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## A MINOR CHILD'S CLAIM FOR LOST PARENTAL SOCIETY AND COMPANIONSHIP IN ILLINOIS: ANOTHER LOOK

We are keenly aware of the need of children for the love, affection, society and guidance of their parents; any injury which diminishes the ability of a parent to meet these needs is plainly a family tragedy, harming all members of that community.<sup>1</sup>

The law survives as a flexible and evolving means by which the goals of society and the interests of individuals are secured against infringement.<sup>2</sup> One of the most important, intimate, and sensitive interests common to all of society is that interest inherent in the parent-child relationship.<sup>3</sup> As undeniably important as this relationship is, the law is loathe to free itself of archaic concepts that fail to afford this relationship the legal protection it deserves.<sup>4</sup> This anachronistic lack of protection is evidenced by the near unanimous refusal of courts to recognize a child's cause of action for the loss of his parent's society and companionship<sup>5</sup> when the parent is injured by the negligence of

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1. *Borer v. American Airlines, Inc.*, 19 Cal. 3d 441, 453, 563 P.2d 858, 866, 138 Cal. Rptr. 302, 310 (1977) (the court, however, would not recognize the child's cause of action for loss of parental society and companionship).

2. As was most eloquently stated by Mr. Justice Cardozo:

[W]e have the conception of law as a body of rules and principles and standards which in their extension to new combinations of events are to be sorted, selected, moulded, and adapted in subordination to an end.

B. CARDOZO, *THE GROWTH OF THE LAW* 55 (1924).

3. See generally Schetky & Slader, *Termination of Parental Rights*, in *CHILD PSYCHIATRY AND THE LAW* 107 (D. Schetky & E. Benedek ed. 1980). The authors state:

The right of the child to the maintenance of his/her relationship with his/her biological parents is, as a general rule, the foremost guarantee of the child's interest. The family, when functioning, serves the child's primary emotional needs for continuity, consistency and identity. Tampering with the biological family is, correspondingly, usually adverse to his or her interests.

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The maintenance of that [parent-child] relationship, when it exists and can be perpetuated, may be the primary right of the child.

*Id.* at 110-11.

4. "Although traditionally solicitous to the marital relationship, the common law rarely extended much protection to the parent-child relationship. . . ." Note, *Recovery for Loss of Parental Consortium: An Undue Extension of Liability*, 43 U. PITT. L. REV. 285 (1981).

5. The loss of society, companionship and other emotional interests, such as care, love, affection, and sexual relations, as well as material services, generally fall under the rubric of "consortium." See generally, Hol-

some third party.<sup>6</sup> Courts addressing this issue have acknowledged the emotional appeal behind such a claim and have stated that "natural justice" supports the recognition of such an action.<sup>7</sup> Nevertheless, most jurisdictions do not recognize the claim as a legal interest sufficient to warrant the protection that only the law can give.<sup>8</sup> This lack of protection represents a departure from the modern legal trend protecting the interests of children<sup>9</sup> and is inconsistent with what society as a whole would

brook, *The Change in the Meaning of Consortium*, 22 MICH. L. REV. 1 (1923); Lippman, *The Breakdown of Consortium*, 30 COLUM. L. REV. 651 (1930). Consortium in Illinois has been interpreted by the courts as including, "in addition to material services, elements of companionship, felicity and sexual intercourse, all welded into a conceptualistic unity." *Dini v. Naiditch*, 20 Ill. 2d 406, 427, 170 N.E.2d 881, 891 (1960). It further includes a "person's affections, society, and aid." *Betser v. Betser*, 186 Ill. 537, 539-40, 58 N.E. 249, 250 (1900).

6. The following jurisdictions considered and rejected the child's cause of action and the cases in which it was so held. *Jeune v. Del E. Webb Constr. Co.*, 77 Ariz. 226, 269 P.2d 723 (1954), *overruled on other grounds*, *Glendale v. Bradshaw*, 108 Ariz. 582, 503 P.2d 803 (1972); *Borer v. American Airlines Inc.*, 19 Cal. 3d 441, 563 P.2d 858, 138 Cal. Rptr. 302 (1977); *Hinde v. Butler*, 35 Conn. Supp. 292, 408 A.2d 668 (1979); *Clark v. Suncoast Hosp. Inc.*, 338 So.2d 1117 (Fla. Dist. Ct. App. 1976); *Halberg v. Young*, 41 Hawaii 634 (1957); *Koskela v. Martin*, 91 Ill. App. 3d 568, 414 N.E.2d 1148 (1980); *Schmeck v. City of Shawnee*, 231 Kan. 588, 647 P.2d 1263 (1982); *Sabatier v. Travelers Ins. Co.*, 184 So.2d 594 (La. Ct. App. 1966); *Sawyer v. Bailey*, 413 A.2d 165 (Me. 1980); *Salin v. Kloempken*, 322 N.W.2d 736 (Minn. 1982); *Bradford v. Union Elec. Co.*, 598 S.W.2d 149 (Mo. Ct. App. 1979); *General Elec. Co. v. Bush*, 88 Nev. 360, 498 P.2d 366 (1972); *DeAngelis v. Lutheran Medical Center*, 84 A.D.2d 17, 445 N.Y.S.2d 188 (1981); *Morgel v. Winger*, 290 N.W.2d 266 (N.D. 1980); *Gibson v. Johnston*, 75 Ohio App. 413, 144 N.E.2d 310 (1956) *appeal dismissed*, 166 Ohio St. 288, 141 N.E.2d 767 (1957); *Norwest v. Presbyterian Intercommunity Hosp.*, 293 Or. 543, 652 P.2d 318 (1982) (this case probably offers the most thorough explanation of the child's action, pro and con, to date); *Erhardt v. Havens, Inc.*, 53 Wash. 2d 103, 330 P.2d 1010 (1958); *Roth v. Bell*, 24 Wash. App. 92, 600 P.2d 602 (1979).

There are currently three states which recognize the child's causes of action. *Weitl v. Moes*, 311 N.W.2d 259 (Iowa 1981); *Ferriter v. Daniel O'Connell's Sons, Inc.*, 1980 Mass. Adv. Sh. 2075, 413 N.E.2d 690 (1980); *Berger v. Weber*, 411 Mich. 1, 303 N.W.2d 424 (1981).

7. *E.g.*, *Hill v. Sibley Mem. Hosp.*, 108 F. Supp. 739 (D.D.C. 1952); *Hoffman v. Dautel*, 189 Kan. 165, 368 P.2d 57 (1962) (where the court stated it was difficult to not recognize the action on the basis of natural justice).

8. *See supra* note 6.

9. The general trend in Illinois is to offer a broader base of protection to minors and infants. The infant in Illinois has a right to be born free of prenatal injuries which result from earlier negligent acts inflicted upon the mother. *Renslow v. Mennonite Hosp.*, 67 Ill. 2d 348, 367 N.E.2d 1250 (1977). Illinois also has recently enacted a feticide statute. ILL. REV. STAT. ch. 38, § 9-1.1 (1981). Further, an Illinois parent can recover for the wrongful death of a fetus under the Wrongful Death Act. ILL. REV. STAT. ch. 70, § 2.2 (1980). *Chrisafogeorgis v. Brandenburg*, 55 Ill. 2d 368, 304 N.E.2d 88 (1973) (allowed wrongful death action for viable, unborn fetus). The parent is equally able to recover for the wrongful death of a minor child. *Crutchfield v. Meyer*, 414 Ill. 210, 111 N.E.2d 142 (1953). Moreover, the minor child can recover for the wrongful death of a parent. *Koskela v. Martin*, 91 Ill. App. 3d 568, 414 N.E.2d 1148 (1980). Additionally, the child's claim can include loss of support, love

seem to desire.<sup>10</sup>

The Illinois courts that have addressed this issue have followed the majority rule<sup>11</sup> and have failed to recognize that a minor child's interest in his parent's society and companionship is legally sufficient to maintain an action based on that interest when his parent is wrongfully injured.<sup>12</sup> This comment will ex-

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and affection. *Wilbon v. D.F. Bast Co.*, 48 Ill. App. 3d 98, 365 N.E.2d 498 (1977), *aff'd* 73 Ill. 2d 58, 382 N.E.2d 784 (1978). Also of interest is a package of six legislative bills titled "The Child Protection Act of 1983" that was introduced into the Illinois legislature. The package includes bills that would require the Department of Children and Family Services to administer child abuse prevention centers and shelters for abused or neglected children; HB-0537, 83d Leg., 1983 Illinois Journal, amended the Abused and Neglected Child Reporting Act to require the Department of Children and Family Services to establish multidisciplinary child protection teams to oversee child abuse or neglect cases that occur within a certain specified area; HB-0538, 83d Leg., 1983 Illinois Journal, amended the Criminal Code to create a new offense called "child pornography", HB-0539, 83d Leg., 1983 Illinois Journal.

For further commentary on the trend toward protecting the rights of minors in general see Cooney & Conway, *The Child's Right to Parental Consortium*, 14 J. MAR. L. REV. 341, 350-51 (1981); Love, *Tortious Interference with the Parent-Child Relationship: Loss of an Injured Person's Society and Companionship*, 51 IND. L. J. 590, 633-34 (1976); Note, *The Child's Right to Sue for Loss of a Parent's Love, Care and Companionship Caused by Tortious Injury to the Parent*, 56 B.U.L. REV. 722, 742-44 (1976); Comment, *The Child's Cause of Action for Loss of Consortium*, 5 U. SAN. FERN. V.L. REV. 449, 455-56 (1977); Note, *Recovery for Loss of Parental Consortium: An Undue Extension of Liability*, 43 U. PITT. L. REV. 285, 286-87 (1981).

10. That society does in fact have an interest in the family relationship, particularly the parent-child relationship, was noted by Roscoe Pound in 1916:

Today certain social interests are chiefly regarded. These are on the one hand a social interest in the maintenance of the family as a social institution and on the other hand a social interest in the protection of dependent persons, in securing to all individuals a moral and social life and in the rearing and training of sound and well-bred citizens for the future.

Pound, *Individual Interests in the Domestic Relations*, 14 MICH. L. REV. 177, 182 (1916).

Pound specifically noted that the child's interest was not adequately protected: "Also . . . [the child] has an interest in the society and affection of the parent, at least while he remains in the household. But the law has done little to secure these interests. At common law there are no legal rights which protect them." *Id.* at 185. Logically it would seem that, between 1916 and the present, the law would be more responsive to the familial interests of minors. However, this has not necessarily been the case. "The child, in contrast to other members of the immediate family, has received little or no judicial protection of his familial interests." Comment, *Judicial Treatment of Negligent Invasion of Consortium*, 61 COLUM. L. REV. 1341, 1347 (1961). *Cf.*, *Weitl v. Moes*, 311 N.W.2d 259 (Iowa 1981) (recognizing child's cause of action for loss of parental society and companionship); *Ferri-ter v. Daniel O'Connell's Sons, Inc.*, 80 Mass. Adv. Sh. 2075, 413 N.E.2d 690 (1980) (same); *Berger v. Weber*, 411 Mich. 1, 303 N.W.2d 424 (1981) (same).

