

ARTICLES

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SEX, HOUSEWORK, AND THE LAW

1. Introduction

The right to seek compensation for loss or injury incurred as a result of another's negligence is, in general, restricted to the immediate victim of the tortfeasor. However, there are certain exceptions to this general principle, conferred by statute and by the common law, allowing third parties in certain circumstances the right to claim directly against the tortfeasor for losses resulting from the injury to the accident-victim.¹

At common law there is an exception of a somewhat different nature that has enjoyed favour for many centuries: the action of a husband for the loss of *consortium* in the event of tortious injury to his wife.² This action differs in nature from one where the third party brings an action in his own right against the tortfeasor. A husband in the Middle Ages was not regarded as a third party, simply because husband and wife were not two but one entity the legal *persona* of which was located in the male spouse. In fact a wife could not sue as *femme sole* for direct injury to her person except by joining her husband in the action. Furthermore, his right to sue for loss of *consortium* was founded not on a breach of duty owed to him by the wrongdoer, but for the wilful invasion of a proprietary right.

Originally, then, a husband could seek damages against anyone for the loss of his wife's services occasioned by intentional injury to her person.³ The action lay in trespass. The earliest recorded cases⁴ date from the late sixteenth century: "They were not actions ... in respect of harm done to the wife, but for the particular loss of the husband — the *consortium* of his wife."⁵

Any action in respect of harm done to the wife had to be brought by her in a joint declaration with her husband. In this joint action, however, loss of the capacity to render her services could not be averred, since the loss was not considered hers, but his loss. It was he who owned the services of his wife and it was him to whom the law gave an exclusive right in respect of protection of such tangible assets. The husband had a proprietary right in her labour. Given the nature of his right, his interest enjoyed legal protection against the intrusion of third parties.

"Until 1882, the wife could not sue alone for the assault she had suffered; her husband had to join with her; and the damage was alleged in the declaration to have been suffered by them both. But if the husband were suing for loss of *consortium*, it was improper for him to join his wife as a co-plaintiff, for she had not suffered this kind of damage."⁶

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1. E.g., the Fatal Accidents Act (9 & 10 Vict., c.93), (U.K.); Wrongs Act, 1936-1977 (S.A.), Pt. II.
2. The other common law exception being the master/servant action *per quod servitium amisit*.
3. Fleming, J.G., *The Law of Torts* (4th ed., 1971), 576; Brett, P., "Consortium and Servitium", (1955) 29 *A.L.J.* 321, 325, n.42.
4. Fleming, *op. cit.* (*supra*, n.3), 576 n.12; Brett, *loc. cit.* (*supra*, n.3), 325, n.42.
5. *Wright v. Cedzich* (1930) 43 C.L.R. 493, 532 *per* Starke J.; Brett, *loc. cit.* (*supra*, n.3), 325.
6. Brett, *loc. cit.* (*supra*, n.3), 396.

The fact that the law protected the marital incident of a wife's services by vesting not in her, but in her spouse, a legal proprietary interest in her labour, is a reflection of the economic relations in pre-industrial English society. Then, the family was the basic and central economic unit of social organization. The husband was head of that unit.

"The household of a property owning family in seventeenth century England was a complicated economic enterprise that included not only children and relatives but servants, apprentices, and journeymen from different social classes. At the head was the *paterfamilias* who worked alongside his wife, children, employees and wards. He was solely responsible for the economic and spiritual welfare of his family and represented in his person the supposed unity and independence of the family."⁷

Given that economic production and domestic relations were effectively equivalent, it is not surprising that the common law mirrored the social organization in a pre-capitalist society by recognizing two things: first, the value of a wife's labour; secondly, the liability to the husband for the loss of that value by the impairment of her capacity to work. The domestic and economic spheres were one and the same, and he was the owner of labour and production. Consequently,

"The consortium action was quite appropriate in the context of a pre-industrial society when production was largely organized within the family. Every member played an important role and therefore injury to any one individual was injury to the unit as a whole and that unit was entirely under the authority of the man."⁸

Why was *consortium* as a legal incident of marriage the sole prerogative of the male spouse in the eyes of the law? In his article, Brett has this to say:

"Just as the common law did not stop to consider the basis on which it gave a master a remedy for interference with his servant, so it did not trouble itself with enquiring why a husband should have these rights against a stranger who disturbed his conjugal bliss. Blackstone tells us that in both cases the remedies are given to the 'superior of the parties' (master, husband) only, because 'the inferior hath no kind of property in the company, care, or assistance of the superior, as the superior is held to have in those of the inferior'; and he adds, for good measure, the fact that a wife 'hath no separate interest in any thing during her coverture'. But these are dogmatic assertions rather than reasons."⁹

With respect, Brett's views are open to objection. Blackstone's comments may affront the modern thinker nurtured in the wake of the movements for the emancipation of women and the equality of individual members of society. In a post-industrial society Blackstone might be refused a forum even by those who share the implicit chauvinist sentiments expressed in his exegesis of this common law action. However, his comments do serve to explain why the law afforded a legal remedy to a husband for injury to his *consortium*. Male supremacy and patriarchal organization not only describe pre-industrial and early capitalist society; they were also, in Blackstone's world, unquestioned prescriptions of socio-economic forms. It was not for judges to refuse to

7. Zaretsky, *Capitalism, the Family, and Personal Life* (1976), 39.

8. Clarke, K.A., "What is a Wife Worth?", (1978) 5 *B.J.L.S.* 1, 3.

9. Brett, *loc. cit.* (*supra*, n.3), 328.

recognize a state of affairs and a condition in society accepted without question by the members of that society. The law simply grafted its protection onto existing social relationships and institutions. In the sixteenth, seventeenth, and eighteenth centuries, the status of women, as reflected in the law, was not discordant with the contemporary social reality either in its real or moral forms.

2. The Ill-Fated Experiment of Mrs. Julia Best: A Principle of Recovery

By the middle of the twentieth century, the *consortium* action had come under attack from judges and legal writers.¹⁰ Its fate hovered between a call for its abolition on the one hand, and its extension to female litigants on the other, and for the same reason — its continued existence in the twentieth century, as an action available to husbands only, represented a discrimination inconsistent with the process of equalization of social and legal rights between men and women.

The test case for the negligent interference of a wife's *consortium*, occasioned by physical injury to her husband, came midway through this century in the English case of *Best v. Samuel Fox & Co. Ltd.*¹¹ Mrs. Best had brought proceedings for the loss of *consortium* suffered by her as a result of an industrial accident in which her husband was rendered permanently impotent. Mr. and Mrs. Best were both young. The main issue, both for the courts at first instance and on appeal, was whether the plaintiff had a legal right to bring her action. This issue will be discussed at a later stage. First, the scope of the remedy in this action will be examined.

Unlike the judge at first instance,¹² the Court of Appeal¹³ did not deny Mrs. Best a remedy on the ground of an absence of a right of action. Rather, it was held that no damages could be awarded for injury to *consortium* in the absence of proof of total loss, either temporary or permanent. It was said that *consortium* is one and indivisible.¹⁴ This principle of indivisibility, as a proposition of law, is without authority:

"No authority was cited for this proposition. We cannot wonder at this, for there is no authority for it. The unexpressed foundation of the argument is that *consortium* is a term of art with a precise meaning."¹⁵

The attempt in the Court of Appeal to limit the scope of *consortium* with a principle requiring that *consortium* be "one and indivisible" was unfortunate. It served to herald an equivocal formula in an action already fraught with semantic confusion.

Undaunted, Mrs. Best brought an appeal in the House of Lords.¹⁶ Although their Lordships shared with the Court of Appeal a rejection of Mrs. Best's

10. See, generally: Brett, *loc. cit.* (*supra*, n.3); Forbes, M.Z., "Loss of Consortium: A Restatement", (1958) 32 *A.L.J.* 239; Baker, R.W., "Consortium And The Alleged Emancipation Of The Married Woman", (1951) 2 *Annual L.R.* 80.

11. [1952] A.C. 716.

12. [1950] 2 All E.R. 798.

13. [1951] 2 K.B. 639.

14. "*Consortium* is, according to *Birkett*, L.J., 'one and indivisible'; it consists of a number of elements, and in order to succeed the plaintiff must show a loss of each and every element, either permanent or temporary. With this *Cohen*, L.J. agreed; and Lord *Asquith* of *Bishopstone* expounded the same view, except that he preferred the phrase 'one and indiscrptible.'" See Brett, *loc. cit.* (*supra*, n.3), 396.

15. Brett, *loc. cit.* (*supra*, n.3), 396.

16. [1952] A.C. 716.

application, they did so on a different ground. In contradistinction to the lower appeal court that had avoided the issue of Mrs. Best's right to bring such an action, dismissing her claim on the failure to meet the requirement of "one and indivisible" injury, the House of Lords reverted to the ground held by the judge at first instance,¹⁷ namely, that *consortium* is not available as a right of action to a wife. However, four of their Lordships did offer their observations on the indivisibility principle in point of law.¹⁸ Lords Goddard, and Porter (tentatively), put their *imprimatur* on the Court of Appeal's ground of decision, with the accompanying inference that damages for loss of *consortium* should be limited to pecuniary loss.¹⁹ Lord Reid, (Lord Oaksey concurring), rejected outright any suggestion that mere impairment, as opposed to total loss of *consortium*, would not constitute sufficient injury in the eyes of the law for the purpose of awarding damages. Lord Morton failed to give an opinion on this point, thus holding the scales in the balance.

In Australia, the "one and indivisible" principle was rejected unanimously by the High Court in *Toohy v. Hollier*.²⁰ In that case an award had been made in the Supreme Court of Western Australia, by a single judge,²¹ to a husband, for his loss of *consortium* occasioned as a result of the bodily injuries sustained by his wife in a vehicular collision. The assessment fell under two heads: an award of special pecuniary damages, covering medical and housekeeping expenses incurred while Mrs. Hollier was hospitalized; and a further £1,000 described as general damages. Against the latter item the defendant appealed.

The High Court, (Dixon C.J., McTiernan and Kitto JJ.), delivering a single judgment, *a propos* "indivisibility", said that:

"In the present case the male plaintiff has suffered and will continue to suffer a very substantial prejudice or disadvantage of a material or practical kind because of the greatly reduced capacity of his wife to perform the domestic duties, manage the household affairs and give him her support and assistance. Why should this not form a proper head of consequential damage to him? The answer given by the appellant was that it is all a part of *consortium* and *consortium* is one and indiscernible. Unless you lose it all you have no remedy. We venture to think that such an answer proceeds from a supposition which finds no justification either in the history of the cause of action or in the common law principles by which it is governed, a supposition that the husband's remedy in damages is only for the violation of a right which the law gives him to the *consortium* of his wife and further that there is no actionable breach of the duty to respect the right except by the commission of an act completely depriving the husband of her *consortium*. The common law took no such abstract and theoretical position."²²

17. [1950] 2 All E.R. 798.

18. [1952] A.C. 716, 728 *per* Lord Porter, 733 *per* Lord Goddard, 735 *per* Lord Reid, (Lord Oaksey concurring).

19. This inference is drawn by Parsons, "Torts Affecting Domestic Relations", (1953) 2 *Annual L.R.* 591, 606, where he states of Lords Porter and Goddard's observations: "There is much in the words they have used to suggest that in future the husband's action against a negligent defendant will be confined to recovery for pecuniary loss."

20. (1955) 92 C.L.R. 618.

21. Unreported decision of the Supreme Court of Western Australia, *per* Wolff J.: see *Toohy v. Hollier* (*ibid.*).

22. (1955) 92 C.L.R. 618, 627.

The High Court upheld Mr. Hollier's award on the basis that the only limitation on a husband's remedy in this action is that found in the principle confining damages to "special" recovery; not in the sense of particular or specific loss but rather in the requisite proof of: "...some actual temporal loss, the deprivation of some material temporal advantage capable of estimation in money ..."²³

Applying this test to the facts of the instant case, the Court proceeded to state that:

"...the general conclusion appears to be that such elements as mental distress are to be excluded but the material consequences of the loss or impairment of his wife's society, companionship and service in the home and the expense of her care and treatment incurred as the result of the injury form proper subjects of compensation to the husband."²⁴

It would appear from this decision that the High Court had it in mind to exclude any claim for mental distress or emotional loss by the application of the "material or temporal loss" recovery principle. However, it is not immediately obvious what, if any, "material or temporal loss" ensues from the loss of a wife's "society and comfort" (or companionship), in contradistinction to the loss of her "services."²⁵ Yet it is apparent that in the High Court's decision, both elements, (if for convenience, or for logic, they may be separated), of "society" and "service" respectively, are subsumed together under the one claim for general damages. Thus, on the facts here, the damage to *consortium*, (taken as a single aggregate), was capable of reference to the recovery principle since the damage to Mrs. Hollier's "service" was a material loss. Whether "comfort and society" alone would satisfy the recovery principle in *Toohy v. Hollier*,²⁶ is a question not answered by the *ratio* in that decision. Therefore, notice should be made of the fact that although the High Court pays negative lip service to the indivisibility principle in *Best v. Fox*,²⁷ nevertheless, effectively the decision on the facts mirrors that principle. This conclusion is proposed on the basis of a twin premise: first, that the indivisibility principle precludes recovery for emotional loss where that loss *is not accompanied by pecuniary loss*,²⁸ and secondly, that the "material or temporal loss capable of estimation in money" test, represents an equation with pecuniary loss.²⁹ The second arm in the latter-stated premise is a literal construction of the High Court's recovery limitation. In his article, Brett suggests that such an interpretation might limit damages to the loss of a wife's "services", on the argument that:

23. *Id.*, 625.

