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Logical Limitations: Loss of Spousal, Parental and Filial Consortium Claims

Jeffrey A. VanderLaan

INTRODUCTION

The ability to sue for the loss of society and companionship of a loved one has taken many forms since its inception at common law. By another name, the cause of action for loss of consortium has been recognized to include the loss of society and companionship, evolving into a right of recovery not simply benefiting the patriarch whose “property,” or wife and children, have been tortuously injured or killed, but also to benefit many of the familial relationships Americans value. Perhaps because of its intangible and non-pecuniary character, the nature and extent of the loss of consortium claim vary wildly from state to state. Some states have altered the common law rules by statute, others have used judicial interpretations to encourage the use of the loss of consortium claim to include not only a spousal relationship, but also the parent-child relationship. What is needed is uniform state legislation which clearly enunciates the bounds and circumstances under which a consortium claim will be allowed.

At first blush, it appears that no controversy exists; the judiciary is acting through differing lens of judicial interpretation to either create new causes of action or prevent the proliferation of them. However, in Michigan, and other states as well, there is an inherent contradiction in the manner in which the judiciary allows family members to sue a tortfeasor for the loss of society and companionship, or the consortium, of a loved one. Specifically, Michigan’s wrongful death statute allows the parents of a tortuously killed child to sue for the loss of their child’s consortium,¹ while the Supreme Court has chosen to deny parents of

¹ See MICH. COMP. LAWS § 600.2922(6) (2001).

tortuously injured children the same cause of action.² Many courts, including those in New York and Illinois have ruled in a similar manner.³ Others, however, take the opposite view, allowing parents recovery for the loss of their tortuously injured child's society and companionship.⁴ Still other jurisdictions have wisely preempted the oft-confusing decisions of the judiciary, employing a statutory cause of action which allow the parents of tortuously injured children to recover for the loss of filial consortium as well.⁵

The debate begins with an analysis of the underlying policy rationales of the different types of consortium, called patriarchal, spousal and filial for the purposes of clarity in this writing. The evolution of the reasoning by which the consortium claim has been recognized and expanded bears insight into who should draw a proper line of demarcation which limits the consortium claim to a logical and manageable point. In the context of the five states whose approaches are analyzed here and in light of the underlying policies of the different types of consortium claims, this paper will address where the judiciary and legislatures of these states have gone too far, not gone far enough or have simply gone mad.

I. HISTORICAL BACKGROUND: LOSS OF CONSORTIUM⁶

A. Spousal Consortium

Beginning with the paternalistic notions of early law, the patriarch has always asserted the right to recover for injuries to his servants, or property, at the hands of third parties.⁷ By the Seventeenth Century, courts began analogizing the master-servant relationship with the spousal

² See *Sizemore v. Smock*, 430 Mich. 283, 299 (1988).

³ See, e.g., *Gilbert v. Stanton Brewery, Inc.*, 67 N.E.2d 155 (N.Y. App. Div. 1946); *Dralle v. Ruder*, 529 N.E.2d 209 (Ill. 1988).

⁴ See *United States v. Dempsey*, 635 So.2d 961 (Fla. 1994); *Gallimore v. Children's Hosp. Med. Ctr.*, 617 N.E.2d 1052 (Ohio 1993).

⁵ See MASS. GEN. LAWS ch. 231, § 85X (2001).

⁶ Policy considerations underlying the various types of consortium claims will be addressed in the foregoing sections of this paper, the immediate section serves to generally define the types of consortium. See *infra* notes 151-189 and accompanying text.

relationship, giving husbands the right to recover the loss their wives' services from tortfeasors.⁸ Eventually, husbands were allowed to seek emotional damages as well.⁹ This included recovery for sexual relations, comfort, society and companionship.¹⁰ Consequently, the term "consortium damages" for husbands came to encompass not only the financial losses, including the lost services and medical expenses a patriarch suffered when his wife was injured, but it also included damages for injury to his emotions as a result of having an injured spouse.¹¹

Conversely, the wife had no analogous cause of action.¹² If her husband was injured, a wife "was without remedy for the loss of household assistance, sexual intercourse, companionship and affection."¹³ In 1950, the U.S. Circuit Court of Appeals for the District of Columbia rebuffed this divided approach to the spousal consortium cause of action and allowed a wife to seek recovery for the loss of her husband's consortium.¹⁴ Other jurisdictions soon followed and today "[a]ny tort causing direct physical harm to one spouse will give rise to a claim for loss of consortium by the other."¹⁵

B. Parental and Filial Consortium

Similar to the English common law treatment of wives, fathers were allowed to recover damages for their "servant" children who were injured by a third-party tortfeasor.¹⁶ Gradually in many jurisdictions, parents were allowed recovery for the loss of a child's consortium.¹⁷

⁷ See W. PAGE KEETON, PROSSER AND KEETON ON TORTS § 125 at 931 (5th ed. 1984).

⁸ See *id.*

⁹ See *id.* See also Matthew Brady, *Back Up and Hit Him Again: Illinois' Problem With Parental Consortium Lost Because of Nonfatal Injury*, 25 LOY. U. CHI. L.J. 545, 546-49 (1994).

¹⁰ See *id.*

¹¹ See *id.*

¹² See *id.*

¹³ *Id.*

¹⁴ See *id.* at 932 (citing *Hitafter v. Argonne Co.*, 183 F.2d 811 (1950)).

¹⁵ *Id.* Procedurally, loss of consortium claims are generally brought together with the injured spouse's claims against the tortfeasor and are tried together in order to prevent duplicative recovery for claimed damages. See *id.* at 933.

¹⁶ See *id.* at 934.

¹⁷ See *id.*

Beginning in the 1980's, some jurisdictions began to recognize that a child had a cause of action for an injured parent's consortium.¹⁸ However, as this paper will demonstrate, a mystifying split exists in contemporary American jurisprudence, which begs interference by state legislatures in many cases, over allowing parents and children to recover non-pecuniary consortium-type damages for injuries inflicted upon the other by an intentional or negligent tortfeasor.¹⁹ These damages include those such as the loss of society, companionship, love and comfort of a parent or child. In some cases, recovery is allowed for all financial and non-financial damages by both the parent and a child of an injured parent or child, and in other cases no recovery is allowed.²⁰ In still other jurisdictions, a child is allowed to seek consortium damages for an injured parent, while parents are denied the same right of recovery when the child is injured.²¹

II. THE MICHIGAN INTERPRETATION

In *Sizemore v. Smock*, the Michigan Supreme Court addressed the plaintiff's claims for the "loss of the companionship, society and protection" of her fifteen year-old daughter who had been struck by a car while riding her bicycle.²² At the appeals court level, a grant of summary judgment in favor of the defendants on the plaintiff's claims was overturned.²³ The court found that the Michigan Supreme Court case of *Berger v. Weber* supported the notion that parental recovery for the loss of a child's consortium was allowed.²⁴ The *Sizemore* court reversed, finding that the laws of the state did not support such a cause of action.²⁵

¹⁸ See *id.* at 936.

¹⁹ See *id.* at 934-36.

²⁰ See *infra* notes 47-150 and accompanying text.

²¹ See *infra* notes 22-46 and accompanying text.

²² See *Sizemore v. Smock*, 430 Mich. 283, 285-86 (1988) (citing *Sizemore v. Smock*, 155 Mich. App. 745, 746-47 (1986)).

²³ See *Sizemore*, 430 Mich. At 286.

²⁴ See *id.* See also *Berger v. Weber*, 411 Mich. 1 (1981).

²⁵ See *Sizemore*, 430 Mich. at 299.

For the purposes of background, in 1981 the *Berger* court addressed a child's claim for the loss of parental society and companionship.²⁶ Reversing the court of appeals, the court ruled that a cause of action for the loss of parental consortium was enforceable under Michigan law.²⁷ The court found support for its expansion in previous cases which allowed women to maintain a loss of consortium claim for their spouses,²⁸ parents to sue for the loss of services of their children,²⁹ and the Michigan Wrongful Death Statute,³⁰ which allowed for such damages if the parent was killed.³¹ The court also dispensed with the defendant's arguments that recognizing the cause of action would result in clogged court dockets, increased insurance premiums and uncertainty in the law with respect to figuring damages.³² Rather, the court found that the "importance of the child to our society merits more than lip service. Convinced that we have too long treated the child as second-class citizen or some sort of nonperson, [sic] we feel constrained to remove the disability[, which is the inability to sue for loss of parental consortium damages,] we have imposed."³³

²⁶ See *Berger*, 411 Mich. at 11. Christine Berger was severely and permanently injured as result of an automobile accident with the defendant. See *id.* at 10-11. Berger, along with her husband, brought suit for a multitude of damages, including medical expenses, loss of wages and spousal consortium. See *id.* at 11. As next of friend, Berger's husband brought suit on behalf of the couple's handicapped daughter for loss of parental consortium. See *id.* Interestingly enough, the daughter died before final disposition of the case and no damages were sought on behalf of the Bergers' minor son. See *id.* at 11, n.2.

