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Recognizing Parental Consortium: Montana Follows a National Trend in Pence v. Fox

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NOTE

RECOGNIZING PARENTAL CONSORTIUM: MONTANA FOLLOWS A NATIONAL TREND IN *PENCE v. FOX*

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I. INTRODUCTION

For years many states have allowed husbands and wives to recover damages for the emotional loss suffered when a spouse is seriously injured. The husband or wife can independently sue the tortfeasor for the loss of the injured spouse's society, company, affection and sexual relations. These so-called "loss of consortium" cases traditionally marked the boundary of recovery for family members of an injured person where the injuries were not fatal.

Historically, courts did not permit anyone other than the spouse—not brothers or sisters, grandparents, cousins, uncles or aunts—to claim loss of consortium, no matter how close a relationship a relative had with the injured party. Although the common law recognized three different forms of consortium, spousal consortium,[1] parental consortium,[2] and filial consortium,[3] most states limited the recovery of consortium damages in injury cases exclusively to the spousal relationship.

Recently in *Pence v. Fox*,[4] Montana joined a growing minority

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1. Spousal consortium is generally defined as those rights inhering in the husband-wife relationship which allows one spouse to recover for the loss of "company, society, co-operation, affection, and aid of the other in every conjugal relation." BLACK'S LAW DICTIONARY 280 (5th ed. 1979).

2. Parental consortium is typically defined as the child's right inhering in the parent-child relationship for the loss of "parental aid, protection, affection, society, discipline, guidance and training." Pence v. Fox, 248 Mont. 521, 527, 813 P.2d 429, 433 (1991).

3. Filial consortium is the reverse of parental consortium; it is the parent's right to recover damages for the loss of a child's society and companionship. *See* Todd R. Smyth, Annotation, *Parent's Right to Recover For Loss of Consortium in Connection with Injury to Child*, 54 A.L.R. 4th 112, 116 (1987 & Supp. 1992).

4. 248 Mont. 521, 813 P.2d 429 (1991).

of jurisdictions recognizing a child's right to recover for the loss of parental consortium.[5] In *Pence*, the Montana Supreme Court broadly expanded state tort law and eliminated a disparity between the rights of adults and those of children to recover consortium damages.[6] In recognizing a new cause of action for parental consortium, however, the court failed to address a number of important issues and to provide adequate guidance to the Montana bench and bar regarding this new cause of action.

The discussion that follows focuses on the Montana Supreme Court's decision in *Pence v. Fox*. This Note first summarizes the historical developments of consortium in the common law and explains the statutory foundation for parental consortium in Montana's code. Second, this Note discusses the court's reasoning and unanimous decision to expand tort law to include a cause of action for parental consortium. Finally, this Note analyzes the implications of recognizing a new cause of action for parental consortium and identifies areas requiring further clarification by the Montana Supreme Court.

II. LEGAL FOUNDATION FOR PARENTAL CONSORTIUM

A. *Historical Development of Consortium*

Traditional concepts of consortium are deeply rooted in the ancient Roman civil law. Under Roman law, the legal rights of a family were vested in the male head of the household.[7] In the eyes of the law, the male head, or *paterfamilias*, personified the household.[8] Any intentional tortious injury to any member of his family was an injury suffered directly by him.[9] The *paterfamilias* could recover damages for injury to his wife, child, slave or servant just

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5. *Id.* at 527, 813 P.2d at 433. Note that the phrase "loss of consortium" is often misused. As the Texas Supreme Court noted in Reagan v. Vaughn, 804 S.W.2d 463 (Tex. 1991):

> 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.

Id. at 464 n.1 (quoting Whittlesey v. Miller, 572 S.W.2d 665, 666 (Tex. 1978)).

6. *Pence*, 248 Mont. at 526-27, 813 P.2d at 433.

7. Susan G. Ridgeway, Comment, *Loss of Consortium and Loss of Services Actions: A Legacy of Separate Spheres*, 50 MONT. L. REV. 349, 352 (1989); Marian F. Ratnoff, Note, *The Case of the Lonely Nurse: The Wife's Action for Loss of Consortium*, 18 W. RESERVE L. REV. 621, 623-24 (1967).

