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Husband and Wife: Husband's Contributory Negligence as a Bar to Wife's Action for Loss of Consortium (Hall v. United States, 266 F.Supp. 671, D. Mont. 1967)

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The basic policy of the marital deduction will be fulfilled by allowing the deduction in these instances. Otherwise, an interest may be taxed twice although it seems to be "fairly within the language and underlying policy" of the statute.³² The liberality of the Court in construing "specific portion" offends the traditional policy of construing tax deduction statutes against the taxpayer,³³ but this rule of construction is not absolute.³⁴ The Supreme Court's ruling should have obviated the necessity for further legislation to interpret the present Act. Ironically, the dissent in *Citizens National Bank of Evansville* may best have described the ambit of "specific portion"—" . . . something judicially rationalized as approximately equivalent . . ."³⁵

THOMAS A. HARNEY.

HUSBAND AND WIFE: HUSBAND'S CONTRIBUTORY NEGLIGENCE AS A BAR TO WIFE'S ACTION FOR LOSS OF CONSORTIUM. Gene Hall was seriously injured by reason of the negligence of the United States, but was denied recovery because of his own contributory negligence. His wife, Josephine Hall, was denied recovery for loss of consortium. Josephine Hall then moved for a new trial or in the alternative to amend the findings and conclusions entered to permit her to recover for loss of consortium. *Held*, that under Montana law, a husband's contributory negligence bars a wife's recovery from a negligent third party for loss of consortium. *Hall v. United States*, 266 F. Supp. 671 (D. Mont. 1967).

The term "consortium" has been variously defined by different courts and not one definition would be acceptable in all jurisdictions.¹ Under

³²*Gelb v. Comm'r*, *supra* note 21, at 551.

³³The dissent in the instant case lamented the interpretation of a tightly worded tax statute as if it were a workmens compensation act. *Instant case* at 1682. Traditionally, courts have construed tax deduction statutes against taxpayers. *Empire Trust Co. v. United States*, 226 F. Supp. 623, 626 (S.D.N.Y. 1960); *Stapf v. United States*, 189 F. Supp. 830 (N.D. Tex. 1960); *Empire Trust Co. v. Comm'r*, 94 F.2d 307 4th Cir. 1938); *Jackson v. United States*, *supra* note 1, at 510.

³⁴"And in denying the deduction, the courts have been less concerned with the underlying philosophy of the marital deduction than they have been with maintaining the so-called legislative principle that 'deductions should be strictly construed against the taxpayer and in favor of the sovereign.' This attitude, too, has played its part in subverting the original purpose of Congress of equalization between the different property systems If we consider these cases and the judicial attitude they reflect from the viewpoint of equalization, we see that the represent a frustration of that objective." Paul E. Anderson, *Marital Deduction and Equalization Under the Federal Estate and Gift Taxes Between Common Law and Community Property States*. 54 MICH. L. REV. 1087, 1111 (1956).

³⁵*Citizens Nat'l Bank of Evansville v. United States*, *supra* note 21, at 822.

¹Technically, "consortium" is an element of damage rather than an action. The expression has long been used by the courts, however, to denote those actions in which injury to consortium is the major element of damage. The following definition is typical of most: "Conjugal fellowship of husband and wife, and the right of each to the company, cooperation, affection, and aid of the other in every conjugal relation." BLACK'S LAW DICTIONARY (4th ed. 1951).

Montana law, "consortium" to which a spouse is entitled embraces aid, protection, affection and society of the other spouse.²

The husband's action for loss of consortium was first recognized in 1619.³ At common law, however, the wife was prevented from bringing an action for loss of consortium.⁴ Whether the wife was barred from bringing the action because of a substantive rule of law or a procedural principle is obscure.⁵ Many somewhat dubious reasons and theories were suggested to justify the unanimous authority denying the wife's right to recover for loss of consortium.⁶ In 1950, however, a federal court pierced the "thin veil of reasoning employed to sustain the rule," and granted the wife a cause of action.⁷

