LOSS OF CONSORTIUM: INEQUALITY BEFORE THE LAW

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1. Introduction: Perpetuating an Anomaly

The Diceyan dictum of equality before the law is a basic premise of the Anglo-Australian legal system. Loss of consortium, however, is an example of *de jure* discrimination on the ground of sex extant in the common law, for it permits a husband, but not a wife, the right to initiate a damages suit arising from the negligence of a third party. The action is premised on wrongful injury[1] to the wife which renders her less able to provide domestic services and conjugal society for the husband. Historically, the underlying rationale of the action resides within a patriarchal legal system in which a wife's identity became subsumed within that of the husband on marriage, and which denied her the right to institute an independent suit.

The appropriateness of the continuance of this effete action today, at least in its present form, is highly questionable, particularly as the action for intentional impairment of consortium has been abolished.[2] However, Australian courts, and the New South Wales Court of Appeal in particular, believe the action to be still viable. This is illustrated by recent cases which have not only upheld or increased damages awards but have also extended the operation of the law within its traditional sex-specific parameters.[3] Of these cases, *State Rail Authority of New South Wales* v. *Sharp*[4] may be regarded as exemplary.

The *Sharp Case* arose out of the death of a young woman in the Granville Rail disaster. On hearing of the death of her daughter, the mother of the victim suffered nervous shock[5] and was awarded quite substantial damages.[6] The victim's father then sued for loss of consortium arising from the consequent injury to his wife. In respect of the latter claim, the Court of Appeal upheld the award of $40,0000 for loss of consortium, being $25,000 for loss of services and $15,000 for loss of society and sexual relationship.

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[1] The common law does not permit an action for wrongful death. See *Baker* v. *Bolton* (1808) 1 Camp. 493; 170 E.R. 1033.

[2] The Family Law Act 1975 (Cth), s. 120. In South Australia, the action was abolished by the Wrongs Act, 1936-1977 (S.A.), s. 35.

[3] *Kealley* v. *Jones* [1979] 1 N.S.W. L.R. 723; *Johnson* v. *Kelemic* [1979] F.L.C. 78, 487; *Bagias* v. *Smith* [1979] F.L.C. 78, 497; *State Rail Authority of New South Wales* v. *Sharp* [1981] 1 N.S.W. L.R. 240.

[4] [1981] 1 N.S.W. L.R. 240.

[5] Under s. 4(1)(a) of the Law Reform (Miscellaneous Provisions) Act, 1944 (N.S.W.).

[6] $281,000 was awarded under this head.

Thus, the success of the plaintiff 's action was premised on the emotional injury done to the wife which, in turn, was premised on the physical injury done to the daughter. In itself, this represents an extension of the established doctrine in regard to the action which specifies the tortious infliction of physical injury to the wife.[7] While it is not disputed that recovery for so-called "nervous shock" *per se* is properly compensable,[8] the fact that the alleged wrong to the husband was consequential on an intangible loss, for which only a statutory remedy was available, did provide a means for the court to delimit the cause of action rather than to take the view that it was relentlessly propelled towards its conclusion.

Furthermore, one might have thought that the well-respected doctrine of *stare decisis* would have settled the question, for all members of the Court of Appeal in *Smee* v. *Tibbetts*[9] had held, in a similar factual situation, that s. 4(1) of the Law Reform (Miscellaneous Provisions) Act, 1944 (N.S.W.) did not entitle the husband to sue for general damages for loss of consortium.[10] The majority, however, (*per* Street, J. and Clancy, J.) did permit recovery of special damages incurred in medical treatment of the wife. Strictly speaking, this component is grounded in the husband's legal obligation to provide maintenance for the wife which is in fact independent of the right to recover for loss of consortium.[11] Owen, J. (dissenting) argued that it was unsound to treat the section as creating a new duty of care owed to persons whom the defendant could not reasonably anticipate would be affected by his acts.

Samuels, J.A., who delivered the opinion of the court in the *Sharp Case*, averred that *Smee* v. *Tibbetts* could no longer stand in the light of the subsequent decisions of *Birch* v. *Taubmans Ltd*[12] and *Toohey* v. *Hollier*.[13] However, His Honour's reasons for this contention are not at all clear. Indeed, both of the latter cases dealt with physical injuries to wives resulting from motor vehicle accidents, not with nervous shock or, more particularly, with the specific question as to whether general damages for loss of consortium could be awarded in the light of the nature of the right created under s. 4 of the Law Reform (Miscellaneous Provisions) Act, 1944 (N.S.W.).

In *Scala* v. *Mammolitti*,[14] the High Court did address itself to the meaning of that section. Nevertheless, it would not appear to be a helpful precedent to the *Sharp Case* since it dealt with the question of whether a third person falling within one of the enumerated categories of consanguinity and affinity was estopped from instituting an action for nervous shock when liability to the primary victim had not been satisfactorily proven. While the High Court held that a husband was not so estopped, it is

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[7] *Toohey* v. *Hollier* (1955) 92 C.L.R. 618.

[8] *Mt Isa Mines Ltd* v. *Pusey* (1975) 125 C.L.R. 383.

[9] [1953] 53 S.R. 391.

[10] It is submitted that Riseley, whose analysis is generally excellent, is in error in concluding *contra* on this occasion. See A. C. Riseley, "Sex, Housework, and the Law" (1981) 7 *Adelaide L.R.* 421, 428.

[11] *Cf. Best* v. *Samuel Fox & Co Ltd.* [1952] A.C. 716, 733, *per* Lord Goddard.

[12] [1957] S.R. 93.

[13] (1955) 92 C.L.R. 618.

[14] (1965) 114 C.L.R. 153.

submitted that the case would appear to be of little assistance in the instant case as there was no problem about the mother's nervous shock action, liability for which was admitted.

Furthermore, in accepting the perpetuation of an anachronistic common law perception of the marital relationship which has been propped up by legal fictions, Samuels, J.A. stated, in the classic manner of judicial abdication: "It is not for judges to root out archaisms of this kind. . . ."[15] However, the inference that it is for the legislature alone to intervene in the development of the common law, while the judges merely interpret and correct, represents yet another myth.[16] Indeed, it is by virtue of the very fact that the common law resides *in gemio judicis* that judges have been able to alter and develop the law according to contemporary social mores.