²⁷ See *id.*

²⁸ See *Montgomery v. Stephan*, 359 Mich. 33 (1960). The wife of a driver who was injured an accident as a result of the defendant's negligence brought suit for loss of consortium. See *Montgomery*, 359 Mich. at 35. Overturning precedent which had previously denied women the right to seek such compensation, the court stated "[t]he obstacles to the wife's action were judge-invented and they are herewith judge-destroyed." *Id.* at 49.

²⁹ See *Gumeinny v. Hess*, 285 Mich. 411 (1938). The plaintiff sought recovery for the loss of services of his minor son who was injured by the defendants. See *Gumeinny*, 285 Mich. at 412. The court reiterated the well-established rule that the parent is allowed to recover, in their own distinct cause of action, damages the parent incurs, including loss of services, when their child is tortuously injured. See *id.* at 414-15.

³⁰ See MICH. COMP. LAWS § 600.2922(6) ("In every action under this section, the court or jury may award damages as the court or jury shall consider fair and equitable . . . including . . . the loss of the society and companionship of the deceased.").

³¹ See *Berger*, 411 Mich. at 12-13

³² See *id.* at 14-16.

³³ *Id.* at 17.

Beginning by stating it must “independently reexamine the various arguments and policy considerations” which supported previous expansion of the right of family members to seek consortium damages, including the decision in *Berger*, the *Sizemore* court sought to explain its reason for denying the mother’s claim.³⁴ Acknowledging “the unique value inherent in the parent-child relationship and the importance to society in protecting it,” the court declined to further extend tortfeasor liability in this instance.³⁵ Calling any consortium action an “anomaly” in the law of torts because compensation flows to an individual not directly injured by the tortfeasor’s behavior, the court addressed a multitude of policy arguments against recognizing a parent’s right to sue for the loss of filial consortium.³⁶

The court reasoned that “[s]ocial policy must intervene at some point to limit the extent of one’s liability” when considering the expansion the loss of consortium action to include filial consortium.³⁷ Relying heavily on the dissent in *Berger* and citing the “intangible character of the loss” the opinion for the court found, among other arguments, that recovery of filial consortium damages would not redress any loss suffered by the parent of an injured child.³⁸ Rather, it would result in increased insurance premiums, increased financial and docket burdens on the courts and an increased probability of double recovery.³⁹ The court also criticized the dissent for its inability to draw a line of liability for consortium damages, ruling that the majority “fail[ed] to see where such a point of demarcation should [more] logically begin” than ruling against the plaintiff.⁴⁰

³⁴ *Sizemore*, 430 Mich. at 290.

³⁵ *Id.* at 292.

³⁶ *See id.* at 292-93.

³⁷ *Id.* at 293 (citing *Borer v. American Airlines, Inc.*, 563 P.2d 858 (Cal. 1977)).

³⁸ *Id.*

³⁹ *See id.* at 294-95 (quoting *Berger*, 411 Mich. at 36,41 (Levin, J., *dissenting*)).

⁴⁰ *See Sizemore*, 430 Mich. at 296. The proper “point of demarcation,” as will be more thoroughly addressed later, should be determined by the legislature because, as this *Sizemore* court demonstrates, the judiciary has failed to place this line at a logical position.

The court also faced the plaintiff's argument that because recovery for the loss of filial consortium by parents was allowed under the Michigan Wrongful Death Statute,⁴¹ so too should it be allowed when the child is tortuously injured.⁴² Relying once again on the dissent in *Berger*, the court noted that damage awards in a wrongful death action are "based on historical and policy considerations that are not applicable to negligence claims involving less grievous injury."⁴³ The *Berger* court reasoned "[i]f the primary victim of the accident may bring an action, there is no need to permit other family members to recover in order to provide some compensation for the family and to prevent the tortfeasor from escaping liability altogether."⁴⁴ Further still, the *Sizemore* court found that although some jurisdictions had allowed parents recovery for filial consortium damages, a similar number had not, relying on many of the same policy considerations it had.⁴⁵ Consequently, Michigan was placed solidly in the category of jurisdictions that did not recognize the cause of action.⁴⁶

III. FLORIDA AND OHIO: RECOVERY ALLOWED BY JUDICIAL DECISIONS

A. Florida

Standing in contrast to the Michigan Supreme Court's interpretation of the subject matter of this writing is the Supreme Court of Florida's pronouncement in *United States v. Dempsey*.⁴⁷ In that case, the Court reached the opposite conclusion of the Michigan Supreme Court in *Sizemore*,⁴⁸ finding that "a parent of a tortuously injured child has a right to recover for the permanent loss of filial consortium suffered as a result of a significant injury resulting in the

⁴¹ See MICH. COMP. LAWS § 600.2922(6).

⁴² See *Sizemore*, 430 Mich. at 296-97.

⁴³ *Id.* at 296.

⁴⁴ *Berger*, 411 Mich. at 48 (Levin, J., *dissenting*).

⁴⁵ See *Sizemore*, 430 Mich. at 298.

⁴⁶ See *id.* at 299.

⁴⁷ 635 So.2d 961 (Fla. 1994).

⁴⁸ See *Sizemore v. Smock*, 430 Mich. 283, 299 (1988).

child's permanent total disability."⁴⁹ Submitted as a certified question by the United States Court of Appeals for the Eleventh Circuit, the court addressed many familiar arguments and concerns regarding the expansion of the right to sue for filial consortium.⁵⁰

Under the Federal Torts Claims Act, parents Pansy and Lonney Dempsey brought suit against the United States for, among other damages, the loss of society and companionship of their daughter.⁵¹ At birth, the Dempsey's daughter became severely mentally retarded as a result of the negligence of doctors at Englin Air Force Base Hospital.⁵² After an award of \$1.3 million to the Dempseys for the loss of their daughter's society and companionship in the district court, the Court of Appeals, upon appeal by the United States, certified a question to the Florida Supreme Court regarding Florida law in the matter.⁵³ The question provided "[d]oes Florida law permit parents to recover for the loss of a child's companionship and society when the child is severely injured?"⁵⁴ The Florida court took up the matter, answering affirmative to the federal court's inquiry.⁵⁵

Arguing before the Florida Supreme Court, the United States maintained that the district court had misconstrued rulings by the Florida court in *Wilke v. Roberts*⁵⁶ and *Yordon v. Savage*⁵⁷ in allowing the Dempseys to recover for the loss of their injured child's society and

⁴⁹ *United States v. Dempsey*, 635 So.2d 961, 965 (Fla. 1994).

⁵⁰ *See Dempsey*, 635 So.2d at 962.

⁵¹ *See United States v. Dempsey*, 32 F.3d 1490, 1491-92 (1994).

⁵² *See Dempsey*, 32 F.3d at 1492.

⁵³ *See id.* The magistrate judge who heard the case at the district court level also ruled in favor of the Dempsey's daughter, awarding her \$2.8 million for medical expenses. *See id.* The United States did not appeal this portion of the magistrate's decision, choosing instead to challenge the validity of the award of society and companionship damages to the parents. *See id.*

⁵⁴ *See id.* The Appeals Court certified an additional question to the Florida Supreme Court regarding whether "Florida law permit[s] parents to recover for the loss of the services of a severely injured child absent evidence of extraordinary income-producing abilities?" *See id.* This issue will not be addressed by this article.

⁵⁵ *See Dempsey*, 635 So.2d at 964.

⁵⁶ 109 So. 225 (Fla. 1926).

⁵⁷ 279 So.2d 844 (Fla. 1973).

companionship.⁵⁸ *Wilke* involved the tortuous operation of an automobile by the defendant's servant, resulting in serious injury to the plaintiff's minor son.⁵⁹ The court found that a "father's right to the custody, *companionship*, services and earnings of his minor child are valuable rights . . . wrongful injury to which by a third person will support an action in favor of the father."⁶⁰ Likewise, in *Yordon*, the court found that recognition of "the theoretical proposition that women should enjoy equal opportunities, right [sic], and responsibilities" allowed a tortuously injured child's mother to seek the same remedies allowed a father by *Wilke*, including "the loss of the child's companionship, society and services."⁶¹ The Florida court disagreed with the United States' assessment, finding that *Wilke*, *Yordon* and "our modern concept of family relationships" required allowing recovery for the Dempseys.⁶² Specifically, the court noted that it "appear[ed]" to have recognized the parents' right of recovery in *Wilke* and *Yordon*.⁶³

Rather than resting entirely on appearances, the court went on to make a series of equitable arguments that it believed justified formal recognition of the cause of action.⁶⁴ Noting that Florida had recognized the right of women to sue for spousal consortium⁶⁵ and for children to sue for the loss of companionship of a parent,⁶⁶ the court reasoned it was proper policy to consider that changing values and customs of society to recognize loss of society and

⁵⁸ See *Dempsey*, 635 So.2d at 962.

