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THE CHILD’S CLAIM FOR LOSS OF
CONSORTIUM DAMAGES: A LOGICAL
AND SYMPATHETIC APPEAL

Legal history shows that artificial islands of exceptions, created
from the fear that the legal process will not work, usually do not
withstand the waves of reality and, in time, descend into oblivion.¹

Jodie Lynn Suter was nine years old when her mother was in-
volved in an automobile accident. The accident left Jodie's mother
seriously disabled and unable to provide care or support for her
child. Jodie's mother brought an action in negligence against
Leonard, the driver of the other automobile. Jodie also brought
an action against Leonard, claiming that his negligence deprived
her of the “society, care, protection, support and affection of her
mother.”²

If her mother had been killed in the accident, there would be
little doubt that Jodie's claim for loss of consortium³ in a wrongful
death action would have survived a demurrer.⁴ If the accident

72, 85 (1968).
². Suter v. Leonard, 45 Cal. App. 3d 744, 745, 120 Cal. Rptr. 110, 111
(1975).
³. Basically, consortium consists of love, affection, protection, support,
services, companionship, care, society and in the marital situation, sexual re-
denied, 340 U.S. 852 (1950). The change in the meaning of consortium was
noted by the court in Hinnant v. Tide Water Power Co., 189 N.C. 120, 123,
126 S.E. 307, 309 (1925):
   In its original application the term “consortium” was not confined
to society, companionship, and conjugal affection. Service was a
prominent, if not a predominant, factor; not so much the service
which resulted in the performance of labor or the earning of wages
as those which contributed aid and assistance in all the relations
of domestic life.
   When the death of a person not being a minor, or when the death
of a minor person who leaves surviving him . . . child or children
. . . is caused by the wrongful act or neglect of another, his heirs
. . . may maintain an action for damages against the person causing
the death. . . . In every action under this section, such damages
may be given as under all the circumstances of the case may be just....
had involved Jodie instead of her mother, her mother undoubtedly could have stated a claim for loss of Jodie's "society, care, protection, support and affection." However, Jodie's claim was dismissed because no statute or precedent supported a child's right to recover for negligent injury to its parent. That dismissal was affirmed by the Second District Court of Appeal of California.6 Surprisingly, the California Supreme Court— noted for such familiar decisions as Rowland v. Christian,7 Dillon v. Legg,8 and

5. CAL. CIV. PRO. CODE § 376 (West 1973) provides:
   The parents of a legitimate unmarried minor child, acting jointly, may maintain an action for injury to such child caused by the wrongful act or neglect or another . . .
   . . .
   Any such action may be maintained against the person causing the injury. If any other person is responsible for any such wrongful act or neglect the action may also be maintained against such other person. The death of the child or ward shall not abate the parents' or guardian's cause of action for his injury as to damages occurring before his death.

In every action under this section, such damages may be given as under all the circumstances of the case may be just . . .

See Hayward v. Yost, 72 Idaho 415, 242 P.2d 971 (1952). The court reasoned that those damages which "may be just" include compensation for the services of the child as well as the "loss of protection, comfort, society and companionship." Id. at 425, 242 P.2d at 977; Shockley v. Priver, 66 Wis. 2d 394, 225 N.W.2d 495 (1975) (parent allowed to recover for loss of comfort and society of an injured minor child). Contra, Hair v. County of Monterey, 45 Cal. App. 3d 538, 119 Cal. Rptr. 639 (1975). The court did not allow the parents of a negligently injured child to recover damages for the loss of society and companionship of the child. However, the decision was based on the technical distinction that the child's action for the injury had been concluded prior to the effective date of Rodriguez v. Bethlehem Steel Corp., 12 Cal. 3d 382, 525 P.2d 669, 115 Cal. Rptr. 765 (1974) which had recognized the right of both husband and wife to recover for loss of consortium. Moreover, the court reasoned that "logically, there is no objection to an extension of the rule laid down therein so as to permit recovery by parents for lost pleasure, society, comfort and companionship sustained by reason of injuries inflicted upon their child." Hair v. County of Monterey, supra, at 545, 119 Cal. Rptr. at 643-44. Since the only basis for denying relief was the inability to apply Rodriguez retroactively and the court recognized that the "law favors the parent-child relationship sufficiently to permit a parent to recover for lost comfort, society and companionship," it would appear that in the future such a recovery will be allowed. Id. at 545-46, 119 Cal. Rptr. at 644.

