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# LOSS OF CONSORTIUM: A DERIVATIVE INJURY GIVING RISE TO A SEPARATE CAUSE OF ACTION

## INTRODUCTION

Evolving perceptions of the rights and duties of married persons have required a frequent reevaluation of laws concerning marriage.<sup>1</sup> One legal right that has undergone dramatic change is the right of a spouse to recover when a disabling injury to the other spouse<sup>2</sup> results in a loss of consortium,<sup>3</sup> a right deeply rooted in the early common law.<sup>4</sup> In its original common-law form, the action for loss of consortium was available only to a husband whose wife was injured by another. Although recovery was historically predicated on the loss of the wife's<sup>5</sup> services,<sup>6</sup> today the loss is recognized by an overwhelming majority of states as encompassing the loss, by either spouse,<sup>7</sup> of the "affection, solace, comfort, companionship, society, assistance, and

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1. See H. Clark, *The Law of Domestic Relations in the United States* ch. 7 (1968) (development of legal rights of married women); 1 F. Harper & F. James, *The Law of Torts* §§ 8.1-.4, 8.7, 8.9 (1956) (evolution of tort actions with respect to marriage); W. Prosser, *Handbook of the Law of Torts* § 74, at 489-90 (4th ed. 1971) (effect of Married Women's Acts on rights of wives in tort actions); Kulzer, *Law and the Housewife: Property, Divorce, and Death*, 28 U. Fla. L. Rev. 1 *passim* (1975) (effect of changing ideas of marital property, divorce and property distribution at death); Weyrauch, *Metamorphoses of Marriage*, 13 Fam. L.Q. 415, 421-24 (1980) (general legal consequences of changing nature of marriage).

2. Traditionally, loss of consortium has been recognized only when it flows from physical injuries of the disabled spouse. The Supreme Court of California, however, has held that there can be recovery for loss of consortium resulting from the disabled spouse's emotional injury. *Molien v. Kaiser Found. Hosps.*, 27 Cal. 3d 916, 932-33, 616 P.2d 813, 823, 167 Cal. Rptr. 831, 841 (1980) (en banc); *accord Agis v. Howard Johnson Co.*, 371 Mass. 140, 146-47, 355 N.E.2d 315, 319-20 (1976).

3. Unintentional deprivation of consortium, resulting from an injury to one spouse, is referred to as loss of consortium. See W. Prosser, *supra* note 1, § 125, at 889. Intentional deprivation of consortium is referred to as alienation of affections. See W. Prosser, *supra* note 1, § 124, at 878.

4. See *Birmingham S. Ry. v. Lintner*, 141 Ala. 420, 427-28, 38 So. 363, 365 (1904); *Ohio & M. Ry. v. Cosby*, 107 Ind. 32, 34-35, 7 N.E. 373, 375 (1886); *Mallett v. Dunn*, [1949] 2 K.B. 180, 183-85; *Hyde v. Scysson*, 79 Eng. Rep. 462 (1619); W. Prosser, *supra* note 1, § 125, at 888-89.

5. See 1 F. Harper & F. James, *supra* note 1, § 8.9, at 635, 639; W. Prosser, *supra* note 1, § 125, at 889, 894; see, e.g., *Birmingham S. Ry. v. Lintner*, 141 Ala. 420, 427, 38 So. 363, 365 (1904); *Ohio & M. Ry. v. Cosby*, 107 Ind. 32, 34-35, 7 N.E. 373, 375 (1886).

6. 1 F. Harper & F. James, *supra* note 1, § 8.9, at 638; see W. Prosser, *supra* note 1, § 125, at 889-90.

7. See W. Prosser, *supra* note 1, § 125, at 895. Prosser stated in 1971 that a majority of courts that considered the question had extended the right to recover for loss of consortium. *Id.* Since his 1971 edition, additional states have followed. E.g., *Rodriguez v. Bethlehem Steel Corp.*, 12 Cal. 3d 382, 408, 525 P.2d 669, 686, 115 Cal. Rptr. 765, 782 (1974) (en banc); *Hopson v. St. Mary's Hosp.*, 176 Conn. 485, 496, 408 A.2d 260, 265 (1979); *Diaz v. Eli Lilly & Co.*, 364 Mass. 153, 167-68, 302 N.E.2d 555, 564 (1973).

sexual relations necessary to a successful marriage.”<sup>8</sup> It is also now generally recognized that loss of consortium is a separate injury of the loss of consortium spouse.<sup>9</sup>

Consistent with the archaic belief that the husband and wife are a legal unity<sup>10</sup> rather than distinct entities, however, the modern action is frequently characterized as derivative<sup>11</sup> or is treated as an action for

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8. *Whittlesey v. Miller*, 572 S.W.2d 665, 666 (Tex. 1978); *accord Schreiner v. Fruit*, 519 P.2d 462, 465-66 (Alaska 1974); *Rodriguez v. Bethlehem Steel Corp.*, 12 Cal. 3d 382, 404-05, 525 P.2d 669, 684, 115 Cal. Rptr. 765, 780 (1974) (en banc); *Gates v. Foley*, 247 So. 2d 40, 43 (Fla. 1971); *Millington v. Southeastern Elevator Co.*, 22 N.Y.2d 498, 502, 239 N.E.2d 897, 899, 293 N.Y.S.2d 305, 308 (1968). Recovery for loss of consortium may be substantial. *See Rodriguez v. McDonnell Douglas Corp.*, 87 Cal. App. 3d 626, 652, 663-64, 151 Cal. Rptr. 399, 413, 419-20 (1978) (award of \$500,000 for loss of consortium was held to be not excessive where spouse, at the age of 22 and married 16 months, was rendered a triplegic, and the other spouse claiming the loss of consortium was 20); *Rocha v. State*, 77 Misc. 2d 290, 301-02, 352 N.Y.S.2d 990, 1003 (Ct. Cl. 1974) (\$50,000 award to spouse, 28 years old at the time of the accident, who had no sexual relations with disabled spouse since the accident and probably never would), *aff'd*, 45 A.D.2d 633, 360 N.Y.S.2d 484 (1975); *Redepenning v. Dore*, 56 Wis. 2d 129, 137-38, 201 N.W.2d 580, 585 (1972) (\$15,000 award to husband whose wife, since an accident, refused to do housework or to have sexual relations). Loss of consortium is a separate injury which must be separately proved. *Washington v. Jones*, 386 Mich. 466, 472-73, 192 N.W.2d 234, 237 (1971) (evidence of personal injuries of spouse does not constitute evidence of loss of consortium, and mere averment of loss of consortium does not suffice as basis of awarding relief). Furthermore, all elements of loss of consortium need not be suffered to warrant relief. *See, e.g., Ricker v. Zinser Textilmaschinen GmbH*, 506 F. Supp. 3, 8 (E.D. Tenn. 1978), *aff'd*, 633 F.2d 218 (6th Cir. 1980) (spouse deprived of his wife's services of doing housework and assisting with farm work awarded \$1800 notwithstanding lack of evidence of defendant's negligence causing deprivation of sexual relations).

9. *See, e.g., Schreiner v. Fruit*, 519 P.2d 462, 465-66 (Alaska 1974) (loss of consortium is a personal loss); *Millington v. Southeastern Elevator Co.*, 22 N.Y.2d 498, 504-05, 239 N.E.2d 897, 900, 293 N.Y.S.2d 305, 309-10 (1968) (“consortium now represents the interest of the injured party's spouse”). The Supreme Court of Wisconsin, permitting a wife to assert her loss of consortium claim separately from her husband's personal injury claim, noted that “her claim is not for his personal injuries but for the separate and independent loss she sustained.” *Fitzgerald v. Meissner & Hicks, Inc.*, 38 Wis. 2d 571, 581, 157 N.W.2d 595, 600 (1968).

10. 1 W. Blackstone, Commentaries \*442; W. Prosser, *supra* note 1, § 122, at 859-60. “By marriage, the husband and wife are one person in law; that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband . . . .” 1 W. Blackstone, *supra*, at \*442 (footnotes omitted).

11. *E.g., Tollett v. Mashburn*, 291 F.2d 89, 93 (8th Cir. 1961); *Allen v. Endrukaitis*, 35 Conn. Supp. 286, 290-91, 408 A.2d 673, 675 (1979); *Hamm v. City of Milton*, 358 So. 2d 121, 123 (Fla. Dist. Ct. App. 1978); *Anderson v. Lutheran Deaconess Hosp.*, 257 N.W.2d 561, 562 n.1 (Minn. 1977); *Maidman v. Stagg*, 82 A.D.2d 299, 305-06, 441 N.Y.S.2d 711, 715 (1981); *White v. Lunder*, 66 Wis. 2d 563, 574-76, 225 N.W.2d 442, 449 (1975).

injury to the marriage.<sup>12</sup> These characterizations are offered as justification for applying to the loss of consortium action substantive and procedural laws applicable to the action of the disabled spouse.<sup>13</sup> Similarly, because the married couple is viewed by some courts as an economic entity, recovery of the loss of consortium spouse is diminished or denied if there is contributory negligence on the part of the disabled spouse.<sup>14</sup>

This Note contends that although the loss of consortium injury is derivative, the action is not. It criticizes the practice of imputing the negligence of the disabled spouse to the loss of consortium spouse. It further argues that the other justifications offered for this practice—that the injury is to the marriage rather than to the affected spouse or that the married couple is an economic entity—are inconsistent with the modern view of marriage. This Note similarly criticizes the practice of mechanically applying the procedural rules attendant to the disabling injury action to the loss of consortium action. The courts are urged to acknowledge modern realities and apply substantive and procedural laws consistent with the separate nature of the loss of consortium injury and action.

## I. NATURE OF LOSS OF CONSORTIUM

### A. *Development of Loss of Consortium*

At early common law, loss of consortium primarily compensated the husband for the loss of material services of the wife.<sup>15</sup> Because the husband and wife were deemed one person with all rights vested in the husband,<sup>16</sup> the wife had no enforceable right to the material

12. *Eggert v. Working*, 599 P.2d 1389, 1391 (Alaska 1979); see *Millington v. Southeastern Elevator Co.*, 22 N.Y.2d 498, 504-05, 239 N.E.2d 897, 900, 293 N.Y.S.2d 305, 309-10 (1968); *infra* pt. II(B).

13. *E.g.*, *Tollett v. Mashburn*, 291 F.2d 89, 93 (8th Cir. 1961); *Eggert v. Working*, 599 P.2d 1389, 1391 (Alaska 1979); *Allen v. Endrukaitis*, 35 Conn. Supp. 286, 290, 408 A.2d 673, 675 (1979); *Anderson v. Lutheran Deaconess Hosp.*, 257 N.W.2d 561, 562 n.1 (Minn. 1977); *Maidman v. Stagg*, 82 A.D.2d 299, 305-06, 441 N.Y.S.2d 711, 715 (1981); *White v. Lunder*, 66 Wis. 2d 563, 574, 225 N.W.2d 442, 449 (1975).

14. See *Eggert v. Working*, 599 P.2d 1389, 1391 (Alaska 1979); *Ross v. Cuthbert*, 239 Or. 429, 435-37, 397 P.2d 529, 532 (1964) (en banc).

15. Note, *Judicial Treatment of Negligent Invasion of Consortium*, 61 Colum. L. Rev. 1341, 1343-44 (1961); see, *e.g.*, *Reeves v. Lutz*, 179 Mo. App. 61, 83-84, 162 S.W. 280, 286-87 (1913); *Kimberly v. Howland*, 143 N.C. 398, 405, 55 S.E. 778, 781 (1906); *Standen v. Pennsylvania R.R.*, 214 Pa. 189, 198-200, 63 A. 467, 470-71 (1906). The term "services" often included the wife's services both inside and outside the home. See Warren, *Husband's Right to Wife's Services* (pt. 1), 38 Harv. L. Rev. 421, 421 (1925). Even today, it is not always clear what elements are considered part of loss of consortium. See *Schwartz v. City of Milwaukee*, 54 Wis. 2d 286, 292-93, 195 N.W.2d 480, 484 (1972).