24. *Id.*, 627.

25. Arguably, the distinction between "services" and "society" is formal. However, at times the distinction is used conveniently, since, on one view, both elements are part of a wife's marital obligation of "service" to her husband. See *infra*, n.39.

26. [1955] 92 C.L.R. 618.

27. [1952] A.C. 716.

28. The first arm of this twin premise is drawn by Parsons, *loc. cit.* (*supra*, n.19), 607, where he correctly identifies the reason behind the use of an indivisibility principle: "The crucial point is that to admit the divisibility of *consortium* may allow recovery for emotional distress alone ... To insist that *consortium* is indivisible at least prevents recovery for emotional distress negligently caused which does not accompany some pecuniary loss." [Emphasis supplied]. Recovery for emotional loss is therefore only successfully linked to damage if the indivisibility principle is satisfied. This implication may be drawn on one interpretation of *Lynch v. Knight* (1861) 9 H.L.C. 577 per Lord Wensleydale. See *infra*, n.33.

29. Brett, *loc. cit.* (*supra*, n.3), 431.

"...money is a medium of exchange, and it could be argued with some force that only those things which can be bought and sold, are 'capable of estimation in money'."³⁰

Nevertheless, Brett does add: "This argument would ... ignore the trend of decision on questions of damages generally."³¹ It is submitted that Brett's counter-argument is correct, with the following qualification. An appeal to the general principles by which tortious damages are assessed may not gain favour, given the proposition that recovery for pain and suffering, as afforded to the immediate victim of bodily injury, finds no parity in a claim for consequential damages by a third party. Besides the fact that the latter's claim is arguably too remote a consequence of the negligent act, with respect to *consortium*, although usually an action predicated on negligence, it is a separate action, the liability in which is not measured by a general duty of care, but by interference with a particular relational interest.

A better approach for disposing of either the narrow interpretation of the High Court's recovery principle, or the contention in Lord Goddard's *dictum* that "...the only loss that the law can recognize is the loss of that part of the consortium that is called servitium, the loss of service..."³² is one based on an analysis of the development of the *consortium* action itself. Such an analysis reveals that while a claim for mental distress was never recognized under the head of *consortium*,³³ nevertheless,

"Gradually, it seems to have become recognized that the value of the conjugal relationship to him [the husband] consisted not only in his wife's domestic assistance and the care of children, but also in the less tangible elements of her comfort and society..."³⁴

Lord Goddard's error lay in his assumption that *consortium* or *servitium* have had a particular *locus* in time and society, when in truth, both the elements, and the qualities constituent of these concepts, have not remained stationary. Support for this proposition may be found in *Toohey v. Hollier* where at one point in the judgment their Honours said *obiter*:

"There is no reason to suppose that the word *consortium* possessed or acquired a legal meaning ... The notion of sharing a domestic life was probably all that was intended."³⁵

Thus, we find in the early case of *Cholmeley and Conges*³⁶ a husband brought an action for loss resulting from the battery of his wife *per quod*

30. *Ibid.*

31. *Ibid.*

32. *Best v. Fox* [1952] A.C. 716, 734.

33. *Cf.* the recognized heads of claim in the old actions of criminal conversation and adultery. Also, the distinction between the element of "mental distress" and loss of "society" has been very fine where damage to *consortium* is alleged. Thus, in *Lynch v. Knight* (1861) 9 H.L.C. 577, 598-599, Lord Wensleydale said *obiter*: "Mental pain or anxiety the law cannot value, and does not pretend to redress, when the unlawful act complained of causes that alone; though where a material damage occurs, and is connected with it, it is impossible a jury, in estimating it, should altogether overlook the feelings of the party interested ..." [Emphasis supplied].

34. Fleming, *The Law of Torts* (4th ed., 1971), 576.

35. (1955) 92 C.L.R. 618, 625-626.

36. (1586) 4 Leon. 88; 74 E.R. 748.

negotia sua infecta remanserunt.³⁷ This plea was analogous to the action of *servitium*. By the eighteenth and nineteenth centuries we find in the alternative,

"... a variety of expressions describing the special damage of the husband ... You find allegations that the husband has lost the comfort, company or fellowship of his wife and her aid and assistance in his domestic affairs and business..."³⁸

It would appear from the change in the English pleadings that the law came to recognize a wife's "comfort and society" as a material interest, or temporal advantage, contained within her husband's *consortium*. *Consortium* has enjoyed no fixed legal meaning because views of the socially necessary functions of a wife have changed in accordance with the changing socio-economic bases of the family and domestic life.³⁹ Lord Goddard⁴⁰ referred to *Lynch v. Knight*.⁴¹ In that case, Lord Wensleydale drew an analogy between a wife's "services" and those of a hired domestic, tutor or governess.⁴² The analogy fails to include "comfort and society" in the concept of "services", (thus supporting Lord Goddard's view). However, it does succeed in highlighting the mercurial nature of *consortium*. Were an analogy to be drawn in this century, it would be between a wife's "services" and those of a supervisor of consumption, welfare (both emotional and psychological) officer, and housekeeper. Lord Goddard's failure to see her role of welfare officer as a modern version of her function to provide "comfort and society", possibly results from the relatively low status, and invisibility,⁴³ that increasingly, nowadays, attaches to her occupational station.

"As capitalism developed the productive functions performed by the family were gradually socialized ... Material production within the family — the work of housewives and mothers — was devalued since it was no longer seen as integral to the production of commodities."⁴⁴

37. The phrase may be roughly translated: "through which his business affairs remained not done".

38. *Toohey v. Hollier* (1955) 92 C.L.R. 618, 626.

39. The duty to provide "society" for a husband by *apparent* ladylike concerns and intelligent conversation was considered by some upper-class women in the nineteenth century as an oppressive assignment of social obligation and domestic chore. The view is expressed in the following extract from Elizabeth Barrett Browning's epic, *Aurora Leigh*, (First Book):

"I read a score of books on womanhood
To prove, if women do not think at all,
They may teach thinking ...

— books that boldly assert

Their right of comprehending husband's talk
When not too deep, and even of answering
With pretty 'may it please you', or 'so it is' —
Their rapid insight and fine aptitude,
Particular worth and general missionariness,
As long as they kept quiet by the fire
And never say 'no' when the world says 'ay',
For that is fatal — their angelic reach
Of virtue, chiefly used to sit and darn ..."

40. *Best v. Samuel Fox & Co. Ltd.* [1952] A.C. 716, 732.

41. (1861) 9 H.L.C. 577.

42. *Id.*, 598-599.

43. As Galbraith observes of the modern unacknowledged housewife: "Competence here is not remarked; it is assumed. If she discharges these duties well, she is accepted as a good homemaker, a good helpmate, a good manager, a good wife — in short, a virtuous woman." *Economics and the Public Purpose* (1974), 32.

44. Zaretsky, *Capitalism, the Family, and Personal Life* (1976), 65. Also, see generally, Firestone, *The Dialectic of Sex* (1972).

It is an issue of current contention, whether the roles of wife and mother have become devalued because they have become socially and economically useless, or whether they are considered useless because of their indirect link with commodity production and hence have no value. What is not debated, but correctly assumed, is that the quality of a wife's "services" have changed. In a post-industrial society, "...the family acquired *new functions* as the realm of personal life — as the primary institution in which the search for personal happiness, love, and fulfilment takes place."⁴⁵ The implementation of these functions became tasks socially assigned to the new housewife.⁴⁶

The *dicta* in *Best v. Fox*⁴⁷ and *Toohy v. Hollier*⁴⁸ represent attempts to restrict the scope of *consortium*. While *consortium* rests on a premise of inequality between spouses, such attempts are welcomed for their good intention. However, shifts in principle must take account of current social models of the family and its relations. Any change in the law that mistakes appearance for reality, and status for utility, will, unfortunately, succeed only in entrenching further the inequality sought to be remedied.

3. The Recovery Principle in Australia: The Loss of Sexual Capacity

Not long after *Best v. Fox* the case of *Snee v. Tibbetts*⁴⁹ came on appeal before the Full Court of the Supreme Court of New South Wales. The respondent had been awarded, *inter alia*, a sum described as general damages for injury to *consortium*, the loss being that of his wife's "comfort and society" during the period of her illness. The appeal was upheld unanimously. The majority's reasoning placed reliance on the "principles" to be found in the *dicta* of Lords Goddard and Porter in *Best v. Fox*. It has already been noted that their Lordships' observations, as propositions of law, lack nothing but authority. Consequently, Street C.J.'s ascription to these *dicta* the status of "principles"⁵⁰ is somewhat surprising. The following two extracts from their Lordships' speeches were those relied on by Street C.J., and Clancy J., respectively:⁵¹

"Today the damages which a husband receives for injury to his wife are commonly measured by his expenses, whether for medical treatment of the wife or in payment for household services which her injuries prevent

45. Zaretsky, *op. cit.* (*supra*, n.44). [Emphasis supplied].

46. *Id.*, 64. Also, Galbraith makes the point regarding the changing quality, though not *quantum*, of a house worker's role: "In pre-industrial societies women were accorded virtue, their procreative capacities apart, for their efficiency in agricultural labor or cottage manufacture or, in the higher strata of the society, for their intellectual, decorative, sexual or other entertainment value. Industrialization eliminated the need for women in such cottage employments as spinning, weaving or the manufacture of apparel; in combination with technological advance it greatly reduced their utility in agriculture. Meanwhile rising standards of popular consumption, combined with the disappearance of the menial personal servant, created an urgent need for labor to administer and otherwise manage consumption. In consequence a new social virtue came to attach to household management — to intelligent shopping for goods, their preparation, use and maintenance and the care and maintenance of the dwelling and other possessions. The virtuous woman became the good housekeeper or, more comprehensively, the good homemaker." *Op. cit.* (*supra*, n.43), 31.

47. [1952] A.C. 716.

48. (1955) 92 C.L.R. 618.

49. (1953) 53 S.R.(N.S.W.) 391.

50. *Id.*, 396.

51. *Id.*, 396 *per* Street C.J.; 401 *per* Clancy J.

her from performing, and little, if any, attention is paid to a loss of consortium which involves other considerations beyond those two."⁵²

Further comments on this proposition are two-fold. First, Lord Porter's *dictum* is weak in logic, since it argues to a restriction of recovery, as a matter of law, from what as a matter of fact has been recovered. Secondly, with the increasing numbers of married women entering the workforce, (though this was not an obvious fact at the time *Best v. Fox* was decided), the "comfort and society" element of *consortium* in a husband's claim is likely to assume predominance over the element of "services", since lawyers and judges may presume that a "working" wife no longer performs the services of a housewife.⁵³

"[A] husband nowadays constantly claims and recovers for medical and domestic expenses to which he has been put owing to an injury to his wife ... the latter is truly a remnant, and perhaps the last, of his right to sue for the loss of servitium..."⁵⁴

Again, this *dictum* suffers from the same logical flaw as does Lord Porter's. In the statement preceding the above extract, Lord Goddard describes the *consortium* action as "an anomaly".⁵⁵ Even if one agrees with his Lordship on this point, it is submitted that his sympathy for justice is not a *carte blanche* in the face of precedent. For the purpose of judicial decision, if one must find the law, then one must accept it as it is found. A temporary departure from the doctrine of precedent, even by a law lord, is apt to founder for lack of a clear statement of policy.

The law in Australia might have followed the direction taken in English case law as a result of these *dicta* in *Best v. Fox*. Their adoption in *Smev v. Tibbetts*⁵⁶ was short-lived due to the enunciation of the recovery principle in the later High Court decision.⁵⁷ The courts in Australia being bound by the latter,⁵⁸ have, in contradistinction to the English cases,⁵⁹ proved more generous in their interpretation of the scope of recovery in *consortium*, and have avoided the metaphysical considerations imposed on their English counterparts. They have, however, given rise to problems of their own; in particular, the meaning of "material or temporal loss" as a limiting principle on recovery of general damages, specifically with reference to "comfort and society". It is the construction of this principle as interpreted and applied subsequently which will now be considered.

In 1957 the New South Wales Supreme Court heard an appeal in the case of *Birch v. Taubmans Ltd.*⁶⁰ The facts effectively duplicated those in *Best v. Fox*,

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

53. The assumption that housewives do not "work" in the house and therefore have no calculable "earning capacity" in a primary tort claim, may now find a corollary in an assumption that "working" wives do have an "earning capacity" and therefore do not "work" in the house.

54. *Best v. Fox* [1952] A.C. 716, 733 per Lord Goddard.

55. *Ibid.*

56. (1953) 53 S.R. (N.S.W.) 391.

57. *Toohy v. Hollier* (1955) 92 C.L.R. 618.

58. For an examination of possible conflict between the binding authorities of England and Australia see, generally, Forbes, "Loss of Consortium: A Restatement", (1958) 32 *A.L.J.* 239.

59. E.g., *McNeil & Another v. Johnston* [1958] 1 W.L.R. 888; *Lawrence & Another v. Biddle* [1966] 2 Q.B. 504; *Kirkham v. Boughey* [1958] 2 Q.B. 338; *Cutts v. Chumley* [1967] 1 W.L.R. 742.