7. 69 Cal. 2d 108, 443 P.2d 561, 70 Cal. Rptr. 97 (1968) (landowner's liability held to be based upon the reasonable man test rather than the distinctions between trespassers, licensees and invitees).
8. 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968) (parent allowed
Brown v. Merlo⁹—refused review.¹⁰

This Comment presents the case for Jodie's claim—and for the claims of all children deprived of their parents' consortium by another's negligence. It takes the position that statute, precedent and tort principles compel the recognition of such an action where, in the words of the Suter Court of Appeal, "there can be little question of the reality of the loss suffered by a child deprived of the society and care of its parent."¹¹

THE CHILD'S CLAIM CARRIES BOTH LOGICAL AND SYMPATHETIC APPEAL

The child's claim for loss of his parent's consortium is set in a framework that perhaps can best be understood in terms of five typical situations:

1. The Husband's Action for Loss of Consortium. Suppose the wife is injured in an automobile accident occasioned by defendant's negligence. In such a situation the wife has an action against defendant in negligence, and the husband has an action against defendant for loss of his wife's consortium. The husband's action was recognized at early common law;¹² in most jurisdictions today, courts recognize the husband's right to loss of consortium damages.¹³

To recover for emotional trauma from witnessing the death of her child although not within the traditional zone of danger).

9. 8 Cal. 3d 855, 506 P.2d 212, 106 Cal. Rptr. 388 (1973) (negligent host-driver held responsible for his wrongdoing regardless of whether the passenger accepted the ride without giving compensation).

10. The California Supreme Court denied a hearing in this case on May 22, 1975.


12. At common law, the "husband's right to the consortium of his wife was clear and definite." Holbrook, The Change in the Meaning of Consortium, 22 Mich. L. Rev. 1, 2 (1923). In the first case to allow a husband to recover for the loss of consortium of his wife, the court held that "... the action is not brought in respect of the harm done to the wife, but it is brought for the particular loss of the husband, for that he lost the company of his wife, which is only a damage and loss to himself, for which he shall have the action." Guy v. Livesey, 79 Eng. Rep. 423 (K.B. 1619). The husband maintained an action whether the loss of consortium was due to intentional or negligent injury to the wife.

2. The Wife's Action for Loss of Consortium. Suppose the husband is injured in an automobile accident occasioned by defendant's negligence. In this situation the husband has an action against defendant in negligence, and the wife has an action against defendant for loss of her husband's consortium. Early common law did not recognize the wife's action;¹⁴ most state courts have come to recognize the wife's right to loss of consortium damages.¹⁵

3. The Parents' Action for Loss of Consortium. Suppose the child is injured in an automobile accident occasioned by defendant's negligence. In this situation the child has an action against the defendant in negligence, and the parents have an action against defendant for loss of their child's consortium. The child's action was not recognized at early common law,¹⁶ but it is recognized to-


¹⁵. In Bennett v. Bennett, 116 N.Y. 584, 23 N.E. 17 (1889), a woman was allowed to recover for loss of consortium due to the intentional alienation of her husband's affection. See, e.g., Commercial Carriers, Inc. v. Small, 277 Ky. 189, 126 S.W.2d 143 (1939); Cravens v. Louisville & N.R.R., 195 Ky. 257, 242 S.W. 628 (1922); Clow v. Chapman, 125 Mo. 101, 28 S.W. 328 (1894); Sheard v. Oregon Elec. Ry., 137 Ore. 341, 2 P.2d 916 (1931). Contra, Anderson v. McGill Club, 51 Nev. 16, 266 P. 913 (1928), cert. denied, 278 U.S. 557 (1928); Krohn v. Richardson-Merrell, Inc., 219 Tenn. 37, 406 S.W.2d 166 (1966), cert. denied, 386 U.S. 970 (1967). In Hitaffer v. Argonne Co., 183 F.2d 811 (D.D.C.), cert. denied, 340 U.S. 852 (1950), a woman was allowed to recover for loss of consortium caused by the negligent injury to her husband. The history of the action in California is illustrative of the long struggle for recognition of a right of recovery for loss of consortium damages. Originally, the California courts followed the common law rule allowing a husband to recover for loss of his wife's consortium. Gist v. French, 136 Cal. App. 2d 247, 286 P.2d 1033 (1955). In Deshotel v. Atchison, Topeka & Sante Fe Ry. Co., 50 Cal. 2d 664, 328 P.2d 449 (1958), the court refused to extend to a wife the right to recover for loss of consortium due to negligent injury. Then, in West v. City of San Diego, 54 Cal. 2d 489, 353 P.2d 929, 6 Cal. Rptr. 289 (1960), the court denied the action for loss of consortium to the husband as well as the wife. Finally, a complete reversal was made by the court in Rodriguez v. Bethlehem Steel Corp. 12 Cal. 3d 382, 525 P.2d 699, 115 Cal. Rptr. 765 (1974) which held that both the husband and wife could recover for loss of consortium. For a list of those jurisdictions allowing recovery to the wife see id. at 389-90, nn.4 & 5, 525 P.2d at 673, nn.4 & 5, 115 Cal. Rptr. at 769, nn.4 & 5.