11. See cases cited *supra* note 6.

12. It appears that the following are the only Illinois cases to have addressed the issue: *McNeil v. Diffenbaugh*, 105 Ill. App. 3d 350, 434 N.E.2d 377

plore the legal underpinnings of the family relationship as it has evolved from the early common law. The focus will then shift to the manner in which Illinois law has affected the familial relationship, especially its effect on the development of a spouse's action for loss of consortium. The Illinois decisions which have denied the child's claim for loss of parental society and companionship will be examined and the rationale of those cases will be analyzed. Analogies will be drawn from Illinois cases involving similar types of claims (e.g. alienation of affections and wrongful death actions) and applied to the child's claim for lost parental society and companionship. The proposed claim will be discussed in relation to general concepts of public policy and modern notions of social justice, as well as the need for judicial accomodation. This claim will finally be analyzed under traditional negligence law in Illinois. This comment will demonstrate that the reasons relied on by the Illinois courts for denying the child's action are not persuasive and that the action should be recognized and protected as an independent legal right.

#### HISTORICAL BACKGROUND

The early common law secured individual interests in the family relation under the doctrine of *paterfamilias*.<sup>13</sup> This doctrine treated all individual interests of the family members, and their interpersonal relationships, as vested in the head of the family—the father.<sup>14</sup> A father's action for wrongful injury to his family members was based on a master's action for injury to his servants. An injury to a servant was, in law, an injury to the master in that he was being deprived of the services usually rendered by the servant.<sup>15</sup> Thus, the father had a proprietary interest in the services he received from his spouse and children and

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(1982); *Mueller v. Hellrung Constr. Co.*, 107 Ill. App. 3d 337, 437 N.E.2d 789 (1982); *Koskela v. Martin*, 91 Ill. App. 3d 568, 414 N.E.2d 1148 (1980); *Collier v. Wagner Castings Co.*, 70 Ill. App. 3d 233, 388 N.E.2d 265 (1979). The child's action was tacitly deemed nonexistent in *Hall v. Gillins*, 13 Ill. 2d 26, 147 N.E.2d 352 (1958) where the court stated: "If the deceased in this case had survived, for example, his injuries might have been such as to inflict upon these plaintiffs [wife and minor son] deprivations of the same kind and of equal severity (referring to emotional losses). Yet the only person entitled to recover would be the injured man himself." *Id.* at 30, 147 N.E.2d at 355.

13. In Roman law, the head or master of a family. BLACK'S LAW DICTIONARY 1014 (rev. 5th ed. 1979).

14. See Cooney & Conway, *supra* note 9, at 342; Fisher, *Pater Familias—A Cooperative Enterprise*, 41 ILL. L. REV. 27 (1946); Pound, *supra* note 10, at 179; Note, *The Child's Right to Sue for Loss of a Parent's Love, Care and Companionship Caused by Tortious Injury to the Parent*, *supra* note 9, at 724; Comment, *The Child's Cause of Action for Loss of Consortium*, *supra* note 9, at 450.

15. See *Dini v. Naiditch*, 20 Ill. 2d 406, 422, 170 N.E.2d 881, 889 (1960) (first Illinois case allowing a wife to recover for loss of consortium of husband;

could recover for the pecuniary value of the services lost due to the wrongful conduct of a third party.<sup>16</sup> Under this purely "economic view" of the family, the wrongdoer would be liable to the master-father for losses caused by either intentional<sup>17</sup> or negligent<sup>18</sup> conduct.

### *Protection of Family Interests in Illinois*

The development of the law in Illinois surrounding the interests of the family reflects the influence of the early common law.<sup>19</sup> An early Illinois Supreme Court case,<sup>20</sup> for instance,

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court reviewed history of action and stated husband was entitled to services of wife, like any servant).

16. Note, *The Child's Right to Sue for Loss of a Parent's Love, Care and Companionship Caused by Tortious Injury to the Parent*, *supra* note 9, at 724.

17. *E.g.*, *Powell v. Strickland*, 163 N.C. 393, 79 S.E. 872 (1913) (action brought by husband for criminal conversation with wife).

18. *E.g.*, *Wilton v. Middlesex R.R.*, 125 Mass. 130 (1878) (child hit and injured by train).

19. The law in Illinois reflects the archaic concepts that are rooted in the early common law. A parent can recover from a third party who intentionally interferes with the parent-child relationship. *Ball v. Bruce*, 21 Ill. 161 (1859) (plaintiff, standing *in loco parentis*, could recover for loss of services of minor girl seduced by defendant). The parent would sue under an agency principle which required allegations and proof of the minor's services for the benefit of the parent in order to maintain the action. *Id.* at 162. It was essential to the parents' action, however, that they have a legal interest in the child's services. Thus, a parent could not recover for the loss of services of an emancipated minor. *Mercer v. Jackson*, 54 Ill. 397 (1870). If the parent did have a legal interest in the services of the minor, the courts would, at least in seduction cases, recognize even the slightest acts of "service" by the child as sufficient to show the existence of the master-servant relationship. *Ball v. Bruce*, 21 Ill. 161 (1859) (slight evidence, such as mending clothes or making tea, sufficient to show acts of service); *Mercer v. Jackson*, 54 Ill. 397, 401 (1870) (same). Even at this early date, however, the Illinois courts were acknowledging that the loss of the child's services was not the real ground for recovery and only served as the legal basis for bringing the action. In cases of seduction of a daughter, it was the injury to the intangible elements of family life, such as degradation to the family reputation, emotional distress and mental anguish resulting from the defendant's conduct, which formed the real basis of recovery. *Yundt v. Hartrunft*, 41 Ill. 9, 12 (1866) (injury to character of family, mental distress and anguish are real grounds of recovery); *Grable v. Margrave*, 4 Ill. 372 (1842) (parent allowed to recover for loss of daughter's society and comfort when seduced by defendant).

If the child is negligently injured by the defendant, the parents cannot recover for the loss of the child's society and companionship. *Curtis v. County of Cook*, 109 Ill. App. 3d 400, 440 N.E.2d 942 (1982). Only "actual losses" to the parent are recoverable, including the "expense and trouble in caring for the child and the deprivation of his services during minority." *Seltzer v. Saxton*, 71 Ill. App. 229, 233 (1897). The *Curtis* decision, however, is devoid of any logical explanation as to why the claim for loss of the child's society should be denied. The principal thrust of the analysis is that "[o]ther jurisdictions overwhelmingly support the view that parents may not recover for the loss of a minor child's society and companionship." *Cur-*

stated "that marriage merges the civil rights of the woman [with

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tis, 109 Ill. App. 3d at 408, 440 N.E.2d at 947. The *Curtis* court concluded that *Koskela v. Martin*, 91 Ill. App. 3d 568, 414 N.E.2d 1148 (1980), though factually inapposite, precluded recognition of such an action. *Curtis*, 109 Ill. App. 2d at 408, 440 N.E.2d at 947. Even though an overwhelming number of jurisdictions that have addressed the claim have denied it, *see* Annot., 69 A.L.R.3d 553 (1976), the fact is that some courts have recognized the legitimacy of the parents' claim and that the trend appears to be heading towards recognition of such an action. *See e.g.*, *Drayton v. Jiffee Chem. Corp.*, 395 F. Supp. 1081 (N.D. Ohio 1975) (allowed parents to recover, applying Ohio law); *Shockley v. Prier*, 66 Wis. 2d 394, 225 N.W.2d 495 (1975) (allowing parents' claim).

Moreover, the cases that have denied the parents' claim reflect an archaic notion that children are merely sources of economic security and support rather than an integral member of a family relationship providing love, affection and companionship to the other family members. As in seduction cases, where the Illinois courts have recognized that "loss of services" is merely a legal fiction designed to compensate for the real injury, *viz.*, destruction of the family unit including all intangible elements of the family relationship, so in negligence cases the real injury is the destruction of the social and emotional interchange among the family members. The *Curtis* case thus, merely breathes new life into a stale and outmoded concept that has long outlived its usefulness to society and law. *See generally* H. CLARK, *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* 269 (1968) ("The essence of the [parent's] action is the interference by the defendant with what can be called the parent's right of consortium."); Note, *Parent's Recovery for Loss of Society and Companionship of Child*, 80 W. VA. L. REV. 340 (1978).

In cases involving the negligently caused wrongful death of a minor, courts have allowed a surviving father to recover for the loss of that child's services, if the father would have been entitled to those services had the child lived. Moreover, actual proof of loss of services was deemed unnecessary because the law implied a pecuniary loss that was compensable under the wrongful death statute. *Stafford v. Rubens*, 115 Ill. 196, 3 N.E. 568 (1885); *Chicago v. Hesing*, 83 Ill. 204 (1876); *Chicago v. Major*, 18 Ill. 349 (1857). In assessing damages, however, the jury was instructed not to take into account the bereaved affections or mental anguish of the surviving parent. *Chicago v. Major*, 18 Ill. 349, 360 (1857). The damage issue was reaffirmed in *Zostautas v. St. Anthony De Padua Hosp.*, 23 Ill. 2d 326, 178 N.E.2d 303 (1961) where the court held that the parents of a 5 year old child who died during a tonsillectomy could not recover for their bereavement and mental anguish under the Wrongful Death Act. More recently, two appellate courts held that parents cannot recover for the loss of a child's society or companionship in a wrongful death action. *Trotter v. Moore*, 113 Ill. App. 3d 1011, 447 N.E.2d 1340 (1983); *Bullard v. Barnes*, 112 Ill. App. 3d 384, 445 N.E.2d 485 (1983). As with the *Curtis* decision, the decisions in *Trotter* and *Bullard* reflect the unacceptable view that minor children are of only economic importance to a family and that their wrongful death does not implicate a protected interest of the parents in the child's society and companionship. Further, as explained below, these decisions are overly rigid in their approach to an expanding and dynamic area of the law which encompasses the entire family relationship.

Both *Trotter* and *Bullard* have as their foundation the Illinois Supreme Court decision of *Elliott v. Willis*, 92 Ill. 2d 530, 442 N.E.2d 163 (1982). In *Elliott*, Mr. Elliott was killed in an automobile collision with a truck. Mrs. Elliott filed a wrongful death action against the driver of the truck and its owner. At trial, the judge instructed the jury, over the plaintiff's objection, that in determining "pecuniary injuries" under the Wrongful Death Act, not to consider the loss of the decedent's society by the widow and next of kin. The appellate court reversed and held, *inter alia*, that the jury should

those of her husband]; that she is thereby deprived of her sepa-

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have been instructed on Mrs. Elliott's loss of consortium. *Elliott v. Willis*, 89 Ill. App. 3d 1144, 412 N.E.2d 638 (1980). On appeal, the supreme court noted that previous decisions had given the term "pecuniary injuries" a broad interpretation. The court therefore found loss of consortium to be included within that phrase and compensable under the Act. 92 Ill. 2d at 540, 442 N.E.2d at 167. Subsequently, the appellate court decided *Bullard v. Barnes*, 112 Ill. App. 3d 384, 445 N.E.2d 485 (1983). In *Bullard*, a 17 year old was killed in an automobile collision with a truck. The complaint filed against the driver and owner of the truck contained numerous counts including a wrongful death claim. The trial court, in apparent reliance on the appellate decision in *Elliott*, instructed the jury that, in determining pecuniary loss to the parents, they could consider the parent's loss of society. *Id.* at 389, 445 N.E.2d at 489. The appellate court in *Bullard*, however, did not understand the *Elliott* decision as allowing the loss of a child's society as an element of damages under the Wrongful Death Act. The court believed "that there is a qualitative difference between the 'society' of a spouse and that of a child" in that society "is inherent in the marital relationship." *Id.* at 390, 445 N.E.2d at 490. Further, since there is no common law action for loss of the child's society in non-fatal cases and since the appellate opinion in *Elliott* implies that the Wrongful Death Act is supposed to fill the gap for fatal injuries by being "the obverse of common law non-fatal actions, there is no basis for including" the loss of society of a child within the damage provisions of the Wrongful Death Act. *Id.* The *Trotter* decision, though analytically more conducive and solicitous to the parent's claim, nonetheless denied it. The *Trotter* court was persuaded by *Bullard's* observations that the supreme court's decision in *Elliott* was confined to cases involving loss of consortium between spouses in fatal cases and because the common law provided no recovery to the parents for the lost society of their child due to non-fatal injuries. 113 Ill. App. 3d at 1016, 447 N.E.2d at 1344. Hence, "there is no shortcoming for the Wrongful Death Act to obviate where the loss of society arises from the wrongful death of a child." *Id.*

The appellate court decisions in *Bullard* and *Trotter*, however, are based on too narrow a reading of the supreme court's decision in *Elliott* and rely too heavily on the common law's failure to provide a parent with a cause of action for the loss of society of a non-fatally injured child. Further, based on *Elliott's* broad interpretation of "pecuniary injuries," there is a shortcoming that needs to be obviated.

