if any, of [Parent].[134]

This model is simplistic and avoids confusion through its step by step approach to parental consortium. It avoids the use of spousal consortium instructions and requires that the jury determine the merits of the case before addressing damages.

A fourth, and not very popular, model merely contemplates the insertion of a parental consortium measure of damages statement into general personal injury instructions.[135] This model provides the jury with little, if any, actual information about the underlying cause of action.

Well drafted jury instructions are important in parental consortium actions, especially if double recoveries and excessive or inadequate verdicts are to be prevented. Much of the language used in parental consortium jury instructions is purely discretionary. However, the court should instruct the jury that the child's damages for parental consortium are separate and distinct from the parent's recovery, and that any award will "accrue directly to the child rather than be lumped in with that of the parent who may or may not spend it for the child's benefit."[136]

Carefully drafted instructions should also inform the jury of the nature of the action for parental consortium. This can be achieved either by defining the concept for the jury and/or by setting out a specific prima facie case which the plaintiff must satisfy in order to recover. The jury should also be instructed

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[134] *Id.* 7.11B.

[135] *See* WASHINGTON PATTERN JURY INSTRUCTIONS (CIVIL) 32.05 (3d ed. 1989).

[136] Berger v. Weber, 303 N.W.2d 424, 427 (Mich. 1981); *see* Hibpshman v. Prudhoe Bay Supply, Inc., 734 P.2d 991, 996 (Alaska 1987); Ueland v. Reynolds Metals Co., 691 P.2d 190, 195 (Wash. 1984); Theama v. City of Kenosha, 344 N.W.2d 513, 516 (Wis. 1984).

on the factors that can be considered in assessing damages.[137] Likewise, an instruction prohibiting double recoveries and outlining the specific elements of damages would lessen the probability of confusion and excessive or inadequate damages.

4. Sentimental vs. Material Damages

At early common law, consortium protected only the right that husbands had to the services of their injured wives.[138] Consequently, early common law courts interpreted consortium to include only the material, economic or tangible aspects of the marital relationship. Consortium, therefore, did not protect non-pecuniary interests.

Contemporary courts, unlike their early counterparts, define consortium quite broadly to include all aspects of the spousal relationship. Consequently, awards for spousal consortium have been expanded to compensate for impairment of not only material losses, but also sentimental ones. Material losses correspond to economically quantifiable, tangible, pecuniary losses, while sentimental aspects refer to intangible, non-pecuniary, non-economic losses not suitable for market valuation.[139] The terms "society, companionship, affection, love, and care" all reflect the non-quantifiable sentimental elements of consortium. The term "services" typifies the material, economically quantifiable element of consortium.

The distinctions between the concepts of material and sentimental losses has in the law of spousal consortium become blurred. Regardless of how the various jurisdictions characterize consortium, therefore, all courts evaluate the same factors as proof of loss of consortium.[140]

Courts recognizing loss of parental consortium claims have characterized the action, in varying degrees, as the right of children to the love, care, society, guidance, services and com-

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[137] *See supra* note 127 and accompanying text.
[138] *See supra* note 4 and accompanying text.
[139] Ridgeway, *supra* note 3, at 350.
[140] *Id.* at 351.

panionship of the injured parent.[141] Arguably, the inclusion of the word "services" in the characterization of parental consortium suggests that children, as well as the injured parent, may recover for material and sentimental losses. This, however, is not the case. The sentimental/material dichotomy is alive and well in the law of loss of parental consortium. This action is intended to protect only the child's sentimental, non-pecuniary interests in the filial relationship. Thus, the general rule is that all material, pecuniary losses, such as those for services, can be recovered only by the injured parent in a direct action against the tortfeasor. The sentimental/material dichotomy in parental consortium further prevents double recovery. Logic dictates that once the injured parent is compensated and made whole, the primary obligation to financially care for the child shifts back to the parent.

Problems, however, do remain. Since the injured parent is entitled to recover for his own diminished earning capacity, the child's consortium claim cannot be allowed to include lost services that are also part of the diminished capacity of the parent. In Michigan, where the term "services" is expressly used to characterize damages in loss of parental consortium claims,[142] a different rule has developed. This rule provides that damages for loss of the parent's services cannot be recovered by both the injured parent and child. Though it is possible for the child to recover for loss of the injured parent's services, no significant breach of the general rule results because either the parent or the child, but not both, may recover. This rule, like the absolute prohibition against a child recovering for loss of services, achieves the same end as that achieved by the sentimental/material dichotomy.

Texas, like Michigan, uses the term "services" to characterize damages recoverable in a parental consortium action.[143] Texas, however, treats the term "services" as a non-pecuniary

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[141] *See supra* note 34.

[142] *See* Berger v. Weber, 303 N.W.2d 424, 425 (Mich. 1981); *see also* MICHIGAN STANDARD JURY INSTRUCTIONS—CIVIL 52.02 (2d ed. 1990).