¹⁶. Pound, Individual Interests in the Domestic Relations, 14 Mich. L. Rev. 177 (1916). Historically, the rights of the child were vested in the father as head of the household.

In Roman law we find all manner of interests of dependent members of the household so treated as interests of the head of the household as to show that he is standing legally for a group of kindred which is or was the jural unit. Id. at 179.
day. Early common law recognized only the father's action for loss of consortium, under the doctrine of pater familias; today each parent has a cause of action for loss of the child's consortium.

4. The Action for Wrongful Death. Suppose the husband and child are killed in an automobile accident occasioned by defendant's negligence. In this situation the wife or mother has an action in jurisdictions that have enacted a wrongful death statute, both with respect to the husband's death and with respect to the child's death. Similarly, if the father is killed in an automobile accident occasioned by defendant's negligence, the child has an express statutory action in wrongful death against the defendant.

5. The Child's Action for Loss of Consortium. Suppose the parent is injured in an automobile accident occasioned by defendant's negligence. In such a situation the parent has an action in negligence against defendant. However, no jurisdiction permits the child an action for loss of consortium.

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17. The child alone has a cause of action for two elements of damage: physical pain and mental suffering, and prospective medical expense and loss of earnings after majority. Restatement of Torts § 703 (1938).
20. Since a cause of action for death did not exist at common law, the right of recovery is based solely on statute. In California the wrongful death action is codified in Cal. Civ. Pro. Code § 377 (West 1973):
   
   When the death of a person not being a minor, or when the death of a minor person who leaves surviving him either a husband or wife or child or children or father or mother, is caused by the wrongful act or neglect of another, his heirs, and his dependent parents, if any, who are not heirs, or personal representatives on their behalf may maintain an action for damages against the person causing the death . . . .

21. Id.
22. The husband's right to recover for his own injuries was recognized at common law. Under Cal. Civ. Code § 370 (West 1973) a wife is also entitled to recover on her own cause of action for physical injury.
23. The recognition of the interest of the child in the society, care and protection of the parent "has run into a stone wall where there is merely negligent injury to the parent." W. Prosser, Law of Torts § 125 at 896 (4th ed. 1971). Traditionally, the child had no action against a third person for an injury to the parent-child relationship. T. Cooley, Law of Torts § 137 at 264 (student's ed. 1907); Note, Judicial Treatment of Negligent Invasion of Consortium, 61 Colum. L. Rev. 1341, 1347 (1961). However, some jurisdictions now recognize the right of a child to recover for loss of consortium caused by the intentional alienation of a parent’s affection. Daily v. Parker,
It is with the fifth situation that this Comment is concerned. Viewed in the framework of the other four situations, surely the child's claim “carries both logical and sympathetic appeal.”24

**THE CHILD’S CLAIM HAS BOTH STATUTORY AND PRECEDENTIAL SUPPORT**

In addition to the logical and sympathetic appeal of a child’s claim for loss of consortium, section 1714 of the California Civil Code provides further support for the recognition of this cause of action:

Every one is responsible, not only for the result of his willful acts, but also for an injury occasioned to another by his want of ordinary care or skill in the management of his property or person, except so far as the latter has, willfully or by want of ordinary care, brought the injury upon himself...25

This code section, which has remained unchanged since enacted in

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1872, "serves as the foundation of our negligence law."26

The loss suffered by the child when his parent is negligently in-
jured is a legally cognizable injury within the contemplation of sec-
tion 1714. As the Suter court recognized, "there can be little ques-
tion of the reality of the loss suffered by a child deprived of the
society and care of its parent."27 A child has an interest in the
society and affection of his parent.28 Furthermore, the society,
education, protection and love of a parent is necessary for the
child's welfare and development.29 "The child, for the full and
harmonious development of his personality, needs love and under-
standing."30 When the child is deprived of his parents' society,
care, protection and affection he suffers a real injury. In recogniz-
ing the husband-wife right to consortium, the court in Rodriguez
v. Bethlehem Steel Corp.31 held that the loss of companionship,
emotional support and love are real injuries. Similarly, the child's
loss of his parents' love, society and protection deprives him of the
essentials for a healthy development and thus results in a real in-
jury to the child.