8. Ridgeway, *supra* note 7, at 352.

9. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 129, at 980 (5th ed. 1984) [hereinafter PROSSER].

as he would recover for an intentional tortious injury to himself.[10]

English common law adopted the *paterfamilias* model from the Roman civil law, and developed the concept of consortium in the context of the master-servant relationship.[11] Women and children, under English common law, were recognized merely as servants of their male masters (husbands or fathers).[12] A husband or father could sue for the intentional tortious injuries to his wife or children and the resulting loss of services just as a master would sue for the loss of his servant's labor.[13] English common law defined consortium exclusively as the loss of services resulting from an intentional tortfeasor's acts.[14]

In the nineteenth century, many American states adopted the English model of consortium based on the master-servant relationship.[15] American courts originally limited recovery for consortium to intentional tortious acts, but as the common law developed, the courts extended consortium damages to provide relief for the negligent acts of a tortfeasor.[16] *Sanford v. Inhabitants of Augusta*[17] was the first case in an American court to extend a loss of consortium claim to a husband based on a negligent tortious injury to his wife.[18]

The Married Women's Acts,[19] adopted by state legislatures throughout the United States in the late 1800s and early 1900s, transformed the legal underpinning of consortium from the master-servant relationship to a contract-based relationship.[20] The Married Women's Acts effectively severed the singular legal entity of marriage developed under English common law,[21] and granted women the right to sue and be sued in their own names.[22] With the

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10. *Id.* at 979-80.

11. 1 WILLIAM BLACKSTONE, COMMENTARIES *442; Jacob Lippman, *The Breakdown of Consortium*, 30 COLUM. L. REV. 651, 653 (1930).

12. Jean C. Love, *Tortious Interference with the Parent-Child Relationship: Loss of an Injured Person's Society and Companionship*, 51 IND. L.J. 590, 600 (1976).

13. Guy v. Livesey, 79 Eng. Rep. 428, 428 (K.B. 1619) (allowing recovery for a wife as a servant). *See also* Love, *supra* note 12, at 600.

14. *Guy*, 79 Eng. Rep. at 428.

15. *See, e.g.*, MONT. CODE ANN. § 1-1-109 (1991) (adopting English common law in general).

16. Sanford v. Inhabitants of Augusta, 32 Me. 536, 539 (1851).

17. *Id.*

18. *Id.*

19. Also known as "Married Women's Property Acts." *See, e.g.*, MONT. CODE ANN. §§ 40-2-101 to -315 (1991).

20. Lippman, *supra* note 11, at 662-64. *See also* Ridgeway, *supra* note 7, at 355.

21. A married woman's identity was no longer subsumed in that of her husband's identity. Ratnoff, *supra* note 7, at 627. *See also* Lippman, *supra* note 11, at 656 (characterizing a woman in Old England as a Dred Scott or nonperson).

22. Ratnoff, *supra* note 7, at 627 (citing WILLIAM L. PROSSER, LAW OF TORTS, § 101, at

lifting of this legal disability, courts were forced either to allow a woman the right to recover for the loss of her husband's consortium or to eliminate consortium altogether.[23] Courts generally extended women the right to sue for loss of consortium for intentional tortious injuries to their husbands rather than to eliminate consortium altogether.[24] Women were first extended the right to recover for negligent tortious acts in 1950 in *Hitaffer v. Argonne Co.*[25]

Montana only recently began extending loss of consortium claims to plaintiffs other than husbands. A woman's right to bring a loss of spousal consortium claim in Montana was first recognized by a Montana Federal District Court in 1961.[26] In 1986, the Montana Supreme Court in *Bain v. Gleason*[27] also granted a wife the right to state a separate and distinct cause of action for spousal consortium.[28]

Since 1986 the Montana Supreme Court has limited consortium actions solely to the spousal relationship. Either a husband or a wife could recover for the loss of consortium caused by the intentional or negligent acts of a third party resulting in serious injury to the spouse. Until *Pence v. Fox*, however, the Montana Supreme Court had never confronted the issue of parental consortium.

B. Statutory Support for Parental Consortium

Montana's code has no specific provisions regarding parental consortium. The code, however, does provide persuasive collateral support for Montana courts to recognize a parental consortium cause of action. Montana's code is replete with statutes that seek to protect the welfare of Montana's youth and preserve the family relationship in general.[29] As argued by counsel for the Pence chil-

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672 (2d ed. 1955)).

23. Lippman, *supra* note 11, at 662.

24. PROSSER, *supra* note 9, at 932 nn.8-9.

25. 183 F.2d 811 (D.C. Cir.), *cert. denied*, 340 U.S. 852 (1950).

26. Duffy v. Lipsman-Fulkerson & Co., 200 F. Supp. 71 (D. Mont. 1961).

27. 223 Mont. 442, 726 P.2d 1153 (1986).

28. *Id.* at 445, 726 P.2d at 1155.

