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THREE NEW CAUSES OF ACTION? A STUDY OF THE FAMILY RELATIONSHIP

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Does a cause of action exist in favor of a child for negligent injury to his parent not resulting in death? If not, should such a cause of action be created?¹ Most practicing attorneys would probably answer both questions "off the cuff" with a simple "no". A more emphatic and forceful "no" would undoubtedly be heard from the insurance companies and common carriers. It is the opinion of this writer that the cause of action does not exist and should not be created; but it is also his opinion that several wedges have been driven into the common law from which this cause of action can be argued by analogy. At least two direct attempts have recently been made to establish it, and considering the number of trial and appellate courts in the United States it is entirely possible that some ably presented attempts will succeed in the future. Whether the common law would then present an unwavering front to the cry of "trend" is not altogether certain.

Since the creation of such a cause of action necessarily involves a consideration of two other controversial causes of action, namely, the right of the wife to sue for the negligent invasion of her interest in the

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1. This question was the subject of the 1953-54 Case Club competition at the University of Missouri and was argued on Law Day before a Special Court composed of Paul Van Osdol, Commissioner of the Supreme Court of Missouri, A. P. Stone, Judge of the Springfield Court of Appeals, and Ivan Lee Holt, Jr., Judge, 8th Judicial Circuit. The court, by a 2 to 1 vote, decided against the establishment of the cause of action. This writer was at that time a student at the University of Missouri and a participant in the competition. Credit for the research necessary for this article must naturally be divided among the other three participants, Fred E. Schoenlaub, now practicing in St. Joseph, Missouri, and David L. Hilton and Robert Redmond, law students at the University who will graduate in June, 1955.

family relationship, and the right of the child to sue for the intentional invasion of his interest in the family relationship, it is the purpose of this article to consider these three causes of action, with particular emphasis upon the child's action for negligent invasion of his interest.

There have been two decisions directly denying a cause of action to a child for negligent injury to his parent, but they were not exhaustive, nor were they final in tone. In *Hill v. Sibley Memorial Hospital*,² a case decided by the District Court of the District of Columbia in 1952, the plaintiff, a minor child suing by her stepfather, sought to recover damages resulting from the deprivation of the comfort, aid, kindness and assistance of her mother due to injuries sustained by the mother as the result of the alleged negligence of the defendant. Despite the fact that this attempt was made in one of the three jurisdictions that have extended the right to sue for negligent invasion of consortium to the wife,³ the court denied that such a right of action existed in the child, and called attention to the fact that no jurisdiction had ever sanctioned such a cause of action. The language of the one page opinion, however, could probably be used as effectively for the cause of action as against it, for the court stated:⁴

"This Court confesses that it has been difficult for it on the basis of natural justice to reach the conclusion that this type of an action will not lie. When a child loses the love and companionship of a parent, it is deprived of something that is indeed valuable and precious. Courts should ever be alert to widen the circle of justice to conform to the changing needs and conditions of society. At the same time a lower court should be cautious in laying down a completely new rule in the light of prior holdings of our Court of Appeals indicating hesitancy to extend the right of recovery . . . to a child."

During the past year the Supreme Court of Arizona rejected a similar attempt to establish the cause of action in *Jeune v. Del E. Webb Const. Co.*⁵ In this case both the wife and the minor child of the injured person attempted to recover on separate causes of action. The child asked recovery for loss of support, education and parental comfort. The opinion centered its discussion primarily on the denial of the wife's

2. 108 F. Supp. 739 (D.D.C. 1952). This case is discussed in 6 OKLA. L. REV. 500 (1953) and 6 VAND. L. REV. 926 (1953).

3. *Hitaffer v. Argonne Co.*, 183 F.2d 811 (App. D.C. 1950).

4. 108 F. Supp. 739 at 741.

5. 269 P.2d 723 (Ariz. 1954).

right of action, but the holding also clearly rejected the child's action. The court admitted that there has been a split of opinion as to whether a child has an action for intentional interference with his interest in the domestic relation since the case of *Daily v. Parker*,⁶ but indicated that in any event such an action clearly could not form the basis of the action before the court. The court refused to follow by analogy a recent decision of that state⁷ allowing the wife a cause of action against a defendant for knowingly furnishing liquor to her husband, a habitual drunkard, and also refused to follow the District of Columbia case of *Hitaffer v. Argonne Co.*⁸ allowing the wife a cause of action for loss of consortium.

In addition to the two direct attempts referred to above, the Minnesota case of *Eschenbach v. Benjamin*⁹ can be used as authority against the existence of this cause of action. In that case the wife and three minor children of Eschenbach sued the defendant for negligently inflicting permanent injuries upon Eschenbach. The cause of action was denied by a unanimous Supreme Court of Minnesota, but it is not clear from the opinion what theory was relied upon by the children for their attempted recovery. The attitude of the court was clear enough, however, for it stated:¹⁰

“. . . the general rule is that at common law neither wife nor children have a cause of action for an injury inflicted upon the husband and father, that right being strictly limited to the injured party. . . .”

