1995

Loss of Consortium: Kentucky Should No Longer Prohibit a Child's Claim for Loss of Parental Consortium Due to the Negligent Act of a Third Party

Bruce Gehle
University of Kentucky

Follow this and additional works at: https://uknowledge.uky.edu/klj

🔗 Part of the Torts Commons

Click here to let us know how access to this document benefits you.

Recommended Citation

Available at: https://uknowledge.uky.edu/klj/vol84/iss1/5

This Note is brought to you for free and open access by the Law Journals at UKnowledge. It has been accepted for inclusion in Kentucky Law Journal by an authorized editor of UKnowledge. For more information, please contact UKnowledges@lsv.uky.edu.
NOTES

Loss of Consortium: Kentucky Should No Longer Prohibit a Child’s Claim for Loss of Parental Consortium Due to the Negligent Act of a Third Party

INTRODUCTION

A child in Kentucky has no claim for loss of parental consortium when a parent is injured due to another person’s negligence. Kentucky’s Supreme Court most recently addressed this issue in 1977, when it declined to allow such a claim on the grounds that no other jurisdiction had yet recognized such a cause of action. This remained the case until 1980, but now a trend is rapidly emerging in other jurisdictions toward recognizing a child’s claim for loss of parental consortium due to a third party’s negligence.

1 Generally, loss of consortium “consists of several elements, encompassing not only material services but such intangibles as society, guidance, companionship, and sexual relation.” BLACK’S LAW DICTIONARY 309 (6th ed. 1990).

2 Brooks v. Burkeen, 549 S.W.2d 91, 92 (Ky. 1977) (“[N]o court or legislature in the United States has yet seen fit to recognize such an action. We decline the opportunity to be the first to do so.”).

3 See, e.g., Hibshipman v. Prudhoe Bay Supply, Inc., 734 P.2d 991, 997 (Alaska 1987) (recognizing that minors do have a separate cause of action for loss of parental consortium); Villareal v. State Dep’t of Transp., 774 P.2d 213, 216 (Ariz. 1989) (holding that children may recover for loss of consortium when a parent has a serious, permanent, and disabling injury); Audubon-Exira v. Illinois Cent. Gulf R.R., 335 N.W.2d 148, 151-52 (Iowa 1983) (citing an Iowa statute that allows children to bring an action for loss of parental consortium in cases of parental death or injury); Ferriter v. Daniel O’Connell’s Sons, Inc., 413 N.E.2d 690, 695 (Mass. 1980) (holding that children have the right to a remedy when they lose their expectation of parental society due to the negligent acts of others); Berger v. Weber, 303 N.W.2d 424, 427 (Mich. 1981) (holding that children are entitled to damages for loss of parental society and companionship); Pence v. Fox, 813
Claims for loss of consortium are currently recognized in Kentucky for the loss of a child\(^4\) and for the loss of a spouse.\(^5\) Such claims have been gaining acceptance based on the common law recognition of the importance of certain relationships beyond mere economic ties.\(^6\) Although a child can recover under Kentucky’s wrongful death statute,\(^7\) he or she is left without recourse when a parent is seriously injured and cannot carry on a relationship with the child equivalent to their pre-injury relationship. Due to the development in Kentucky of consortium claims in general,\(^8\) the trend in other jurisdictions toward recognition of claims for loss of parental consortium,\(^9\) and vital policy reasons,\(^10\) it is time for

---

\(^4\) KY. REV. STAT. ANN. § 411.135 (Baldwin 1994). This statute allows parents to recover damages for the loss of “affection and companionship” based on the wrongful death of a minor child, but not for serious injury to a minor child. Id.

\(^5\) Id. § 411.145. This statute defines consortium as “the right to services, assistance, aid, society, companionship and conjugal relationship between husband and wife, or wife and husband.” Id.