16. 1 W. Blackstone, *supra* note 10, at \*442; W. Prosser, *supra* note 1, § 122, at 859-60. The husband and wife were legally identified with each other, and therefore

services of her spouse,<sup>17</sup> and her loss of the husband's consortium was not a compensable injury.<sup>18</sup>

Starting in the mid-nineteenth century,<sup>19</sup> statutes known as Married Women's Acts,<sup>20</sup> which have now been passed in all states,<sup>21</sup> abolished

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the husband was liable for the wife's torts. *E.g.*, *Henley v. Wilson*, 137 Cal. 273, 274, 70 P. 21, 22 (1902); *Missio v. Williams*, 129 Tenn. 504, 509-10, 167 S.W. 473, 474 (1914). Consistent with deeming the husband the owner of the wife's property, however, the wife was not liable for the husband's torts. *See, e.g.*, *Vanneman v. Powers*, 56 N.Y. 39, 42-43 (1874); *Longey v. Leach*, 57 Vt. 377, 379 (1885). This legal unity prevented the husband and wife from suing each other. *See, e.g.*, *Libby v. Berry*, 74 Me. 286, 288 (1883); *Freethy v. Freethy*, 42 Barb. 641, 645 (N.Y. App. Div. 1865); *Howe v. Blanden*, 21 Vt. 315, 321 (1849). To some extent, the Married Women's Acts have been used to justify abrogation of this interspousal immunity. *E.g.*, *Notes v. Snyder*, 4 F.2d 426, 427 (D.C. Cir. 1925); *Hubbard v. Ruff*, 97 Ga. App. 251, 252-55, 103 S.E.2d 134, 135-37 (1958); *Vigilant Ins. Co. v. Bennett*, 197 Va. 216, 222-23, 89 S.E.2d 69, 74-76 (1955). *See generally* *W. Prosser, supra* note 1, § 122, at 861-64 (discussion of reasons advanced by courts to recognize or deny a cause of action for torts between spouses); *McCurdy, Torts Between Persons in Domestic Relation*, 43 Harv. L. Rev. 1030, 1050-56 (1930) (same). Upon marrying, the wife lost many rights. She generally could not bring suit without joining her husband. *E.g.*, *Rogers v. Smith*, 17 Ind. 323, 323-24 (1861); *Laughlin v. Eaton*, 54 Me. 156, 160 (1866). Also, the husband could use the wife's property as he pleased. *See, e.g.*, *Ellington v. Harris*, 127 Ga. 85, 56 S.E. 134 (1906); *Jones v. Patterson*, 11 Barb. 572 (N.Y. App. Div. 1852). The husband could obtain a judgment for all damages resulting from an injury to the wife. *See* *W. Prosser, supra* note 1, § 122, at 860; *see, e.g.*, *Little v. Marsh*, 37 N.C. 18, 27, 2 Ired. Eq. 8, 15 (1841); *Tritt's Adm'r v. Colwell's Adm'r*, 31 Pa. (7 Casey) 228, 232-33 (1858).

17. *Lippman, The Breakdown of Consortium*, 30 Colum. L. Rev. 651, 665 (1930); *see* *Hitaffer v. Argonne Co.*, 183 F.2d 811, 812-15 (D.C. Cir.), *cert. denied*, 340 U.S. 852 (1950), *overruled on other grounds*, *Smith & Co. v. Coles*, 242 F.2d 220 (D.C. Cir.), *cert. denied*, 354 U.S. 914 (1957).

18. *See* 1 F. Harper & F. James, *supra* note 1, § 8.9, at 635, 639; *W. Prosser, supra* note 1, § 125, at 889, 894; *see, e.g.*, *Birmingham S. Ry. v. Lintner*, 141 Ala. 420, 427, 38 So. 363, 365 (1904); *Ohio & M. Ry. v. Cosby*, 107 Ind. 32, 34-35, 7 N.E. 373, 375 (1886). All elements of the loss either gave rise to a derivative right of the husband to recover on behalf of the wife or a right of the husband to sue based on an injury to the marital entity. *Blair v. Seitner Dry Goods Co.*, 184 Mich. 304, 312, 151 N.W. 724, 727 (1915) (the husband had the right to the "labor, services, and earnings of his wife"), *overruled*, *Montgomery v. Stephan*, 359 Mich. 33, 101 N.W.2d 227 (1960); *see* *Hannigan, Damages Recoverable by Husband for Injury to Wife*, 16 Colum. L. Rev. 122, 124-25 (1916); *Lippman, supra* note 17, at 653. "The husband was allowed to sue for loss of consortium both because of the wife's status as a chattel of her husband, and because of her inability to bring suit in her own behalf for injuries she sustained." *Schreiner v. Fruit*, 519 P.2d 462, 463 (Alaska 1974) (footnote omitted).

19. *W. Prosser, supra* note 1, § 122, at 861.

20. *See, e.g.*, Cal. Civ. Code § 5112 (West 1970) (concurring negligence of spouse not defense unless it would be "if the marriage did not exist"); Mass. Ann. Laws ch. 209, § 1 (Michie/Law. Co-op. 1981) (married women can own and control property); Mich. Comp. Laws Ann. § 600.2001 (1981) (married women can bring suit without joining their husbands); N.Y. Gen. Oblig. Law § 3-301(2) (McKinney 1978) (married women may recover for their own injuries). Each spouse is liable only for his or her own torts. *See, e.g.*, *Slaughter v. Slaughter*, 122 Ga. App. 374, 376, 177

the fiction of marital unity. The recognition that the husband and wife had separate rights required a reevaluation of the nature of loss of consortium to assure proper allocation of recovery between the spouses.<sup>22</sup> Because the wife now had a right to recover for her own lost services, a few courts abrogated the cause of action.<sup>23</sup> They reasoned that loss of consortium had been essentially an economic loss and rejected the argument that the emotional elements of the loss were worthy of redress.<sup>24</sup> Most courts, however, continued to recognize consortium as a compensable right because they deemed the emotional elements worthy of protection.<sup>25</sup> Nevertheless, they refused

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S.E.2d 119, 121 (1970); *McClure v. McMartin*, 104 La. 496, 507, 29 So. 227, 231-32 (1901).

21. W. Prosser, *supra* note 1, § 122, at 861; *see* 3 C. Vernier, *American Family Laws* § 167 (1935) (wife's property); *id.* § 179 (wife as a party in litigation); *id.* § 180 (litigation between husband and wife).

22. *See* *Diaz v. Eli Lilly & Co.*, 364 Mass. 153, 155-56, 302 N.E.2d 555, 557 (1973). "To be sure, loss of the wife's services or earnings could no longer figure in a right of consortium on the part of the husband, but the other components of the right—the wife's society or companionship or assistance and her sexual availability—could remain." *Id.*; *see* *Holbrook, The Change in the Meaning of Consortium*, 22 Mich. L. Rev. 1, 6-8 (1923).

23. W. Prosser, *supra* note 1, § 125, at 891; *e.g.*, *Marri v. Stamford St. R.R.*, 84 Conn. 9, 22-24, 78 A. 582, 586-87 (1911), *overruled*, *Hopson v. St. Mary's Hosp.*, 176 Conn. 485, 408 A.2d 260 (1979); *Blair v. Seitner Dry Goods Co.*, 184 Mich. 304, 314, 151 N.W. 724, 727 (1915), *overruled*, *Montgomery v. Stephan*, 359 Mich. 33, 101 N.W.2d 227 (1960); *see* 1. F. Harper & F. James, *supra* note 1, § 8.9, at 638-39. The highest court of Connecticut, abrogating the husband's right to recover for loss of consortium, reasoned that because Connecticut's Married Women's Act granted the wife the right to enforce her own rights and because the husband's loss of consortium claim was "essentially grounded . . . in the impairment of the wife's capacity for service and usefulness," there was no longer a claim for loss of consortium. *Marri v. Stamford St. R.R.*, 84 Conn. 9, 23, 78 A. 582, 586 (1911), *overruled*, *Hopson v. St. Mary's Hosp.*, 176 Conn. 485, 408 A.2d 260 (1979).

24. *Marri v. Stamford St. R.R.*, 84 Conn. 9, 23-24, 78 A. 582, 586-87 (1911), *overruled*, *Hopson v. St. Mary's Hosp.*, 176 Conn. 485, 408 A.2d 260 (1979). "[T]he law has never undertaken any such investigations, has never countenanced any attempt to measure pecuniarily such a loss, and, as we have seen, has never recognized in the mere impairment of conjugal relations, pure and simple, the foundation of a right of action." *Id.* at 23-24, 78 A. at 587. The court refused to distinguish between the wife's services rendered inside the home and those rendered outside the home. *Id.* at 23, 78 A. at 586-87.

25. W. Prosser, *supra* note 1, § 125, at 891. The Supreme Court of Connecticut recently reversed itself and now recognizes loss of consortium. *Hopson v. St. Mary's Hosp.*, 176 Conn. 485, 496, 408 A.2d 260, 265 (1979). Recovery for loss of the wife's services was often included as part of the loss. *E.g.*, *People's Home Tel. Co. v. Cockrum*, 182 Ala. 547, 550, 62 So. 86, 87 (1913); *Hansen v. Costello*, 125 Conn. 386, 389, 5 A.2d 880, 882 (1939). *But see* *Glanville v. Chicago, R.I. & P. Ry.*, 196 Iowa 456, 464, 193 N.W. 548, 551-52 (1923) (statute providing that wife can recover for loss of her time included the value of domestic services). The wife's earnings outside the home belong to her. *E.g.*, *Diaz v. Eli Lilly & Co.*, 364 Mass. 153, 155, 302 N.E.2d 555, 556 (1973); *Standen v. Pennsylvania R.R.*, 214 Pa. 189, 199, 63 A. 467, 470 (1906). The nature of loss of consortium had changed, therefore, from being primarily an economic injury, to being primarily an emotional injury. *See* *Acufl v.*

to extend this right to the wife<sup>26</sup> until 1950, when the District of Columbia Circuit decided *Hitaffer v. Argonne Company*.<sup>27</sup> The *Hitaffer* court recognized that “[i]nvasion of the *consortium* is an independent wrong directly to the spouse so injured.”<sup>28</sup> The court

Schmit, 248 Iowa 272, 274, 78 N.W.2d 480, 481-82 (1956); *Diaz v. Eli Lilly & Co.*, 364 Mass. 153, 155, 302 N.E.2d 555, 556 (1973); *Millington v. Southeastern Elevator Co.*, 22 N.Y.2d 498, 507, 239 N.E.2d 897, 902, 293 N.Y.S.2d 305, 311 (1968); *Martin*, *Torts*, 30 Syracuse L. Rev. 555, 592-93 (1979); *Judicial Treatment of Negligent Invasion of Consortium*, *supra* note 15, at 1343-44.

26. *W. Prosser*, *supra* note 1, § 125, at 894-95; *e.g.*, *Giggey v. Gallagher Transp. Co.*, 101 Colo. 258, 261, 72 P.2d 1100, 1101-02 (1937); *Gambino v. Manufacturers Coal & Coke Co.*, 175 Mo. App. 653, 658-59, 158 S.W. 77, 79 (1913), *overruled*, *Novak v. Kansas City Transit*, 365 S.W.2d 539, 545 (Mo. 1963) (en banc); *Goldman v. Cohen*, 30 Misc. 336, 337, 63 N.Y.S. 459, 459-60 (1900). It is interesting that at common law, although the wife was denied the right to sue for loss of consortium, she probably could have recovered for alienation of affections. *See, e.g.*, *Hoover v. Hoover*, 103 Fla. 846, 847, 138 So. 373, 374 (1931) (en banc); *Norris v. Stoneham*, 46 S.W.2d 363, 363-64 (Tex. Civ. App. 1932); *Newsom v. Fleming*, 165 Va. 89, 92-93, 181 S.E. 393, 395-96 (1935); *Domestic Relations—Right of Wife to Sue for Loss of Consortium Due to a Negligent Injury to Her Husband*, 35 Ky. L.J. 220, 221-22 (1947). One reason proffered for not permitting the wife the right to sue for loss of consortium is that at common law she lacked capacity to bring suit to obtain redress. *Holbrook*, *supra* note 22, at 2. Because the Married Women’s Acts permitted the wife to bring suit, it would have been expected that courts would recognize the wife’s right to bring a loss of consortium action. Another reason proffered, however, is that she simply did not have the same rights as the husband. *Id.* Blackstone has descriptively accounted for this reason: “We may observe that in these relative injuries notice is only taken of the wrong done to the superior of the parties related . . . while the loss of the inferior by such injuries is totally unregarded.” 2 *W. Blackstone*, *supra* note 10, at \*142.

27. 183 F.2d 811 (D.C. Cir.), *cert. denied*, 340 U.S. 852 (1950), *overruled on other grounds*, *Smither & Co. v. Coles*, 242 F.2d 220 (D.C. Cir.), *cert. denied*, 354 U.S. 914 (1957). The Supreme Court of North Carolina had been the first court to permit the wife to recover for loss of consortium, but temporarily overruled itself. *Hipp v. E.I. Dupont de Nemours & Co.*, 182 N.C. 9, 15-17, 108 S.E. 318, 323 (1921), *overruled*, *Hinnant v. Tidewater Power Co.*, 189 N.C. 120, 128, 126 S.E. 307, 312 (1925), *overruled*, *Nicholson v. Hugh Chatham Memorial Hosp.*, 300 N.C. 295, 300-04, 266 S.E.2d 818, 821-23 (1980). In 1945, the North Carolina court also denied the cause of action to the husband. *Helmstetler v. Duke Power Co.*, 224 N.C. 821, 824, 32 S.E.2d 611, 613 (1945), *overruled*, *Nicholson v. Hugh Chatham Memorial Hosp.*, 300 N.C. 295, 300-04, 266 S.E.2d 818, 821-23 (1980). In 1980, this court, overruling *Hinnant* and *Helmstetler*, recognized loss of consortium for either the wife or husband. *Nicholson v. Hugh Chatham Memorial Hosp.*, 300 N.C. 295, 300-04, 266 S.E.2d 818, 821-23 (1980).