And further on the same page:

“If this rule were to be extended as plaintiffs would have us do, then, . . . there would, in many accident cases, be litigation almost without end and all based upon a single tort and only one individual physically involved in the accident itself.”

While research has revealed no other attempts to establish this cause of action, the courts of Missouri, Massachusetts and Michigan have employed strong *dicta* indicating their accord with the above cases. In the Missouri case of *Stout v. K. C. Terminal Railway*,¹¹ the court, in deny-

6. 152 F.2d 174 (7th Cir. 1945).

7. *Pratt v. Daly*, 55 Ariz. 535, 104 P.2d 147, 130 A.L.R. 341 (1940).

8. 183 F.2d 811 (App. D.C. 1950).

9. 195 Minn. 378, 263 N.W. 154 (1935).

10. 263 N.W. 154, at 155.

11. 172 Mo. App. 113, 157 S.W. 1019 (1913).

ing the injured person's *wife* a cause of action against the negligent defendant for loss of consortium, stated:¹²

"there may be a loss (in common parlance) of comfort and society to the wife *and so there may be to the children*, yet these are not those direct or natural losses the law has recognized. They are remote consequences." (emphasis added)

Similar *dicta* may be found in the Massachusetts case of *Feneff v. N.Y. Central and H. R.R.*,¹³ and in the Michigan case of *Blair v. Seitner Dry Goods Company*.¹⁴ There is, moreover, the negative evidence that such a cause of action is not even mentioned, much less favored, by the great mass of text and encyclopedia writers. What then could be the basis for such a cause of action?

If this right of action in a child is to be recognized, it must be my way of analogy, and probably by one or more of the following:

1. There have been cases extending to the wife a right of action for loss of consortium due to the negligent injury of her husband,¹⁵ this action being similar to the traditional common law action on the part of the husband.

2. There have been cases extending to the child a right of action for alienation of his parent's affections.¹⁶

3. There is some analogy between the cause of action under discussion and the common law cause of action existing in a parent for the loss of a child's services.

4. There is some analogy between this cause of action and the cause of action sometimes allowed a wife against a person knowingly supplying her husband with drugs or intoxicating liquor.

5. There is the analogy of the wrongful death statutes and of other statutes vesting particular rights of action in minor children.

12. 157 S.W. 1019, at 1021.

13. 203 Mass. 278, 89 N.E. 436 (1909).

14. 184 Mich. 304, 151 N.W. 724 (1915).

15. *Hitaffer v. Argonne Company*, 183 F.2d 811 (App. D.C. 1950); *Brown v. Georgia-Tennessee Coaches, Inc.*, 88 Ga. App. 519, 77 S.E.2d 24 (1953); *Cooney v. Moomaw*, 109 F. Supp. 448 (D. Neb. 1953).

16. *Daily v. Parker*, 152 F.2d 174 (7th Cir. 1945); *Johnson v. Luhman*, 330 Ill. App. 598 (1947); *Russick v. Hicks*, 85 F. Supp. 281 (W.D. Mich. 1949); *Miller v. Monsen*, 228 Minn. 400 (1949).

A combination of the first two analogies would seem the most forceful presentation that could be made, *i.e.* a combination of the right of action in the *wife* for *negligent* invasion of consortium with the right of action in a *child* for *intentional* invasion of his interest in the family relationship, thereby giving the *child* an action for *negligent* invasion. The chief difficulty in this approach is that the analogies are themselves but minority views already refuted in many jurisdictions.

I. WIFE'S ACTION FOR LOSS OF CONSORTIUM

In *Hitaffer v. Argonne Company*,¹⁷ the Federal Court of Appeals for the District of Columbia made a thorough and extensive analysis of the question and decided that the wife should have a cause of action for the negligent invasion of her right of consortium. The court viewed the wife's loss as the end of an unbroken chain of cause and effect and therefore not too remote to be a recoverable item of damages, pointing out that the husband has a similar cause of action to which "remoteness" of injury has never been a defense. The court also answered the claim that damages could not properly be assessed by pointing out that damages were satisfactorily assessed in the corresponding action on the part of the husband and also in the husband's action for alienation of affections and criminal conversation where the entire recovery is for intangible elements and no element of compensation for services is involved.