By relying on the common law's failure to provide a parent with recovery for the loss of society of a non-fatally injured child as a basis for denying the recovery when the child dies, the appellate decisions further engrained the concept that children are of only economic importance to a family. As explained earlier in this note, historically, in non-fatal cases, the parents can only recover for actual losses including the "expense and trouble in caring for the child and the deprivation of his services during minority." *Seltzer v. Saxton*, 71 Ill. App. 229, 233 (1897). The family relationship was based on the idea of master and servant with the father being the master entitled to the services of his entire family. Thus, family members were of only economic importance, in the eyes of the law, to the father.

It would seem to go without saying that fathers in contemporary society do not believe that their families are of *only* economic importance. Yet, by denying the parent's recovery for loss of a child's society, on the basis of the common law, that is exactly what the appellate courts are saying. Further, the *Elliott* decision can be read much more broadly than the appellate courts read it. Both *Trotter* and *Bullard* stated that the supreme court limited its holding to the loss of consortium by a widow. Yet nowhere in the *Elliott* decision can such a conclusion be explicitly found. The *Elliott* court's emphasis on loss of consortium by a widow is logical because the facts of the case were such that an analysis of the parent's claim for lost



rate, legal existence, and that the husband and wife are but one person."<sup>21</sup> The law acknowledged the husband as that one person and it was the husband who was vested with standing to

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society of a child was not required. It would have been extraordinary for the court to have used such a sweeping analysis in a situation which only required statutory construction.

Also, the *Elliott* decision discloses the court's concern with keeping abreast of the trend in this area of the law, *viz*, allowing recovery for loss of society under the Wrongful Death Act. As stated by the court in *Elliott*, "[t]he purpose of the Wrongful Death Act is to compensate the surviving spouse and next of kin for the pecuniary losses sustained due to the decedent's death." 92 Ill. 2d at 540, 442 N.E.2d at 168. In arriving at its conclusion that loss of consortium is an element of damages to be considered, the court carefully analyzed various other cases that allowed recovery for intangibles under wrongful death claims. The court's methodology could, therefore, be read as supporting the parent's claim rather than impeding it.

Finally, based on its earlier holdings that the felicity and care of a father are included within the term "pecuniary injuries," the *Elliott* court was "compelled to conclude that the companionship and conjugal relationship of a spouse are equally compensable as 'pecuniary injuries.'" *Id.* at 538, 442 N.E.2d at 167. This creates a shortcoming in need of correction. As noted by the *Trotter* court:

We observe that if felicity and companionship, *i.e.*, loss of society as between a decedent and his child (*Allendorf v. Elgin, Joliet and Eastern Ry. Co.*) or a decedent and his spouse (*Elliott v. Willis*) are capable of evaluation the damages would be no less capable of evaluation where the decedent was a child and the survivors were the next of kin. This analysis is consistent with the observation noted in *Elliott* that whether such damages classified as "pecuniary" or recognized and allowed as "non-pecuniary" the recent trend is unmistakably in favor of permitting such recovery.

113 Ill. App. 3d at 1014-15, 447 N.E.2d at 1343. Yet, both *Bullard* and *Trotter* stated that there is no shortcoming for the Wrongful Death Act to correct because there was no recovery at common law for the loss of society of a non-fatally injured child. *Trotter*, 113 Ill. App. 3d at 1016, 447 N.E.2d at 1344; *Bullard*, 112 Ill. App. 3d at 390, 445 N.E.2d at 490.

While it is true that there is no obverse common law action allowed in cases of non-fatally injured children, this is not the real shortcoming. The shortcoming is that if a father dies, his children can recover for the loss of his advice, moral training, instruction, attention, guidance and other intangible elements. *Goddard v. Enzler*, 222 Ill. 462, 78 N.E. 805 (1906); *Anthony Ittner Brick Co. v. Ashby*, 198 Ill. 562, 64 N.E. 1109 (1902); *Chicago, R.I. & Pac. R.R. Co. v. Austin*, 69 Ill. 426 (1873); *Illinois Central R.R. Co. v. Weldon*, 52 Ill. 290 (1869). Both *Goddard* and *Anthony Ittner Brick Co.* were cited with approval in *Elliott*. 92 Ill. 2d at 538, 442 N.E.2d at 167. Further, the child's claim includes loss of love, support and affection. *Wilbon v. D.F. Bast Co.*, 48 Ill. App. 3d 98, 365 N.E.2d 498 (1977), *aff'd* 73 Ill. 2d 58, 382 N.E.2d 784 (1978). Yet, if the child dies, the parent cannot recover for any of these losses and is limited to actual damages, which in essence are funeral expenses. This legal anomaly is in need of correction. The *Elliott* court was compelled to allow the spousal claim because of the previous decisions allowing the children's claim when the father dies. The appellate decision disallowing the parent's claim is therefore in seeming contravention with the language of the *Elliott* case and the direction in which the supreme court appears to be heading.

20. *Love v. Moynihan*, 16 Ill. 277 (1855).

21. *Id.* at 280. See also *Burger v. Belsley*, 45 Ill. 72, 75 (1867) (husband and wife are one legal entity).

enforce legal rights incident to the marriage relation.<sup>22</sup> Regarding his children, the father could independently recover for loss of his children's services due to the wrongful conduct of another.<sup>23</sup> The father, however, was required to prove that he had a legal interest in the services of his child, or the requisite master-servant relationship would not be established.<sup>24</sup> A father could not, therefore, recover for the lost services of an emancipated minor.

In actions by the husband against a third party for criminal conversation with his wife,<sup>25</sup> or when the father sued a third party for seducing his daughter,<sup>26</sup> the Illinois courts began to acknowledge that "loss of services" was merely a legal fiction used to support the father's or husband's claim.<sup>27</sup> The essence of the action was to compensate the "master" for the dishonor and disgrace cast upon the character of the family<sup>28</sup> and for the resulting distress and mental anguish.<sup>29</sup> Compensation was intended to soothe the pain of "being deprived of the society and comfort"<sup>30</sup> of the injured spouse or daughter.

The early common law in Illinois, allowing the husband an independent right to recover for lost services of an injured wife,<sup>31</sup> began to change in 1861 when Illinois passed the Married Woman's Act.<sup>32</sup> The Act removed a married woman's legal disability and allowed her the freedom to protect her own property interests. By 1870, the Illinois Supreme Court had interpreted the Act as granting a wife the sole right to her wages and allowed for her recovery of lost earnings against a tortfeasor. Fur-

22. Note, *The Child's Right to Sue for Loss of a Parent's Love, Care and Companionship Caused by Tortious Injury to the Parent*, *supra* note 9, at 724.

23. See *Grable v. Margrave*, 4 Ill. 372 (1842) (father, as master, must allege loss of daughter's services); *Seltzer v. Saxton*, 71 Ill. App. 229 (1896) (father can recover for loss of child's services). See *supra* note 19.

24. *Mercer v. Jackson*, 54 Ill. 397 (1870) (parent had no legal interest in services of emancipated minor).

25. *Yundt v. Hartrunft*, 41 Ill. 9 (1866) (husband sued defendant for having sexual relations with his wife).

26. *E.g.*, *Grable v. Margrave*, 4 Ill. 372 (1842) (father sued defendant for seducing his minor daughter).

27. "[T]he loss of service is not the real gravamen of the suit, but it is for the most part a legal fiction, which is resorted to as a legal foundation for the support of the action." *Mercer v. Jackson*, 54 Ill. 397, 401 (1870).

28. *Yundt v. Hartrunft*, 41 Ill. 9, 12 (1866).

29. *Id.*

30. *Grable v. Margrave*, 4 Ill. 372, 373 (1842).

31. See Carr, *Measuring Damages in the Family Context*, 1962 U. ILL. L.F. 574, 596-98; Comment, *Judicial Treatment of Negligent Invasion of Consortium*, 61 COLUM. L. REV. 1341, 1344 (1961).

32. 1861 ILL. LAWS p. 142. (an act designed to free wives' property from control of husbands).

ther, the term "property" within the Act was construed to include a wife's cause of action for wrongful injury to her person.<sup>33</sup> The husband, however, still retained a cause of action for his deprivation of comfort and for liabilities incurred during the period of the wife's disabilities.<sup>34</sup> The action in the husband was thereafter recognized as one for the loss of consortium of his injured wife.<sup>35</sup>

If the husband was injured, however, no cause of action for loss of support or consortium existed in the wife.<sup>36</sup> This law remained unchanged in Illinois until 1960 when the Illinois Supreme Court decided *Dini v. Naiditch*.<sup>37</sup> In *Dini* the court stated that the reasons underlying the denial of a wife's cause of action for loss of consortium "[were] without substance, and apparently [had] been added to support a predetermined conclusion dictated by history and the fear of extending liability."<sup>38</sup> It was apparent to the court that the historical setting from which the rule denying the wife's action arose had completely changed, and that "the entire movement of the law toward protecting familial interests"<sup>39</sup> warranted recognition of a wife's interest in consortium as a legally protected right.<sup>40</sup>

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33. *City of Peru v. French*, 55 Ill. 317 (1870); *Chicago, B. & Q. R.R. Co. v. Dunn*, 52 Ill. 260, 264-65 (1869).

34. See cases cited *supra* note 33. See also *Chicago and Milwaukee Elec. Ry. Co. v. Krempel*, 116 Ill. App. 253 (1904) (husband could recover for loss of wife's services and society).

35. *Blair v. Bloomington & N. Ry., Elec. & Heating Co.*, 130 Ill. App. 400 (1906). "That the husband has a separate right of action to recover damages for the loss of services and *consortium* of his wife occasioned by her injury, is the settled law of this and other jurisdictions." *Id.* at 403. Neither the Illinois cases cited by the court, nor any discovered upon independent research, disclosed a use of the term "consortium" prior to the *Blair* case. Thus, it would seem that at this juncture the term "consortium" was being used to describe the intangible elements of the spousal relationship, including society and companionship. These intangible elements were also a part of the recovery by the father in actions for the seduction of his daughter. See *Grable v. Margrave*, 4 Ill. 372 (1842) (in seduction case, real damage is injury to family reputation).