⁵⁹ See *Wilke v. Roberts*, 109 So. 225, 226 (Fla. 1926)

⁶⁰ See *Wilke*, 109 So. at 227 (emphasis added). See also *Dempsey*, 635 So.2d at 963.

⁶¹ *Yordon v. Savage*, 279 So.2d 844, 846-47. In *Yordon* the minor child was rendered deaf and retarded as a result of the negligence of his pediatrician. See *Yordon*, 279 So. 2d at 845. Suit was brought on behalf of the minor by his parents and also by his parents individually to seek their own recovery for their son's injuries. See *id.* See also *Dempsey*, 635 So.2d at 963.

⁶² *Id.* at 964.

⁶³ See *id.*

⁶⁴ See *id.*

⁶⁵ See FLA. STAT. § 768.0415 (1993). The statute states 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." § 768.0415.

⁶⁶ See *Gates v. Foley*, 247 So.2d 40 (Fla. 1971).

companionship as an element of damages that a parent may recover.⁶⁷ The court also found that it was its privilege to make changes to the law when “common law rules are in doubt.”⁶⁸ Today, the court stated, “children are valued for the love, affection, companionship and society they offer their parents” and are no longer viewed as servants or property of their parents.⁶⁹ Consequently, “[t]he loss of a child’s companionship and society is one of the primary losses that the parent of a severely injured child must endure.”⁷⁰

However, the court was careful to place limits on its enunciation of the parent’s right to sue for the loss of a child’s consortium.⁷¹ Defining the parent’s right to sue for the loss of the child’s consortium to mean “the loss of companionship, society, love, affection and solace of the injured child,” the court required that the loss must be as a result of “significant injury” which causes “permanent total disability” to the “child.”⁷² More recently, the court has held the ruling in *Dempsey* limits claims by parents for loss of a child’s consortium to minor children only.⁷³ In sum, under Florida law, parents of minor children who are permanently disabled as a result of significant injury may seek recovery from the tortious tortfeasor for the loss of their child’s consortium

B. Ohio

⁶⁷ See *Dempsey*, 635 So.2d at 964.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ See *id.* at 965.

⁷² *Id.*

⁷³ See *Cruz v. Broward County School Bd.*, 800 So.2d 213 (Fla. 2001). In *Cruz*, a mother sued the school district for failing to provide adequate supervision when her mentally retarded fifteen year old son suffered a head injury in an altercation with another student at school. See *Cruz*, 800 So.2d at 214. The court found that *Dempsey* should not be construed to allow for damages for loss of the child’s consortium to extend into adulthood. See *id.* at 217. The court reasoned that under Florida law, “a parent is not entitled to any claim for damages when an adult child incurs personal injuries due to the tortious conduct of another. It would make little sense to allow for damages into the adulthood of a child in the one instance but not in the other.” *Id.*

In much the same way as Florida has recognized the right of a parent to recover for the loss of a tortuously injured child's consortium, so too has Ohio.⁷⁴ In the 1993 Ohio Supreme Court case of *Gallimore v. Children's Hospital Medical Center*, the court faced the sole issue of whether "parents of a minor child who is injured by a third-party tortfeasor may recover damages in a derivative action for loss of filial consortium."⁷⁵ Taking the view that "times have changed and so should the law," the court expressly recognized a parent's right to recover filial consortium damages as a result of the tortuous injury of their child.⁷⁶

Factually, the *Gallimore* court addressed the issue when plaintiff brought suit on her infant son's behalf and on her own behalf to recover damages from the Children's Hospital as a result of an overdose of a ototoxic drug which rendered plaintiff's son profoundly deaf.⁷⁷ At the trial level, the plaintiff was awarded damages for the loss of her son's "society."⁷⁸ Following a confusing set of affirmations, reversals and remands at the appeals and trial courts level, the Ohio Supreme Court took up the issue of "society" damages.⁷⁹

Focusing largely on policy, the court sought legal support in a handful of previous cases, most notably in the 1877 case of *Clark v. Bayer*.⁸⁰ In that case, the court grappled with damages claimed by the caretaker grandfather of minor children who were wrongfully taken from him by the children's biological parents.⁸¹ Specifically with respect to the consortium issue, the *Gallimore* court focused on the *Clark* court's conclusion that the grandfather could seek

⁷⁴ See *Gallimore v. Children's Hosp. Med. Ctr.*, 617 N.E.2d 1052 (Ohio 1993).

⁷⁵ See *Gallimore*, 617 N.E.2d at 1054.

⁷⁶ *Id.* at 1056.

⁷⁷ See *id.* at 1052.

⁷⁸ See *id.*

⁷⁹ See *id.*

⁸⁰ See *id.* at 1054-1055. See also *Clark v. Bayer*, 32 Ohio St. 299, 1877 WL 120 (Ohio 1877).

⁸¹ See *Clark*, 32 Ohio St. at 300-1.

damages for the “services of the minors, without averring their ability serve him”⁸² to be dispositive.⁸³ The *Gallimore* court reasoned that that

the court in *Clark* did recognize a “parental” right to maintain a general damage claim based up “the right to service,” despite acknowledging that the infant children were incapable of rendering valuable services. Thus, the only “services” that the infant children could realistically have provided the plaintiff during the period of abduction were society, companionship, comfort, love and solace, *i.e.*, elements of “consortium.”⁸⁴

As such, *Clark* was found support the notion that Ohio recognized the right of a parent to sue for the loss of consortium of a tortuously injured child.⁸⁵

From an additional legal standpoint, the court noted that Ohio’s Wrongful Death Statute⁸⁶ provides for loss of consortium damages when a family member is wrongfully killed.⁸⁷ In dealing with that issue, the court simply noted “it would be incongruous to deny parents recover for loss of the society and companionship of a seriously injured child while recognizing that such losses are compensable in cases involving death.”⁸⁸

In further policy analysis, replete with stirring pronouncements regarding the role of the judiciary branch in the evolving nature of the law, the court dismissed several arguments against the extension of the consortium cause of action.⁸⁹ The first of these arguments was the difficulty in measuring consortium damages.⁹⁰ Stating that there is no historical basis for this argument, including the fact that there has been no trouble figuring consortium damages when already

⁸² *Id.* at 312.

⁸³ *See Gallimore*, 617 N.E.2d at 1054-55

⁸⁴ *Id.*

⁸⁵ *See id.* at 1057.

⁸⁶ *See* OHIO STAT. § 2125.02 (Baldwin’s 2001).

⁸⁷ *See Gallimore*, 617 N.E.2d at 1057. Note this is the same situation faced by the Michigan Supreme Court with regard to the inconsistency between the Michigan Wrongful Death Statute and Michigan common law on the issue. *See supra* notes 40-43 and accompanying text.

⁸⁸ *Gallimore*, 617 N.E.2d at 1057.

⁸⁹ *See id.* at 1057-60. For example, the court noted “[w]e can find no specific common-law impediments to recovery for such losses. If there were any, they would be devoid of rational justification in the modern law.” *Id.* at 1057. The court further noted “[t]he common law is not static. It is dynamic, and it must continue to evolve to keep up with the times.” *Id.* at 1059.

allowed by the law, the court dismissed the defendant's argument.⁹¹ By highlighting the value of the parent/child relationship in society, the court also dismissed the slippery slope argument that recognition of right of the right of a parent to sue for the loss of a child's consortium would lead to recognition of similar rights between aunts, cousins and other family relationships.⁹²

Further arguments included fear of double recovery and the requirement of attaching a value to the parent child relationship to which the court rebutted by stating its confidence in the jury's ability to award proper damages.⁹³ The final argument brought before the court was the matter was best left to the legislature.⁹⁴ Once again reiterating its pivotal role in the development of the law, the court stated "[w]hen the common law has been out of step with the times, and the legislature, for whatever reason, has not acted, we have undertaken to change the law, and rightfully so. After all, who presides over the common law but the courts?"⁹⁵ The court, answering it's own query, felt it did, expanding the cause of action to include parents suing for damages as a result of a third-party tortfeasor's actions which result in the injury of a child. Specifically, the new right included "the parent's loss of the services, society, companionship, comfort, love and solace of the injured child."⁹⁶

On its own initiative, the *Gallimore* court continued on to address and overrule its own decision on parental consortium in *High v. Howard*.⁹⁷ In that ruling, issued one year earlier, the court addressed the question of whether a child could sue a tortfeasor for the loss of parental

⁹⁰ *See id.* at 1058.

⁹¹ *See id.*

⁹² *See Gallimore*, 617 N.E.2d at 1058.

⁹³ *See id.* at 1058-59.

⁹⁴ *See id.*

⁹⁵ *Id.* at 1059.

⁹⁶ *Id.* at 1054.