60. (1957) 57 S.R. (N.S.W.) 93.

save for one notable difference: the loss of sexual capacity was incurred by a wife. The plaintiff, suing for loss of "comfort and society", and, in particular, injury as a result of his wife's loss of sexual capacity, was Mr. Birch. This being the only fact upon which the case diverges from those relevant in *Best v. Fox*, the decision of the appeal court in the present case makes an interesting comparison. It will be recalled that in response to the anomalous nature of *consortium*, two of the law lords not only were not willing to extend the action to female litigants, but were also concerned to restrict the ambit of recovery in the case of a male spouse to the action.

Mrs. Birch, as a consequence of a motor accident, suffered permanent total destruction of her sexual capacity. The jury returned a verdict in favour of Mr. Birch's claim for sums covering his actual expenses. However, with respect to his claim for the loss of the "comfort and society" of Mrs. Birch the jury awarded him nominal damages of one pound precisely. Regarding this item, Mr. Birch appealed on the basis of the direction given by the trial judge to the jury.⁶¹ In the course of the appeal judgment, their Honours distinguished *Smee v. Tibbetts*,⁶² neither over-ruling, nor expressing disapproval of the previous decision of their own court.⁶³ The rejection of the *ratio* in the earlier case is, nevertheless, implicit in their single judgment. Although the appeal submission in *Smee v. Tibbetts* raised different questions,⁶⁴ the rejection of the right to recover non-pecuniary general damages as a matter of law in that case was not shared by the court in the instant case. Furthermore there is an express rejection in *Birch v. Taubmans Ltd.*⁶⁵ of the limitation (adopted as "principle" in *Smee v. Tibbetts*⁶⁶) proposed by Lord Goddard in *Best v. Fox*.⁶⁷ This is hardly surprising given the intervention of *Toohey v. Hollier* between *Smee's* case and that of *Birch*.

Preferring the *dicta* of Lord Reid, (and by implication, of Lord Oaksey), the court proceeded to consider the scope of the "limitation placed upon the husband's right to recover by the decision in *Toohey v. Hollier*..."⁶⁸ *A propos* the construction of "material or temporal loss", their Honours said in the course of their judgment:

"We think that the meaning of this limitation is plain. Injury suffered by the husband in the nature of *diminished happiness* or *lessened spiritual enjoyment* of his home life or his wife's society is not recoverable. Indeed, elements of this kind, including also such matters of *mental distress* suffered by the husband, are not in a true sense impairments of *consortium* at all."⁶⁹

In so saying, their Honours paraphrased a passage in *Toohey v. Hollier*. On the matter of the trial judge's award of general damages to Mr. Hollier, it was said:

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61. "The learned trial judge told the jury that they could award 'such sum as your sense of fitness leads you to believe ought to be awarded in respect of this ... matter.'" *Id.*, 95.
 62. (1953) 53 S.R. (N.S.W.) 391.
 63. (1957) 57 S.R. (N.S.W.) 93, 98. (In *Smee v. Tibbetts* the court consisted of Street C.J., Clancy and Owen JJ., while in *Birch v. Taubmans Ltd.* the members of the court were Herron, Manning and Owen JJ.)
 64. The appeal in the earlier case was brought by the defendant, whereas in the instant case, it was brought by the plaintiff.
 65. (1957) 57 S.R. (N.S.W.) 93, 96-97.
 66. (1953) 53 S.R. (N.S.W.) 391, 396.
 67. [1952] A.C. 716, 734.
 68. (1957) 57 S.R. (N.S.W.) 93, 99.
 69. *Ibid.* [Emphasis supplied].

"It is clear enough that of the elements taken into account in arriving at the assessment of damages none represented distress of mind, diminished happiness, *lessened enjoyment of home life or of conjugal society.*"⁷⁰

But the loss of the capacity for conjugal society was precisely the item of injury in the element of "comfort and society" for the loss of which Mr. Birch sought compensation in his appeal. If their Honours were to uphold his appeal, then the loss of his wife's sexual capacity would only have constituted legal injury to him if it could be characterized as one accompanied by "material or temporal" deprivation.

The question for their Honours' consideration then, was whether any other loss, other than that pertaining to happiness or enjoyment, was entailed by the destruction of Mr. Birch's conjugal society in the narrow sense of that term. It might appear from the passage cited above that the High Court in *Toohey v. Hollier* did not consider sexual capacity to be a matter falling within the "material or temporal loss" requirement. It will be noticed, however, that the kind of injury excluded was that represented by loss of happiness or enjoyment. Thus, the loss of sexual capacity may constitute a legal injury under the head of "comfort and society" provided that the claim of damages for such loss does not include compensation for the "spiritual" aspect of the injury.

The distinction between "material or temporal" and "spiritual" is a fine one in the present context. As their Honours said in *Birch v. Taubmans Ltd.*:

"The ultimate question of whether deprivation of sexual intercourse with his wife may be said to affect him in a "material or temporal" sense is far from easy of solution."⁷¹

In resolving in favour of the inclusion of sexual capacity within the "material or temporal loss" category, the court relied on two approaches. First, they argued from the husband's legal conjugal right. Second, they looked to the purpose of marriage. Each of these will be considered in turn.

The *American Restatement of Law — Torts* was cited with approval,⁷² their Honours finding authority for this approach in the consistency between the relevant paragraph in the *Restatement*⁷³ and the American decisions quoted in *Toohey v. Hollier*.⁷⁴ The following passage from one of those American decisions appears with approval in the High Court's judgment:

"The husband, also, of course, has a legal right to the society of the wife, involving all the amenities and *conjugal incidents* of the relation. ... For such *impairment*, so to say, *of the wife's society*, of his right of *consortium*, such deprivation of the aid and comfort which the wife's

70. (1955) 92 C.L.R. 618, 624. [Emphasis supplied].

71. (1957) 57 S.R. (N.S.W.) 93, 99.

72. *Id.*, 98.

73. *Restatement of the Law — Torts*, para. 693, p.492: "One who by reason of his tortious conduct is liable to a married woman for illness or other bodily harm is subject to liability to her husband for the resulting loss of her services and society, including any impairment of her capacity for sexual intercourse ..."

74. *Birmingham Southern Railway Co. v. Lintner* 141 Ala. 420, 427 (1904) per McClellan C.J.; *Furnish v. Missouri Pacific Railway Co.* 102 Ho. 669 (1890), 22 Am. State Reports 800, 801 per Barclay J.: both cases cited with approval in *Toohey v. Hollier* (1955) 92 C.L.R. 618, 628.

society, as a thing different from mere services, is supposed to involve, he is entitled to recover."⁷⁵

It is difficult to reconcile authorities such as those cited by the High Court with the common law rule of recovery articulated in the same judgment. To argue that destruction of the conjugal society in a wife falls within the scope of recovery because the husband has a legal right to the conjugal incident of marriage does not establish a remedy in any particular case. The latter must be found in the recovery principle. In *Toohey v. Hollier* a tension is created between the legal right to conjugal society (for which authorities can be found) and the legal remedy as measured by the test laid down in that case.⁷⁶ The test measures recovery not by a pre-existing right capable of differentiation in the "bundle of rights"⁷⁷ described as *consortium*, but rather by the common law rule cognisant only of legal injury that can be described as "material or temporal".

The problem is highlighted when one considers that the High Court intended to exclude claims for emotional loss or mental distress in the use of the test. Turning to the common law authorities in which the husband's conjugal right to his wife's society was protected as a legal right, one sees that recovery for injury to that right represents an exception to the common law rule. Actions such as those for enticement, and damages for adultery, stood as exceptions to any confinement of consequential damage to "material or temporal" loss. A husband's right to recover damages for adultery was recognized by the common law from the seventeenth century in the action for criminal conversation.⁷⁸ The action was abolished by the Family Law Act, 1975 (Cth.),⁷⁹ but its noticeable feature lay in the fact that there was no requirement "...of proof of pecuniary loss and [it] allowed recovery for emotional distress as such."⁸⁰

As recently as 1958 it was held in a South Australian decision⁸¹ that besides considerations of pecuniary loss, compensation could be awarded to a husband, "...for the injury to his feelings, the blow to his marital honour, and the serious hurt to his matrimonial and family life."

In the action for adultery, direct interference with a husband's conjugal right was the cause of the action.⁸² In the action for enticement, while adultery need not have been proved, loss of conjugal society was always one of the effects of the tortfeasor's interference recognized in the husband's claim.⁸³ Further, where actual pecuniary loss did form a head of damage in such actions, the

75. *Birmingham Southern Railway Co. v. Lintner* 141 Ala. 420, 427 (1904): cited with approval in *Toohey v. Hollier* (1955) 92 C.L.R. 618, 628. [Emphasis supplied].

76. (1955) 92 C.L.R. 618, 628.

77. This description of "*consortium*" as one denoting a "bundle of rights" was used in *Best v. Fox* [1952] A.C. 716, 736 *per* Lord Reid.

78. Brett, P., "*Consortium and Servitium*", (1955) 29 *A.L.J.* 321, 326.

79. Section 120.

80. Fleming, *The Law of Torts* (4th ed., 1971), 573. Also, see *Butterworth v. Butterworth and Englefield* [1920] P.126. In an action for adultery the headnote reads:

"The grounds on which damages are given are: (1) the actual value of the wife lost; (2) compensation to the husband for the injury to his feelings, the blow to his honour, and hurt to his family life.

The value of the wife has two aspects: (1) pecuniary, and (2) what may be called the *consortium* aspect ..."

81. *Page v. Page* [1958] S.A.S.R. 243, 244 *per* Abbott J.

82. Fleming, *op. cit.* (*supra*, n.80), 572-573.

83. *Id.*, 571.

loss of conjugal rights was concomitant with the cessation, either temporarily or permanently, of the marital relationship. In the case of adultery, the action could only be brought as a predicate of divorce proceedings;⁸⁴ while the gist of enticement was always deliberately inducing a wife to leave her husband.

It is respectfully submitted that the recognition of a husband's right to his wife's conjugal society has been an exception to the common law rule excluding emotional damage from recovery. Emotional loss as an independent item of legal injury has been co-terminous with the concept of a husband's legal conjugal right.

While enticement⁸⁵ and adultery have been abolished by statute as being products of otiose moral codes in Western society, the *consortium* action has increased in importance in this century. In this it is similar to the general action for negligence. As Fleming remarks:

"The relational interests within the family are much more liable to suffer from conduct which, rather than being aimed at disrupting that relation as by enticing a wife, merely happens to impinge upon it unwittingly..."⁸⁶

This is particularly so in relation to loss to a spouse consequent upon the other being injured in a vehicular collision or an industrial accident. It is perhaps for the existence of this state of affairs that the High Court in *Toohy v. Hollier*,⁸⁷ while appearing to measure the remedy by the right (as defined by the interest of *consortium*) nevertheless insisted that the outer parameter of the remedy should be measured by the common law rule of recovery. The principle of recovery applied strictly in an assessment of damages, should contain an action showing signs of potential litigation. The simultaneous use of the right and the remedy to measure legal injury in *Toohy v. Hollier* is comparable to the way in which the duty of care and the remoteness test in general negligence actions serve as alternative devices at judicial disposal for assessing the particular facts of a case.

The second approach in *Birch v. Taubmans Ltd.*⁸⁸ involved looking at the purpose of marriage. It is here that their Honours find a link between damage to sexual capacity and "material or temporal loss". The "material or temporal" as opposed to "spiritual" quality of matrimonial sex was not an immediately obvious conclusion for the judges to draw. While "services" in the sense of housekeeping are replaceable, the sexual relation between husband and wife has not in the past been acknowledged as anything but unique to each marriage.⁸⁹ Love, sex and marriage is an equation that society, until recently,

84. At least after the Act of Lord Campbell, 1837 (U.K.); in Australia, by virtue of the Matrimonial Causes Act, 1959 (Cth.), s.44, an action for adultery could be brought on divorce proceedings only. This has now been repealed by the Family Law Act, 1975 (Cth.), s.120, so that no action for adultery is available in Australia.

85. This action abolished by the Family Law Act, 1975 (Cth.), s.120. In South Australia, by the Wrongs Act, 1936-1977 (S.A.), s.35.

86. *Op. cit.* (*supra*, n.80), 576.

87. (1955) 92 C.L.R. 618.

88. (1957) 57 S.R. (N.S.W.) 93. The correctness of the approach and analysis of the present case should be measured against a different one taken by Forbes, "Loss of Consortium: A Restatement", (1958) 32 *A.L.J.* 239, 278.

89. This social outlook is changing as may be seen in the judgments of the Family Law Court (Australia). For example, in *In the Marriage of Todd (No. 2)* (1976) 9 A.L.R. 401 a divorce was sought under s.49 of the Family Law Act. That section provides for one roof separation. It was said *obiter* by Watson J. that casual acts of sexual intercourse do not necessarily constitute an interruption of separation between spouses intending to separate (403).

actively instilled in its members. The principle of *restitutio in integrum* is not applicable to such loss — the concept of compensation is. Yet compensation as a principle brings with it the implication that the remedy is one for loss of enjoyment or happiness in relation to the lost capacity or lost amenity concerned.