In addition to the discriminatory basis of the action, it is also anomalous in that it represents an exception to the principle that the compensatory function of tort law is to afford a remedy to the primary victim only and that recovery for injury to relational interests should be denied for policy reasons.[17] Thus, one must ask in respect of cases such as *Sharp* whether it is appropriate for a husband to be separately compensated by the tortfeasor for the wife's lessened ability to carry out services for *him* when they both have already been compensated for their daughter's death under the Compensation to Relatives Act and the wife has been separately compensated for nervous shock. The possibility of duplication of general damages awards is a real one, as may be seen more clearly when we focus on the questionable nature of the alleged harm to the husband.

Furthermore, while the basic negligence test of reasonable foreseeability is applied in order to establish liability in respect of the primary victim in common law actions, this test is not used in respect of the derivative action; it is replaced by what is virtually strict liability. While the elements of negligence have to be proved in order for the primary victim to recover, proof of the commission of a wrongful act is sufficient to establish liability for the derivative action,[18] subject to proof as to the extent of loss.

In view of the substantial developments in the law of negligence, it has been suggested that a husband's loss of consortium action might also be regarded as an action in negligence.[19] However, no actual endeavour appears to have been made in the Anglo-Australian legal system to argue that, on the one hand, harm to the husband of a woman negligently injured is reasonably foreseeable while, conversely, comparable harm to a wife is not. Some United States jurisdictions, however, have dealt with loss of consortium within the framework of negligence. For example, the court in

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[15] [1981] 1 N.S.W. L.R. 240, 244.

[16] *Cf.* Murphy, J. in *State Government Insurance Commission* v. *Trigwell* (1979) 26 A.L.R. 67, 92.

[17] *Cf.* J. G. Fleming, *The Law of Torts* (6th ed., 1983) at 136, 618, 641. See also P. Handford, "Relatives' Rights and *Best* v. *Samuel Fox*" (1979) 14 *U.W.A.L.R.* 79.

[18] The husband's claim is not even destroyed by contributory negligence on the part of the primary victim. See *Curran* v. *Young* (1965) 112 C.L.R. 99. But *cf.* Wrongs Act, 1936-1977 (S.A.). See also *Meadows* v. *Maloney* (1972) 4 S.A.S.R. 567 and *Hasaganic* v. *Minister of Education* (1973) 5 S.A.S.R. 554.

[19] *Curran* v. *Young* (1965) 112 C.L.R. 99, *per* Barwick, C.J.

Rodriguez v. *Bethlehem Steel Corp.*[20] adopted the view that injury to the spouse was primary in nature and that each spouse[21] suffers an immediate, personal loss when the other is injured and that each is entitled to recover from the responsible tortfeasor.

Indeed, it is likely to be more probable than not that serious injury to a person in our society would have a significant effect on at least one intimate relationship. But while it is acknowledged that a husband may be deleteriously affected by serious injury to a wife, it cannot be denied that serious injury to a husband, a non-marital partner or a child would also be likely to give rise to harms of a comparable nature so far as persons close to them are concerned. Thus, the application of the reasonable foreseeability test does not eliminate the discriminatory nature of the loss of consortium action, but highlights the fact that it discriminates against other relationships on the ground of marital status, in addition to that of sex.

2. History of the Action

Historically, the action was founded upon the proprietary interest of the husband in the *servitium* of the wife.[22] As *pater familias*, the husband had *potestas* over all members of the household, namely, the children and servants, as well as the wife. An injury to any one of them was an injury to him in an economic sense because their ability to carry out services was affected.[23] In fact, the original action *per quod consortium amisit* was brought in trespass, confirming the view that these members of the household held a legal status which was no more than that of chattels.[24]

While changes were mooted in respect of the action over 100 years ago, the predominant conservatism of the entirely male judiciary has militated against any substantial change in the nature of the action. In 1861, Lord Campbell went so far as to suggest that the loss of conjugal society is a loss which the law may recognise to the wife as well as to the husband.[25] However, it is the words of Lord Wensleydale which have been oft-quoted and the more influential, and which emphasise the property interest which the husband has in the services of the wife. He denied that a woman would be entitled to institute an action because of the different character of the consortium which she has in the husband. He stressed the material value of the wife's services capable of being estimated in money which "resemble the services of a hired domestic, tutor or governess".[26] Such loss, he suggested, could be repaired by the hiring of another servant, while the wife, on the other hand, sustained only the loss of the comfort of

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[20] (1974) 525 P. 2d 669.

[21] Most American jurisdictions now view the loss from a sex-neutral perspective. See *infra*.

[22] For detailed consideration of the history of the action, see P. Brett, "Consortium and Servitium: A History and Some Proposals" (1955), 29 A.L.J. 321, 389 and 428. See also Riseley, *supra* n. 10.

[23] *Cf.* K. A. Clarke and A. I. Ogus, "What is a Wife Worth?" (1978) 5 *Br. J.L. & S.* 1, 3.

[24] The action *per quod servitium amisit* has close parallels with the action *per quod consortium amisit*. See, e.g., R. W. Baker, "Consortium and the Delayed Emancipation of the Married Woman" (1951) 2 *U.W.A.L.R.* 80.

[25] *Lynch* v. *Knight* [1861] IX H.L.C. 576.

[26] *Id.* 598.

the husband's society and affectionate attention, which the law cannot remedy.[27]

This lowly perception of the value of the full-time homemaker tends to emanate from a judicial and societal inability to evaluate the contributions of unpaid work in a capitalist structure concerned with the acquisition of wealth and monetary reward. No margin is allowed for the intellect of the woman, for her academic ability in educating the children or critically examining the husband's work, the proficiency in entertaining his colleagues, or for any other particular talents or skills she might have. The judiciary have adopted the view that the loss of all these skills is compensable at the lowest market rate for a replacement domestic worker or servant.[28]

The passage of the Married Women's Property Acts at the turn of the century[29] would suggest the occurrence of a significant change in the legal status of married women, for it was unequivocally established that a wife was no longer to be regarded as the chattel of her husband. The procedural barrier which prevented a married woman from suing in her own right was removed, and two reported cases were instituted by married women for loss of consortium in the 1920s: one in England[30] and one in New South Wales.[31] Only the latter was successful, however, and it stands out as an aberration. Formal emancipation was not enough for the judiciary, as contemporary judicial practice continued to treat a wife as part of her husband's property. The lack of independence was illustrated soon afterwards when the High Court in *Wright* v. *Cedzich*[32] held that a wife had no cause of action for the loss of consortium of her husband. The majority (Knox, C.J., Gavan Duffy, Rich and Starke, JJ.) were persuaded by history rather than contemporary mores[33] and found that, while the common law had always recognised the dominium exercised by the husband over the wife, the wife had never had any such dominion over her husband.[34]

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[27] The only remedy open to the wife was a suit for maintenance, which the husband was still bound to supply. See n. 11 *supra*.