36. *Patelski v. Snyder*, 179 Ill. App. 24 (1913) (wife had no right to recover for physical injuries to husband). Children were treated the same as their mother. "Servants" cannot sue for injury to their "master". 3 W. BLACKSTONE, COMMENTARIES \*142-43.

37. 20 Ill. 2d 406, 170 N.E.2d 881 (1960).

38. *Id.* at 429, 170 N.E.2d at 892.

39. *Id.* at 430, 170 N.E.2d at 892.

40. It is appropriate to look a little more closely at the *Dini* decision. Many of the arguments asserted by the defendant for not recognizing the wife's action for loss of consortium are identical to the reasons advanced in Illinois and elsewhere for not allowing a minor child a separate basis of liability for loss of parental society and companionship.

In the *Dini* case, Mrs. Dini's husband, a fireman, was injured while fighting a fire at the defendant's building. There was substantial evidence showing defendant's negligence and statutory violations in maintaining the

The modern day spousal action for loss of consortium is derivative in nature and based on the theory of transferred negligence.<sup>41</sup> Transferred negligence is a doctrine that, in theory, allows a person to recover for injuries which result when the defendant's negligence is directed at some third party. In a spousal action for loss of consortium, the defendant's negligence directed at one spouse "transfers" and will result in a recoverable injury to the other spouse for the loss of sentimental and physical interests in the first spouse.<sup>42</sup> The nearly identical sentimental interest of the minor child in his parent's society and companionship, however, has never been recognized in Illinois as a legally protected interest. Apparently the first case in Illi-

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premises. In a combined action, Mrs. Dini's claim for loss of consortium was dismissed following a motion for summary judgment. On appeal, the supreme court traced the origin of the common law rule and then addressed the various reasons advanced for denying the claim.

One of the principle reasons used to deny the wife's action was that her injury was "too remote and indirect to warrant protection." *Id.* at 426, 170 N.E.2d at 890. The court stated that because the identical injury to the husband had "never been regarded [as] too remote or indirect," the argument lacked merit. *Id.*, 170 N.E.2d at 891.

Another frequently asserted reason was the possibility of double recovery because the husband might recover for his diminished ability to support his family in his own action. *Id.* The court stated that the argument merely emphasized one aspect of consortium—loss of support. It also includes "elements of companionship, felicity and sexual intercourse, all welded into conceptualistic unity." *Id.* at 427, 170 N.E.2d at 891. Furthermore, by merely deducting from the computation of damages awarded in the consortium action any compensation already given the husband for his impaired ability to support the family, any double recovery would be avoided. *Id.* The court stated that the "'double recovery' bogey is merely a convenient cliché for denying the wife's action for loss of consortium." *Id.*

Another reason adduced for denying the wife's action was that the courts should defer to the legislature. The court, however, found

no wisdom in abdicating to the legislature our essential function of re-evaluating common-law concepts in the light of present day realities. Nor do we find judicial sagacity in continually looking backward and parroting the words and analyses of other courts so as to embalm for posterity the legal concepts of the past.

*Id.* at 429, 170 N.E.2d at 892.

The court reasoned that the common law ideas, based on medieval society, were out of kilter with modern notions and could not, in all good conscience, be determinative of the issue. *Id.*

In his dissent, Chief Justice Schaefer stated; "[I]t is hard to see why . . . the wife of an injured man should be allowed a recovery that is denied to his children. If the boundaries of permissible recovery are to be extended, they should be extended upon a realistic appraisal of the factors involved." *Id.* at 433, 170 N.E.2d at 894 (Schaefer, C.J., dissenting).

41. *Hammond v. North American Asbestos Corp.*, 97 Ill. 2d 187, 454 N.E.2d 210 (1983); *Renslow v. Mennonite Hosp.*, 67 Ill. 2d 348, 357, 367 N.E.2d 1250, 1255 (1977). See *infra* notes 110-13 and accompanying text.

42. See Prosser, *Palsgraf Revisited*, 52 MICH. L. REV. 1, 19-24 (1953). See *infra* notes 121-26 and accompanying text.

nois so holding is *Collier v. Wagner Castings Co.*<sup>43</sup>

#### ILLINOIS CASE LAW DENYING CHILD'S CLAIM

In *Collier*, a father's action under the Illinois Workers' Compensation Act<sup>44</sup> included a claim by his minor child for the loss of the father's society and companionship due to the defendant's wrongful conduct.<sup>45</sup> The Fourth District Appellate Court stated, without citation or discussion, that the minor son had no cause of action for the loss of the father's society and companionship.<sup>46</sup> The question arose next in the First District in 1980 in the seminal case of *Koskela v. Martin*.<sup>47</sup> The plaintiff in *Koskela* was a handicapped child who brought an action, as part of a multicount complaint, against the owner and operator of a garbage truck which had collided with the father's vehicle. The collision resulted in severe injuries to the father. The pertinent count alleged that the child, suffering from "autism", was "uniquely dependent on her father for personal care and supervision"<sup>48</sup> and that, as a result of the disabling accident to her father, she would be deprived of that personal care and attention. Moreover, the child had been attending a special school to help alleviate the disorder and, since the father was now unable to drive her to the school, she alleged her condition would deteriorate. The interruption of this remedial treatment would result in permanent injury to the child. Finally, as a result of the defendant's negli-

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43. 70 Ill. App. 3d 233, 388 N.E.2d 265 (1979), *aff'd* 81 Ill. 2d 229, 408 N.E.2d 198 (1980) (the child's claim for lost parental society and companionship was not renewed on appeal to the supreme court). The child's action was tacitly deemed non-existent in *Hall v. Gillins*, 13 Ill. 2d 26, 147 N.E.2d 352 (1958) where the court stated: "If the deceased in this case had survived, for example, his injuries might have been such as to inflict upon these plaintiffs (wife and minor son) deprivations of the same kind and of equal severity. Yet the only person entitled to recover would be the injured man himself." *Id.* at 30, 147 N.E.2d at 355.

44. ILL. REV. STAT. ch. 48, § 138.1 *et seq.* (1981).

45. The father suffered a heart attack while at work and brought a four count complaint against the defendants under the Workers' Compensation Act. The complaint alleged gross negligence against the defendants because of the extraordinarily inadequate manner in which the nurse on duty at the company responded and acted towards the father-employee when he complained of being sick and after having collapsed while on the job. Count IV of the complaint was brought by the father-employee's wife and minor child seeking damages for severe emotional distress and loss of society and companionship. *Id.* at 235, 388 N.E.2d at 267.

46. The dismissal of the complaint was upheld. *Id.* at 242, 388 N.E.2d at 271. In his dissent, Justice Craven, voting for reversal and a remand, thought the complaint should be reinstated. Though his dissent made no mention of the child's claim, it can be viewed as implicit support for recognition of the child's action.

47. 91 Ill. App. 3d 568, 414 N.E.2d 1148 (1980).

48. *Id.* at 569, 414 N.E.2d at 1149.

gence, the child alleged she would be deprived of her father's society, companionship and affection.<sup>49</sup>

The appellate court, while recognizing the trend in Illinois towards broadening the protection of the family relationship, denied the child's claim stating that "not every loss can be made compensable, and we must locate the line where liability terminates."<sup>50</sup> The court enunciated several reasons which it considered dispositive of the child's claim.<sup>51</sup> The reasons adduced for denying the action were:

1. the determination of whether a child can maintain the action should be left to the legislature;<sup>52</sup>
2. the lack of sound precedent;<sup>53</sup>
3. the intangible nature of the loss makes pecuniary valuation difficult;<sup>54</sup>

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49. *Id.* The situation was further compounded because the child's mother was ill and required frequent hospitalization. *Id.*

50. *Id.* at 570, 414 N.E.2d at 1150. The court discussed the Michigan Appellate Court's decision in *Berger v. Weber*, 82 Mich. App. 199, 267 N.W.2d 124 (1978), *aff'd* 411 Mich. 1, 303 N.W.2d 424 (1981), but off-handedly rejected it and also *Ferriter v. Daniel O'Connell's and Sons, Inc.*, 80 Mass. Adv. Sh. 2075, 413 N.E.2d 690 (1980) (another decision recognizing the child's action, cited but not discussed in *Koskela*) in favor of the line of cases rejecting recognition of the child's action. *See supra* cases cited at note 6.

51. The reasons advanced by Illinois are reflective of the arguments raised by all jurisdictions which have addressed this question. *See e.g.*, *Borer v. American Airlines, Inc.*, 19 Cal. 3d 441, 563 P.2d 858, 138 Cal. Rptr. 302 (1977). *See generally* H. CLARK, *supra* note 19, at 274-79; Cooney & Conway, *supra* note 9, at 344-48; Love, *supra* note 9, at 595-605; Note, *The Child's Right to Sue for Loss of a Parent's Love, Care and Companionship Caused by Tortious Injury to the Parent*, *supra* note 9, at 728-40; Comment, *The Child's Cause of Action for Loss of Consortium*, *supra* note 9, at 453-59; Note, *Recovery for Loss of Parental Consortium*, *supra* note 9, at 291-306.

52. *Koskela*, 91 Ill. App. 3d at 571, 414 N.E.2d at 1151. The *Koskela* court agreed with the majority of other jurisdictions that believed it better to defer to their respective legislatures than to be the harbinger of change in their states. "The determination of where a negligent act in this instance has an end to its legal consequences is best left to the legislature." *Id.* *See infra* notes 69-82 and accompanying text. For a thorough discussion concerning the chasms that can develop and the problems that can arise between legislative action or inaction and the role of the courts, see Friendly, *The Gap in Lawmaking—Judges Who Can't and Legislators Who Won't*, 63 COLUM. L. REV. 787 (1963).

53. 91 Ill. App. 3d at 571, 414 N.E.2d at 1151. Although the court recognized that the common law was sufficiently flexible to adapt to the changing social mores and conditions relevant to our evolving conceptions of justice, the "lack of sound precedent must be considered as a bar to recognizing this cause of action." *Id.* *See infra* notes 69-82 and accompanying text. This line of reasoning does not speak well of either the Massachusetts Supreme Court or the Michigan Appellate Court, both of which allowed the child's action at the time *Koskela* was decided. *See supra* note 6.

54. 91 Ill. App. 3d at 571, 414 N.E.2d at 1151. The court reasoned that because an emotional harm is intangible in nature that it is difficult to attach a monetary value to that harm. Moreover, monetary compensation was deemed to be an inadequate substitute for the loss of the father's guidance and companionship. *Id.* *See infra* notes 83-86 and accompanying

4. the possibility of double recovery;<sup>55</sup>
5. recognition of the action would result in increased litigation and multiple claims;<sup>56</sup>
6. the defendant's liability would be greatly expanded;<sup>57</sup>

text. In *Elliott v. Willis*, 92 Ill. 2d 530, 442 N.E.2d 163 (1982) however, the supreme court stated that the loss of consortium of a widow was compensable as "pecuniary injuries" under the Wrongful Death Act. The court so held because "the felicity and care of a father are capable of evaluation as 'pecuniary injuries' under the Wrongful Death Act." *Id.* at 538, 442 N.E.2d at 167.

