BEST v SAMUEL FOX & CO., LTD. 1952 2 A. E. R. 394.

Negligence – Consortium – Injury to husband resulting in sexual impotency – Loss of consortium by wife – Liability of tortfeasor to wife

In this recent case the House of Lords was called upon to determine the state of the law on a rather unique point. Since the case was one of first impression it had to be discovered whether it was new in principle or simply new in instance. The question, as stated in the judgment of Lord Goddard, was whether a married woman, whose husband has been injured by a negligent act or omission, has a right of action against the person causing that injury for the loss or impairment of consortium consequential on the injury.

The pertinent facts may be set forth briefly. The appellant's husband was injured during the course of his employment with the respondents, and as a result of the accident he sustained serious personal injuries which deprived him of his ability to have sexual intercourse. The husband was successful in recovering damages from the respondents in an action for damages for breach of statutory duty and negligence. In the present action the appellant rested her claim for damages on the contention that because of the negligence of the respondents her consortium with her husband had been unjustifiably interfered with in that she had been deprived of the opportunity of having further children and of ordinary marital relations, "as a result whereof she suffers from nervousness, instability, . . . insomnia, . . . and is restless . . . "

Croom-Johnson, J., by whom the action was heard, dismissed the plaintiff's claim, drawing an analogy to the group of cases known as the enticement cases, viz., **Gray v Gee** (1923) 39 T. L. R. 429, **Place v Searle** (1932) 2 K. B. 497, and **Newton v Hardy** (1933) 149 L. T. 165. An essential ingredient of an action of this description was that the infringement of the rights of the consort had to be intentional, and in the case at bar Mr. Justice Croom-Johnson found that the defendant had not committed any intentional or deliberate act which was intended to break up the consortium.

The plaintiff's appeal to the Court of Appeal was heard by Lord Asquith of Bishopstone (appointed Lord of Appeal in Ordinary April 23, 1951), Cohen and Birkett, L. JJ. They decided that the rendering of the husband incapable of sexual intercourse was but an impairment of consortium, and in order for the wife to succeed against the respondents she must prove total loss of consortium as contrasted with impairment of, or interference with consortium. Lord Justice Birkett and Lord Justice Cohen, with Lord Justice Asquith agreeing, based their decision on the belief that consortium is one and indivisible, and the wife had not lost it as a whole. Lord Justice Birkett said:

> Companionship, love, affection, comfort, mutual services, sexual intercourse — all belong to the married state. Taken together they make up the consortium, but I cannot think that the loss of one element, however grievous it may be, as it undoubtedly is in the present case, can be regarded as the loss of the consortium within the meaning of the decided cases. Still less could any impairment of one of the elements be so regarded. Consortium, I think, is one and indivisible. The law gives a remedy for its loss, but for nothing short of that.

Lord Justice Cohen entertained some doubt whether even total loss of consortium would enable a wife to succeed where the loss was occasioned by a negligent, not a malicious, act of the defendant. Lord Justice Asquith felt that the wife had no cause of action as was claimed, but that if he were wrong, it would require total loss of consortium to constitute it.

An appeal from this judgment to the House of Lords was dismissed by their Lordships, but on different grounds.

Appellant's consel contended before their Lordships that since the law gives an action to a husband for a negligent injury to his wife by a third party, therefore it ought to give the same right to the wife. For many decades a husband was entitled, and still is, to recover damages for loss of consortium against a person who negligently injures his wife. This right is grounded on the decisions in numerous old cases. Their Lordships, however, were of the opinion that this was an anomaly at the present day and saw no reason for extending it to the wife. For this reason the appeal was dismissed. As Lord Morton of Henryton expresses it:

> There is thus no general principle of English law which would entitle the appellant to succeed in the present case. Nor is her claim justified by authority . . . It (i. e., the principle that a husband can maintain an action for loss of consortium) is founded on old authorities decided at a time when the husband was regarded as having a quasi-proprietary right in his wife, and is now so firmly established that it could only be abolished by statute.

