What about the Children--Toward an Expansion of Loss of Consortium Recovery in the District of Columbia

Maureen Ann Delaney

Recommended Citation

What about the Children--Toward an Expansion of Loss of Consortium Recovery in the District of Columbia
COMMENTS

WHAT ABOUT THE CHILDREN?
TOWARD AN EXPANSION OF LOSS OF CONSORTIUM RECOVERY IN THE DISTRICT OF COLUMBIA

MAUREEN ANN DELANEY*

INTRODUCTION

At common law, a husband had a separate cause of action for loss of consortium with his wife when she was negligently injured.¹ The concept of consortium signified the husband's right to "services, society and sexual intercourse of the wife."² Most jurisdictions have expanded the common law to also allow a wife to recover for loss of consortium when her husband is injured.³

Prior to 1980, courts uniformly refused to recognize a child's cause of action for loss of consortium of a negligently injured parent.⁴ Courts generally identified four main justifications in refusing

* The author wishes to express thanks to the law firm of Eaton, McClellan & Allen, and in particular David T. Smorodin, Esq., for assistance with this Comment.
3. See Berger, 411 Mich. at 21, 303 N.W.2d at 429 (Levin, J., dissenting) (noting that loss of consortium cause of action has been expanded to allow wife to recover and questioning whether child should be permitted to bring similar cause of action).
4. See Early v. United States, 474 F.2d 756, 758 (9th Cir. 1973) (maintaining that neither statute nor court decision in Alaska provides children of injured parent award for loss of affection and services); Pleasant v. Washington Sand & Gravel Co., 262 F.2d 471, 473 (D.C. Cir. 1958) (believing any change in law regarding loss of consortium should be left to legislature); Borer v. American Airlines, Inc., 19 Cal. 3d 441, 453, 563 P.2d 858, 866, 138 Cal. Rptr. 302, 310 (1977) (en banc) (refusing to recognize child's cause of action for loss of parental consortium due to inadequacy of monetary compensation to alleviate harm to child, difficulty of measuring damages, and danger of imposing extended and disproportionate liability); Hoffman v. Dautel, 189 Kan. 165, 169, 368 P.2d 57, 59-60 (1962) (noting that possibility of multiplicity of actions and potential for double recovery to child are sufficient to prevent recognition of this cause of action); General Elec. Co. v. Bush, 88 Nev. 360, 368, 498 P.2d 366, 371 (1972) (refusing to recognize child's cause of action because of distinction between mother's claim of loss of consortium with her husband and children's claim of loss of consort-
to recognize this cause of action: (1) deference to the legislature to make changes in the law;\(^5\) (2) the belief that loss of parental consortium was too intangible;\(^6\) (3) fear of an increase in litigation;\(^7\) and (4) the concern of severe increases in defendant liabilities.\(^8\) Ironically, courts discounted these same arguments when expanding the cause of action for loss of consortium to allow recovery to wives.\(^9\)

Over the past ten years, however, courts in several jurisdictions have extended the common law cause of action for loss of consortium to include claims for loss of parental consortium by children.\(^10\)

---

See Jeune v. Del E. Webb Constr. Co., 77 Ariz. 226, 228, 269 P.2d 723, 724 (1954) (holding that children do not have cause of action for loss of parental consortium because court does not have power to change common law), overruled in Villareal v. State Dep't of Transp., 160 Ariz. 474, 477, 774 P.2d 213, 216 (1989). Arizona courts have since changed their position regarding their ability to change the common law. See Reben v. Ely, 146 Ariz. 309, 314, 705 P.2d 1360, 1365 (Ct. App. 1985) (recognizing parents' cause of action for loss of consortium of their injured child). The court in Reben noted it is the judiciary's function, not the legislature's, to change tort law. Id. at 311, 705 P.2d at 1362. The court reasoned that tort law concerns "relations between parties," whereas the legislature's focus is the relation of the state to its citizens. Id. at 311, 705 P.2d at 1362. Additionally, the court observed that legislative inaction in an area did not represent legislative intent. Id. at 310, 705 P.2d at 1361. But see General Elec. Co. v. Bush, 88 Nev. 480, 368 P.2d 566, 571 (1972) (choosing to await legislative action on issue of loss of parental consortium for children).


See Hoffman v. Dautel, 189 Kan. 165, 169, 368 P.2d 57, 60 (1962) (holding that minor children could not recover for loss of their father's consortium). In Hoffman, the father incurred brain damage as a result of a car accident. Id. at 166, 368 P.2d at 58. The court refused to recognize the children's cause of action because it could give rise to potential litigation involving multiplicity of actions based on a single tort. Id. at 169, 368 P.2d at 60.

See Russell, 61 N.J. at 506, 295 A.2d at 864 (1972) (declaring that significant increase of damage awards to single family based on one accident presents serious problem to particular defendant).


See Hibi, 139 F. Supp. 2d at 426, 465-66 (Tex. 1990) (recognizing cause of action for loss of parental consortium and refusing to limit right of recovery to minor children); Hay v. Medical Center Hosp., 145 Va. 533, 545, 496 A.2d 939, 946 (1985) (allowing minor child to recover for loss of parental consortium when mother was alive but permanently comatose as result of defendant's negligence); Ueland v. Reynolds Metals Co., 103 Wash. 2d 131, 140, 691 P.2d 190, 195 (1984) (recognizing that two minor children could receive recovery for loss of love, care, companionship, and guidance after father was tortiously injured by third party and suffered mental and physical
Since the 1950s, the District of Columbia has not recognized this cause of action and its courts have refused to consider the issue. In light of the numerous courts in other jurisdictions that recently have considered a child's cause of action for loss of consortium, District of Columbia courts are likely to face this issue in the next few years. In fact, a case recently before the District of Columbia Court of Appeals, Washington v. Washington Hospital Center.

disabilities); Belcher v. Goins, 400 S.E.2d 830, 841 (W. Va. 1990) (permitting minor children or handicapped children of any age who are physically, emotionally, and financially dependent on their natural or adoptive parents to maintain cause of action for loss of parental consortium); Theama v. City of Kenosha, 117 Wis. 2d 508, 527, 344 N.W.2d 513, 522 (1984) (allowing minor children to recover for loss of parental consortium where father suffered severe injuries to head and internal organs as result of motorcycle accident).

11. Pleasant v. Washington Sand & Gravel Co., 262 F.2d 471, 472 (D.C. Cir. 1958) (refusing to recognize child's loss of consortium claim). The court stated that the common law did not offer the child an enforceable right to recover damages from either a parent or a third party for the loss of personal care, affection, and companionship. *Id.* at 473; see Hill v. Sibley Memorial Hosp., 108 F. Supp. 739, 739 (D.D.C. 1952) (noting absence of authority for granting recovery to child when parent is negligently injured).


presented an opportunity for the District of Columbia to revisit this issue.

The courts that have expanded the common law application of loss of consortium refute the traditional reasons for refusing to recognize parental consortium claims. They acknowledged that a child who loses the companionship and affection of a parent suffers a loss similar to that of an adult deprived of spousal consortium. In addition, these courts recognized that in many jurisdictions wrongful death statutes permit children to recover for loss of society and companionship when a parent is killed negligently. To these

---


15. See Ferriter v. Daniel O’Connell’s Sons, Inc., 381 Mass. 507, 510, 413 N.E.2d 690, 692 (1980) (comparing wife’s interest in spousal consortium with child’s interest in parental consortium). The court in Ferriter expressed doubts that the child’s interest in parental consortium was less intense than the wife’s interest in spousal consortium. Id. at 510, 413 N.E.2d at 692.

16. See Reighley v. International Playtex, Inc., 604 F. Supp. 1078, 1080 (D. Colo. 1985) (discussing Colorado wrongful death statute). Reighley concerned a wrongful death case in which the mother died of toxic shock syndrome. The court held, with certain limitations, that a child has a recognized cause of action for loss of society and companionship of a parent. Id. at 1084. Given that the husband and wife can sue for loss of consortium, the court stated that a child may sue for the similar loss. Id. at 1081. The court noted that judicial recognition and expansion of this cause of action is growing. Id. The fact that intangible losses have been calculated in the past demonstrates that they can likewise be calculated here. Id. at 1082-83. The court viewed compensation as a means to alleviate the child’s grief and enable him to function more easily. Id. at 1083. Although the court recognized that insurance costs may increase, the court in Reighley reasoned that any increase is outweighed by society’s benefit of a well-adapted child. Id. Despite the court’s expansion of the law of consortium, it placed several limits on the child’s cause of action. In order to bring suit, children are required to join with the parent’s action, if feasible, and demonstrate economic and emotional dependency on the deceased parent. Id. at 1084; see Cavnar v. Quality Control Parking, Inc., 696 S.W.2d 549, 551 (Tex. 1985) (allowing children to recover for loss of parental consortium when mother died after being hit by van in hotel parking lot). In Cavnar, the children sued for damages under common law negligence, Texas wrongful death statute, and Texas survival statute. Id. at 550. All the children received damages for loss of affection, comfort, compan-
courts, logic compels a similar result when a parent is injured negligently or intentionally.17

This Comment examines whether the District of Columbia should join other jurisdictions in allowing loss of consortium to benefit children. Part I reviews the development of the concept of consortium at common law. Next, Part II examines the status of the law regarding loss of consortium in the District of Columbia. Part III provides a discussion of Washington v. Washington Hospital Center and illustrates the context in which a child's cause of action for loss of consortium may arise. Part IV focuses on recent changes in the area of loss of consortium pertaining to children. Furthermore, in order to determine whether the District of Columbia should re-examine the law of loss of consortium and its application in today's society, this Comment analyzes the arguments regarding expanding loss of consortium to include children in Part V. Part VI offers a strategy for the logistics of loss of parental consortium recovery. Finally, the Comment concludes with a recommendation that the District of Columbia recognize the cause of action for children's loss of consortium.

I. BACKGROUND OF LOSS OF CONSORTIUM

The origin of loss of consortium dates back to the 1600s when courts first recognized that a husband had the right to recover for


the loss of his wife's domestic services. The husband's rights evolved out of the structure of seventeenth-century domestic relationships. Under common law, the head of the household held a recognized claim for interference with the master-servant relationship. Additionally, the rights of all family members were assigned to the head of the household, the father.

The rationale for the husband's right to sue for loss of consortium was that the common law equated wives and children with servants. Like the master-servant relationship, a husband's recovery was restricted to the monetary value of his wife's services. Although courts allowed the husband to seek compensation for the loss of his wife's services, they refused to recognize a similar right to the wife for loss of her husband's services.