Thus, the court fastened onto the procreative purpose of marriage in order to link Mr. Birch's injury with the requirement of "material or temporal loss":

"No one disputes the importance of the particular ingredient in the *consortium* which has been extinguished ... which includes the wife's capacity to bear children in wedlock": see *Best v. Samuel Fox & Co. Ltd.* ... The first reason given in the Marriage Service for the ordination of marriage is the procreation of children."⁹⁰

Of course procreation and marriage are not inevitable partners. Procreation is a biological activity; marriage a social one. As marriage has been such a successful regulator of the former activity, one might be forgiven for mistaking an institution of the *status quo* for a state of nature. Marriage has made procreation a recognized material or temporal asset for the procreators, whereas biological reproduction in nature enjoys no such description except in the broad sense of a physical activity. Thus, procreation *intra* marriage has in the recent past come with a legal guarantee of legitimacy: an important social policy for the purpose of effecting the laws of inheritance and succession.⁹¹ Until recently, female procreators *extra* marriage were social and legal outcasts, while female procreators *intra* marriage of children to partners other than their husbands could be divorced on the ground of infidelity.⁹² This coin served as an assurance policy for men's temporal concern with their own paternity. Women *extra* marriage were *extra* law if they engaged in child bearing. Women *intra* marriage were *intra* law provided they bore by one man, their husband. Marriage has been a legal market and sexual capacity a commodity. The hallmark of "material" relations is existence in a market of exchange.⁹³

Given one accepts this account, one would accept as correct the second approach adopted by the court in *Birch v. Taubmans Ltd.*⁹⁴ By looking to the purpose of marriage and finding it to be procreation, their Honours successfully reveal a "material or temporal loss" that accompanies the deprivation of a husband's conjugal society.

The case leaves unanswered the question whether sexual capacity *qua* sexual expression is recoverable where there is injury to it. At the end of the judgment, the actual *ratio* is couched in cautious terms:

"And we are of opinion that where, as in this case, the opportunity ...[to procreate] has been taken away *absolutely*, such a deprivation

90. (1957) 57 S.R. (N.S.W.) 93, 99.

91. The status of children conceived *extra* marriage is now changed by: Children (Equality of Status) Act, 1976 (N.S.W.); Status of Children Act, 1978 (Qld.); Family Relationships Act, 1975 (S.A.); Status of Children Act, 1974 (Tas.); Status of Children Act, 1974 (Vic.). See also Status of Children Act, 1978 (N.T.). In Western Australia no equivalent statute exists, but a similar effect has been achieved by amendments to individual statutes dealing with specific areas such as succession.

92. Although adultery was a ground for divorce available to either party, for obvious reasons a woman's illicit sexual activity was more easily discovered, and more easily proved.

93. The last recorded strike in which the supply of matrimonial sex was held up is found in the "fictional" Greek drama, *Lysistrata*.

94. (1957) 57 S.R. (N.S.W.) 93, 99.

transcends matters which might well be said to be within the terms of the limitation above referred to and is a loss which is temporal rather than spiritual."⁹⁵

The decision in *Birch v. Taubmans Ltd.* might have stopped the pendulum's swing at the point where recovery for loss of conjugal society was limited to the loss of the procreative sexual capacity. Given that the current trend is to bear fewer children per couple,⁹⁶ such a limitation might prove in the future to operate unjustly. First, because it would restrict recovery to young plaintiffs such as Mrs. Best⁹⁷ or Mr. Birch. Second'y, because the figures indicate that spouses in their marital life will be making more use of sexual capacity *qua* sexual expression⁹⁸ rather than as a means to procreate. The introduction or appearance of two child families as a norm has and will bring childbearing to a halt relatively early in the lifespan of any particular marriage.

Added to this must be the fact mentioned above,⁹⁹ that the element of "comfort and society", in particular the item of "sexual activity", will gain increasing emphasis in *consortium* actions as married women continue to enter the workforce in increasing numbers. This increased mobility from the private to the public sphere has begun to reflect itself in an underlying assumption that the activity of domestic "services" is being shared.¹⁰⁰ The following three cases tend to support the foregoing propositions.

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95. *Ibid.* [Emphasis supplied]. The Court's use of the term "absolutely" should be compared with a similar implicit limitation on recovery for sexual capacity as found in *Best v. Fox* [1952] A.C. 716, 736 *per* Lord Reid in a *dictum* in which he referred to the "destruction" of a wife's capacity for sexual intercourse.
96. "The First Report of the National Population Inquiry summarized the historical development of this trend [decreasing number of children per family] by stating: 'Two features of family formation patterns seem to be emerging during the last decades: a concentration of childbearing into a shorter period of the lifecycle; and a declining proportion of children of higher birth order. In other words, there seems to be a tendency to have all children desired within a shorter period of time and for the desired numbers of children to be fewer than in the past.' (Borrie, p.78)": *Families and Social Services in Australia*, a Report to the Minister for Social Security, vol. 1, Commonwealth of Australia, 1978.
97. Assuming Mrs. Best would have had a right of action.
98. "Sexual activity" as a pursuit in itself is now being proliferated as a human need, for both females and males. Of course, sexual activity is as much a human need as coloured television. The remark is not facetious. Currently in the Family Court cases, the failure of spouses to watch television together has been admitted as some evidence of irretrievable breakdown. In the last century, evidence of this kind, had it been predicted, would have been considered science fiction. The point about sexual activity being a human need is that in fact we need to relate sexually and more satisfactorily to our partners in order to remind us of our human identity; public identity (by contrast), being built around the necessity to perform like a machine or robot. In order to buffer alienation, increasing emphasis on physical contact in our personal lives has become necessary. "Asked for an explanation for the proliferation of clinics for sex therapy William Masters (of Masters and Johnson) gave as one reason: '...a man and a woman need each other more now than ever before. People need someone to hold on to. Once they had the clan but now they only have each other.' *New York Times*, 29 October 1972": Zaretsky, *Capitalism, the Family, and Personal Life* (1976), 74.
99. *Supra*, n.53. Support for this proposition might arguably be found in the emphasis put on the "comfort and society" element of a husband's *consortium* in the case of *Markellos v. Wakefield* (1974) 7 S.A.S.R. 436. There the injured wife was in the workforce.
100. This assumption can be found in recent judgments of the Family Law Court. For example, *In the Marriage of Parey* (1976) 10 A.L.R. 259, 265 *per* Evatt C.J., Derriack and Watson JJ., it was said in relation to *consortium vitae*: "It also seems necessary to comment upon the fact that so often evidence in a case of this kind turns upon cooking, washing and housework. *As more men turn their hands to these activities they will become much less significant as indicators of the condition of the marital relationship.*" [Emphasis supplied]. This prediction should be compared with very recent sociological studies in Australia. See, generally, Harper, *Mothers and Working Mothers* (1979); Richards, *Having Families* (1978).

The cases are relatively recent. They are all South Australian. It should also be borne in mind that South Australia, in its period of rapid legislative reform, has further distinguished itself as the Sweden of the common law world by extending the right to bring an action for *consortium* to female litigants.¹⁰¹

More particularly, the cases are good authority for the following propositions. First, although the indivisibility principle was never seriously considered after *Toohy v. Hollier*,¹⁰² the precedent in *Birch v. Taubmans Ltd.* was inextricably linked with the fact that in that case Mrs. Birch's injury was total. She was rendered an invalid. It will be seen that less serious injury will not be distinguished in order to exclude a claim for loss of sexual capacity. Secondly, (and this follows from the last proposition), the possibility of claiming for loss of capacity for sexual activity, independent of procreative ability, is recognized. Finally, and surprisingly in the light of the foregoing analysis, "mental distress" as an item of recoverable loss in the element of "comfort and society", is held to be an injury with a legal remedy.

4. Some Recent South Australian Cases: Sexual Capacity

The case of *Birch v. Taubmans Ltd.*¹⁰³ was significant for the recognition of damage to a wife's procreative capacity. That element is now a proper subject for compensation in a husband's *consortium* action. The decision was underscored by the fact that the marriage of Mr. and Mrs. Birch was still in its early stage. Early last decade, the case of *Meadows v. Maloney*¹⁰⁴ came for consideration before Walters J., in the Supreme Court of South Australia. This decision is usually cited as authority for the proposition that by virtue of s.27a(9) of the Wrongs Act, 1936-1977 (S.A.), any damages awarded to a husband in a *consortium* action must be reduced by the victim's contributory negligence. It is cited here for another reason.

Mrs. Meadows was 52 years old at the time a motor accident rendered her permanently disabled, physically and mentally. In contradistinction to *Birch v. Taubmans Ltd.*, the case is significant in that it raises the question of the value of *consortium* to a husband in a marriage that has reached its maturity.

Walters J. awarded Mr. Meadows \$8,000 for his loss of *consortium*, under the description of general damages. That description in the judgment is divided into the elements of *servitium* and *consortium*.¹⁰⁵ Nevertheless, in view of the fact that the household comprised only the two spouses,¹⁰⁶ it is submitted that the award represented a substantial value being placed on the conjugal incident of companionship — an incident that acquires increasing value to marital partners as their marriage matures. Support for this is found in the judgment of Walters J., who took pains to stress that:

"Although ... such items as grief, unhappiness and distress of mind occasioned to Mr. Meadows by his wife's injuries and disabilities are to be excluded from an assessment of his damages, yet the law entitles him to be compensated for violation of his right to her *consortium*."¹⁰⁷

101. Statutes Amendments (Law of Property and Wrongs) Act, 1972 (S.A.), Pt. III, inserting s.33 in the principal Act; Wrongs Act, 1936-1972 (S.A.).

102. (1955) 92 C.L.R. 618.

103. (1957) 57 S.R. (N.S.W.) 93.

104. (1973) 4 S.A.S.R. 567.

105. *Id.*, 579.

106. The offspring presumably settled elsewhere in their own households.

107. (1973) 4 S.A.S.R. 567, 577. This *dictum* should be contrasted with the first arm of the supposition that met with disapproval in *Toohy v. Hollier* (1955) 92 C.L.R. 618, 627.

His Honour cited *Toohy v. Hollier* and quoted from an American authority in that case.¹⁰⁸ It will be recalled that the American *dictum* was authority for the recognition of a wife's "society" as something distinct from her "services".¹⁰⁹ His Honour's emphasis and his choice of authorities indicate that Mr. Meadows' loss of his wife's companionship was a substantial element in his claim for loss of *consortium*. The fact of his loss of her future "services" in the household did not raise any question of a claim for emotional or mental distress. Damage to the *servitium* aspect of *consortium* has always been considered to be a material loss. His Honour further relied on a decision of the High Court which made "...an assessment of two thousand five hundred pounds for loss of the wife's services and conjugal society".¹¹⁰ In that case it was said by Owen J.:

"Before the accident, he and his wife were living a normal family life. She looked after the household affairs ... and was able to give him that companionship and assistance that goes with a happy marriage. These things she can do no longer."¹¹¹

Meadows v. Maloney establishes the companionship element of "comfort and society". However, it does not extend the issue of damage to sexual capacity any further than *Birch v. Taubmans Ltd.*¹¹² Less than a year later, a case appeared in the same court. Mr. Hasaganic claimed for partial loss of *consortium*,

"...in that he has lost some of the services of his wife in relation to housework, and intercourse between them is now painful and difficult and happens infrequently."¹¹³

The presiding judge, Zelling J., was not disposed to award a high amount under either head of Mr. Hasaganic's claim.¹¹⁴ Mrs. Hasaganic sustained injuries when she tripped over a wire fence while employed as a teacher. The most serious injury was to her neck.¹¹⁵ However, his Honour did not dismiss the particular claim of damage to sexual activity in point of law. Furthermore, Mr. and Mrs. Hasaganic were the parents of three daughters. Thus, there was no question here of damage to sexual activity *qua* procreative capacity. Given that the statement of claim was sustained, the conclusion to be drawn is that where damage to sexual capacity *qua* sexual expression is alleged, then such injury may be considered as a fit subject for compensation. Zelling J. fixed the damages at \$1,000.¹¹⁶ The low figure does not belie the fitness of the subjects in the plaintiff's claim. Rather, it points to a lack of weight attached by the judge to the evidence called on both the subjects of housework and sex.¹¹⁷

108. *Birmingham Southern Railway Co. v. Lintner* 141 Ala. 420, 427 (1904), (cited with approval in *Meadows v. Maloney* (1973) 4 S.A.S.R. 567, 577).

109. *Toohy v. Hollier* (1955) 92 C.L.R. 618, 628.

110. (1973) 4 S.A.S.R. 567, 578.

111. *Horsnell v. Sturgess and Another (No. 2)* [1964] Q.W.N. 19, 48.

112. (1957) 57 S.R. (N.S.W.) 93.

113. *Hasaganic v. Minister of Education* (1973) 5 S.A.S.R. 554, 558.

114. *Ibid.* "I think his daughter was the better witness and that the husband does not do a great deal more round the house than many Australian husbands would think it necessary to do irrespective of whether their wife was well or not ... As far as sexual relations are concerned ... some of this disability comes from the accident and some from circumstances which have nothing to do with the accident at all."

115. (1973) 5 S.A.S.R. 554, 555.

116. Reduced to \$800 by virtue of 25% contributory negligence of the victim: Wrongs Act, 1936-1977 (S.A.), s.27a(9).

117. (1973) 5 S.A.S.R. 554, 558.