Montana is one of twelve jurisdictions⁸ which now allow the wife to maintain an action for loss of consortium.⁹ The Montana Federal District Court concurred with the almost unanimous opinion of legal writers¹⁰ and a growing number of jurisdictions in rejecting the "torturous, twisted reasoning used by courts in denying the wife's right to bring the action."¹¹

The unanimous American rule, however, allows the husband's or wife's contributory negligence to bar the other spouse's action for loss of consortium.¹² The only conceivable judicial authority to the contrary

²Dutton v. Hightower & Lubrecht Construction Co., 214 F.Supp 298 (D. Mont. 1963).

³Guy v. Livesay, Cro.Jac. 501, 79 Eng. Rep. 428 (1619).

⁴1 C.J.S. *Husband and Wife* § 404 (1944); Williams, *Consortium and the Common Law*, 15 S. CAL. L. REV. 810 (1963).

⁵There is authority that this was a substantive principle. See, Holbrook, *The Change in the Meaning of Consortium*, 22 MICH. L. REV. 1, 3, (1923). But see, Root v. Root, 31 F.Supp. 562, 564 (N.D. Cal. 1940). The position of Montana courts concerning this controversy was apparently uncertain. In *Dutton*, supra note 2, the Supreme Court stated that if the denial was based on the premise that at common law the wife obtained no right to consortium by virtue of her marriage, the common law in that respect was changed by REVISED CODES OF MONTANA, 1947, §§ 36-101, 48-101. (Hereinafter REVISED CODES OF MONTANA are cited R.C.M.). It was further stated that if the common law recognized the wife's right to consortium, but simply denied her the right to sue for its loss as a procedural matter, that was changed in Montana by the Married Woman's Act.

⁶Annot., 23 A.L.R.2d 1378 (1952) suggests that the principle upon which denial of recovery rested was that the injury to the wife was too remote and indirect. Some courts denied the wife's right of action on the theory that to permit it would result in "double recovery" to the husband and wife for the same injury. Still others argued that the wife had no right to the services of her husband or that no new rights were created by married women's acts.

⁷Hitaffer v. Argonne Co., 183 F.2d 811 (D.C. Cir. 1950), overruled on another point in *Smither & Co., Inc. v. Coles*, 242 F.2d 220 (D.C. Cir. 1957), cert. denied, 354 U.S. 914 (1957).

⁸3 A.L.R.2d LATER CASE SERVICE 615-16 (1965).

⁹The Montana Federal District Court first granted the wife an action for loss of consortium in *Duffy v. Lipsman-Fulkerson & Co.*, 200 F.Supp. 71 (D. Mont. 1961).

¹⁰See Holbrook, supra note 5; Lippman, *The Breakdown of Consortium*, 30 COL.L.REV. 651 (1930); Simeone, *The Wife's Action for Loss of Consortium—Progress or Not?* 4 ST. LOUIS U. L. REV. 424 (1957).

¹¹Supra Note 9, at 74-75.

¹²Annot., 42 A.L.R. 717 (1926); RESTATEMENT SECOND OF TORTS § 494 (1965); *Chicago B. & Q. Ry. Co. v. Honey*, 63 F. 39, 26 L.R.A. 42 (8th Cir. 1894). One Canadian case has held to the contrary. *Wasney v. Juraszky*, 1 D.L.R. 616 (1933).

consists of an overruled 1894 case¹³ and misconstrued language in ambiguous decisions.¹⁴ Courts apply the established rule without question¹⁵ perhaps based on a compulsion to follow precedent rather than upon a deep conviction that the rule is just.¹⁶ Those courts which attempt to justify the rule do so on the basis that one spouse's negligence is imputed to the other¹⁷ or that consortium is a derivative cause of action¹⁸ or that an action is denied in analogous situations and thus cannot be allowed here.¹⁹ It has also been suggested that because a husband allows his wife to go about unattended, he is responsible for her contributory fault and cannot recover for loss of consortium.²⁰

In the instant case, the Montana U. S. District Court admitted that the rule has been "severely criticized by the scholars."²¹ The court firmly asserted, however, that in Montana the existing signposts "point in the direction taken by the courts rather than the scholars."²² The District Court judge was merely guessing as to the probable Montana law. The decision did not deny the validity of scholarly criticism or attempt to logically justify the established rule.