29. *See, e.g.*, MONT. CODE ANN. § 40-4-212 (1991) (requiring courts to "determine custody in accordance with the best interest of the child"); MONT. CODE ANN. § 40-4-222 (1991) (declaring the intent of the legislature to "assure minor children frequent and continuing contact with both parents"); MONT. CODE ANN. § 40-6-201 (1991) (presuming all children born in wedlock to be legitimate); MONT. CODE ANN. § 40-6-211 (1991) (obligating the custodial parent(s) of a child to provide the child with "support and education suitable to his circumstances"); MONT. CODE ANN. § 41-3-101 (1991) (declaring the policy of the state of Montana to "preserve the unity and welfare of the family whenever possible"); MONT. CODE ANN. § 41-3-102 (1991) (defining harm to a child's health or welfare as "the harm that occurs whenever the parent or other person responsible for the child's welfare . . . causes [the

dren, a synthesis of Montana's family law[30] and minors statutes[31] suggests a public policy that favors recognizing consortium duties in the parent-child relationship and a cause of action for the subsequent loss.[32]

Montana's code implies a contractual basis for the parent-child relationship analogous to the marital contract.[33] Section 40-6-211 outlines the obligations of parents to "give support and education" to their children.[34] Arguably this language corresponds to the "obligations of mutual respect, fidelity and support"[35] found in the marital contract.[36] From this analogous contractual foundation, one can argue that parental consortium and spousal consortium have similar legal basis.[37]

An additional source of support for a parental consortium cause of action stems from the public policy pronouncements of Montana's Child Abuse, Neglect, and Dependency statutes.[38] These statutes implicitly declare Montana's strong policy to promote and enforce a child's right to the consortium inhering in the parent-child relationship. Section 41-3-101 states, "the policy of . . . Montana [is] to . . . insure that all youth are afforded an adequate physical and *emotional environment* to promote normal development."[39] The code further defines harm to a child's welfare as any act or omission by a parent that causes a child's "failure to thrive."[40] These statutes are regularly used in child abuse and neg-

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child's] failure to thrive").

30. *See* MONT. CODE ANN. tit. 40 (1991).

31. *See* MONT. CODE ANN. tit. 41 (1991).

32. *See* Brief of Plaintiffs and Appellants at 6-7, Pence v. Fox, 248 Mont. 521, 813 P.2d 429 (1991) (No. 90-483) [hereinafter Appellants' Brief].

33. MONT. CODE ANN. § 40-6-211 (1991) (codifying the parents obligation to support and educate their children); *cf.* MONT. CODE ANN. § 40-2-101 (1991) (codifying the mutual obligations of husband and wife to each other).

34. MONT. CODE ANN. § 40-6-211 (1991) provides: "The parent or parents entitled to the custody of a child must give him support and education suitable to his circumstances."

35. MONT. CODE ANN. § 40-2-101 (1991).

36. *Compare* MONT. CODE ANN. § 40-2-101 (1991), *with* MONT. CODE ANN. §§ 40-6-211 and -301 (1991). The mutuality of contractual obligations in the parent-child relationship becomes more apparent upon analysis of sections 40-6-211 and -301. The parent assumes the obligation to provide his/her with child support and education during the child's years of minority, and the child assumes the obligation to provide "necessary food, clothing, shelter, and medical attendance" if the parent should ever become indigent. MONT. CODE ANN. §§ 40-6-211 and -301 (1991). *See also* MONT. CODE ANN. § 40-6-214 (1991) (codifying the reciprocal duties of parents and children in maintaining each other); *Pence*, 248 Mont. at 525, 813 P.2d at 432 (describing the similarity in contractual obligations between husband-wife and parent-child).

37. Appellants did make this argument. *See* Appellants' Brief, *supra* note 32, at 6-7.

38. MONT. CODE ANN. §§ 41-3-101 to -1152 (1991).

39. MONT. CODE ANN. § 41-3-101(a) (1991) (emphasis added).

40. MONT. CODE ANN. § 41-3-102(3)(c) (1991).

lect actions to enforce the statutory duties inhering in the parent-child relationship. These inherent obligations are the same interests protected by loss of parental consortium actions.[41]

Montana's Wrongful Death Statute[42] also suggests support for a parental consortium cause of action. The Wrongful Death Statute currently allows a minor child to recover consortium damages when a parent dies as the result of the tortious acts of a third party.[43] Prior to *Pence*, however, if a tortfeasor *merely injured* the parent, even if severely, leaving the parent unable to interact normally with the child, the child would receive no consortium damages.[44]

Making an award of parental consortium damages contingent solely upon the occurrence of the parent's death is unfair considering the damage suffered by the child of the catastrophically injured parent is comparable.[45] No rational basis exists for allowing a child to recover for consortium damages when a parent dies, but not when a parent is seriously injured and incapacitated.[46] The loss of consortium to the child is very real in either case, and the child's welfare warrants protection.