The last case worthy of notice in this area is *Markellos v. Wakefield*.¹¹⁸ Mrs. Markellos was involved in a vehicular collision. She suffered a "whiplash" injury to the cervical spine. To quote from the succinct headnote in the report:

"Although the injury, in itself, was not a severe nature [sic], the wife developed an anxiety neurosis and a personality change, which was substantial and irreversible. The finding of the trial judge was that she had changed 'from being a normal, happy, busy, healthy woman to a miserable hypochondriac whose depression is genuine'."¹¹⁹

Mr. Markellos brought a claim for \$2,500 for the loss of "services" and "society" of his wife. The claim was upheld. In his decision, Hogarth J. expressly emphasized the importance of the impairment to the plaintiff's marital society. His Honour acknowledged the reduced efficiency of the wife's domestic "services" in a single sentence. He then proceeded to enlarge on the "society" element of the claim, observing that:

"...the most serious thing from the male plaintiff's point of view is that instead of *enjoying* the company of a cheerful, happy wife, he must endure the society of a woman in a perpetual state of depression."¹²⁰

This statement challenges the *dicta* in *Toohey v. Hollier*. Not unaware of this, his Honour, after reciting a passage from that decision expressly excluding "such elements as mental distress", placed a construction on "mental distress" which differentiates two connotations of the term. In his Honour's opinion a distinction can be drawn between "mental distress" as it refers "...to a husband's natural sympathetic feeling of distress at seeing his wife in an injured condition..."¹²¹ and "mental distress" as it relates "...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."¹²² The former feeling is excluded from legal recovery. The latter is not, because it is: "...as much a loss of his wife's aid and comfort as is her inability to perform household tasks as before."¹²³

It is submitted that Hogarth J.'s decision extends the scope of loss to *consortium* to include a matter formerly outside the recovery principle in *Toohey v. Hollier*. The *ratio* is open to argument on principle, and recent authority. It is also arguable that the extension in the case is confined to its particular fact situation, *i.e.*, that the injury to the wife must be of a kind characterized by a change in her mental state. The latter limitation may be inferred from the language of his Honour's judgment. Nevertheless, from the viewpoint of the husband's claim, the wrong in question was the injury done to him; and his Honour clearly recognized the husband's own mental distress as a legal injury. The category of injury to the wife is irrelevant for the purpose of bringing a *consortium* action, providing only that her injury is commissioned by tortious act.

The interpretation of "mental distress" relied on by Hogarth J. is excluded by the recovery principle. It is submitted, however, that it should not be overruled by a later decision. His Honour's decision was just on the facts, albeit

118. (1974) 7 S.A.S.R. 436 (Hogarth J.).

119. *Ibid.*

120. *Id.*, 437. [Emphasis supplied].

121. *Ibid.*

122. *Ibid.*

123. *Ibid.*

wrong in law. If the recovery principle in *Toohey v. Hollier* was the only conceptual device used to measure "comfort and society", it could be argued that a different fate be accorded his Honour's extension of that element. However, all the courts, including that deciding *Toohey v. Hollier*, have met with considerable difficulty in characterizing this element within the recovery principle. While paying lip service to the principle in relation to "comfort and society", the courts have consistently resorted to authorities which merely assert a right of recovery. If the decision of Hogarth J. is wrong in law, it is no more so than other decisions in which contrary devices are used to include a claim for an item within "comfort and society". His Honour's decision is further proof of the inadequate principles in this area of *consortium*.

If Mr. Markellos enjoyed an exception to the recovery principle because his wife suffered a personality change, what then of recovery for loss of "comfort and society" occasioned by mere physical injury to the victim? If one asks what benefit a husband loses when the "comfort and society" of his wife is impaired or destroyed, it is difficult to imagine any injury to him other than an emotional, psychological, or mental one. With the possible exception of procreative activity, in general the judgments in the above-mentioned decisions reflect an inability to articulate the reason why loss of "comfort and society" is accompanied by "material or temporal loss". The view expressed by Hogarth J. is a realistic appraisal of the quality of benefit in a wife's "society".

Interference with the "comfort and society" incident of *consortium* can transform the familial household from a retreat, to a place of more than everyday burden. In view of the importance of this incident in marriage nowadays, a pecuniary value should be placed on it when it is destroyed or impaired by a negligent act. Indicative in the foregoing decisions is the necessity for a rationalization of the legal principles presently available to judges for the purpose of measuring and assessing the element of "comfort and society" in the *consortium* action. The possibility of provision by statute of an award for mental distress and emotional loss, similar to present provisions for *solatium*¹²⁴ in a fatal accidents claim, should be canvassed in relation to non-fatal injury. Any ceiling on such a statutory award should be fixed much higher than that presently accorded to *solatium*. First, the latter's present compensation is inadequate. Secondly, mental distress resulting from non-fatal injury, where the spouses remain married, represents a continuing damage. The premise "out of sight, out of mind" is not an operative one where an accident is less than fatal. Finally, as is apparent from the cases canvassed above, the *quantum* of loss varies from case to case. Variables include such facts as the duration of the marriage, the degree of injury to the immediate victim, and the nature of the "comfort and society" enjoyed prior to the commission of the tort.

5. The Right to Bring the Action:

The Common Law Development Until 1972

"Comfort and society" is one element in *consortium*; the loss of a wife's "services" is another. In the past, the latter element has been the predominant legally recognized injury in a *consortium* action. It has not shared the uncertainty attached to "comfort and society", either in principle or application, at least, not in kind and degree. Within the context of the right to bring an action, "services" will now be discussed.

124. Wrongs Act, 1936-1977 (S.A.), s.23(a), (b).

The issue in *Best v. Fox*¹²⁵ was whether a female litigant had a right to bring the *consortium* action. The question met with a singular reply: a unanimous negative from the House of Lords. The historical and conceptual bases upon which their Lordships relied have been adequately canvassed by commentators.¹²⁶ Consequently, the common law principles used to deny a wife a right of action for loss of *consortium* are, in this paper, accorded merit only for the purpose of examining some problems in the change of policy underlying the recent statutory extension of the action to wives in South Australia.¹²⁷

The right to bring an action for damage to *consortium*, whether through negligence or otherwise, has been denied to wives on the principle of inequality between spouses. Examination of the case law in this area reveals the principle as one with a character whose form has been as protean as its theme has been constant.

In *Best v. Fox* the right to bring the *consortium* action was held to be exclusive to men because of the original proprietary or quasi-proprietary basis. Lord Goddard, (with whom Lord Reid expressed agreement on this point), said in one passage of his judgment:

"...the action which the law gives to the husband for loss of consortium is founded on the proprietary right which from ancient times it was considered the husband had *in his wife*."¹²⁸

Similarly, Lord Morton said:

"It is true that a husband is entitled to recover damages for loss of consortium against a person who negligently injures his wife, but this exceptional right is an anomaly at the present day, as my noble and learned friend, Lord Goddard, has said. It is founded on old authorities decided at a time when the husband was regarded as having a quasi-proprietary right *in his wife*, and is now so firmly established that it could only be abolished by statute. A wife, on the other hand, was never regarded as having any proprietary right *in her husband*, and the old authorities do not help the appellant."¹²⁹

However, the husband's right to sue on this anomaly has, in the last 100 years, been held exclusive to him on bases which, though they share a common derivative, are refinements on the cruder proprietary concept. Thus, the express reference to the proprietary doctrine in their Lordships' speeches was in fact a resurrection of the original concept. The proprietary basis of *consortium* continued to exist only by implication in the case law of the nineteenth century and later. The French Revolution had, by this time, made its way into the social philosophy of England and the call for the emancipation of women and children, and for individualism, is reflected in less reactionary, although conservative, conceptual devices used by lawyers and judges to deny wives a right of action.

125. [1952] A.C. 716.

126. See, generally, Brett, "Consortium and Servitium", (1955) 29 *A.L.J.* 321; Parsons, "Torts Affecting Domestic Relations", (1953) 2 *Annual L.R.* 591; Forbes, "Loss of Consortium: A Restatement", (1958) 32 *A.L.J.* 239; Baker, "Consortium And The Alleged Emancipation Of The Married Woman", (1951) 2 *Annual L.R.* 80.

127. Wrongs Act, 1936-1977 (S.A.), s.33.

128. [1952] A.C. 716, 731. [Emphasis supplied].

129. *Id.*, 735. [Emphasis supplied].

Rather than property in a wife, reference may be found to: (i) the difference in status between spouses; (ii) the difference in quality of the husband and wife's *consortium* respectively, (the difference being characterized sometimes as one of logic, sometimes as one of law, or both); (iii) the superiority of the husband or his dominion over his wife. The shift from the proprietary concept has been located by some lawyers¹³⁰ as early as the eighteenth century (on the premise that *consortium* actions came to be brought in case rather than trespass). Be that as it may, the subtle shift in reasoning that "...for more than half a century ... [appears] to have been accepted *sub silentio* by the legal profession ..."¹³¹ is to be found crystallized in the views of Lord Wensleydale in the mid-nineteenth century case of *Lynch v. Knight*.¹³²

The plaintiff, Mrs. Knight, brought an action for slander against the defendant. As she had no right to maintain this action save on proof of special damage, she averred loss of her husband's *consortium*. She had been forced to return from the conjugal household to her father's house. The case came on appeal to the House of Lords. Their Lordships dismissed the claim on the ground that the damage alleged was too remote. Thus, although Mrs. Knight failed in her action, it was not on the ground that no right in her husband's *consortium* existed. However, the *obiter* remarks of Lords Campbell and Wensleydale respectively were used by lawyers in subsequent advocacies for or against the existence of such a right.

Lord Campbell, while not expressly conceding to a wife a right to bring an action for damage to *consortium*, was prepared to recognize the legal status of a wife's benefit in *consortium*, albeit that the subject matter of the benefit to her was merely the conjugal society of her spouse. On the other hand, Lord Wensleydale was of the opinion that her *consortium* had no legal character, because of its different character to that of a husband. The following extract from his judgment shows that the husband's right was not expressed in terms of any proprietary concept. An emphasis was placed on the distinction in logical type and therefore legal status of the husband's right in the *consortium* of a wife:

"...the benefit which the husband has in the *consortium* of the wife, is of a different character from that which the wife has in the *consortium* of the husband. The relation of the husband to the wife is in most respects entirely dissimilar from that of the master to the servant, yet in one respect it has a similar character. The assistance of the wife in the conduct of the household of the husband, and in the education of his children, resemble the service of a hired domestic, tutor or governess; is of material value, capable of being estimated in money; and the loss of it may form the proper subject of an action, the amount of compensation varying with the position in society of the parties. This property is wanting in none. It is to the protection of such material interests that the law chiefly attends ... The loss of such service of the wife, the husband, who alone has all the property of the married parties may repair by hiring another servant; but the wife sustains only the loss of the comfort of her husband's society and affectionate attention,

130. Baker, *loc. cit.* (*supra*, n.126), 81; see also, *Wright v. Cedzich* (1930) 43 C.L.R. 493 *per* Isaacs J.

131. Brett, *loc. cit.* (*supra*, n.126), 394.

132. (1861) 9 H.L.C. 577; 11 E.R. 854.

which the law cannot estimate or remedy. She does not lose her maintenance, which he is bound still to supply ..."¹³³

As Brett remarks, Lord Wensleydale's reasoning was mere rationalization.¹³⁴ The law recognized, and still does, (at least in Australia), a husband's legal right to the "comfort and society" of his wife as an incident of *consortium* separate from a wife's "services". It was on this point of law that Lord Campbell expressed disagreement. Unfortunately, the observations of Lord Campbell left themselves open to ambiguous interpretation. Consequently it was argued he did not by his *dicta* recognize a wife's right to sue for damage to *consortium*. Rather, her benefit in the *consortium* of her spouse could, where she suffered deprivation of it, constitute legal injury. Legal injury finds a remedy, however, only if it is predicated on a right. This is the interpretation given to Lord Campbell's judgment by Rich J., in the Australian case of *Wright v. Cedzich*.¹³⁵ In that decision his Honour extended the *dictum* of Lord Wensleydale. His Lordship favoured a logical difference between a husband's right to "services" and a wife's mere right to "society". Rich J. cited authority extending that proposition: with respect to the element of "society" alone, a wife's right to her husband's is not the same in kind, degree, and value, as his right to her society.¹³⁶

Lord Goddard in *Best v. Fox*¹³⁷ considered Rich J.'s analysis of Lord Campbell's judgment with approval. His Lordship also recognized the legal nature of a wife's "society" as one giving rise to a right of action where the cause was enticement.¹³⁸ This represented an inconsistency in Lord Goddard's judgment. It was said that:

"Enticement actions depend ... on the well established legal principle that the violation of a legal right committed knowingly is a cause of action.[¹³⁹] ... A wife is entitled to enjoy the society, comfort and protection of her husband and to be maintained by him, and if another entices him from her so that she is bereft of those benefits she is as much entitled to claim damages as is a husband whose wife is for any reason, save humani'y, abducted or persuaded to leave his home."¹⁴⁰

The acceptance in *Best v. Fox* of a wife's right to sue for loss of *consortium* where the interference was enticement, and the simultaneous rejection of her right to bring a general *consortium* action was wrong. Brett remarks of their Lordships' speeches:

"...a curious hovering between history and principle. If a decision is to be based on principle, two courses are open — abolish the action altogether, or allow it to husband and wife alike ... in the middle of the twentieth century, there is no principle which justifies giving the action to a husband and denying it to a wife. This can only be justified by an appeal to history. But history does not support the extension, approved by the House, of the enticement action to a wife."¹⁴¹

133. *Id.*, 598-599; cited in Brett, *loc. cit.* (*supra*, n.126), 394.

134. Brett, *loc. cit.* (*supra*, n.126), 394.

135. (1930) 43 C.L.R. 493, 525.

136. *Id.*, 524.

137. [1952] A.C. 716, 732.

138. *Id.*, 730.

139. It was this principle upon which Isaacs J. unsuccessfully attempted to found his dissenting judgment in *Wright v. Cedzich* (1930) 43 C.L.R. 493; *infra*, n.157.

140. [1952] A.C. 716, 729 *per* Lord Goddard.