Protection of the child against this type of injury to the family
relationship is equally important to the state.32 Since the charac-

Rptr. 97, 100 (1968).
27. Suter v. Leonard, 45 Cal. App. 3d 744, 746, 120 Cal. Rptr. 110, 111
(1975).
177, 185 (1916).
29. Note, Alternatives to "Parental Right" in Child Custody Disputes In-
volving Third Parties, 73 Yale L.J. 151, 158 (1963). In discussing problems
concerning child custody, the author recognized the child's needs and inter-
ests:
The mutual interaction between adult and child, which might be
-described in such terms as love, affection, basic trust, and confi-
dence, is considered essential for the child's successful develop-
ment, and is the basis of what may be termed psychological paren-
thood.
When a person is injured either intentionally or negligently, to the
extent that such person can no longer be a companion and is no
longer capable of giving love, affection, society, comfort and sexual
relations to his or her spouse, that spouse has suffered a direct and
real personal loss. Id. at 400, 525 P.2d at 681, 115 Cal. Rptr. at
777, citing Clouston v. Remlinger Oldsmobile Cadillac, Inc., 22 Ohio
32. Heck v. Schupp, 394 Ill. 296, 300, 68 N.E.2d 464, 466 (1946) (hus-
band allowed to recover for alienation of wife's affection).
ter of the child has an impact on society "it is of the highest importance to the child and society that its rights to receive the benefits derived from its mother [or father] be protected." Gradually, the courts have extended protection to the relational interest of the family. Courts are often called upon to secure the rights of an individual against physical harms and harms of appropriation, as well as negligent invasion of the family relationship. When the relational interest of a family member is destroyed by the intentional alienation of another member's affection, the injured party is allowed to recover. When a family member loses the love, society and protection of a parent or child due to wrongful death, the injured party maintains a cause of action. However, when negligent injury of a member destroys the family relationship it is only the parent, husband or wife that is allowed to recover. The child's interest in the protection of the family relationship against negligent invasion is not legally enforceable. Although the manner and degree of the injury varies in the cases of alienation of affection, wrongful death and negligent injury, redress should be premised upon an invasion of a right. The court's recognition of the reality of the child's loss coupled with a readiness to protect against injury to the family relationship gives support to the proposition that children are entitled to legal protection of the family relationship against negligent invasion.

In order to bring an action for loss of consortium of a negligently injured parent under section 1714, the child must also be considered a person within the contemplation of the statute. However, children have long been denied the status of "person" in both the social and legal systems. It is only recently that legal scholars have called for the recognition of the humanity of a child before the

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33. Miller v. Monsen, 228 Minn. 400, 403, 37 N.W.2d 543, 545 (1949) (child allowed to recover damages for the enticement of her mother away from the family home).
34. Green, Relational Interests, 29 ILL. L. REV. 460, 463 (1934).
36. Cases cited notes 15 & 23 supra. However, according to California statute no cause of action is recognized for alienation of affection. CAL. CIV. CODE § 43.5 (West 1974).
37. Cases cited note 3 supra.
38. Traditionally, children have been regarded as chattels of the family and wards of the state. Rodham, Children Under the Law, 43 HARV. EDUC. REV. 487, 489 (1973). Either the parent or the state maintains the power to regulate the activities and determine the rights of the child. Note, The Minor's Right to Abortion and the Requirement of Parental Consent, 60 VA. L. REV. 305, 314 (1974).
law. Courts have also begun to recognize that children are persons under the law. Yet, the acceptance of the child's humanity has not necessarily led to the recognition of the child's legal rights. Although the legal system traditionally has been concerned with the protection of rights, consideration of children's rights has been minimal.

Despite this general reluctance of the courts to recognize that children are persons with standing to assert their rights, the negligence area of tort law provides support for this proposition. Al-

39. Foster & Freed, A Bill of Rights for Children, 6 Fam. L.Q. 343 (1972). In setting out a Bill of Rights for children, the authors proposed that "a child has a moral right and should have a legal right ... [t]o be regarded as a person within the family, at school and before the law." Id. at 347.


42. The movement for recognition of children's rights has been primarily in the areas of education and juvenile law. In upholding a child's right to remain silent during the pledge of allegiance, the Court in West Virginia Board of Education v. Barnette, 319 U.S. 624 (1943), established that a child has rights guaranteed by the first amendment. In Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969), the Court again protected children's exercise of first amendment rights in allowing students to wear black armbands to protest the Vietnam war. The Court has also held that students in public schools are entitled to protection under the due process clause. Goss v. Lopez, 419 U.S. 565 (1975). However, despite the Court's past acknowledgement of a child's right to education, (Brown v. Board of Educ. of Topeka, 347 U.S. 483 (1954)), in San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973), such a right was expressly denied.