Judicial recognition of the husband's right to receive compensation for loss of his wife's services laid the groundwork for changes in the common law. By the late nineteenth century, courts expanded the common law by permitting the husband to recover for

18. See Guy v. Livesey, Cro. Jac. 501, 502, 79 Eng. Rep. 428, 428 (1619) (maintaining husband's action was for his personal loss when wife was assaulted and that this action is similar to one that master has for loss of servant's services); Young v. Prid, Cro. Car. 89, 90, 79 Eng. Rep. 679, 679 (1627) (emphasizing husband's damages were recovered for loss sustained while waiting for wife when she was assaulted and abducted for half year).

Loss of consortium is commonly thought of as loss of not only material services, but such intangibles as society, guidance, companionship, and sexual relations in a marital relationship. BLACK'S LAW DICTIONARY 309 (6th ed. 1990). In the parent-child relationship, the term consortium means the "loss of a parent's love, care, companionship and guidance . . . ." Comment, The Child's Right to Sue, supra note 17, at 723. The term "parental consortium" refers to the latter definition.


20. PROSSER & KEETON ON THE LAW OF TORTS § 125, at 931 (W. Keeton 5th ed. 1984) [hereinafter PROSSER & KEETON ON TORTS]; see Comment, The Child's Right To Sue, supra note 17, at 724 (noting that under doctrine of pater familias, only father had cause of action for injuries of family members because of proprietary interest).

21. See Comment, The Child's Right To Sue, supra note 17, at 724 (emphasizing lack of recognition women and children received).

22. See id. (comparing husband's relationship with wife and children to master's relationship with servant); Note, Purging the Law, supra note 19, at 542 (maintaining that male's claim for interference with master-servant relationship is firmly rooted in history).

23. Comment, The Child's Right to Sue, supra note 17, at 724. The husband could also recover for incidental expenses such as any medical costs incurred. Id.

24. See Lynch v. Knight, 9 H. L. Cas. 577, 599, 11 Eng. Rep. 854, 868 (Ire. 1861) (refusing to allow loss of consortium recovery to wife). In Lynch, the court reasoned that the husband, as sole owner of all marital property, may recover damages in order to hire another servant. Id. The wife, however, suffers only the loss of her husband's society and affection which cannot be compensated. Id.

25. See Comment, The Child's Right to Sue, supra note 17, at 724 (discussing evolution of cause of action for loss of consortium from its historical foundation based on loss of services by husband).
the loss of sentimental elements such as companionship, society, and comfort.26 These sentimental elements soon became the dominant theme for loss of consortium claims.27 The loss of consortium cause of action became one in which services formed only one component.28 Eventually, courts even granted recovery for loss of consortium to husbands where there was no showing of services rendered or lost.29 Although the courts enlarged loss of consortium recovery, the cause of action remained solely with the husband.30

In 1950, the United States Court of Appeals for the District of Columbia Circuit established the District of Columbia as the pioneering jurisdiction in the law of loss of consortium.31 In Hitaffer v.

26. See Denver Consol. Tramway Co. v. Riley, 14 Colo. App. 132, 139-40, 59 P. 476, 478-79 (1899) (emphasizing that although companionship and society of wife cannot be measured, compensation should be given). In Riley, the husband brought an action to recover damages for loss of his wife's services, companionship, and society. Id. at 134, 59 P. at 476. Mrs. Riley became permanently disabled when she was thrown to the ground due to the railroad's negligence. Id. at 134, 59 P. at 477. The Riley court stated that the husband was entitled to receive compensation for the loss of his wife's love and companionship. Id. at 139-40, 59 P. at 479. The jury was to determine the compensation based upon the facts and circumstances of the case. Id.; see Furnish v. Missouri Pac. Ry. Co., 102 Mo. 669, 676, 15 S.W. 315, 317 (1891) (allowing husband recovery for loss of wife's society and companionship). The action in Furnish was also brought by a husband to recover damages sustained by him when his wife was severely injured. Id. at 670, 15 S.W. at 316. The injury occurred when Mrs. Furnish was a passenger on defendant's train which derailed. Id. As a result of the accident, Mrs. Furnish was unable to walk. Id. at 671, 15 S.W. at 316. Over the objection of the defendant, the court instructed the jury to compensate Mr. Furnish for the loss of society and companionship of his wife. Id. at 672, 15 S.W. at 316.

27. See Comment, The Child's Right to Sue, supra note 17, at 724 (noting lesser emphasis placed on services element of consortium).

28. See Hitaffer v. Argonne Co., 183 F.2d 811, 814 (D.C. Cir.) (emphasizing that consortium is comprised of more than mere services of spouse), cert. denied, 340 U.S. 852 (1950), overruled on other grounds, Smith & Co. v. Coles, 242 F.2d 220 (1956) (overruling interpretation of Longshore and Harbor Workers' Compensation Act). The court in Hitaffer defined consortium as not only "material services, [but] also ... love, affection, companionship, sexual relations, etc., all welded into a conceptualistic unity." Id.

29. See id. at 815 (commenting on cases where husbands' cause of action for loss of consortium does not involve loss of services); see also Prosser & Keeton on Torts, supra note 20, § 125, at 931-32 (outlining evolution of loss of consortium cause of action and eventual wide-scale abandonment of services-based recovery).

30. See, e.g., Giggey v. Gallagher Transp. Co., 101 Colo. 258, 260-61, 72 P.2d 1100, 1101 (1937) (refusing to recognize wife's right to recover for loss of consortium when husband is negligently injured and maintaining that wife already receives recovery when her husband is awarded damages); Cravens v. Louisville & Nashville R.R., 195 Ky. 257, 264, 242 S.W. 628, 632 (1922) (allowing wife to recover for loss of consortium of her husband due to intentional wrong, yet denying recovery for merely negligent act); Kosciolek v. Portland Ry., Light & Power Co., 81 Or. 517, 524, 160 P. 132, 133 (1916) (acknowledging that while husband could maintain action for loss of consortium from injury or death to wife, wife could not maintain identical cause of action for loss of consortium from husband to herself).

31. A long line of authority uniformly denied the wife recovery for loss of consortium prior to Hitaffer. See Tyler v. Brown-Service Funeral Homes Co., 250 Ala. 295, 297, 34 So. 2d 203, 204-05 (1948) (refusing to grant recovery to wife who discovered her husband in a freezing condition due to defendant's negligence in leaving her husband in unheated home); Boden v. Del-Mar Garage, Inc., 205 Ind. 59, 72, 185 N.E. 860, 864 (1933) (holding that wife has no cause of action for loss of consortium of her husband who sustained severe injuries through third party's actions, even though injury was inflicted willfully and maliciously).
Argonne Co., the court recognized a wife's cause of action for loss of consortium that resulted from a negligent injury to her husband. The court concluded that the justifications for allowing only a husband to recover for loss of consortium were unreasonable.

In Hitaffer, the court addressed several arguments that are currently made against recognizing children's rights to seek recovery for loss of parental consortium. At the outset, the court rejected the argument that the wife's injuries were too indirect. Rather, the court determined that "invasion of loss of consortium is an independent wrong directly to the spouse so injured." Next, the court rebutted the argument that the injuries of the wife are too remote and inconsequential with two lines of reasoning. First, the rule in negligence cases states that the wrongdoer is liable for injuries produced, absent any intervening causes, that would not have occurred but for the negligent act. Second, because damages to a husband for sentimental elements of consortium are not too remote and inconsequential, a wife's damages for sentimental elements should likewise not be too remote and inconsequential.

Aside from equating a wife's right to recover for loss of consortium to that of her husband, the court in Hitaffer clarified the definition of consortium. Consortium stood not only for material services, but also for love, affection, companionship, and sexual relations. The court reasoned that the wife has a right to these "sentimental elements" and is thus afforded a remedy. Courts around the country followed Hitaffer and recognized a wife's right to seek damages for loss of consortium. In addition, courts have adopted

34. See id. (holding that there is no rationale for allowing husband to assert action for loss of consortium, yet denying wife protection of exact same interest).
35. Id. at 815.
36. See id. at 815 (stating that because wife's injuries from loss of consortium are not foreseeable does not excuse wrongdoer for that which would not have occurred but for negligent act).
37. See id. (commenting that if remoteness of injuries were valid reason for denying wife recovery, then husband also has no basis for cause of action).
38. See id. at 813 (stating that material services do not predominate over companionship, love, felicity, and sexual relations as element of consortium).
39. Id.
40. See Duffy v. Lipsman-Fulkerson & Co., 200 F. Supp. 71, 74 (D. Mont. 1961) (maintaining that wife is entitled to recovery for loss of support, companionship, and affection of husband when injury results from negligence of third person); Missouri-Pacific Transp. Co. v. Miller, 227 Ark. 351, 364, 299 S.W.2d 41, 48-49 (1957) (announcing that reason and justice require wife to recover for loss of consortium when husband was rendered totally disabled in
the *Hitaffer* description of consortium as encompassing not only material services, but also the sentimental elements of love and companionship.4\(^1\)

II. **DISTRICT OF COLUMBIA LAW REGARDING LOSS OF CONSORTIUM IN THE PARENT-CHILD CONTEXT**

District of Columbia courts confronted another novel loss of consortium issue two years after *Hitaffer* in *Hill v. Sibley Memorial Hospital*.4\(^2\) In *Hill*, the claim for loss of consortium arose in the context of the parent-child relationship.4\(^3\) The United States District Court for the District of Columbia acknowledged that when a parent is negligently injured, the child suffers an unobjectionable loss: the love and companionship of a parent.4\(^4\) Although the court recognized the child’s loss, it refused to extend consortium law to permit a recovery.4\(^5\) The court observed that “a lower court should be cautious in laying down a completely new rule . . .”4\(^6\)

Six years after *Hill*, the loss of consortium issue in the parent-child context confronted the United States Court of Appeals for the District of Columbia Circuit. In *Pleasant v. Washington Sand & Gravel Co.*,4\(^7\) the Court of Appeals held that a child has no enforceable right to damages for loss of personal care, affection, and companionship when a third party has destroyed the family relationship by negligently injuring a parent; Bailey v. Wilson, 100 Ga. App. 405, 408, 111 S.E.2d 106, 108 (1959) (recognizing that wife of man injured in automobile collision has cause of action for loss of consortium); Brown v. Georgia-Tennessee Coaches, Inc., 88 Ga. App. 519, 529, 77 S.E.2d 24, 31 (1953) (holding that wife has cause of action for loss of consortium due to negligent injury to her husband); Burk v. Anderson, 232 Ind. 77, 80-81, 109 N.E.2d 407, 408 (1952) (allowing widow to recover for loss of husband’s support, society, and maintenance from owners of tavern who sold intoxicating liquors to her husband); Acuff v. Schmit, 248 Iowa 272, 280, 78 N.W.2d 480, 485-86 (1956) (finding logic in *Hitaffer* sound and granting wife recovery for loss of consortium when husband was permanently disabled in automobile collision); Montgomery v. Stephan, 359 Mich. 33, 49, 101 N.W.2d 227, 235 (1960) (holding that wife may maintain action for loss of consortium with husband who was involved in automobile collision due to defendant’s negligence).