Moreover, the court felt, and probably accurately, that loss of services is an "outworn fiction". The real basis for the decision was that the underlying ground of the common law discrimination against the wife (*i.e.* her incapacity to maintain a separate action for tort) was swept away by the Married Womens Act and there was therefore no longer a basis for the distinction. The decision is convincing to read, but has a major weakness in that it seems to use the existence of the husband's right of action as its mainstay rather than a consideration of the real merits of the cause of action. This seems true despite the statement by the court that it did not base its opinion alone upon the inequality between husband and wife. As discussed later in this article, there have been other and perhaps more satisfactory solutions to the inequality of the common law.

17. 183 F.2d 811 (App. D.C. 1950).

In *McDade v. West*,¹⁸ the Georgia court was evenly divided on allowing recovery, but four years later the same court adopted the *Hitaffer* decision in its entirety in the case of *Brown v. Georgia-Tennessee Coaches, Inc.*¹⁹ stating:²⁰

"It is as much the duty of this court to restore a right which has been erroneously withheld by judicial opinion as it is to recognize the propriety in the first instance . . . we do indeed have a 'charge to keep' but that charge is not to perpetuate error or to allow our reasoning or conscience to decay or to turn deaf to new life and new light."

One further case allowing such recovery to the wife is *Cooney v. Moomaw*,²¹ decided in the federal district court for Nebraska.

Although the first of these decisions, the *Hitaffer* case, was not handed down until 1950, it still requires some stretch of the imagination to decide that the three cases constitute a substantial trend. The overwhelming weight of authority still denies to the wife the right of recovery for loss of consortium when the husband is negligently injured by the defendant. The question of the wife's right of action has arisen and been denied in at least twenty-four jurisdictions including Missouri. One such case from each of these jurisdictions is cited below.²² Moreover, a substantial number of cases can be cited which denied the wife's right

18. 80 Ga. App. 481, 56 S.E.2d 299 (1949).

19. 88 Ga. App. 519, 77 S.E.2d 24 (1953).

20. 77 S.E.2d 24, at 32.

21. 109 F. Supp. 448 (D. Neb. 1953).

22. *Bernhardt v. Perry*, 276 Mo. 612, 208 S.W. 462 (1918); *Lurie v. Mammone*, 200 Misc. 320, 107 N.Y.2d 182 (1951); *Giggey v. Gallagher Transp. Co.*, 101 Colo. 258, 72 P.2d 1101 (1937); *Jeune v. Del E. Webb Constr. Co.*, 269 P.2d 723 (Ariz. 1954); *Marri v. Stamford St. Ry.*, 84 Conn. 9, 78 Atl. 582 (1911) (denied to husband, indicating action not available to either spouse); *Sobolewski v. German*, 32 Del. 540, 127 Atl. 49 (1924); *Ripley v. Ewell*, 61 So. 2d 420 (Fla. 1952); *Petelski v. Snyder*, 179 Ill. App. 24 (1913); *Boden v. Del Mar Garage*, 205 Ind. 59, 185 N.E. 860 (1933); *Cravens v. Louisville & N. R.R.*, 195 Ky. 257, 242 S.W. 628 (1922); *Feneff v. New York Cent. & H. R.R.* 203 Mass. 278, 89 N.E. 436 (1909); *Emerson v. Taylor*, 133 Md. 192, 104 Atl. 538 (1918); *Blair v. Seitner Dry Goods Co.*, 184 Mich. 304, 151 N.W. 724 (1915) (denied to husband, indicating neither spouse could recover); *Eschenbach v. Benjamin*, 195 Minn. 378, 263 N.W. 154 (1935); *Nash v. Mobile & O. R.R.*, 149 Miss. 823, 116 So. 100 (1928); *Hinnant v. Tidewater Power Co.*, 189 N.C. 120, 126 S.E. 307 (1925); *Tobiassen v. Polley*, 96 N.J.L. 66, 114 Atl. 153 (1921); *Smith v. Nicholas Bldg. Co.*, 93 Ohio St. 101, 112 N.E. 204 (1915); *Howard v. Verdigris Valley Electric Co-operative, Inc.*, 201 Okla. 504, 207 P.2d 784 (1949); *Sheard v. Oregon Electric Ry.*, 137 Ore. 341, 2 P.2d 916 (1913); *Dupe v. Hunsberger*, 58 P.D. & C. 483, 62 Montg. Co. L.R. 315 (Pa. 1946); *Martin v. United Electric R.R.*, 71 R.I. 137, 42 A.2d 897 (1945) (denied to husband); *Ash v. S.S. Mullen, Inc.*, 261 P.2d 118 (Wash. 1953).

of action after the decision in *Hitaffer v. Argonne*, and at least eight decisions can be cited in which the *Hitaffer* case was expressly considered and rejected.²³