141. Brett, *loc. cit.* (*supra*, n.126), 396.

The resurrection of the proprietary concept in *Best v. Fox* highlights the entrenchment of inconsistency in the common law development of a wife's right to *consortium*. One principle upon which the existence of a wife's right to bring an action for enticement is placed makes this tort *sui generis* and distinguishable from the general *consortium* action. One point of distinction is that interference in the former had to be wilful. However, that consideration while it is differential does not explain the relatively recent judicial deference for assuming "society" to be a mutual legal obligation in one action, and not in another. In point of law, enticement, like the *consortium* action was originally based on the proprietary concept. The development in the common law this century, that has given to wives one action but not another, in both of which the damage and underlying principle is the same, can only be categorized as arbitrary. It is this contingent process that has been anomalous, and not a husband's sole right to the *consortium* action.

Arguably the procedural difficulties, removed by the Married Women's Property Acts,¹⁴² account for this inconsistency. Before 1882, a husband would not have joined himself in his wife's action for enticement. Even if he did the law would not have given a remedy where damages could be pocketed by a wrongdoer. In contrast a husband had something to gain from joining his wife in a *consortium* action brought by her for negligent interference with the relation of her husband.¹⁴³ But if that argument is used to explain the immutable common law of the tortious actions of a wife in the twentieth century, it falls down when the United Kingdom development is contrasted with its parallel in Australia.

A wife's right to bring an action for enticement was first recognized in the United Kingdom in 1923.¹⁴⁴ In a High Court counterpart, *Wright v. Cedzich*,¹⁴⁵ it was held that the plaintiff, a wife, had no right to bring such an action.¹⁴⁶ The main judgments are those of Rich J., (in the majority), and Isaacs J., the only dissident.

Knox C.J. and Gavan Duffy J. in a joint judgment cite, with approval, the *dictum* of Lord Wensleydale in *Lynch v. Knight*.¹⁴⁷ Little attention is given to the origins of the action, their Honours being satisfied to find such origins in the superior status of the husband as head of the family. Social change was accorded brief attention at the end of their judgment where they remarked that:

"The common law has always recognized the dominion exercised by the husband over the wife, though the exact nature and extent of the dominion has changed with the development of society, and the husband's action is apparently based on an interference with such dominion. The wife never had any such dominion over her husband."¹⁴⁸

142. Married Women's Property Act (45 & 46 Vict., c.75), 1882 (U.K.); Married Women's Property Act, 1883-1884 (S.A.), now absorbed into the Law of Property Act, 1936-1975 (S.A.).

143. This argument was rejected by Rich J. in *Wright v. Cedzich* (1930) 43 C.L.R. 493, 522-523.

144. *Gray v. Gee* (1923) 39 T.L.R. 429 *per* Darling J.

145. (1930) 43 C.L.R. 493.

146. "In Australia the authority of the decision of the Full Court of New South Wales Supreme Court in *Johnson v. The Commonwealth*, which allowed an action by a wife for loss of consortium arising out of the wrongful imprisonment of her husband, was swept away by the pronouncement of the High Court in *Wright v. Cedzich* ...": Baker, *loc. cit.* (*supra*, n.126), 85.

147. (1861) 9 H.L.C. 577 *per* Lord Wensleydale, cited with approval in *Wright v. Cedzich* (1930) 43 C.L.R. 493, 498.

148. (1930) 43 C.L.R. 493, 500.

In contradistinction, Starke J. was sympathetic to the changing position of wives and inter-spousal relationship. Nevertheless, he held that the plaintiff had no right of action. Relying on the separation of powers doctrine he said:

"If the law be archaic, and not in keeping with modern development and thought, the remedy lies with the Legislature, and not with the Court, for the Court's duty is to expound, not to make, the law."¹⁴⁹

Rich J. reached agreement with the majority after a long excursion into history and authority, and adopted a different approach. In his Honour's opinion, the principle upon which a wife's action for enticement was not capable of being maintained was that the rights of a husband to the society and person of the wife are different and greater from the same rights of a wife to her husband.¹⁵⁰ *Consortium* was never a mutual right given to a spouse by virtue of the status of marriage:

"...the husband's right to complain of a stranger's act *per quod solamen et consortium uxoris amisit* was not given to him as one of two spouses with corresponding rights which each was entitled to vindicate against the world, but because as the husband he was entitled to maintain the freedom of his household from the invasion or impairment of strangers. There is nothing in its character to suggest that it belonged to each of the spouses."¹⁵¹

It may appear that his Honour identified the same concept of "dominion" referred to in the judgment of Knox C.J., and Gavan Duffy J. However, from the remainder of his judgment it is clear that his Honour did not confine the relevance of a husband's right to "control",¹⁵² (with the corollary obligation to "protect"), to some locus in time past. "Dominion" or "control" is not relevant in his Honour's judgment for being merely binding legal precedent. His Honour proceeded to examine the encroachment made on a husband's right by social change. He used as an indicator of that change, the Married Women's Property Act.¹⁵³

By reading the Act *expressio unius*, the learned judge dismissed any argument founded on an assumption of intention in the Act to extend all existing legal rights of husbands to their wives. Without referring directly to contemporary society, Rich J. found evidence for the continuing existence of a husband's "control" as a present fact. Pointing out that marriage placed the

149. *Id.*, 535.

150. *Butterworth v. Butterworth and Englefield* [1920] P.126, 131 *per* McCardie J., cited with approval in *Wright v. Cedzich* (1930) 43 C.L.R. 493, 531 *per* Rich J.

151. *Wright v. Cedzich* (1930) 43 C.L.R. 493, 522 *per* Rich J.

152. The concept of "control", as relied on by his Honour, is made clear when the *dicta* of McCardie J., *Butterworth v. Butterworth and Englefield* [1920] P.126, 131, are read. Rich J. approved these *dicta* as being correct statements of the principles upon which the husband's right is distinguishable. Citing Lush J. in his *Treatise on the Law of Husband and Wife* (3rd ed.), 13, McCardie J. quotes with approval: "...the wife is under the coverture and protection of the husband, but the husband is not under the coverture or protection of the wife." The obligation of protection on a husband had a limiting operation in the Roman Law of *delict* similarly affecting the rights of action in a wife. Thus, in a translation of Justinian's Code it is revealed that for the tort of "outrage" to a wife, both husband and wife could sue for their respective damage. However, for outrage to a husband, only he had a right of action. His wife had no action in this case since: "...wives should be protected by their husbands, not husbands by their wives." Book IV, Title IV.2.

153. His Honour's examination was made within the context of the procedural-bar argument; see *supra*, n.143.

non-mutual obligation of maintenance on a husband, he considered that the Act, (read narrowly or otherwise), did not change the fact in legal (and therefore social) reality that it is the husband "...who chooses and can change the matrimonial domicile".¹⁵⁴

Despite the positivism of his Honour's approach, the implications for women and society in the judgment at the time *Wright v. Cedzich* was litigated can be supported by social facts. For while female emancipation could be measured in the comparative freedom of women to seek work,¹⁵⁵ suffrage, and the right of a married woman to own property, female equality had not extended itself into an existing social paradigm in which she was expected to work. When she did, the location of her employ was not, and still is not, a factor in deciding the location of the family home.

In contrast to the approach of Rich J., Isaacs J. embraced a chivalrous defence of married women. In what is now a famous *dictum* his Honour stated:

"I utterly reject the view that *consortium* in point of law means, on the part of the woman, her society and services (using those terms in the most unmeasured sense), and, on the part of the man, the one duty of cash remuneration in maintaining her, for which she may sue her husband directly if he fails to provide it. Sitting here, I decline to declare judicially that Australian wives occupy such a repellent position of legal and moral degradation."¹⁵⁶

His Honour based the plaintiff's right to bring her action on the principle that the law recognizes the wilful invasion of a person's legal right.¹⁵⁷ The weakness of this proposition lies in the fact that it begs the question. For by what principle, or authority, does a wife have a legal right in *consortium* capable of any type of interference? Isaacs J. attempted to meet that question by characterizing the correlative rights and duties of marriage as being mutual. Unlike Rich J., who easily found laws with respect to marriage and domicile to prove the immutable status in law of the inter-spousal rights, Isaacs J.'s argument rested principally on a plea of what the law ought to be. Analogy was drawn with the law of desertion to establish that in law, "A wife is entitled to her husband's society, and the protection of his name and home, in cohabitation."¹⁵⁸ The weakness of this metaphor lies in the fact that the law of desertion recognizes a wife's right only after the marriage ceases to subsist, and further, such recognition takes account of little but her right to maintenance. In a further analogy his Honour proposed that: "A wife's services ... are those not of a hired employee, but of a *partner* in the common undertaking."¹⁵⁹

With respect it is submitted that the latter statement is remarkable not for its correct exposition of marriage law as it then was, but for its demonstrable

154. (1930) 43 C.L.R. 493, 525, citing Eversley, *The Law of the Domestic Relations* (3rd ed., 1906), 370-371.

155. Lower class women have never had any choice in this respect since industrialization.

156. (1930) 43 C.L.R. 493, 506.

157. *Supra*, n.139.

158. *Wright v. Cedzich* (1930) 43 C.L.R. 493, 506 per Isaacs J., citing *Yeatman v. Yeatman* (1868) L.R. 1 P. & D. 489, 481 per Lord Penzance.

159. (1930) 43 C.L.R. 493, 510 [emphasis supplied], in refutation of Lord Wensleydale's analogy in *Lynch v. Knight* (1861) 9 H.L.C. 577.

foresight. In characterizing marriage as a partnership, his Honour pre-dated the philosophy embodied in the Family Law Act, 1975 (Cth.), by 40 years.

Despite his enlightened views, there are passages in his Honour's judgment which, while they stop short of Rich J.'s patriarchal conservatism, nevertheless betray a benevolent paternalism that fails to come to terms with the concept of a husband's "greater" or "superior" status, so much relied on by Rich J. Thus, immediately following the last quoted passage, in which Isaacs J. asserted the "partnership" nature of marriage, he added:

"The husband may be the *managing* partner in many respects, but the business of life in which both parties have embarked is a life *partnership*, whether viewed from the individual standpoint or that of the community."¹⁶⁰

A little earlier in his judgment his Honour referred to:

"...the *natural leadership*, and in most cases the *decisive voice* of the husband as head of the family in the management of domestic affairs. But his leadership is not that of a despot or a slave-master."¹⁶¹

While *Wright v. Cedzich* is no longer good law in Australia with respect to the action for enticement,¹⁶² it is still authority for the inference that a wife has no right to bring a general action for loss of *consortium*.¹⁶³ In the same statute abolishing the action for enticement, the South Australian legislature has extended the consortium action to wives in this State.¹⁶⁴ The principle of equality, so much pressed by Isaacs J. in *Wright v. Cedzich*, has seen legislative reform at both federal and state levels in the last ten years. Reform has come in the wake of a climate of increased social awareness. Post-war economic and social change has effected an actual change in the socio-economic position and status of women. There is a discernible shift towards a pluralism of models both for married women and the family. In the light of this process, the extension of the *consortium* action to South Australian wives is now considered.

6. Equality of Rights — Fact or Fiction :

Wrongs Act, 1936—1977 (S.A.), s.33

In 1972 an amending section to the Wrongs Act, 1936-1959 (S.A.), was passed. Section 33 now provides that:

- "(1) Where a person causes injury to another (by wrongful act, neglect or default, he shall (whether or not the injury results in death) be liable in damages to the wife of the injured person for loss or injury suffered by her as a result of the loss or impairment of the consortium of husband and wife.
- (2) The damages shall be assessed in the same manner as upon a claim by a husband for damages in tort in respect of loss or impairment of consortium."

160 (1930) 43 C.L.R. 493, 510. [Emphasis supplied].

161. *Id.*, 506. [Emphasis supplied].

162. Family Law Act, 1975 (Cth.), s.120; Wrongs Act, 1936-1977 (S.A.), s.35.

163. Excepting South Australian jurisdiction due to amendment giving action to wives; Wrongs Act, 1936-1977 (S.A.), s.33.

164. *Ibid.*

This amendment followed a recommendation in the *Eleventh Report of the Law Reform Committee, 1970 (S.A.)*, in which it was suggested that a wife should have, "...the same right of action in respect of loss or impairment to consortium in tort as her husband would have in the same circumstances."¹⁶⁵

In their *Report* the Committee made it clear that the decision in *Best v. Fox*, rested as it was on the proprietary principle, was the law sought to be remedied by their recommendation.¹⁶⁶ The policy of the Committee was to remove the taint of sexual discrimination from this area of the law. The extension of the action to wives was not the only available option to the law reformers in order to effect such a policy. A similar committee in Great Britain had put forward proposals to replace the action for loss of consortium by: "...a general cause of action available to members of the family who suffer pecuniary loss as a result of the victim's injuries ..."¹⁶⁷ The South Australian and Great Britain Committees, while sharing a common purpose in their attempts to perfect a non-discriminatory system of individual compensation,¹⁶⁸ differed in their recommendations for the implementation of such a policy: retention and extension of the consortium action, abolition and replacement of it, respectively.

Why did the South Australian committee adopt this amending *modus operandi* in relation to the *consortium* action? Presumably because it considered that the retention of the old *consortium* action served the best useful purpose. This inference is drawn from the fact that in the same *Report*, the same Committee recommended the abolition of the action for enticement, rather than its extension to wives, because the action did not serve "...any useful purpose at the present day"¹⁶⁹ There can be no disagreement with this reasoning in relation to enticement as an available action either to husbands or wives.¹⁷⁰ However, the difference in treatment accorded the two actions by the Committee raises the question: does the extension of the *consortium* action to wives in its common law form serve either any or the best possible useful purpose?