In addition, the "best interest of the child" statute[47] lends further support for recognizing a parental consortium claim. The policy of parental consortium to protect the child's right to the aid, society, guidance, and training of the parent(s) parallels the policy underlying the "best interests of the child test" in custody determinations.[48] A court considers two factors in determining child custody; they are: (1) "the interaction and interrelationship of the child with his parent or parents"[49] and (2) "the child's adjustment

41. *Pence*, 248 Mont. at 527, 813 P.2d at 433.

42. MONT. CODE ANN. § 27-1-513 (1991). This statue provides:

> When injuries to and the death of one person are caused by the wrongful act or neglect of another, the personal representative of the decedent's estate may maintain an action for damages against the person causing the death or, if such person be employed by another person who is responsible for his conduct, then also against such other person.

43. Dawson v. Hill & Hill Truck Lines, 206 Mont. 325, 329, 671 P.2d 589, 591 (1983) (noting that Montana "allows recovery in a wrongful death action for loss of care, comfort, society and companionship").

44. Counsel for the Pence children strenuously argued this point. *See* Appellants' Brief, *supra* note 32, at 11.

45. Gino L. Gabrio, Comment, *Actions for Loss of Consortium in Washington: The Children Are Still Crying*, 56 WASH. L. REV. 487, 489 (1981).

46. *Id.*

47. MONT. CODE ANN. § 40-4-212 (1991).

48. *Pence*, 248 Mont. at 527, 813 P.2d at 433.

49. MONT. CODE ANN. § 40-4-212(1)(c) (1991).

to his home."[50] Where a parent is seriously injured and incapacitated, the injury typically interferes with the normal parent-child relationship and adjustment to his home. The Montana Supreme Court in *Pence* logically found that preserving the best interests of the child in such injury cases required the court to recognize a parental consortium claim.[51]

III. PENCE v. FOX

A. *The Facts*

John Pence, husband of Judy Pence and father of Brittney and Jared Pence, was injured on January 2, 1988, when he climbed out of a hot tub manufactured and installed by defendants.[52] John Pence "trotted" a short distance from the hot tub when, without warning, he lost consciousness and collapsed forward.[53] His face struck the frozen ground with such force that his C5 vertebra burst and rendered him a permanent quadriplegic.[54] At the time of John's accident, Brittney Pence was four years old and Jared was three years old.[55]

John Pence, individually, and Judy Pence, individually and as the guardian ad litem of Brittney and Jared Pence, filed suit in state district court against the manufacturers and installers of the hot tub.[56] Brittney and Jared asserted claims against defendants for "the loss of value of [John Pence's] services and for the loss to them of his society, companionship and comfort."[57]

Defendants moved for dismissal of Brittney and Jared's parental consortium action for failure to state a claim on which the court could grant relief.[58] The district court dismissed Brittney and Jared's claims for parental consortium[59] and held that parental consortium, although analogous to spousal consortium, does not have the same type of contractual basis as spousal consortium.[60]

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50. MONT. CODE ANN. § 40-4-212(1)(d) (1991).
51. *Pence*, 248 Mont. at 527, 813 P.2d at 433.
52. *Id.* at 523, 813 P.2d at 430.
53. *Id.*
54. *Id.*
55. *Id.*
56. *Id.* at 522, 813 P.2d at 430.
57. *See* Appellants' Brief, *supra* note 32, at 4.
58. *Pence*, 248 Mont. at 522, 813 P.2d at 430.
59. *Id.* at 523, 813 P.2d at 430.
60. Pence v. Fox, No. CDV-90-036, (Montana Eight Judicial District Court, Cascade County, Aug. 17, 1990) (order and judgment denying parental consortium claims). The district court stated that "the basis for a consortium claim lies in the Montana statutes in which the husband and wife contract for obligations of mutual respect, fidelity, and support." *Id.* (quoting Bain v. Gleason, 223 Mont. 442, 445, 726 P.2d 1153, 1155 (1986)).