[28] There has been a more conscientious attempt to assess the homemaker contribution in the Family Law jurisdiction in interpreting s. 79(4)(b) of the Family Law Act 1975 (Cth). For example, in *Aroney* v. *Aroney* [1979] F.L.C. 78, 780 the wife was not disqualified as a homemaker because she had domestic help and did little physical work around the house in view of the fact that she acted as a hostess and organised the household. However, in *Weber* v. *Weber* [1976] F.L.C. 75, 347, an alcoholic wife was "punished" by being awarded a partially reduced interest in the property because of her "partial dereliction of duty". See S. Magee, *Housework Contributions under Section 79(4)(b) of the Family Law Act* 1975, Legal Research Project presented for course LAW 514, Macquarie University, 1982.

[29] Married Women's Property Act, 1882 (U.K.); Married Women's Property Act, 1901 (N.S.W.); Married Women's Property Act, 1915 (Vic.); The Married Woman's Property Amendment Act, 1898 (S.A.); Married Women's Property Acts, 1890 (Qld.); Married Women's Property Act, 1892 (W.A.).

[30] *Gray* v. *Gee* (1923) T.L.R. 429, *per* Darling, J., who said that there was no reason why a wife should not sue for enticement as the procedural impediments had been swept away with the passage of the Married Women's Property Act. Nevertheless, the jury found for the defendant. *Cf.* also the *obiter dicta* of Scutton, L.J. in *Place* v. *Searle* [1932] 2 K.B. 497, 512.

[31] *Johnson* v. *The Commonwealth* (1927) 27 N.S.W.S.R. 133.

[32] (1930) 43 C.L.R. 493. The plaintiff's husband had been allegedly enticed away by another woman.

[33] Women had also been enfranchised, and admitted to universities and professions by that stage.

[34] At 500.

Isaacs J., in a powerful dissenting opinion, attacked the legal fiction at the basis of the mediaeval doctrine that a woman lost her identity on marriage and became subsumed within the *persona* of her husband. In view of both the formal changes in women's status and their actual role in society, he pointed out that it was high time that the law abandoned the notion that women were "merely adjuncts or property or the servants of their husbands".[35]

As a result of *Wright* v. *Cedzich*, the reports do not indicate any actions for loss of consortium instituted by women in Australia during the ensuing 50 years, despite the fact that that case was based on enticement.[36] The view seems to have been taken that the decision should be regarded as good law for denying a woman a remedy, whether an action arose from an intentional or an unintentional wrong.[37] Despite ample scope for invoking the time-honoured practice of distinguishing, the matter appears to have been regarded as closed when the House of Lords, in *Best* v. *Samuel Fox*,[38] held that a wife had no right to sue in respect of loss of consortium in a case where her husband was negligently injured in the workplace so that he was unable to engage in sexual relations.[39]

The formal abolition of the enticement action might well have acted as an incentive to test the denial to a wife of a right of action for negligent impairment, since the abolition of the right to sue for wilful interference arguably left *Wright* v. *Cedzich*[40] as a somewhat shaky authority. In addition, the mid-seventies were characterised by a raised public consciousness on issues pertaining to sex discrimination and a spate of legislation expressly designed to overcome inequalities on the grounds of sex and marital status in the public arena was enacted.[41] However, this changing societal consciousness as to the status of women does not appear to have percolated through to the traditional areas of the common law, and no intrepid wife has challenged this discriminatory action. The appropriateness of such an approach will be pursued subsequently.

3. Nature of the Action

> Consortium has been defined as a partnership or association; but in the matrimonial sense it implies much more than these rather cold words suggest. It involves a sharing of two lives, a sharing of the joys and sorrows of each party, of their successes and disappointments. In its fullest sense it implies a companionship between each of them, entertainment of mutual friends, sexual intercourse — all those elements

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[35] At 505.

[36] An action for which had been abolished in the meantime. See n. 2.

[37] *Cf.* Riseley, *supra* n. 10 at 446.

[38] [1952] A.C. 716.

[39] Only Lord Birkett of the Court of Appeal was prepared to allow the wife an action on exactly the same terms as the husband. See *Best* v. *Samuel Fox* [1951] K.B. 639.

[40] (1930) 43 C.L.R. 493.

[41] Sex Discrimination Act, 1975 (S.A.); Anti-Discrimination Act, 1977 (N.S.W.); Equal Opportunity Act, 1977 (Vic.).

> which, when combined, justify the old common law dictum that a man and his wife are one person.[42]

There is no precise legal definition of consortium and its elusive nature has permitted the judiciary to place its own gloss on the concept from time to time. While the above definition, emanating from the old Matrimonial Causes jurisdiction, stresses the notions of interdependence, sharing and mutuality in the relationship, the action for loss of consortium is concerned only with the diminution in the quality of the relationship from the perspective of the husband; a wife's sufferings, following injury to her husband, is of no concern to the law. This definition also accentuates the finer, more intangible sentiments of a marital relationship, whereas assessment of damages in loss of consortium actions has placed most weight on the *servitium* aspect. Although the judiciary have traditionally conceptualised the wife's role as one of service,[43] there is also the suggestion that damages for loss of services could be more easily calculated than for non-material loss.[44] In addition, it may be dubious as to whether a claim for an intangible loss alone could be sustained.[45]

When we turn to the more cerebral elements of the marital relationship, it may be further observed that the leading High Court case, *Toohey* v. *Hollier*,[46] has stressed the material consequences of the loss of impairment of the wife's society and companionship as constituting proper subjects of compensation to the husband, while intangible elements such as mental distress are to be excluded.[47] Needless to say, the identification of the material consequences of "society and companionship" is problematical as Moffit, P. observes:

> It is difficult to formulate what is temporal as distinct from the spiritual disadvantages and more difficult still to attribute to it a compensatory sum of money.[48]

The overly subtle distinction between the material and non-material aspects which are themselves essentially abstract, has given rise to some rather sophistical reasoning in interpreting the High Court's view:

> I understand "mental distress" to refer to a husband's natural sympathetic feeling of distress at seeing his wife in an injured condition. I do not understand it to relate to the feeling of distress which he is likely to suffer, arising from the atmosphere of gloom which surrounds the wife as a result of her change of personality.[49]

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[42] *Crabtree* v. *Crabtree (No. 2)* [1964] A.L.R. 820.