---

41. See Montgomery v. Stephan, 359 Mich. 33, 36, 101 N.W.2d 227, 228 (1960) (defining consortium as “love, companionship, affection, society, comfort, sexual relations, services, solace . . . and more”).
44. *Id.* at 741.
45. *Id.* (observing that although common law should continually be reappraised to meet changing needs of society, lower courts should respect prior holdings of appellate courts).
46. See *id.* (confessing that it has been difficult on basis of natural justice to conclude that this cause of action will not be recognized, but noting that this court should not be one to initiate any change in doctrine).
47. 262 F.2d 471 (D.C. Cir. 1958).
gently injuring the child's parent. The court distinguished this case from Hitaffer by stating that the holding in Hitaffer was based on a right arising out of a marital relationship.

The court in Pleasant based its decision on a narrow reading of Hitaffer and ignored Hitaffer's broad description of the elements comprising consortium. In fact, Hitaffer encompassed much more than granting a wife the right to recover for loss of consortium because her husband had such a remedy. The court in Hitaffer broke from the common law tradition of denying the wife a right to loss of consortium recovery and made a step-by-step analysis of the justifications for allowing recovery to a wife for loss of consortium. In addition, Hitaffer set out a clear framework for the meaning of loss of consortium. In Pleasant, the court failed to use the framework presented in Hitaffer to analyze the soundness of a child's consortium claim. Instead, it followed the custom of denying a remedy

49. Id. at 472.
50. Compare Pleasant, 262 F.2d at 472 (noting that decision in Hitaffer was based solely on marriage relationship) with Hitaffer v. Argonne Co., 183 F.2d 811, 814 (D.C. Cir.) (illuminating all elements of consortium and naming sexual relations as only one component), cert. denied, 340 U.S. 852 (1950), overruled on other grounds, Smith & Co. v. Coles, 242 F.2d 220 (1956) (overruling interpretation of Longshore and Harbor Workers' Compensation Act). In Hitaffer, the court stated that "[t]here is more to consortium than the mere services of the spouse. Beyond that there are the so-called sentimental elements to which the wife has a right for which there should be a remedy." Hitaffer, 183 F.2d at 814 (emphasis in original).
51. See Brief for Appellant at 21, Washington v. Washington Hosp. Center, 579 A.2d 177 (D.C. 1990) (No. 89-829) [hereinafter "Brief for Appellant"] (asserting that Hitaffer opinion provides valuable tool to analyze issue of whether other family members should have recognized cause of action for loss of consortium and noting that it is undisputable that family members, children in particular, suffer injuries similar to interests protected under Hitaffer court's portrayal of consortium).
53. See supra notes 38-41 and accompanying text (noting many components of consortium).
54. See Pleasant v. Washington Sand & Gravel Co., 262 F.2d 471, 473 (D.C. Cir. 1958) (reasoning that common law did not recognize child's claim for damages for "loss of personal care, affection, and companionship" from either parent or third party).
to children who have suffered the loss of their parents.55

The court in Pleasant concluded by stating that there is "no trend in the law at the present time in favor of recognizing new rights in children."56 While true in 1958, that statement does not hold true today.57 Courts continue to recognize the rights of children to recover for loss of consortium.58 In the intervening thirty-two years, however, the District of Columbia courts have not addressed the issue put forth in Pleasant.59

III. Washington v. Washington Hospital Center

The District of Columbia Court of Appeals was presented with an opportunity to evaluate the issue presented in Pleasant. Washington v. Washington Hospital Center,60 a medical malpractice case, involved claims by the children of LaVerne Alice Thompson, who underwent elective surgery requiring general anesthesia at the Washington

55. Id. at 473 (noting absence of "trend" in law at present recognizing new rights in children and asserting that Congress should make any change).

56. Id.


The child shall enjoy special protection, and shall be given opportunities and facilities, by law and by other means, to enable him to develop physically, mentally, morally, spiritually and socially in a healthy and normal manner and in conditions of freedom and dignity. In the enactment of laws for this purpose the best interests of the child shall be the paramount consideration.

Id. at 4; see also Coughlin, The Rights of Children, in RIGHTS OF CHILDREN: EMERGENT CONCEPTS 7, 22 (emphasizing human rights are based on being human person and children are equally deserving of these rights as adults); Drinan, The Rights of Children in Modern American Family Law, in RIGHTS OF CHILDREN: EMERGENT CONCEPTS 37, 45 (stating that whenever courts must make decision affecting life and future of children, primary objective should be rights of all children to economic, educational, and emotional stability); H. COHEN, EQUAL RIGHTS FOR CHILDREN 1, 133 (1980) (advocating equal rights for children because justice requires it and noting that children deserve respect and one method of demonstrating respect is to treat people justly).

58. See supra note 10 and accompanying text (noting trend of recognizing children's right to loss of consortium recovery).

59. See supra notes 11-13 and accompanying text (providing history of loss of parental consortium cases in District of Columbia since 1952).

Hospital Center. 61 One issue on appeal was whether Mrs. Thompson's two children could recover for loss of consortium with their mother. 62

Prior to the surgery, a nurse-anesthetist, under the supervision of an anesthesiologist, inserted an endotracheal tube into Mrs. Thompson's throat to permit oxygen to flow to the anesthetized patient during surgery. 63 In the lawsuit, the plaintiffs 64 asserted that the nurse-anesthetist mistakenly placed the tube in Mrs. Thompson's esophagus, just above the stomach. 65 The plaintiffs alleged that as a result of this error and the Washington Hospital Center's failure to have proper monitors in place to detect this error, Mrs. Thompson did not receive sufficient oxygen during surgery and suffered a cardiac arrest. 66 Although she was resuscitated, Mrs. Thompson suffered "catastrophic brain injuries." 67

Mrs. Thompson is now in a permanent vegetative state. 68 Experts testified that she is "essentially awake but unaware" of her surroundings." 69 Although Mrs. Thompson may live for another ten to twenty years, doctors do not anticipate any change in her condition. 70

Mrs. Thompson's family filed suit on her behalf in the District of Columbia Superior Court in December 1987. 71 In addition to the normal medical malpractice claims, the complaint included claims for loss of consortium on behalf of Mrs. Thompson's two children, nineteen-year-old Toyia Green and seven-year-old Devin Michelle Thompson. 72

Prior to trial, the defendants moved for summary judgment on the children's loss of consortium claims. 73 On August 3, 1988,

62. Brief for Appellant, supra note 51, at 18.
64. Id. The plaintiffs consisted of LaVerne Alice Thompson's entire family: her mother, her two daughters, and her husband. Id.
65. Id. The proper placement of the endotracheal tube is in the trachea, just above the lungs. Id.
66. Id.
67. Id.
68. Id.
69. Id.
70. Id.
71. Id. at 71. Alma D. Washington, Mrs. Thompson's mother, filed a medical malpractice suit individually as conservator of LaVerne Alice Thompson's estate. Id. Mrs. Washington filed suit in her individual capacity, with Mrs. Thompson's two daughters, Toyia I. Green and Devin Michelle Thompson, and Mrs. Thompson's estranged husband, Michael L. Thompson. All four co-petitioners sought damages for loss of consortium with Mrs. Thompson. Id.
72. Id.
73. Memorandum and Order, Washington v. Associated Anesthesiologist Servs., P.C.,
Judge Greene of the District of Columbia Superior Court granted the defendant’s motion. Judge Greene wrote that while prior case law dictated his actions, “the loss to a child of a parent’s companionship and care represents something which is valuable, precious, and quantifiable. . . .” Judge Greene stated that, were it not for the binding prior decisional law in this jurisdiction, the court would allow the plaintiffs to present their causes of action for loss of consortium with their mother.

The medical malpractice case proceeded to trial against the Washington Hospital Center. The jury awarded Mrs. Thompson $4,586,278 and awarded Mr. Thompson $63,000. Both the Washington Hospital Center and the plaintiffs filed notices of appeal to the District of Columbia Court of Appeals. On August 3, 1990, a three-judge panel of the Court of Appeals affirmed the trial court’s judgments.

The Court of Appeals dispensed with plaintiffs’ appeal on the loss of consortium issue in a single paragraph. The court noted that the parties had agreed that District of Columbia precedent, Pleasant v. Washington Sand & Gravel Co., foreclosed such consortium

Civil Action No. 10616-87, at 1 (Aug. 3, 1988) (maintaining that case law did not recognize plaintiffs’ cause of action).

74. Id. at 2-3.

75. Id. at 3 n.1. Judge Greene stated that loss of parental consortium is quantifiable “at least to the extent that other kinds of recovery permitted by tort law are quantifiable . . . .” Id. He also noted that loss of parental consortium is a reasonably foreseeable consequence of an injury to a parent. Id. To permit a child to recover in wrongful death action, yet deny recovery for loss of care and services when the parent is disabled in the case at hand makes no logical sense. Id.

76. Id.; cf. D.C. CODE ANN. § 16-2701 (1981) (allowing recovery for pecuniary damages to spouse and next of kin of decedent); Doe v. Binker, 492 A.2d 857, 863 (D.C. 1985) (identifying two elements of recovery under Wrongful Death Act as (1) compensation for pecuniary loss and (2) compensation for value of services lost to family as result of decedent’s death).

77. Washington v. Washington Hosp. Center, 579 A.2d 177, 180 (D.C. 1990). Several of the original defendants were dismissed. Id. The anesthesiologist, the nurse-anesthetist, and their employer settled midway through the trial. Id.

78. Memorandum and Order, Washington v. Associated Anesthesiologist Servs., P.C., Civil Action No. 10616-87, at 1 (Jan. 5, 1989). Mr. Thompson’s loss of consortium claims were limited to claims for lost services in caring for the couple’s daughter, Devin Michelle Thompson. Id.

79. See Brief for Appellant, supra note 51, at 18 (appealing issues concerning loss of consortium claims); Brief for Appellee at 15, Washington v. Washington Hosp. Center, 579 A.2d 177 (D.C. 1990) (No. 89-829) (appealing issues unrelated to this Comment).

80. Washington v. Washington Hosp. Center, 579 A.2d 177, 179 (D.C. 1990). The case was presented before Chief Judge Rogers and Associate Judges, Steadman and Farrell. Id. Judge Farrell wrote the opinion. Id.

