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Casenotes: Torts — Loss of Consortium —
Children Do Not Have a Cause of Action for Loss
of Parental Consortium When a Parent Survives a
Tortious Injury. *Gaver v. Harrant*, 316 Md. 17, 557
A.2d 210 (1989)

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TORTS-LOSS OF CONSORTIUM-CHILDREN DO NOT HAVE A CAUSE OF ACTION FOR LOSS OF PARENTAL CONSORTIUM WHEN A PARENT SURVIVES A TORTIOUS INJURY. *Gaver v. Harrant*, 316 Md. 17, 557 A.2d 210 (1989).

The common law did not permit a child to recover damages for the loss of parental consortium¹ caused by the negligence of a third party.² This is still the majority view of the courts.³ The majority of

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1. Courts have provided a variety of definitions of parental consortium. These definitions include a parent's "love, companionship, affection, society, comfort, services and solace," *Berger v. Weber*, 411 Mich. 1, 14, 303 N.W.2d 424, 426 (1981), "love, care, companionship and guidance," *Ueland v. Reynolds Metals Co.*, 103 Wash. 2d 131, 132 n.1, 691 P.2d 190, 191 n.1 (1984) (en banc) (citation omitted), and a parent's "society and companionship," *Theama v. City of Kenosha*, 117 Wis. 2d 508, 522, 344 N.W.2d 513, 522 (1984).
 2. 3 W. BLACKSTONE, COMMENTARIES *143. Blackstone explained the common law view of loss of consortium as follows:

We may observe that in these relative injuries, notice is only taken of the wrong done to the superior of the parties related, by the breach and dissolution of either the relation itself, or at least the advantages accruing therefrom; while the loss of the inferior by such injuries is totally unregarded. One reason for which may be this: that 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 therefore the inferior can suffer no loss or injury. The wife cannot recover damages for beating her husband, for she hath no separate interest in any thing during her coverture. The child hath no property in his father or guardian; as they have in him, for the sake of giving him education and nurture.

Id.

3. *DeLoach v. Companhia de Navegacao Lloyd Brasileiro*, 782 F.2d 438 (3d Cir. 1986) (maritime law); *Pleasant v. Washington Sand & Gravel Co.*, 262 F.2d 471 (D.C. Cir. 1958); *Hoelsing v. Sears, Roebuck & Co.*, 484 F. Supp. 478 (D. Neb. 1980) (Nebraska law); *Gray v. Suggs*, 292 Ark. 19, 728 S.W.2d 148 (1987); *Borer v. American Airlines, Inc.*, 19 Cal. 3d 441, 563 P.2d 858, 138 Cal. Rptr. 302 (1977); *Lee v. Colorado Dep't of Health*, 718 P.2d 221 (Colo. 1986); *Zorzos v. Rosen*, 467 So. 2d 305 (Fla. 1985); *Halberg v. Young*, 41 Haw. 634 (1957); *Van de Veire v. Sears, Roebuck & Co.*, 178 Ill. App. 3d 794, 533 N.E.2d 994 (1989); *Hoffman v. Dautel*, 189 Kan. 165, 368 P.2d 57 (1962); *McFarland v. Cathy*, 349 So. 2d 486 (La. Ct. App. 1977); *Durepo v. Fishman*, 533 A.2d 264 (Me. 1987); *Salin v. Kloempken*, 322 N.W.2d 736 (Minn. 1982); *Bradford v. Union Elec. Co.*, 598 S.W.2d 149 (Mo. Ct. App. 1979); *General Elec. Co. v. Bush*, 88 Nev. 360, 498 P.2d 366 (1972); *Russell v. Salem Transp. Co.*, 61 N.J. 502, 295 A.2d 862 (1972); *De Angelis v. Lutheran Medical Center*, 58 N.Y.2d 1053, 449 N.E.2d 406, 462 N.Y.S.2d 626 (1983); *Vaughn v. Clarkson*, 324 N.C. 108, 376 S.E.2d 236 (1989); *Morgel v. Winger*, 290 N.W.2d 266 (N.D. 1980); *Sanders v. Mt. Sinai Hosp.*, 21 Ohio

commentators, however, favor recognition of loss of parental consortium,⁴ and some courts have recently recognized it.⁵ In *Gaver v. Harrant*,⁶ the father of two minor children was severely injured while helping his neighbor with a construction project.⁷ He, his wife and their children sued the neighbor in the Circuit Court for Frederick County.⁸ One of the counts in their complaint was a claim by the children for the loss of consortium of their father.⁹

The trial court granted the defendant's motion to dismiss the children's parental consortium claim on the ground that the claim was not recognized in Maryland, and the plaintiffs appealed.¹⁰ Prior to review of the case by the Court of Special Appeals of Maryland,