55. 91 Ill. App. 3d at 571, 414 N.E.2d at 1151. It was obvious to the court that the parent's own personal injury action would include the loss of future earnings as part of the damages award. The loss of future earnings is tied to the ability of the parent to provide for the support and care of the family. The court reasoned that because the "jury may consider the child's loss of his parent's material services and support" in the child's action for loss of parental consortium, then there would be an overlap in recovery. *Id.* Furthermore, the jury would have considered the emotional harm suffered by the family in its award to the injured parent. Therefore, if the child's action were allowed it would result in double recovery that would not be obviated by special instructions to the jury. *Id.* at 571-572, 414 N.E.2d at 1151. See *infra* notes 87-95 and accompanying text.

56. 91 Ill. App. 3d at 572, 414 N.E.2d at 1151. The court reasoned that by allowing the claim, each child would have his own action. This would result in multiple claims and increased litigation. As a consequence, the possibility of settlements would diminish, or at least increase the dollar amounts involved. This in turn would place the pecuniary burden on society as a whole through increased insurance premiums. *Id.* See *infra* notes 96-100 and accompanying text. Whether insurance rates increase as a result of judicial recognition of a new cause of action, however, is not related to the question of whether the action should be recognized in the first place. It is the courts duty to initially decide the legitimacy of the claim. If judicial recognition later demonstrates an unreasonable increase in insurance premiums, then citizens can petition their legislators to rectify the situation. As was stated most succinctly by Justice Dooley: "We are not concerned with automobile insurance rates, nor the premiums of health insurance benefits, nor the cost of medical malpractice insurance. Such questions involve many issues foreign to the question presented here." *Renslow v. Mennonite Hosp.*, 67 Ill. 2d 348, 370, 367 N.E.2d 1250, 1261 (1977) (Dooley, J., concurring). Another eloquent response to the "rising insurance" argument can be found in *Norwest v. Presbyterian Intercommunity Hosp.*, 293 Or. 543, 652 P.2d 318 (1982) where the court said:

[W]hatever the opposing psychological and social contentions mean for a legal obligation to compensate a child for incapacitating one of its parents, they cannot properly be "weighed" against concern about insurance rates, at least not by a court of law. A person's liability in our law still remains the same whether or not he has liability insurance; properly, the provision and cost of such insurance varies with potential liability under the law, not the law with the cost of insurance.

652 P.2d at 323.

Furthermore, the rising insurance argument is inevitably raised in each case where a new cause of action or a change in existing law is sought. For example, when Illinois adopted comparative negligence, the defendant argued that insurance rates would escalate. The Illinois Supreme Court, however, rejected that argument in no uncertain terms. *Alvis v. Ribar*, 85 Ill. 2d 1, 19, 421 N.E.2d 886, 893 (1980).

57. 91 Ill. App. 3d at 572, 414 N.E.2d at 1151. The court was persuaded that if the child was allowed to maintain the action, then it may be difficult

7. the damages based upon loss of consortium historically relate to the impairment of the sexual life of a married couple and are thus not an element of damages in the child's claim.<sup>58</sup>

The same appellate court was confronted with another child's claim two years later in *McNeil v. Diffenbaugh*.<sup>59</sup> In an action that fell within the parameters of the Illinois Workers' Compensation Act,<sup>60</sup> the minor child's action was summarily rejected by the court relying exclusively on *Koskela v. Martin*.<sup>61</sup> Illinois' most recent decision on the subject is in *Mueller v. Helbrung Construction Co.*,<sup>62</sup> where the Fifth District Appellate Court dismissed a minor's claim.<sup>63</sup> The court stated:

All things considered, we think that the balance must be struck against the creation of a new cause of action for loss of parental companionship and society. Although we appreciate the loss sustained by the minor child in the instant case, the loss is not one that in Illinois is actionable.<sup>64</sup>

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later to shore-up the defendant's liability if all members of a household had potential claims. Human activity would be subjected to an unreasonable burden if one tortious act resulted in recoverable damages to such a wide segment of the population. *Id.* See *infra* notes 101-05 and accompanying text.

58. 91 Ill. App. 3d at 572, 414 N.E.2d at 1151. See *infra* notes 104-13 and accompanying text. The court also denied the child's argument that article 1, section 12 of the Illinois Constitution mandated the creation of the child's remedy. Article 1, section 12 provides: "Every person shall find a certain remedy in the laws for all injuries and wrongs which he receives to his person, privacy, property or reputation. He shall obtain justice by law, freely, completely, and promptly." ILL. CONST. art. I, § 12 (1970). The Illinois Supreme Court has held, however, that this provision represents an expression of a "philosophy" and therefore does not guarantee that a certain remedy be provided in any specific form. *Sullivan v. Midlothian Park Dist.*, 51 Ill. 2d 274, 277-278, 281 N.E.2d 659, 662 (1972).

59. 105 Ill. App. 3d 350, 434 N.E.2d 377 (1982).

60. ILL. REV. STAT. ch. 48, §§ 138.1 to 138.30 (1981). The child's father, an employee of Montgomery Ward and Co., was injured while unloading a semi-trailer. Following the accident, the father was treated by a doctor who was a fellow employee of Montgomery Ward as well as another doctor at a local hospital. The defendants failed to diagnose an existing tumor and a multiple myeloma in the father's back. The father is now paralyzed from the neck down and is terminally ill. However, the exclusive remedy provision of the Workers' Compensation Act, ILL. REV. STAT. ch. 48, § 138.5 (1977), precluded the common law malpractice actions. *McNeil v. Diffenbaugh*, 105 Ill. App. 3d at 353, 434 N.E.2d at 379-80.

61. 91 Ill. App. 3d 568, 414 N.E.2d 1148 (1980). See *supra* notes 43-54 and accompanying text.

62. 107 Ill. App. 3d 337, 437 N.E.2d 789 (1982).

63. The court relied heavily on the *Koskela* decision in denying the action. Additionally, in response to the plaintiff's equal protection argument, the court, citing *Garza v. Kantor*, 54 Cal. App. 3d 1025, 127 Cal. Rptr. 164 (1976) and *Russell v. Salem Transp. Co.*, 61 N.J. 502, 295 A.2d 862 (1972), stated that "the minor [was] not denied equal protection of the laws by the failure to recognize a cause of action for the loss of parental companionship and society." 107 Ill. App. 3d at 341, 437 N.E.2d at 793.

64. 107 Ill. App. 3d at 339, 437 N.E.2d at 792. The court also relied in part on the dissent in *Berger v. Weber*, 411 Mich. 1, 303 N.W.2d 424 (1981).



It can be seen that the Illinois cases that have addressed the issue of the child's claim generally recognize that the child does in fact suffer an injury to his emotional psyche.<sup>65</sup> There can be little dispute with such a finding. A minor child, in the formative stages of physical, emotional and psychological development, is greatly influenced and affected by the conduct and aura of people around him. The nature of relationships between a minor child and other persons, especially parents, has tremendous impact upon all aspects of a child's development. For the very reason that children are in such a formative and impressionable state, any activity influencing their lives, particularly negative and adverse influences, will have deep and lasting consequences. As stated most clearly in *Koskela v. Martin*,<sup>66</sup> Illinois does not recognize the need to judicially protect a child's interest in these relationships from the negligent actions of third parties.<sup>67</sup> By stating that the question of whether such an action should be allowed is one for the legislature,<sup>68</sup> Illinois courts have forsaken one of a minor child's most important interests in favor of a hands-off, deferential approach that leaves the child with an unremedied injury. An analysis of the reasons relied on by Illinois courts shows the weakness of those reasons. Though superficially logical and persuasive, a close examination demonstrates that each reason stands on an analytically unsound foundation.

### *Analysis of Illinois Cases*

One of the principal arguments relied on by the Illinois courts for denying the child's claim is the lack of a legislatively sanctioned policy supporting such an action.<sup>69</sup> An implicit aspect of this argument is that there is a lack of sound precedent from which the courts can support their decisions. This argument is somewhat persuasive to the extent that the state legislature has provided a statutory remedy in other analogous situations, but has not provided a statutory remedy enabling a child to sue for lost parental society and companionship. Illinois

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65. See e.g., *Koskela v. Martin*, 91 Ill. App. 3d 568, 414 N.E.2d 1148 (1980) where the court referred to the "intangible emotional nature of this loss." *Id.* at 571, 414 N.E.2d at 1151.

66. 91 Ill. App. 3d 568, 414 N.E.2d 1148 (1980). See *supra* notes 47-58 and accompanying text.

67. "While we are sympathetic to plaintiff's circumstances in the pending matter, we must, however, concur with the reasoning of the majority of other jurisdictions who believe that the determination of whether a child should be granted this cause of action is one of legislatively determined public policy." *Koskela*, 91 Ill. App. 3d at 571, 414 N.E.2d at 1151.

68. *Id.*

69. See *supra* note 52.

has statutory remedies available for alienation of affections,<sup>70</sup> criminal conversation,<sup>71</sup> and wrongful death.<sup>72</sup> The *Koskela* court stated that the child's action for loss of parental society and companionship, like these other actions, would best be provided by the legislature so that all aspects of the child's claim could be examined and protected.<sup>73</sup> This reasoning, however, ignores the important fact that actions for alienation of affections and criminal conversation are products of the common law that grew and developed in accordance with the evolving views of society and justice as espoused by the courts.<sup>74</sup> Both actions were thereafter codified and amended by the legislature into their present form.<sup>75</sup> As in cases of alienation of affection and criminal conversation where the legislature acted after the judiciary's initiative, the courts should follow a similar path regarding a child's claim for loss of parental society and companionship. By deferring judicial protection of the child's claim until the legislature acts, if at all, the Illinois courts are acting in a manner inconsistent with the development of these other actions that also protect the integrity of the familial relationship.

Similarly, the cause of action for loss of "consortium" between spouses arose out of the common law.<sup>76</sup> consortium is comprised of companionship, felicity, sexual intercourse, affection, society and aid.<sup>77</sup> The child's proposed claim seeks to recover for sentimental interests that are elements of the term "consortium." The child's claim is essentially, therefore, also a product of the common law.<sup>78</sup> Additionally, the only real obsta-

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70. ILL. REV. STAT. ch. 40, §§ 1901 to 1907 (1981).

71. *Id.* at §§ 1951 to 1957.

72. *Id.* at ch. 70, §§ 1 to 2.2 (1981).

73. *Koskela*, 91 Ill. App. 3d at 570, 414 N.E.2d at 1150.

74. In regards to alienation of affections, the case of *Johnson v. Luhman*, 330 Ill. App. 598, 71 N.E.2d 810 (1947) allowed a child a common law action for alienation of affections. Four months later, the Illinois legislature enacted the Alienation of Affections Act. For a thorough discussion of alienation of affections, see *Rudnick v. Vokaty*, 84 Ill. App. 3d 1003, 406 N.E.2d 105 (1980). The case of *Yundt v. Hartrunft*, 41 Ill. 9 (1866) allowed a husband a common law action for criminal conversation against a man who had sexual relations with the husband's wife.

75. See *supra* notes 70-71. It is conceded that the action for wrongful death was not recognized at common law. *Hall v. Gillins*, 13 Ill. 2d 26, 28, 147 N.E.2d 352, 354 (1958); *Baker v. Bolton*, 1 Camp. 493, 170 Eng. Rep. 1033 (1808). The common law rule has been changed everywhere, however, and Illinois has had legislation to that effect since 1853. See 1853 ILL. LAWS p. 97.

76. *Dini v. Naiditch*, 20 Ill. 2d 406, 422-26, 170 N.E.2d 881, 888-90 (1960).