\(^6\) Michael A. Mogill, *And Justice for Some: Assessing the Need to Recognize the Child’s Action for Loss of Parental Consortium*, 24 ARIZ. ST. L.J. 1321, 1328 (1992) (discussing the fact that courts are recognizing the importance of “love, society, companionship and affection” instead of “services” as the predominant elements in consortium claims). Id.

\(^7\) KY. REV. STAT. ANN. § 411.130 (Baldwin 1994) (allowing the family to recover damages when a family member is negligently or intentionally killed).

\(^8\) See *infra* notes 38-68 and accompanying text.

\(^9\) See *infra* notes 138-89 and accompanying text.

\(^10\) See *infra* notes 190-208 and accompanying text.
Kentucky's Supreme Court to grant validity to a child's claim for loss of parental consortium.

Part I of this Note will discuss the history of consortium claims in general. Part II will look at the particular history of consortium claims in Kentucky. Part III outlines the major arguments against recognizing this new cause of action, while Part IV refutes these reasons in favor of recognition. Part V points out some of the policy considerations which support such a claim, and finally, this Note concludes that Kentucky should recognize a child's right to sue for loss of parental consortium when a parent is injured by another's negligence.

I. HISTORY OF CONSORTIUM CLAIMS

The Roman system of "paterfamilias" is the root of protection for relational interests among family members. The idea, which made its way through England to American common law, was that an injury to the wife, children, or servants of the father of the family was also an injury to the father. In other words, they had identical interests. A husband or father's right to sue for injury to his wife, children, or servants was based upon his loss of their services. Notably, this right to sue was only allowed to the husband, for when the wife sustained a loss it was "only the loss of the comfort of her husband's society and affectionate attention, which the law cannot estimate or remedy."

Modern courts and statutes no longer emphasize the notion of "services" when addressing a consortium claim. Factors such as love, society, affection, and companionship play a much greater role in their determinations. Even though recognition of more than just an interest

---

11 See infra notes 17-37 and accompanying text.
12 See infra notes 38-68 and accompanying text.
13 See infra notes 69-137 and accompanying text.
14 See infra notes 138-89 and accompanying text.
15 See infra notes 190-208 and accompanying text.
16 See infra notes 209-11 and accompanying text.
18 Id.
19 Id. This idea passed to the English common law through a master-servant analogy.
20 Id. at 353.
21 Mogill, supra note 6, at 1328 (quoting Lynch v. Knight, 11 Eng. Rep. 854, 863 (Ir. 1861)).
22 Id.
in “services” began before the nineteenth century, a wife’s identity was considered to merge into the husband’s at marriage, and she had no claim for loss of his consortium. With the enactment of the Married Women’s Acts (“Acts”) in the late nineteenth century, the concept of the merged identity was finally abolished. After passage of the Acts a married woman maintained a “separate legal identity, and an interest in her own property, as well as . . . the right to contract.” However, even with this enlightened view of a wife’s rights, she was still only allowed to sue for intentional injuries to her husband, and not for loss of consortium due to negligence. Intentional acts were considered to cause “a malicious interference with the marriage,” and malice was thought necessary for such a claim to be valid.

The first major breakthrough for wives was in 1950 with Hitaffer v. Argonne Co. With this decision, the District of Columbia Circuit Court of Appeals became the first court in the nation to recognize a wife’s cause of action for loss of her husband’s consortium. Interestingly, in finding this cause of action, the court refuted many of the arguments that courts continue to use today against allowing a child to recover for loss of parental consortium. The crucial factor in the court’s decision was that there was really no basis for allowing a husband to bring a consortium claim and not allowing a wife to bring a reciprocal action. Currently all

---

23 Id. at 1329.
24 Id.
25 Id.
26 Id. at 1330.
27 Id. Mogill also cites a relevant Kentucky case, Turner v. Heavrin, 206 S.W. 23, 25 (Ky. 1918), which endorses the philosophy behind the Acts: [The tendency of [the Married Women’s Acts] . . . [has] been to put the husband and wife upon an exact equality before the law, whereby the commonlaw rule of servitude in marriage had been repealed, so that the husband and wife now stand upon an equality of right in respect to property, torts, and contracts. . . . [There is] no reason in natural justice why the right of the wife to maintain an action against the seductress of her husband should not be coextensive with his right of action against her seducer.