28. 183 F.2d at 815. “[A]fter piercing the thin veils of reasoning employed to sustain the rule, we have been unable to disclose any substantial rationale on which we would be willing to predicate a denial of a wife’s action for loss of *consortium* due to a negligent injury to her husband.” *Id.* at 813; *accord Swartz v. United States Steel Corp.*, 293 Ala. 439, 441-46, 304 So. 2d 881, 882-87 (1974); *Schreiner v. Fruit*, 519 P.2d 462, 464-66 (Alaska 1974); *cf. American Export Lines v. Alvez*, 446 U.S. 274, 284-85 (1980) (wife can recover under general maritime law for loss of husband’s society caused by non-fatal injury).

found no merit in the argument that because loss of material services is the primary element of loss of consortium, the wife, who had no legal right to the husband's material services, had no cause of action.<sup>29</sup> The *Hitaffer* court reasoned that loss of services is only one element<sup>30</sup> of the "conceptualistic unity"<sup>31</sup> that comprises loss of consortium. The court recognized that "[t]he medieval concepts of the marriage relation to which other jurisdictions ha[d] reverted in order to [deny the wife's action] ha[d] long since ceased to have any meaning."<sup>32</sup> Today, almost all states have adopted the *Hitaffer* rationale and recognize loss of consortium as a cause of action available to either spouse.<sup>33</sup>

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29. 183 F.2d at 813. "The difficulty with adhering to these authorities is that they sound in the false premise that in these actions the loss of services is the predominant factor." *Id.*

30. *Id.* Deeming loss of services the predominant factor of loss of consortium "is nothing more than an arbitrary separation of the various elements of consortium devised to circumvent the logic of allowing the wife such an action." *Id.*

31. *Id.* at 814. "It is not the fact that one or the other of the elements of *consortium* is injured in a particular invasion that controls the type of action which may be brought but rather that the *consortium* as such has been injured at all." *Id.*; see *Aderhold v. Stewart*, 172 Okla. 77, 78, 46 P.2d 346, 348 (1935) (per curiam); D. Dobbs, *Handbook on the Law of Remedies* § 8.11, at 587-88 (1973).

32. 183 F.2d at 819; see *W. Prosser, supra* note 1, § 125, at 894-95.

33. See *supra* note 7. In some states, the legislature has extended the right to sue for loss of consortium to the wife. Okla. Stat. Ann. tit. 32, § 15 (West 1976); S.C. Code Ann. § 15-75-20 (Law. Co-op. 1977); Tenn. Code Ann. § 25-1-106 (1980); Vt. Stat. Ann. tit. 12, § 5431 (Supp. 1981). In Virginia, instead of extending this right to the wife, the legislature removed it from the husband. See *Carey v. Foster*, 345 F.2d 772, 776 (4th Cir. 1965) (construing Va. Code § 55-36 (1950)). When courts extended the right to sue for loss of consortium to the wife, they justified this extension as a consequence of the separate right of the wife to consortium and the separate personal harm suffered by the loss of consortium spouse. *E.g.*, *Swartz v. United States Steel Corp.*, 293 Ala. 439, 446, 304 So. 2d 881, 887 (1974) (because each spouse has a personal interest in the maintenance of the marriage relationship, an injury to the relationship is a separate injury to each spouse); *Diaz v. Eli Lilly & Co.*, 364 Mass. 153, 165, 302 N.E.2d 555, 563 (1973) ("marital interest is quite recognizable and its impairment may be definite, serious, and enduring"). The early common-law practice of allowing the husband, but not the wife, to sue for loss of consortium raises the issue of equal protection of law. The Tenth Circuit granted recovery to a wife before the effective date of Oklahoma's statute extending loss of consortium to the wife because it found Oklahoma's practice of recognizing only the husband's loss to be a violation of the fourteenth amendment of the United States Constitution. *Duncan v. General Motors Corp.*, 499 F.2d 835, 838 (10th Cir. 1974). "The intangible segments of the elements comprising the cause of action for loss of consortium are equally precious to both husband and wife." *Id.* Utah has overcome any equal protection problem by denying loss of consortium recovery to both spouses. *Tjas v. Proctor*, 591 P.2d 438, 440 (Utah 1979); *Ellis v. Hathaway*, 27 Utah 2d 143, 144, 493 P.2d 985, 986 (1972); Utah Code Ann. § 30-2-4 (1953). A few states continue the discriminatory practice of granting the husband, but not the wife, the right to recover for loss of consortium. *Roseberry v. Starkovich*, 73 N.M. 211, 218, 387 P.2d 321, 326-27 (1963); *Bates v. Donnafield*, 481 P.2d 347, 348-49 (Wyo. 1971). See generally *Torts in the Family* (pt. a), 32 J. Am. Trial Law. A. 265 (1968) (fourteenth amendment violated

### B. *Derivative Causes of Action*

Today, many states deem loss of consortium a derivative cause of action—that is, derivative of the cause of action of the disabled spouse.<sup>34</sup> Although there is no precise definition of a derivative action,<sup>35</sup> it is generally an action that owes its existence to a preceding cause of action<sup>36</sup> and is often no more than a separate right to enforce the preceding claim.<sup>37</sup> In a shareholders' derivative suit,<sup>38</sup> for example, only the corporation is injured; shareholders bring a derivative suit to seek redress of the corporation's injury.<sup>39</sup> The shareholders' suit is contingent on the corporation's having an enforceable cause of action,<sup>40</sup> and recovery in the suit generally accrues to the corporation.<sup>41</sup> Similarly, if an insurance company pays a claim of its insured, the company is subrogated to the position of the insured and can bring

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when only the husband can recover for loss of consortium); Comment, *Equal Protection: The Wife's Action for Loss of Consortium*, 54 Iowa L. Rev. 510 (1968) (same).

34. E.g., *Hamm v. City of Milton*, 358 So. 2d 121, 123 (Fla. Dist. Ct. App. 1978); *White v. Lunder*, 66 Wis. 2d 563, 574, 225 N.W.2d 442, 449 (1975). The loss of consortium spouse's "right to recover is derived, both in a literal and legal sense, from the injury suffered by her spouse." *Maidman v. Stagg*, 82 A.D.2d 299, 305, 441 N.Y.S.2d 711, 715 (1981); see 1 F. Harper & F. James, *supra* note 1, § 8.9, at 640.

35. 16 G. Couch, *Couch Cyclopedia of Insurance Law* § 61:37 (2d ed. 1966) ("right of subrogation is purely derivative as the insurer succeeds only to the rights of the insured"); 3B J. Moore, *Moore's Federal Practice* ¶ 23.1.16[1], at 23.1-47 (2d ed. 1981) (derivative suits "are those which seek to enforce any right which belongs to the corporation"). *Black's Law Dictionary* defines "derivative" as "[c]oming from another; taken from something preceding; secondary. That which has not its origin in itself, but owes its existence to something foregoing. Anything obtained or deduced from another." *Black's Law Dictionary* 399 (5th ed. 1979).

36. See 16 G. Couch, *supra* note 35, § 61:37; 3B J. Moore, *supra* note 35, ¶ 23.1.16[1], at 23.1-47.

37. See *Aetna Casualty & Sur. Co. v. Windsor*, 353 A.2d 684, 686 (D.C. 1976) (insurance company is subrogated to position of insured); 16 G. Couch, *supra* note 35, § 61:37 ("no new cause of action is created" (footnote omitted)); 3B J. Moore, *supra* note 35, ¶ 23.1.16[1], at 23.1-39 (derivative rights are secondary in nature).

38. See Fed. R. Civ. P. 23.1. "[A] derivative action [may be] brought by one or more shareholders or members to enforce a right of a corporation or of an unincorporated association, the corporation or association having failed to enforce a right which may properly be asserted by it . . ." *Id.*

39. See, e.g., *Koster v. Lumbermens Mut. Casualty Co.*, 330 U.S. 518, 522 & n.2 (1947); *Molever v. Levenson*, 539 F.2d 996, 998 (4th Cir.), *cert. denied*, 429 U.S. 1024 (1976).

40. *Falvey v. Foreman-State Nat'l Bank*, 101 F.2d 409, 414 (7th Cir. 1939); see *Papilsky v. Berndt*, 466 F.2d 251, 255 (2d Cir.), *cert. denied*, 409 U.S. 1077 (1972).

41. 7A C. Wright & A. Miller, *Federal Practice and Procedure* § 1821, at 294 (1972); see *Molever v. Levenson*, 539 F.2d 996, 1003 (4th Cir.), *cert. denied*, 429 U.S. 1024 (1976).

a suit<sup>42</sup> seeking the remedies the insured could have sought had he brought suit.<sup>43</sup>

Loss of consortium is derivative in a different sense.<sup>44</sup> As in the shareholders' derivative suit or the insurance suit, the plaintiff's action is dependent on the occurrence of an injury to another. Unlike the shareholders or insurance company, however, the loss of consortium spouse suffers an original injury that is the subject of the action;<sup>45</sup> the shareholders can assert only the right that the corporation could have asserted had it sued,<sup>46</sup> and the insurance company can assert only the right of the insured.<sup>47</sup>

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42. See, e.g., *Williams v. Globe Indem. Co.*, 507 F.2d 837, 839 (8th Cir. 1974), cert. denied, 421 U.S. 948 (1975); *American States Ins. Co. v. Williams*, 151 Ind. App. 99, 106, 278 N.E.2d 295, 300 (1972); 16 G. Couch, *supra* note 35, § 61:4.

43. *American States Ins. Co. v. Williams*, 151 Ind. App. 99, 106, 278 N.E.2d 295, 300 (1972). "[T]he insurer stands in the shoes of the insured." *Id.*; see 16 G. Couch, *supra* note 35, § 61:9.

44. Because personal injury to one spouse is a prerequisite to loss of consortium, loss of consortium is dependent on the initial injuries. See, e.g., *Lantis v. Condon*, 95 Cal. App. 3d 152, 157, 157 Cal. Rptr. 22, 24 (1979); *Utech v. Steinagel*, 54 Wis. 2d 507, 515-17, 196 N.W.2d 674, 679-80 (1972). The more severe the personal injuries are, the more severe the loss of consortium is likely to be. Compare *Rodriguez v. McDonnell Douglas Corp.*, 87 Cal. App. 3d 626, 663-64, 151 Cal. Rptr. 399, 419-20 (1979) (jury awarded \$4,239,996 to personal injury spouse and \$500,000 to loss of consortium spouse), with *Hagenbuch v. Snap-On Tools Corp.*, 339 F. Supp. 676, 685 (D.N.H. 1972) (\$105,000 award, exclusive of reduction for contributory negligence, to personal injury spouse and \$1000 to loss of consortium spouse).

45. *Harrison v. United States*, 479 F. Supp. 529, 532 (D. Conn. 1979), *aff'd mem.*, 622 F.2d 573 (2d Cir.), cert. denied, 449 U.S. 828 (1980). "[An] action against a tortfeasor for loss of consortium is an action for damages to her own interest, not a remote consequence of the tortfeasor's injury to the husband." *Id.* (citation omitted); accord *Milde v. Leigh*, 75 N.D. 418, 431, 28 N.W.2d 530, 537-38 (1947). *Contra Allen v. Endrukaitis*, 35 Conn. Supp. 286, 291, 408 A.2d 673, 675 (Super. Ct. 1979). A claim for the loss of a child's services and society is similar to the loss of consortium action in that the parent, like the loss of consortium spouse, suffers a separate injury flowing from disabling injuries. See *Handeland v. Brown*, 216 N.W.2d 574, 575 (Iowa 1974). The difference between an action for derivative injuries and a purely derivative action can be demonstrated by a comparison of wrongful death and survival actions. "[A] distinction exists between a survival action which preserves after death a purely derivative right through decedent for his damages, and a wrongful death action which creates an independent right in designated survivors for damages they sustain by reason of decedent's death." *Fisher v. Missoula White Pine Sash Co.*, 164 Mont. 41, 45-46, 518 P.2d 795, 797 (1974).

46. E.g., *Bergeson v. Life Ins. Corp. of Am.*, 265 F.2d 227, 233 (10th Cir. 1959); *Falvey v. Foreman-State Nat'l Bank*, 101 F.2d 409, 414 (7th Cir. 1939); see 3B J. Moore, *supra* note 35, ¶ 23.1.16[1], at 23.1-41, -47.

47. See, e.g., *Aetna Casualty & Sur. Co. v. Windsor*, 353 A.2d 684, 686 (D.C. 1976); *American States Ins. Co. v. Williams*, 151 Ind. App. 99, 106, 278 N.E.2d 295, 300 (1972); 16 G. Couch, *supra* note 35, § 61:36, at 261-62; 3 J. Moore, *supra* note 35, ¶ 14.09, at 14-248; cf. J. Calamari & J. Perillo, *The Law of Contracts* § 18-16 (2d ed. 1977) (assignee is in same position as assignor).