To the extent that the element of "comfort and society" is a mutual incident of *consortium*, the answer to the question posed must be affirmative. In their *Report*, the Committee stated that:

"...in speaking of consortium here we are not referring to the narrow concept of a wife's right to *consortium* dealt with by the High Court in *Wright v. Cedzich* ... but in the wide sense used in *Best v. Samuel Fox* ..."¹⁷¹

It will be recalled that a wife's right to *consortium*, (albeit in the context of enticement), was confirmed in *Best v. Fox* as one in which she was entitled to the society, comfort, protection and maintenance of her husband.¹⁷² Thus, under s.33 of the Act a wife may seek compensation where there is loss or

165. *Eleventh Report of the Law Reform Committee, 1970 (S.A.)*, para. 5, p.7.

166. *Id.*, para. 5, p.6.

167. Clarke, "What is a Wife Worth?", (1978) 5 *B.J.L.S.* 1, 3; *Law Reform Committee's Eleventh Report (Loss of Services)* (1963) Cmnd. 2017; *Law Commission's Published Working Paper No. 19* (1968), paras. 46-87; but see proposals in the Commission's *Final Report, No. 56* (1973), paras. 115-159.

168. The phrase is borrowed from Clarke, *loc. cit.* (*supra*, n.167), 3.

169. *Eleventh Report of the Law Reform Committee, 1970 (S.A.)*, para. 8, p.6.

170. Enticement as an activity no longer accords with social attitudes.

171. *Eleventh Report of the Law Reform Committee, 1970 (S.A.)*, para. 5, p.6.

172. [1952] A.C. 716, 730 *per* Lord Goddard.

impairment of the "comfort and society" of her husband resulting from the commission of a tort. The element of "protection" would be worth little additional value in any award, while her right to "maintenance", although of substantial pecuniary value, would be met in her husband's primary claim under the head of his lost earnings capacity. The principle against double recovery would preclude any inclusion of this element in her action.¹⁷³ Further, the interpretation given to s.27a(9) of the Act¹⁷⁴ excludes the possibility of her claiming any difference represented by the reduction in her husband's primary claim due to his contributory negligence. Thus, although the common law rule regards the *consortium* action as separate and independent of the immediate victim's assessment of damages, paradoxically the Wrongs Act, 1936-1977 (S.A.) in one section, effectively abolishes what might have been a substantial claim in a wife's action for loss of *consortium*.¹⁷⁵

Unless women marry themselves to wives in the future,¹⁷⁶ the possibility of claiming substantial damages under the "services" element of *consortium* is very remote. The "services" element has always been the most valuable in a husband's claim. It is the difference in marital roles that makes s.33 thin in equitable content with respect to wives. There is little evidence to support any suggestion of a trend towards an inverted re-assignment of social roles between spouses. In a recent sociological survey¹⁷⁷ of roughly 190 Melbourne couples, the sample revealed only one marriage¹⁷⁸ in which the traditional breadwinner contract had been reversed by informal agreement between the spouses.

Mrs. Irvin works full-time in the work-force. Mr. Irvin works full-time as the house-worker/child-minder in the matrimonial household. If Mrs. and Mr. Irvin ever move to South Australia, Mrs. Irvin can rest safe in the knowledge that although insurance companies will not easily give her husband any policy covering accidents to him,¹⁷⁹ nevertheless she would probably have a good claim on proof of any loss of her husband's housekeeping services under s.33.¹⁸⁰ For the majority of marriages in South Australia, however, this particular type of role-reversal is likely to remain a very rare occurrence indeed. Thus, any prediction of wives bringing statutory actions for the loss of the *servitium* aspect of *consortium* would be more an expression of wishful polemic than actual probability.¹⁸¹

173. Cf. *Best v. Fox* [1952] A.C. 716, 730 per Lord Goddard commenting on the separateness of the two actions.

174. *Meadows v. Maloney* (1973) 4 S.A.S.R. 567; *Hasaganic v. Minister of Education* (1973) 5 S.A.S.R. 554. Cf. English decision of *Mallett v. Dunn* [1949] 2 K.B. 180.

175. The possibility of extending the *consortium* action to wives was negated for lack of any useful purpose in Parsons, "Torts Affecting Domestic Relations", (1953) 2 *Annual L.R.* 591, 610, save for the argument that she could claim what "the husband might be precluded by contributory negligence". A similar suggestion was put forward by Luntz, *Assessment of Damages For Personal Injury And Death* (1974), 112. The argument does not apply in South Australia due to the interpretation given Wrongs Act, 1936-1977 (S.A.), s.27a(9).

176. No tautology intended by this statement.

177. Harper, *Mothers and Working Mothers* (1979).

178. *Id.*, 244.

179. "[H]ousewives cannot easily get cover against sickness and accident, because benefits are usually a percentage of income and do not apply where there is no income. Very few companies offer cover where there is no income." *Report of the Royal Commission into Human Relationships* (1976), vol. 5, para. 154.

180. Wrongs Act, 1936-1977 (S.A.).

181. There are no reported cases of wives bringing an action under s.33 since the amendment was passed.

It was the intention of the South Australian legislature to remove the inequality inherent in a husband's exclusive right to sue for loss of *consortium*. At the Bill's second reading in Parliament, the then Attorney-General, the Honourable Mr. King, said in a speech defending the passage of the Bill:

"The general purpose of the Bill is to remove from the law any remaining vestiges of the idea that a woman should be accorded a lower status and inferior legal right to those of a man. *The Bill also removes from the law certain other principles that arise from obsolete notions regarding the interpersonal relationships of men and women.*"¹⁸²

Ironically, the principle of inequality, expressed in only one of its forms in *Best v. Fox*,¹⁸³ remains entrenched in the provisions of s.33.¹⁸⁴ By retaining the common law action of *consortium*, s.33 envisages no change in the right of a husband to sue for the loss of his wife's "services". The medieval basis of his action can no longer be used in South Australia to deny a wife a right of action for loss of her husband's *consortium*. However, a medieval philosophy is reflected in the continued existence of the *consortium* incident of "services" as one in which the *legal* benefit is to the husband. Section 33 does not remove discrimination, it merely shifts it. In the foregoing historical analysis it was contended that the original proprietary concept had, at least in the last century of case law, been replaced by other discriminatory concepts generic of the same principle of inequality between spouses. The more recent conceptual devices of "dominion", "greater status", and "head of the household", (all linked with a husband's role of wage-earner), still underlie s.33 of the Wrongs Act, 1936-1977 (S.A.).

What then of the question, why does a husband still have a right to sue for loss of his wife's capacity to perform domestic duties? The retention of this interest in him can only be justified or explained by reference to the fact that a wife is the dependant of her wage-earning husband, and he is thus head of the household.

It is this lacuna that has gone unnoticed by judges and legal commentators alike. They have argued for the legal recognition of a wife's *consortium* in her husband on the basis of female emancipation.¹⁸⁵ Thus, because unequal social status is attached to the different roles of husband and wife, no legal status for a wife's role has been recognized *in her*. The social division of roles in the

182. *Hansard* (March 8, 1972), 3702. [Emphasis supplied]. The extract as a whole refers to a consolidation of amendments to the common law. The emphasis relates to the specific intention behind s.33.

183. [1952] A.C. 716.

184. The identity of equality as something equivalent to similar legal rights is not always assumed by policy makers. For instance, both parties to a contract have always had the right to sue on the agreement, yet both federal and state legislatures have enacted consumer protection legislation this decade. The policy behind such reforms sweeps away the prior *laissez-faire* philosophy that assumed equality of bargaining power. Consumer protection legislation is thus an attempt at legal equality predicated on socio-economic inequality.

185. The assumption that housework as a category falls inside a husband's legal interest and is not thereby indicative of legal inequality is expressly stated in Parsons, *loc. cit.* (*supra*, n.126), 610, n.84: "Once confine the husband's action to *pecuniary loss and the argument for recognition of the wife's action* based on equality of the sexes loses its sting." [Emphasis supplied]. Similar "logic" is expressed in Fleming, *The Law of Torts* (4th ed., 1971), 578, where he says: "The sting of sex discrimination apparent in this decision [*Best v. Fox* [1952] A.C. 716] is somewhat alleviated by the fact that, unlike a husband, a wife does not ordinarily incur expenses for ... household services as the result of the other's disablement."

domestic sphere, in a society which sets store by pecuniary achievement,¹⁸⁶ has resulted in the ascription of natural law being given to a husband's social status of head of the household.¹⁸⁷ Greater status¹⁸⁸ is accorded to the breadwinner because of the existence of the other great social division of labour in present capitalist society, *viz.*, the exchange of labour with capital for wages. Not only is a housewife's "service" not productive work in the strict economic sense, (on either a Marxist or Neo-classical model), it also has no pecuniary value, since the labour of housework is not exchanged directly in the wage/labour market.

It might be argued that this unequal economic and social status given to a wife's "services" in our society proves against any criticism of a husband's *consortium* action as it is presently maintained by the law in South Australia. Certainly it is not contended in this paper that law reform should effectuate equality by imposing values not shared in the wider society. However, the law itself provides its own rejoinder against such a line of argument.

It is submitted that the "services" interest as a head of recovery, should be shifted to the immediate victim's tortious action (whether that victim be wife or a husband). Such a proposal is put forward on the basis of two premises: one found in the common law, the other in the recent federal legislation on family law.

First, with respect to the economic thesis of housework, that finds no pecuniary or material value in domestic labour, the common law itself, albeit in the husband's action, has never shared the economist's viewpoint. No doubt has ever been cast in *consortium* actions on the material value of housework. As Clarke points out¹⁸⁹ "...the judiciary would be horrified to learn ..." that the traditional common law method of assessing a husband's loss of "services" is one based on a Marxist theory of value, *viz.*, what can be bought and sold within a market economy based on a social division of labour.¹⁹⁰

However, to support what is being contended, the value put on "services" by the common law must be shifted from the context of husband as beneficiary of such interest. This requirement leads the present argument into its second premise. While the law is not always a reliable gauge of changing social conditions, the proposition that a wife's domestic work is not her own meets with some opposition from the present philosophy underlying the Family Law Act, 1975 (Cth.).

Unlike the common law of marriage with its assumption of an *exchange* in different *consortium* between spouses, (*viz.*, maintenance for services), the Family Law Act, 1975 (Cth.) rests on a concept of marriage as a partnership. Accordingly, any actual difference in the roles spouses undertake, is taken

186. This turn of phrase borrowed from Galbraith, *Economics and the Public Purpose* (1974), 35.

187. This is the weakness in *Wright v. Cedzich* (1930) 43 C.L.R. 493 *per* Isaacs J., since he talks of the equality of the spouses and the *natural* leadership of the husband as co-existent.

188. This concept used in *Wright v. Cedzich* (1930) 43 C.L.R. 493 *per* Rich J.

189. Clarke, *loc. cit.* (*supra*, n.167), 22.

190. In contrast to the civil law method of calculation found in France. There a neo-classical economic premise is used, *viz.*, the value to be placed on housework is a function of its utility. Thus, if a wife who is a qualified doctor works as a full-time wife and mother, it is assumed a higher value has been put by her on the latter occupation relative to the first. Consequently, the pecuniary value to be put on her housework is equivalent to that of a doctor's earnings. See generally, Clarke, *loc. cit.* (*supra*, n.167); Secombe, "The Housewife and Her Labour Under Capitalism", (1974) 83 *New Left Review* 3.

account of not by the old concept of *exchange*, but rather, by the concept of *contribution*. Thus, in the property distribution section of the Act, in considering what order should be made, the court must take account of, *inter alia*, the following provisions:

“(a) the financial *contribution* made directly or indirectly by or on behalf of a party or a child to the acquisition, conservation or improvement of the property, or otherwise in relation to the property;

(b) the *contribution* made directly or indirectly to the acquisition, conservation or improvement of the property by either party, including any contribution made in the capacity of homemaker or parent...”¹⁹¹

Also, the maintenance section of the Act provides for matters to be taken into account as being, *inter alia*:

“(j) the extent to which the party whose maintenance is under consideration has *contributed* to the income, earning capacity, property and financial resources of the other party...”¹⁹²

If these sections are contrasted with the provisions in the equivalent Matrimonial Causes Act, 1973 (U.K.), the emphasis in s.79(4)(a) and (b), and s.75(2)(j) of the Family Law Act, 1975 (Cth.) becomes apparent. Section 25(f) of the United Kingdom Act provides for an assessment of property distribution according to

“...the contributions made by each of the parties to the marriage to the *welfare of the family*, including any contribution made by looking after the home or caring for the family.”¹⁹³

The emphasis in the Australian provisions is a commercial one. The contribution of each party is made referable to property or other financial assets, (in the broad sense), of the other party. In contrast, the United Kingdom provision has as its point of reference contributions to the welfare of the family. Further, s.79(4)(b) is a clear recognition of a homemaker's activity as one having quasi-proprietary status. As an item to be considered in any settlement of property on divorce, it represents an indirect property interest in homemaking of which the homemaker (wife or husband) is beneficiary in law. In *Potthoff and Potthoff*¹⁹⁴ the Full Court of the Family Court of Australia made it clear that a presumption of half shares in the marital property and assets was the starting point for any settlement. At one point in his judgment Fogarty J. (Watson and Simpson JJ. concurring) said:

“I must say for my own part that where a court under the *Family Law Act* is dealing with jointly owned assets or assets which are acquired or built up by the joint efforts of the parties in a marriage ... equality is ... at least the proper starting point.”¹⁹⁵

7. Conclusion: Some Problems

In conclusion, some of the problems related to recovery for loss of a wife's services will now be raised. The first problem is concerned with the

191. Family Law Act, 1975 (Cth.), s.79(4)(a) and (b). [Emphasis supplied].

192. *Id.*, s.75(2)(j). [Emphasis supplied].