81. Id. (stating that it was bound by precedent that barred loss of consortium claims).

82. 262 F.2d 471 (D.C. Cir. 1958).
claims.\textsuperscript{83} The court cited \textit{M.A.P. v. Ryan},\textsuperscript{84} which held that a division of the court cannot overrule binding precedent.\textsuperscript{85} Instead, the entire \textit{en banc} court is necessary to overrule a prior decision.\textsuperscript{86}

After the court's decision on August 3, 1990, the plaintiffs filed a motion seeking to sever their appeal from that of the Washington Hospital Center so that they might file a motion to seek the full court's review of the consortium issue.\textsuperscript{87} The motion was granted on January 11, 1991.\textsuperscript{88} The plaintiffs then proceeded to file a Motion for Rehearing \textit{En Banc} on January 18, 1991.\textsuperscript{89} The District of Columbia Court of Appeals requested the Washington Hospital Center to file a brief in opposition to the plaintiffs' motion for rehearing.\textsuperscript{90} The court subsequently denied plaintiffs' Motion for Rehearing \textit{En Banc}.

IV. RECENT DEVELOPMENTS ACROSS THE COUNTRY

Case law expanding actions for loss of consortium remains minimal.\textsuperscript{91} Nevertheless, there are eight states that currently recognize a

\textsuperscript{83} \textit{Washington Hosp. Center}, 579 A.2d at 179 n.1. The court stated that \textit{Pleasant v. Washington Sand & Gravel Co.}, as controlling law in the District of Columbia, forecloses a cause of action for loss of parental consortium recovery. \textit{Id.}

\textsuperscript{84} 285 A.2d 310 (D.C. 1971).


Given that the District of Columbia Court of Appeals became the highest court for the District of Columbia on February 1, 1971, the decisions of the United States Court of Appeals after that date do not restrict it. \textit{Id.} The District of Columbia Court of Appeals recognized that decisions rendered prior to February 1, 1971 comprise the case law of the District of Columbia and, therefore, established that no division of the Court of Appeals can ignore a decision of the United States Court of Appeals prior to February 1, 1971. \textit{Id.} The District of Columbia Court of Appeals is composed of nine judges who sit in divisions of three. \textit{Id.} at 312 n.11. To overrule a prior decision of the court or refuse to follow a decision of the United States Court of Appeals, the entire \textit{en banc} court is required. \textit{Id.} at 312.

\textsuperscript{86} \textit{Id.} at 312.


\textsuperscript{91} See Petrilli, \textit{A Child's Right to Collect}, supra note 17, at 317 n.1 (observing only minimum number of courts have allowed action and that as of 1987, 22 states had refused to recognize child's loss of consortium action, leaving 22 states to address issue in future).
child's cause of action for loss of parental consortium. For these states, the expansion of loss of consortium recovery was basically a move from the narrow view of loss of consortium, with its focus on sexual relations and the marital relationship, to a broader view encompassing the modern components of consortium such as society and companionship. Among these eight states, Massachusetts, Michigan, and Washington best exemplify the expansion.

In 1980, the Supreme Judicial Court of Massachusetts became the first state court to grant children the right to recover for loss of consortium. In Ferriter v. Daniel O'Connell's Sons, Inc., a work-related accident caused Ferriter to be paralyzed from the neck down. The Supreme Judicial Court of Massachusetts held that the two minor children could recover for loss of parental consortium with their father. The court acknowledged that a child who loses a parent's companionship and affection suffers a loss comparable to that suffered by an adult who loses spousal consortium. Because Massachusetts allows children to recover for loss of parental society in wrongful death actions, the Ferriter court concluded that the child's expectation of parental society should likewise be protected when the parent is negligently injured.

92. See supra note 10 and accompanying text (identifying Alaska, Massachusetts, Michigan, Texas, Vermont, Washington, West Virginia, and Wisconsin as states that recognize child's right to loss of consortium recovery).
93. See supra note 10 and accompanying text (listing cases that recognize capacity of consortium to encompass other family members).
94. See infra notes 95-122 and accompanying text (discussing cases in states that grant child's cause of action).
97. Ferriter, 381 Mass. at 508, 413 N.E.2d at 691. Mr. Ferriter was seriously injured while working as a carpenter for the defendant. Id. A one- to two-hundred pound load of wood beams fell approximately fifty feet, and at least one hit him in the neck. Id. As a result of the accident, Mr. Ferriter was hospitalized and became paralyzed from the neck down. Id. at 509, 413 N.E.2d at 691. The plaintiffs were his wife and two children, ages five and three. Id. at 508, 413 N.E.2d at 691.
98. Id. at 516, 413 N.E.2d at 696 (reasoning that children have viable claim if there is proof of dependence on parent).
99. See id. at 510, 413 N.E.2d at 692 (stating that child's interest is no less intense than wife's).
100. See id., at 515, 413 N.E.2d at 695 (citing Massachusetts General Law ch. 229, sec. 2, stating that children are entitled to recover for "loss of the reasonably expected ... society ... of the decedent"); see also Glicklich v. Spievack, 16 Mass. App. Ct. 488, 496-98, 452 N.E.2d 287, 292-93 (awarding damages to patient's son for loss of parental consortium suffered as result of doctor's negligence), appeal denied, 390 Mass. 1103, 454 N.E.2d 1276 (1983). In Glicklich, a mother brought a medical malpractice claim because her doctor failed to diagnose the breast cancer which led to the spreading of the cancer to her brain thereby reducing her chances of survival. Id. at 490-91, 452 N.E.2d at 289-90. The court awarded her nine-year-old son damages for loss of parental society because he is living in the injured parent's household and is dependent on her for guidance and support. Id. at 496, 452 N.E.2d at 292. The court emphasized the fact that the mother played a significant role in her son's daily life and
Massachusetts discounted the argument that this change in the law should be left to the legislature. The court reasoned that since loss of consortium was a judicially created doctrine, courts should also be the instrument of any change in this area of law.

One year later in Berger v. Weber, Michigan joined Massachusetts in expanding common law loss of consortium. In Berger, the child's mother sustained severe and permanent psychological and physical injuries due to an automobile collision. The Supreme Court of Michigan held that a child may recover for loss of a parent's society and companionship caused by negligent injury to the parent.

Although the Michigan court was confronted with a lack of precedent, it did not retreat from what it saw as its duty to adjudicate this claim. The court in Berger stated that it refused to continue to treat children as "second class citizens." The court rejected the argument that the difference between the spousal relationship and the parent-child relationship demanded different legal treatment, noting that sexual relations are only one aspect of a spousal consortium claim.

The Michigan court did acknowledge that recognition of the new cause of action might increase litigation. The court, however,
chose to judge the case on its merits rather than by "engaging in gloomy speculation as to where it will all end."\textsuperscript{110} Like the Supreme Judicial Court of Massachusetts in \textit{Ferriter}, the Michigan court saw a serious injustice in allowing a child to recover for loss of a parent's society and companionship when a parent dies, but denying recovery when a parent is injured.\textsuperscript{111}

The court in \textit{Berger} refused to succumb to the economic argument that recognition of the child's claim would significantly raise insurance premiums.\textsuperscript{112} The court reasoned that allowing children to recover immediate compensation for their losses benefits society because the recovery will help such children become emotionally stable.\textsuperscript{113} In the long run, the court observed, this benefit outweighs any potential increases in insurance premiums.\textsuperscript{114}

Finally, the court in \textit{Berger} did not choose to leave this matter to the legislature.\textsuperscript{115} Judicial decisions, not legislative action, prevented awards for the loss of parental consortium. Accordingly, it was the court's task to remove this barrier.\textsuperscript{116}

In 1984, the Supreme Court of Washington recognized the child's right to loss of consortium recovery in the case of \textit{Ueland v. Reynolds Metals Co.}\textsuperscript{117} In \textit{Ueland}, two children sought recovery for loss of parental consortium with their father.\textsuperscript{118} Like Mr. Ferriter, Mr. Ueland was injured during the course of his employment and suffered severe and permanent mental and physical impairment.\textsuperscript{119} The Washington Supreme Court held that children have a separate cause of action for loss of parental consortium when a parent is injured through the negligence of another.\textsuperscript{120} Although \textit{Ueland} dealt with the claims of two minor children, the court specifically stated that a

\textsuperscript{110} \textit{Id.} at 15, 303 N.W.2d at 426 (following same rationale that Michigan Court of Appeals applied in 1978 when it held that child may maintain cause of action for loss of parental society and companionship when parent is "severely" injured).
\textsuperscript{111} \textit{See id.} (noting anomaly in law).
\textsuperscript{112} \textit{Id.}
\textsuperscript{113} \textit{Id.}
\textsuperscript{114} \textit{Id.} (claiming societal benefit will offset increase in insurance).
\textsuperscript{115} \textit{Id.} at 17, 303 N.W.2d at 427 (noting that actions for loss of spousal consortium and actions by parents for loss of child's services were created and developed by judiciary, not legislature).
\textsuperscript{116} \textit{Id.} (reasoning that child's cause of action for loss of parental consortium is not so complex to warrant deferring it to legislature).
\textsuperscript{117} 103 Wash. 2d 131, 691 P.2d 190 (1984).
\textsuperscript{118} \textit{Ueland v. Reynolds Metals Co.}, 103 Wash. 2d 131, 132, 691 P.2d 190, 191 (1984). The Uelands were separated and in the process of seeking a divorce when the accident occurred. \textit{Id.} Mrs. Ueland brought this action on behalf of her children for loss of parental consortium with their father. \textit{Id.}
\textsuperscript{119} \textit{See id.} (noting that Mr. Ueland's injuries occurred when he was struck by metal cable while working for Seattle City Light).
\textsuperscript{120} \textit{Id.} at 140, 691 P.2d at 195.
child is not required to be a minor or dependent on the injured parent to recover. The court did, however, limit the child's claim by requiring that children's claims for loss of parental consortium be joined with the injured parent's claim whenever possible.

Like the United States Court of Appeals for the District of Columbia Circuit, the Supreme Court of Washington first addressed the issue of parental consortium in a 1958 case, *Erhardt v. Havens*. Similarly, the court in *Erhardt*, like the United States Court of Appeals for the District of Columbia Circuit, refused to adopt this cause of action. The court observed that no other jurisdiction recognized a child's cause of action for loss of consortium. In fact, the Washington state courts did not even permit a wife's cause

---

121. *Ueland*, 103 Wash. 2d at 137, 691 P.2d at 194. The court chose to maintain consistency with the policy in wrongful death actions that allows recovery for loss of parental consortium to children that are not minors. *Id.* at 140, 691 P.2d at 195; see *Kramer v. Portland-Seattle Auto Freight, Inc.*, 43 Wash. 2d 386, 397, 261 P.2d 692, 698 (1953) (noting that wrongful death recovery to children does not necessarily end with arrival of age of majority).