As a general rule, therefore, the shareholder or insurance company cannot maintain a position superior to that of the holders of the primary cause of action:<sup>48</sup> The plaintiff in the derivative action, suing for the same injury, will be awarded only that which the holder of the primary cause of action would have received had he brought suit.<sup>49</sup> In addition, any defect in the primary cause of action will be imputed to the derivative action.<sup>50</sup> Moreover, procedure applicable to the primary cause of action is generally applied to the derivative cause of action.<sup>51</sup> The loss of consortium spouse, however, asserts a separate right;<sup>52</sup> the injury rather than the claim is derivative. The rights of the loss of consortium spouse, therefore, should not be restricted by, or contingent on, the rights of the disabled spouse.<sup>53</sup>

Some courts, apparently, are confused by this distinction. Such confusion is most evident in their treatment of loss of consortium as a

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48. See, e.g., *Surowitz v. Hilton Hotels Corp.*, 342 F.2d 596, 603 (7th Cir. 1965), *rev'd on other grounds*, 383 U.S. 363 (1966); *American States Ins. Co. v. Williams*, 151 Ind. App. 99, 106, 278 N.E.2d 295, 300 (1972). This is similar to the general rule that an assignee's right cannot have a position superior to the corresponding assignor's right. See J. Calamari & J. Perillo, *supra* note 47, § 18-16 (generally, defenses applicable to the assignor are also applicable to the assignee). The assignment theory has been held applicable to loss of consortium. *Stuart v. Winnie*, 217 Wis. 298, 305, 258 N.W. 611, 614 (1935). Under this theory, all defenses against the disabled spouse are also applicable against the loss of consortium spouse. *Id.* The problem with applying the assignment theory to loss of consortium is that it violates a basic principle of assignment: One cannot assign what one does not have. The disabled spouse does not have the right to sue for loss of consortium. See *Schwartz v. City of Milwaukee*, 54 Wis. 2d 286, 293, 195 N.W.2d 480, 484-85 (1972).

49. See, e.g., *Surowitz v. Hilton Hotels Corp.*, 342 F.2d 596, 603 (7th Cir. 1965), *rev'd on other grounds*, 383 U.S. 363 (1966); *Niles v. New York Cent. & Hudson River R.R.*, 176 N.Y. 119, 126, 68 N.E. 142, 145 (1903). An insurance company, however, generally cannot receive an amount in excess of that which it paid to the insured. 16 G. Couch, *supra* note 35, § 61:39, at 263.

50. See, e.g., *Aetna Casualty & Sur. Co. v. Windsor*, 353 A.2d 684, 685 (D.C. 1976); *American States Ins. Co. v. Williams*, 151 Ind. App. 99, 106, 278 N.E.2d 295, 300 (1972).

51. See, e.g., *Aetna Casualty & Sur. Co. v. Windsor*, 353 A.2d 684, 685 (D.C. 1976); W. Knepper, *Liability of Corporate Officers and Directors* § 14.01, at 375-76 (2d ed. 1973).

52. See, e.g., *Schreiner v. Fruit*, 519 P.2d 462, 465-66 (Alaska 1974); *Lantis v. Condon*, 95 Cal. App. 3d 152, 157, 157 Cal. Rptr. 22, 24 (1979); *Millington v. Southeastern Elevator Co.*, 22 N.Y.2d 498, 504-05, 239 N.E.2d 897, 900-01, 293 N.Y.S.2d 305, 309-10 (1968); *Fitzgerald v. Meissner & Hicks, Inc.*, 38 Wis. 2d 571, 581, 157 N.W.2d 595, 600 (1968).

53. See *Macon v. Seaward Constr. Co.*, 555 F.2d 1, 2 (1st Cir. 1977); *Lantis v. Condon*, 95 Cal. App. 3d 152, 155-56, 157 Cal. Rptr. 22, 23 (1979); *Bartalo v. Superior Court*, 51 Cal. App. 3d 526, 533, 124 Cal. Rptr. 370, 374-75 (1975); *Fuller v. Buhrow*, 292 N.W.2d 672, 674 (Iowa 1980); *Felch v. General Rental Co.*, 421 N.E.2d 67, 70-71 (Mass. 1981); *Palmer v. Clarksdale Hosp.*, 213 Miss. 611, 623-24, 57 So. 2d 476, 481 (1952); *Kraut v. Cleveland Ry.*, 132 Ohio St. 125, 127, 5 N.E.2d 324, 325 (1936).

derivative action for the purpose of attributing the negligence of the disabled spouse to the loss of consortium spouse and as non-derivative for procedural purposes.<sup>54</sup>

## II. CONTRIBUTORY NEGLIGENCE OF THE DISABLED SPOUSE

### A. Deeming the Action Derivative

In most jurisdictions, the contributory negligence of the disabled spouse is attributed to the loss of consortium spouse to either reduce or bar recovery.<sup>55</sup> Because the husband and wife are no longer legally

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54. Compare *Gates v. Foley*, 247 So. 2d 40, 45 (Fla. 1971) (action is derivative for purpose of contributory negligence of the disabled spouse), and *Tjaden v. Moses*, 94 Ill. App. 2d 361, 365, 237 N.E.2d 562, 565 (1968) (loss of consortium action is dependent upon third party's liability to the personal injury spouse), and *White v. Lunder*, 66 Wis. 2d 563, 574, 225 N.W.2d 442, 449 (1975) (loss of consortium is a derivative action for purpose of reducing or barring award by contributory negligence of disabled spouse), with *Daniels v. Weiss*, 385 So. 2d 661, 663 (Fla. Dist. Ct. App. 1980) (amendment to pleadings to add the separate loss of consortium action could not relate back), and *Mitchell v. White Motor Co.*, 58 Ill. 2d 159, 163, 317 N.E.2d 505, 507 (1974) (the separate loss of consortium action is not governed by the statute of limitations that governs the action of the disabled spouse), and *Schwartz v. City of Milwaukee*, 54 Wis. 2d 286, 293, 195 N.W.2d 480, 484 (1972) (loss of consortium is a separate cause of action not to be added to personal injuries damages in ascertaining statutory amount). Although the Supreme Court of Ohio held that the loss of consortium spouse's action was not derivative and therefore was neither barred by the adverse adjudication nor governed by the statute of limitations of the claim of the disabled spouse, it noted that contributory negligence of the disabled spouse would be a defense to an action by the loss of consortium spouse. *Kraut v. Cleveland Ry.*, 132 Ohio St. 125, 5 N.E.2d 324 (1936).

55. W. Prosser, *supra* note 1, § 125, at 892; see Restatement (Second) of Torts § 494 (1965 & app. 1966). Some cases limit recovery because loss of consortium has been designated derivative. *E.g.*, *Nelson v. Busby*, 246 Ark. 247, 254-55, 437 S.W.2d 799, 803 (1969); *Hamm v. City of Milton*, 358 So. 2d 121, 123 (Fla. Dist. Ct. App. 1978); *Thill v. Modern Erecting Co.*, 284 Minn. 508, 513, 170 N.W.2d 865, 869 (1969); *Maidman v. Stagg*, 82 A.D.2d 299, 305, 441 N.Y.S.2d 711, 715 (1981). Recovery has also been limited because of an archaic view of loss of consortium as an injury to the marriage. See *Eggert v. Working*, 599 P.2d 1389, 1391 (Alaska 1979). The "well-settled rule" theory, which favors precedent over policy, has apparently provided solace for some courts in limiting recovery. See *Ross v. Cuthbert*, 239 Or. 429, 435-36, 397 P.2d 529, 531-32 (1964) (en banc). Many commentators have opposed the attribution of contributory negligence. *E.g.*, *Gilmore, Imputed Negligence* (pt. 1), 1 Wis. L. Rev. 193, 213-14 (1921); *Gregory, The Contributory Negligence of Plaintiff's Wife or Child in an Action for Loss of Services, Etc.*, 2 U. Chi. L. Rev. 173, 173-74 (1935); 11 Wayne L. Rev. 824, 825 (1965). In at least four jurisdictions, the contributory negligence of one spouse will not affect the loss of consortium award of the other. *Macon v. Seaward Constr. Co.*, 555 F.2d 1, 2 (1st Cir. 1977) (construing New Hampshire law); *Lantis v. Condon*, 95 Cal. App. 3d 152, 155-56, 157 Cal. Rptr. 22, 23 (1979); *Fuller v. Buhrow*, 292 N.W.2d 672, 674 (Iowa 1980); *Felch v. General Rental Co.*, 421 N.E.2d 67, 71-72 (Mass. 1981); *cf. Handeland v. Brown*, 216 N.W.2d 574, 578-79 (Iowa 1974) (child's contributory negligence no bar to parental suit).

identified as a unit in non-consortium cases, its general use has been severely criticized for defeating recovery on the basis of a fictitious agency<sup>56</sup> and its use, in these same jurisdictions, is quite limited today.<sup>57</sup> Since the enactment of the Married Women's Acts, marriage is no longer deemed a sufficient nexus to impute the contributory negligence of one spouse to the other.<sup>58</sup> Thus, if a husband and wife are in an automobile accident with a third party, and the negligence of one spouse contributes to the personal injuries or property damage of the other, the marriage relationship will not serve as a basis for imputing negligence: The injured spouse can recover fully from the third-party defendant.<sup>59</sup>

Nonetheless, the loss of consortium spouse's award is often reduced or barred because of the contributory negligence of the disabled spouse.<sup>60</sup> Although rejecting the applicability of the doctrine of im-

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56. W. Prosser, *supra* note 1, § 74, at 488; *accord* *Dashiell v. Keauhou-Kona Co.*, 487 F.2d 957, 961 (9th Cir. 1973). "[A]pplying the concept of imputed contributory negligence . . . would needlessly frustrate some basic policies of tort law. [Plaintiff] was found by the jury to be blameless, and since negligence law is based on personal fault, it would be both illogical and inequitable to deny him recovery . . . . [I]n fact, application of the imputed contributory negligence rule would have the opposite effect of freeing from liability another party who is at fault even though the person denied recovery is blameless." *Id.*; *accord* *Lessler, The Proposed Discard of the Doctrine of Imputed Contributory Negligence*, 20 *Fordham L. Rev.* 156, 175 (1951); *see* *Restatement (Second) of Torts* § 485 comment b (1965).

57. W. Prosser, *supra* note 1, § 74, at 488. "Except for vestigial remnants which are at most moribund historical survivals, 'imputed contributory negligence' in its own right has now disappeared. The result at which the courts have arrived is that the plaintiff will never be barred from recovery by the negligence of a third person unless the relation between them is such that the plaintiff would be vicariously liable as a defendant to another who might be injured." *Id.* (footnote omitted).

58. W. Prosser, *supra* note 1, § 74, at 489-90, § 123, at 869-71; *see* *Gilmore, supra* note 55, at 202-05; *cf.* *Lewis v. Till*, 395 So. 2d 737, 738-39 (La. 1981) (wife's contributory negligence in causing death of 18-month-old son not imputed to husband). *But cf.* *Stull v. Ragsdale*, 620 S.W.2d 264, 266-67 (Ark. 1981) (wife's contributory negligence in causing death of four-year-old daughter imputed to husband). Contributory negligence can properly be imputed today if a sufficient nexus exists between the husband and wife independent of the marriage. *See, e.g., Hover v. Clamp*, 40 Colo. App. 410, 412, 579 P.2d 1181, 1183 (1978) (contributory negligence of husband imputed to wife because the husband was driving automobile owned by the wife).

59. *E.g., Dunham v. Kampman*, 37 Colo. App. 233, 236, 547 P.2d 263, 266 (1975), *aff'd en banc*, 192 Colo. 448, 560 P.2d 91 (1977); *Anding v. Southwestern Ins. Co.*, 358 So. 2d 690, 696 (La. Ct. App. 1978); *Peters v. Bodin*, 242 Minn. 489, 497, 65 N.W.2d 917, 922 (1954); *see* W. Prosser, *supra* note 1, § 74, at 490.

60. *E.g., Eggert v. Working*, 599 P.2d 1389, 1391 (Alaska 1979); *Nelson v. Busby*, 246 Ark. 247, 254-55, 437 S.W.2d 799, 803 (1969); *Maidman v. Stagg*, 82 A.D.2d 299, 306-07, 441 N.Y.S.2d 711, 716 (1981); *Ross v. Cuthbert*, 239 Or. 429, 436-37, 397 P.2d 529, 532 (1964) (*en banc*); *see* *Restatement (Second) of Torts* § 494 (1965 & *app.* 1966); *supra* note 55.

puted contributory negligence in such cases,<sup>61</sup> a number of courts deem the reduction a necessary consequence of the derivative nature of loss of consortium.<sup>62</sup> The distinction, however, is purely semantic.<sup>63</sup> As one court has noted, "[r]educed to its bare essentials, the only real effect of holding that [the loss of consortium] action is 'derivative' would be to resurrect under a different name the doctrine of imputed negligence."<sup>64</sup> Whether the reduction results from the alleged "derivative" nature of the action or from the doctrine of imputed contributory negligence, the resulting diminution of recovery, and the underlying reason, the contributory negligence of the disabled spouse, are identical. Notwithstanding the derivative nature of the loss of consortium injury, the separate action, brought by and on behalf of the separately injured loss of consortium spouse, should be judged on its own merits.

### B. Deeming the Injury as One to the Marriage

Some courts similarly evade the imputation of contributory negligence issue by deeming loss of consortium an injury to the marriage relationship.<sup>65</sup> Because the injury is to the marriage, the fault of either party to the relationship is treated as relevant to recovery.<sup>66</sup> The Supreme Court of Alaska, for example, reducing a loss of consor-

61. *Maidman v. Stagg*, 82 A.D.2d 299, 306 n.\*, 441 N.Y.S.2d 711, 715 n.\* (1981); *see* Restatement (Second) of Torts § 485 comments a-c, at 541-42 (1965); *id.* § 487; *W. Prosser, supra* note 1, § 74, at 489-90.