In juvenile proceedings, the Court has generally applied the constitutional guarantees associated with adult criminal prosecutions. In Haley v. Ohio, 332 U.S. 596 (1948), the Court extended to juveniles the protection of the fourteenth amendment against coerced confessions in a state trial. Children in juvenile proceedings have been guaranteed the procedural safeguards of the sixth and fourteenth amendments. In re Winship, 397 U.S. 358 (1970); In re Gault, 387 U.S. 1 (1967). However, the right to a trial by jury has not been extended to children in juvenile court delinquency proceedings. McKeiver v. Pennsylvania, 403 U.S. 528 (1971). Recently, the right of a child to protection against double jeopardy was recognized by the Court. Breed v. Jones, 95 S. Ct. 1779 (1975).
though at common law a child could not maintain an action for his personal injuries against a negligent tortfeasor, such an action is recognized today. The injured child has an action against the tortfeasor for damages for physical and mental suffering as well as for future loss of earning power. Moreover, the injured child can maintain such an action for damages regardless of whether the tortfeasor is a stranger or the child’s brother, sister or parent. It has also been recognized that a child has standing to bring an action in negligence under section 1714. In Beard v. Atchison, Topeka & Santa Fe Railway, the court held that a child need not base the liability of a tortfeasor on the attractive nuisance doctrine but rather on section 1714 “which imposes general liability on every person for injuries occasioned to others by want of ordinary care in the management of his property.” Therefore, it appears that a child is a person with standing to assert his right of compensation for personal injury under section 1714.

The California Supreme Court’s trend toward abandoning untenable common law precedents in order to conform to the changing needs and conditions of society seems to add additional support for the recognition of the child’s cause of action. The common law is not static, but rather adjusts to the new developments in social and

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44. Durkee v. Central Pac. R.R., 56 Cal. 388, 38 Am. R. 59 (1880). After enumerating the damages which the parent can recover when a child is negligently injured, the court stated that “[d]amages awarded upon any other grounds than these clearly belong to the person corporally injured, whose right to sue, it must be remembered, is entirely unaffected by the action of his parent or master.” Id. at 392, 38 Am. R. at 65. In California, the child’s right to maintain an action against a negligent tortfeasor is codified in Cal. CIV. CODE § 42 (West 1954) which provides: “A minor may enforce his rights by civil action, or other legal proceedings, in the same manner as a person of full age, except that a guardian must conduct the same.”
45. Stone v. Yellow Cab Co., 221 P.2d 131 (Cal. App. 1950). The court also held that a parent “(1) may recover the value of the child’s services during the period of minority, and (2) the expenses of medical care.” Id. at 135.
46. In Emery v. Emery, 45 Cal. 2d 421, 289 P.2d 218 (1955), the California Supreme Court declined to create an exception to the general principle of liability by denying a child the right to sue a sibling in tort for negligence. The parental immunity doctrine was eliminated by the court in Gibson v. Gibson, 3 Cal. 3d 914, 479 P.2d 648, 92 Cal. Rptr. 288 (1971). In allowing a child to maintain an action against his parent for negligent injury, the court again enunciated the general legal principle that “when there is negligence, the rule is liability, immunity is the exception.” Id. at 922, 479 P.2d at 653, 92 Cal. Rptr. at 293 (citation omitted).
47. 4 Cal. App. 3d 129, 84 Cal. Rptr. 449 (1970).
48. Id. at 136, 84 Cal. Rptr. at 454.
economic life. In fulfilling the historical function of the common law, the California Supreme Court has reevaluated the precedents of the past in light of the needs and concerns of the present.

Courts have a creative job to do when they find that a rule has lost its touch with reality and should be abandoned or reformulated to meet new conditions and new moral values.

In California, the supreme court has eagerly accepted this challenge of judicial activism.

The thrust of tort reform in California is twofold. The courts have sought to eliminate areas of historical tort immunity while expanding the scope of tort liability.

The negligence principle is being constantly expanded so as to clear out pockets of vestigial immunity and at the same time limitations to liability that inhere in the negligence principle are giving way.

The denial of the child’s claim for loss of consortium may be characterized as an “immunity” for the tortfeasor. In this instance, the tortfeasor is allowed to injure the child by depriving him of the love, society, care and protection of his parent with impunity. However, the tortfeasor would not be immune from liability if the


53. Id. at 1587.


55. This characterization may not strictly conform to the definition of a traditional immunity which has been stated as an “exemption, as from serving in an office, or performing duties which the law generally requires other citizens to perform.” Black’s Law Dictionary 885 (4th ed. 1968). However, the scope of an immunity appears to have been expanded by the California Supreme Court in Rowland v. Christian, 69 Cal. 2d 108, 443 P.2d 561, 70 Cal. Rptr. 97 (1968). The court eliminated the landowner’s “immunity” from liability which had been predicated upon the classifications of trespasser, licensee and invitee. In the instant case, it would appear that the tortfeasor’s “immunity” from liability which is predicated upon the classifications of husband, wife, parent and child is clearly within the scope of the Rowland characterization of an immunity.
status of the injured party was that of husband, wife or parent. The perpetuation of such an immunity seems to be inconsistent with the California Supreme Court's policy of elimination of tort immunity through extension of tort liability.