Judy Pence, as guardian ad litem, appealed the judgment.[61] The Montana Supreme Court reversed and remanded.[62]

B. The Holding

The court in a unanimous decision held that minor children may sue and recover for the loss of parental consortium when a parent is injured by a negligent tortfeasor.[63] The court further held that the injured parent, the spouse, or a child may recover pecuniary damages for an injured parent's economic losses, but encouraged the trial court to consider such damage awards to prevent double recovery for any element of damages.[64] Finally, the court held that damages for loss of parental consortium "are recoverable only by the child."[65]

C. The Reasoning

The decision in *Pence* reflects the slow, but inevitable development of tort law throughout the United States.[66] Although courts considering the issue of parental consortium have not unanimously accepted the new tort claim,[67] the Montana Supreme Court noted the growing trend among state courts to recognize a new cause of action for parental consortium.[68]

While the supreme court considered leaving the decision to recognize a cause of action for parental consortium to the Montana

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61. *Pence*, 248 Mont. at 522, 813 P.2d at 430.

62. *Id.* On remand the case settled before trial; the defendants paid consideration for the parental consortium claim. Telephone Interview with Norman L. Newhall, Attorney of Record for the Pences, Alexander, Baucus & Linnell, P.C. (Nov. 18, 1992).

63. *Id.* at 527, 813 P.2d at 433.

64. *Id.*

65. *Id.*

66. *Id.* at 523, 813 P.2d at 430-31.

67. *See, e.g.*, Borer v. American Airlines, Inc., 563 P.2d 858 (Cal. 1977); Gaver v. Harrant, 557 A.2d 210 (Md. App. 1989); DeAngelis v. Lutheran Medical Ctr., 445 N.Y.S.2d 188 (N.Y. App. Div. 1981), *aff'd*, 449 N.E.2d 406 (1983); Butz v. World Wide, Inc., 492 N.W.2d 88 (N.D. 1992); High v. Howard, 592 N.E.2d 818 (Ohio 1992); Steiner v. Bell Tel. Co., 517 A.2d 1348 (Pa. Super. Ct. 1986), *aff'd*, 540 A.2d 266 (1988).

68. *Pence*, 248 Mont. at 524, 813 P.2d at 431. As of February 7, 1993, 11 other jurisdictions have judicially recognized a cause of action for loss of parental consortium. Hibpshman v. Prudhoe Bay Supply, Inc., 734 P.2d 991 (Alaska 1987); Villareal v. Arizona Dep't. of Transp., 774 P.2d 213 (Ariz. 1989); Weitl v. Moes, 311 N.W.2d 259 (Iowa 1981), *modified by* Audubon-Exira Ready Mix, Inc. v. Illinois Cent. Gulf R.R. Co., 335 N.W.2d 148 (Iowa 1983); Ferriter v. Daniel O'Connell's Sons, Inc., 413 N.E.2d 690 (Mass. 1980); Berger v. Weber, 303 N.W.2d 424 (Mich. 1981); Williams v. Hook, 804 P.2d 1131 (Okla. 1991); Reagan v. Vaughn, 804 S.W.2d 463 (Tex. 1991); Hay v. Medical Center Hosp., 496 A.2d 939 (Vt. 1985); Ueland v. Reynolds Metals Co., 691 P.2d 190 (Wash. 1984); Theama v. City of Kenosha, 344 N.W.2d 513 (Wis. 1984); Nulle v. Gillette-Campbell County Joint Powers Fire Bd., 797 P.2d 1171 (Wyo. 1990).

Legislature, it rejected the argument that the court was ill-equipped to address the issue.[69] The court concluded that "[s]uch an argument ignore[d the court's] responsibility to face a difficult legal question and accept judicial responsibility for a needed change in the common law."[70] The supreme court observed that "when the conditions and needs of the society have changed, judges must adapt the common law to those new conditions."[71] It acknowledged the Montana Legislature's power to "ratify, limit or reject" the court's decision in *Pence*.[72] The Montana court recognized the compelling support for parental consortium embodied in Montana public policy.[73] The court found that Montana's statutes implicitly support a child's right to recover parental consortium damages.[74]

In considering the foundation for creating this new cause of action, the Montana Supreme Court expressly rejected the argument that consortium is limited to the marriage contract relationship. The court explained that section 40-2-101,[75] which outlines the contractual duties of a married couple, does not "create" the cause of action for loss of consortium.[76] Instead, the statute "merely defines the obligations which inhere in the marriage relationship and upon which the common law action is based."[77]

IV. ANALYSIS

The Montana Supreme Court's recognition of a parental consortium cause of action is a logical development of tort law in Montana. As Chief Judge Hatfield, U.S. District Court for the District of Montana, noted in a court order in *Allstate Insurance Co. v. Froman*:[78]