62. *See Maidman v. Stagg*, 82 A.D.2d 299, 302-06, 441 N.Y.S.2d 711, 713-15 (1981); *accord Gates v. Foley*, 247 So. 2d 40, 45 (Fla. 1971); *Tjaden v. Moses*, 94 Ill. App. 2d 361, 365, 237 N.E.2d 562, 565 (1968); *White v. Lunder*, 66 Wis. 2d 563, 574, 225 N.W.2d 442, 449 (1975). When the New York Court of Appeals extended the right to recover for loss of consortium to the wife, it noted that "[t]o describe the loss as 'indirect' is only to evade the issue." *Millington v. Southeastern Elevator Co.*, 22 N.Y.2d 498, 503, 239 N.E.2d 897, 899, 293 N.Y.S.2d 305, 308 (1968). It is curious, therefore, that when a New York appellate court reduced recovery for loss of consortium by the contributory negligence of the initially injured spouse, it relied on its characterization of loss of consortium as an indirect injury. *Maidman v. Stagg*, 82 A.D.2d 299, 305, 441 N.Y.S.2d 711, 715 (1981).

63. *See Schwartz v. City of Milwaukee*, 54 Wis. 2d 286, 293-94, 195 N.W.2d 480, 484-85 (1972); 1 F. Harper & F. James, *supra* note 1, § 8.9, at 640; 11 Wayne L. Rev. 824, 825 (1965).

64. *Lantis v. Condon*, 95 Cal. App. 3d 152, 159, 157 Cal. Rptr. 22, 26 (1979); *accord* 1 F. Harper & F. James, *supra* note 1, § 8.9, at 640. California has abolished the doctrine of imputing contributory negligence solely on the basis of the marital relationship. 95 Cal. App. 3d at 155-56, 157 Cal. Rptr. at 23 (citing Cal. Civ. Code § 5112 (West 1970)).

65. *See Schreiner v. Fruit*, 519 P.2d 462, 465-66 (Alaska 1974); *Millington v. Southeastern Elevator Co.*, 22 N.Y.2d 498, 504-05, 239 N.E.2d 897, 900, 293 N.Y.S.2d 305, 309-10 (1968).

66. *Eggert v. Working*, 599 P.2d 1389, 1391 (Alaska 1979); *Maidman v. Stagg*, 82 A.D.2d 299, 306, 441 N.Y.S.2d 711, 716 (1981).

tium award because of the contributory negligence of the disabled spouse,<sup>67</sup> paradoxically reasoned:

The fact that each spouse is equal and independent and suffers a personal loss when the other is injured, does not alter the fact that the basis for recovery for loss of consortium is "interference with the continuance of a healthy and happy marital life" and "injury to the conjugal relation."<sup>68</sup>

The view of consortium as an injury to the marital relationship<sup>69</sup> is a poorly reasoned relic of early common law. The legal fiction of the unity of the husband and wife no longer exists.<sup>70</sup> Consortium is each spouse's separate right to enjoyment of the marital relationship.<sup>71</sup> Loss of consortium is a distinguishable and separate injury of one spouse<sup>72</sup> and should be unaffected by the contributory negligence of the other spouse.

### C. Deeming the Married Couple an Economic Entity

Some courts, focusing on economic consequences, reduce or bar recovery for loss of consortium to prevent conversion of the fruits of the negligent conduct of the disabled spouse into a "financial recoupment for the family exchequer."<sup>73</sup> The family exchequer, however,

67. *Eggert v. Working*, 599 P.2d 1389, 1391 (Alaska 1979).

68. *Id.* (quoting *Schreiner v. Fruit*, 519 P.2d 462, 465-66 (Alaska 1974); *Millington v. Southeastern Elevator Co.*, 22 N.Y.2d 498, 505, 239 N.E.2d 897, 900, 293 N.Y.S.2d 305, 310 (1968)).

69. *Millington v. Southeastern Elevator Co.*, 22 N.Y.2d 498, 504-05, 239 N.E.2d 897, 900, 293 N.Y.S.2d 305, 309-10 (1968). "Once it is recognized that consortium now represents the *interest of the injured party's spouse* in the continuance of a healthy and happy marital life and that the cause of action seeks to compensate for the *injury to that relationship*, it becomes evident that the cause of action is not a relic." *Id.* (emphasis added). Although the court recognized the individual interest in consortium of either spouse, it considered the purpose of recovery to be the rectification of the injury to the relationship. Because the interest is an individual one, however, injury to that interest is likewise individual. See *supra* note 52 and accompanying text.

70. See *supra* notes 16-21 and accompanying text.

71. See *Hitaffer v. Argonne Co.*, 183 F.2d 811, 816 (D.C. Cir.), *cert. denied*, 340 U.S. 852 (1950), *overruled on other grounds*, *Smither & Co. v. Coles*, 242 F.2d 220 (D.C. Cir.), *cert. denied*, 354 U.S. 914 (1957). In extending the right to recover for loss of consortium to the wife, the court noted "that the husband and the wife have equal rights in the marriage relation which will receive equal protection of the law." *Id.*

72. See *Ballard v. Lumbermens Mut. Casualty Co.*, 33 Wis. 2d 601, 612, 148 N.W.2d 65, 71-72 (1967). In *Ballard*, an injured woman was allowed recovery for her loss of enjoyment of playing golf and her spouse was granted a separate award for loss of consortium that included loss of his wife's companionship in playing golf. *Id.* The loss of consortium award was only for the separate injury sustained by the spouse who lost the companionship. *Id.*; see *supra* note 45 and accompanying text.

73. *Ross v. Cuthbert*, 239 Or. 429, 436, 397 P.2d 529, 532 (1964) (en banc); see *White v. Lunder*, 66 Wis. 2d 563, 574-75, 225 N.W.2d 442, 449 (1975).

may not in fact exist.<sup>74</sup> If the husband and wife do not share funds, the disabled spouse does not profit from his negligence and, if recovery is fully or partially denied, the loss of consortium spouse is unjustly deprived.<sup>75</sup>

Furthermore, if the basis for limiting recovery is that the husband and wife are an economic unit, this limitation should apply regardless of the nature of the injury. Yet, the contributory negligence of a spouse is usually not attributed to the other spouse if recovery is for injuries other than loss of consortium.<sup>76</sup> Allowing full recovery for other injuries, while reducing or barring the loss of consortium award under the auspices of preventing a windfall recovery, disregards that both types of awards are equally available to the negligent spouse.

Because the loss of consortium spouse cannot directly sue the disabled spouse,<sup>77</sup> some courts that focus on economic consequences

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74. See *Osborne v. Osborne*, 1981 Mass. Adv. Sh. 2216 (Nov. 13, 1981) (available on LEXIS, States library, Mass file) (antenuptial agreement providing for finances).

75. See *Felch v. General Rental Co.*, 421 N.E.2d 67, 71 (Mass. 1981). If loss of consortium recovery is limited by the disabled spouse's contributory negligence, the loss of consortium spouse is unjustly deprived because he was not personally at fault. *Id.*; cf. H. Clark, *The Law of Domestic Relations in the United States* § 9.1, at 253-54 (1968) (one spouse should not be prevented from suing the other spouse on the basis of possible unjust enrichment of the negligent spouse). "The fact that [one spouse] may decide to give the proceeds of the judgment to [the other spouse] is not a reason to deny . . . compensation in all cases." *Id.* at 253.

76. *E.g.*, *Peters v. Bodin*, 242 Minn. 489, 497, 65 N.W.2d 917, 922 (1954) (if disabled spouse was negligent, other spouse could recover for property damage, but not for loss of consortium); *Painter v. Lingon*, 193 Va. 840, 845, 71 S.E.2d 355, 357-58 (1952) (recovery for personal injuries is unaffected by contributory negligence of spouse); see W. Prosser, *supra* note 1, § 74, at 489-90. Compare, *e.g.*, *Dunham v. Kampman*, 37 Colo. App. 233, 237, 547 P.2d 263, 266 (1975) (innocent wife can recover fully from defendant for personal injuries where defendant was negligent and husband was contributorily negligent), *aff'd en banc*, 192 Colo. 448, 560 P.2d 91 (1977), with *Pioneer Constr. Co. v. Bergeron*, 170 Colo. 474, 483, 462 P.2d 589, 593-94 (1969) (en banc) (innocent loss of consortium spouse denied recovery for loss of consortium because disabled spouse was contributorily negligent). The Appellate Division of the New York Supreme Court has distinguished recovery for personal injuries and property damage from loss of consortium. *Maidman v. Stagg*, 82 A.D.2d 299, 305-06, 441 N.Y.S.2d 711, 715 (1981). The court said that personal injuries and property damage are direct injuries, but loss of consortium is only an indirect injury. Therefore, although the contributory negligence of a plaintiff's spouse is irrelevant to recovery for personal injuries and property damage, the court held that it bars or reduces recovery for loss of consortium. *Id.*

77. H. Clark, *supra* note 1, § 10.1, at 262. The exclusive remedy between spouses for loss of consortium is divorce. *Id.* In 1969, the Supreme Court of Minnesota totally abrogated interspousal immunity. *Beaudette v. Frana*, 285 Minn. 366, 373, 173 N.W.2d 416, 420 (1969). In 1976, however, the same court held that the loss of consortium spouse could not recover for loss of consortium from the disabled spouse who negligently caused the loss. *Plain v. Plain*, 307 Minn. 399, 401-02, 240 N.W.2d 330, 332 (1976) (en banc). Between the spouses, the right to consortium is dependent

reduce or bar recovery to prevent the defendant from paying an amount in excess of his proportionate share.<sup>78</sup> Of the parties to the action, however, the loss of consortium spouse is the least at fault. Any allocation of costs, therefore, should favor this innocent spouse.<sup>79</sup>

The unfairness of a defendant paying an amount in excess of his proportionate fault can be remedied by permitting the defendant to sue the disabled spouse for contribution even though the disabled spouse is not directly liable to the loss of consortium spouse.<sup>80</sup> In an analogous situation, for instance, the New York Court of Appeals held in *Dole v. Dow Chemical Co.*<sup>81</sup> that although a negligent employer was not directly liable to its employee for a work-related injury because of worker's compensation,<sup>82</sup> the employer was indirectly liable:

on one spouse's voluntary rendition thereof. *Id.* at 401-02, 240 N.W.2d at 331-32. Nevertheless, most states do permit recovery for loss of consortium where it is caused by third parties: Third parties have a duty not to interfere with one spouse's right to consortium. See *supra* note 7 and accompanying text.

78. *Ross v. Cuthbert*, 239 Or. 429, 436, 397 P.2d 529, 532 (1964) (en banc). "Evidently the courts view with disfavor a contention that a third party should pay all of the damages when the [disabled spouse's] own negligence was responsible for some of them." *Id.* at 435, 397 P.2d at 531; see *Eggert v. Working*, 599 P.2d 1389, 1391 (Alaska 1979) (defendant pays amount proportionate to fault when award is reduced); cf. *Stull v. Ragsdale*, 620 S.W.2d 264, 267 (Ark. 1981) (contributory negligence of one parent in causing death of child is imputed to other parent because negligent parent shares in recovery).

79. Tort law is usually based on fault. W. Prosser, *supra* note 1, § 75, at 492-93. In certain situations, as where one engages in an abnormally dangerous activity, strict liability, that is, liability without fault, will be imposed. *Id.* at 494.

80. See *Lantis v. Condon*, 95 Cal. App. 3d 152, 159, 157 Cal. Rptr. 22, 26 (1979); *Fuller v. Buhrow*, 292 N.W.2d 672, 676 (Iowa 1980) (en banc); cf. *Perchell v. District of Columbia*, 444 F.2d 997, 998-99 (D.C. Cir. 1971) (parental immunity does not prevent defendant from receiving contribution from contributorily negligent parent); *Shor v. Paoli*, 353 So. 2d 825, 826 (Fla. 1977) (interspousal immunity does not prevent defendant who paid more than his proportionate share of personal injuries damages from recovering from contributorily negligent spouse); *Puller v. Puller*, 380 Pa. 219, 221, 110 A.2d 175, 177 (1955) (defendant entitled to contribution from spouse even though the plaintiff is precluded from enforcing judgment against spouse). Most courts do not allow contribution if the person from whom contribution is sought was not directly liable to the injured person. *E.g.*, *Short Line, Inc. v. Perez*, 238 A.2d 341, 343 (Del. 1968); *Shonka v. Campbell*, 260 Iowa 1178, 1181-82, 152 N.W.2d 242, 244-45 (1967). The Supreme Court of Iowa, holding that a host-driver was not liable to a motor vehicle guest and was therefore not liable for contribution to a third party, stated that such holding "is premised upon a commonly accepted theory that the right to contribution among concurrent tort-feasors is dependent upon *common liability* to an injured party." *Id.* at 1181, 152 N.W.2d at 244 (emphasis in original). The dissenting judge, who would have required contribution, noted that the majority opinion permits a concurrent tort-feasor to escape liability if he has a defense unavailable to the other tort-feasor. *Id.* at 1183, 152 N.W.2d at 245 (Mason, J., dissenting). See generally 1 J. Dooley, *Modern Tort Law Liability & Litigation*, § 26.22 (1977 & Supp. 1981) (requirement of common liability for contribution); W. Prosser, *supra* note 1, § 50, at 309 (same).