[43] See, e.g. *Cutts* v. *Chumley* [1967] 1 W.L.R. 742, where the husband was awarded £5,000 for the total loss of services and £200 for the loss of society for the period of almost three years during which the wife had been hospitalised. The wife suffered serious brain injury which had the effect of reducing her to the intellectual level of a three-year-old child.

[44] Note, "An Expanded Cause of Action in Texas — *Whittlesey v Miller*: Either Spouse May Recover for the Negligent Impairment of Consortium" (1979) 33 *Southwestern L.J.* 895.

[45] U.K. Law Commission, *Published Working Paper No. 19*, 1968, Para 47.

[46] (1955) 92 C.L.R. 618.

[47] *Id.* 627.

[48] *Bagias* v. *Smith* [1979] F.L.C. 78, 497, at 78, 502.

[49] *Markellos* v. *Wakefield* (1974) 7 S.A.S.R. 436, 437, *per* Hogarth, J.

Thus, it would appear that while the husband cannot be compensated for distress resulting from seeing his wife's injuries, he can be compensated for the distress he experiences resulting from her personality change. In *Johnson* v. *Kelemic*,[50] for example, the husband was compensated because the wife, who was already a quadraplegic as a result of an earlier accident, changed from a cheerful happy person to a morose and difficult one.

Similarly, in *Kealley* v. *Jones*,[51] Samuels, J.A. described sexual intercourse as a "comfort of the most material kind".[52] However, to stress the material at the expense of the intangible elements of such an act is academic.[53] An earlier New South Wales case, *Birch* v. *Taubman Ltd*,[54] in endeavouring to interpret the *dictum* of the High Court in a way which was palatable to the court, characterised the deprivation of sexual intercourse as a loss of a temporal rather than a spiritual loss because of the extinction of the wife's capacity to bear children. The extension of the action for loss of consortium to include a property right in respect of children is no less offensive than an assertion of a husband's property right in respect of his wife. Indeed, the analysis has not won favour with subsequent courts which have accepted characterisation of the loss of consortium *per se* as a loss of sexual expression, rather than as one of sex as a means of procreation.[55]

In computing damages for loss of consortium, the basic principle of compensation applies; that is, the plaintiff should be placed in as good a position, so far as money can do it, as if the wrong had not been done.[56] However, if a judge is ambivalent about the quintessential wrong, this proposition is not particularly helpful. Thus, while some judges have taken the view that damages should be no more than nominal,[57] others have taken the view that the award of a nominal sum is not the proper way to eliminate an anachronistic action.[58]

The quantification of damages for loss of consortium would seem to be a very imprecise art. Inevitably, judges feel more at ease with the services component than they do with the society and companionship component. By use of the replacement cost value test, a sum is calculated based on what it actually cost to employ someone to act as housekeeper. However, the husband may also be compensated for having to carry out such tasks himself.[59] Damages for carrying out housework by the husband under sufferance

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[50] [1979] F.L.C. 78, 487.

[51] [1979] 1 N.S.W.L.R. 723.

[52] *Id.* 751.

[53] *Cf.* also *McIntyre* v. *Miller* (1980) 30 A.C.T.R. 8 in which the wife's capacity to dance with the husband had been greatly reduced.

[54] [1957] S.R. 93.

[55] *Hasaganic* v. *Minister of Education* (1975) 5 S.A.S.R. 554; *Cf. Thomas* v. *Iselin* [1972] Q.W.N. 15. See also Riseley, *supra* n. 10 at 434-435.

[56] E.g., *Behrens* v. *Bertram Mills Circus Ltd* [1954] 2 Q.B. 1, 29, *per* Devlin, J.

[57] E.g., Hutley, J.A. in *Kealley* v. *Jones* [1979] 1 N.S.W.L.R. 723 and in *Bagias* v. *Smith* [1979] F.L.C. 78, 497 at 78, 511.

[58] E.g., Samuels, J.A. in *Kealley* v. *Jones* [1979] 1 N.S.W.L.R. 723 and Moffiitt, P. in *Bagias* v. *Smith* [1979] F.L.C. 78, 497 at 78, 502.

[59] In *Lawrence* v. *Biddle* [1966] 1 Q.B. 504, the husband complained that he now did the heavy housework whereas, previously, he could relax when he came home after work while his wife did all that was required to be done. *Cf. Kealley* v. *Jones* [1979] N.S.W.L.R. 723 and *Bagias* v. *Smith* [1979] F.L.C. 78, 497.

are not computed in any precise way and are likely to be included in a lump sum under general rather than special damages.

The traditional view that the woman herself should not be compensated in her personal injury action for the inability to carry out tasks which she formerly performed has reinforced the ambivalent societal attitude towards unpaid work. While compensation for loss is the basic principle of recovery, the loss in this case has been conceptualised as a loss of benefits by the husband, rather than as a loss of capacity by the wife.[60]

Of course, in compensating the husband in monetary terms, the full irony of the wife's perceived role is revealed, for there is normally no public accounting of the wife's contribution to the economic unit and, indeed, it is invisible in the computation of the Gross National Product. The assumption has rarely been questioned by the judiciary that in looking at "services" more is involved than the replacement of the services of a cheap servant with the paid services of a stranger.[61] It is this non-accountability and invisibility of housework which has been partially responsible for its devaluation.

Thus, even as the action is presently conceived, the low level of awards redounds against women in that the judicial attitudes reflect and reinforce the low valuation of the work of the unpaid homemaker in our society:

> Nor is the domestic housekeeper normally employed for the number of hours of a homemaker, and certainly not at the inconveniently intermittent time spells which are required of a homemaker. It is unlikely that any plaintiff would find an individual replacement housekeeper, except at a very high rate of pay, to fully perform the totality of tasks demanded of the average homemaker.[62]

Empirical studies have demonstrated that full-time housewives spend approximately 57 hours on housework per week, while their husbands spend about 11 hours.[63] Such studies showed that women who worked for wages had total work weeks of 76 hours, including an average of 33 hours per week on housework. Men, however, have been surprisingly unresponsive to women's increased wage work, despite a belief on the part of some members of the judiciary that working couples do share the domestic burdens.[64] In fact, it would appear that the husbands of women who work for wages do not spend more time on housework than husbands of women who do not work for wages.[65] In *Bagias* v. *Smith*,[66] for example, the evidence in-

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[60] Since *Donnelly* v. *Joyce* [1974] Q.B. 454, there has been some recognition that the loss of capacity by a housewife is a compensable loss, although computation of damages constitutes a problem for the courts. See e.g., *Daly* v. *General Steam Navigation Co.* [1981] 1 W.L.R. 120, 130, *per* Ormerod, J. For the position in New South Wales, see n. 114.