It might be helpful to reconsider the basis of this unanimous rule and attempt to determine anew denying consortium to one spouse because of

¹³In *Honey v. Chicago, B. & Q. Ry. Co.*, 59 F. 423 (S.D. Iowa 1893), the wife's contributory negligence did not preclude the husband's recovery for loss of consortium. The court reasoned: "It cannot be successfully maintained that the right of action in behalf of the husband is derived from the wife." The decision was reversed in *Chicago, B. & Q. Ry. Co. v. Honey*, *supra* note 12. The argument denying the derivative character of the husband's action was not answered by the reversing court.

¹⁴In *Elmore v. Illinois Terminal Railroad Co.*, 301 S.W.2d 44 (Mo. 1957), plaintiff argued that his wife's contributory negligence did not bar his claim for consortium and in support thereof cited the following rather ambiguous language from *Monken v. Baltimore & O. R. R. Co.*, 342 Ill. App. 1, 95 N.E.2d 130, 133 (1950):

As to the judgment in favor of the plaintiff, Earl Monken, however, the situation is not the same. The negligence of the plaintiff, Ellen Monken, could not be imputed to her husband Earl Monken.

The court in the *Elmore* case did not accept counsel's argument and ruled that the *Monken* decision "cannot properly be construed to announce a rule inconsistent with the well established rule that a husband's right to recover for loss of services of his wife is derivative only, so that if she has no valid claim for personal injuries he is likewise without right to recover special damages flowing therefrom."

¹⁵See Annot., *supra* Note 12, at 718, wherein the author indicates the rule has been "generally taken for granted."

¹⁶This consistent failure to analyze the basis of the rule was apparent in the instant case. See generally, Gregory, *Vicarious Responsibility and Contributory Negligence*, 41 YALE L.J. 831 (1932).

¹⁷*Marbury Lumber Co. v. Westbrook*, 121 Ala. 179, 25 So. 914 (1899); *Winner v. Oakland Twp.*, 158 Pa. 405, 27 A. 1110 (1893). For a general discussion of imputing negligence in this situation see annot., *supra* note 15, at 719; Gilmore, *Imputed Negligence*, 1 WIS. L. REV. 193 (1921).

¹⁸See, e.g., *Elmore*, *supra* note 14; *Callies v. Reliance Laundry Co.*, 188 Wis. 376, 206 N.W. 198 (1925); note 13 B.U.L. REV. 725 (1933).

¹⁹See, e.g., *Instant case*, at 672, wherein the court analogizes the loss of consortium action to one for wrongful death; *Callies v. Reliance Laundry Co.*, *supra* note 18.

²⁰*Chicago, B. & Q. Ry. Co. v. Honey*, *supra* note 13. To argue, on the other hand, that because a wife allows her husband to go about unattended and is thus responsible for his contributory negligence, seems somehow less persuasive.

²¹*Instant case*, at 672.

²²*Id.*

the other's contributory negligence is consistent with the legal, economic, and social atmosphere of contemporary society.

It is sometimes reasoned that consortium is a derivative action. Thus, if the injured spouse was contributorily negligent, the spouse seeking consortium derives an inherently defective cause of action.²³ This theory has been largely discredited by both the cases²⁴ and legal writers.²⁵ The action of one spouse for personal injuries resulting from the tort is entirely separate, distinct, and independent from the other spouse's action for loss of consortium. The claim for loss of consortium never did belong to the injured spouse and therefore cannot be "derived" from that spouse.²⁶ This conclusion is further supported by the inability of the injured spouse to destroy the claim for loss of consortium through release, settlement, or assignment.²⁷ Moreover, a judgment in one spouse's action for personal injuries is not *res judicata* to the other spouse's action for loss of consortium.²⁸