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- App. 3d 249, 487 N.E.2d 588 (1985); *Norwest v. Presbyterian Intercommunity Hosp.*, 293 Or. 543, 652 P.2d 318 (1982); *Steiner v. Bell Tel. Co.*, 358 Pa. Super. 505, 517 A.2d 1348 (1986), *aff'd per curiam*, 518 Pa. 57, 540 A.2d 266 (1988); *Still v. Baptist Hosp., Inc.*, 755 S.W.2d 807 (Tenn. Ct. App. 1988).
4. W. PROSSER, *THE LAW OF TORTS* § 125, at 896-97 (4th ed. 1971); 2 S. SPEISER, C. KRAUSE & A. GANS, *THE AMERICAN LAW OF TORTS* § 8:23, at 590-96 (1985); Love, *Tortious Interference With the Parent-Child Relationship: Loss of an Injured Person's Society and Companionship*, 51 IND. L.J. 590 (1976); Note, *The Child's Right to Sue for Loss of a Parent's Love, Care and Companionship Caused by Tortious Injury to the Parent*, 56 B.U.L. REV. 722 (1976); Comment, *A Minor Child's Claim for Lost Parental Society and Companionship in Illinois: Another Look*, 17 J. MARSHALL L. REV. 113 (1984); Comment, *Loss of Parental Consortium: Why Children Should be Compensated*, 18 PAC. L.J. 233 (1986); Comment, *The Child's Claim for Loss of Consortium Damages: A Logical and Sympathetic Appeal*, 13 SAN DIEGO L. REV. 231 (1975); Comment, *The Child's Cause of Action for Loss of Consortium*, 5 SAN FERN. V.L. REV. 449 (1977); Comment, *Compensating the Child's Loss of Parental Love, Care, and Affection*, 1983 U. ILL. L. REV. 293 (1983); Note, *Expanding Loss of Consortium in Vermont: Developing a New Doctrine*, 12 VT. L. REV. 157 (1987); Note, *Child's Right to Sue for Negligent Disruption of Parental Consortium*, 22 WASHBURN L.J. 78 (1982). *But see* Note, *Recovery for Loss of Parental Consortium: An Undue Extension of Liability*, 43 U. PITT. L. REV. 285 (1981) [hereinafter Note, *Recovery for Loss of Parental Consortium*].
 5. *Hibpshman v. Prudhoe Bay Supply, Inc.*, 734 P.2d 991 (Alaska 1987); *Villareal v. State Dep't of Transp.*, 160 Ariz. 474, 774 P.2d 213 (1989); *Weitl v. Moes*, 311 N.W.2d 259 (Iowa 1981) (en banc); *Ferriter v. Daniel O'Connell's Sons, Inc.*, 381 Mass. 507, 413 N.E.2d 690 (1980); *Berger v. Weber*, 411 Mich. 1, 303 N.W.2d 424 (1981); *Hay v. Medical Center Hosp.*, 145 Vt. 533, 496 A.2d 939 (1985); *Ueland v. Reynolds Metals Co.*, 103 Wash. 2d 131, 691 P.2d 190 (1984) (en banc); *Theama v. City of Kenosha*, 117 Wis. 2d 508, 344 N.W.2d 513 (1984).
 6. 316 Md. 17, 557 A.2d 210 (1989).
 7. *Id.* at 18, 557 A.2d at 211. A 2,400-pound post and beam structure collapsed on the father resulting in permanent injuries to his back, body, and limbs. He cannot work and will suffer pain indefinitely. *Id.*
 8. *Id.*
 9. *Id.* The other counts in the complaint were negligence, strict liability, gross negligence, and loss of spousal consortium. *Id.*
 10. *Id.*

the court of appeals granted certiorari¹¹ to consider the case, which was one of first impression in Maryland. In a 6-1 decision,¹² the court of appeals affirmed the trial court's decision and held that a child does not have a cause of action for loss of parental consortium when a parent survives a tortious injury.¹³

Legal recognition of loss of consortium resulted from the common law view that the master-servant relationship was analogous to the husband-wife relationship.¹⁴ A master had a proprietary interest in his servant, who, in the view of the common law, was his master's chattel.¹⁵ A third party who tortiously injured a servant was liable to the master for the loss of the servant's services resulting from the servant's injury.¹⁶ Based on an analogy to the master-servant relationship, a husband was deemed to have a proprietary interest in his wife¹⁷ and could recover damages from a tortfeasor who inflicted an injury upon his wife that interfered with the delivery of her services to her husband.¹⁸ Gradually, the husband's action for loss of his wife's services was expanded, and he was permitted to recover damages for loss of her affection, society, and companionship, as well.¹⁹ A father also had a proprietary interest in his children's services, and the loss of their services that resulted from tortious injuries inflicted upon them by a third party was actionable by the father.²⁰ A wife, however, had no proprietary interest in her husband, so she had no legal redress for the loss of her husband's services, affection, society, or companionship, nor could a child bring an action for the loss of his or her father's services.²¹

11. *Gaver v. Harrant*, 313 Md. 49, 542 A.2d 1266 (1988).

12. *Gaver*, 316 Md. at 33, 557 A.2d at 218 (Adkins, J., dissenting).

13. *Id.*

14. Love, *supra* note 4, at 599-600; Note, *Recovery for Loss of Parental Consortium*, *supra* note 4, at 286.

15. See Comment, *The Breakdown of Consortium*, 30 COLUM. L. REV. 651, 653 (1930).

16. Comment, *A Minor Child's Claim for Lost Parental Society and Companionship in Illinois: Another Look*, 17 J. MARSHALL L. REV. 113, 116-17 (1984).

17. See Comment, *supra* note 15, at 653; Comment, *supra* note 16, at 116-17.

18. See W. PROSSER, *supra* note 4, § 124, at 873-74; Comment, *supra* note 15, at 653.

19. W. PROSSER, *supra* note 4, § 124, at 873-74.

20. W. PROSSER & W. KEETON, *THE LAW OF TORTS* § 125, at 934 (5th ed. 1984).

Although the common law expanded in that it permitted a husband to recover nonpecuniary damages in addition to pecuniary damages for tortious injury to his wife, see *supra* text accompanying note 19, it did not so expand in the father-child context. A father's recovery of damages for tortious injury to his child was limited to pecuniary losses; the loss of his child's affection, society, and companionship was not actionable under the common law. W. PROSSER & W. KEETON, *supra*, § 125, at 934; Love, *supra* note 4, at 599-600.