Some courts, however, recognizing the child's cause of action for loss of parental consortium to the child, limit recovery to minor children dependent on the parent. See, e.g., *Weitl v. Moes*, 311 N.W.2d 259, 270 (Iowa 1981) (limiting damages to period during which child is minor); *Ferriter v. Daniel O'Connell's Sons, Inc.*, 381 Mass. 507, 516, 413 N.E.2d 690, 696 (1980) (maintaining that loss of parental consortium recovery is permissible upon showing that children are minors and dependent on parent); *Theama v. City of Kenosha*, 117 Wis. 2d 508, 527, 344 N.W.2d 513, 518 (1984) (holding that minor child may recover for loss of love, care, society, companionship, protection, training, and guidance of parent due to negligence of third party). Some courts, however, recognizing the child's cause of action for loss of parental consortium to the child, limit recovery to minor children dependent on the parent. See, e.g., *Weitl v. Moes*, 311 N.W.2d 259, 270 (Iowa 1981) (limiting damages to period during which child is minor); *Ferriter v. Daniel O'Connell's Sons, Inc.*, 381 Mass. 507, 516, 413 N.E.2d 690, 696 (1980) (maintaining that loss of parental consortium recovery is permissible upon showing that children are minors and dependent on parent); *Theama v. City of Kenosha*, 117 Wis. 2d 508, 527, 344 N.W.2d 513, 518 (1984) (holding that minor child may recover for loss of love, care, society, companionship, protection, training, and guidance of parent due to negligence of third party).

122. *Ueland*, 103 Wash. 2d at 137, 691 P.2d at 194. The court acknowledged that the number of claims could equal the number of children of the injured parent. *Id.* at 136, 691 P.2d at 193. A number of courts have denied the child's cause of action for this very reason. See *Juene v. Del E. Webb Constr. Co.*, 77 Ariz. 226, 228, 269 P.2d 723, 724 (1954) (arguing that law has never allowed for multiple actions to be brought by each member of family for negligent injury to father); *Borer v. American Airlines, Inc.*, 19 Cal. 3d 441, 444, 563 P.2d 858, 864, 138 Cal. Rptr. 302, 304 (1977) (asserting that if all nine children were permitted to bring independent causes of action for loss of parental consortium, tort liability of defendant would significantly multiply); *Hoffman v. Daultel*, 189 Kan. 165, 169, 368 P.2d 57, 59-60 (1962) (noting that recognition of such cause of action would have far-reaching results, including multiplicity of actions based on single tort); *Russell v. Salem Transp. Co.*, 61 N.J. 502, 506, 295 A.2d 862, 864 (1972) (stating that allowance of minor child's claim would result in substantial increase of liability against wrongdoer arising out of one occurrence).

In *Ueland*, the court chose to adopt the Iowa Supreme Court's solution to the problem of multiplicity of litigation. *Ueland*, 103 Wash. 2d at 137, 691 P.2d at 193-94; see *Weitl v. Moes*, 311 N.W.2d 259, 270 (Iowa 1981) (requiring child's claim for loss of parental consortium be joined with injured parent's claim whenever feasible or, if claim is brought separately, burden will be placed on child plaintiff to explain why joinder is not possible).

123. 53 Wash. 2d 103, 330 P.2d 1010 (1958). In *Erhardt*, two minor children sought recovery for loss of parental consortium with their mother. *Erhardt v. Havens, Inc.*, 58 Wash. 2d 105, 103, 330 P.2d 1010, 1010 (1958). Their mother was permanently paralyzed due to the negligence of the defendant hospital. *Id.* at 103-04, 330 P.2d at 1010. In addition, the mother lost all of her mental capabilities and could no longer recognize her children. *Id.* at 104, 330 P.2d at 1010.

124. *See id.* at 106, 330 P.2d at 1012 (noting that legal guardian of minor children can maintain action in his own name and recover damages claimed by children).

125. *See id.* (rejecting claim that it should set precedent).
of action for loss of spousal consortium. The Erhardt court indicated that when confronted with the "proper case," it would be willing to recognize the action for parental consortium.

Twenty-one years later, a Washington state court revisited the issue in Roth v. Bell. In deciding Roth, the Washington Court of Appeals followed Erhardt and declined to recognize the cause of action. The intermediate appellate court held that this matter should be left to the legislature.

The Washington State Supreme Court overruled the court of appeals in Ueland v. Reynolds Metals Co. The supreme court noted that case law subsequent to Erhardt expanded the consortium theory of recovery. Accordingly, the court recognized that adoption of the child’s cause of action was indeed appropriate, if not long overdue.

---

126. Id.; see Ash v. S.S. Mullen, Inc., 43 Wash. 2d 345, 346-47, 261 P.2d 118, 118-19 (1959) (refusing to allow recovery to wife of worker for loss of consortium due to employer's negligence because action was not permitted at common law or conferred by statute and Worker's Compensation Act bars such action), overruled in Lundgren v. Whitney's, Inc., 94 Wash. 2d 91, 92, 614 P.2d 1272, 1273 (1980) (en banc) (holding that wife could claim damages for loss of consortium when husband is injured by negligence of third party); see also supra note 31 and accompanying text (identifying court in Hitaffer as first court to grant wives loss of consortium recovery due to defendant's negligent conduct toward spouse).
127. Erhardt, 53 Wash. 2d at 106, 330 P.2d at 1012. The court was unwilling to extend the common law because the child could recover all claimed damages by an action in the parent's name. Id.
128. 24 Wash. App. 92, 600 P.2d 602 (1979). In the case, three minor children sought recovery for loss of parental consortium with their mother. Roth v. Bell, 24 Wash. App. 92, 93, 600 P.2d 602, 603 (1979). The mother suffered a severe stroke after taking an oral contraceptive manufactured by one of the defendants. Id.
129. See id. at 93, 600 P.2d at 604 (granting recovery to husband for loss of consortium, but denying recovery to children for loss of parental consortium because they had no recognized right to sue). Id.
130. Id. at 104, 600 P.2d at 607 (stating legislature was proper entity to balance interest of injured party against defendant's limited liability).
133. Ueland v. Reynolds Metals Co., 103 Wash. 2d 131, 134-35, 691 P.2d 190, 192 (1984) (noting that "stage was set for the adoption of the child's cause of action"). The court followed the reasoning of Dean Pound of Harvard Law School. In 1916 Dean Pound wrote: As against the world at large a child has an interest ... in the society and affection of the parent, at least while he remains in the household. But the law has done little to secure these interests. At common law there are no legal rights which protect them ... It will have been observed that legal securing of the interests of children falls far short of what general considerations would appear to demand. Id. (citing Pound, Individual Interests in the Domestic Relations, 14 MICH. L. REV. 177, 185-86 (1916)); see also W. PROSSER, HANDBOOK ON THE LAW OF TORTS § 125, at 896 (4th ed. 1971) (criticizing void in law that has denied child compensation for loss of parent's love and guidance as result of negligent injury to parent). Dean Prosser stated that "[t]he interest of the child in proper parental care ... has run into a stone wall ... ." Id. Prosser argued that the child does suffer a serious and genuine injury, but unfortunately the child has received more sympathy from legal commentators than from judges. Id.
In *Ueland*, the court found nonconformity in this area of law troubling. For instance, a child is permitted to recover for loss of consortium upon the death of a parent due to another's negligence. Conversely, if the parent managed to survive, albeit in a vegetative state, prior case law denied the child recovery. Additionally, the court saw the incongruity of allowing a husband or wife to recover for loss of consortium, but not children. The court viewed this practice as a mistaken assumption that adults have a greater tendency to suffer emotional harm than children. While the court acknowledged that many jurisdictions have denied this cause of action, it noted that the "emerging trend" is to recognize the child's right to recover for loss of parental consortium. The court found that cases adopting the child's cause of action were more logically persuasive.

V. THE DISTRICT OF COLUMBIA SHOULD RE-EXAMINE LOSS OF CONSORTIUM

Despite *Ueland*'s recognition of the emerging trend allowing children to recover for loss of consortium, a majority of courts still do not recognize this cause of action. Before the District of Columbia courts jettison long-standing precedent and adopt a minority holding, they should closely evaluate the legal and social arguments

---

134. *Ueland*, 103 Wash. 2d at 134, 691 P.2d at 192.
135. *Id.*
136. *Id.; see Comment, The Child's Right to Sue, supra* note 17, at 742 (arguing children have greater need for compensation for loss of emotional benefits from family than either parents or spouses).
137. *Ueland*, 103 Wash. 2d at 134, 691 P.2d at 192.
138. *Id.* at 135, 691 P.2d at 195; *see Annotation, The Child's Right of Action for Loss of Support, Training, Parental Attention, or the Like, Against a Third Person Negligently Injuring Parent, 11 A.L.R. 4th 549, 552 (1982) (noting that courts have traditionally denied such cause of action).
140. *Ueland*, 103 Wash. 2d at 135, 691 P.2d at 193.
presented on both sides of this issue. The traditional arguments brought forth to combat the expansion of loss of consortium are legislative deference, the intangible nature of the loss, the potential for double recovery, the concern of increased litigation, and the fear of escalating insurance rates. The analyses adopted by Ferriter, Berger, Ueland, and their progeny show that these legal arguments do not warrant the continued denial of children's rights to recover for loss of parental consortium. Moreover, public policy considerations demonstrate that courts should recognize a cause of action for loss of parental consortium.