Traditional immunities have been eliminated in diverse areas of tort law. The intrafamilial immunities have gradually given way to the principle of liability for negligently caused harm.56 The doctrine of sovereign immunity was eliminated in *Muskopf v. Corn ing Hospital District.*57 Charitable immunities have similarly disappeared.58 In *Rowland v. Christian,*59 the court eliminated landlord immunities based on the distinctions between invitee, licensee and trespasser. The immunity granted by the California automobile guest statute60 was discarded by the court in *Brown v. Merlo.*61 The fundamental principle supporting the elimination of tort immunities is that in the absence of statute or compelling reason of public policy, each person proximately injured by the negligent act of another must be compensated.62

The elimination of tort immunities has been coupled with the extension of tort liability. The California Supreme Court has utilized section 1714 as a basis upon which to expand tort liability. In *Rowland v. Christian,*63 the court extended the liability of a landowner for injuries to individuals who come onto his land by application of the general principle "that a person is liable for injuries caused by his failure to exercise reasonable care."64 The court observed that it is clear that in the absence of statutory provision declaring

57. 55 Cal. 2d 211, 359 P.2d 457, 11 Cal. Rptr. 89 (1961). The general principle of liability was expressed by the court in these terms: "In formulating 'rules' and 'exceptions' we are apt to forget that when there is negligence, the rule is liability, immunity is the exception." Id. at 219, 359 P.2d at 462, 11 Cal. Rptr. at 94.
60. CAL. VEH. CODE § 17158 (West 1971). The guest statute basically provides that the driver of a vehicle owes no duty of care to a passenger who accepts a ride without giving compensation.
64. Id. at 112, 443 P.2d at 564, 70 Cal. Rptr. at 100.
an exception to the fundamental principle enunciated by section 1714 of the Civil Code, no such exception should be made unless clearly supported by public policy.” Thus, in the absence of statutory provision or public policy, the general principle of tort law in California affords “protection from negligence” through the extension of tort liability.

In order to determine whether a departure from the liability principle is justified, the courts usually consider the foreseeability of the harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant’s conduct and the injury suffered and the moral blameworthiness of the defendant’s conduct. The imposition of a legal duty is largely an expression of these policy considerations. In the absence of such policy considerations, the courts have expanded the scope of tort liability by imposing a uniform duty of reasonable care on all tortfeasors.

In light of the principles of tort law in California, a strong case can be made for allowing a child to recover for loss of consortium due to negligent injury to a parent. The tortfeasor who negligently injures a person should not be granted immunity because the injured party is a child rather than a husband, wife or parent. Since there is no statute expressly denying recovery to the child and public policy supports elimination of tort immunities, the general principle of liability embodied in section 1714 should be applied to allow the child recovery when his parent is negligently injured. Further, the duty of reasonable care should be imposed on the tortfeasor who negligently injures a person, regardless of the status of that person. Thus, it appears that both statute and precedent of California tort

65. Id.
68. Dillon v. Legg, 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968). The court quoted Prosser in holding that duty is a shorthand statement of a conclusion, rather than an aid to analysis in itself. But it should be recognized that ‘duty’ is not sacrosanct in itself, but only an expression of the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection. Id. at 734, 441 P.2d at 918, 69 Cal. Rptr. at 76.
law support the recognition of a child's claim for loss of consortium damages due to negligent injury to the parent.

**NO SUBSTANTIAL RATIONALE SUPPORTS THE DENIAL OF THE CHILD'S CLAIM**

The denial of the child's cause of action for loss of consortium due to negligent injury to the parent has been predicated upon a variety of concerns. The court in *Suter* set forth the predominant reasons upon which denial of the action has been based in other jurisdictions. These concerns included the absence of an enforceable claim by the child to the parents' services; the absence of precedent; the uncertainty of damages; the possibility of overlap with the parents' recovery; the indirectness and derivative nature of the injury; the multiplication of tort claimants and tort litigation; the inability of the courts to draw the line on liability; and the deference to the legislature in making changes in the well-settled rules of common law.

Various writers have proposed that the foregoing reasons for denying recovery to a child for negligent injury to the parent are untenable, and that there is no substantial rationale on which to predicate such a denial. The following discussion will attempt to pierce "the thin veils of reasoning" which the courts have employed to sustain the denial of the child's cause of action.

At common law, a child had no enforceable right to the services

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of a parent. As expounded by Blackstone, "the inferior hath no kind of property in the company, care or assistance of the superior, as the superior is held to have in those of the inferior; and therefore the inferior can suffer no loss or injury." However, the consortium action is not based solely on the individual aspect of loss of services. Together with the value of services, an injured party may recover for the loss of society, care, protection and affection. A child's right to the support of his parent has been recognized by the courts and legislature as well as legal scholars. In allowing a child recovery for alienation of a parent's affection, the court in Daily v. Parker stated that "children are entitled to shelter, food, clothing, and schooling and to the social, the moral support, guidance, and protection of their father." In 1955, the California Legislature enacted the Uniform Civil Liability for Support Act which specifically compels a parent to support his child. In his classic discussion of an individual's interests in domestic relations, Roscoe Pound noted the duty of a parent to support his child:

As against the parent, the child may claim: (1) support during infancy; (2) education and training so far as the situation of the parent permits, and (3) in case of indigent children of mature years who are unable to support themselves, maintenance at least so far as the parent can afford.