> [T]here exists no rational basis for denying the interests of children in the emotional benefits flowing from the family while recognizing and protecting the interests of spouses and parents in what are essentially the same benefits.[79]

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69. *Pence*, 248 Mont. at 524, 813 P.2d at 431.
70. *Id.* (quoting *Hay*, 496 A.2d at 945-46).
71. *Id.*
72. *Id.* at 525, 813 P.2d at 431 (quoting *Hay*, 496 A.2d at 946).
73. *Id.* at 527, 813 P.2d at 433.
74. *Id. See supra* discussion in Section II(B).
75. MONT. CODE. ANN. § 40-2-101 (1991).
76. *Pence*, 248 Mont. at 525, 813 P.2d at 432.
77. *Id.*
78. Allstate Ins. Co. v. Froman, No. CV-89-142-GF (D. Mont. Aug. 18, 1990) (order granting child's motion for summary judgment on parental consortium claim).
79. *Id.*

The Montana Supreme Court, in recognizing this new cause of action, did not address a number of important issues: (a) Can consortium be extended to other family relationships? (b) Is the joinder of parental consortium claims with the tort claims of the injured parent and the spouse merely encouraged or compulsory? and (c) Is a child's right to parental consortium derivative or completely independent of the primary tortious injury to the parent?

A. Extending Consortium to Other Relationships

The Montana Supreme Court clearly recognized the child's right to sue for the loss of parental consortium, but did not indicate whether consortium claims extend to other family relationships. Creating a parental consortium cause of action could open a floodgate of similar consortium claims for grandparents, siblings, aunts and uncles, cousins, and other relatives. Other state supreme courts have dismissed the "floodgates argument" by limiting the consortium cause of action to two basic relationships—the husband-wife relationship and the parent-child relationship.[80] As the Texas Supreme Court noted:

> While all family members enjoy a mutual interest in consortium, the parent-child relationship is undeniably unique and the wellspring from which other family relationships derive. It is the parent-child relationship which most deserves protection and which, in fact, has received judicial protection in the past.
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> . . . .
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> 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.[81]

The Montana Supreme Court invites future litigation by not expressly limiting consortium actions to the immediate family. Because of the *Pence* court's recognition of parental consortium, district courts are more likely to move forward and consider other family members' claims for loss of consortium. Already, the *Pence*

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80. *See, e.g.*, Weitl v. Moes, 311 N.W.2d 259, 266 (Iowa 1981) (recognizing a cause of action for parental consortium); Reagan v. Vaughn, 804 S.W.2d 463, 466 (Tex. 1991) (recognizing a cause of action for parental consortium).

81. *Reagan*, 804 S.W.2d at 466 (quoting Villareal v. Arizona Dep't. of Transp., 774 P.2d 213, 217 (Ariz. 1989) and Theama v. City of Kenosha, 344 N.W.2d 513, 521 (Wis. 1984)).

decision has encouraged one Montana district court to recognize a new cause of action for loss of filial consortium.[82] Recognizing a cause of action for filial consortium is the next logical step in the consortium area; the statutory and common law basis for filial consortium and parental consortium are nearly identical,[83] and both are rooted in the parent-child relationship. The supreme court, however, has left the door open for other relatives to bring loss of consortium claims because the court chose not to explicitly limit consortium claims to the spousal and parent-child relationships.

B. Making Joinder of Claims Compulsory

The Montana Supreme Court in *Pence* approved of joining parental consortium claims with the claims of the primary tort victim,[84] but did not definitively compel such joinder. Critics who oppose this new cause of action for parental consortium often argue that the claim encourages a multiplicity of lawsuits.[85] For example, each of the nine children of a catastrophically injured parent could bring a separate cause of action for loss of parental consortium.[86] Although statistically unlikely,[87] the scenario suggests the potential for abuses.

The Montana Supreme Court should have followed other state supreme courts in requiring that all claims for loss of consortium be joined with those of the primary tort victim whenever feasible.[88]

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82. Lescantz v. State Farm Mut. Auto Ins., No. DV-90-131 (Dist. Ct. Mont. Nov. 20, 1991), MONTANA LAW WEEK, Nov. 30, 1991, at 1-2. The Defendants appealed the decision of the district court, but allowed the appeal to lapse; the Montana Supreme Court did not have an opportunity to render a decision. Telephone Interview with Mr. Ed Smith, Clerk of the Montana Supreme Court (Feb. 8, 1992). *See* definition of filial consortium, *supra* note 3.