A. Dismantling the Traditional Arguments Against Expanding Loss of Consortium

1. Legislative deference

Many courts, while recognizing the equity of providing children with the right to recover for loss of parental consortium, have reasoned that the legislature, and not the judiciary, should make significant changes in the common law. These courts defer to the

142. See supra note 5 and accompanying text (noting that legislature is appropriate medium for change of this nature).
143. See supra note 6 and accompanying text (arguing that action for loss of parental consortium need not be recognized because it is too intangible).
144. See Salin v. Kloempken, 322 N.W.2d 736, 740 (Minn. 1982) (stating that double recovery to child presents very real threat because juries may already factor in child's emotional loss through award to parent). But see Hay v. Medical Center Hosp., 145 Vt. 533, 541-42, 496 A.2d 939, 944 (1985) (noting that careful jury instructions can avoid problem of double recovery); Berger v. Weber, 411 Mich. 1, 17, 303 N.W.2d 424, 427 (1981) (asserting that better alternative is to have child's claims argued openly in court and evaluated separately).
145. See supra note 7 and accompanying text (discussing fear of increased litigation).
146. See supra note 8 and accompanying text (observing that numerous claims may evolve from one tortious incident); see also Salin, 322 N.W.2d at 741 (noting that settling or litigating claims for loss of consortium would be sizable expense, plus substantial social cost would result from use of valuable judicial resources).
147. See generally Comment, The Child's Right to Sue, supra note 17, at 740 (noting that child who is deprived of parent's love, care, companionship, and guidance experiences tremendous loss); Love, Tortious Interference with the Parent-Child Relationship, supra note 17, at 597 (maintaining that it is possible to view both actions for spousal consortium and actions for parental consortium as compensating for loss of familial society and companionship); Petrilli, A Child's Right to Collect, supra note 17, at 320 (concluding that children have legal interest in their relationship with family members and, therefore, have remedial right to sue for enforcement of such interest).
148. See Hoffman v. Dautel, 189 Kan. 165, 169, 368 P.2d 57, 59 (1962) (acknowledging that child of injured parent is deprived of something valuable and precious, but nevertheless rejecting child's claim because of its "far-reaching results").
149. Accord Zorzos v. Rosen, 467 So. 2d 305, 307 (Fla. 1985) (maintaining that it is wiser to allow legislature to confer right as legislative branch has greater ability to study and evaluate cause); Huter v. Ekman, 137 Ill. App. 3d 733, 735, 484 N.E.2d 1224, 1225-26 (1985) (reasoning that legislature is in better position to weigh costs and benefits of proposed action); Steiner v. Bell Tel. Co., 358 Pa. Super. 505, 513, 517 A.2d 1348, 1356 (1986) (stating that due to legislature's greater ability to weigh benefits and costs of creating new legal remedies, it, and not courts, is appropriate entity to create cause of action for child's loss of consort-
legislature and deny the child’s right to recover for loss of parental consortium. In Hitaffer v. Argonne Co., however, the District of Columbia Circuit did not wait for legislative action to extend loss of consortium recovery to the wife of the injured spouse. In 1958, however, the same court, in Pleasant v. Washington Sand & Gravel Co., refused to similarly recognize a child’s cause of action for loss of parental consortium, relying on the excuse that a change of this nature should be left to the legislature.

Several courts presented with the loss of parental consortium issue have adhered to the legislative deference argument. The courts adopting this rationale fail to recognize that the action for loss of consortium was originally a judicial, not legislative, creation and, therefore, can be judicially expanded. Traditionally, courts have discovered rights and remedies in response to perceived needs of individuals and society’s changing aspirations. As society evolves, courts should recognize new or evolving rights and remedies. The proper approach for the expansion of loss of consortium is for courts to take an active role in evaluating the common

tium); see Duhan v. Milanowski, 75 Misc. 2d 1078, 1084, 348 N.Y.S.2d 696, 702 (Sup. Ct. 1973) (stating that judicial system is completely inadequate to solve such complex issue). But see Reben v. Ely, 146 Ariz. 309, 310, 705 P.2d 1360, 1361 (Ct. App. 1985) (noting that legislative inaction in areas of loss of consortium is not expression of legislative intent).

Recently, the Maryland Court of Appeals held that a child may not recover for the loss of parental consortium when a parent is injured by a negligent third party. Gaver v. Harrant, 316 Md. 17, 32, 557 A.2d 210, 218 (1989). The District of Columbia often looks to the law of Maryland for guidance. See D.C. CODE ANN. § 49-301 (1981) (stating that common law and all British statutes in force in Maryland remain in force in District of Columbia except where inconsistent with or repealed by subsequent legislation). The District of Columbia, however, is not required to follow the laws of Maryland blindly, particularly in the area of common law.

150. See supra note 149 (identifying courts which defer to legislature).
151. See supra notes 31-34 and accompanying text (observing D.C. Circuit’s willingness to break ground in area of loss of spousal consortium to wife).
153. See supra note 5 and accompanying text (noting legislative deference as reason for denying child’s cause of action).
154. See Comment, The Child’s Right to Sue, supra note 17, at 729; see also Lundgren v. Whitney’s, Inc., 94 Wash. 2d 91, 92-95, 614 P.2d 1272, 1275 (1980) (stating that most courts have rejected argument that abrogation of common law loss of consortium rule should be left to legislature and that it is court’s duty to reassess common law); Ueland v. Reynolds Metals Co., 103 Wash. 2d 131, 140, 691 P.2d 190, 195 (1984) (granting children right of action for loss of parental consortium and refusing to defer to legislature because justice requires reformation of common law to answer evolving standards).
156. Justice Cardozo’s famous directive illustrates the appropriate role of the court: The court best serves the law which recognizes that the rule of law which grew up in a remote generation may . . . be found to serve another generation badly, and which
law, rather than abdicating their responsibility by deferring to the legislature.157

2. Intangible nature of the loss

Another argument against the expansion of the common law is that loss of parental consortium is too intangible.158 Some courts fear that damages would be too speculative and not offer the appropriate remedy to the child.159 Loss of consortium damages will always be somewhat “uncertain” because these damages seek compensation for an intangible loss—yet, District of Columbia courts authorize the recovery of damages for intangible losses in many cases.160 In Hitaffer, for example, the court denounced this same argument in 1950 when it provided wives with recovery for a similar intangible loss.161

Although a monetary award cannot replace the loss of a parent, it is the only remedy that our legal system can offer.162 Compensation
seems even more appropriate in the parent-child relationship than in the spousal relationship. In fact, a child’s reliance on a parent may be greater than the reliance between a husband and wife. Adults have the ability to create new relationships to replace the emotional support they have lost. Children, on the other hand, would rarely take the initiative to form new relationships to mitigate their loss. Children of a single parent who have grown accustomed to depending on that one person are even less likely to fill their emotional void. It is in society’s best interest to facilitate a child’s emotional development. While monetary awards are no replacement for parental love and affection, they can offset some of the difficulties.

3. Double recovery

The fear of double recovery has caused other courts to shy away from the recognition of the child’s right to recover for loss of parental consortium. The argument that permitting children to recover results in double recovery assumes, often incorrectly, that a jury considers the plight of children when awarding damages to the injured parent. Accordingly, any further compensation to the children would result in double recovery.

Washington Hospital shows that this assumption is mistaken. In the Washington v. Washington Hospital Center trial, the jury never heard deny recovery to child who has suffered loss of parent’s society and companionship); Comment, The Child’s Right to Sue, supra note 17, at 734 (arguing that monetary award can alleviate loss by allowing for services such as live-in help which may permit child to receive some guidance and companionship).

163. See Comment, The Child’s Right to Sue, supra note 17, at 742 (arguing that children are in greater need of compensation because they are in their formative years and, therefore, require more emotional nurturance to develop appropriately).

164. Id.

165. Id.

166. See Glicklich v. Spievack, 16 Mass. App. 488, 496, 452 N.E.2d 287, 292 (1983) (stating that minor son living with single parent could recover for loss of parental consortium, even though he was not economically dependent on parent, because it was sufficient that mother had played significant role in daily life).

167. See infra note 208 and accompanying text (emphasizing how well-being of children affects society).

168. See infra notes 201-03 (suggesting some ways monetary award may mitigate traumatic impact that loss of parent has on child).

169. See Salin v. Kloempken, 322 N.W.2d 736, 740 (Minn. 1982) (arguing that double recovery is possible since juries may already compensate child for loss of economic support through award to parent, or juries may indirectly factor in child’s emotional loss through award to parent). But see Hay v. Medical Center Hosp., 145 Vt. 533, 541-42, 496 A.2d 939, 944 (1985) (stating that careful jury instructions can avoid problem of double recovery).

170. See generally Note, Washington Expands a Child’s Cause of Action, supra note 162, at 605 (noting that acceptance of double recovery argument assumes that juries do not follow instructions of trial court).

171. See supra note 144 and accompanying text (identifying potential threat of double recovery).
Mrs. Thompson's children testify and never really heard the full extent of the hardships wrought as a result of the injuries to their mother. Thus, any indirect compensation that the children received would be awarded in a purely speculative manner.

A simple resolution to the potential problem of double recovery would be for judges to instruct the jury that the children's damages are distinct from the parent's injury. Juries could make two separate damage awards. The children would be compensated for the loss of companionship, support, and guidance with the injured parent. The injured parent, on the other hand, would receive an award as compensation for the injuries personal to herself or himself.

One court noted that recognition of the child's cause of action would permit greater equity. Independent claims for children would prevent juries from blindly calculating the loss suffered by the child as a part of the damages awarded to the parent. When juries incorporate damages for the child into the parent's recovery, the protection of that child's rights are left to chance. The reality is that the child is harmed and should not be forced to depend on the cause of action of another for compensation.

4. Increased litigation

Some courts have expressed a concern that recognition of the right to recover for loss of parental consortium may significantly in-

173. Hay, 145 Vt. at 541-42, 496 A.2d at 944. Sample jury instructions for loss of parental consortium could parallel those used in spousal consortium cases. See Shockley v. Prier, 66 Wis. 2d 394, 403 n.5, 225 N.W.2d 495, 500 n.5 (1975) (identifying jury instructions for loss of consortium when husband is injured). The instructions could read as follows:

To answer the question pertaining to loss of parental consortium with the parent, you should name such sum as you feel will fairly and reasonably compensate the children for such loss as they have sustained by being deprived of the parent's aid, assistance, comfort, society, and companionship during such period as the parent was unable to render such services because of the injuries. In considering the amount to be awarded, you will bear in mind the evidence as to the relationship which existed between the parent and the child before the injury.

You will not include in your finding any sum which you are required to determine in any other question, representing loss of earning capacity sustained by the parent by reason of his injuries. To do so would allow double damages for such loss of earning capacity, which you must not do.

175. See id. (maintaining that child's loss could be openly argued in court).
176. See id. (noting that parent may or may not spend award on child).
177. Comment, The Child's Claim, supra note 17, at 248 (addressing concern that because parent cannot recover for child's loss, child is unprotected) (quoting Maddever, Right of Child to Recover Damages for Enticement of His Mother, 20 CORNELL L.Q. 255, 257 (1935)).
crease litigation. Courts have feared that the number of claims made would equal the number of children of the injured parent. Rather than ignore the legal rights of children, courts can minimize this concern by requiring that the claims of all children be joined with the injured parent’s lawsuit. Once it is determined that a wrong has been committed, it would be an act of injustice to deny recovery of one individual simply because additional claims may be brought. The theory is that all who are wronged as a result of the defendant’s conduct should receive compensation from the defendant. The concern of increased litigation should not be a factor for denying the child’s cause of action where mandatory joinder of claims can solve the potential problem.