Even Blackstone acknowledged man's instincts and feelings which "move him more effectually than municipal law to support and care for his child."
Although various courts have cited lack of precedent as a viable reason for denying the child's recovery, an overwhelming number of courts have disputed this rationale. In allowing a woman to recover for the negligent injury to her husband, the court in Montgomery v. Stephan, held that lack of precedent was not a valid reason for denying a cause of action:

Were we to rule upon precedent alone, were stability the only reason for our being, we would have no trouble with this case. We would simply tell the woman to begone, and to take her shattered husband with her, that we need no longer be affronted by a sight so repulsive. In so doing we would have vast support from the dusty books. But dust the decision would remain in our mouths through the years ahead, a reproach to law and conscience alike. Our oath is to do justice, not to perpetuate error.

The concept that there exist no causes of action except those recognized by precedent was not generally accepted at common law, nor is it accepted today.

It has been held that the measurement of damages for the loss of companionship and society would involve sheer conjecture and that the pecuniary value would be difficult to ascertain. The difficulty in assessing damages in tort litigation has long been recognized. “The law of torts is permeated with recognized wrongs for which compensation is allowed although the exact extent of injury is difficult to measure.” In his treatise on damages, McCormick noted the injustice which would occur if denial of relief were based on the uncertainty of the damages:

Where the tort itself is of such a nature as to preclude the ascertainment of the amount of damages with certainty, it would be a perversion of fundamental principles of justice to deny all relief to the injured person, and thereby relieve the wrongdoer from making any amends for his acts.

While recognizing the difficulties of adjudication, the California Supreme Court held in Dillon v. Legg that such difficulties must

89. Id. at 37, 101 N.W.2d at 229.
93. C. McCormick, LAW OF DAMAGES § 27 at 102 (1935).
94. 68 Cal. 2d 728, 739, 441 P.2d 912, 919, 69 Cal. Rptr. 72, 79 (1968).
not be allowed to “frustrate the principle that there be a remedy for every substantive wrong.”

Furthermore, the difficulties of ascertainment of damages are not insurmountable. Courts and juries are required to evaluate similar losses in wrongful death cases. The pain and suffering element of personal injury suits is even less tangible, yet there has been little reluctance to evaluate damage in this area. Although money is a poor substitute for the loss of the support, society and affection of a parent, it is better than denying compensation altogether.

The fear of double recovery has influenced some courts in their denial of the child’s cause of action. In Halberg v. Young, the Hawaii Supreme Court reasoned that the injured parent could recover from the tortfeasor the full damage he had sustained, including compensation for any inability to properly care for his children. The child is expected to share in the benefit of the parent’s recovery. A similar rationale was used by the court in Deshotel v. Atchison, Topeka & Santa Fe Railway, to deny a woman recovery for the loss of consortium of her husband:

A judgment obtained by a husband after he is injured by a third person might include compensation for any impairment of his ability to participate in a normal married life, and, if his wife is allowed redress for loss of consortium in a separate action, there would be danger of double recovery.

Some courts assume that the trier of fact considers the plight of children in evaluating the damages of a parent who has been “so seriously injured as to be unable to give them proper care and attention.” Thus, courts reason that the children have been adequately compensated in the parent’s cause of action.

The possibility of overlap with the parents’ recovery becomes minimal when the elements of consortium are separately compensated. Although the parent usually recovers for any impairment of his duty to support the child, the impairment of the child’s nor-

95. Miller v. Monsen, 228 Minn. 400, 405, 37 N.W.2d 543, 546 (1949).
98. 50 Cal. 2d 664, 328 P.2d 449 (1958).
99. Id. at 667, 328 P.2d at 451.
mal relationship with the injured parent cannot be recovered.\textsuperscript{101} Since the parent is not allowed to include the child's loss of love, society and companionship in his cause of action, it is only by chance that the rights of the child are protected.

The child is the loser and should not have to depend on another's right of action for recompense. That he would ever get just compensation through the father's action for damages is at least uncertain if not actually unlikely.\textsuperscript{102}

The more just and forthright approach to the problem of double recovery would be to recognize the individual claim of the child. The parent's cause of action would be limited to the child's pecuniary loss of support of the parent. The child's cause of action would include the loss of the parent's love, society and protection. The requirement of joinder would provide "additional protection against the suggested danger of double recovery."\textsuperscript{103} The court in \textit{Rodriguez v. Bethlehem Steel Corp.}\textsuperscript{104} overruled \textit{Deshotel} by adopting this precise procedure. Employing these procedures in the child's action will prevent the possibility of double recovery and will protect the interests of the child in more than a haphazard fashion.