Id.

28 183 F.2d 811 (D.C. Cir. 1950).
29 Id. at 812. The court noted the fact that they were not “unaware of the unanimity of authority elsewhere denying the wife recovery under these circumstances.” Id.
30 Id. at 814-15.
31 Id. at 819. The court stated that: It can hardly be said that a wife has less of an interest in the marriage relation than does the husband or in these modern times that a husband renders services of such a different character to the family and household that they must be
but three jurisdictions in the United States allow a similar claim to be made.\textsuperscript{32}

Although the common law did not consider a child to be the property of his father, the father was still allowed to recover for loss of the child’s services when the child was negligently injured.\textsuperscript{33} However, as the idea of the primacy of services in a consortium claim eroded, a number of courts began to recognize that the parent’s loss of a child’s affection, society, and companionship deserved compensation.\textsuperscript{34} Kentucky is one of many states that recognizes a parent’s right to recovery in a wrongful death claim for its minor child.\textsuperscript{35}

Several states have gone so far as to recognize a parent’s right to recover even when her child is merely injured due to another’s negligence. The 1975 case of \textit{Shockley v. Prier}\textsuperscript{36} involved the blinding of a

\begin{quote}
measured by a standard of such uncertainty that the law cannot estimate any loss thereof. The husband owes the same degree of love, affection, felicity, etc., to the wife as she to him.
\end{quote}

\textit{Id.}\textsuperscript{32} See, e.g., VA. CODE ANN. § 55-36 (Michie 1994) (abolishing a husband’s right to sue for loss of consortium); Schmeck v. City of Shawnee, 647 P.2d 1263, 1266-67 (Kan. 1982) (holding that a wife has no separate cause of action for loss of consortium); Cozart v. Chapin, 241 S.E.2d 144, 145-46 (N.C. 1978) (declining to recognize a husband’s right of action for loss of consortium due to the negligent acts of others); see also D. Richard Joslyn, Annotation, \textit{Wife’s Right of Action for Loss of Consortium}, 36 A.L.R.3D 900 (1971) (discussing if and when a wife has a cause of action for the loss of her husband’s consortium).

\textsuperscript{31} W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 125, at 934 (5th ed. 1984).

\textsuperscript{33} Id. at 932.


\textsuperscript{35} 225 N.W.2d 495 (Wis. 1975).
child as a result of a physician’s negligence. The court stated, “[o]ne needs little imagination to see the shattering effect that . . . [the child’s] blindness will have on the relationship between him and his parents. The loss of enjoyment of those experiences normally shared by parents and children need no enumeration here.” 37 Since there is a cause of action for injury to the parent/child relationship when the child is injured, there should also be a cause of action for the child when the parent is injured.

II. HISTORY OF CONSORTIUM CLAIMS IN KENTUCKY

Under current Kentucky law, only a husband or wife can make a claim for loss of consortium due to the negligence of others outside of the wrongful death context. 38 “Consortium” is defined as “the right to the services, assistance, aid, society, companionship and conjugal relationship between husband and wife, or wife and husband.” 39 The basis for this statute was the Kentucky Supreme Court’s 1970 decision in Kotsiris v. Ling. 40

Andrew Kotsiris made a claim for damages against George Ling for injuries sustained by Kotsiris due to Ling’s negligence. 41 After his claim was settled, his wife asserted a claim against Ling for loss of her husband’s consortium. 42 At the time, the majority of jurisdictions in the United States still denied such a claim. 43 However, the court felt that the justifications for denial had been “worked carefully upon, beat soundly, thwacked repeatedly, dubbed, and assailed verbally,” 44 by scholars and other courts. Therefore, the Kentucky Supreme Court rejected stare decisis 45 and expressly overruled their earlier cases denying such a claim. 46 Thus, the court allowed Mrs. Kotsiris’ claim for loss of society, companionship, conjugal affections, and physical assistance to proceed. 47