21. Love, *supra* note 4, at 599-600; see *supra* note 2.

The enactment of Married Women's Acts,²² which began in the United States in the nineteenth century, gave wives legal identities apart from their husbands and generally provided married women with greater legal rights than they had had under the common law.²³ Some courts responded to the enactment of the Married Women's Acts by refusing to recognize loss of a wife's consortium, on the basis that these acts eliminated a husband's legal entitlement to his wife's services, which meant that he suffered no legal damages as a result of an injury to her.²⁴ The majority of courts, however, continued to recognize a husband's loss of his wife's consortium.²⁵

Although most jurisdictions continued to recognize the right of a husband to recover for loss of his wife's consortium, no jurisdiction during the first half of the twentieth century recognized a wife's right to sue for loss of her husband's consortium.²⁶ Finally, in the 1950 case of *Hitaffer v. Argonne Co., Inc.*,²⁷ the United States Court of Appeals for the District of Columbia Circuit recognized a wife's right to sue for loss of her husband's consortium. The *Hitaffer* court based its holding on an equal protection rationale.²⁸ The court reasoned that because a husband was entitled to sue for the loss of his wife's consortium, equal protection required the converse to be permitted as well, although a wife had had no such cause of action under the common law.²⁹

Maryland initially rejected *Hitaffer*,³⁰ but in 1967 the court of appeals held that a wife did have the right to sue for loss of her husband's consortium by bringing a joint action with her husband.³¹

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22. For a synopsis of Married Women's Acts by jurisdiction, see 3 C. VERNIER, *AMERICAN FAMILY LAWS* § 167 (1935). For commentary on the developments leading to the enactment of the Married Women's Acts, see R. Chused, *Married Women's Property Law: 1800-1850*, 71 *GEO. L.J.* 1359 (1983).
 23. See Holbrook, *The Change in the Meaning of Consortium*, 22 *MICH. L. REV.* 1, 4 (1923). For example, the Married Women's Acts generally permitted married women to own property and to sue without the assistance of their husbands and also entitled married women to retain their own income. *Id.* Married women did not have these rights under the common law. See *id.*
 24. W. PROSSER, *supra* note 4, § 125, at 891; Holbrook, *supra* note 23, at 6-8.
 25. See *supra* note 24.
 26. *Coastal Tank Lines, Inc. v. Canoles*, 207 Md. 37, 46, 113 A.2d 82, 86 (1955).
 27. 183 F.2d 811 (D.C. Cir.), *cert. denied*, 340 U.S. 852 (1950).
 28. See 183 F.2d at 816 ("the husband and the wife have equal rights in the marriage relation which will receive equal protection of the law.").
 29. See *id.* at 816-19.
 30. *Coastal Tank Lines, Inc. v. Canoles*, 207 Md. 37, 45-51, 113 A.2d 82, 86-89 (1955). For an early Maryland case which held that a wife had no cause of action for the loss of her husband's consortium, see *Emerson v. Taylor*, 133 Md. 192, 104 A. 538 (1918).
 31. *Deems v. Western Md. Ry. Co.*, 247 Md. 95, 115, 231 A.2d 514, 525 (1967). The court's holding also required a husband to bring a joint action with his wife for injury to the marital relationship in order to recover for loss of her consortium. *Id.*

The court's decision was influenced by the possibility that equal protection was violated by existing Maryland law which permitted husbands, but not wives, to sue for loss of spousal consortium.³² After the *Hitaffer* decision other jurisdictions also recognized a wife's right to sue for loss of her husband's consortium, at least in part to avoid violating equal protection.³³ Most jurisdictions in the United States now recognize this cause of action.³⁴

There has recently been a line of cases which has recognized a child's loss of parental consortium as a cause of action.³⁵ In the 1978 decision of *Berger v. Weber*,³⁶ Michigan's intermediate appellate court became the first appellate court which was not subsequently reversed to recognize this cause of action. In 1980 the Supreme Judicial Court of Massachusetts became the first state court of last resort to recognize loss of parental consortium.³⁷ The following year, the Supreme Court of Michigan affirmed the 1978 decision of Michigan's intermediate appellate court,³⁸ and Michigan became the second state in the country whose highest court recognized the cause of action. Eight state supreme courts have expressly recognized loss of parental consortium;³⁹ however, most courts do not.⁴⁰

Courts which have recognized loss of parental consortium have stated a variety of reasons for doing so. First, these courts have viewed loss of parental consortium as analogous to other kinds of recognized consortium claims such as loss of spousal consortium,⁴¹ loss of a child's consortium,⁴² and loss of parental consortium under

32. The court stated that a "federal constitutional question" was presented. *Id.* at 113, 231 A.2d at 524. This "federal constitutional question" was a reference to equal protection which the court had discussed earlier in its opinion. *See id.* at 101-07, 231 A.2d at 517-21. The *Deems* court also stated that it adopted the joint action approach for legal and social policy reasons. *Id.* at 113, 231 A.2d at 524.

33. W. PROSSER & W. KEETON, *supra* note 20, § 125, at 931-32; *see* *Robinson v. Trousdale County*, 516 S.W.2d 626, 634 (Tenn. 1974) (Henry, J., concurring).

34. Comment, *Who Should Recover for Loss of Consortium?*, 35 ME. L. REV. 295 n.4 (1983) (44 states and the District of Columbia recognize a wife's right to recover for loss of her husband's consortium).

35. *See supra* note 5.