83. For statutory support of filial consortium, see MONT. CODE ANN. §§ 40-6-214, -221 and -236 (1991).

84. The Montana Supreme Court approved of the district court's action to postpone the trial of John Pence's claim until the outcome of the appeal so that the cases could be tried together if the supreme court upheld the children's claim. *Pence*, 248 Mont. at 527, 813 P.2d at 433.

85. Annotation, *Child's Right of Action for Loss of Support, Training, Parental Attention, Or the Like, Against a Third Person Negligently Injuring Parent*, 11 A.L.R. 4th 549, 564-65 (1982 & Supp. 1992).

86. *See* Borer v. American Airlines, Inc., 563 P.2d 858, 863-64 (Cal. 1977) (mother of nine children was severely injured and all nine children brought a separate claim for loss of parental consortium).

87. *See Borer*, 563 P.2d at 868-69 (Mosk, J., dissenting) (using the Statistical Abstract of the United States to show that the proportion of families in the United States with several children is low); Gabrio, *supra* note 45, at 494-95 (stating that only 8.8 percent of U.S. families have three or more children).

88. *See, e.g.*, Hibpshman v. Prudhoe Bay Supply, Inc., 734 P.2d 991, 997 (Alaska 1987); Weitl v. Moes, 311 N.W.2d 259, 270 (Iowa 1981), *modified by* Audubon-Exira Ready Mix, Inc. v. Illinois Cent. Gulf R.R. Co., 335 N.W.2d 148 (Iowa 1983); Hay v. Medical Center

Compulsory joinder would eliminate double recovery,[89] multiplicity of suits, and maximize judicial economy.[90] Furthermore, compulsory joinder could assist the jury in appropriately allocating damages among the plaintiffs' respective claims since all victims of the tortfeasor appear before the jury.

C. *Independent or Derivative Cause of Action*

The Montana Supreme Court created a "separate cause of action for loss of parental consortium,"[91] but left unclear whether the new cause of action is independent or derivative[92] of the parent's primary tortious injury. The distinction is important because of the current debate developing in many appellate courts around the nation.[93]

The distinction between derivative and independent cause of action is crucial because counsel for the child-plaintiff must determine how the statute of limitations applies to the parental consortium claim. For example, if the parental consortium cause of action is independent, a child's minority status tolls the statute of limitations until the child's eighteenth birthday.[94] A minor child suffering a loss of parental consortium could wait to bring an action until after he or she reaches the age of majority and the applicable statute of limitations begins to run. If the cause of action is deriva-

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Hosp., 496 A.2d 939, 943 (Vt. 1985); Ueland v. Reynolds Metals Co., 691 P.2d 190, 193-94 (Wash. 1984). One method of compelling joinder is illustrated by a quote from a recent North Dakota Supreme Court case:

> In the future, if the "deprived" party fails to join the claim, that party must offer the court a compelling reason for non-joinder or it will be dismissed with prejudice. Absent a compelling reason, non-joinder will result in an absolute bar to any loss of consortium claim asserted after the conclusion of the underlying action of the "impaired" party.

Butz v. World Wide, Inc., 492 N.W.2d 88, 91 (N.D. 1992).

89. Love, *supra* note 12, at 626-28. The Montana Supreme Court did note in *Pence* that joinder would "prevent double recovery for economic losses." *Pence*, 248 Mont. at 527, 813 P.2d at 433.

90. David P. Dwork, Note, *The Child's Right to Sue for Loss of a Parent's Love, Care and Companionship Caused by Tortious Injury to the Parent*, 56 B.U. L. REV. 722, 732-33 (1976): "[A]lthough the overcrowding of dockets is a legitimate concern to both the courts and society, there are procedural mechanisms [such as joinder] that would allow the courts to provide legal redress to children whose parents have been wrongfully injured without substantially increasing the burden on the courts." *Id.*

91. *Pence*, 248 Mont. at 527, 813 P.2d at 433.