⁹⁷ *See id.* at 1060.

consortium when the tortfeasor injures the child's parent.⁹⁸ Citing precedent and rejecting arguments that other jurisdictions had recognized the cause of action, the court declined "to recognize a new cause of action for loss of parental consortium because we believe the responsibility for changing public policy to permit recovery for loss of parental consortium rests with the General Assembly, not this court."⁹⁹ Instead, the *Gallimore* court declared the dissent in the four-to-three "unfair and legally unjustifiable" decision in *High* to be persuasive on the issue.¹⁰⁰ Thus, in one case the Ohio Supreme Court had recognized two rights to recover for loss of consortium.¹⁰¹

IV. NEW YORK: RECOVERY NOT ALLOWED BY THE JUDICIARY

Similar to Michigan, but in contrast with Florida and Ohio, New York courts have chosen to not to recognize a parent's right to sue for any non-pecuniary damages, including the loss of filial consortium, when their child is injured by a third-party tortfeasor.¹⁰² However, New York courts have maintained adherence to a 1946 decision by the New York Court of Appeals that limited the damages which a parent could recover for losses sustained as a result of a child's injury.¹⁰³ Unlike the interpretations of the jurisdictions already explored in this paper,

⁹⁸ See *High v. Howard*, 592 N.E.2d 818 (Ohio 1992). Plaintiffs in *High* were brothers, both minors, whose father was seriously injured as a result of the negligent driving of the defendant. See *High*, 529 N.E.2d at 818. See also *Kane v. Quigley*, 203 N.E.2d 338 (Ohio 1964) (finding that there is no basis for a child to maintain a suit for a loss of parental consortium).

⁹⁹ *High*, 592 N.E.2d at 820. In further soaring rhetoric, the *Gallimore* court noted
[o]ur critics may wish to perpetuate an anachronistic and sterile view of the relationship between parents and children, but we seek to distance ourselves from that viewpoint. Either the common law must be modernized to conform with present-day norms, or it will engender a lack of respect as being out of touch with the realities of our time.

Gallimore, 617 N.E.2d at 1060

¹⁰⁰ *Id.* The bulk of the dissent's argument in *High* rested on distinguishing the facts of *High* from the 1964 case of *Kane v. Quigley*, 203 N.E.2d 338, which the majority had relied upon in denying the cause of action for parental consortium. See *High*, 592 N.E.2d at 821-23. The court also relied heavily upon the argument that many other states had allowed the right to recover for the loss of parental consortium. See *id.* at 823.

¹⁰¹ See *id.* at 821.

¹⁰² See *Gilbert v. Stanton Brewery, Inc.*, 67 N.E.2d 270 (N.Y. App. 1946).

¹⁰³ See *Devito v. Opiach*, 627 N.Y.S.2d 441, 442 (N.Y. App. Div. 1992) (plaintiff-parents were not allowed recovery for non-pecuniary damages as a result of the defendant's negligence during childbirth which caused the infant to suffer from cerebral palsy).

no New York court has yet to address the filial consortium claim in an explanative nature in any single opinion. Instead, New York courts follow, in general and usually without question, the decision of *Gilbert v. Stanton Brewery* in the matter.¹⁰⁴

In *Gilbert*, the infant plaintiff's mother brought, along with the infant's claims, a claim for damages resulting from the deprivation "of the companionship, and services of her infant daughter."¹⁰⁵ At issue was an instruction which charged the jury to award damages, if appropriate, to the mother for the loss of her daughter's services and companionship.¹⁰⁶ The plaintiff argued the jury instruction, although in error, should be disregarded.¹⁰⁷ The court disagreed, noting that the loss of companionship instruction was an "improper element of damages."¹⁰⁸ Rather, under New York law the only damages a minor's mother is allowed to recover from a third-party tortfeasor who injured the minor is the "pecuniary loss she sustained thereby including the value of her daughter's services, if any, of which she was deprived and reasonable expenses necessarily incurred by the mother in an effort to restore the infant to health."¹⁰⁹ As such, New York law does not recognize the right of a parent to recover non-pecuniary damages, such as loss of consortium, for the tortuous injury of their child by a third-party.¹¹⁰

Another case frequently cited by New York courts addressing filial consortium claims is *Foti v. Quittel*.¹¹¹ Relying solely on *Gilbert*, the *Foti* court reversed a jury award for the plaintiff which exceeded special damages for injuries suffered by the plaintiff's child that had been

¹⁰⁴ See *Devito*, 627 N.Y.S.2d at 442; *Thomas v. New York City*, 814 F. Supp. 1139, 1154 (E.D.N.Y. 1993) (mother was denied recover for the loss of society and companionship of her eight children who were removed from her by state protective services and were subsequently exposed to years of abuse in foster homes).

¹⁰⁵ See *Gilbert*, 67 N.E.2d at 156.

¹⁰⁶ See *id.*

¹⁰⁷ See *id.* at 157.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 157 (citing *Barnes v. Keene*, 132 N.Y. 13 (1892)).

¹¹⁰ See *id.*

proved at trial.¹¹² The court reasoned that the only way the jury award could have been so high is if loss of the child's services were included, which were not proved at trial, or if the loss of filial consortium was included, "which is not compensable" under New York law.¹¹³ Recent New York cases have followed this adherence to the denial of parents' claims for the loss of filial consortium as well.¹¹⁴ In fact, New York courts do not allow for recovery of any non-pecuniary damages for suits arising out of injury to the parent-child relationship.¹¹⁵ Thus, although failing to address filial consortium damage claims in such an exhaustive nature as some other states, New York courts have repeatedly ruled that no such cause of action exists under the state's laws.

V. ILLINOIS: "DIRECT" VERSUS "INDIRECT"

Adding yet another twist to the filial consortium analysis is the Illinois interpretation of the parent's right to recovery for the loss of a child's consortium as the result of the acts of a

¹¹¹ 241 N.Y.S.2d 15 (N.Y. App. Div. 1963).

¹¹² See *Foti v. Quittel*, 241 N.Y.S.2d 15, 16 (N.Y. App. Div. 1963). In *Foti*, the jury awarded the plaintiff-mother \$3,000 for damages claimed as the result of tortuous injury to her plaintiff-daughter. See *Foti*, 241 N.Y.S.2d at 16.

¹¹³ *Id.* at 17 (citing *Gilbert*, 67 N.E.2d 155).

¹¹⁴ See *Martell v. Boardwalk Enterprises, Inc.*, 748 F.2d 740, 754 (2d Cir. 1984) (plaintiff-parents were denied recovery for the loss of their sixteen year old son's consortium after he lost his arm and suffered other severe injuries in a boating accident); *Devito*, 627 N.Y.S.2d at 442; *Thomas*, 814 F. Supp. at 1154; *Mosher-Simons v. Allegany*, 1997 WL 662512 at 15 (W.D.N.Y. 1997) (plaintiff-mother was denied damages for the loss of consortium of her infant son who was taken from her by state protective services and subsequently killed by the infant's aunt who had been awarded custody of him).

¹¹⁵ See *DeAngelis v. Lutheran Medical Center*, 445 N.Y.S.2d 188 (N.Y. App. Div. 1981). In *DeAngelis*, a mother sought recovery on behalf of her three children for the loss of her society, companionship and other consortium-type damages for her physician's negligence during her tubal ligation. See *DeAngelis*, 445 N.Y.S.2d at 190. A companion case consolidated with the previous case dealt with claims for loss of parental consortium damages brought on behalf of two minors who's mother had been negligently injured in an automobile accident. See *id.* at 190-91. In both cases, the court denied recover for the loss of parental consortium. See *id.* at 195-96. Using what is by now familiar language, the court found that

on the basis of public policy and the results which would arise upon recognition of this types of claim, such as the additional burden placed on society through increased costs of insurance and the added expense of litigation and settlement, and in the interest of limiting the legal consequences of a wrong to a controllable degree, we decline to recognize a new cause of action on behalf of a child for the loss of parental consortium. We do not pretend to doubt the harm experienced by a child upon the loss of parental care, companionship, guidance, love and training.

Id. at 195.

third-party tortfeasor.¹¹⁶ The Illinois Supreme Court has chosen to allow a cause of action for the deprivation of filial consortium in some instances and deny it in others.¹¹⁷ On one hand, the court has chosen to allow parental claims for the loss of a child's society and companionship when they are not derivative in nature.¹¹⁸ On the other, Illinois law denies parents the same recovery if the parent's claim is "the derivative consequence of an injury to the child."¹¹⁹ This distinction was first enunciated in the 1988 Illinois Supreme Court case of *Dralle v. Ruder*.¹²⁰ In that case, the plaintiffs were a husband and wife and their infant son who was born with severe birth defects as a result of a prescription drug taken by the mother during pregnancy.¹²¹ The court found that because the parents' action was a derivative cause of action of the their son's claims, no recovery for loss of consortium would be allowed.¹²²

The court's reasoning in the matter took many forms, including the notation of the Illinois Courts of Appeals' repeated failure to allow both parents to seek recovery for the loss of filial consortium and for children to seek the loss of parental consortium.¹²³ The court also refused the parents' argument that the court's construction of the Illinois Wrongful Death statute should be interpreted to allow recovery in their situation.¹²⁴ The court found that although the statute specifically allowed pecuniary damages and had been recognized by the court to also authorize non-pecuniary damages, including consortium claims, such recovery was allowed in wrongful death actions only.¹²⁵ Citing several previous decisions, the court noted that it was the

¹¹⁶ See *Dralle v. Ruder*, 529 N.E.2d 209 (Ill. 1988).