[143] *See* Reagan v. Vaughn, 804 S.W.2d 463, 467 (Tex. 1990).

loss.[144] A similar view is followed in Iowa, which defines consortium to include the present value of the "services" which would have been rendered by a parent to the child.[145] However, Iowa further provides that loss of financial support is not included in the damages recoverable in a parental consortium action.[146]

D. The Prima Facie Case

The prima facie case requirement for parental consortium depends upon how courts respond to three substantive issues: standing (minor/adult child); the nature or quality of the injury required (temporary/permanent); and how the jurisdiction in question views consortium claims (derivative/independent). Ordinarily the plaintiff must prove: (1) he or she has standing to sue; (2) an injury of the quality required under the law of his jurisdiction has occurred; (3) the filial relationship; and (4) actual harm to the filial relationship and plaintiff.

Jurisdictions which limit standing to minor children, require permanent injury and view consortium claims as derivative. The plaintiff must show that: (1) parent has suffered a compensable injury; (2) the injury is permanent; (3) plaintiff was a minor at the time of the injury; and (4) as a result of the injury to the parent, the plaintiff has suffered a loss of parental consortium. The measure of damages where standing is limited to minor children may not exceed the number of years remaining until plaintiff reaches majority age. The court presumes damage to the filial relationship once the plaintiff has shown that the parent's injury was permanent in nature. However, the plaintiff must still put on evidence of the relationship before and after the injury. This evidence will influence the amount of damages awarded.

In a jurisdiction such as Iowa, which does not limit standing to minor children or view consortium as derivative, the

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[144] *Reagan*, 804 S.W.2d at 467.

[145] Audubon-Exira Ready Mix, Inc. v. Illinois Cent. G.R.R., 335 N.W.2d 148, 152 (Iowa 1983).

[146] *See* IOWA CIVIL JURY INSTRUCTIONS 200.20 (1991).

prima facie requirement consists of evidence that: (1) the parent has suffered an injury; (2) the injury is permanent; and (3) as a result of the injury to the parent, the plaintiff has suffered a loss of parental consortium. The proof required to satisfy this prima facie case differs greatly from the prima facie case set out above only where the plaintiff is an adult child. In order to recover substantial damages, an adult child must put on evidence of a strong filial relationship. This evidence must demonstrate that the adult child continues to look to the injured parent for substantial economic, emotional and psychological support. A presumption of injury to the filial relationship does not arise in favor of non-dependent adult children. Likewise, where adult children are allowed to recover for loss of parental consortium, the trier of fact determines the damages for permanent injury based on the shorter of the injured parent's or child's life expectancies.

Another prima facie case scenario is followed in jurisdictions which do not treat consortium as derivative or require permanent injury. In such jurisdictions the evidence must show that: (1) the parent has suffered an injury; and (2) as a result of the injury to the parent, the plaintiff has suffered a loss of parental consortium.

The chart below illustrates how jurisdictions that currently recognize the action have responded to the issues of standing (minor/adult child); the nature or quality of the injury required (temporary/permanent); and how consortium claims (derivative/independent) should be viewed.

STATE	STANDING		NATURE of INJURY		PARENTAL CONSORTIUM		SPOUSAL CONSORTIUM	
	Minor \ Adult		Permanent \ Temporary		Independent \ Derivative		Independent \ Derivative	
Alaska	Yes	No	Yes	No	undecided	undecided	No	Yes
Arizona	Yes	Yes	Yes	No	Yes			
Iowa	Yes	Yes	Yes	No	undecided	undecided	Yes	No
Mass.	Yes	No	Yes	Yes	undecided	undecided	Yes	No
Michigan	Yes	No	Yes	Yes	undecided	undecided	No	Yes
Montana	Yes	No	Yes	No	Yes		No	Yes
Oklahoma	Yes	No	Yes	No	undecided	undecided	No	Yes
Texas	Yes	Yes	Yes	No	Yes		No	Yes
Vermont	Yes	No	Yes	No	Yes		No	Yes
Wash.	Yes	Yes	Yes	No	Yes		Yes	No
Wis.	Yes	No	Yes	Yes	Yes		No	Yes
Wyoming	Yes	No	Yes	Yes	undecided	undecided	No	Yes
Ohio	Yes	No	Yes	No	Yes		Yes	
W. Va.	Yes	No	Yes	No	Yes		No	Yes

E. An Ending But Not A Conclusion

Continued efforts to expand the concept of consortium are inevitable.[147] This is due, in part, to the difficulty courts have experienced in articulating a precise definition of the concept. Inherently nebulous, the concept of consortium was originally used to describe the husband's action for the loss of his wife's services. The concept was subsequently expanded to protect the husband's interest in his wife's services, as well as her companionship, love, society and sexual relationship.