In Kotsiris the court stated that it was persuaded by the reasoning in Hitaffer, which addressed and dispensed with the major arguments against

---

37 Id. at 499.
39 Id.
40 451 S.W.2d 411 (Ky. 1970).
41 Id. at 411.
42 Id.
43 Id.
44 Id. at 412.
45 Stare decisis is defined as the “[p]olicy of courts to stand by precedent and not to disturb settled point.” Black’s Law Dictionary 1406 (6th ed. 1990).
46 Kotsiris, 451 S.W.2d at 412.
47 Id. at 413.
recognizing a wife's cause of action for loss of consortium.\textsuperscript{48} The Hitaffer court dismissed the argument that a wife was not entitled to her husband's services as an "arbitrary separation of the various elements of consortium devised to circumvent the logic of allowing the wife such an action."\textsuperscript{49} Emphasis on services was misplaced, for consortium was to be viewed as a "conceptualistic unity" of love, affection, companionship, and sexual relations.\textsuperscript{50}

The Kotsiris decision also dismissed the argument that there was a danger of double recovery. This argument reasons that the wife should not have a separate claim for damages arising out of the same incident for which her physically injured husband already has his own claim for damages.\textsuperscript{51} Once again the court stated that services were not to be the only element considered in a consortium claim.\textsuperscript{52} Additionally the court recognized certain sentimental elements for which a wife has a right to recovery.\textsuperscript{53} It went on to dismiss the argument of indirectness (that the wife was not directly harmed by the tortfeasor's actions) as moot in light of the fact that this had never stopped a husband from being allowed to recover for loss of a wife's consortium.\textsuperscript{54} The Kotsiris court thus rebuked some of the same arguments (double recovery and indirectness) that have been used by opponents of a child's recovery for loss of parental consortium. Although these reasons were not explicitly adopted in Kotsiris, the Kentucky Supreme Court's endorsement of the Hitaffer decision clearly shows approval of that court's rationales in refuting many of these standard arguments.

As in many other jurisdictions, the children of Kentucky have not yet had these arguments successfully applied in their favor. However, the reciprocity argument used by the court in Hitaffer can also be used in Kentucky when looking at the statute allowing parents to recover damages for the wrongful death of their minor child.\textsuperscript{55} This statute states that in a wrongful death action for a child, a parent has the right to sue for "loss of affection and companionship."\textsuperscript{56} Logically then a child

\textsuperscript{48} Id. at 412.
\textsuperscript{49} Hitaffer v. Argonne Co., 183 F.2d 811, 813 (D.C. Cir. 1950).
\textsuperscript{50} Id. at 814.
\textsuperscript{51} Kotsirs, 451 S.W.2d at 412 (stating that a wife cannot recover the cost of services provided to the injured husband; only the husband, as the injured party, can recover from the tortfeasor).
\textsuperscript{52} Id.
\textsuperscript{53} Hitaffer, 183 F.2d at 814.
\textsuperscript{54} Id. at 815.
\textsuperscript{55} KY. REV. STAT. ANN. § 411.135 (Baldwin 1994).
\textsuperscript{56} Id.
should also be able to sue for "loss of affection and companionship" when he or she loses a parent's society.