5. Increased insurance rates

A final argument courts often present against recognizing a child’s right to recover for loss of parental consortium is that society will bear the cost of this new cause of action through increased insurance rates. It is questionable whether judicial recognition of a child’s right to loss of consortium recovery would substantially increase insurance rates because many insurance companies may be


180. See Ueland v. Reynolds Metals Co., 103 Wash. 2d 131, 140, 691 P.2d 190, 194 (1984) (holding that children's claims for loss of parental consortium must be joined with injured parent's claim whenever possible); see also Love, Tortious Interference with the Parent-Child Relationship, supra note 17, at 604 (identifying solution to problem of increased litigation by requiring children in single family to sue as class); Fed. R. Civ. P. 20(a) (noting that all persons may join in one action as plaintiffs if they assert any right to relief arising out of same transaction or occurrence).

181. See Comment, The Child's Claim, supra note 17, at 248-49 (arguing that all who are injured should be allowed to recover against wrongdoer) (quoting Maddever, Right of Child to Recover Damages for Enticement of His Mother, 20 CORNELL L.Q. 255, 256 (1935)); see also Williams v. Baker, 572 A.2d 1062, 1067 (D.C. 1990) (concerning mother's recovery for mental distress). The court in Williams stated that "fear of opening the gates to a flood of litigation [should not] be determinative of whether the interest in question should be legally protected." Id.

182. See Comment, The Child’s Claim, supra note 17, at 248 (concluding child should not have to depend upon non-injured parent’s cause of action for compensation for it is uncertain whether child would ever recover) (quoting Maddever, Right of Child to Recover Damages for Enticement of His Mother, 20 CORNELL L.Q. 255, 256 (1935)).

183. See supra note 180 and accompanying text (discussing joinder of claims).

184. See Note, Washington Expands a Child’s Cause of Action, supra note 162, at 605 (maintaining argument of increased insurance rates as reason for denying child’s cause of action).
1991] EXPANSION OF LOSS OF CONSORTIUM RECOVERY 133

currently paying children’s claims in settlements to avoid unfavora-
ble judgments.185 Insurance costs may increase, but this should not
bar recognition of the child’s cause of action.186 Until such cause of
action is implemented, the increase in insurance rates cannot be de-
termined with certainty.187

Furthermore, the argument is weakened because courts that have
rejected loss of parental consortium as a cause of action have dis-
missed the argument of an increased societal insurance burden.188
These courts note that recognition of the child’s right to loss of pa-
rental consortium recovery cannot be “weighed” against the con-
cern of increasing insurance rates.189 The cost of insurance must
not be a factor in determining a party’s legal liability. Rather, the
cost of such insurance should vary with the magnitude of a person’s
potential liability under the law.190

B. Arguments in Favor of Expanding Loss of Consortium

I. Policy considerations

The decision to recognize a child’s cause of action for loss of pa-
rental consortium has significant public policy considerations.191
The decision to allow a child the opportunity to recover for lost pa-
rental consortium signifies the importance society attaches to pro-
tecting the interest of children.192 The primary reasons for allowing
the child to recover are the recognition of children as legal per-
sons,193 the acknowledgment that the child has suffered true

185. See Harrison, Children Collect Consortium with Injured Parents, 11 LAW. ALERT No. 6, 1, 8
(Mar. 18, 1991) (acknowledging that it is in defendant’s best interest to settle cases in order to
avoid larger liability in future cases).
186. Love, Tortious Interference with the Parent-Child Relationship, supra note 17, at 604 (dis-
cussing possibility of increased premiums and ceiling on amount of damages recoverable as
solution if costs of recognizing child’s cause of action for loss of parental consortium becomes
prohibitive).
187. Id. (stating it is impossible to predict precise impact child’s right to recover for loss
of parental consortium will have on insurance premiums).
188. See Norwest v. Presbyterian Intercommunity Hosp., 293 Or. 543, 552, 652 P.2d 318,
323 (1982) (refusing to recognize child’s cause of action for loss of parental consortium, while
discounting argument of increased insurance costs); see also Green v. A.B. Hagglund & Soner,
634 F. Supp. 790, 796 (D. Idaho 1986) (adopting analysis and conclusion of Norwest in refus-
ing to recognize child’s loss of consortium cause of action).
189. See Norwest, 293 Or. at 522, 652 P.2d at 323 (determining courts cannot weigh psy-
chological or social elements involved in determining compensation for child against insur-
ance rates).
190. Id. (emphasizing that person’s liability under common law “remains the same
whether or not he has liability insurance”).
191. See supra note 147 and accompanying text (listing policy considerations).
192. See Comment, The Child’s Right to Sue, supra note 17, at 740 (noting that decision to
impose liability upon defendant signifies that social importance of protecting child’s interest
exceeds importance of freeing defendant from liability).
193. See Theama v. City of Kenosha, 117 Wis. 2d 508, 516-17, 344 N.W.2d 513, 517-18
(1984) (noting child’s evolving status into person deserving of constitutional rights and pro-
loss, and the importance of the family relationship.

First, the courts have begun to recognize the child as a legal person. Accordingly, children should receive the same legal protections and opportunities currently provided to adults. If an adult can receive compensation for loss of consortium with an injured spouse, children should likewise be compensated for loss of consortium with an injured parent.

Second, common sense requires the recognition that children suffer a genuine loss when they are deprived of a parent’s companionship and affection. Studies have shown that these losses have a negative impact on the child’s development and, consequently, have long range effects on the child’s welfare and personality. It is well known that life experiences have different effects on an individual’s personality. If children can encounter enough rewarding experiences, their losses may be softened. An award of damages to the child enables the child to receive services and activities that

 protections as factor for granting child’s cause of action for loss of consortium). For examples of protections that children receive, see Wisconsin v. Yoder, 406 U.S. 205, 243 (1972) (Douglas, J., dissenting) (stating “children are ‘persons’ within the meaning of the Bill of Rights”); Prince v. Massachusetts, 321 U.S. 158, 165 (1944) (maintaining that it is in society’s interest to protect children from abuse and provide opportunity for them to grow into well-developed citizens), reh’g denied, 321 U.S. 804 (1944).

194. See Comment, The Child’s Right to Sue, supra note 17, at 740 (recognizing that children suffer serious loss when they are denied injured parent’s love, care, companionship, and guidance).

195. See id. at 741 (acknowledging that family relationship is relation on which “society must depend for endurance, permanence, and well-being”) (quoting Russick v. Hicks, 85 F. Supp. 281, 284 (W.D. Mich. 1949)); see also Theama, 117 Wis. 2d at 517-18, 344 N.W.2d at 518 (observing importance of family unit in society).

196. Weil v. Moes, 311 N.W.2d 259, 269 (Iowa 1981) (discussing trend to recognize child’s cause of action for loss of parental consortium and concluding that since children suffer most, money damages should be awarded separately to ensure it benefits child).

197. See id. (stating that arguments presented to deny recognition of child’s claim are no more significant than those in spouse’s claim).


201. See id. at 105 (discussing how some rejected children benefit from warm, non-hostile relations with their peers).
they would otherwise be unable to obtain.\textsuperscript{202} In the long run, society benefits from a healthy and emotionally stable citizenry.\textsuperscript{203}

Third, because the family is an integral part of our society and the child plays a significant role in the family relationship, the child's interest should require legal protection.\textsuperscript{204} The judicial system's failure to recognize the child's right to recover for loss of parental consortium devalues the importance of a parent.\textsuperscript{205} The reality is that each family member plays a significant role in creating the family unit.\textsuperscript{206} Because an injury to one family member affects all others, the loss of spousal consortium can be no more weighty than the loss of parental consortium.\textsuperscript{207}

Considering these three elements—recognition of children as legal persons, acknowledgement that the child has suffered a true loss, and the importance of the family relationship—it would be unjust to refuse to grant the child's cause of action for loss of parental consortium. The child's loss of a parent's companionship and affection can significantly influence a child's welfare and personality for his or her entire life. Because the nature and disposition of every individual impacts society, it is extremely important to both children and society that the legal system protect the nurturance and support children receive from their parents.\textsuperscript{208}

2. \textit{One unexplored avenue: changing structure of the family}

One important consideration that most courts fail to focus on

\textsuperscript{202} See generally Petrilli, \textit{A Child's Right to Collect}, supra note 17, at 346 (stating compensation can provide children with babysitters, psychiatrists, or other counselors to promote normal development).


\textsuperscript{204} See supra note 195 and accompanying text (acknowledging important role families play in society); see also Williams v. Baker, 572 A.2d 1062, 1064 (D.C. 1990) (concerning granting of recovery to family members for emotional distress). The \textit{Williams} court held that "immediate family members" could recover for emotional distress if they were within the physical zone of danger and feared for their own safety. \textit{Id.}

\textsuperscript{205} See Comment, \textit{The Child's Right to Sue}, supra note 17, at 741 (emphasizing that denial of child's right to recover for loss of parental consortium undermines importance of parent to child). But see Ueland v. Reynolds Metals Co., 103 Wash. 2d 151, 142, 691 P.2d 190, 196 (1984) (Dore, J., dissenting) (pointing out that by awarding parental consortium damages, child will receive message that "the special relationship he had with his parent was not special after all because it could be replaced by money"). Judge Dore concluded his dissent with the following observation: "Unfortunately, some pains in life must be endured and overcome by the individual himself. Perhaps it is better this way; sometimes a child should grieve and learn that a parent's love is irreplaceable." \textit{Id.} at 143, 691 P.2d at 197.

\textsuperscript{206} See generally Comment, \textit{The Child's Right to Sue}, supra note 17, at 741-42 (discussing the roles and interests of spouses, parent, and child as well as comparable worth of those roles to family unit).

\textsuperscript{207} \textit{Id.} (concluding that children have equal or more need for compensation of consortium loss than do parents or spouses).

\textsuperscript{208} Miller v. Monsen, 228 Minn. 400, 403, 37 N.W.2d 543, 545 (1949).
when reviewing the parental consortium issue is the changing structure of the family. The American family today is quite different from families at the time the judiciary first created the concept of consortium. Today it has become more and more common to find families composed of only one adult, usually a woman and minor children. For instance, in the District of Columbia 19.3% of the households are headed by women with minor children. When children have only one parent in the home and that parent is injured, their loss can only be intensified. Nevertheless, the law currently deprives these children of any right to recover for their loss when a parent, possibly their only one, is injured.

It is essential that the law maintain sufficient flexibility to change with society. The importance of protecting children's interests and the emergence of a new family structure are two factors that were absent when the United States Court of Appeals for the District of Columbia Circuit denied the child's cause of action for loss of parental consortium in 1958. These changed circumstances should mandate the District of Columbia Court of Appeals to expand its law regarding loss of consortium.