36. 82 Mich. App. 199, 267 N.W.2d 124 (1978), *aff'd*, 411 Mich. 1, 303 N.W.2d 424 (1981).

37. *Ferriter v. Daniel O'Connell's Sons, Inc.*, 381 Mass. 507, 413 N.E.2d 690 (1980).

38. *Berger v. Weber*, 411 Mich. 1, 303 N.W.2d 424 (1981), *aff'g*, 82 Mich. App. 199, 267 N.W.2d 124 (1978).

39. *See supra* note 5.

40. *See supra* note 3.

41. *Hibpshman v. Prudhoe Bay Supply, Inc.*, 734 P.2d 991, 994-95 (Alaska 1987).

42. *Ferriter v. Daniel O'Connell's Sons, Inc.*, 381 Mass. 507, 512-13, 413 N.E.2d 690, 693-94 (1980); *Theama v. City of Kenosha*, 117 Wis. 2d 508, 509, 334 N.W.2d 513, 515-16 (1984).

a wrongful death statute.⁴³ Second, these courts have recognized that children are now enjoying more legal rights and protections such as first amendment,⁴⁴ due process,⁴⁵ and equal protection rights.⁴⁶ Third, some of these courts have held that their state's legislature has a policy of protecting children's interests and that this policy supports recognition of a child's right to recover for loss of parental consortium.⁴⁷ Finally, these courts have been concerned about the need to compensate children for the injury they undoubtedly sustain when they are deprived of parental consortium.⁴⁸

Courts which have rejected a cause of action for loss of parental consortium have generally done so based on tort law principles, public policy grounds, or both. One of the tort law principles used to justify rejection of the parental consortium claim is that tort law generally permits only a primary tort victim—the person who is directly injured by the tortfeasor—to recover damages, so a secondary tort victim—a person who is injured by the injury to the primary tort victim—is generally not permitted to recover against a tortfeasor.⁴⁹ Another tort law principle used to reject the parental consortium claim is that a tortfeasor does not owe a duty to the injured parent's

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43. *E.g.*, *Ferriter*, 381 Mass. at 515, 413 N.E.2d at 695; *Berger v. Weber*, 411 Mich. 1, 13, 303 N.W.2d 424, 425 (1981).
 44. *Theama*, 117 Wis. 2d at 517, 344 N.W.2d at 517.
 45. *Villareal v. State Dep't of Transp.*, 160 Ariz. 474, 478, 774 P.2d 213, 217 (1989); *Theama*, 117 Wis. 2d at 517, 344 N.W.2d at 517.
 46. *Villareal*, 160 Ariz. at 478, 774 P.2d at 217; *Theama*, 117 Wis. 2d at 517, 344 N.W.2d at 517.
 47. *Ferriter*, 381 Mass. at 515-16, 413 N.E.2d at 695.
 48. *E.g.*, *Berger v. Weber*, 411 Mich. 1, 15, 303 N.W.2d 424, 426 (1981) ("compensating a child who has suffered emotional problems because of the deprivation of a parent's love and affection may provide the child with the means of adjustment to the loss"); *Ueland v. Reynolds Metals Co.*, 103 Wash. 2d 131, 138, 691 P.2d 190, 194 (1984) (en banc) ("Allowing a child to recover for loss of consortium may aid in ensuring the child's continued normal and complete mental development into adulthood."); *Theama*, 117 Wis. 2d at 523, 344 N.W.2d at 520 ("Although a monetary award may be a poor substitute for the loss of a parent's society and companionship, it is the only workable way that our legal system has found to ease the injured party's tragic loss.").
 49. *Berger*, 411 Mich. at 34, 303 N.W.2d at 435 (Levin, J., dissenting) ("There are few other instances [except for consortium claims] where a *secondary* tort victim has been permitted to recover for a *negligently* inflicted injury to a *relational* interest unaccompanied by physical injury to himself.") (emphasis in original); *Norwest v. Presbyterian Intercommunity Hosp.*, 293 Or. 543, 560-61, 652 P.2d 318, 328 (1982) ("negligence alone, as a reason to shift the burden of a resulting loss, has not been deemed so grievous as to hold the negligent actor liable beyond the immediate victim's injury to others who suffer a loss only in consequence of that injury").

child.⁵⁰ One court which rejected the cause of action noted that tort law usually does not impose liability for psychic injuries that are not accompanied by a physical injury to the tort victim.⁵¹

A policy reason used to support rejection of the cause of action is the increased burden its recognition would place on the litigation system due to the added number of claims it would permit.⁵² Courts have also expressed the need to place reasonable limits on a tortfeasor's liability as a reason to reject the cause of action.⁵³ Another policy reason frequently used to support the denial of recognition of the parental consortium claim is that recognition of the cause of action would impose additional costs upon society through increased insurance premiums.⁵⁴ Because of the expected increase in insurance premiums, some courts have also been concerned that marginal insureds would choose to be uninsured.⁵⁵ Some of these policy concerns were explained succinctly in *Russell v. Salem Transportation Co., Inc.*,⁵⁶ where the Supreme Court of New Jersey stated:

If the [parental consortium] claim were allowed there would be a substantial accretion of liability against the tortfeasor arising out of a single transaction (typically the negligent operation of an automobile). Whereas the assertion of a spouse's demand for loss of consortium involves the joining of only a single companion claim in the action with that of the injured person, the right here debated would entail adding as many companion claims as the injured parent had minor children, each such claim entitled to separate appraisal and award. The defendant's burden would be further enlarged if the claims were founded upon injuries to both parents. Magnification of damage awards to a single family derived from a single accident might well become a serious problem to a particular defendant as well as in terms of the total cost of such enhanced awards to the insured community as a whole.⁵⁷

50. *DeAngelis v. Lutheran Medical Center*, 84 A.D.2d 17, 22-23, 445 N.Y.S.2d 188, 193 (1981), *aff'd mem.*, 58 N.Y.2d 1053, 449 N.E.2d 406, 462 N.Y.S.2d 626 (1983).