Various courts have cited the uncertainty and derivative nature of the injury to the child as a basis for the denial of recovery, particularly because the harm sustained by the child occurs only indirectly as a consequence of the tortfeasor's negligence.\textsuperscript{105} The doctrinal distinction between direct and indirect wrong has little if any significance.\textsuperscript{106} This rationale has been set aside by those courts allowing recovery by the wife for the wrongful injury to her husband.\textsuperscript{107} The \textit{Rodriguez} court reasoned that the foresee-
ability of the risk was the critical factor in determining whether an injury is direct. The court concluded that "one who negligently causes a severely disabling injury to an adult may reasonably expect that the injured person is married and that his or her spouse will be adversely affected by that injury." By parity of reasoning, the tortfeasor may reasonably expect that the injured person is married and that his or her child will be adversely affected by the injury.

The possibility of multiplicity of tort claimants and tort litigation based upon a single tort has been cited as a basis for denying the child relief. A Minnesota court in *Eschenbach v. Benjamin* predicted "litigation almost without end" if a wife or child were allowed to recover for the negligent injury to the husband-father. However, this concern has been summarily dismissed by several courts, citing the injustice which would ensue from such a policy.

If you admit that the conduct of defendant was a wrong to the plaintiff, it is no argument merely to say that a large number of suits will arise where all the children in a large family have suffered the same loss. All who are wronged should be allowed recovery against the wrongdoer.

The inability of the courts to draw the line on liability as a basis for denying recovery in various actions has been recognized by several courts. In *Deshotel*, the court reasoned that if recovery were allowed for the wife, then other members of the family would seek to enforce similar claims. "[T]he courts would be faced with the perplexing task of determining where to draw the line with

109. Id. at 400, 525 P.2d at 680, 115 Cal. Rptr. at 776.
113. 20 CORNELL L.Q. 255, 256 (1935).
respect to which claims should be upheld."\textsuperscript{115} However, the California Supreme Court in \textit{Dillon v. Legg} held that "[t]he alleged inability to fix definitions for recovery on the different facts of future cases does not justify the denial of recovery on the specific facts of the instant case . . . ."\textsuperscript{116} In granting a wife recovery for the negligent injury to her husband, the \textit{Rodriguez} court disputed the "draw-the-line" rationale. "That the law might be urged to move too far, in other words, is an unacceptable excuse for not moving at all."\textsuperscript{117}

It has been held that it is the responsibility of the legislature to make any changes in the "well-settled rule of the common law denying to a child the right of action for personal injuries to his parent."\textsuperscript{118} In considering the right of a woman to recover for the negligent injury to her husband, the court in \textit{Deshotel} held that any departure from the overwhelming weight of authority in support of the common law rule should be left to the legislature.\textsuperscript{119} However, at least one court in considering a child's cause of action has held that it was not necessary "to wait for legislative sanction before entertaining an action for which there is no judicial sanction."\textsuperscript{120} In \textit{Rodriguez}, the court held that the rationale of \textit{Deshotel} had been rendered untenable, indicating that the primary instrument of evolution in the common law system is the judiciary, not the legislature.\textsuperscript{121} The courts compromise a basic responsibility when they abdicate to the legislature the essential function of re-evaluating the common law.\textsuperscript{122} It is the responsibility of the judiciary to extend the common law in order to allow a child to recover for the negligent injury to the parent.

\textsuperscript{116} Dillon v. Legg, 68 Cal. 2d 728, 739, 441 P.2d 912, 919, 69 Cal. Rptr. 72, 79 (1968) (emphasis in original).
\textsuperscript{118} Halberg v. Young, 41 Hawaii 634, 647, 59 A.L.R.2d 445, 453 (1957).
CONCLUSION

When a parent is injured in an accident occasioned by defendant's negligence, the child is not permitted to recover loss of consortium damages. The child’s claim for the loss of society, care, protection, support and affection should be recognized. It is difficult on the basis of natural justice to deny the child’s right to recover for the loss of consortium of a negligently injured parent.

It is not easy to understand and appreciate this reluctance to compensate the child who has been deprived of the care, companionship and education of his mother, or for that matter his father, through the defendant's negligence.123

The case for allowing the child loss of consortium damages is supported by the statutory principle that in the absence of statute or public policy, each person injured by the act of another must be compensated. Furthermore, an acknowledgement of the child’s cause of action would be consistent with the California Supreme Court’s liberal attitude toward establishing causes of action for injured plaintiffs. The rationale on which courts base their denial seems clearly untenable. In light of these considerations, the California Supreme Court should once again accept the challenge of judicial activism and grant a remedy to a child for the loss of the society, care, protection, support and affection of a negligently injured parent.

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