A somewhat similar line of reasoning imputes the contributory negligence of the injured spouse to the one seeking redress for loss of consortium.²⁹ Contributory negligence has been criticized as a harsh and questionable doctrine.³⁰ A wrongdoer is not relieved of liability by contributory negligence because of any merit in his own position. The plaintiff is simply unable to recover because of a deviation from the required standard of care.³¹ Imputed contributory negligence has been subjected to even more severe attack.³² When contributory negligence is imputed to the completely innocent spouse of an injured part to bar the action for loss of consortium, the injustice becomes apparent. As previously indicated, the consortium action is separate and distinct from the action for personal injuries.³³ The spouse suing for loss of consortium is seeking redress for injury to entirely different interests invaded by an independent wrong to her. It would seem completely irrelevant that the other spouse has been barred by contributory negligence.

²³See *supra* note 18.

²⁴See, e.g., *Hitaffer v. Argonne Co.*, *supra* note 7, at 815.

²⁵*Prosser, Torts* § 119 3d ed. 1964); Gregory, *The Contributory Negligence of Plaintiff's Wife or Child in an Action for Loss of Services*, 6 U. CHI.L.REV. 173 (1935); James, *Imputed Contributory Negligence*, 14 LA.L.REV. 340 (1954).

²⁶2 HARPER & JAMES, *TORTS* § 23.8, at 1278 (1956).

²⁷*Id.*; PROSSER, *supra* note 25, at 911, 915.

²⁸See, e.g., *Wolf v. DuPuis*, 233 Ore. 317, 378 P.2d 707 (1963); *Smittle v. Eberle*, 353 P.2d 121 (Okla. 1960).

²⁹SUPRA note 17.

³⁰See, *Eldredge, Contributory Negligences an Outmoded Defense that Should be Abolished*, 43 A.B.A.J. 52 (1957); Green, *Illinois Negligence Law*, 39 ILL. L. REV. 36 (1944).

³¹RESTATEMENT (SECOND) OF TORTS § 463 (1965).

³²See, GREGORY, *LEGISLATIVE LOSS DISTRIBUTION IN NEGLIGENCE CASES* 148 (1936); *Gilmore, supra* note 17; James, *Imputed Negligence and Vicarious Liabilities: The Study of a Paradox*, 10 U. FLA.L.REV. 48 (1957); Keeton, *Imputed Contributory Negligence*, 13 TEXAS L. REV. 161 (1936); Lessler, *The Proposed Discard of the Doctrine of Imputed Contributory Negligence*, 20 FORDHAM L. REV. 156 (1951).

³³*Supra* notes 23-28.

It is allegedly established that negligence will not be "imputed" to a plaintiff unless his relationship to the person whose negligence is involved is such as to make him liable for that person's negligence if it resulted in injury to a third person.³⁴ One spouse is not liable for the other's torts³⁵ and negligence is not imputed on the basis of the marital relationship.³⁶ These general rules have been recognized in Montana.³⁷ There is no logical reason why these well-established tort principles should not be applied to actions for loss of consortium. As it now stands, the law permits a wife to recover for injuries to person or property despite her husband's contributory negligence, but denies recovery for loss of consortium when her husband was contributorily negligent.³⁸

Some courts have analogized the action for loss of consortium with that of a beneficiary or representative under a wrongful death statute.³⁹ The court in the instant case justified its decision with the following statement:⁴⁰

The same criticisms made of the rule that contributory negligence is a bar in a loss of consortium action can be and are leveled at the rule making contributory negligence a bar in a wrongful death action, and yet in Montana contributory negligence is a bar in the wrongful death action.