51. *Norwest*, 293 Or. at 548, 652 P.2d at 321.

52. *See Salin v. Kloempken*, 322 N.W.2d 736, 741 (Minn. 1982).

53. *Lewis v. Rowland*, 287 Ark. 474, 478, 701 S.W.2d 122, 124 (1985); *Russell v. Salem Transp. Co.*, 61 N.J. 502, 507, 295 A.2d 862, 864 (1972).

54. *E.g.*, *Borer v. American Airlines, Inc.*, 19 Cal. 3d 441, 447, 563 P.2d 858, 862, 138 Cal. Rptr. 302, 306 (1977); *Salin*, 322 N.W.2d at 741.

55. *See Borer*, 19 Cal. 3d at 447, 563 P.2d at 862, 138 Cal. Rptr. at 306; *DeAngelis*, 84 A.D.2d at 24, 445 N.Y.S.2d at 193-94.

56. 61 N.J. 502, 295 A.2d 862 (1972).

57. *Id.* at 506, 295 A.2d at 864.

Other reasons courts have used to support their rejection of parental consortium claims include: the decision to adopt the cause of action should be left to the legislature,⁵⁸ remoteness and uncertainty of damages are inherent in the cause of action,⁵⁹ the number of actions that could arise from a single tort could multiply,⁶⁰ and the possibility that an injured parent and a child would receive a double recovery.⁶¹ Courts have also been skeptical about the ability of money damages to compensate children for consortium losses⁶² and have rejected the argument that the failure to recognize parental consortium violates equal protection.⁶³ Finally, courts have also rejected

58. *E.g.*, *Lewis v. Roland*, 287 Ark. 474, 477, 701 S.W.2d 122, 124 (1985); *Zorzos v. Rosen*, 467 So. 2d 305, 307 (Fla. 1985); *Morgel v. Winger*, 290 N.W.2d 266, 267 (N.D. 1980); *Steiner v. Bell Tel. Co.*, 358 Pa. Super. 505, 515, 517 A.2d 1348, 1356 (1986), *aff'd per curiam*, 518 Pa. 57, 540 A.2d 266 (1988). *But see Salin v. Kloempken*, 322 N.W.2d 736, 741 (Minn. 1982) (rejecting the cause of action but stating that it is not proper to defer the matter to the legislature).

59. *Hoffman v. Dautel*, 189 Kan. 165, 167, 368 P.2d 57, 58 (1962); *Russell v. Salem Transp. Co.*, 61 N.J. 502, 507, 295 A.2d 862, 864.

60. *Hoffman*, 189 Kan. at 169, 368 P.2d at 58-59; *Salin*, 322 N.W.2d at 740.

61. *Hoelsing v. Sears, Roebuck & Co.*, 484 F. Supp. 478, 480 (D. Neb. 1980); *Salin*, 322 N.W.2d at 740. Both *Hoelsing* and *Salin* state that the difficulty in determining the child's damages is what can lead to a double recovery. *Hoelsing*, 484 F. Supp. at 480; *Salin*, 322 N.W.2d at 740. *But see Steiner*, 358 Pa. Super. at 517, 517 A.2d at 1354 (court rejects the parental consortium cause of action but states that double recovery can be prevented by careful jury instructions), *aff'd per curiam*, 518 Pa. 57, 540 A.2d 266 (1988).

62. *See Borer v. American Airlines, Inc.*, 19 Cal. 3d 441, 563 P.2d 858, 138 Cal. Rptr. 302 (1977) where the Supreme Court of California expressed this skepticism as follows:

Loss of consortium is an intangible, nonpecuniary loss; monetary compensation will not enable plaintiffs to regain the companionship and guidance of a mother; it will simply establish a fund so that upon reaching adulthood, when plaintiffs will be less in need of maternal guidance, they will be unusually wealthy men and women.

Id. at 447, 563 P.2d at 862, 138 Cal. Rptr. at 306.

63. Two arguments have been advanced to assert that rejection of the cause of action violates equal protection. One argument is that equal protection is violated when minor children are permitted to recover damages under a wrongful death statute for the death of a parent but not when a parent has survived an injury. This argument has been rejected on the ground that under the state's wrongful death statute, the surviving spouse and next of kin can recover damages. Therefore, minor children are not a distinct category of parties to be compensated under the wrongful death statute. *Salin*, 322 N.W.2d at 742; *Russell*, 61 N.J. at 507-08, 295 A.2d at 865. The same equal protection argument has also been rejected on the ground that surviving children who are entitled to damages under a wrongful death statute are permanently deprived of parental consortium, which generally is not the case when the parent survives. *Salin*, 322 N.W.2d at 742; *Russell*, 61 N.J. at 508, 295 A.2d at 865; *Steiner*, 358 Pa. Super. at 518, 517 A.2d at 1355; *cf. Norwest v. Presbyterian Inter-*