Finally, at least three jurisdictions have allowed the wife an action for loss of consortium, or at least indicated that they would do so, only to reverse themselves and rejoin the majority. In *Hipp v. E. I. DuPont de Nemours & Co.*²⁴ North Carolina allowed the wife this right; but four years later the supreme court of that state unanimously denied such right of action in the wife in *Hinnant v. Tidewater Power Co.*²⁵ stating that ". . . Any intimation to the contrary in *Hipp v. DuPont* is disapproved."²⁶ *Griffen v. Cincinnati Realty Co.*²⁷ allowed the wife an action for loss of consortium in Ohio, but two years later Ohio law was established to the contrary in *Smith v. Nicholas Bldg. Co.*²⁸ And *Passalacqua v. Draper*²⁹ allowed the action to the wives of New York, only to be reversed on appeal.³⁰ In addition to the American cases, the English courts have denied the wife's action for loss of consortium on facts almost identical to the facts in the *Hitaffer* case in *Best v. Samuel Fox, Ltd.*³¹

The reason advanced by the courts in denying the right of action to the wife have been many and varied. The most common are remoteness of the wife's injury, fear of double recovery, technical comparisons with the husband's right, upsetting of settlements, inability to measure damages, and lack of power to create new causes of action.

1. *Remoteness of injury.* Many courts have considered the injury of the wife too remote and indirect to allow recovery.³² While this view is

23. *Ripley v. Ewell*, *supra* note 22; *Ash v. S.S. Mullen, Inc.*, *supra* note 22; *Jeune v. Del E. Webb Constr. Co.*, *supra* note 5; *Franzen v. Zimmerman*, 256 P.2d 897 (Colo. 1953); *LaEace v. Cincinnati, New Port & Covington Ry.*, 249 S.W.2d 534 (Ky. 1952); *Larocca v. American Chain and Cable Co.*, 23 N.J. Super 195, 92 A.2d 811 (1952); *Cook v. Snyder*, 119 N.Y.S.2d 481 (Sup. Ct. 1953); *Nelson v. A.M. Lockett & Co., Ltd.*, 206 Okla. 334, 243 P.2d 719 (1952).

24. 182 N.C. 9, 108 S.E. 318 (1921).

25. 189 N.C. 120, 126 S.E. 307 (1925).

26. 126 S.E. 307 at 312.

27. 27 Ohio Dec. 585 (1913).

28. 93 Ohio St. 101, 112 N.E. 204 (1915).

29. 199 Misc. 827, 104 N.Y.S.2d 973 (Sup. Ct. 1951).

30. *Passalacqua v. Drapper*, 279 App. Div. 660, 107 N.Y.S.2d 812 (2d Dep't. 1951).

31. 2 K. B. 639 (1951).

32. *Stout v. K.C. Terminal R.R.*, *supra* note 11; *Feneff v. New York, Cent. & H. R.R.*, *supra* note 13; *Giggy v. Gallagher Transp. Co.*, *supra* note 22; *Hinnant v. Tidewater*, *supra* note 25; *Howard v. Verdigris Valley Electric Cooperative Inc.*, *supra* note 22; *Best v. Samuel Fox, Ltd.*, *supra* note 31.

probably in keeping with traditional concepts of proximate cause, it is open to the objection that the husband is allowed an action for loss of consortium under the same circumstances. Certainly the wife's loss from the husband's injury is no more remote than the husband's loss from the wife's injury. However, the husband's right has been carried over from very early common law and has existed as a separate cause of action not governed by the customary negligence analysis. Whatever validity the argument of remoteness has, however, it is strengthened in its application to a consideration of creating a like right in the child. If the right should be given to the child, why not also the step-child or grandchild or dependent parent or someone yet further removed.

It is interesting to note that while three states have removed the inconsistency between the husband and wife by allowing the wife a cause of action, as discussed above, at least five states have solved the problem by taking away the husband's cause of action following passage of the Married Women's Acts.³³

2. *Fear of double recovery.* A second argument against the wife's right of action is that the husband's recovery, in legal contemplation, makes him whole, and the wife therefore has no cause of action.³⁴ This fear of double recovery becomes fear of multiple recovery if the right is extended to children. A good summary of this viewpoint is contained in an article by Professor Roscoe Pound in which he stated:³⁵

"Where these interests are infringed by physical injury to the husband or by an abduction of the husband, a difficulty arises in that the husband has an action in which he may recover for diminution of his earning power, loss of earnings, and impairments of his ability to support those dependent upon him. The same problem arises in case of like interests of children. The reason for not securing the interest of the wife or child in these cases seems to be that our modes of trial are such and our mode of assessment of damages by the verdict of a jury is necessarily so

33. *Marri v. Stamford Street Ry.*, 84 Conn. 9, 78 Atl. 582 (1911); *Bolger v. Boston Elevated R.R.*, 205 Mass. 420, 91 N.E. 389 (1910); *Blair v. Seitner Dry Goods Co.*, 184 Mich. 304, 151 N.W. 724 (1915); *Helmstetter v. Duke Power Co.*, 224 N.C. 821, 32 S.E.2d 611 (1945); *Martin v. United Electric R.R.*, 71 R.I. 137, 42 A.2d 897 (1945).