77. *Id.* at 427, 170 N.E.2d at 891; *Betser v. Betser*, 186 Ill. 537, 539-40, 58 N.E. 249, 250 (1900). See *supra* note 5.

78. Note, *The Child's Right to Sue for Loss of a Parent's Love, Care and Companionship Caused by Tortious Injury to the Parent*, *supra* note 9, at 729.

cles to the child's claim are those interposed by judicial decisions. Since it is apparent that the elements of the child's claim and the nature of the obstacles between it and legal recognition are created by the courts, there is no compelling reason to await legislative action. Furthermore, the child's claim is, in substance, not much different from the spousal claim for loss of consortium. As such, it is not the type of action that requires the mobilization of the legislative process in order to adequately protect the right. Moreover, the "deference to the legislature" argument was advanced and rejected in *Dini v. Naiditch*,<sup>79</sup> the first Illinois case recognizing a wife's right to sue for loss of consortium. The Illinois Supreme Court found no wisdom in deferring to the legislature when faced with an essential function of the courts, *viz*, to re-evaluate "common law concepts in the light of present day realities."<sup>80</sup>

Additionally, deference to the legislature is an inappropriate means of addressing this issue for the very obvious fact that no one is likely to draft, introduce and lobby for such legislation sufficiently "to offset the concentrated efforts of the highly organized professional lobbyist."<sup>81</sup> A lobby group composed of minor children who may someday be deprived of their parent's society and companionship is highly unlikely. Even if such an interest group was formed, it would not be a well funded, highly organized lobby group capable of successfully opposing the insurance lobby.

Further, the implicit concept on which the deferential approach stands, the lack of sound judicial precedent, is no longer true. The supreme courts of the states of Iowa, Massachusetts and Michigan have recognized the child's claim without waiting for legislative action.<sup>82</sup> Even if legislative action is the best answer, the courts should still adhere to their duty of evaluating and reappraising the law under the everchanging light of social and cultural needs. If the legislature thereafter changes the direction of this state's social policy, then the political cycle will have made a full circle with all actors having been involved.

The Illinois courts have also denied the child's claim because of the intangible and emotional nature of the injury.<sup>83</sup>

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79. 20 Ill. 2d 406, 428-29, 170 N.E.2d 881, 892. See *supra* notes 38-40 and accompanying text.

80. *Id.* at 429, 170 N.E.2d at 892.

81. Note, *Right of the Child to Recover Damages from One who Has Negligently Injured Either Parent*, 8 S.C.L. REV. 477, 480 (1956).

82. *Weitl v. Moes*, 311 N.W.2d 259, 270 (Iowa 1981); *Ferriter v. Daniel O'Connell's Sons, Inc.*, 381 Mass. 507, 515, 413 N.E.2d 690, 695 (1980). *Berger v. Weber*, 411 Mich. 1, 4, 303 N.W.2d 424 (1981).

83. See *supra* note 54.

This type of psychic or emotional injury is difficult to quantify in monetary terms, thus making any pecuniary valuation speculative at best. It is argued that the injury sustained by the child is not of the type that can be rectified by money damage; nor is money an adequate substitute for lost parental society and companionship. The result is that the courts have no standard by which the adequacy of an award could be judged. Upon close examination, however, these arguments lose much of their force.

An initial problem with these arguments is the assumption that the child's injury is of such a nebulous and elusive nature that our present system of monetary damages is inadequate to fill the void created by the lost parental society and companionship. Another misconception is that dollar amounts cannot be assessed in some manner relative to the injury. It cannot seriously be said that the child's injury is any more difficult to measure in monetary terms than are the damages for loss of spousal consortium, for pain and suffering in a personal injury action, for an invasion of privacy, or for severe mental distress.<sup>84</sup> Also, the money received is not designed to act as a substitute for the loss sustained, but to compensate for and mitigate that loss.<sup>85</sup> While money can never replace the lost love, society and companionship of a parent, it is the only means available at law to compensate a tort plaintiff for his loss and also to place the imprimatur of social and judicial disapproval upon the actions of the defendant. Moreover, because a child may see that society recognizes that he has been injured and supports him in his struggle to overcome the loss, monetary compensation does provide at least a modicum of comfort. Even if the child is too young to truly understand his loss, monetary compensation may provide for an easier adaptation to the disrupted family relationship by enabling the family to obtain live-in help or other services that would ease the severity of the disruption.<sup>86</sup>

The Illinois courts also deny the child's claim because the difficulty in placing a pecuniary value on the child's damages would allow for an overlap in recovery.<sup>87</sup> In the parent's personal injury action, damages are allowed for loss of future earnings which have a direct impact on familial care and support.

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84. See *Rickey v. Chicago Transit Auth.*, (Ill. May 1983). See generally, Proehl, *Anguish of Mind—Damages for Mental Suffering under Illinois Law*, 56 N.W.U.L. REV. 477 (1961).

85. See Proehl, *supra* note 84, at 488.

86. Note, *The Child's Right to Sue for Loss of a Parent's Love, Care and Companionship Caused by Tortious Injury to the Parent*, *supra* note 9, at 734.

87. See *supra* note 55.

Courts' maintain that if the child is allowed to maintain a separate action, the "jury may consider the child's loss of the parent's material services and support", resulting in a double recovery.<sup>88</sup> If this in fact was the result, then undoubtedly there would be a double recovery. Any possibility of overlap, however, can be prevented by an instruction to the jury not to consider loss of parental support in the child's action. The *Koskela* court's statement that the double compensation problem "would not necessarily be alleviated by any simple jury instruction to only consider the child's loss"<sup>89</sup> is not valid because Illinois juries are regularly asked to perform difficult mental tasks, such as disregarding statements already made in open court and now, under comparative negligence, to balance the relative degrees of fault of the parties involved and to place a percentage ranking on these degrees.<sup>90</sup> Double recovery could also be avoided by way of special interrogatories given to the jury requiring an itemization of damages under specific subject headings. This possible solution, when accompanied by an admonition to the jury to not consider the loss of the parent's material services and support, would force the jury to distinguish between the differing losses. A third possible solution is to require joinder of all the actions of the family members into one suit. This would allow the jury to see the problems and claims *in toto* and thus be in a better position to perceive the differences in recovery being sought by each family member. "If the jury is made aware that the children have their own action, it will not perceive the need to compensate their loss in the parent's suit"<sup>91</sup> and, logically, the parent's loss in the child's suit.

The Illinois courts further reason that because the jury is probably already compensating the child's emotional losses in the damage award to the injured parent, allowing a separate claim would result in double compensation that would not be obviated by special instructions to the jury.<sup>92</sup> If the jury is awarding damages for the child's injuries in the parent's suit, however, allowing the child his own action would give the jury the opportunity to hear arguments on both sides, see the evidence presented and, as a whole, be in a better position to analyze the full extent of the child's loss, if any.<sup>93</sup> Moreover, the

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88. *Koskela v. Martin*, 91 Ill. App. 3d 568, 571, 414 N.E.2d 1148, 1151 (1980).

89. *Id.* at 572, 414 N.E.2d at 1151.

90. *See Alvis v. Ribar*, 85 Ill. 2d 1, 421 N.E.2d 886 (1981).

91. *Weitl v. Moes*, 311 N.W.2d 259, 268 (Iowa 1981).

92. *Koskela*, 91 Ill. App. 3d at 571-72, 414 N.E.2d at 1151.

93. Note, *The Child's Right to Sue for Loss of a Parent's Love, Care and Companionship Caused by Tortious Injury to the Parent*, *supra* note 9, at 736; *Weitl v. Moes*, 311 N.W.2d 259, 268 (Iowa 1981). Illinois adopted compar-

assumption that the jury is already compensating the child's emotional loss suggests that society recognizes an injury to the child which should be recognized by our courts. Additionally, the overlap in recovery argument was advanced as a reason for denying the wife's claim for loss of consortium in *Dini v. Naiditch*.<sup>94</sup> In rejecting that argument, the supreme court stated: "The 'double recovery' bogey is merely a convenient cliché for denying the wife's action for loss of consortium."<sup>95</sup>

Another reason adduced for denying the child's claim is that, as a practical matter, the courts are concerned that recognition of the suit would result in increased litigation, multiple claims, and a greatly expanded scope of liability for the defendant. The increase in legal claims would have an adverse affect on the ability of the parties involved to reach a settlement or would, at least, increase the expense of settling the suit. It is also argued that if the child could bring his action after the parent's suit is settled, it would jeopardize all settlement possibilities because defendants would be unwilling to settle a suit if all possible party plaintiffs would not be bound by the settlement.<sup>96</sup>

One commentator has suggested that the answer to these objections is "that it is the courts' responsibility to deal with suits on their merits, whether there be few suits or many."<sup>97</sup> While this approach may be rather simplistic in view of today's crowded dockets, it does carry a ring of accuracy. The courts need not be concerned that the responsibility of entertaining these suits will overcrowd their dockets because the statistics simply do not support such a "flood-gate" argument.<sup>98</sup>

In 1981, 67.8% of the adult male population, and 62.4% of the adult female population, were married.<sup>99</sup> Additionally, the

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ative negligence in part because juries were ignoring the harsh application of the rule of contributory negligence. *Alvis v. Ribar*, 85 Ill. 2d 1, 20, 421 N.E.2d 886, 894-95 (1980).

94. 20 Ill. 2d 406, 170 N.E.2d 881 (1960). See *supra* notes 37-40 and accompanying text.

95. 20 Ill. 2d at 427, 170 N.E.2d at 891. See *Berger v. Weber*, 411 Mich. 1, 16-17, 303 N.W.2d 424, 427 (1981) (court found no merit to argument that child's claim should be denied because of possibility of double recovery).

96. See *supra* notes 56-57.

97. Note, *The Child's Right to Sue for Loss of a Parent's Love, Care and Companionship Caused by Tortious Injury to the Parent*, *supra* note 9, at 732 (citing *Bivens v. Six Unknown Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 410-11 (Harlan, J., concurring)).

98. For a slightly outdated, but still very accurate and persuasive statistical response to the multiple claims argument, see *Borer v. American Airlines, Inc.*, 19 Cal. 3d 441, 455-56, 563 P.2d 858, 868-69, 138 Cal. Rptr. 302, 312-13 (1977) (Mosk, J., dissenting).

99. United States Department of Commerce, Bureau of the Census, Statistical Abstract of the United States 41, chart no. 52 (1982-83). Adults are measured as those persons eighteen or older. *Id.*

number of children within a family is represented as follows: families with no children, 48.2%; with one child under eighteen, 21.1%; with two children under eighteen, 19.2%.<sup>100</sup> Thus, 88.5% of the families in the United States have two or less children under eighteen, with a mere 3.8% having four or more. Furthermore, 69.3% have one or no children. From these figures it is apparent that allowing minor children a cause of action would not appreciably alter the existing amount of litigation. While it is true that if the injured parent had at least one minor child, the number of potential claims has increased. This may be remedied, however, through the procedural devices outlined previously, such as compulsory joinder. The slight increase in claims would not, therefore, severely or adversely affect current settlement procedures.

Even if the injured parent had twenty minor children, each should be able to bring an action. Because the family unit has no choice but to be subjected to the negligence of the defendant, the defendant should not have the choice of limiting the number of family members able to recover for his negligence. To follow the reasoning of the Illinois courts would be to permit the defendant, who is at fault, to limit his liability against innocent parties merely because of judicial convenience. The procedural mechanisms available would alleviate the problems envisioned by the courts. The child's suit would be appended to the parent's personal injury action, thereby diminishing any increased burden on court dockets.