attempts to analogize parental consortium to other consortium claims.⁶⁴

The courts which have recognized the cause of action have criticized some of the reasons used by the majority view to reject the cause of action. For example, the courts adopting the cause of action have rejected the view that recognition of the cause of action is a legislative matter, because recognition of lost consortium is a judicially created doctrine which can be modified without legislative approval.⁶⁵ The courts adopting the cause of action have rejected concerns raised about the remoteness and uncertainty of damages inherent in the cause of action because these same difficulties are tolerated by courts when they recognize other kinds of consortium claims or other claims involving intangible injuries.⁶⁶ As to the problems of increased insurance and societal costs which have been used as reasons to reject the cause of action, these courts have stated that compensating a child who has been deprived of parental consortium may offset an increase in costs to society resulting from recognition of the cause of action.⁶⁷ Finally, the courts adopting the cause of action have stated that the problem of the parent and child being awarded a double recovery can be solved by giving proper jury instructions,⁶⁸ and that the potential problem of multiplicity of actions

community Hosp., 293 Or. 543, 568, 652 P.2d 318, 332 (1982) (the distinction between a surviving child who is compensated under a wrongful death statute and a child whose parent is injured but survives "is not among kinds of children but between the scope of defendants' liability for causing fatal as distinct from nonfatal injuries to the immediate victims of their negligence").

The second kind of equal protection argument which has been made to urge adoption of the cause of action is that equal protection is violated when spousal consortium is recognized and parental consortium is not. This argument has been rejected on the ground that the spousal relationship and the parent-child relationship are not comparable. *Salin*, 322 N.W.2d at 742; *Steiner*, 358 Pa. Super. at 518, 517 A.2d at 1355.

The courts which have recognized parental consortium have not stated that equal protection requires it to be recognized. *See supra* note 5.

64. *E.g.*, *Zorzos v. Rosen*, 467 So. 2d 305, 307 (Fla. 1985) (the legislature's decision to recognize loss of parental consortium in wrongful death cases coupled with its failure to recognize it in nonwrongful death cases indicates the legislature deliberately decided not to recognize parental consortium in nonwrongful death cases); *Salin*, 322 N.W.2d at 739-40 (loss of spousal consortium is distinct from loss of parental consortium because the former is based in part on the loss of sexual relations and the opportunity to bear children while the latter is not).
65. *E.g.*, *Hay v. Medical Center Hosp.*, 145 Vt. 533, 536-37, 496 A.2d 939, 941 (1985); *Ueland v. Reynolds Metals Co.*, 103 Wash. 2d 131, 136, 691 P.2d 190, 193 (1984) (en banc).
66. *See, e.g.*, *Berger v. Weber*, 411 Mich. 1, 15-16, 303 N.W.2d 424, 426-27 (1981); *Hay*, 145 Vt. at 540-41, 496 A.2d at 943-44.
67. *E.g.*, *Berger*, 411 Mich. at 15, 303 N.W.2d at 426; *Ueland*, 103 Wash. 2d at 140, 691 P.2d at 195.
68. *Ueland*, 103 Wash. 2d at 139, 691 P.2d at 194-95; *cf. Berger*, 411 Mich. at 17,

can be solved by requiring joinder of the child's and parent's claims.⁶⁹

In assessing the loss of parental consortium claim in *Gaver v. Harrant*,⁷⁰ the court noted that this cause of action had never been recognized by Maryland common law.⁷¹ The court stated that adoption of a new cause of action raised public policy concerns⁷² and that the declaration of Maryland's public policy is usually a legislative function.⁷³ On the other hand, the court also acknowledged that Maryland's common law is "subject to judicial modification in light of modern circumstances or increased knowledge"⁷⁴ and that *stare decisis* does not prevent the court from changing or modifying Maryland common law when the court finds "in light of changed conditions or increased knowledge, that the [common law] rule has become unsound in the circumstances of modern life, a vestige of the past, no longer suitable to our people."⁷⁵ It was against this test that the court considered the arguments for and against adoption of loss of parental consortium as a cause of action.

The court in *Gaver* relied primarily on a combination of tort law and public policy reasons to justify application of *stare decisis* and thus rejected recognition of loss of parental consortium. As to the tort law reasons, the court viewed parental consortium with disfavor because a child who has been tortiously deprived of parental consortium is a secondary tort victim as opposed to a primary tort victim.⁷⁶ Because the child is a secondary tort victim with only intangible injuries, the court reasoned that the uncertainty and remoteness of damages inherent in the parental consortium claim was "a more important factor"⁷⁷ in determining whether the cause of action should be recognized.⁷⁸ The policy reasons the court relied on to reject the cause of action were the expansion of tortfeasor liability and the increased societal costs that recognition of the cause of action would impose,⁷⁹ coupled with the practical consideration of the inability of money damages to remedy loss of parental consortium.⁸⁰

303 N.W.2d at 427 (because juries take into account the loss suffered by the children in determining an award to the parent, a separate cause of action for the children would eliminate the potential for a double recovery by the parent).

69. *Hibpshman v. Prudhoe Bay Supply, Inc.*, 734 P.2d 991, 997 (Alaska 1987); *Ueland*, 103 Wash. 2d at 136-37, 691 P.2d at 193-94.

70. 316 Md. 17, 557 A.2d 210 (1989).

71. *Id.* at 27, 557 A.2d at 216.

72. *Id.* at 28, 557 A.2d at 216.

73. *Id.* at 28-29, 557 A.2d at 216.

74. *Id.* at 27-28, 557 A.2d at 216 (quoting *Ireland v. State*, 310 Md. 328, 331, 529 A.2d 365, 366 (1987)).

75. *Id.* at 28, 557 A.2d at 216 (quoting *Harrison v. Montgomery County Bd. of Educ.*, 295 Md. 442, 459, 456 A.2d 894, 903 (1983)).

76. *Id.* at 30, 557 A.2d at 217.