34. *Bernhardt v. Perry*; *Boden v. Del Mar Garage, Inc.*; *Giggy v. Gallagher Transp. Co.*; *Marri v. Stamford St. Ry.*; *Feneff v. New York Cent. & H. R.R.*; *Tobiasen v. Polley*, *supra* note 22.

35. Pound, *Interests in Domestic Relations*, 14 MICH. L. REV. 177 (193) (1916).

crude, that if husband and wife were each allowed to sue, instead of each recovering an exact reparation, each would be pretty sure to recover what would repair the injury to both. Moreover, the injury to wife or child is very hard to measure in money. Hence, on a practical balancing of interests the wife is usually denied an action."

Pound does not seem too concerned about the lack of symmetry arising from the husband having an action under like circumstance, for he states:³⁶

"Reviewing the whole subject of individual interests in the domestic relations, it will be seen that on the surface the interests of the parent and of the husband are more completely secured than those of the wife and of the child. But under modern legislation and in view of the course of modern decisions, the difference is often more superficial than substantial."

3. *The wife is owed no services.* A third argument is that the husband's right of action is based primarily upon his right to his wife's services, and that since the husband owes the wife no services he has lost nothing for which she can recover. This objection, though technically arguable, is probably the weakest of those discussed and is certainly unrealistic. It does find some support, however, including support from Missouri and the Restatement.³⁷

4. *The upsetting of settlements.* The Supreme Court of Florida, *en banc*, in *Ripley v. Ewell*,³⁸ gave as one of its reasons for rejecting the *Hitaffer* doctrine the dislike of upsetting compromise settlements on which the statute of limitations had not run. The court frankly stated:³⁹

"In the second place we would be blinding ourselves to known conditions if we did not appreciate the fact that almost daily accidents occur which come within the scope of the questions here presented and that in most cases the parties responsible make settlements with those injured.

"If we were to adopt the rule asserted by appellant, all such

36. *Id.*, p. 196.

37. *Stout v. Kansas City Terminal Ry.*; *Smith v. Nicholas Bldg. Co.*; RESTATEMENT OF TORTS § 965 (1938), and *comment* (a) thereto.

38. 61 So.2d 420 (Fla. 1952).

39. 61 So.2d 420 at 424.

cases, when the husband was the injured party, and within the statute of limitations, would be reopened and a new claim presented by the wife, and new liabilities imposed upon persons who have already paid once for the result of their negligent acts. While we should not hesitate to declare the law as we find it, even though the unwary who have been ill advised in their action may suffer, we should not by judicial fiat make changes in established law that will injuriously affect many persons who could not possibly foresee or anticipate such action on our part."

Needless to say, the number of such settlements that would be upset would be far greater if the action were extended to the child.

5. *Unintentionally caused harm to the relationship cannot properly be compensated.* Another argument is that despite the vital role of conjugal relations in American family life, the law should not attempt to award damages for unintentionally caused harm to this delicate relationship.⁴⁰ The inability of a jury to properly assess damages for such intangible loss and the inadequacy of monetary damages when recovered are factors here.

6. *The courts are powerless to create new causes of action.* The courts often refuse to recognize such a novel claim upon lack of precedent and lack of power to create a new cause of action without precedent.⁴¹ This argument is unsound, for our courts have on many occasions entered the field of judicial empiricism to create new causes of action. Many states, for example, have recently allowed by judicial decision a cause of action for injury to an unborn child. Perhaps a better view is that while novelty of cause of action is not a complete bar, it does cast an extremely heavy burden upon the plaintiff to justify his cause. As stated by a Canadian writer,⁴² commenting on *Best v. Samuel Fox, Ltd.*:

" . . . On the contrary, everything points to the presumptions being the other way, and that though the court will not necessarily strike out a claim *in limine* because of its novelty, it will regard the onus as being on the plaintiff to show some close analogy with an existing head of liability before admitting the claim into the arcana of acknowledged categories of tortious responsibility."

40. *Marri v. Stamford Ry.*, *supra* note 22; 14 MICH. L. REV. 177, *supra* note 35.

41. *Ripley v. Ewell*; *Ash v. S.S. Mullen, Inc.*, *supra* note 23.

42. *Lloyd, comment*, 29 CAN. L. REV. 210, 215 (1951).