Concomitant with the multiple claims argument is the issue of greatly expanding the defendant's liability. The Illinois courts reason that if a minor child was allowed a cause of action, then all members of the household and relatives would have potential claims. Such an unreasonable expansion of liability would place too great a burden on all of human activity and would create liability disproportionate to the relative culpability of the defendant.<sup>101</sup> If all relatives of the injured party, or even neighbors who had an extremely close relationship, were allowed to sue, then the defendant's liability would be unreasonably expanded in relation of his culpability. The theory that a defendant is liable for all the consequences of his wrongful act, however, has been universally rejected in tort law because "the consequences of an act go forward to eternity, and back to the

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100. *Id.* at 49, chart no. 68.

101. Note, *The Child's Right to Sue for Loss of a Parent's Love, Care and Companionship Caused by Tortious Injury to the Parent*, *supra* note 9, at 737.

beginning of the world."<sup>102</sup> "Any attempt to impose responsibility on such a basis would result in infinite liability for all wrongful acts."<sup>103</sup> Such a rationale underlies the argument advanced by the Illinois courts. The courts assume that they will be unable to strike an accurate and reasonable balance between the interests of particular individuals and the liability of the defendant.

Given the unwillingness of the courts to extend an action to the minor children of an injured parent makes it extremely unlikely that the courts would feel obligated to extend the action to ancestors, siblings or neighbors of the injured parent. Also, the action can only exist if the minor child has in fact suffered some loss. Society generally assumes that adults are better able to handle emotional trauma than minor children. An adult relative therefore, even if living in the same house as the injured party, would be faced with a difficult proof problem in trying to convince a fact-finder that a real loss of society had been suffered. Moreover, the minor's claim would be contingent on a showing of dependency on the parent. Absent such proof, the fact-finder should not even find a loss as to the minor child.<sup>104</sup> The problem of shoring-up the lines of the defendant's liability, therefore, are not insurmountable.<sup>105</sup>

The final reason used by the Illinois courts to deny the child's claim is that, as a historical matter, loss of consortium deals with the impairment or destruction of the sexual life of a married couple.<sup>106</sup> As such, it does not exist as an element of the child's action. This argument is accurate in only a limited sense. Historically, the impairment or destruction of a married couple's sexual life was but one element of consortium.<sup>107</sup> Although this one element is obviously not present in the child's claim, the distinction is not significant enough to deny the recognition of the child's action.<sup>108</sup>

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102. Prosser, *Palsgraf Revisited*, 52 MICH. L. REV. 1, 24 (1953).

103. *Id.*

104. This would be the situation of an emancipated minor or a minor proved non-dependant on his parents for support and care. *Cf.* *Mercer v. Jackson*, 54 Ill. 397 (1870) (parent unable to recover loss of services of emancipated minor).

105. Note, *The Child's Right to Sue for Loss of a Parent's Love, Care and Companionship Caused by Tortious Injury to the Parent*, *supra* note 9, at 738.

106. *See supra* note 5.

107. *See generally*, Lippman, *The Breakdown of Consortium*, 30 COLUM. L. REV. 651 (1930).

108. *Berger v. Weber*, 411 Mich. 1, 14, 303 N.W.2d 424, 426 (1981). *See supra* notes 15-35 and accompanying text.



As a historical matter, the roots of consortium are embedded in the concept of *paterfamilias* where the "master" was suing to recover for the lost services of a servant. When the courts began to acknowledge the fictional loss of services where the injured party was a spouse or child, they noted that the essence of the claim was for lost companionship, comfort, society, and, in the case of an injured spouse, of sexual relations.<sup>109</sup> Thus, to speak of consortium as if it deals solely with the impairment of the sexual life of a married couple is inaccurate and overstates the importance of sexual relations in consortium actions.<sup>110</sup> For example, an octogenarian can sue for lost consortium when his spouse is negligently injured. Yet it seems logical that as the age of the parties increases, the impairment of sexual relations decreases in importance as an element of the consortium claim as opposed to other elements, such as society and companionship. Since the sexual aspect of a relationship is but one element in a consortium action, and sometimes perhaps a minor element, it cannot reasonably be used as a pivotal factor in denying the child's claim. Moreover, it is the courts that have generally designated the child's action as one for "loss of parental consortium."<sup>111</sup> Most complaints allege loss of society, love, affection, companionship or nurture. It appears anomalous for the complaint to allege a deprivation of the foregoing factors only to have the courts integrate these factors into the generic concept of consortium and then deny the action because "consortium" is comprised of factors not present in the parent-child relationship. Additionally, if the child's father is killed the courts have allowed recovery for the child's loss of moral instruction, training, guidance and nurture.<sup>112</sup> This compounds the anomaly further by calling the child's loss one of instruction, guidance, nurture, etc. if the parent is killed and one of consortium if the parent is merely injured. These symantical aberrations result in the elevation of form over substance and do nothing to protect the identifiable interest of a child in his parent's company and society.<sup>113</sup>

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109. See discussion *supra* notes 6 and 26.

110. Consortium has been described as including a "person's affections, society and aid." *Betser v. Betser*, 186 Ill. 537, 539-40, 58 N.E. 249, 250 (1900). See *supra* note 5.

111. *E.g.*, *Mueller v. Hellrung Constr. Co.*, 107 Ill. App. 3d 337, 338, 437 N.E.2d 789, 790 (1982) (complaint stated loss of father's society, companionship, love, affection and parental guidance).

112. *Goddard v. Enzler*, 222 Ill. 462, 78 N.E. 805 (1906); *Anthony Ittner Brick Co. v. Ashby*, 198 Ill. 562, 64 N.E. 1109 (1902).

113. Some authors suggest that all interests inherent in the family relation should be called consortium and actionable by each member for its loss. *E.g.*, H. CLARK, *supra* note 19, at 261-62.

POLICY CONSIDERATIONS AND ANALOGOUS CLAIMS RECOGNIZED  
IN ILLINOIS

In Illinois, both a husband and wife are allowed to bring claims for loss of consortium. Major elements of the spousal relationship, inherent in the claim for loss of consortium, include the need for each other's love, society, aid, affection and companionship. These same elements are present in the parent-child relationship. These common elements represent a threat interwoven into both sets of relationships that is vital to a harmonious family relationship. When spouses are allowed to recover for these losses and children are not, the courts are suggesting that the minor child's loss is less deserving of legal protection than is the spouses'. In addition, the courts should not be precluded from recognizing the child's claim merely because the spousal relationship is contractual, includes recovery for lost sexual relations, and is more enduring, at least to the extent that most minor children eventually grow up and move away from the family. These distinctions form an insufficient basis for denying the child's claim. In a spousal action for loss of consortium, the fact that the contractual nature of the relationship is interfered with does not form the basis of recovery. It is the deprivation of, and interference with, the emotional and social interests inherent in the relationship that forms the basis of the action. Of these interests, sexual relations and matrimonial endurance are just two elements of many that form the basis of recovery.<sup>114</sup> The fact that the two sets of relationships are distinguishable on certain grounds does not warrant such a disparity in treatment when the major underpinnings of the relationships are essentially the same.

Illinois also allows children to sue a third party under the Alienation of Affections Act.<sup>115</sup> Children are deemed to have a legally enforceable right to protect the family relationship from intentional interferences by a third party. The Illinois Alienation of Affections Act had been described as involving the protection of those interests present in a claim for loss of consortium.<sup>116</sup> The Act has been amended and now only allows

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114. "[I]n addition to material services, [consortium includes] elements of companionship, felicity and sexual intercourse, all welded into a conceptualistic unity." *Dini v. Naiditch*, 20 Ill. 2d 406, 427, 170 N.E.2d 881, 891 (1960). See *supra* note 5.

115. ILL. REV. STAT. ch. 40, § 1901 *et seq* (1981). See *Rudnick v. Vokaty*, 84 Ill. App. 3d 1003, 406 N.E.2d 105 (1980) (adopted son allowed to sue for alienation of mother's affections). In Iowa, where the child's claim is allowed, a child cannot recover for intentional alienation of affections. *Weitl v. Moes*, 311 N.W.2d 259, 265-68 (Iowa 1981).

116. *Dini v. Naiditch*, 20 Ill. 2d 406, 428, 170 N.E.2d 881, 892 (1960).

recovery for "actual damages." Actual damages, however, do not include loss of consortium.<sup>117</sup> But, the essence of the action is to allow a family member to sue for the intentional disruption of the family unit. Although the statute speaks in terms of "actual damages", it is not altogether unlikely that juries are implicitly awarding money for the very types of emotional losses that are forbidden—the very same losses present in a child's claim for lost parental society and companionship. Moreover, the statute reflects a legislatively determined policy to protect the interests of minors in the familial relationship. Merely because the disruption is brought about by an intentional act, makes very little difference in terms of the harm done to the child. Also, the child can sue for the alienation of affections of a parent who is probably not entirely "innocent" as far as the damage done to the child. A parent enticed away from the family unit by the propositions of a tortious paramour logically seems predisposed to destroying the unity of the family. Whereas in the case of the parent who is negligently injured, the parent is, by definition, not actively participating in the disruption of the family. Yet the present state of the law allows the child the possibility of recovery in the former instance but not the latter.

In another analogous situation, a child in Illinois has been declared to be a party in interest in a wrongful death action based on the tortious death of a parent.<sup>118</sup> The damages recoverable under the Wrongful Death Act have recently been interpreted as including loss of consortium.<sup>119</sup> Additionally, children have always been allowed to recover for the loss of instruction and moral, physical and intellectual training brought about by the wrongful death of a parent.<sup>120</sup> If the child can recover for the intangible losses of moral training when a parent dies, it is anomalous to refuse the same claim if the parent survives the injury. The loss can be just as great to the child if the parent is

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117. *Coulter v. Renshaw*, 94 Ill. App. 3d 93, 96, 418 N.E.2d 489, 491 (1981).

118. *Koskela v. Martin*, 91 Ill. App. 3d 568, 570, 414 N.E.2d 1148, 1150 (1980). Compare *Mueller v. Hellrung Constr. Co.*, 107 Ill. App. 3d 337, 437 N.E.2d 789 (1982) (minor children of deceased parent do not constitute category of compensated beneficiaries under Wrongful Death Act), with *Murphy v. Martin Oil Co.*, 56 Ill. 2d 423, 308 N.E.2d 583 (1974) (spouse sued as next friend of minor child under Wrongful Death Act when father was tortiously killed) and *Hall v. Gillens*, 13 Ill. 2d 26, 147 N.E.2d 352 (1958) (minor child within class of plaintiffs allowed to recover under Wrongful Death Act).

119. *Elliott v. Willis*, 92 Ill. 2d 530, 442 N.E.2d 163 (1982). See discussion *supra* note 19.

120. *Id.* at 540, 442 N.E.2d at 166. Cf., *Goddard v. Enzler*, 222 Ill. 462, 78 N.E. 805 (1906) (child allowed to recover for loss of instruction and moral training of deceased father). "[P]robably the recovery of psychic damages for a parent's wrongful death offers the strongest parallel for a similar recovery for losing a parent by negligent disablement." *Norwest v. Presbyterian Intercommunity Hosp.*, 293 Or. 543, 553, 652 P.2d 318, 326 (1982).

permanently disabled as if the parent dies. Also, a family where one person's parental abilities have been effectively terminated due to negligently inflicted injuries can result in a child being deprived of more society and companionship than if the parent had died and the surviving spouse subsequently remarried (thus filling the emotional void in the child's life). Conversely, it could be just as likely that a child whose parent has died might have suffered no loss whatsoever, especially in cases of a family fraught with discord and violence. Yet Illinois law recognizes recovery in one case but not the other. The determinative factor, of course, is the child himself and the losses he has suffered. But it is overly simplistic to assume that the child will be more deprived of parental society if the parent dies than if injured.