77. *Id.*

78. *Id.*

79. *Id.* at 31, 557 A.2d at 217-18.

80. *Id.* at 30, 557 A.2d at 217.

The court also rejected arguments that the cause of action was analogous to spousal consortium⁸¹ or to loss of parental consortium under Maryland's wrongful death statute.⁸²

Although the court in *Gaver* recognized that children sustain a loss when they are deprived of parental consortium,⁸³ it concluded "that adoption of the proposed cause of action is not compelled by changing circumstances nor by a pressing societal need. The existing rule has not 'become unsound in the circumstances of modern life.'"⁸⁴ Thus, the court declined to recognize the cause of action and stated that any change in the law should be made by the legislature.⁸⁵

Judge Adkins dissented because he believed that adoption of the cause of action was consistent with the legislature's policy of protecting children and preserving the family unit.⁸⁶ In addition, the

81. *Id.* at 31, 557 A.2d at 218. The court cited differences between the child-parent relationship and the husband-wife relationship to distinguish parental from spousal consortium. *Id.* The court also noted that in Maryland the spousal consortium claim does not belong to either spouse individually but that it belongs to the marital entity. *Id.* (citing *Deems v. Western Md. Ry. Co.*, 247 Md. 95, 108-15, 231 A.2d 514, 523-25 (1967)).

82. *Gaver*, 316 Md. at 32-33, 557 A.2d at 218. Maryland's wrongful death statute permits a minor child to recover "damages for mental anguish, emotional pain and suffering, loss of society, companionship, comfort, protection . . . parental care, filial care, attention, advice, counsel, training, guidance, or education where applicable." MD. CTS. & JUD. PROC. CODE ANN. § 3-904(d)(1989). The court distinguished claims for loss of parental consortium in nonfatal cases from loss of parental consortium claims actionable under wrongful death statutes by stating that the claims under wrongful death statutes were created legislatively, not judicially. *Gaver*, 316 Md. at 32-33, 557 A.2d at 218 (citing *Zorzos v. Rosen*, 467 So. 2d 305 (Fla. 1985)). Furthermore, the court stated that policy reasons support recognition of loss of parental consortium in wrongful death cases because the failure to recognize such claims along with the application of the pecuniary loss rule "could result in no recovery at all if the victim was an unproductive member of society, very old or young, or disabled." *Id.* at 32-33, 557 A.2d at 218.

83. *Gaver*, 316 Md. at 33, 557 A.2d at 218.

84. *Id.* (quoting *Harrison v. Montgomery County Bd. of Educ.*, 295 Md. 442, 459, 456 A.2d 894, 903 (1983)).

85. *Id.*

86. *Id.* at 33, 557 A.2d at 219 (Adkins, J., dissenting). The dissent cited the following Maryland statutes to demonstrate that Maryland's legislature has such a policy: MD. FAM. LAW CODE ANN. § 4-401 (1984) (legislature's policy is to "promote family stability, to preserve family unity, and to help families achieve and maintain self reliance."); *id.* § 5-203(b)(1) (1984) (parents are responsible for the "support, care, nurture, welfare, and education" of their children); *id.* § 5-313(a) (Supp. 1988) (best interests of the child governs whether custody rights of natural parents may be terminated); *id.* § 5-502 (1984) (Maryland's public policy is to protect foster children); *id.* §§ 5-701 to -715 (Supp. 1988) (protects children from abuse and neglect); *id.* § 5-801 (Supp. 1988) (provides criminal sanctions for leaving children unattended); *id.* § 5-

dissent asserted that it was anomalous to permit a child to recover for the loss of a deceased parent's consortium under the wrongful death statute and to recognize loss of spousal consortium, and yet reject the proposed cause of action.⁸⁷ The dissent also contended that permitting a child to recover consortium damages would help the child adjust to his or her injury, which would in turn benefit society.⁸⁸

The holding in *Gaver* was justified, and the court's rationale was generally well-reasoned as to both the tort law concerns and the public policy concerns presented by the proposed cause of action. The court correctly viewed loss of parental consortium with disfavor because tort law disfavors compensating parties who are not directly injured by a tortfeasor's conduct.⁸⁹ While legal recognition of loss of spousal consortium is an exception to this rule, spousal consortium claims are necessarily limited to two people, whereas loss of parental consortium claims could interject a significantly larger number of plaintiffs into a case, depending on the number of children in the primary tort victim's family.⁹⁰ Therefore, the majority's concern about the expansion of tortfeasor liability and the corresponding increased societal costs that would accompany adoption of the cause of action⁹¹ was justified. This in turn justified the court's holding that the common law rule which did not recognize the cause of action was not unsound and that consequently, a change to this rule should be made only by the legislature.⁹²

The dissenting opinion was not persuasive for several reasons. In attempting to establish that the cause of action should be recognized because of the legislature's policy of protecting children and preserving the family unit, the dissent relied on authority inapposite to the case under review. While the dissent was correct that Maryland does have such a public policy, most of the authorities relied on by the dissent to demonstrate that this policy exists were based primarily on family law, not tort law.⁹³ Thus, the dissent used family law

1002(b)(2) (1984) (children born out of wedlock have the same rights as children not born out of wedlock); *id.* § 9-202(a) (1984) (guidelines for resolving custody disputes attempt to protect the best interests of children); MD. CTS. & JUD. PROC. CODE ANN. § 3-904(d) (1984 & Supp. 1988) (children have a cause of action for lost parental consortium in the case of a wrongful death of a parent). 316 Md. at 38-45, 557 A.2d at 221-24.