7. *The disparity between negligent and intentional invasion.* Finally, in the many states which have already denied the child an action for intentional invasion of the family relationship,⁴³ the creation of this cause of action would result in affording the plaintiff a higher degree of protection from negligent injury than from intentional injury.⁴⁴

These are the reasons advanced for denying the wife an action for loss of consortium. Some may not be sound. Their cumulative effect, however, would seem to indicate that the reluctance to recognize this action is based upon more than ultra-conservative or reactionary judges, particularly in view of the fact that many of these decisions are recent cases decided by the best courts in America. These arguments, whatever they are worth, are more forceful when applied to a consideration of creating a like right in the child.

II. CHILD'S ACTION FOR ALIENATION OF AFFECTIONS

There is another close analogy by which the child might be given an action for negligent injury to his parent. Again, however, as with the wife's action for loss of consortium, the analogy is a minority view if it can be considered even that.

In the 1945 federal case of *Daily v. Parker*,⁴⁵ the court established a precedent and allowed a child a cause against one who had enticed away one of his parents, stating:⁴⁶

"Our conclusion, without going further into the matter, is that a child today has a right enforceable in a court of law, against one who has invaded and taken from said child the support and maintenance of its father, as well as damages for the destruction of other rights which arise out of the family relationship and which have been destroyed or defeated by a wrong doing third party. Likewise, we are persuaded that because such rights have not heretofore been recognized, is not a conclusive reason for denying them."

For the establishment of this cause of action the court relied in part upon an Illinois Constitutional provision guaranteeing a remedy in

43. The alienation of affections and criminal conversation cases, discussed *infra*.

44. See Note, 1951 U. OF ILL. L. FORUM 322 at 325.

45. 152 F.2d 174 (7th Cir. 1945).

46. 152 F.2d 174, at 177.

the law for all injuries.⁴⁷ It should be noted in this regard, however, that similar provisions appear in nearly all state constitutions, including that of Missouri,⁴⁸ but such provisions are generally not construed as authorizing new causes of action, but merely as protecting established legal rights.⁴⁹

Daily v. Parker was immediately hailed as a "landmark" case and was commented upon in over a hundred notes and comments in the legal periodicals, more often than not in a favorable manner. A sample of such favorable comment is found in the *Missouri Law Review*:⁵⁰

"It is submitted that the Parker case is one of those rare and admirable instances in judicial history, in which a court will depart from outmoded precedent and render a decision in harmony with contemporary principles of social organization."

Several decisions were shortly handed down which adopted the doctrine of *Daily v. Parker*: the Illinois case of *Johnson v. Luhman*,⁵¹ the Minnesota case of *Miller v. Monsen*,⁵² and the federal case of *Russiek v. Hicks*,⁵³ decided in Michigan. However, since *Daily v. Parker* was decided in Illinois, the "trend" amounted to only three jurisdictions and stopped there. The cause of action was attempted and denied in at least ten jurisdictions after the decision in *Daily v. Parker*.⁵⁴

47. ILL. CONST. ART. II, § 19: "Every person ought to find a certain remedy in the laws for all injuries and wrongs which he may receive in his person, property, or reputation."

48. MO. CONST. ART. I, § 14: "That the courts of justice shall be open to every person and certain remedy afforded for every injury to person, property or character, and that right and justice shall be administered without sale, denial or delay."

49. *Waltman v. Waltman*, 153 Minn 217, 189 N.W. 1022 (1922); *Conley v. Conley*, 92 Mont. 425, 15 P.2d 922 (1932); 16 C.J.S., *Constitutional Law*, § 709 (c), page 1496.

50. Cholkofsky, *Right of Children to Sue for Interference with the Family Relation and Support*, 15 Mo. L. Rev. 58 at page 65 (1950).

51. 330 Ill. App. 598, 71 N.E.2d 810 (1947).

52. 228 Minn. 400, 37 N.W.2d 543 (1949).

53. 85 F. Supp. 281 (W.D. Mich. 1949).

54. *Elder v. MacAlpine-Downie*, 180 F.2d 385 (App. D.C. 1950); *Nelson v. Richwager*, 326 Mass. 485, 95 N.E.2d 545 (1950); *Taylor v. Keefe*, 134 Conn. 156, 56 A.2d 768 (1947); *Rudley v. Tobias*, 84 Cal. App.2d 454, 190 P.2d 984 (1948) (statute abolishing alienation suits); *Kleinow v. Ameika*, 19 N.J. Super 165, 88 A.2d 31 (1952) (statute barring alienation suits held to bar wife's action; no action exists in child); *Katz v. Katz*, 197 Misc. 412, 95 N.Y.S.2d 863 (Sup. Ct. 1950) (statute barring alienation actions, but court indicating that child had no action before the statute); *Henson v. Thomas*, 231 N.C. 173, 56 S.E.2d 432 (1949); *Gleitz v. Gleitz*, 88 Ohio App. 337, 98 N.E.2d 74 (1951); *Garza v. Garza*, 209 S.W.2d 1012 (Tex. Civ. App. 1948); *Scholberg v. Itneyere*, 264 Wis. 211, 58 N.W.2d 698 (1953).