#### TRADITIONAL TORT ANALYSIS

The Illinois Supreme Court has stated that an action brought by a husband or parent for the loss of a spouse's or child's services<sup>121</sup> and an action for loss of spousal consortium,<sup>122</sup> are derivative in nature. The court has further stated that, "because of the nature of the relationship between the parties harmed, the law recognizes a limited area of transferred negligence."<sup>123</sup> The derivative view of the spouse's or parent's injury is a carry over from the old master-servant analogy that originally served as the legal basis for these claims.<sup>124</sup> The theory is that the action for loss of services, and as it has evolved into one for loss of consortium, derives from, and is dependent upon, the validity of the underlying tort action and is not an independently viable legal right. Thus, before spouses in Illinois can recover for loss of consortium, they must establish that the defendant *is liable* for the other spouse's injuries.<sup>125</sup>

The derivative view of these actions, along with the related concept of transferred negligence, has been more popular with the courts than with the legal commentators. As stated by William Prosser: "None of this reasoning can be supported, and all

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121. *Renslow v. Mennonite Hosp.*, 67 Ill. 2d 348, 357, 367 N.E.2d 1250, 1254-55 (1977).

122. *Hammond v. North Am. Asbestos Co.*, 97 Ill. 2d 195, 454 N.E.2d 210 (1983).

123. *Renslow*, 67 Ill. 2d at 357, 367 N.E.2d at 1254-55.

124. See *supra* notes 13-31 and accompanying text.

125. *Knox v. North Am. Car Co.*, 80 Ill. App. 3d 683, 399 N.E.2d 1355 (1980). See *Kolar v. City of Chicago*, 299 Ill. App. 3d 887, 299 N.E.2d 479 (1973) (husband's action for loss of consortium is separate and distinct from wife's personal injury action, but is dependent on favorable outcome in wife's action); *Plocar v. Dunkin' Donuts of Am., Inc.*, 103 Ill. App. 3d 740, 431 N.E.2d 1175 (1981) (plaintiff in consortium action cannot recover unless the injured party has good cause of action against defendant).

of it has been condemned by writers on the subject. There is ample evidence that, historically and at present, the action is an independent one, and is not controlled by the disposition of [the underlying tort claim]."<sup>126</sup> Further, all results or consequences are derivative in the sense that "but for" some prior act or occurrence, the result would not have happened. The one spouse's personal injury action is just as derivative from the negligent conduct of the defendant as is the other spouse's action for loss of consortium. Thus, Illinois' reliance on a "derivation" concept is really quite useless. The courts should analyze these cases under a traditional negligence formula. Additionally, a child's action for loss of parental society and companionship also falls within the parameters of a traditional negligence formula and should be so analyzed.

Liability in a negligence action, and in any case delineating the boundaries of tort liability, represents a social policy that reflects a balancing of the competing interests involved.<sup>127</sup> The interests of the injured plaintiff, and of society, in seeing redress for injuries are balanced against the scope of a tortfeasor's liability based on the nature of his conduct and society's interest in maintaining reasonable limits on a person's liability. In a negligence action, the jurisprudential concept of duty, resolved as a matter of law by the court,<sup>128</sup> helps to balance these interests and define the scope of the defendant's liability. If a person falls within the scope of the defendant's duty of reasonable care, then the defendant may be liable for injuries resulting from his unreasonable conduct.<sup>129</sup>

Duty in Illinois is a flexible and utilitarian concept by which the courts are able to control the evolution of the common

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126. W. PROSSER, HANDBOOK OF THE LAW OF TORTS 893 (4th ed. 1971). See *Fletch v. General Rental Co.*, 81 Mass. Adv. Sh. 1189, 421 N.E.2d 67 (1981) (loss of consortium is direct injury resulting in independent cause of action).

127. W. PROSSER, *supra* note 126, at 14-23. As stated in *Berger v. Weber*, 411 Mich. 1, 303 N.W.2d 424 (1981): "Today we balance the interest of an injured person's child in monetary redress for injury to the parent-child relationship against the consequences of imposing yet another potential liability upon a negligent defendant . . ." *Id.* at 7, 303 N.W.2d at 430 (Levin, J., dissenting).

128. *Mieher v. Brown*, 54 Ill. 2d 539, 301 N.E.2d 307 (1973).

129. The question of duty is not an end in itself, but is the sum total of various considerations which lead the judge to believe that a particular plaintiff is entitled to legal protection. These various considerations relate to the scope of a person's obligation to exercise reasonable care in relation to others. "Duty," therefore, is a conclusion and the "scope" of the defendant's obligation of reasonable conduct is the real question. If the plaintiff falls within the scope of the defendant's obligation of reasonable conduct, then a duty is owed. W. PROSSER, *supra* note 126, at 324-27.

law.<sup>130</sup> A duty may exist as to a person foreseeably harmed even though he is unknown and remote in both time and place and his existence was not apparent at the time of the defendant's act.<sup>131</sup> Moreover, "[i]t is well established that the injury need not be foreseeable in the precise form in which it occurs. Nor need an injury to the specific person be foreseeable. The likelihood of harm in some form to a class of person[s] [sic] is sufficient."<sup>132</sup> In *Renslow v. Mennonite Hospital*,<sup>133</sup> the Illinois Supreme Court extended a tortfeasor's legal duty to an infant born alive, but suffering from injuries which resulted from negligence to the mother prior to the infant's conception. The court "believe[d] that there is a right to be born free from prenatal injuries foreseeably caused by a breach of duty to the child's mother."<sup>134</sup> A minor child is no less deserving of an extension of a tortfeasor's duty when the defendant's negligent conduct injures the child's parent and the child is deprived of parental society and companionship. The child is within that class of persons likely to suffer some form of harm when a parent is injured.

When a defendant negligently injures a parent, there is a direct injury to the parent resulting in a personal injury action. There is also a direct injury to the spouse usually resulting in an action for loss of consortium.<sup>135</sup> There is an equally direct injury to the minor child depriving him of parental society and companionship. The policy lines of liability, as defined by duty, should be extended to encompass the *entire* family relationship, especially since the children are presently without any remedy. "Simply because the question is new does not mean that it is invalid."<sup>136</sup> Illinois already recognizes a negligence action by a person whose existence was not apparent at the time of the de-

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130. *Renslow v. Mennonite Hosp.*, 67 Ill. 2d 348, 357, 367 N.E.2d 1250, 1254 (1977).

131. *Wintersteen v. National Cooperage & Woodenware Co.*, 361 Ill. 95, 197 N.E. 578 (1935).

132. *Renslow*, 67 Ill. 2d at 364, 367 N.E.2d at 1258 (1977) (Dooley, J., concurring). Also, there appears to be a loosening of any rigid adherence to a duty concept as evidenced by the Illinois Supreme Court's recent decision in *Rickey v. Chicago Transit Auth.*, Nos. 55962, 55963, slip op (Ill. May 1983) where the court allowed a bystander to recover for emotional distress which resulted from witnessing an injury to his brother. The bystander did not suffer any contemporaneous physical injury or impact at the time of the injury.

133. 67 Ill. 2d 348, 367 N.E.2d 1250 (1977).

134. *Id.* at 357, 367 N.E.2d at 1255.

135. *E.g.*, *Peebles v. Sargent*, 77 Wis. 2d 612, 253 N.W.2d 459 (1977) (injury in action for loss of consortium is direct injury).

136. *Renslow*, 67 Ill. 2d at 367, 367 N.E.2d at 1256 (1977) (Dooley, J., concurring).

fendant's act<sup>137</sup> and a person only has to fall within that class of persons likely to suffer some form of injury in order to maintain an action.<sup>138</sup> Extending such protection to minor children, therefore, will not wreak havoc with the traditional limits of negligence law. Rather, it falls squarely within the currently recognized boundaries of a negligence action because the minor is subjected to a reasonably foreseeable injury as a member of that class of persons likely to suffer some form of harm. A minor child whose parent is negligently injured, therefore, does have a legally recognized injury that falls within the scope of a defendant's duty of reasonable conduct.<sup>139</sup>

### CONCLUSION

The nature of relationships between minors and others is vitally important because of the influence on the developing child. Yet Illinois does not legally protect the child's interest in his parents society, or the child's interest in the integrity of the family unit, from negligent interference. The courts defer to the legislature even though such deference perpetuates static concepts and rules that are out of step with modern trends and serve only to affirm the views of a culture long since changed.<sup>140</sup>

Similarly, the argument that a child's injury is beyond pecuniary valuation is untenable. It is unreasonable to say that the law is not capable of placing a pecuniary valuation on the injury suffered by the child, but is capable of placing pecuniary values on losses suffered in analogous situations. It is equally unreasonable for the courts to assume, without equivocation, that money would not help the child under any circumstances. The courts' fear that recognition of the child's action will result in double recovery can be quelled by joinder rules, special instructions and interrogatories to the jury. Moreover, the fears of expanded liability and multiple claims are unrealistic in view of

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137. See *supra* note 131.

138. *Renslow*, 67 Ill. 2d at 364, 367 N.E.2d at 1258 (1977) (Dooley, J., concurring).

139. Also, the mere fact that the minor child's claim is emotional in nature should not be a barrier to the action. As explained *supra* notes 83-86 and accompanying text, many other "emotional" type of injuries are already being compensated for by the law.

140. *C.f.*, *Dempsey v. Chambers*, 154 Mass. 330, 28 N.E. 279 (1891) where Mr. Justice Holmes stated:

[W]e are not at liberty to refuse to carry out to its consequences any principle which we believe to have been part of the common law, simply because the grounds of policy on which it must be justified seem to us to be hard to find, and probably to have belonged to a different state of society.

*Id.* at 332, 28 N.E. at 280.

the statistical figures relating to the number of children in families and the courts ever present fear of opening the judicial doors too far.

Furthermore, the intolerable incongruities in Illinois case law are apparent. As evidenced by the Alienation of Affections Act and Wrongful Death Act, there exists a legislatively sanctioned public policy in Illinois allowing children access to the courts to seek redress for invasions of the integrity and unity of the family relationship. But, if the parent is negligently injured, no such public policy is recognized for the benefit of the children even though the interest sought to be protected is essentially the same. Additionally, the child's interest is comprised of many of the same elements inherent in the spousal action for loss of consortium which is recognized by public policy as a legally protected interest. This anomaly negates the expansion of legal protection to the child's interest in his parents even though the modern trend is generally towards broadening the protection afforded to a minor's interest in the family unit.<sup>141</sup> Furthermore, the child's claim is legally sufficient under a traditional negligence analysis. The public policy of this state, therefore, should recognize and protect all aspects of the minor's interest in the family unit as an independent legal right. The failure of the judiciary to accommodate these interests entrenches ancient legal norms and fictions into the dynamics of today's illuminated view of the family unit and invariably slows the development of law in an area much in need of legal protection.

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141. *See supra* note 9.