The effect of the House of Lords decision is that the wife can have no cause of action for either loss or impairment of consortium. In a dictum Lord Goddard agreed with the Court of Appeal in so far as the question of impairment affected the claim of a husband. Lord Porter felt there was much to be said for the view taken by the Court of Appeal, but found difficulty in determining what would be loss of consortium and what would not.

The judgment of the House of Lords thus serves to focus more clearly two divergent viewpoints on a particular phase of case law which, it was agreed, had an illogical historical development. There was the possibility of expressing disapproval with the theory that a husband can recover damages for the loss of consortium suffered as a result of injury caused to his wife by a negligent third party, and so refuse to extend it so as to give the wife a like cause of action. On the other hand, each

Court might have placed the emphasis on equal rights for men and women proclaimed so vigorously in our modern age, and, despite their belief that the husband's cause of action for loss of consortium was anomalous in character, extend the cause of action to the wife. The Court of Appeal appeared to accept the latter view, with the proviso that there must be total loss of consortium. The House of Lords, however, exercising a higher degree of judicial restraint, felt that there was no general principle of English law upon which the appellant could succeed, and moreover, saw no reason for extending the husband's exceptional cause of action to the wife.

The position of the law in the United States on this point is discussed by Lord Justice Birkett in his judgment in the Court of Appeal. (1) The claim of a wife for loss of consortium has, with the exception of one case, been denied in that country by decided cases and this view was adopted by the American Restatement of the Law. (2) The one exception (3) is noteworthy because of its recentness and its possible influence on the conclusion arrived at by the Court of Appeal. There, in circumstances similar to those in the instant case, a United States Court of Appeals was able to hold that the wife has a cause of action for her loss of consortium brought about by injuries to her husband through the negligence of another person. One notable difference, however, is that the wife's statement of claim in the American case alleged deprivation of consortium, while in the present case the wife's claim was for interference with her consortium.

The situation in Canada also deserves short comment. In some Canadian cases (4) the husband was allowed to recover damages for the loss of his wife's services and society, although in one case (5) the husband was refused recovery for the loss of his wife's companionship. Earlier this year in a Nova Scotia case (6) the Court of Appeal decision in the present case was considered. While the action was by a husband seeking damages for deprivation of the services and companionship of his wife by reason of injury to his wife through a defendant's negligence, the case presents an interpretation by a Canadian Court of the distinction made in the present English case between loss and impairment of consortium. Assuming it to be the law that a husband must suffer loss of consortium, the Nova Scotia Supreme Court felt that each case must be decided on its facts, and it would be a loss of consortium despite the fact that the wife should retain some particular capacity where others are gone. This Canadian case was decided before the House of Lords decision in the case under review. With regard to a wife's claim there is more difficulty, occasioned by a dearth of case law in respect to it. Before the present case reached the Court of

1 (1951) 2 K. B. at 654.
2 Vol. 3, the Law of Torts, para. 695.
3 **Hitaffer v Argonne Co.** (1950) 183 Fed. R. 811.
4 **Corkill v Vancouver Recreation Parks Ltd.** (1933) 1 W. W. R. 413; **Dallas v Hinton and Home Oil Distributors** (1937) 4 D. L. R. 260.
5 **Lawrence v Edmonton** (1917) 2 W. W. R. 940.
6 **Robar v MacKenzie** (1952) 2 D. L. R. 678.

Appeal the judgment of Mr. Justice Croom-Johnson was applied in an Ontario case (7) by the Court of Appeal of that province. The decision, however, was considered from the point of view of an action brought by a wife for alienation of affections to which Mr. Justice Croom-Johnson had drawn a parallel, and to which the attention of the Ontario Court was directed. In a recent Manitoba case (8) it was held that a widow whose husband has been killed by negligence could not recover damages for loss of consortium, because such loss is not a cause of action surviving the deceased. The Court, however, made no remarks as to whether the wife would have had a valid claim had the husband not been fatally injured, but had survived the accident.

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7 **Brydon v Abernethy** (1951) O. W. N. 428.
8 **Drewry v Towns** (1951) 2 W. W. R. (N.S.) 217.