The reasons advanced by the courts in denying the child an action for alienation of his parent's affections center around the inability to create new causes of action, fear of excessive litigation, and the technical objection that the child has no right to the consortium of parents.

1. *The courts are powerless to create new causes of action.* This objection has been raised to some extent by the courts in denying the wife an action for loss of consortium. However, it has been relied on much more heavily in denying the child a cause of action for alienation of his parent's affections, as the following excerpts clearly demonstrate:

"... in the absence of legislation, expressly authorizing it, an action of this sort cannot be maintained in the District of Columbia."⁵⁵

"We still believe that the creation of new rights is a question for the consideration and determination of the legislature, a function which the courts should not usurp."⁵⁶

"Much has been said and written concerning 'judicial empiricism'. . . . However, the members of the court are of the opinion that the right to create new legal rights and remedies is . . . vested in the legislative bodies and not in the courts, . . ."⁵⁷

"... neither public policy nor any other concept can here justify a creation of personal rights by so called 'judicial process'.⁵⁸

"The 'excelsior cry for a better system', in order to keep step with the new conditions and spirit of a more progressive age, must be made to the legislature rather than to the courts, whose only province is to enforce the law as they find it."⁵⁹

As previously mentioned, this argument appears unsound when one considers the many causes of action that have been created by means of judicial empiricism. It does, however, provide an "easy way out" for the courts which regard the creation of the new action as unwise upon a practical balancing of the many and intangible interests involved.

2. *The fear of excessive litigation.* Another argument advanced is that of fear of excessive litigation. As stated by a New York court in *Morrow v. Yannantuono*:⁶⁰

55. *Elder v. MacAlphine-Downie*, 180 F.2d 385, at page 385 (App. D.C. 1950).

56. *Scholberg v. Itneyere*, 264 Wis. 211, 58 N.W.2d 698, 700 (1953).

57. *Gleitz v. Gleitz*, 88 Ohio App. 337, 98 N.E.2d 74 (1951).

58. *Rudley v. Tobias*, 84 Cal. App.2d 454, 190 P.2d 984 at 987 (1948).

59. *Garza v. Garza*, 209 S.W.2d 1012 at 1015-1016 (Tex. Civ. App. 1948), quoting from *Gowin v. Gowin*, 264 S.W. 529 at page 538.

60. 152 Misc. 134, 273 N.Y. Supp. 912 at 913-914 (Sup. Ct. 1934).

"If this plaintiff has a cause of action, then his brothers and sisters, if any, also have a cause of action. . . . I am convinced that to uphold this complaint would open our courts to a flood of litigation that would inundate them. It would mean that every one whose cheek is tinged by the blush of shame would rush into court. . . . The husband has a cause of action. The ages and number of his children are elements to be considered in his action."

This argument is often criticized upon the ground that if a right exists it should be protected, and it is the duty of the state to provide adequate machinery to protect its citizens in enforcing such rights. It is the opinion of this writer, however, that such criticism presupposes the existence of the right, and that when a court is asked to exercise its quasi-legislative powers and invent a new cause of action, it is justified in weighing all the factors of practicability and policy in the process. Certainly the necessity of "drawing a line somewhere" has resulted in some very basic concepts of our law—the concept of proximate cause being probably the most notable example. Needless to say, the force of this argument is magnified many times in a consideration of extending the child's right to include negligence.

3. *The technical objection that the child has no right to his parents' consortium.* Another objection to the child's right of action is that, for all practical purposes, the action is one for loss of consortium and a child has no legal right to the consortium of his parents.⁶¹ This argument would apply equally to the creation of the child's right for negligent invasion of his family interest, but it is a very weak objection in that it is based upon technical and historical considerations without any evaluation of the merits of the action.

A note in the *University of Pennsylvania Law Review*⁶² presents a sound summary of four practical objections to the establishment of such a right: first, multiplicity, of suits; second, possibility of extortionary litigation, since the action, always susceptible to fraud, becomes more so by virtue of its numerical increase and the relative tenuousness of the child's relationship; third, inability to define the point at which the child's right would cease, inasmuch as the status itself hypothesizes muta-

61. *Taylor v. Keefe*, 134 Conn. 156, 56 A.2d 768 (1947); *Morrow v. Yannantuono*, 152 Misc. 134, 273 N.Y. Supp. 912 (Sup. Ct. 1934); *Nelson v. Richwagen*, 326 Mass. 485, 95 N.E.2d 545 (1950).