209. See Petrilli, A Child's Right to Collect, supra note 17, at 344 (discussing failure of courts to consider one-adult families and changing family structures when considering whether to adopt child's cause of action for loss of parental consortium).
210. See Petrilli, A Child's Right to Collect, supra note 17, at 344 n.70 (citing that 25% of children in United States may experience mental development troubles because one out of four children live in households without one or both parents); see also United States Dep't of Commerce, Bureau of the Census Statistical Abstract of United States 53 (104th ed. 1983) (finding that one out of four children live in households that lack one or both parents); T. Nazario, In Defense of Children: Understanding the Rights, Needs and Interests of the Child 180 (1988) (noting that families have changed dramatically in recent years). The author cites the following changes: the number of couples living together without the "benefit" of marriage has nearly tripled, the divorce rate has increased 65% over the past ten years, single parenting has increased, and the percentage of families where both husband and wife work has increased by nearly 20%. Id. at 181. Despite these changes, the family must continue to fulfill the needs of children. Id. at 180. Fulfilling the needs of children entails spending time with children each day, sharing personal beliefs and feelings, and encouraging the development of outside friendships and experiences. Id.
211. Petrilli, A Child's Right to Collect, supra note 17, at 344.
213. See Beikmann v. International Playtex, Inc., 658 F. Supp. 255, 258 (D. Colo. 1987) (surmising children are in greater need of law's protection than spouses because children of single parent families often do not have someone to guide, comfort, or support them throughout life after they lose parent).
215. See Brief for Appellant, supra note 51, at 27-28 (citing Holmes, The Path of the Law, 10 Harv. L. Rev. 457, 469 (1897)) (stating that "[i]t is . . . revolting if the grounds upon which . . . [a rule] was laid down have vanished long since, and the rule simply persists from blind imitation of the past.").
216. See supra note 210 and accompanying text (discussing recent societal changes).
VI. Recommendations

The District of Columbia Court of Appeals should recognize the child's cause of action for loss of parental consortium. In doing so, the court should establish parameters for recovery. In order to establish guidelines for recovery, the District of Columbia Court of Appeals must evaluate three areas: the severity of the injury required to implicate a suit for loss of parental consortium, the measure of damages, and the allocation of damages.

Admittedly, children are inconvenienced virtually every time their parents are injured. The court, therefore, must determine the threshold level at which the child's loss will be deemed sufficient to warrant compensation. For instance, should a child receive compensation if a parent breaks a leg and is temporarily unable to participate in recreational activities? One can easily envision claims for recovery being taken to the extreme.217

Most courts that allow a child to recover for loss of parental consortium limit recovery to situations where the parent is severely injured.218 The inquiry for determining whether a parent is severely injured determines whether the child suffered a loss of society and companionship and, consequently, is deprived of parental guidance, love, and affection.219 In Washington Hospital Center, these questions are easily answered. Both Devin Michelle Thompson and her sister Toyia Green clearly have been deprived of their mother's guidance, love, and affection.220 Their mother will remain, according to medical opinion, in a vegetative state for the remainder of her life.221 It would be difficult to imagine a more compelling case for recognizing a child's loss of parental consortium. Unfortunately, the District

---

   
   It is still unthinkable that any one shall be liable to the end of time for all of the results that follow in endless sequence from his single act. Causation cannot be the answer; in a very real sense the consequences of an act go forward to eternity, and back to the beginning of the world.
   
   Id. (quoting Prosser, Palsgraf Revisited, 52 Mich. L. Rev. 1, 24 (1953)).

218. See generally Note, Washington Expands a Child's Cause of Action, supra note 162, at 611 (asserting that limiting recovery to those situations where parent is severely injured will decrease chance of unwarranted recovery and unlimited liability). But see Berger v. Weber, 411 Mich. 1, 17, 303 N.W.2d 424, 427 (1981) (refusing to limit child's cause of action to instances where parents are "severely" injured).

219. See Note, Washington Expands a Child's Cause of Action, supra note 162, at 611 (noting that where parent is severely injured, child will be deprived of parental guidance, support, and affection).


221. Id.
of Columbia Court of Appeals did not seize this opportunity to recognize the child's cause of action.

In cases such as *Washington Hospital Center*, the appropriate measure of damages is difficult to assess due to the intangible nature of the loss. 222 In making such a determination, the jury must be instructed to look at the totality of the circumstances. Such circumstances include, but are not limited to, the ages of the children, the level of interaction between the parent and the child, and the personalities of both the parent and the child. 223 If an injured parent has several children, the fact finder should determine the appropriate measure of damages for each child by evaluating each child's individual loss. 224

In setting the limits of loss of consortium claims, the District of Columbia Court of Appeals may wish to refer to the Wrongful Death Act as a guide. 225 Recovery under the Wrongful Death Act compensates the decedent's spouse for both the monetary loss of income and the value of services lost to the family as a result of the decedent's death. 226 The court should not, however, feel compelled to limit recovery to the standards set out in the Act for two reasons. First, a child whose parent has died suffers a loss equal to the loss of a child whose parent is severely injured, yet the child with the injured parent is reminded of his or her loss daily, thus, preventing the child's grief from fading with time. 227 Second, the Wrongful Death Act and the remedy of loss of consortium were created in two different spheres, the legislature and common law respectively. 228 Given these differences, incongruous treatment of the two would be appropriate. 229

---


224. *Id.* at 625 (discussing alternatives for allocating damages when more than one survivor brings wrongful death action).

225. *See supra* note 76 and accompanying text (enumerating elements of Wrongful Death Act and identifying anomaly in law of permitting recovery in wrongful death situations, yet denying recovery when parent is negligently injured).


227. *See Love, Tortious Interference with the Parent-Child Relationship, supra* note 17, at 610-12 (maintaining death/injury classification of wrongful death statutes should be subjected to intermediate standard of review, and as such, are fatally underinclusive, because parents and children of severely injured person sustain genuine loss of society and companionship, recovery for which is one objective of wrongful death legislation).

228. *See Cogger v. Trudell, 35 Wis. 2d 350, 353, 151 N.W.2d 146, 147 (1967)* (noting that cause of action for wrongful death is purely statutory as no such right existed at common law).

229. *See Theama v. City of Kenosha, 117 Wis. 2d 508, 519, 344 N.W.2d 513, 518 (1984)* (acknowledging that children of injured parent would not have cause of action under Wrongful Death Act, but noting that cause of action for wrongful death evolved from legislature and
Further, the allocation of damages should accrue to the child immediately.\textsuperscript{230} The purpose behind immediate compensation is that children need help alleviating the pain they suffer while growing up.\textsuperscript{231} The child's recovery may be partially spent during childhood in order to provide support for the child.\textsuperscript{232} In this way, the child's rights will truly be effectuated.

It makes sense for society to require the negligent party to provide assistance to the children rather than for children to bear these costs themselves. Although a monetary award cannot replace the love, care, and guidance offered by a parent, it can assist in filling the void a child experiences when deprived of parental consortium.\textsuperscript{233} Society must protect the interests of children, as children cannot protect themselves.

**CONCLUSION**

The current status of the law in the District of Columbia does not permit a child to recover loss of consortium damages when a parent is injured by a person's negligent conduct.\textsuperscript{234} Children should have a recognized cause of action for the loss of society, companionship, care, affection, protection, and support of their injured parent.\textsuperscript{235} In cases such as *Washington Hospital Center*, justice compels the allowance of such a cause of action.

The United States Court of Appeals for the District of Columbia Circuit recognized the need to expand the common law in 1950 when it allowed wives to recover for loss of spousal consortium.\textsuperscript{236} At that time, the court altered the common law to adapt to the

---

\textsuperscript{230} See Note, *Washington Expands a Child's Cause of Action*, supra note 162, at 611 (discussing logistics of payment to child).

\textsuperscript{231} See supra notes 199-203 and accompanying text (stating that parental loss during childhood can cause emotional and psychological problems, but compensation can help child function without emotional handicap).

\textsuperscript{232} See supra note 202 and accompanying text (noting benefits children can obtain by receiving compensation during childhood).

\textsuperscript{233} See supra notes 201-02 and accompanying text (discussing benefits that compensation can provide).

\textsuperscript{234} See Pleasant v. Washington Sand & Gravel Co., 262 F.2d 741 (D.C. Cir. 1958) (concluding children have no right to maintain action for loss of parental consortium).

\textsuperscript{235} See supra note 10 and accompanying text (discussing prior holdings that recognized children's right to maintain cause of action to recover for loss of parental consortium).

changing conditions of society. Spousal consortium, however, focused less on the services aspect of the claim and more on the sentimental elements.

Today, the emerging trend is toward judicial recognition of parental consortium. Not only has the meaning of consortium broadened since 1950, but the child's status in our society has changed. Children are now recognized fully as legal persons deserving of the same protection adults enjoy.

The United States Court of Appeals for the District of Columbia Circuit was the first court to recognize a wife's right to spousal consortium. The arguments against expanding loss of consortium recovery to children today are the same arguments the United States Court of Appeals for the District of Columbia Circuit confronted and discounted when it allowed wives to recover for loss of spousal consortium. The loss children suffer when a parent is negligently injured can be no more intangible than the loss a wife suffers when her spouse is negligently injured. By requiring specific jury instructions and joinder of the children's claims with that of the injured parent, courts can avoid double recovery and increased litigation.

Children need and deserve to have a cause of action for loss of parental consortium. Given that society and the law have begun to recognize the changing status of children, the District of Columbia Court of Appeals should likewise adapt to these changes and recognize the child's cause of action. By allowing children to recover for loss of parental consortium, the District of Columbia can maintain its status as a forerunner in recognizing consortium recovery.

237. See supra note 52 and accompanying text (discussing expansion of common law).
238. Hitaffer, 183 F.2d at 814.
239. See supra note 10 and accompanying text (listing cases that support trend recognizing children's right to loss of parental consortium claims).
240. See supra note 57 and accompanying text (enumerating rights that children currently possess that were not law when District of Columbia courts first encountered child's claim for loss of parental consortium).
241. See supra note 193 and accompanying text (discussing recognition of children as persons deserving of constitutional rights).
243. See id. at 815-19 (discussing arguments that injuries to wives are too remote, consequential, or problematic in ascertaining damages); see also Berger v. Weber, 411 Mich. 1, 14-17, 305 N.W.2d 424, 426-27 (1981) (dismissing reasons not to adopt child's cause of action for loss of parental consortium).
244. See Theama v. City of Kenosha, 117 Wis. 2d 508, 344 N.W.2d 513, 520 (1984) (stating recovery for loss of spousal consortium involves damages that are just as intangible as those involved for parental consortium).
245. See supra note 173 and accompanying text (providing jury instructions as solution to double recovery problem).