This statement, of course, does not speak to the justice of denying the action in either case. Some courts properly differentiate the right to recover under a wrongful death statute from the right to redress for loss of consortium on the ground that wrongful death was created by legislation and was non-existent at common law.⁴¹ The wrongful death statutes, having created a new cause of action, have been strictly construed. The type of analogy employed by the court in the instant case has therefore been described as highly inaccurate and confusing.⁴²

Numerous analogies could be suggested as supporting the wife's action for loss of consortium when the husband has been contributorily negligent. In all jurisdictions, for example, a wife can recover for loss of consortium when the injury to her husband is the result of an intentional

³⁴This has become known as the "both ways" rule. Origin of this term is attributed to Gregory, *Vicarious Responsibility and Contributory Negligence*, 41 YALE L.J. 831 (1932). It was incorporated into RESTATEMENT (SECOND) OF TORTS § 485, comment a (1934).

³⁵In about two-thirds of the states there are specific statutory provisions making the wife fully responsible for her own torts. These statutes are collected in the Note, 3 U. Fla. L. Rev. 206 (1950).

³⁶RESTATEMENT (SECOND) OF TORTS § 487 (1965).

³⁷Laird v. Berthelote, 63 Mont. 122, 206 P. 455, 464 (1922).

³⁸Ross v. Cuthbert, 79 Ore. 625, 397 P.2d 529, 534 (1964) (dissenting opinion of J. O'Connell).

³⁹See *supra* note 19.

⁴⁰Instant case, at 672.

⁴¹Honey v. C. B. & Q. Ry. Co., *supra* note 13. The propriety of this distinction was also noted in Annot., 42 A.L.R. 717, 718 (1926).

⁴²Greggory, *supra* note 25, at 182.

act⁴³ such as sale of liquor or habit forming drugs to the husband.⁴⁴ She may also recover in an action for alienation of affections⁴⁵ and criminal conversation.⁴⁶ The wife is not barred from recovery in these situations although the husband has engaged in contributorily culpable conduct.⁴⁷ In actions by the wife for alienation of affections or criminal conversations, joinder of the husband was not permitted at common law because it was considered unjust for the husband to benefit from his own misconduct.⁴⁸ The misconduct, however, was not imputed to the wife to bar her action.

Western civilization is founded upon the family as a basic and vital social institution. The importance of marriage in Montana and other states is evidenced by the many statutory provisions governing the relationship.⁴⁹ The action for consortium seeks to protect this relational interest between husband and wife.⁵⁰ This interest has not been afforded a degree of protection commensurate with its importance.

It is arguable that strong public policy favors an action for loss of consortium even though the injured spouse has been contributorily negligent. Physical disability of one spouse is never in itself a sufficient ground for divorce. There is no legal opportunity for the other spouse to remarry, and enjoy a normal, healthy family relationship. A sick, lame, or total incapacitated spouse is certainly a less desirable companion than one capable of fulfilling the usual marital obligations. In some cases, a spouse might be charged with the lifelong burden of nursing an invalid. These burdens which the wife might unexpectedly have to bear were among the compelling reasons leading to her action for loss of consortium.⁵¹ The suffering to an innocent wife which results from loss of consortium is certainly not lessened by the presence of contributory negligence on the part of her husband.

⁴³*Bennett v. Bennett*, 116 N.Y. 584, 23 N.E. 17 (1889); Restatement (Second) of Torts § 690 (1939).

⁴⁴*Pratt v. Daly*, 55 Ariz. 535, 104 P.2d 147, 130 A.L.R. 341 (1940); Annot., 75 A.L.R.2d 833 (1961).

⁴⁵*Murray v. Murray*, 30 N.M. 557, 240 P. 303 (1925); *Moelleur v. Moelleur*, 55 Mont. 30, 173 P. 419 (1918); *Wallace v. Wallace*, 85 Mont. 492, 279 P. 374 (1929).

⁴⁶*Oppenheim v. Kridel*, 236 N.Y. 156, 140 N.E. 227, 28 A.L.R. 320 (1923).

⁴⁷The wife can recover even though the husband himself was the pursuer or seducer, so long as there was encouragement on the part of the other woman. *Hart v. Knapp*, 76 Conn. 135, 55 A. 1021 (1903); *Norris v. Stoneham*, Tex. Civ. App. 46 S.W.2d 363 (1932).