62. 83 U. OF PA. L. REV. 276 (1934).

bility (i.e. a spouse is always a spouse, but a child becomes an adult); and fourth, inability of a jury to cope with the question of damages—both because of the type of injury and because of the possible overlapping with the parent's recovery. All of these arguments, except the second, would, of course, apply to the creation of a child's right for negligent invasion of his interest in the family relationship.

III. OTHER ANALOGIES

Aside from the two major analogies discussed above, there are other analogies from which a child's right of action for loss of consortium could be argued. A thorough study of these analogies is outside the scope of this article, but they should at least be mentioned in passing.

1. *Analogy of the parent's action for loss of child's services.* There is a definite analogy between the parent's action for loss of his child's services and the child's action under consideration. This analogy becomes more forceful as the courts increasingly tend to ignore the necessity for "loss of services" and allow recovery for the intangible elements of the parent's loss.⁶³ Many jurisdictions, however, still require a showing of actual pecuniary loss before allowing the parent to recover.⁶⁴ While this analogy is a fairly strong one, it should be remembered that the action for loss of child's services, like the husband's action for loss of consortium, has been carried over from the early common law, and its existence does not necessarily establish the propriety of creating like rights in the child.

2. *Analogy to the action for knowingly furnishing drugs or alcohol to an addict.* Many jurisdictions have developed, by statute or case law, a cause of action, usually in the wife, against one who knowingly furnishes drugs or liquor to the husband-addict.⁶⁵ Such an action, however, appears too narrow in scope to justify the creation of the cause under discussion.

3. *Analogy to the wrongful death and other statutory causes of*

63. *Stephens v. Weigel*, 336 Ill. App. 36, 82 N.E.2d 697 (1948); *Hayward v. Yost*, 72 Idaho 415, 242 P.2d 971 (1952); *Tyson v. Romey*, 88 Cal. App.2d 752, 199 P.2d 721 (1948).

64. *Gilbert v. Stanton*, 295 N.Y. 270, 67 N.E.2d 155 (1946); *Mobile & O. R.R. v. Watley*, 69 Miss. 45, 13 So. 825 (1891); *Quinn v. Pittsburg*, 243 Pa. 521, 90 Atl. 353 (1914); *Sorells v. Matthews*, 129 Ga. 319, 58 S.E. 819 (1907); *Evans v. Farmer's Elevator Co.*, 347 Mo. 326, 147 S.W.2d 593 (1941); *Stone v. City of Pleasanton*, 115 Kan. 476, 223 Pac. 303 (1924).

65. An example is *Pratt v. Daly*, 55 Ariz. 535, 104 P.2d 147, 130 A.L.R. 341 (1940).

action. Children have, in recent years, been vested with statutory causes of action under wrongful death statutes, the Federal Employer's liability Act, and other statutes. Moreover, recovery for intangible elements has often been allowed under these statutory causes of action.⁶⁶ It might be argued, however, that the very existence of these actions argues against the establishment of similar causes by the courts for the reason that if the legislature has considered this area of the family relationship and specifically enacted legislation to protect a particular interest therein, the failure of the legislature to cover other similar rights would seem, by implication, to exclude such rights.

CONCLUSION

It can be seen that the wife's action for loss of consortium and the child's action for alienation of affections are allowed by only a small minority of jurisdictions and are opposed by recent decisions of a vast majority of the courts of this country. It can also be seen that the creation of the child's right for negligent invasion of his interest in the family relationship would necessarily involve acceptance of these two analogous causes of action if the law is to be established in an orderly manner. The creation of this trio of new causes of action would therefore result in a number of cross-relationships within each family all of which would be protected by the courts against both negligent and intentional invasion. It is submitted that despite the seeming tendency of our law to encompass and protect larger areas of interest, the practical considerations involved are too great to merit the establishment of these causes of action at the present time.

66. *Mobile & O. R.R. v. Williams*, 226 Ala. 541, 147 So. 819 (1933) ("care, attention, instruction, training, advice and guidance"); *Miller v. Southern Pac. Co.*, 117 Cal. App. 492, 256 P.2d 603 (1953) ("care, attention, instruction, training, advice and guidance"); *Mishoe v. Atlantic Coast Line R.R.*, 186 S.C. 402, 197 S.E. 97 (1938) ("mental shock and suffering, wounded feelings, grief and sorrow, loss of companionship, and deprivation of the experience, knowledge, judgment, care and protection"); *Shulman v. Los Angeles Ry. Corp.*, 44 Cal. App.2d 122, 111 P.2d 924 (1941) ("society, comfort, care, protection and right to receive support"); *Smith v. Mederacke*, 302 Mo. 538, 259 S.W. 83 (1924) ("the home she furnished to them, the mental and moral training and physical care she would, as a mother, bestow").