81. 30 N.Y.2d 143, 282 N.E.2d 288, 331 N.Y.S.2d 382 (1972).

82. *Id.* at 152, 282 N.E.2d at 294, 331 N.Y.S.2d at 390.

A manufacturer found liable to the employee for the same injury could sue the employer for contribution.<sup>83</sup>

Although a defendant may be unable to recover for an amount paid in excess of fault if the disabled spouse is judgment proof, the negligent defendant, rather than the innocent loss of consortium spouse, should bear this cost. Admittedly, there may be fear that the disabled spouse and the loss of consortium spouse will conspire to render the negligent spouse judgment proof.<sup>84</sup> Such collusion, however, should be readily detectable. For example, if the negligent spouse transfers funds to the loss of consortium spouse so as to appear judgment proof, such a transfer should leave a tangible, discoverable trail.<sup>85</sup> Moreover, neither the threat of possible collusion nor the costs of discovery justify a general rule denying the innocent spouse full recovery.<sup>86</sup>

The net effect of allowing the loss of consortium spouse to recover fully from a defendant who then partially recovers from the disabled spouse is a transfer of funds between spouses. If the loss of consortium spouse and the disabled spouse in fact have a family exchequer, the mere transfer of funds has the same result as an initial reduction in the award.<sup>87</sup> If there is no family exchequer, however, there has been a more equitable allocation of damages. Moreover, even if there is a family fund, insurance of the disabled spouse may result in full recovery for both spouses, with the defendant paying only a proportionate share.<sup>88</sup> In any event, liability for the injury is more equitably allo-

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83. *Id.* at 152-53, 282 N.E.2d at 294-95, 331 N.Y.S.2d at 390-91.

84. *Ross v. Cuthbert*, 239 Or. 429, 435, 397 P.2d 529, 531-32 (1964) (en banc); *cf. Interspousal Immunity Rule and the Effect of Liability Insurance in Automobile Accidents*, 11 S.D. L. Rev. 144, 149-50 (1966) (fear of collusion with respect to interspousal suits) [hereinafter cited as *Interspousal Immunity*].

85. *Cf. D. Dobbs, supra* note 31, § 4.3, at 240-44 (a constructive trust can be imposed and property can be traced which equitably belongs to the plaintiff).

86. *Cf. Moulton v. Moulton*, 309 A.2d 224, 228 (Me. 1973) (wife could sue husband for premarital tort); *Interspousal Immunity, supra* note 84, at 149-50 (fear of collusion against insurance companies by spouses does not justify refusal to abrogate interspousal immunity). "We do not have so little trust in the general ethics and honor of our citizenry, and in the abilities of our judges and jurors to discern the genuine from the spurious." 309 A.2d at 229.

87. For example, if the loss of consortium is valued at \$10,000 and the allocation of negligence is 70% to the defendant and 30% to the other spouse, the family fund is affected as follows. If there is attribution of negligence, the spouse receives \$7,000 from the defendant. The disabled spouse pays nothing. If there is no attribution, the defendant pays \$10,000 to the loss of consortium spouse and the other spouse pays \$3,000 as contribution to the defendant. The net amount received by the family fund, therefore, is the same \$7,000.

88. In comparative negligence states, initial reduction of the loss of consortium award disregards the possibility of insurance. If the disabled spouse has insurance to pay for his proportionate share of the loss of consortium damages should defendant seek contribution, the net recovery of the disabled spouse and the loss of consortium spouse will be greater whether or not the husband and wife have joint or separate

cated to the negligent parties, and the innocent loss of consortium spouse receives the just, full award.

#### D. Community Property States

Community property states characterize property of the husband and wife either as separate—that is, owned by one spouse—or as community—that is, owned by husband and wife together.<sup>89</sup> Generally, earnings of either spouse are community property<sup>90</sup> and certain other property, such as a gift to one spouse, is separate property.<sup>91</sup> Damages may be difficult to characterize.<sup>92</sup> If damages for loss of

funds. Because an insurance company has no right of subrogation against its insured, *see* Home Ins. Co. v. Pinski Bros., 160 Mont. 219, 225-26, 500 P.2d 945, 949 (1972), the insurance company would not recover the amount it pays to the defendant. An insurance policy is a contract. *In re* Estate of O'Neill, 143 Misc. 69, 72, 255 N.Y.S. 767, 771 (1932). The coverage of an insurance policy is, therefore, a question of contractual interpretation. *See id.* An insurance policy may, however, be construed as excluding recovery for loss of consortium suffered by the insured's spouse. Some automobile liability policies, for example, exclude coverage for injuries to the policyholder. *See* R. Keeton, Basic Text on Insurance Law § 4.7(b), at 231, § 4.9(c), at 242 (1971). It has also been held that the maximum liability provision of an insurance policy included both the disabling damages and the resulting loss of consortium damages. State Farm Mut. Auto. Ins. Co. v. Hodges, 221 Ga. 355, 357-58, 144 S.E.2d 723, 725 (1965); *see* R. Keeton, *supra*, § 5.9, at 330. Insurance has been a factor in determining whether the individual identities of the husband and wife should be recognized in other contexts. An argument against abrogation of interspousal immunity, for instance, has been the possibility of collusion and fraud where there is insurance coverage. *See* W. Prosser, *supra* note 1, § 122, at 868. The Supreme Court of Florida has left the interspousal immunity intact. Orefice v. Albert, 237 So. 2d 142, 145-46 (Fla. 1970). The Supreme Court of Minnesota, on the other hand, has completely abrogated the immunity. Beaudette v. Frana, 285 Minn. 366, 373, 173 N.W.2d 416, 420 (1969). Some courts have abrogated the immunity to a limited extent. *E.g.*, Lewis v. Lewis, 370 Mass. 619, 629-30, 351 N.E.2d 526, 532-33 (1976); Rupert v. Stienne, 90 Nev. 397, 404, 528 P.2d 1013, 1017 (1974). Courts abrogating the immunity believe the collusive and fraudulent suits can be separated from the bona fide suits. Freehe v. Freehe, 81 Wash. 2d 183, 188-89, 500 P.2d 771, 775 (1972) (en banc). *See generally* Interspousal Immunity, *supra* note 84, at 149-50 (discussion of collusion in insurance cases).

89. Fuller v. Ferguson, 26 Cal. 546, 565-66 (1864); Lee v. Lee, 112 Tex. 392, 401, 247 S.W. 828, 832 (1923); W. de Funiak & M. Vaughn, Principles of Community Property § 1, at 1-2 (2d ed. 1971). The community property states are Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas and Washington. W. Reppy & W. de Funiak, Community Property in the United States v (1975).

90. W. Reppy & W. de Funiak, *supra* note 89, at 1. "The crux of a community property system . . . is shared ownership by husband . . . and wife . . . of acquisitions earned by either or both during marriage." *Id.*

91. W. de Funiak & M. Vaughn, *supra* note 89, § 1, at 2.

92. *See id.*, § 82; W. Reppy & W. de Funiak, *supra* note 89, at 170-210; *cf.* Horowitz, Conflict of Law Problems in Community Property (pt. 2), 11 Wash. L. Rev. 212, 229-30 (1936) (damages for pain and suffering are not earned and should be the separate property of the injured spouse).

consortium are deemed community property, a reduction of or bar to the award based on the contributory negligence of the disabled spouse is reasonable because, as potential co-owner of such recovery, a spouse should not be permitted to profit from his negligence.<sup>93</sup> The trend in community property states, however, is to consider the nature of the injuries when characterizing damages.<sup>94</sup> Damages for an individual injury are considered separate property while those for an injury to the spousal community are community property.<sup>95</sup> As has been discussed, loss of consortium is an individual injury.<sup>96</sup> The defendant interferes with a separate right of the loss of consortium spouse and the computation of damages measures the loss suffered by that spouse; it does not measure the "community loss."<sup>97</sup> If both spouses have suffered a loss of consortium, there are two distinct causes of action.<sup>98</sup>

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93. *E.g.*, *Levy v. New Orleans & N.E. R. Co.*, 21 So. 2d 155, 156 (La. Ct. App. 1945) (per curiam); *Choate v. Ransom*, 74 Nev. 100, 108, 323 P.2d 700, 704 (1958); *cf. Eggert v. Working*, 599 P.2d 1389, 1391 (Ala. 1979) (loss of consortium award reduced in non-community property state when disabled spouse was contributorily negligent because couple are an economic unit); *Ross v. Cuthbert*, 239 Or. 429, 435-36, 397 P.2d 529, 531-32 (1964) (en banc) (same). If loss of consortium damages are characterized as community property, the loss of consortium spouse and the disabled spouse jointly own the proceeds and the possibility of the husband and wife having separate funds does not exist: The law imposes a family treasury on such funds. *See Silvestri v. Hurlburt*, 26 Ariz. App. 243, 244, 547 P.2d 514, 515 (1976); *W. Reppy & W. de Funiak*, *supra* note 89, at 197.

94. *Rogers v. Yellowstone Park Co.*, 97 Idaho 14, 18, 539 P.2d 566, 570 (1974). The Supreme Court of Idaho "believe[s] the correct concept is first to consider the nature of the right or interest invaded or harmed by the negligence of a defendant, and based on a determination of the nature of this right, then to characterize the damages recovered in relation to the right violated." *Id.*; *accord Jurek v. Jurek*, 124 Ariz. 596, 598, 606 P.2d 812, 814 (1980) (en banc); *see Soto v. Vandeventer*, 56 N.M. 483, 494, 245 P.2d 826, 832 (1952); *W. de Funiak & M. Vaughn*, *supra* note 89, § 82.

95. *Jurek v. Jurek*, 124 Ariz. 596, 598, 606 P.2d 812, 814-15 (1980) (en banc) (compensation for personal injuries should be separate property); *Rogers v. Yellowstone Park Co.*, 97 Idaho 14, 20, 539 P.2d 566, 572 (1974) (personal injuries damages are separate property; lost earnings are community in character).

96. *See supra* notes 45, 69, 72. The Supreme Court of Texas, holding that either spouse has a cause of action for loss of consortium, disagreed that loss of consortium should not be a cognizable injury despite the defendant's argument that there would be a possibility of double recovery. *Whittlesey v. Miller*, 572 S.W.2d 665, 669 (Tex. 1978). The court noted that "it cannot be said that the character of the deprived spouse's recovery for loss of consortium is community property." *Id.* In 1980, a federal court applying Texas state law similarly characterized loss of consortium damages as separate property. *Lester v. United States*, 487 F. Supp. 1033, 1041 (N.D. Tex. 1980).

97. *See, e.g.*, *Lester v. United States*, 487 F. Supp. 1033, 1041 (N.D. Tex. 1980) ("this court awards . . . \$50,000.00 for his loss of consortium" (emphasis added)); *Whittlesey v. Miller*, 572 S.W.2d 665, 669 (Tex. 1978) ("Each spouse recovers for losses peculiar to the injury sustained by each of them.").

98. *See Renfrow v. Gojohn*, 600 S.W.2d 77, 78 (Mo. Ct. App. 1980); *cf. Bartalo v. Superior Court*, 51 Cal. App. 3d 526, 584, 124 Cal. Rptr. 370, 374-75 (1975)

Community property states, therefore, should treat the award as separate property and should not require the reduction or bar of the loss of consortium award because of the contributory negligence of the disabled spouse.<sup>99</sup>

### III. PROCEDURAL CONSIDERATIONS

Because they designate the loss of consortium action derivative, many courts subject the loss of consortium claim to the procedural rules of the disabling injury claim.<sup>100</sup> Anomalously, a number of courts that designate the action derivative do not require this result.<sup>101</sup> This inconsistency reflects the ambiguity inherent in the "derivative" label and the need to distinguish between the loss of consortium injury and action.

#### A. Statute of Limitations

If the statute of limitations runs on the claim of the disabled spouse, the claim of the loss of consortium spouse is often automatically barred.<sup>102</sup> It is reasoned that because the loss of consortium action is

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(spouses' complaint could not be amended to include loss of each other's consortium because each spouse's claim for loss of consortium is separate).

99. De Funiak and Vaughn do not agree. *W. de Funiak & M. Vaughn, supra* note 89, § 83, at 205. They focus, however, on only one element of loss of consortium: loss of services. Damages for lost earnings are properly deemed community property because a basis of the community property principle is that the husband and wife are a partnership as to earnings of either spouse, even if one works inside the home. *See W. Reppy & W. de Funiak, supra* note 89, at 1. Loss of consortium, however, includes emotional elements, which are individual losses, such as loss of companionship, affection and sexual relations, and therefore it should be characterized as separate property. Although California had not deemed loss of consortium damages separate property, a California court refused to reduce the loss of consortium award by the contributory negligence of the disabled spouse. *Lantis v. Condon*, 95 Cal. App. 3d 152, 155-56, 157 Cal. Rptr. 22, 23 (1979). The defendant would be permitted to sue the disabled spouse for contribution, and the disabled spouse must first use his separate property to pay his proportionate share before using community property. *Id.* at 159, 157 Cal. Rptr. at 26.