¹¹⁷ See *Dralle*, 529 N.E.2d at 214-15.

¹¹⁸ See *id.* at 214.

¹¹⁹ *Id.*

¹²⁰ See *id.* at 214-15.

¹²¹ See *id.* at 209-10

¹²² See *id.* at 215.

¹²³ See *Dralle*, 529 N.E.2d at 210-11

¹²⁴ See *id.* at 211.

¹²⁵ See *id.* (citing *Bullard v. Barnes*, 468 N.E.2d 1228 (Ill. 1984)). In *Bullard*, the parents of a seventeen year old boy brought a wrongful death action after the boy was killed in an automobile accident with a truck. See *Bullard*,

policy of the state to allow non-pecuniary damage recovery in wrongful death actions because such actions were the result of the complete loss of a family member.¹²⁶ The court reasoned that recovery should not be allowed because “the nonfatally injured victim retains his [or her] own cause of action against the tortfeasor.”¹²⁷ The court also cautioned that allowing parents to seek recovery for the loss of an injured child’s consortium would create risks of increased liability, duplicative recovery as well as result in difficulty in figuring damages.¹²⁸

The *Dralle* court’s most important pronouncements came with respect to its distinction of previous Illinois cases wherein recovery for the loss of filial consortium had been allowed.¹²⁹ In *Dymek v. Nyquist*, the court of appeals allowed a father to recover for the loss of his minor child’s society and companionship from the child’s mother and psychiatrist.¹³⁰ Relying on previous Illinois court decisions that expanded the right to recover for the loss of consortium of a loved one, the court stated that “it is our opinion that we should now recognize a cause of action for parental loss of a minor child’s society and companionship.”¹³¹ Similarly, the Federal District Court in *Kunz v. Dietch* applied Illinois law to grant a father loss of society damages against his daughter’s maternal grandparents.¹³² Noting that the Illinois Supreme Court had not

468 N.E.2d at 1230-31. The court found that because the Illinois Wrongful Death Act had already been construed to allow non-pecuniary loss recovery for cases which involved the loss of a parent or spouse, the parents were allowed recovery for the loss of their son’s “society” under the Act. *See id.* at 1233.

¹²⁶ *Dralle*, 529 N.E.2d at 211 (citing *Hall v. Gillins*, 147 N.E.2d 352 (Ill. 1958) (court found that the wrongful death statute precluded any common law actions because the statute provided for both the pecuniary and non-pecuniary losses of the wife a child of an individual killed in a car accident). *See also* *Elliot v. Willis*, 442 N.E.2d 163, 168 (Ill. 1982) (The wife of a driver killed as a result of the defendant’s negligence in a car accident was allowed to recover for the loss of her husband’s “companionship and conjugal relations” under the Illinois Wrongful Death Act because the Act “is intended to provide the surviving spouse the benefits that would have been received from the continued life of the decedent.”).

¹²⁷ *Id.* at 212.

¹²⁸ *See id.* at 213.

¹²⁹ *See id.* at 214-15.

¹³⁰ *See Dymek v. Nyquist*, 469 N.E.2d 659, 666 (Ill. 1984).

¹³¹ *Dymek*, 469 N.E.2d at 666. (citing *Bullard*, 445 N.E.2d 485, *Elliot*, 442 N.E.2d 163 and *Hall*, 147 N.E.2d 352).

¹³² *See Kunz v. Dietch*, 660 F. Supp. 679 (N.D. Ill. 1987). In *Kunz*, the father sought loss of society damages after his infant daughter’s maternal grandparents tried to put her up for adoption and prevent him from seeing her after her mother died from heart disease. *See Kunz*, 660 F. Supp. at 680-81.

yet ruled in the matter, the court reasoned that given the chance, the Supreme Court would allow the father to recover.¹³³ The federal court's premonition proved incorrect.

In ruling against the parents in *Dralle*, the court distinguished *Dymek* and *Kunz* based upon the procedural nature of the cases.¹³⁴ While *Dymek* and *Kunz* involved direct actions by the parent unaccompanied by any action by the child for his or her own injuries, *Dralle* involved parents' claims as a derivative, or indirect, consequence of the child's injuries.¹³⁵ In summary, as long as the parent's action for the loss of a child's consortium as the result of the acts of a third party tortfeasor are not derivative of the child's claim, the parent's claim will be allowed.¹³⁶

VI. MASSACHUSETTS: THE STATUTORY CAUSE OF ACTION

Adding yet another twist to interpreting a cause of action for filial consortium is Massachusetts. In Massachusetts, legislation which grants parents the right to sue for loss of consortium of children injured by a third-party tortfeasor was enacted in 1989.¹³⁷ The statute recites that "[t]he parents of a minor child or an adult child who is dependent on his [or her] parents for support shall have a cause of action for loss of consortium of the child who has been seriously injured against any person who is legally responsible for causing such injury."¹³⁸ Interestingly, this statute is the Massachusetts legislature's response to the Massachusetts Supreme Court decision of *Norman v. Massachusetts Bay Transportation Authority*, wherein the court ruled that parents had no right to recover for the loss of a child's consortium from a third-party tortfeasor.¹³⁹

¹³³ See *id.* at 683. The Illinois Supreme Court's decision in *Dralle* was published in 1988, almost a year after the *Kunz* decision's publication in 1987.

¹³⁴ See *Dralle*, 529 N.E.2d at 214-15.

¹³⁵ See *id.*

¹³⁶ See, e.g., *Doe v. McKay*, 700 NE.2d 1018, 1025 (Ill. 1998) (recognizing the distinction made in *Dralle* between allowing recovery for filial consortium in "direct" actions and not allowing it in "indirect" actions).

¹³⁷ See MASS. GEN. LAWS ch. 231, § 85X (2001).

¹³⁸ *Id.*

¹³⁹ See *Norman v. Massachusetts Bay Trans. Auth.*, 529 N.E.2d 139 (Mass. 1988).

In *Norman*, the court addressed parents' claims for the loss of consortium of their son who was severely injured as a result of being run over by a Massachusetts Bay Transportation Authority vehicle.¹⁴⁰ The court began by noting that it had previously recognized causes of action for loss of spousal¹⁴¹ and parental consortium,¹⁴² but warned that it had to limit a defendant's liability, "[o]therwise society's exposure to threat of financial ruin will be intolerable."¹⁴³ The court also found that because "ordinarily minor children are critically dependent on their parents for the spiritual and physical necessities of life," recognizing a cause of action for loss of parental consortium did not necessitate the need for recognition of filial consortium actions.¹⁴⁴ Thus, the court found that the nature of the relationship and the dependency the uninjured family members had on the injured party was the point of distinction which allowed the court to rule against the parents.¹⁴⁵ Additionally, the court disposed of the plaintiffs' argument that because the Massachusetts's wrongful death statute allowed recover for the loss of filial consortium, so too should courts recognize it for the tortuous injury of a child.¹⁴⁶ Conversely, the court reasoned that allowing such a recovery would effectuate a double recovery, whereas in wrongful death actions "no one recovers for the losses sustained by the deceased party."¹⁴⁷

Following the enactment of Massachusetts's statute allowing recover for the loss of filial consortium, courts, including the Massachusetts Supreme Court which issued the ruling in *Norman*, began interpreting and applying the new statute. In *Monahan v. Town of Methuen*, the

¹⁴⁰ See *Norman*, 529 N.E.2d at 139-40 ("[W]e observe that the complaint is silent with respect to whether Matthew was an adult or a minor, and was emancipated or unemancipated when the accident occurred. Neither fact is essential to our resolution of the consortium issue.").

¹⁴¹ See *id.* at 140 (citing *Diaz v. Eli Lilly & Co.*, 302 N.E.2d 555 (Mass. 1973)).

¹⁴² See *id.* (citing *Ferriter v. Daniel O'Connell's Sons, Inc.*, 413 N.E.2d 690 (Mass. 1980)).

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ See *id.* at 141.