193. Matrimonial Causes Act, 1973 (U.K.), s.25(f). [Emphasis supplied].

194. [1978] F.L.C. para. 90-475, p.77,444.

195. *Id.*, 77,446; see also, *Wardman and Hudson* [1978] F.L.C. para.90-466, p.77, 380.

relationship between economic models and the mode of assessment for loss of household services.¹⁹⁶ The point is highlighted with reference to recent proposals put forward by two Australian legal commentators.

If a full-time, non-wage-earning housewife who "would work only in the home"¹⁹⁷ is unable to provide her services due to personal injury, then she ought, according to Luntz, to recover damages for such loss on the policy premise that:

"The services were *presumably* fulfilling a community need and the plaintiff ought to be given the opportunity through the medium of money to continue to fulfil that need."¹⁹⁸

Elsewhere he submits that:

"...in accordance with modern social ideas the primary claim for loss of *her own capacity* should be the wife's whether she would have used that capacity for her own benefit or that of her family."¹⁹⁹

In the latter statement Luntz correctly observes that at the level of social attitudes, western society is beginning to view a housewife's labour in the domestic sphere as being her own. The philosophical precept that a person has property in his own labour was first propounded by Locke²⁰⁰ in the seventeenth century in defence of the rising capitalist class. Thus the extension of this concept, (in an operational sense), to housewives is, relative to other members of the labour force, belated. The gap between recognition of a housewife's right to have the controlling interest in her labour, and recognition of the socio-economic value of her labour in real terms is implicit in the contrast between the two statements above. While Luntz is certain that housework belongs to housewives, he only *presumes* that housework fulfils some community need. This failure to see the value of housework as an economic fact is shared by economists and lawyers alike.²⁰¹ Discussing the possibility of a full-time housewife making a claim in a general negligence action for lost earnings, (on the thesis that assessment of this item is made with respect to "capacity" to earn and not "actual" earnings²⁰²), Atiyah argues that:

"...one of the principal social purposes of awarding damages for lost earnings is to enable the victim to meet his normal commitments — mortgage payments, hire-purchase payments, etc. — without suffering too drastic a change in his ordinary manner of living. *This argument* in general has *no application to housewives*, students and retired persons who are not earning at the time of the injury."²⁰³

Even if one accepts Atiyah's view of the policy premise behind compensation for lost earnings, nevertheless one is not committed to the conclusion he draws. From the subjective *locus* of the individual victim, the *social* purpose of such an award may be compensation for the change to his material habits. However, from the objective viewpoint of society, the economic purpose of

196. Clarke, "What is a Wife Worth?", (1978) 5 *B.J.L.S.* 1, 15-22.

197. Luntz, *Assessment of Damages* (1974), 136-137.

198. *Id.*, 137. [Emphasis supplied].

199. *Id.*, 112. [Emphasis supplied].

200. Sackville and Neave, *Property Law* (2nd ed., 1975), 29.

201. Catley, *From Tweedledum to Tweedledee* (1974), 37-74.

202. See *Robinson v. Grafton* (1968) 122 C.L.R. 649; *O'Brien v. McKean* [1969] A.L.R. 85;

Atiyah, "Loss of Earnings or Earning Capacity?", (1971) 45 *A.L.J.* 228.

203. Atiyah, *loc. cit.* (*supra*, n.202), 231. [Emphasis supplied].

such compensation is to maintain the victim's consumer role in the wider economy. Atiyah's identification of policy is correct from only one view of the importance of compensating a victim under this head of damage.

If it is accepted that the socio-economic purpose of such awards is to maintain consumption capacity, then housewives cannot be excluded from such an award on this premise. The underlying economic model in the arguments of both Luntz and Atiyah is one shared by economists, whether marxist or neo-classical in their persuasion. Their argument is that housework is not productive labour, (except in the general social sense), because it cannot be directly related to commodity production in the economy proper. The weakness of this axiom lies in what economists overlook, *viz.*, that the equation, labour + production = capital, is incomplete without the variable of "consumption" added to it.

Galbraith posits an alternative economic model, (not necessarily the correct one), in which the equation has no meaning unless it reads: labour + production + consumption = capital. Further, he observes that the role of organizing "consumption" is assigned to housewives in western society. He remarks that:

"The value of the services of housewives has been calculated, somewhat impressionistically, at roughly one fourth of total Gross National Product ... If it were not for this service, all forms of household consumption would be limited by the time required to manage such consumption — to select, transport, prepare, repair, maintain, clean, service, store, protect and otherwise perform the tasks that are associated with the consumption of goods. *The servant role of women is critical for the expansion of consumption in the modern economy ... the labour of women to facilitate consumption is not valued in national income or product. This is of some importance for its disguise; what is not counted is often not noticed.*"²⁰⁴

In *Franco v. Wolfe* (Ontario High Court)²⁰⁵ it was argued that:

"...since the Gross National Product could not be achieved without the housewife, a proportionate part of the G.N.P. should be attributed to each such contribution."²⁰⁶

204. Galbraith, *Economics And The Public Purpose* (1974), 33. [Emphasis supplied].

205. (1974) 52 D.L.R. (3d) 355, 361 *per Haines J.* The case was a fatal accidents one in which a husband claimed compensation for the loss of his wife's services. Professor Hawrylyskyn, Ph.D., Assistant Professor of Economics at Queens University was called by the plaintiff to give evidence of the financial contribution of a wife to the economy in terms of G.N.P. His Honour said at one passage in his judgment having regard to the expert evidence: "He [the witness] brings considerable resources to his resolution. Therefore, I accept as a realistic definition that the gross national product is simply the sum total of all acts and services that provide certain benefits to the individuals in the economy. In that must be included the homemaker in the services she renders to her husband, to each child, so that they in turn may enter the community and contribute to the economy. ... I accept the evidence of Professor Hawrylyskyn respecting the value of the services of a housewife with two teen-age children. ... On the basis of the gross national product, it is \$4,000 to \$4,538 per services she renders, it is \$4,940 to \$5,118 per year. On the basis of the well-accepted Walker-Gauger studies the average Canadian figure would be \$5,160." The judge decided on a value of \$4,500 to \$5,000 per year in an effort to strike a balance between the different approaches. He also found "...after the children leave and the wife is employed, that the value of her services to the husband is between \$3,750 and \$4,000 per year."

206. Clarke, *loc. cit.* (*supra*, n.167), 16, n.116.

The foregoing discussion is made only to highlight the problem of inarticulated assumptions of economic models in relation to the assessment of loss of services. There are at least four possible models of assessment.²⁰⁷ No particular model is advocated here. A second problem relating to the measurement of loss of services is referable generally to assumptions of changing social patterns and activity, and is specifically considered here in relation to housewives who are also part-time wage earners. Married women currently represent 63.4 per cent of females in the labour force.²⁰⁸ Within that figure, a significant number is made up of part-time workers. Further, to the extent that married women are able to continue entering the "workforce", the numbers of married women doing part-time work might be expected to increase. The latter proposition is supported by a recent sociological survey conducted in Melbourne in which one of the main reasons given by married women for their not being in the workforce was the unavailability of suitable part-time work.²⁰⁹

Where a married woman who is also a part-time wage earner, suffers tortious injury, she has a claim in her own action for lost earnings based not on the "capacity" thesis, but on that of "actual" earnings lost.²¹⁰ Where there is also a claim for loss of services (either in her own action, or as is currently the law, in her husband's *consortium* action) the fear is that this item may be lower than it should be because of the currently held assumption that "working" wives and mothers are not performing domestic duties without the help of their husbands. This assumption has found recent expression in judgments of the Family Court of Australia.²¹¹ The assumption that spouses who share the breadwinning also share the homemaking is, in general, false. In the same sociological survey referred to above, the conclusion drawn from a sample of almost 200 married couples from all income groups was that:

"Despite the differences, whatever the social group, it could generally be said that when the wife worked it was more or less taken for granted that she would carry out what came to be called, in the first studies of working women in the 1950s, the 'dual role'."²¹²

Elsewhere the remark is made that:

"One of the most interesting patterns was that women who worked part-time scored, on average, almost as much on responsibility for regular household chores as women at home, higher on responsibility for occasional chores, and the same on child-tasks."²¹³

Strategically then, the proposal to shift recovery for loss of services from a husband's *consortium* action to a wife's own general negligence claim, may,

207. *Ibid.*

208. *Report of the Royal Commission Into Human Relationships* (1976), vol. 5, para. 53, p.11.

209. Harper, *Mothers and Working Mothers* (1979), 223.

210. The hypothesis in this statement with respect to part-time work is significant for the fact that O.E.C.D., *Australia* recommends encouragement of married women into the workforce as part-time workers in order to avoid "expensive social overhead capital outlays" required when a government looks for the reserve labour force in the alternative possibility of increased immigration. See, Catley, *op. cit.* (*supra*, n.201), 38 where reference is made to O.E.C.D., *Australia*, p.38, and O.E.C.D., *The Re-Entry of Women into the Work Force*, p.13.

211. See *supra*, n.116 and accompanying text.

212. Harper, *op. cit.* (*supra*, n.209), 192.

213. *Id.*, 189.

given the above information, be a bad one. The suspicion is that where a wage-earning housewife sues for loss of earning capacity and loss of capacity to perform household services, assumptions by law reformers and the judiciary with respect to "sharing" household tasks will operate to decrease the recognition and/or the quantum awarded for the latter item. Arguably, while the items are recoverable in separate actions, the false assumptions of current social domestic patterns may not carry the same weight since both losses would not be located in the same person. The same argument, to the extent that it has any merit, applies to housewives who are full-time wage earners. While many studies have been done on the number of hours housewives work at household tasks,²¹⁴ probably the most reliable guide to how many hours a full-time wage earning wife works in the household may be taken from a recent manual in which full-time wage earning wives were advised to *aim* for a maximum of 21 hours of home management a week.²¹⁵

Whether housewives are wage-earners or not the conclusion may be drawn, contrary to popular notions, that she is neither in the category of under-employed nor unemployed,²¹⁶ but rather, the over-employed. That fact should not be disguised or lost where she seeks compensation for personal injury.²¹⁷

The final problem to be considered relates to the principle of equality upon which the proposal to allow recovery for the loss of services in a wife's own primary claim is based. The problem is a philosophical one. The present proposal is based on a connotation of "equality" that is, arguably, not the prevailing interpretation of the term. "Equality" appears to be currently identified as synonymous with "equality of opportunity". Just as status is determined by the structure of economic relations, so too are philosophical concepts and ideals. The point is illustrated in a passage from the *Report of the Royal Commission on Human Relationships*. There it was said that:

"The socially valuable function of caring for home and young children does not carry the status and income which convey its real worth to the community. Employment and income largely determine status. *Women cannot attain equality of status until they have equal access to jobs and careers, commanding wages and salaries equal to those of men.*"²¹⁸

214. "The Hon. Clyde R. Cameron, M.P., The Australian Minister for Labour, spoke of women's work in the home when addressing a forum on 'Women in the Work Force' in Melbourne in December 1973:

'Several bodies have attempted to estimate the work load of housewives. Their findings are illuminating. A study in Sydney in 1958, showed that the average housewife's 80-hour week was longer than her husband's and higher than a single woman's, even when the single woman was allowed 19½ hours a week for travelling and domestic tasks.

Around the same time, a survey was made of 1796 French housewives. They were found to spend between 47 and 74 hours per week on home duties, depending on the number of children. An earlier and smaller study found that Tasmanian housewives with two or three children of whom at least one was less than seven years old, averaged between 70 and 84 hours a week. The Chase Manhattan Bank estimated that the average American housewife works 99.6 hours a week. And it was estimated a few years ago in Sweden that a total of 1290 million human hours were spent in industry each year, but that nearly double that amount (2340) were spent on housework. One-and-a-half million hours a day were spent on washing up alone!': cited in Handfield, *Double Bed and Separate Bank Accounts* (1977), 6-7.

215. Handfield, *op. cit.* (supra, n.214), 7.

216. These are the categories in which Luntz puts case-reports concerned with housewife plaintiffs: *op. cit.* (supra, n.197), ch.4.

217. In the Report of the National Committee of Inquiry (1974), *Compensation and Rehabilitation in Australia*, compensation for housewives partially incapacitated was not included in the recommendations: see, Luntz, *Compensation and Rehabilitation* (1975), 77-78.

218. *Report of the Royal Commission on Human Relationships* (1977), vol. 5, para. 6, p.4. [Emphasis supplied].

There is no single ideological model of equality presently embraced by women. The underlying assumption in the Commission's statement above, is shared by some feminists and non-feminists alike. Even within the politic of feminists there exists great divergence of methodology reflecting different epistemological assumptions. Consequently, the unstated premise in the second half of this paper, *viz.*, that a pecuniary value should be placed on housework, has been criticized from one quarter as being reactionary, and from another as too radical.

The proposal put forward in this paper with respect to recovery for services is based upon a certain philosophical premise. That premise should be tested by the criticisms levelled against it.