Thereafter, consortium was further broadened beyond its common law definition to include the right of the wife to the benefits of the marital relationship. Since then, consortium has taken on a descriptive, rather than definitive meaning. Generally, consortium has been used to describe such elements of damages as companionship, love, solace, affection and services. It has simultaneously been used to connote a substantive cause of action. Many courts, however, still cling to the archaic notion that consortium protects only the conjugal fellowship of spouses. These same courts, however, recognize that other nonspousal filial relationships are entitled to legal protection. The legal profession, in response, has identified the law of consortium as the proper avenue to an otherwise accepted end. The legal protection accorded the parent-child relationship is analogous to a two way street. Along one street runs the child's interest in the love, affection and care of an injured parent. Along the other travels the corresponding interests of parents in the love, affection and attention of an injured child. While more jurisdictions have recognized the right of a child to recover for negligent injury to a parent, a strong contingent of jurisdictions have undertaken to protect the consortium interest of

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[147] *See generally* Catherine O'Brien, *Some Lawyers Argue that Twins Need Legal Rights*, TULSA WORLD NEWSP., Dec. 28, 1993, at 13. Lawyers in California have filed several law suits in which they contend that twins' experiences bind them so closely together that they also share a special legal status. Death or disfigurement of one destroys the twins' bond entitling them to special compensation. *Id.*

parents in nonfatally injured children.[148]

The kinship between the two actions is more than historical and theoretical. This fact is demonstrated by the case of *United States v. Dempsey*.[149] In *Dempsey*, the Eleventh Circuit Court of Appeals submitted on certification to the Supreme Court of Florida the question whether Florida law permits parents to recover for the loss of a child's companionship and society.[150] The court observed that Florida law had for some time recognized the parent's right to recover for such losses.[151] Nevertheless, the court went on to emphatically state that "even if this court previously had not expanded the common law to allow recovery for the loss of a negligently injured child's companionship, we would do so now."[152] The *Dempsey* court found additional support for its conclusion in section 768.0145 of the Florida Statutes which created the right of children to recover loss of consortium damages for permanent injury to a parent.[153] Considered together, the statute, constitution and case law manifested a strong pronouncement that familial relationships should be protected and that recovery be had for wrongful injuries adversely affecting those relationships.[154] Recognizing the substantive similarities between the parents' claim and that of children, the court concluded that recovery for loss of filial consortium should be limited in the same manner.[155]

The arguments for and against protection of the parent's consortium interest in instances where a child is negligently but nonfatally injured are identical to those articulated in parental consortium.[156] These filial relationships differ from the spousal relationship only with regards to the sexual aspect of

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[148] For a list of the jurisdictions protecting the parents' consortium interest, see *supra* note 24.

[149] 635 So. 2d 961 (Fla. 1994).

[150] *Dempsey*, 635 So. 2d at 962.

[151] *Id.* at 963.

[152] *Id.* at 964.

[153] FLA. STAT. ANN. § 786.0145 (West Supp. 1994).

[154] *Dempsey*, 635 So. 2d. at 964-65.

[155] *Id.*

[156] Johnson, *supra* note 23, at 762-64.

the latter. The major policy concern, much like that in parental consortium, is not whether the filial relationship is entitled to legal protection, but rather whether consortium, which historically was only concerned with the conjugal relationship, is the proper means for achieving this end. Consequently, some courts that protect the interest of parents no longer employ the term consortium to describe the legal protection accorded.[157]

Neither the use or disuse of the concept of consortium resolves the issue of whether consortium should be expanded to protect other non-spousal filial relationships. Nor does resolution of the issue require the creation of a new cause of action. Compensating parents and children for loss of the other's society and companionship merely requires a redefining of the protected aspects of the family relationship. The judicial reception that filial protection has received over the past fourteen years suggests that courts should refrain from engaging in euphemistic logomachy. Rather, compensating parents and children for the loss of the other's society "represents a shift in our cultural expression of the importance of various aspects of the filial relationship and the degree of protection each deserves."[158]

In 1976, Professor Jean Love began what eventually would become a universal call for the protection of the parent-child and child-parent relationships.[159] Less than four years later, the Supreme Court of Massachusetts adopted the logic and appeal of Professor Love's work and became the first jurisdiction to recognize an action for parental consortium.[160] In the fourteen years since the Massachusetts decision, this logic and appeal has swiftly spread across the country. As such, contem-

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[157] *See, e.g.*, Norvell v. Cuyahoga County Hosp., 463 N.E.2d 111, 114 (Ohio Ct. App. 1983) (concluding that parents may recover for loss of child's society, services, companionship, comfort, love and solace); Shockley v. Prier, 225 N.W.2d 495, 501 (Wis. 1975) (stating that parent may recover for loss of child's aid, comfort, society and companionship); *cf.* Frank v. Superior Ct. of Ariz., 722 P.2d 955, 961 (Ariz. 1986) (retaining concept of consortium).

[158] Johnson, *supra* note 23, at 778.

[159] *See* Love, *supra* note 31, at 594-95.

[160] *See* Ferriter v. Daniel O'Connell's Sons, Inc., 413 N.E.2d 690, 703 (Mass. 1980).

porary courts can no longer turn a blind eye to the subject of filial rights.

What remains is the test of trial and error against which all common law rights are meted. These tests, and how well filial protection fairs, will be the subject of future scholarly works. However, it is hoped that the discussions and observations contained herein will help direct and influence the future development of the law in this area.