¹⁴⁶ See *Norman*, 529 N.E.2d at 142.

court construed statutory language that “in order to be considered ‘dependent on his [or her] parents for support,’ that child must be, at the very least *financially* dependent on his [or her] parents, either prior to or after the accident, or both.”¹⁴⁸ *Leibovich v. Antonellis* dealt with whether the statute could be applied retroactively.¹⁴⁹ The court found that the legislature had intended the bill to apply retroactively, allowing the plaintiffs to proceed with their filial consortium claims and that the statute did not violate the U.S. Constitution.¹⁵⁰ Therefore, under Massachusetts statutory law, parents are allowed to seek damages for the loss of consortium of a severely injured child who is dependent on them.

VII. CONSORTIUM POLICY BACKGROUND

A. Patriarchal Consortium

The right of a husband to sue for the loss of consortium based upon his relationship with the injured party, be it his wife, servant or child is rooted in early Roman Law.¹⁵¹ At common law, the patriarch would file suit “per quod consortium amisit.”¹⁵² The rationale was that the husband, as master of his household, held a proprietary interest in not only his land and animals,

¹⁴⁷ *Id.*

¹⁴⁸ *See Monahan v. Town of Methuen*, 558 N.E.2d 951, 957 (Mass. 1990). In that case, plaintiff Robert J. Monahan, a full-time firefighter, was severely injured after falling fifty-two feet from a hose-drying tower. *See Monahan*, 558 N.E.2d at 953. Prior to and following his lengthy stay in the hospital, the plaintiff lived with his parents, paying them modest rent and helping out with household chores. *See id.* Robert’s parents joined in his lawsuit claiming their own damages, including for the loss of his consortium under the Massachusetts statute which allows parents to seek damages for filial consortium discussed here. *See id.* at 956. The court denied the parents’ claim, finding that Robert was not financially dependent upon them and thus did not meet the dependency requirement of the statute. *See id.*

¹⁴⁹ *See Leibovich v. Antonellis*, 574 N.E.2d 978 (Mass. 1991). In *Leibovich*, Philip Leibovich and his parents brought suit for severe injuries he suffered in a car accident. *See Leibovich*, 574 N.E.2d at 980. The jury awarded Philip \$5,500,000 for his injuries and each parent \$250,000 for the loss of Philip’s consortium. *See id.* at 981. The judgment was affirmed. *See id.* at 986.

¹⁵⁰ *See id.* at 983-84. The constitutional challenges argued by the defendant included the argument that the retroactive application of the statute violated his due process rights and that the scope of the statute was excessive. *See id.* at 984-86.

¹⁵¹ *See 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, 1327 (1992). *See also* Evan Holbrook, *The Change in the Meaning of Consortium*, 22 Mich. L. Rev. 1, 2 (1923) (“Under the common law, a husband’s right to the consortium of his wife was clear and definite.”).

but also in his wife, children and servants.¹⁵³ In large part, actions brought by the patriarch for consortium focused on the economic nature of the loss.¹⁵⁴ The patriarch sought damages for the loss of services he suffered as the result of the tortuous injury of his wife,¹⁵⁵ children or servants.¹⁵⁶ Less sensitively put, the husband sought recovery for injury to “his interest in her.”¹⁵⁷ However, the husband was not allowed to seek sentimental damages caused by the injury of his wife because “the wife’s legal identity, having been merged with her husband’s at marriage, left her a non-person in the eyes of the law.”¹⁵⁸ In other words, the wife remained nothing more than a servant to her husband, recognized by the law for only the economic benefit she provided her husband.¹⁵⁹

Later, the courts began to recognize that a husband had the right to sentimental and emotional damages stemming from the tortuous injury of his wife.¹⁶⁰ During the 1600’s, courts acknowledged that a husband had a right to the “service” of a conjugal relationship with his wife.¹⁶¹ As a result, courts began allowing husbands whose wives had been injured to seek sentimental consortium damages from a third-party tortfeasor.¹⁶² Today, these consortium damages include such “intangible elements as love, society, companionship, and affection.”¹⁶³

¹⁵² Mogill, *supra* note 150 at 1327 (citing Black’s Law Dictionary 1141 (6th Ed. 1990)). In English, per quod consortium amisit means “whereby he lost the company of his wife.”

¹⁵³ See Thomas A. Demetrio, *Loss of Consortium: A Continuing Evolution*, 36 *Trial* 42, 42 (2000).

¹⁵⁴ See Mogill, *supra* note 150 at 1327.

¹⁵⁵ See Jacob Lippman, *The Breakdown of Consortium*, 30 *Colum. L. Rev.* 651, 653 (1930) (“[T]he foundation of the husband’s right of action for loss of *consortium* is based upon the idea that the wife is her husband’s servant, since an interference with the service of a servant is an actionable trespass.”).

¹⁵⁶ See *id.*

¹⁵⁷ Holbrook, *supra* note 150 at 2 (quoting 4 *Bac. Abr.* 552 (Marriage and Divorce)).

¹⁵⁸ Mogill, *supra* note 150 at 1327.

¹⁵⁹ See *id.*

¹⁶⁰ See Demetrio, *supra* note 152 at 42.

¹⁶¹ See Lippman, *supra* note 154 at 656.

¹⁶² See Demetrio, *supra* note 152 at 42..

¹⁶³ Mogill, *supra* note 150 at 1328.

Consequently, it is extremely well-settled that a husband has a right to sue for the loss of his wife's consortium if she is injured by a third-party tortfeasor.¹⁶⁴

B. Spousal Consortium

In contrast to a patriarch's right to sue for the loss of his "possession's" consortium, stands the wife's reciprocal right. At the time the husband's right seek consortium damages was recognized, a number of reasons were proffered which denied women the right to seek the same damages.¹⁶⁵ Many argued that because when a woman was married, her identity merged into that of her husband's and any recovery by the husband in tort would make the family whole; recovery by the wife for consortium damages would be duplicative.¹⁶⁶ It was also argued that because the wife was her husband's property, she could suffer no damages to any item that could be judicially remedied because she had no converse property interest in her husband.¹⁶⁷ Not the least of these arguments was a procedural one.¹⁶⁸ Under common law rules, "a married woman was incapable of suing except when her husband was joined as plaintiff, an under which the husband was entitled to the proceeds of any suit."¹⁶⁹ In other words, a woman may have had the common law right to sue for the loss of her husband's consortium, but procedural obstructions prevented her from exercising that right.¹⁷⁰

The denial of a woman's right to sue for lost consortium began to erode with the passage by most states of Married Women's Property Acts, which, in part, abolished the notion that husbands were "entitled" to their wives' services.¹⁷¹ In effect, the Married Women's Property

¹⁶⁴ All states recognize that "[a]ny tort causing direct physical injury to one spouse will give rise to a claim for loss of consortium by the other." See W. PAGE KEETON, PROSSER AND KEETON ON TORTS § 125 at 932 (5th ed. 1984).

¹⁶⁵ See Holbrook, *supra* note 150 at 2.

¹⁶⁶ See Mogill, *supra* note 150 at 1327-29.

¹⁶⁷ See Demetrio, *supra* note 152 at 42.

¹⁶⁸ See Holbrook, *supra* note 150 at 2.

¹⁶⁹ *Id.*

¹⁷⁰ See *id.* at 3.

¹⁷¹ See *id.* at 4, 7. See also Demetrio, *supra* note 142 at 42.

Acts took the “historical basis for these [consortium] actions – loss of services – [and] collapsed [them into] a new one, violation of inherent marital rights.”¹⁷² However, these types of legislation presented courts with a whole new set of conceptual problems, including whether the husband still retained his own independent cause of action.¹⁷³ At the outset, a wife could generally sue for any intentional act that resulted in the loss of her husband’s consortium.¹⁷⁴ This included the right to sue for enticement, criminal conversation, alienation of affections, and “the sale to the husband of excessive quantities of drugs.”¹⁷⁵ The reason this distinction existed was that when the husband was negligently injured, he retained his own cause of action against the tortfeasor, whereas in the cases of criminal conversation and the like, he did not.¹⁷⁶ It took several more years before married women were allowed to seek consortium damages for their negligently injured husbands.

In the 1950 U.S. Court of Appeals for the District of Columbia case of *Hitaffer v. Argonne, Co.*, the right of a woman to sue for the loss of her negligently injured husband’s consortium was first expressly recognized.¹⁷⁷ The court criticized prior court interpretations of common law denying married women of such a cause of action as “nothing more than an arbitrary separation of the various elements of consortium devised to circumvent the logic of allowing the wife of such an action.”¹⁷⁸ Essentially, the court rested its decision on the fact that it could “conceive of no reasons for denying the wife this right for the reason that in this

¹⁷² Lippman, *supra* note 154 at 664.

¹⁷³ *See id.* at 654, 662 (“In more modern times, the basis of the action comes into conflict with a change in the position of the woman, and so old concepts have to be re-examined and made to suit new conditions.”).

¹⁷⁴ *See* Holbrook, *supra* note 150 at 6. *See also* Lippman, *supra* note 154 at 664 (“That which previously accrued to the husband alone by reason of his superiority, is extended to the wife who has become his equal.”).