[61] But see *Fisher* v. *Smithson* (1978) 17 S.A.S.R. 223, *per* Bray, C.J. and see *Franco* v. *Woolfe* (1974) 52 D.L.R. (3rd) 355, 360, *per* Haines, J.

[62] K. Cooper-Stevenson, "Damages for Loss of Working Capacity for Women" (1979) 43(2) *Sask L.R.* 7, 22.

[63] E.g., H. I. Hartmann, "The Family as the Locus of Gender, Class and Political Struggle: The Example of Housework" (1981) 6 *Signs: J Women in Culture and Society* 366, 378-379.

[64] *Kealley* v. *Jones* [1979] 1 N.S.W.L.R. 723, 741, *per* Hutley, J.A.

[65] Hartmann, *op. cit. supra* n. 63 at 379-381.

[66] [1979] F.L.C. 78, 497.

dicated that the wife did all the housework while maintaining a full-time job and looking after two young children, yet the decision is preoccupied with the husband's loss.

As a question of social policy, one must ask whether it is appropriate for the judiciary to underscore the fact that it is women who are expected to carry out the preponderance of socially-necessary housework, regardless of whether they are in the paid workforce or not.

If the wife's capacity to earn wages to support herself or to contribute to the household budget is affected by her injury, this cannot be dealt with under the husband's action: it is a loss to the wife alone.[67] Hutley, J.A., however, in *Bagias* v. *Smith*[68] goes so far as to suggest *obiter* that the husband may be entitled to claim an interest in the wife's wages if her primary entitlement had been reduced as a result of contributory negligence.[69] While this paper questions the continued assertion of a husband's proprietary interest in the unpaid work of his wife, it nevertheless has the imprimatur of the law. On the other hand, the view that the husband can assert such an interest in respect of the wife's paid labour may well be in conflict with the Married Women's Property Acts.[70] Indeed, the implementation of such a proposal a century after the passage of such legislation would undeniably represent a retrograde step.

Predictably, the loss of the sexual relationship presents considerable difficulty for the courts in the assessment of general damages. While special damages in the form of out-of-pocket expenses may be recovered in respect of household services based on the idea that such services are easily replaced by a paid worker, such an idea is too awful to contemplate in respect of sexual "services", for it would ineluctably lead to the idea of the wife as prostitute. Samuels, J.A. in *Kealley* v. *Jones*[71] adroitly sidesteps the problem of assessing damages by means of the replacement cost value test that is, by substitution of a "paid worker" by explaining that reference to a substitute is not relevant in respect of the wife's society, for it is *ex hypothesi* unique.[72]

The unease which is felt by the law in placing a monetary value on the husband's inability to engage in sexual intercourse with his wife because of her injuries is well-illustrated by *Birch* v. *Taubmans Ltd*,[73] in which the jury had allowed the plaintiff husband the sum of One Pound for damages for loss of sexual intercourse. The Court of Appeal referred to the feeling of discomfort confronting the jury in facing a task so unpleasant "which may to some degree create a feeling of revulsion".[74]

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[67] *Markellos* v. *Wakefield* (1974) 7 S.A.S.R. 436.
[68] [1979] F.L.C. 78, 497.
[69] See n. 18 *supra*.
[70] See, e.g., Married Women's Property Act, 1901 (N.S.W.), s. 5.
[71] [1979] 1 N.S.W.L.R. 723, 744.
[72] *Id.* 747.
[73] [1957] S.R. 93.
[74] *Id.* 95.

While the courts are now somewhat less prudish, the focus in respect of a wife's loss of sexuality is, nevertheless, still on the harm allegedly suffered by the husband. In *Bagias* v. *Smith*[75] for example, the wife, who had lost all sexual feeling, is treated as a passive receptacle. The husband continued to have sexual intercourse with her but on a less frequent basis. This loss was conceptualised as partial deprivation for which he should be compensated by the tortfeasor. While the wife's general damages may have also included a component for her loss of sexuality, this is uncertain. It was clearly not a matter of significant judicial concern in an action initiated by both husband and wife.

4. Solution

(a) *Extension of the Action to a Wife*

Clearly, this anomaly in the law needs to be rectified. Undoubtedly both spouses have an interest in the continuance of a harmonious intimate relationship.[76] But should the right to sue for loss of consortium be extended to a wife, or should the action be abolished altogether?

The judiciary have not found it easy to justify the sex-specific nature of the action other than by resorting to the power of precedent[77] or to Parliament's legislative role.[78] The floodgates argument is another hoary old favourite. For example, the New Zealand Court of Appeal argued in *Marx* v. *Attorney-General*[79] that the extension of the action would then be justified "to all those with whom an injured man is constantly in contact, such as his children, his workmates, and members of his club and so on".[80] It is difficult to sustain the argument that the harm suffered by a husband in a loss of consortium action is unique, while that suffered by a wife is comparable to that suffered by multifarious others, including mere acquaintances.[81]

A further judicial argument against extension of the action is that pertaining to the possibility of double recovery. The fear is that both husband and wife are likely to recover for the same items of damages.[82] However, this problem is one which already inheres in the action as presently conceived, as pointed out in the earlier discussion of the *Sharp Case*.[83]

The United States which, like Australia, inherited the action for loss of consortium as part of the English common law system, has nevertheless arrived at the view that women are equal partners in a marital relationship. The leading case of *Hitaffer* v. *Argonne*[84] recognised that loss of consortium

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[75] [1979] F.L.C. 78, 497.

[76] *Cf.* W. L. Prosser, *The Law of Torts* (4th ed., 1971) at 895.

[77] E.g., *Cutts* v. *Chumley* [1967] 1 W.L.R. 742, 751, *per* Willis, J.