100. *See W. Prosser, supra* note 1, § 125, at 892; *see, e.g., Sisemore v. Neal*, 236 Ark. 574, 577, 367 S.W.2d 417, 418 (1963); *Allen v. Endrukaitis*, 35 Conn. Supp. 286, 290-91, 408 A.2d 673, 675 (Super. Ct. 1979); *Thill v. Modern Erecting Co.*, 284 Minn. 508, 513, 170 N.W.2d 865, 869 (1969); *Hunter v. School Dist.*, 97 Wis. 2d 435, 447, 293 N.W.2d 515, 521 (1980).

101. *See W. Prosser, supra* note 1, § 125, at 892-93; *supra* note 54 and accompanying text.

102. *W. Prosser, supra* note 1, § 125, at 892; *e.g., Tollett v. Mashburn*, 291 F.2d 89, 93 (8th Cir. 1961); *Francis v. Pan Am. Trinidad Oil Co.*, 392 F. Supp. 1252, 1257 (D. Del. 1975); *Kolar v. City of Chicago*, 12 Ill. App. 3d 887, 890, 299 N.E.2d 479, 481 (1973). Under this rule, the loss of consortium claim is automatically governed by the statute of limitations governing the claim of the disabled spouse, and there is a simultaneous running of the statute on both claims. When the Supreme Court of Minnesota found that a personal injuries claim was barred by the statute of limitations, it held that the loss of consortium claim was also barred because, as a

derivative, it should be disallowed when the primary action is barred.<sup>103</sup> The loss of consortium action, however, is a separate action that is merely based on a derivative injury.<sup>104</sup> A court should therefore determine which statute of limitations applies to the loss of consortium claim and when the statute started to run thereon.<sup>105</sup> Thus, although a spouse injured by the negligence of a doctor had a claim for malpractice subject to a one-year statute of limitations, the Supreme Court of Ohio correctly ruled that his spouse's separate loss of consortium claim was not for malpractice and, therefore, was subject to a different statute of limitations.<sup>106</sup>

Additionally, the initial injury and loss of consortium injury do not necessarily occur simultaneously.<sup>107</sup> For example, if the loss of consor-

derivative action, "it is subject to the same statute-of-limitations considerations." *Anderson v. Lutheran Deaconess Hosp.*, 257 N.W.2d 561, 562 & n.1 (Minn. 1977). It is, of course, possible that the disabling injury and loss of consortium will occur at the same time, *see Berry v. Myrick*, 260 S.C. 68, 69-70, 194 S.E.2d 240, 241 (1973), and that the statute of limitations governing the claim of the disabled spouse will be the proper one to govern the loss of consortium claim. Under such circumstances, if the claim of the disabled spouse is barred, the loss of consortium claim should also be barred. *See Baughman v. Bolinger*, 485 F. Supp. 1000, 1003-04 (S.D. Ohio 1980).

103. *E.g.*, *Tollett v. Mashburn*, 291 F.2d 89, 93 (8th Cir. 1961); *Anderson v. Lutheran Deaconess Hosp.*, 257 N.W.2d 561, 562 n.1 (Minn. 1977); *cf. Aetna Casualty & Sur. Co. v. Windsor*, 353 A.2d 684, 686 (D.C. 1976) (defenses against insured good against insurer); *American States Ins. Co. v. Williams*, 151 Ind. App. 99, 106, 278 N.E.2d 295, 300 (1972) (insurance company has rights no greater than insured). Insurance subrogation is a derivative action. "[B]ecause the insurer's . . . claim is based on the [insured's] rights, the . . . complaint must be brought before the [insured's] action against the [defendant] has been barred by the statute of limitations." 3 J. Moore, *supra* note 35, § 14.09, at 14-248 (footnote omitted).

104. *See, e.g.*, *Goodman v. Mead Johnson & Co.*, 534 F.2d 566, 574 (3d Cir. 1976), *cert. denied*, 429 U.S. 1038 (1977); *Lantis v. Condon*, 95 Cal. App. 3d 152, 156-57, 157 Cal. Rptr. 22, 24 (1979); *supra* notes 44-45 and accompanying text.

105. *See Goodman v. Mead Johnson & Co.*, 534 F.2d 566, 574 (3d Cir. 1976), *cert. denied*, 429 U.S. 1038 (1977); *Corpman v. Boyer*, 171 Ohio St. 233, 234, 169 N.E.2d 14, 15 (1960); *Brown v. Finger*, 240 S.C. 102, 111, 124 S.E.2d 781, 785-86 (1962).

106. *Corpman v. Boyer*, 171 Ohio St. 233, 237-38, 169 N.E.2d 14, 17 (1960). Many states have statutes of limitations governing bodily injuries. *E.g.*, Mich. Comp. Laws Ann. § 600.5805 (1968 & Supp. 1981); Ohio Rev. Code Ann. § 2305.10 (Page 1981). Although loss of consortium is primarily an emotional injury, some courts apply such a statute where it governs the claim of the disabled spouse because of the derivative nature of loss of consortium or because the loss of consortium injury is deemed merely consequential damages of the claim of the disabled spouse. *E.g.*, *Tollett v. Mashburn*, 291 F.2d 89, 93 (8th Cir. 1961); *Kolar v. City of Chicago*, 12 Ill. App. 3d 887, 890-91, 299 N.E.2d 479, 481-82 (1973). Similarly, when the Supreme Court of Wisconsin held that a claim of the disabled spouse was timely because a new statute of limitations could not apply retroactively, it stated that the loss of consortium claim was likewise not barred because loss of consortium is a derivative claim. *Hunter v. School Dist.*, 97 Wis. 2d 435, 447, 293 N.W.2d 515, 521 (1980).

107. In some instances, the disabling injuries do not immediately prevent the disabled spouse from rendering consortium. *See Baughman v. Bolinger*, 485 F. Supp.

tium spouse does not suffer the loss until one year after the other spouse suffered the disabling injuries, the statute of limitations should start to run at that later date.<sup>108</sup> "To hold that the statute of limitations governing [the] right to sue for loss of consortium was running during years in which [the loss of consortium spouse] fully enjoyed that consortium would be to exalt fiction and avoid undeniable reality."<sup>109</sup> Because a statute of limitations generally starts to run when a plaintiff can maintain an action to enforce a claim,<sup>110</sup> the statute of limitations for loss of consortium should not start to run until there has in fact been such a loss.<sup>111</sup>

### B. Amendments to the Disabled Spouse's Complaint

Once it has been determined that the statute of limitations has run on the loss of consortium claim, there is some question whether a timely filed complaint of the disabled spouse may be amended to include the claim of the loss of consortium spouse.<sup>112</sup> Federal and similar state rules of civil procedure<sup>113</sup> are liberal with regard to permitting the amendment of pleadings.<sup>114</sup> Under these rules, timely

1000, 1003 (S.D. Ohio 1980). One interpretation of the applicability of a statute of limitations resulted in the statute expiring on the loss of consortium claim before discovery of the disabling injury. The statute started to run on the claim of the disabled spouse upon discovery. *See Amer v. Akron City Hosp.*, 47 Ohio St. 2d 85, 88-91, 351 N.E.2d 479, 482-83 (1976).

108. *Amer v. Akron City Hosp.*, 47 Ohio St. 2d 85, 93, 351 N.E.2d 479, 485 (1976) (Celebrezze, J., dissenting).

109. *Baughman v. Bolinger*, 485 F. Supp. 1000, 1003 (S.D. Ohio 1980); *see Goodman v. Mead Johnson & Co.*, 534 F.2d 566, 574 (3d Cir. 1976), *cert. denied*, 429 U.S. 1038 (1977).

110. *Andreaggi v. Relis*, 171 N.J. Super. 203, 235-36, 408 A.2d 455, 472 (Ch. Div. 1979); *Brown v. Finger*, 240 S.C. 102, 111, 124 S.E.2d 781, 785 (1962); *Wisconsin Natural Gas Co. v. Ford, Bacon & Davis Constr. Corp.*, 96 Wis. 2d 314, 323, 291 N.W.2d 825, 829-30 (1980).

111. *Milde v. Leigh*, 75 N.D. 418, 429, 28 N.W.2d 530, 537 (1947); *Brown v. Finger*, 240 S.C. 102, 111, 124 S.E.2d 781, 785 (1962); *see Goodman v. Mead Johnson & Co.*, 534 F.2d 566, 574 (3d Cir. 1976) (New Jersey law would require "separate determination of the date of his discovery" of loss of consortium before the statute of limitations starts to run), *cert. denied*, 429 U.S. 1038 (1977).

112. *Compare Hoch v. Venture Enters.*, 473 F. Supp. 541, 542 (D.V.I. 1979) (amendment allowed), *with Bartalo v. Superior Court*, 51 Cal. App. 3d 526, 532-34, 124 Cal. Rptr. 370, 374-75 (1975) (amendment not allowed).

113. Fed. R. Civ. P. 15(c); *see N.Y. Civ. Prac. Law* § 203(e) (McKinney 1972); *Tenn. R. Civ. P.* 15.03.

114. *Conley v. Gibson*, 355 U.S. 41, 48 (1957). "The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits." *Id.* Rule 15(c) of the Federal Rules is concerned with the relation back of amendments. "Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates

pleadings may subsequently be amended to state a new cause of action on which the statute of limitations has run if the information in the original pleadings provides adequate notice of the new cause of action.<sup>115</sup> Thus, it has been held that the disabled spouse can amend his complaint to join the claim of the loss of consortium spouse because loss of consortium, even if viewed as a separate cause of action, arises out of the same conduct that caused the disabling injuries.<sup>116</sup> The original complaint serves to provide adequate notice.<sup>117</sup>

In other states that permit an amendment to relate back only if it does not state a new cause of action,<sup>118</sup> plaintiffs are required to set forth all causes of action against a defendant before the statutes of limitations run.<sup>119</sup> Some of these states, however, characterizing the

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back to the date of the original pleading." Fed. R. Civ. P. 15(c); see 6 C. Wright & A. Miller, *supra* note 41, § 1496, at 482-83; *id.* § 1497, at 498-99.

115. 6 C. Wright & A. Miller, *supra* note 41, § 1471, at 360; *id.* § 1497, at 499-502.

116. Hoch v. Venture Enters., 473 F. Supp. 541, 542 (D.V.I. 1979); Hockett v. American Airlines, 357 F. Supp. 1343, 1347-48 (N.D. Ill. 1973); Grubaugh v. City of St. Johns, 82 Mich. App. 282, 285-86, 266 N.W.2d 791, 793 (1978); cf. Rivera v. St. Luke's Hosp., 102 Misc. 2d 727, 728-29, 424 N.Y.S.2d 656, 657-58 (Sup. Ct. 1980) (amendment to add parent's claim for loss of child's services relates back); Osborne Enters., Inc. v. City of Chattanooga, 561 S.W.2d 160, 163-64 (Tenn. Ct. App. 1977) (amendment to add corporation's subsidiary relates back).

117. Hoch v. Venture Enters., Inc., 473 F. Supp. 541, 542 (D.V.I. 1979). "[T]he loss of consortium claim is based upon the same allegations of negligence contained in [the personal injury spouse's] complaint." *Id.* The amendment can relate back even though the loss of consortium spouse is a new plaintiff. See 6 C. Wright & A. Miller, *supra* note 41, § 1501, at 523-24; *id.* at 170 (Supp. 1982).

118. *E.g.*, Bartalo v. Superior Court, 51 Cal. App. 3d 526, 532-34, 124 Cal. Rptr. 370, 374-75 (1975); Keenan v. Yale New Haven Hosp., 167 Conn. 284, 285, 355 A.2d 253, 254 (1974) (per curiam); Cox v. Seaboard Coast Line R.R., 360 So. 2d 8, 10 (Fla. Dist. Ct. App. 1978). The Supreme Court of Alaska, permitting the personal injury spouse to amend her complaint to include the loss of consortium spouse, reasoned that the "consortium claim was based upon the same conduct, transaction, and occurrence relied upon in the original pleading [and that the defendant] had ample notice of the cause of action." Jakoski v. Holland, 520 P.2d 569, 576 (Alaska 1974). The court, however, stressed that the "amendment here did not state a new claim for relief but did relate back to the date of the original complaint." *Id.*; cf. Wallace v. Shaffer, 155 W. Va. 132, 137-38, 181 S.E.2d 677, 680 (1971) (amendment to complaint alleging alienation of affection to include claim for interference with attempts to reconcile a marriage relationship related back).