¹⁷⁵ Lippman, *supra* note 154 at 662-63.

¹⁷⁶ *See* Holbrook, *supra* note 150 at 6.

¹⁷⁷ *See* *Hitaffer v. Argonne, Co.*, 183 F.2d 811 (D.C. Cir. 1950) (*overruled in part* by *Smither and Co. v. Coles*, 242 F.2d 220 (D.C. Cir. 1957)).

¹⁷⁸ *Hitaffer*, 183 F.2d at 813. In *Hitaffer*, the plaintiff’s husband had been severely injured at work as the result of his employer’s negligence. *See id.* at 812.

enlightened day and age they simply do not exist.”¹⁷⁹ Acknowledging that all prior authority was inconsistent with the manner in which the court was ruling, the court rejected the argument that the wife’s cause of action was more remote than the husband’s.¹⁸⁰ Rather, the court found that negligent injuries to the marital relationship were no less direct and damaging as intentional injuries to the marital relationship.¹⁸¹ The court rejected arguments that the wife had no right to the services of her husband’s, dismissing the notion of consortium actions as essentially loss of service actions as “an outworn fiction, and the wife’s interest in the undisturbed relation of her consort no less worthy of protection than that of the husband.”¹⁸² Many states followed the example set by the *Hitaffer* court. Today, forty-four states and the District of Columbia recognize a married woman’s right to seek damages for the loss of her negligently injured husband’s consortium.¹⁸³

C. Parental and Filial Consortium

As demonstrated by the previous sections of this paper, courts today continue to struggle with the ongoing evolution of the loss of consortium action in the context of parental and filial relationships.¹⁸⁴ Suffice it to say that arguments in favor of wholesale recognition of such causes of action primarily lie with “logic, fairness, and recognition of the value of the parent-child relationship.”¹⁸⁵ At common law, the patriarch of the family was allowed the right to seek damages for tortuous interference with this relationship with his children.¹⁸⁶ Development of consortium actions in the parent-child relationship mirrors, in part, the development of

¹⁷⁹ *Id.* at 819.

¹⁸⁰ *See id.* at 815, 819 (“The medieval concepts of the marriage relation to which other jurisdictions have reverted in order to reach the results which have been handed to us as evidence of the law have long since ceased to have any meaning.”). *See also* Mogill, *supra* note 150 at 1332.

¹⁸¹ *See Hitaffer*, 183 F.2d at 817.

¹⁸² *Id.* at 818.

¹⁸³ *See* Mogill, *supra* note 150 at 1333-34 n.68.

¹⁸⁴ *See supra* Parts II-VI.

¹⁸⁵ Demetrio, *supra* note 152 at 43.

reciprocal spousal consortium claims.¹⁸⁷ Today, consortium actions by parents and children, when allowed, do not focus on the service component which dominated such actions in earlier American jurisprudence.¹⁸⁸ Instead, such actions have been allowed based upon policies of valuing the somewhat intangible emotional nature of the plaintiff's loss.¹⁸⁹

VIII. CONSORTIUM OR CONFUSION?

It has long been accepted that the purpose of tort actions are to compensate the victims of the intentional or negligent acts of others. Many times the aim is to make the plaintiff whole, or to attempt put them in the same position as they were before the event in question occurred. When it comes to claims for loss of filial consortium, varying rationales, justifications and interpretations demonstrated by the five states addressed here seem nebulous and in flux. In short, the law with respect to consortium claims in the parent-child relationship is a frustrating mess. However, the aim of this paper is to shed light on policy rationales upon which a legislature may base a clear set of rules which establish a logical and just cause of action for the loss of consortium.

While perhaps it was the view of the Framers that varying interpretations of the law would result state-to-state, the condition of filial consortium law today leaves much to be desired. Piece-meal judicial decision-making in the matter have resulted in the large variations seen today in whether certain types of consortium damages may be sought. Courts like the Ohio Supreme Court have thrown caution to the wind, making stirring pronouncements about their powers to change the law that would shock the conscience of even some judicial activists, not to mention laying waste to the beliefs of any philosophy of restraint. Still other courts, such as

¹⁸⁶ See Mogill, *supra* note 150 at 1334.

¹⁸⁷ See *id.* at 1338.

¹⁸⁸ See *id.* at 1334-35.

¹⁸⁹ See *id.* (citations omitted).

Michigan and Illinois, exercise restraint, but at a point that does not make sense. Finally, courts like those in New York take an all or nothing approach to consortium damages in the parent-child relationship, limiting its availability to spouses. What is needed is clear legislation, such as the case in Massachusetts, which clearly identifies the nature and extent of consortium damages which may be sought.

A. Judicial Fiat: Ohio and Florida

Sounding more like political campaign ad than a court, the Ohio Supreme Court used lofty judicial rhetoric in *Gallimore v. Children's Hospital Medical Center* to create a new cause of action.¹⁹⁰ Samples of the court's overblown dicta is evident in the section above describing its decision in the matter.¹⁹¹ Statements the court made in finding that parents had a right to recover for the loss of an injured child's filial consortium included the thought that "[t]he common law is ever-evolving and we have the duty, absent action by the General Assembly on a specific question, to be certain that the law keeps up with the ever-changing needs of modern society."¹⁹² The legislative and executive branches of Ohio state government should beware, the judiciary has just named itself emperor. While the importance of the parent-child relationship should not be discounted, the *Gallimore* court's hard-charging verbiage shocks the conscience. Nearly admitting that issues such as this should be left to the legislature, the court prods forward and dictates new rights.¹⁹³

The court does deserve commendation, however, for its consistency. In finding that parents could seek recovery from a tortfeasor for the loss of their child's society and

¹⁹⁰ See *Gallimore v. Children's Hosp. Med. Ctr.*, 617 N.E.2d 1052 (Ohio 1993).

¹⁹¹ See *supra* notes 88-100 and accompanying text.

¹⁹² See *Gallimore*, 617 N.E.2d at 1057.

¹⁹³ See *id.* at 1060.

companionship, the court goes one step further.¹⁹⁴ Without any evidence of prompting, the court overruled its previous decision to allow children to seek damages for the loss of parental consortium.¹⁹⁵ Thus, in Ohio the streak goes in both directions under *Gallimore*.¹⁹⁶ Both parents and children are allowed to seek recovery for the loss of consortium when the other is intentionally or negligently injured by a third-party tortfeasor.¹⁹⁷

Exercising a somewhat more palatable level of restraint, the Florida Supreme Court in *United States v. Dempsey* noted that the apparent “unjust” nature of the current law required it to recognize a parent’s right to seek filial consortium damages.¹⁹⁸ However, the court sought cover from judicial restraint-based criticism by noting that previous cases dealing with damages for parents of injured children seemed to roll consortium-type damages such as companionship under the ambit of services.¹⁹⁹ Unfortunately, the court goes further, finding that it has a duty to abrogate common law “when change is demanded by public necessity or required to vindicate fundamental rights.”²⁰⁰ It seems unlikely that many would agree that the right to seek filial consortium damages, in addition to other damages that are available in tort, is a fundamental right. Furthermore, it is the role of the legislature to respond to the cries of the public, not the judiciary. Both the Florida and Ohio Supreme Courts seem to forget this notion.

B. Judicial Confusion: Michigan and Illinois

Most confusingly of all are the Michigan and Illinois Supreme Court decisions on the matter of parental recovery of filial consortium damages. In an attempt to draw a line to prevent further expansion of a plaintiff’s right to seek damages in tort, the Michigan court in *Sizemore v.*

¹⁹⁴ *See id.*

¹⁹⁵ *See id.* (citing *High v. Howard*, 592 N.E.2d 818 (Ohio 1992)).

¹⁹⁶ *See id.*

¹⁹⁷ *See id.*

¹⁹⁸ *See United States v. Dempsey*, 635 So.2d 961, 964 (Fla. 1994).

¹⁹⁹ *See Dempsey*, 635 So.2d at 963-64 (citing *Wilke v. Roberts*, 109 So.2d 226 (Fla. 1926) and *Yordon v. Savage*, 279 So.2d 844 (Fla. 1973)).

Smock effectuates more of a squiggle than a straight line.²⁰¹ The court acknowledged its previous decisions which allow a child to seek recovery for the loss of a parent's consortium but denied the *Sizmore* parent the same recovery.²⁰² Rather, the court recognized "that any decision to further extend a negligent tortfeasor's liability for consortium damages should be determined by the Legislature."²⁰³ It is granted that the law is filled with inconsistencies, but why should it be left to the legislature to decide a question of consortium damages in one instance and not in the other?