[78] *Best* v. *Samuel Fox* [1952] A.C. 716, 735, *per* Lord Morton.

[79] [1974] 1 N.Z.L.R. 164.

[80] *Id.* 170, *per* McCarthy, P.

[81] The facts of the case make such reasoning particularly inappropriate. The husband had suffered brain damage as a result of a workplace accident. The husband developed a hypersexual attitude towards the wife which manifested itself in numerous violent assaults, requiring hospitalisation on three occasions. The court held that the wife's claim was derivative and she had no claim in law and, so far as negligence was concerned, no duty was owed to her as a relative of the injured person.

[82] Handford, *supra* n. 17 at 129.

[83] See *supra*, p [000].

[84] (DC Circ. 1950), 183 F. 2d 811.

is a direct and independent wrong to the uninjured spouse that includes harm to the "love, affection, companionship, and sexual relationship" as well as the loss of services. Since the *Hitaffer Case*, a majority of American state courts have allowed the wife's cause of action.[85] The view has been taken that the common law imposes a duty on courts to discard outworn concepts and to adapt to prevailing social needs.[86] By the 1970s, the logic of the *Hitaffer* decision was regarded as compelling and impatience was evinced with arguments in favour of *stare decisis* and legislative authorisation of the kind still being adduced in Australia.

It should also be noted that the basis of the American action for loss of consortium has changed so that it now differs significantly from that still generally operating in Australia. The concept of services has given way to a far greater accent on the "sentimental and emotional elements" of marriage and it is argued that the action should not therefore be regarded as anachronistic in the light of developments in tort law for emotional distress.[87] Furthermore, in community of property regimes, the husband is prevented from recovering from loss of services at all. The rationale is that each spouse has a duty to support the community, whether by paid or unpaid work, and it is the community which suffers when the wife's ability to perform services is impaired. The husband's loss of comfort and society, however, is a personal injury for which he may recover in an action for loss of consortium.[88] If the action were to be extended to wives, such a basis of suit would seem to be the only equitable way of resolving the problem, for it removes altogether the proprietorial interest of one spouse in the services of the other.

South Australia has extended the action to wives, the only Australian state to do so, following a recommendation by the South Australian Law Reform Commission.[89] An action may be instituted by a wife in the case of either wrongful injury or death; damages are to be assessed in the same manner as upon a claim by a husband.[90] However, this reform does not seek to establish a new basis for the action; it simply imports into the statute the outdated concept of consortium found in the common law.

The inadequacy of this approach is highlighted by the pervasiveness of sex role stereotypes in the family relationship as illustrated by *Sloan* v. *Kirby*.[91] While the evidence showed that the deceased spouse did little in the nature of domestic chores, nominal damages were allowed for the *mere possibility* that he might have performed such stereotypically male tasks as replacing light fuses and tap washers, mowing the lawn, and wall-papering the walls. This case strongly suggests that such statutory change is merely

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[85] Note, "Consortium: A Survey of the Present Law" (1980-81) 19 *J. Family Law* 707.

[86] E.g., *Swartz* v. *United States Steel Corp* (1974) 293 Ala 439; *Gates* v. *Foley* (1971) 247 So 2d 40.

[87] See Comment, "The Negligent Impairment of Consortium — A Time for Recognition as a Cause of Action in Texas" (1976) 7 *St Mary's L.J.* 864, 874.

[88] Note, "An expanded cause of action in Texas — *Whittlesey* v. *Miller*: Either Spouse may recover for the Negligent Impairment of Consortium" (1979) 33 *Southwestern L.J.* 895.

[89] *11th Report of the Law Reform Commission of SA*, 1970.

[90] Wrongs Act 1936-1977 (S.A.), s. 33.

[91] (1979) 20 S.A.S.R. 263.

propping up the myth that a marriage is based on adherence to the antiquated services-based doctrine.[92]

Some of the more enlightened judges have been remarking for over fifty years that ideas of service have become obsolete in the marriage contract, and it is paradoxical to demand the perpetuation of those ideas in the name of "modern feminine progress" which does not have as its goal the "complete transposition of the older relations of the spouses".[93] Furthermore, so far as husbands are concerned, service has never been the basis of a marital relationship, which means that a wife would be unable, in most cases, to demonstrate actual damage, the essential predicate for successful suit, if her husband were to be injured.

Indeed, to extend the action for loss of consortium to wives would be to transmute what is now direct discrimination into an example of indirect discrimination against women. Thus, while wives are presently treated differently to husbands in the same or similar circumstances because they have no right of action when a husband is injured, there will still be inequality if the action is extended to women because *ipso facto* they can never be in the same or similar circumstances as husbands if the latter are not the primary homemakers. Also, because the household and sexual services of wives are viewed as being worth more to a husband than *vice versa*, the damages attracted by a woman are likely to be miniscule in respect of these components when compared with those appropriate for a man,[94] so much so that she may not be justified in instituting an action. Thus while a reform in this direction would effect what purports to be an equalisation of the law, it would, in fact, underscore woman's structural inequality.

In addition to the dangers inherent in endeavouring to convert the present sex-specific action into a sex-neutral one, the achievement of a state of ostensible "equality" between spouses would also highlight the discrimination *vis-a-vis* non-marital relationships.

In view of the direction of trends which has resulted in a new conceptual basis for a sex-neutral loss of consortium, there has been some limited recognition of loss of consortium in the United States in respect of unmarried heterosexual, cohabitating parties.[95] *Bulloch* v. *United States*[96] adopted the view that the common law cannot ignore current social realities:

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[92] *Cf.* Riseley, *supra* n. 10 at 449.

[93] *Wright* v. *Cedzich* [1929] V.L.R. 117, 128, *per* Mann, J.

[94] *Cf.* Riseley, *supra* n. 10 at 448.

[95] The New South Wales Law Reform Commission presently has a reference directing it to inquire into the legal position of *de facto* (heterosexual) relationships *vis-a-vis* married persons. See New South Wales Law Reform Commission Issues Paper, *De Facto Relationships* (1981).

[96] (D New Jersey, 1980), 487 F Supp 1078. This case was somewhat unusual in that the parties had been married for over 20 years. They divorced and then decided to resume a normal marital relationship, but did not reside together again until after the man's accident, although he was then unable to engage in sexual relations. See further discussion in Note, "Extending Consortium Rights to Unmarried Cohabitants" (1981) 129 *U. Penn L.R.* 911. But see *contra Chiesa* v. *Rowe* (WD Michigan, 1980), 486 F Supp 236 and *Sawyer* v. *Bailey* (Me Sup Jud Cit 1980), 413 A 2d 165 where the spouses were injured during engagement prior to marriage.