119. *E.g.*, Bartalo v. Superior Court, 51 Cal. App. 3d 526, 533, 124 Cal. Rptr. 370, 374-75 (1975); School Bd. v. Surette, 394 So. 2d 147, 154 (Fla. Dist. Ct. App. 1981); Cox v. Seaboard Coast Line R.R., 360 So. 2d 8, 10 (Fla. Dist. Ct. App. 1978). The reason for requiring a plaintiff to assert all his causes of action before the statute of limitations runs was set forth by the Cox court, which denied a plaintiff leave to add his own claim for personal injuries to his complaint that sought relief for the wrongful death of his parent. "[W]e do not see that this rule should be so liberally construed as to allow a plaintiff to circumvent the statute of limitations on the plaintiff's separate cause of action which could have been asserted by separate suit brought at any time within the statutory period." *Id.* at 10. An interesting issue is which rule a federal court must apply in a diversity suit if the state is still using the

loss of consortium action as derivative, permit the disabled spouse to amend his complaint to include the claim of the loss of consortium spouse.<sup>120</sup> As one court noted, permitting a loss of consortium claim to relate back to the disabling injury action ignores that “[a]lthough a claim for loss of consortium is a derivative cause of action, it nevertheless is a separate action.”<sup>121</sup> Despite its anomalous characterization of the action as derivative, this court correctly recognized that the derivative loss of consortium injury is the subject of a separate action. Although liberal amendment of pleadings is the modern rule, the restrictive rule adhered to in some jurisdictions should be consistently applied. In these jurisdictions, the loss of consortium claim should not be permitted to be tacked on to the claim of the disabled spouse.

### C. Prior Adjudication of the Claim of the Disabled Spouse

There is a split in authority as to whether adjudication of the claim of the disabled spouse precludes the loss of consortium spouse from

“separate cause of action” standard. The United States Supreme Court has not addressed the issue. Forum shopping would be encouraged if a loss of consortium spouse would be barred in state court, but would not be barred in federal court. The Court, in *Erie R.R. v. Tompkins*, sought to prevent forum shopping. *Erie R.R. v. Tompkins*, 304 U.S. 64, 74-77 (1938). Authorities are generally of the view that the federal rule should apply irrespective of the state law. F. James & G. Hazard, *Civil Procedure* § 5.7, at 167 n.10 (2d ed. 1977); 6 C. Wright & A. Miller, *supra* note 41, § 1503, at 536. A federal rule of civil procedure is valid if it “really regulates procedure.” *Sibbach v. Wilson & Co.*, 312 U.S. 1, 14 (1941). The First Circuit has ruled that determining if an amendment relates back produces a substantive effect and, when the state rule conflicted with the federal rule, the state rule governed. *Marshall v. Mulrenin*, 508 F.2d 39, 44 (1st Cir. 1974). “Paradoxically, Rule 15 seems, basically, drawn to avoid a substantive effect so far as statutes of limitations are concerned, so as not to extend the statute under the guise of permitting an amendment . . .” *Id.* at 44. Determination of the proper statute of limitations is a substantive issue. *See Walker v. Armco Steel Corp.*, 446 U.S. 740, 753 (1980) (state law should govern in diversity case if it conflicts with the federal rule).

120. *Allen v. Endrukaitis*, 35 Conn. Supp. 286, 290-92, 408 A.2d 673, 675 (Super. Ct. 1979). The *Allen* court, noting that one line of cases allows the loss of consortium amendment to relate back, while the other does not, said that “[t]he nub of the distinction between those two groups of cases is whether the claim for loss of consortium in the tort action is deemed to be a new or different cause of action.” *Id.*; *accord Jakoski v. Holland*, 520 P.2d 569, 576 (Alaska 1974). What the *Allen* court failed to recognize is that the application of the liberal federal rule does not turn on whether a new cause of action is stated in the amendment. *See* 6 C. Wright & A. Miller, *supra* note 41, § 1497, at 499-502. A California court did not allow the disabled spouse to amend her complaint to include the loss of consortium spouse after the statute of limitations had run. The court noted that although loss of consortium is “derivative because it does not arise unless his wife has sustained a personal injury, . . . his claim is not for her personal injuries but for the separate and independent loss he sustained.” *Bartalo v. Superior Court*, 51 Cal. App. 3d 526, 533, 124 Cal. Rptr. 370, 374 (1975); *accord Shelton v. Superior Court*, 56 Cal. App. 3d 66, 81, 128 Cal. Rptr. 454, 464 (1976).

121. *Daniels v. Weiss*, 385 So. 2d 661, 663 (Fla. Dist. Ct. App. 1980) (per curiam) (citation omitted).

separately litigating the loss of consortium claim or the negligence issue.<sup>122</sup> Because loss of consortium is a separate cause of action, brought by a separate party, the majority of courts do not so restrict the loss of consortium action.<sup>123</sup> The marriage relationship is not a sufficient nexus to create the necessary privity.<sup>124</sup> A minority of

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122. *Jones v. Beasley*, 476 F. Supp. 116, 118-19 (M.D. Ga. 1979); see *Husband and Wife: Collateral Estoppel in the Consortium Action*, 27 Okla. L. Rev. 267 (1974). Compare *Palmer v. Clarksdale Hosp.*, 213 Miss. 611, 621-22, 57 So. 2d 476, 481 (1952) (no preclusion from litigating), with *Sisemore v. Neal*, 236 Ark. 574, 367 S.W.2d 417, 417-19 (1963) (collateral estoppel applied). Res judicata operates to bar a party from litigating a claim (claim preclusion). F. James & G. Hazard, *supra* note 119, § 11.3, at 532. Collateral estoppel operates to prevent a party from litigating an issue (issue preclusion). *Id.* There is some confusion over the proper use of these terms. Some courts apparently use them interchangeably. One federal court, for example, deciding that adverse adjudication of the initially injured spouse precluded the loss of consortium spouse from litigating, cited indiscriminately to cases applying or not applying both res judicata and collateral estoppel. *Jones v. Beasley*, 476 F. Supp. 116, 118-19 (M.D. Ga. 1979) (citing, *inter alia*, *Bitsos v. Red Owl Stores, Inc.*, 350 F. Supp. 850, 853 (D.S.D. 1972) (res judicata applied); *Kraut v. Cleveland Ry.*, 132 Ohio St. 125, 126-27, 5 N.E.2d 324, 325 (1936) (res judicata not applied); *Laws v. Fisher*, 513 P.2d 876, 878 (Okla. 1973) (collateral estoppel applied); *Wolff v. Du Puis*, 233 Or. 317, 323, 378 P.2d 707, 710 (1963) (en banc) (collateral estoppel not applied), *overruled on other grounds en banc*, *Bahler v. Fletcher*, 256 Or. 329, 479 P.2d 329 (1970)). Collateral estoppel is the appropriate term because the initial injury action and the loss of consortium action are two separate claims. See F. James & G. Hazard, *supra* note 119, § 11.4, at 532-33, § 11.29, at 590. The United States Supreme Court has stated that "[s]ome litigants—those who never appeared in a prior action—may not be collaterally estopped without litigating the issue. They have never had a chance to present their evidence and arguments on the claim. Due process prohibits estopping them despite one or more existing adjudications of the identical issue which stands squarely against their position." *Blonder-Tongue Laboratories, Inc. v. University of Ill. Found.*, 402 U.S. 313, 329 (1971) (citations omitted). Parties who are neither the same parties of, nor in privity with the parties of, the preceding action may not be collaterally estopped: "It is a violation of due process for a judgment to be binding on a litigant who was not a party or a privy and therefore has never had an opportunity to be heard." *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 327 n.7 (1979) (citations omitted). The Restatement of Judgments takes the position that the loss of consortium spouse should be collaterally estopped from litigating issues that the disabled spouse has already litigated. Restatement (Second) of Judgments § 93(2) (Tent. Draft No. 3, 1976). The Restatement notes that the difference in those jurisdictions that preclude litigation and those that do not is based on the characterization of the loss of consortium as a separate or derivative claim. *Id.* § 93 comment c & illustrations 3-4.

123. *Jones v. Beasley*, 476 F. Supp. 116, 118 (M.D. Ga. 1979); e.g., *Russ Transp., Inc. v. Jones*, 104 Ga. App. 612, 613-14, 122 S.E.2d 282, 283 (1961); *Palmer v. Clarksdale Hosp.*, 213 Miss. 611, 618-21, 57 So. 2d 476, 478-80 (1952); *Womach v. City of St. Joseph*, 201 Mo. 467, 491, 100 S.W. 443, 450 (1907); *Kraut v. Cleveland Ry.*, 132 Ohio St. 125, 126-27, 5 N.E.2d 324, 325 (1936); *Wolff v. Du Puis*, 233 Or. 317, 320-23, 378 P.2d 707, 709-10 (1963), *overruled on other grounds en banc*, *Bahler v. Fletcher*, 256 Or. 384, 479 P.2d 329 (1970).

124. E.g., *Palmer v. Clarksdale Hosp.*, 213 Miss. 611, 618-20, 57 So. 2d 476, 479-80 (1952); *Kraut v. Cleveland Ry.*, 132 Ohio St. 125, 127, 5 N.E.2d 324, 325 (1936). The First Circuit has held that litigation of an issue by one spouse does not collater-

courts, although generally agreeing that marriage does not create privity for other types of actions,<sup>125</sup> apply collateral estoppel<sup>126</sup> or res judicata<sup>127</sup> to loss of consortium actions solely as a consequence of its derivative characterization. Under this minority view, if the spouses are in an accident and the disabled spouse loses an action for injuries, the other spouse is precluded from suing for loss of consortium, but is permitted to sue for other injuries incurred in the same accident.<sup>128</sup>

One federal court, applying state law, felt compelled to preclude the loss of consortium spouse from litigating.<sup>129</sup> Because the applicable state law designated loss of consortium a derivative action, "it follow[ed] that the . . . claim [was] dependent upon the validity of the [disabled] spouse's cause of action."<sup>130</sup> The fallacy of the minority rule is its failure to recognize that there are two separate claims.<sup>131</sup> The loss of consortium spouse does not seek recovery for the injuries of the disabled spouse, but rather seeks relief for the separate loss of consortium injury. The practice of attaching the uncertain "deriva-

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ally estop the other spouse from litigating this issue in her personal injuries claim. *Standard Acc. Ins. Co. v. Doiron*, 170 F.2d 206, 209 (1st Cir. 1948). "The respective causes of action of appellee and his wife were entirely distinct and independent, though they arose out of the same accident." *Id.* at 208.

125. *F. James & G. Hazard*, *supra* note 119, § 11.29, at 589. In these minority jurisdictions, "if a husband sues for his own injuries and loses the action, that judgment precludes the wife from suing for her loss of consortium . . . resulting from his injury; but the judgment does not preclude the wife from suing for bodily injuries to herself suffered in the very same accident." *Id.* (footnotes omitted).

126. *Jones v. Beasley*, 476 F. Supp. 116, 119 (M.D. Ga. 1979); *e.g.*, *Thill v. Modern Erecting Co.*, 284 Minn. 508, 515-16, 170 N.W.2d 865, 870-71 (1969); *Laws v. Fisher*, 513 P.2d 876, 878 (Okla. 1973). Similarly, a few courts have stated that settlement of the claim of the disabled spouse operates to bar the loss of consortium claim. *Hopson v. St. Mary's Hosp.*, 176 Conn. 485, 494, 408 A.2d 260, 264 (1979); *Millington v. Southeastern Elevator Co.*, 22 N.Y.2d 498, 508, 239 N.E.2d 897, 903, 293 N.Y.S.2d 305, 312 (1968). The disabled spouse cannot recover for the loss of consortium and that spouse's unilateral decision to settle the separate injury claim should not affect the ability of the loss of consortium spouse to recover in a separate action. *See Whittlesey v. Miller*, 572 S.W.2d 665, 669 (Tex. 1978).

127. *E.g.*, *Bitsos v. Red Owl Stores, Inc.*, 350 F. Supp. 850, 853 (D.S.D. 1972); *Sisemore v. Neal*, 236 Ark. 574, 574-77, 367 S.W.2d 417, 417-18 (1963).

128. *F. James & G. Hazard*, *supra* note 119, § 11.29, at 589.

129. *Bitsos v. Red Owl Stores, Inc.*, 350 F. Supp. 850, 852 (D.S.D. 1972) (construing South Dakota law).

130. *Id.*

131. *See supra* notes 45, 52 and accompanying text. The Supreme Court of Arkansas, dismissing a loss of consortium claim because the disabled spouse had an adverse judgment on his claim, commented that "logic unquestionably supports the view here taken. To permit a second suit would authorize 'two bites' and would have the actual effect of rendering the prior judgment, wherein [the defendant] was exonerated of liability, a nullity." *Sisemore v. Neal*, 236 Ark. 574, 577, 367 S.W.2d 417, 418 (1963). There are, however, two claims and the judgment is, therefore, not a nullity. The defendant is protected from liability to the disabled spouse who has had his day in court.

tive" label to both the injury and the action should not be permitted to cloak the distinct nature of the loss of consortium claim, and does not justify mechanically applying the preclusive procedural rules of the initial action to the separate loss of consortium action.

#### CONCLUSION

The early common-law legal identity of husband and wife has long ceased to exist. Today each spouse has a separately enforceable and compensable right to consortium. By resorting to the ambiguous "derivative" label or to legal fictions of marital unity, however, courts have circumvented this separateness and retained a link of the chain that once inextricably bound spouses. The current recognition of the husband and wife as two individuals, each possessing separate rights and duties, demands treatment of loss of consortium as a separate and fully enforceable action.

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