92. For a general discussion of the nature of a derivative action, see PROSSER, *supra* note 9, at 937-39.

93. PROSSER, *supra* note 9, at 938-39. Courts differ on whether a claim for loss of consortium is derivative or independent, and often make conclusory observations about the nature of consortium without fully analyzing it. *Id.*

94. MONT. CODE ANN. § 27-2-401 (1991); MONT. CODE ANN. § 40-1-101 (1991).

tive, however, the courts could require joinder where feasible, or require that the statute of limitations on the child's parental consortium claim run consecutively with the parent's primary tort claim.[95]

The distinction between derivative and independent causes of action is important because an affirmative defense to the primary tort victim's claim may diminish the secondary victim's parental consortium claim.[96] Affirmative defenses in Montana include assumption of risk,[97] contributory negligence,[98] and the worker's compensation statutes.[99] If the cause of action is independent, an affirmative defense against the primary tort action does not necessarily effect the parental consortium action.[100] If the cause of action is derivative, however, "the viability of a loss of parental consortium claim is wholly dependent upon the viability of the injured parent's personal injury cause of action."[101]

The Montana Supreme Court, in determining whether the parental consortium cause of action is independent or derivative, may rely on precedent in the spousal consortium area to characterize the cause of action as derivative.[102] In *Priest v. Taylor*, the supreme court held that spousal consortium "is completely *derivative* from the other spouse's claim."[103] The court in *Priest* recognized that a spousal consortium claim is "an independent and distinct cause of action," but noted that it is the same conduct of defendant that gives rise to both the victim's claim and the spouse's loss of consortium claim.[104]

Other jurisdictions that have addressed the independent/derivative issue in a parental consortium context generally have de-

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95. *See, e.g.*, Hibpshman v. Prudhoe Bay Supply, Inc., 734 P.2d 991, 997 (Alaska 1987) (requiring joinder where feasible); Ferriter v. Daniel O'Connell's Sons, Inc., 413 N.E.2d 690, 696 (Mass. 1980) (allowing the statute of limitations for the child's parental consortium claim to run consecutively with the primary tort claim).

96. PROSSER, *supra* note 9, at 937.

97. MONT. R. CIV. P. 8(c). *See* Laura D. Hayes, Note, *Assumption of Risk in Montana: An Analysis of the Supreme Court's Treatment of the Doctrine*, 53 MONT. L. REV. 291, 296 n.38 (1992).

98. MONT. CODE ANN. § 27-1-702 (1991).

99. MONT. CODE ANN. § 39-71-411 (1991) (stating that "[f]or all employments covered under the Worker's Compensation Act . . . the provisions of [the Worker's Compensation Act] are exclusive").

100. *See* Love, *supra* note 12, at 631.

101. Farley v. Progressive Casualty Ins. Co., No. L-90-323, 1992 WL 32111, at *10 (Ohio Ct. App. Feb. 21, 1992), *certifying questions to* and *rev'd* Farley v. Progressive Casualty Ins. Co., 597 N.E.2d 86 (Ohio 1992).

102. Priest v. Taylor, 227 Mont. 370, 740 P.2d 648 (1987).

103. *Id.* at 379, 740 P.2d at 653 (emphasis in original).

104. *Id.*

cided to characterize the cause of action as derivative.[105] The Arizona Supreme Court in *Villareal v. Arizona Dep't of Transportation* expressed the most logical statement for characterizing the cause of action as derivative: "A defendant in a consortium case is liable to the child because the defendant injured the child's parent and thereby damaged the parent-child relationship. Both the child's claim and the parent's claim are based on the same conduct of the defendant."[106]

Characterizing the parental consortium cause of action as derivative also encourages the simultaneous settlement of all tort claims against the defendant.[107] A defendant is more likely to settle with the injured parent, spouse, and children if the defendant is aware of the potential outcome at trial and the injured victims are willing to settle.[108]

V. CONCLUSION

The Montana Supreme Court's recognition of parental consortium damages in *Pence* parallels a trend in the United States. An increasing number of jurisdictions acknowledge the inherent injustice of not recognizing consortium damages in the parent-child relationship, while recognizing consortium damages in the husband-wife relationship. Montana's common law and statutory law provide strong persuasive support for the recognition of parental consortium and, perhaps, filial consortium as well.

Although the Montana Supreme Court carefully explained the common law and statutory basis for recognizing this new cause of action, the court did not define and limit parental consortium damages for future litigation. In the future the court should expressly limit consortium claims to the immediate family, require compulsory joinder of consortium claims with that of the original tort victim's claims, and clearly define the cause of action for parental consortium as derivative. The Montana judicial system can expect to see further litigation in the consortium area to clarify these issues arising from the decision in *Pence v. Fox*.

105. *See, e.g.*, Villareal v. Arizona Dep't. of Transp., 774 P.2d 213, 219 (Ariz. 1989); Reagan v. Vaughn, 804 S.W.2d 463, 466 (Tex. 1991); PROSSER, *supra* note 9, at 938 n.96.
106. *Villareal*, 774 P.2d at 220.
107. *Farley*, 1992 WL 32111 at *9.
108. *Id.*