The Illinois Supreme Court, on the other hand, attempts to remedy inconsistencies in its decisions in the matter. The court in *Dralle v. Ruder* draws the line with respect to filial consortium claims between derivative claims and non-derivative claims.²⁰⁴ Like the Michigan court in *Sizmore*, the Illinois court tries to reconcile its previous decisions by drawing a line at which liability for tortfeasors ends.²⁰⁵ In reality, the *Dralle* court ends up with more of a squiggle than a line as well. As discussed previously, the *Dralle* court distinguished previous cases which allowed parents to recover for the loss of filial consortium on the basis of the fact that there was no action for injury on the part of the child.²⁰⁶ However, this distinction does not hold up under many circumstances.

For example, assume the facts of a case are as the were in *Kunz v. Deitch*, which the *Dralle* court distinguished, wherein a widowed father sued for the loss of his infant child's consortium when the child's maternal grandparents had attempted to put the child up for

²⁰⁰ *Id.* at 964.

²⁰¹ *See Sizmore v. Smock*, 430 Mich. 283 (1988).

²⁰² *See Sizmore*, 430 Mich. at 285 (citing *Berger v. Weber*, 411 Mich. 1 (1981)).

²⁰³ *Id.*

²⁰⁴ *See Dralle v. Ruder*, 529 N.E.2d 209, 214 (Ill. 1988).

²⁰⁵ *See id.*

²⁰⁶ *See supra* notes 129-35 and accompanying text.

adoption without his knowledge.²⁰⁷ The court reasoned filial consortium damages were allowed in that situation because the father's claim was not derivative of the infants.²⁰⁸ Nevertheless, the infant could have easily had claims brought on his behalf for any damages he might have suffered as a result of being wrongfully kept from his father. Under the reasoning in *Dralle*, the father's claim for the loss of filial consortium could not prevail because it would be derivative of any claims the infant now made. Once again, the Illinois Supreme Court should have left it up to the legislature. Instead, it chose to establish a confusing distinction which could be easily circumvented by any intelligent plaintiff's lawyer.

C. All or Nothing: New York

New York courts hold an unwavering opinion that consortium damages should not be expanded to the parent-child relationship.²⁰⁹ Rather than allowing consortium damages in some instances of the parent-child relationship and denying it in others, New York law does not allow for the recovery of any pecuniary non-pecuniary damages for parents or children when the other is injured by a third-party tortfeasor.²¹⁰ Warming the hearts of those adhering to the belief that judicial restraint is the proper means of interpreting the law, consortium damages in New York are confined to their original common law station, the spousal relationship.

D. Getting it Right: Massachusetts

Of all the states' views disseminated in this writing, the most sense comes from the Massachusetts legislature. In what some may have consider the misguided opinion of the Massachusetts Supreme Court in *Norman v. Massachusetts Bay Transportation Authority*,

²⁰⁷ See *Dralle*, 529 N.E.2d 209, 214 (citing *Kunz v. Deitch*, 660 F. Supp. 679 (N.D. Ill. 1987)).

²⁰⁸ See *id.*

²⁰⁹ See *supra* notes 102-4 and accompanying text.

²¹⁰ See *supra* notes 105-9 and accompanying text.

parents were not allowed to seek recovery for the loss of filial consortium.²¹¹ Righting a perceived wrong perpetuated by the judiciary, the Massachusetts assembly enacted legislation creating a private cause of action for the parents of dependent children against third-party tortfeasors who injure their children.²¹² Rather than relying on the judiciary to create new rights for them, the people of Massachusetts instead sought a remedy with the legislature, clearly enunciating the bounds in which a parent may seek damages for the loss of a child's consortium. Today, the Massachusetts parent-plaintiff, in spite of that state's highest court, may sue a intentional or negligent third-party tortfeasor for the loss of a severely injured dependent child's consortium.²¹³

E. Legislative Fiat: The Solution

The argument of this paper is that in light of the confusing body of judicial decision-making which exists today, especially in states like Michigan, the legislature needs to step in and set forth clear rules by which consortium claims may be sought. Some commentators argue that waiting for the legislature to act in this regard is useless due to the sometimes slow manner in which the legislature acts, and the competing interest groups which seek to influence the law through the legislative branch.²¹⁴ However, at least in the case of consortium, leaving the creation of new causes of action and rights to judicial fiat, besides offending the restraint-based feelings of many, has resulted in utter confusion. Geography is the determining factor as to whether a parent may seek recovery for the loss of a child's consortium and whether a child may

²¹¹ See *Norman v. Massachusetts Bay Trans. Auth.*, 529 N.E.2d 139 (Mass. 1988).

²¹² See MASS. GEN. LAWS ch. 231, § 85X (2001).

²¹³ See *supra* notes 136-38 and accompanying text.

²¹⁴ See Mogill, *supra* note 152 at 1368-70. Mogill notes that "crowded legislative dockets . . . pressures on legislatures, including the presence of lobbyists and the ongoing search for compromise . . . [result in legislative] efforts [which] prove less effective or possibly even self-defeating." *Id.* at 1368-69 (citations omitted). See also Matthew Brady, *Back Up and Hit Him Again: Illinois' Problem With Parental Consortium Lost Because of Nonfatal Injury*, 25 LOY. U. CHI. L.J. 545, 563-64 (1994). Brady argues that American courts "should not await legislative

seek the loss of a parent's consortium. As an illustration, if the case is lodged in a Michigan court, children may seek parental consortium damages but parents may not seek filial consortium damages.²¹⁵ Such an interpretation makes as much sense as allowing one spouse to seek consortium damages while denying the other spouse the same right.

The bottom line, from a policy standpoint, is that the nature of familial relationship in society continues to evolve. Just as the spousal relationship has evolved from the archaic notions of a master-servant relationship, so to has the parent-child relationship. Children are, as repeatedly stated by courts recognizing filial consortium actions, valued today for the society and companionship they provide their parents. A logical solution, in both the legal and non-legal sense, is the approach taken by the Massachusetts legislature. Legislatures should, in light of the policies underlying consortium actions, clearly enunciate that parents and children, if not already recognized, should be allowed to seek consortium damages for the loss of one another.

CONCLUSION

At the very least, this paper describes some of the varying philosophies and rationales that have allowed courts and legislatures to come to the conclusion that parents should or should not be allowed to seek damages for the loss of a child's consortium. The Michigan Supreme Court, it could be argued, wants do away consortium damages altogether in the parent-child relationship, but instead renders a decision which limits recovery in tort but makes little common sense. Using much of the same analysis the Michigan Supreme Court uses but coming out with the completely opposite opinion in the matter are the Florida and Ohio Supreme Courts.

Reaching back to earlier decisions of the same court, the Florida found that law as well as equity

action before recognizing the children's claim." *Id.* at 564. Conversely, in many cases it is the legislature who should not await *judicial* action before recognizing such claims.

²¹⁵ *See supra* Part II.

mandated that parents be allowed to seek recovery for the loss of filial consortium.²¹⁶ Likewise, the Ohio Supreme Court, in dicta gone mad, recognized the same right.²¹⁷ Perhaps most confusing is the Illinois interpretation. Trying to strike a balance between what it phrased “direct” and “indirect” actions, the court allowed parents to seek damages for filial consortium if their were not derivative of their child’s claims against the same party but denied recovery when the parent’s claim was derivative of the child’s suit.²¹⁸ Interestingly, New York courts simply do not allow recover for any non-financial damages, such as consortium-type claims, in the parent child relationship.²¹⁹ Finally, although the Massachusetts Supreme Court ruled that filial consortium damages are not allowed under Massachusetts law,²²⁰ the legislature took it upon itself to reverse the pronouncement. Instead, Massachusetts parents are now allowed by statute to seek compensation for the loss of a severely injured dependent child’s consortium.²²¹

So is there an approach which is preferred? The answer is of course. Certainly it is easy to have an opinion over which state “got it right.” In this case, however, the Michigan Supreme Court does not hold the answer, neither do the Supreme Courts of Florida, Ohio, Illinois, New York and Massachusetts. For that matter, no court, state or federal, should be involved in the contraction or expansion of consortium claims. Rather, the matter should be left up to the legislature, with the severity of the injury as the linchpin. If society, or the citizens of a particular state, are so bothered by the fact that they may not seek some type of damages they are allowed a remedy through their elected representatives. The Massachusetts legislature got it

²¹⁶ See *United States v. Dempsey*, 635 So.2d 961 (Fla. 1994).

²¹⁷ See *Gallimore v. Children’s Hosp. Med. Ctr.*, 617 N.E.2d 1052 (Ohio 1993).

²¹⁸ See *Dralle v. Ruder*, 529 N.E.2d 209 (Ill. 1988).

²¹⁹ See *Gilbert v. Stanton Brewery, Inc.*, 67 N.E.2d 270 (N.Y. App. 1946).

²²⁰ See *Norman v. Massachusetts Bay Trans. Auth.*, 529 N.E.2d 139 (Mass. 1988).

²²¹ See MASS. GEN. LAWS ch. 231, § 85X (2001).

right. It should be up to the people, through their elected bodies, to establish a clear standard for the consortium action.