⁴⁸*Eliason v. Draper*, 25 Del. (2 Boyce) 1, 77 A. 572, 573 (1910) (dictum); *Rott v. Goehring*, 33 N.D. 412, 157 N.W. 294, 297 (1916) (dictum).

⁴⁹R.C.M., 1947, §§ 48-101 and 48-141.

⁵⁰*Green, Relational Interests*, 29 ILL. L. REV. 460, 462 (1936).

⁵¹*Missouri Pacific Transportation Co. v. Miller*, 227 Ark. 351, 299 S.W.2d 41, 46 (1957); *Dini v. Naiditch*, 20 Ill.2d 406, 170 N.E.2d 881 (1960); *Montgomery v. Stephan*, 359 Mich. 33, 101 N.W.2d 227 (1960). In *Montana, R.C.M., 1947, 36-103*, provides that if the husband is unable to support himself and his wife out of his property or by his labor, the wife "must assist him as far as she is able." *R.C.M., 1947, 36-121* provides: "The wife must support the husband, when he has not deserted her, out of her separate property, when he has no separate property, and he is unable, from infirmity, to support himself."

Montana initially permitted the wife a claim for loss of consortium because the common law rule had been "demolished as being completely unreasonable and illogical."⁵² Other courts examined the orthodox rule "in light of present day realities" and concluded there was no judicial sagacity in "Continually looking backward and parroting the words and analyses of other courts so as to embalm for posterity the legal concepts of the past."⁵³ These same judicial declarations might well be used as a basis for overruling the common law principle denying one spouse damages for loss of consortium because of the other's contributory negligence.

In addition to the considerations previously mentioned, another factor to be considered is the increasing availability and utilization of liability insurance.⁵⁴ In most of the modern cases involving loss of consortium it would appear that the defendant is insured. Although seldom mentioned in judicial opinions⁵⁵ there is an increasing belief that personal injury loss should not be considered as merely the individual concern of those involved in accidents.⁵⁶ Human failures in modern, mechanized society cause a large and fairly regular number of personal injuries. There is an increasing realization that these failures involve little or nothing in the way of personal moral shortcoming or ethical fault.⁵⁷ These losses should, therefore, be distributed as part of the social cost, either through assumption of the burden of compensation by the enterprise or individual causing the injury or through insurance. If contributory negligence and imputed contributory negligence bar any claim for loss of consortium, the principles of loss compensation and loss distribution will be effectively thwarted.

Although authority is unanimously to the contrary, there is a strong temptation to venture an opinion that some jurisdiction will break away from the well-established rule reiterated in the principal case. Common law rules have a capacity for growth, adaption, and modification. Courts recognize that whenever old rules are found unsuited to present conditions, they should be cast aside and a new rule declared which is in harmony with those conditions.⁵⁸ The development and limitations on the action for loss of consortium have been almost exclusively judicial.⁵⁹ In as much as any obstacles to the action have been "judge invented," there is not conceivable reason why they cannot be "judge destroyed."⁶⁰

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⁵²*Supra* note 9, at 74-75.

⁵³*Dini v. Naiditch*, *supra* note 51, at 892.

⁵⁴PROSSER, *supra* note 25 at 563.

⁵⁵*Id.* at 562.

⁵⁶*See, e.g.,* EHRENZWEIG, NEGLIGENCE WITHOUT FAULT (1951); Malone, *Damage Suits and the Contagious Principle of Workmen's Compensation*, 12 LA.L.REV. 231 (1952).

⁵⁷James and Dickinson, *Accident Proneness and Accident Law*, 63 HARV. L. REV. 769 (1950).

⁵⁸*Missouri Pacific Transportation Company v. Miller*, *supra* note 51, at 46.

⁵⁹*See, Yonner v. Adams*, 53 Del. 229, 167 A.2d 171 (1961).

⁶⁰*Montgomery v. Stephan*, *supra* note 51, at 235.