> Census data and sociological studies confirm the notion felt by many that marriage is not the sacrosanct institution that it once was and that extra-marital relations are not the anathema they once were.[97]

The case held that the underlying rationale of tort policy, which is to compensate justly those who are injured, outweighed the policy of favouring marriage. Nevertheless, the fact that marital status has been the predicate for recovery might suggest that the law has been traditionally more interested in upholding the sanctity of marriage than in compensating wrongs, despite a disclaimer that the courts' protective attitude towards marriage is not based on any moral view about unmarried cohabitation.[98]

Furthermore, while there is an element of administrative convenience in focusing on marriage in that a *bona fide* relationship does not have to be proved and a socially acceptable limitation is imposed upon the action, the status of marriage assumes a particular quality in the nature of the personal relationship which is peculiar to the married state. In fact, however, "marital status is a crude and unsatisfactory indicator of the type of personal relationship in which the plaintiff is involved and, therefore, is an inadequate basis on which to evaluate the value of any loss of consortium".[99]

However, the extension of the action to non-marital partners, whether heterosexual or homosexual, is likely to be fraught with the same problems encountered in respect of extending the action to wives, namely, the accent on services, a dubious basis of an action for non-material loss.

In view of the historical antecedents of the action, the distorting proprietorial factor of services could be avoided only by statutory reference to a concept such as *solatium* which specifically embraces grief and suffering. Thus, *solatium* may already be allowed by way of compensation for wrongful death to those who held a special relationship with the deceased.[100] A parent/child relationship, also may be included within such special familial relationships.

Indeed, if a completely new basis for loss of consortium was established which was to focus on the impairment of the quality of the relationship in an intangible sense, the parent/child relationship could not be rationally excluded any more than could other non-marital relationships which include a sexual dimension.

As with *de facto* relationships, there have been attempts in the United States to extend recovery for loss of consortium or society to a child of a parent negligently injured. For example, in *Berger* v. *Weber*,[101] a father initiated an action on behalf of his mentally retarded daughter for the loss of

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[97] At 1080.

[98] Comment, "Extending Consortium Rights to Unmarried Cohabitants" (1981) 129 *U. Penn. L.R.* 911, 923-924.

[99] *Id.* 942.

[100] E.g., Wrongs Act, 1936-1977 (S.A.); Compensation (Fatal Injuries) Ordinance, 1974 (N.T.), s. 10(3)(f). The Ordinance also recognises *de facto* relationships. Ss. 4(3) and s. 19(3)(c) permit a person who has cohabited with another as husband or wife on a *bona fide* domestic basis to sue for (*inter alia*) loss of consortium on the death of the other person. See *Bennett* v. *Liddy* (1979) 25 A.L.R. 340.

[101] (CA Michigan 1978), 267 NW 2d 124.

society, companionship, love and affection of her mother. The court held that a child may maintain an action where a parent was severely injured. Although there is no sexual aspect in the consortium between parent and child, the court felt that the focus should be directed to the fact that the child had suffered a genuine loss of society and companionship which should be compensated. The magnitude of the child's loss outweighed the factors militating against recovery. The court, also alluded to the emerging rights of children, referring to them as persons with rights who are no longer regarded as chattels in our society. Such sentiments echo those formerly articulated in conjunction with discussion mooting extension of the action to wives.[102]

However, while the mental abnormality of the daughter in the *Berger Case* allowed an exception to be made, most courts have refused to recognise an action for parent-child consortium. In *Nelson* v. *Richwagen*,[103] the court distinguished the parent-child relationship from the husband-wife relationship on the ground that the child has a right only to the monetary support of the parent, while a spouse has the right to the "personal presence and care" of the other. The jury also felt that a policy factor militated against recovery in that there was difficulty in deciding when the child's right ceases.

While these arguments are equivocal, the court in *Borer* v. *American Airlines Inc.*[104] made it clear that there were strong policy factors militating against recovery. Indeed, the number of claimants in the case itself highlights the problem of expansion of the liability of tortfeasors. Each of the nine plaintiff children sought $100,000 damages following the alleged negligent injury of their mother resulting from a defective light fitting.

While recognition of the fact that a cause of action for loss of parental society is likely to increase the cost borne by the negligent defendant, it has been suggested that this is not a good reason in itself to disallow the action and the possibility of exhorbitant recovery could be reduced by either placing dollar limits on liability, or permitting the family to sue as a unit.[105] Clearly, however, the magnification of damages awards to a single family raises a real question as to where the line for recovery should be drawn. As stated by Judge Breitel:

> Every injury has ramifying consequences, like the ripplings of the waters, without end. The problem for the law is to limit the legal consequences of wrongs to a controllable degree.[106]

(b) Abolition

In addition to the disproportionate impact on women, non-marital partners and children of a purported equalisation of the action between

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[102] E.g., Isaacs, J. in *Wright* v. *Cedzich* (1930) 43 C.L.R. 493, 505 *passim*.
[103] (1950) 95 N.E. 2d 545.
[104] (Cal. SC 1977), 563 P. 2d 858.
[105] Recent Cases, "*Ferriter* v. *Daniel O'Connell & Sons, Inc.*" 413 N.E. 2d 690 (Mass. 1980), (1981) 50 *Cincinnati L.R.* 237, 244-245.
[106] *Tobin* v. *Grossman* (1969) 249 N.E. 2d 419, 424.

spouses, a policy factor of an altogether different nature also militates against such a resolution of the problem.

In particular, the implementation of no-fault accident compensation schemes raises the question as to the appropriateness of an action based on fault. Existing no-fault or partial no-fault legislative schemes make no express allowance for derivative claims.[107] Furthermore, neither the New Zealand comprehensive no-fault scheme,[108] the abortive Australian national scheme[109] nor proposals for a comprehensive no-fault scheme presently being mooted in New South Wales[110] envisage compensation of third parties, such as husbands in loss of consortium actions. All such schemes are designed to compensate the primary victim only.

Indeed, many injured homemakers and other persons in the community are presently unable to prove fault in a common law action, and horrifying injuries can go uncompensated because of the element of chance. Therefore, one must ask as a matter of public policy, whether scarce resources should be diverted to the compensation of third parties for the intangible harm to relationships, or for the dubious harm resulting from a loss of services.