87. *Gaver*, 316 Md. at 43, 557 A.2d at 223-24 (Adkins, J., dissenting).

88. *Id.* at 45-46, 557 A.2d at 225 (Adkins, J., dissenting) (quoting *Berger v. Weber*, 411 Mich. 1, 15, 303 N.W.2d 424, 426 (1981)).

89. *See supra* note 49 and accompanying text.

90. *See supra* text accompanying note 57; *see, e.g., Borer v. American Airlines, Inc.*, 19 Cal. 3d 441, 449, 563 P.2d 858, 863-64, 138 Cal. Rptr. 302, 307-08 (1977) (injured parent had nine children).

91. *Gaver*, 316 Md. at 31, 557 A.2d at 217.

92. *See id.* at 33, 557 A.2d at 218.

93. *See supra* note 86 and accompanying text.

principles to justify the adoption of a new tort which possessed characteristics disfavored by tort law.⁹⁴

The dissent's analogy to spousal consortium was not persuasive because spousal consortium and parental consortium involve two very dissimilar relationships — the husband-wife relationship, and the parent-child relationship, respectively. The type of consortium claim most analogous to loss of parental consortium is loss of a child's consortium, because both of those claims involve the parent-child relationship. Since Maryland law does not recognize loss of a child's consortium in nonfatal cases,⁹⁵ reasoning by analogy to Maryland's existing consortium law would actually support the majority's view rather than the view of the dissent. The dissent's analogy to loss of parental consortium under the wrongful death statute was not compelling either, because a child's loss of a fatally injured parent's consortium is always total and permanent, which is not necessarily so when a parent is not fatally injured.⁹⁶ The dissent also failed to consider that legal recognition of a husband's loss of his wife's consortium is based on an anachronism⁹⁷ and that the recent expansion of spousal consortium in Maryland and elsewhere which now permits wives to recover for loss of their husband's consortium⁹⁸ was in part a result of equal protection requirements.⁹⁹ By contrast, equal protection does not require legal recognition of loss of parental consortium.¹⁰⁰

94. See *supra* note 49 and accompanying text stating that tort law generally does not permit a secondary tort victim to recover damages; *supra* text accompanying notes 76-78.

95. See *infra* note 96. The dissent erroneously believed that Maryland law recognizes loss of a child's consortium. See *id.*

96. The dissent also cited *Hudson v. Hudson*, 226 Md. 521, 174 A.2d 339 (1961); *Seglinski v. Baltimore Copper Co.*, 149 Md. 541, 131 A. 774 (1926); *Hussey v. Ryan*, 64 Md. 426, 2 A. 729 (1886); *County Comm'rs v. Hamilton*, 60 Md. 340 (1883); and MD. FAM. LAW CODE ANN. §§ 5-205 to -206 (1984), for the proposition that Maryland allows "a parent . . . to recover for loss of a minor child's services, society, etc." 316 Md. at 37, 557 A.2d at 221 (emphasis added). The dissent was mistaken in part because *Hudson*, *Seglinski*, *Hussey*, and *Hamilton* recognized the right of a parent to recover damages for medical expenses or loss of a child's services; they did not recognize that a parent could recover for nonpecuniary damages such as loss of a child's society. The common law generally did not permit a parent to recover damages for loss of a child's society. See *supra* note 20. Furthermore, §§ 5-205 to 206 permit a parent to recover damages for a child's lost services and earnings; they do not permit a parent to recover for loss of a child's society.

97. See *supra* note 2; *supra* notes 14-25 and accompanying text discussing the proprietary interest a husband had in his wife's services, affection, and companionship at common law.

98. See *supra* notes 14-34 and accompanying text.

99. See *supra* notes 22-34 and accompanying text.

100. Note, *Recovery for Loss of Parental Consortium*, *supra* note 4, at 296-97; see *supra* note 63 and accompanying text. But see *Love*, *supra* note 4, at 606-07.

In addition to rejecting loss of parental consortium as a cause of action in Maryland, the decision in *Gaver* clearly indicates that in the foreseeable future, the court of appeals will view with disfavor proposals for the court to adopt other kinds of consortium claims which have not been previously recognized in Maryland.¹⁰¹

In *Gaver v. Harrant*, the Court of Appeals of Maryland held that children do not have a cause of action for loss of parental consortium when a parent survives a tortious injury. The court rejected the cause of action largely because recognition of it would result in the expansion of tortfeasor liability and increased societal costs and because a consortium claim is for intangible harm sustained by a party who is not the primary victim of a tort. As a result of the decision in *Gaver*, Maryland has joined the majority of jurisdictions which refuse to recognize loss of parental consortium.

James E. Myers

101. An example of such a consortium claim is a parent's loss of a child's consortium which is not recognized in Maryland, *see supra* note 95 and accompanying text, but is recognized in some jurisdictions. *E.g.*, *Reben v. Ely*, 146 Ariz. 309, 705 P.2d 1360 (1985); *Shockley v. Prier*, 66 Wis. 2d 394, 225 N.W.2d 495 (1975). Another potential consortium claim which is unlikely to be recognized in Maryland in light of *Gaver* is loss of an unmarried cohabitant's consortium which some commentators have suggested should be recognized. *See Comment, Iowa Cohabitants Denied Recovery for Loss of Consortium*, 69 IOWA L. REV. 811 (1984); *Comment, Loss of Consortium: Extending the Cause of Action to Cohabitators in Hawaii*, 10 U. HAW. L. REV. 291 (1988); *Note, Expanding Loss of Consortium in Vermont: Developing a New Doctrine*, 12 VT. L. REV. 157, 170-80 (1987).