For reasons of social justice, it would be preferable to devise an equitable method of compensating injured homemakers themselves instead of compensating husbands from shrinking insurance funds. Furthermore, any statutory scheme, which either expressly permitted husbands a right of action for loss of consortium or did not extinguish independent existing common law actions, would once again highlight discrimination *vis-a-vis* wives and/or non-traditional domestic relationships at the institutional level.

It has been suggested that the loss of consortium action "clearly has social utility in so far as it allows the recovery of medical and housekeeping expenses occasioned by injuries to the spouse".[111] However, recovery for nursing and other medical expenses should be and, indeed, can be properly attached to the primary victim's claim.[112] Furthermore, recent developments in both the United Kingdom and in Australia, permit the injured person to recover for the gratuitous rendering of the services by a friend or relative on the basis that the loss is properly characterised as the plaintiff's loss.[113]

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[107] E.g., Workers' Compensation Act, 1926 (N.S.W.); Sporting Injuries Insurance Act, 1978 (N.S.W.); Motor Accidents Act, 1973 (Vic.); Motor Accidents (Liabilities and Compensation) Act, 1973 (Tas.); Motor Accidents (Compensation) Act, 1979 (N.T.).

[108] Accident Compensation Act, 1972 (N.Z.).

[109] *Report of the National Committee of Inquiry on Compensation and Rehabilitation in Australia* (Woodhouse Report) (Canberra, 1974).

[110] See New South Wales Law Reform Commission Issues Paper, *Accident Compensation*, 1982.

[111] Justice P. E. Nygh, "Injuries to Family Relationships", Lecture 5 in *Assessment of Damages*, Committee for Post-graduate Studies in the Department of Law, University of Sydney. Unpublished paper dated 18th November, 1982, p. 11.

[112] E.g., the future costs of providing domestic assistance in the house was a factor taken into account in assessing the wife's damages in *Bresatz* v. *Przibilla* (1962) 108 C.L.R. 541 where the wife had been rendered a quadraplegic in a motor vehicle accident. There was no suggestion in the appeal that this item was not properly allocated to her and the item was put aside in considering the husband's claim for loss of consortium.

[113] *Donnelly* v. *Joyce* [1974] 1 Q.B. 454; *Griffiths* v. *Kerkemeyer* (1977) 139 C.L.R. 161.

Thus, if a homemaker's injuries result in an inability to perform household chores which are subsequently carried out by the husband, such a loss can now be conceptualised as a loss of capacity on the wife's part for which she may be compensated.[114] The problems of quantification and possible windfall to the primary victim are unlikely to be resolved by the retention of the loss of consortium action, even in a modified form.

It is therefore submitted that the action should be abolished altogether. Indeed, some judges themselves have articulated such a view when faced with the task of adjudicating in respect of an action which they have found to be repellant.[115] In the light of demonstrated judicial timidity, however, it would seem that such a move would have to be accomplished through legislative fiat.

In the workplace, there is general acceptance of the principle that the injured worker alone should be compensated for his or her loss of capacity, not the employer who benefits from his or her services.[116] A similar focus on conceptualising loss as that of the injured homemaker (the wife) rather than that of the beneficiary (the husband) would also sound the death knell for the parallel of the *servitium* action.

In addition, if we accept that the wife alone should be compensated for her loss, it takes us closer to the general principle of tort law that only the victim should be compensated; any compensation of a derivative nature to third parties is an aberration.

While the harm to the marital relationship may be considerable, the present focus on "services" is demeaning to women. Furthermore, the continued use of concepts which emphasise the possessory rights or interests of one person in another is distinctly out of step with twentieth century egalitarianism.

Abolition of the action has also been criticised on the basis that loss of society, companionship and assistance would not then be compensable,[117] but one must retort that these factors have not been valued very highly by the courts and the weight of opinion tends to discount such a basis for recovery.[118] Abolition would also avoid the possibility of any discriminatory

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[114] E.g., Glass, J.A. in *Burnicle* v. *Cutelli* [1982] 2 N.S.W.L.R. 26 stated that, so far as doctrine was concerned, he was unable to see why one should differentiate between a capacity to look after oneself and an incapacity to do for ones family. The N.S.W. Court of Appeal, however, has not unequivocally accepted the *Donnelly* v. *Joyce* and the *Griffiths* v. *Kerkemeyer* view, but has read down the principle in such a way that services rendered within the family circle are irrecoverable if it was not necessary to provide them at cost. In addition to *Burnicle* v. *Cutelli*, see also *Johnson* v. *Kelemic* [1979] F.L.C. 78, 487, *Bloomfield* v. *Bambrick* [1979] A.C.L.D. 647, and *Kovac* v. *Kovac* [1982] 1 N.S.W.L.R. 656.

[115] *Best* v. *Samuel Fox* [1952] A.C. 716, 728, *per* Lord Porter.

[116] See *Attorney General for New South Wales* v. *Perpetual Trustee Co. (Ltd.)* [1955] A.C. 457, and *Inland Revenue Commissioners* v. *Hambrook* [1956] 2 Q.B. 641; *Commissioner for Railways (N.S.W.)* v. *Scott* [1959] 102 C.L.R. 392 (*contra*). Generally, see Fleming, *The Law of Torts*, *op. cit. supra* n. 17 at 645-649.

[117] Handford, *supra* n. 17 at 118.

[118] Nygh, *op. cit.*, *supra* n. 111 at 13. Similar proposals for reform have emanated from both the U.K. and from Canada (Ontario). See U.K. Law Commission, *op. cit.* para 47. See also Note, "*Per Quod Consortium Amisit*: New Life for an Old Tort?" (1975) 33 *U. Toronto Faculty of Law R.* 76, 87. The proposals of neither Commission have been acted upon, however. Of the Canadian provinces, only Alberta has enacted legislation which grants a statutory right of action to both spouses, whether loss is intentionally or unintentionally caused. See Domestic Relations Act, R.S.A., 1979 c. 113 as am. S.A. 1973 c. 61.

impact on parent-child relationships and non-traditional domestic relationships.

Finally, in view of the law's ostensible concern with the need to be responsive to changing social mores, it must squarely confront the issues in this instance where, because of discomfort and timidity, the perpetuation of crass stereotypes renders a disservice to men as well as to women.