This logical analysis has been successfully applied in at least two jurisdictions. In *Ueland v. Reynolds Metal Co.*, the Washington Supreme Court faced a statutory situation similar to the present one in Kentucky. In Washington a parent could recover loss of consortium damages for the death or injury of a child by another's negligence. Moreover, under the state's wrongful death statute, a child could recover for loss of companionship if the parent died as a result of another's negligence. However, a child could recover nothing if the parent was severely injured but remained alive in a vegetative state. The court found this to be an incongruent state of affairs: "[P]ermitting a husband or wife but not children to recover for loss of consortium erroneously suggests that an adult is more likely to suffer emotional injury than a child."61

Similarly, in *Weidt v. Moes* the Iowa Supreme Court was forced to interpret a statute that recognized a parent's right to sue for loss of consortium from an injured or dead minor child. The court held that it was "unpersuaded of any legal distinction" between a parent's claim for consortium and a claim for consortium by a child.64

Despite the fact that the Kentucky Supreme Court could have made similar arguments in deciding *Brooks v. Burkeen* in 1977, the court chose to refrain, "because no court or legislature in the United States has yet seen fit to recognize such an action. We decline the opportunity to be the first to do so."65 However, since 1980 at least fourteen jurisdictions have recognized a child's cause of action for loss of parental consortium, with nine of these decisions coming within the last five years.

---

57 691 P.2d 190 (Wash. 1984).
58 Id. at 192.
59 Id. at n.3 (relying on WASH. REV. CODE § 4.20.020). The statute provides, "Every such action shall be for the benefit of the wife, husband, child or children . . . of the person whose death shall have been so caused." WASH. REV. CODE § 4.20.020 (1994).
60 Ueland, 691 P.2d at 192.
61 Id.
63 IOWA CODE ANN. § 613.15 (West 1965).
64 Weidt, 311 N.W.2d at 265 (quoting Borer v. American Airlines, Inc., 563 P.2d 858, 860 (Cal. 1977)).
65 549 S.W.2d 91 (Ky. 1977).
66 Id. at 92.
67 The fourteen jurisdictions are Alaska, Arizona, Iowa, Massachusetts, Michigan, Montana, New Mexico, Ohio, Oklahoma, Texas, Washington, West Virginia, Wisconsin,
years. The Kentucky Supreme Court can no longer stand on its rationale in *Brooks*; either the Kentucky Supreme Court or the Kentucky State Legislature should validate a child's claim for loss of parental consortium as a cause of action.

### III. Arguments in Jurisdictions Refusing to Change

Although the trend is in the opposite direction, a majority of jurisdictions still refuse to recognize a child's claim for loss of parental consortium due to a third party's negligence. Significantly, the high

---

<sup>68</sup> From 1989 to 1994, Wisconsin, Arizona, Oklahoma, Wyoming, West Virginia, Texas, Montana, Ohio, and New Mexico recognized a child's claim for loss of parental consortium. See *supra* note 3.

<sup>69</sup> See, e.g., Pleasant v. Washington Sand & Gravel Co., 262 F.2d 471, 472-73 (D.C. Cir. 1958) (holding that a child's claim for loss of parental consortium cannot be upheld); Meredith v. Scruggs, 244 F.2d 604, 604 (9th Cir. 1957) (holding that a claim for loss of parental consortium must be dismissed for failure to state a claim for which relief can be granted); Hoising v. Sears, Roebuck & Co., 484 F. Supp. 478, 481 (D. Neb. 1980) (interpreting Nebraska law to conclude that the Nebraska Supreme Court would not recognize the cause of action); Lewis v. Rowland, 701 S.W.2d 122, 124 (Ark. 1985) (refusing to create a cause of action for loss of parental consortium because such action should be left to the legislature); Borer v. American Airlines, Inc., 563 P.2d 858, 866 (Cal. 1977) (refusing to create a cause of action for loss of parental consortium); Lee v. Colorado Dep't of Health, 718 P.2d 221, 234 (Colo. 1986) (holding that an action by a child for loss of parental consortium is not recognized in Colorado); Zorzos v. Rosen, 467 So. 2d 305, 307 (Fla. 1985) (declining to create a new cause of action because such decisions are best left to the legislature); W.J. Bremer Co. v. Graham, 312 S.E.2d 806, 808 (Ga. Ct. App. 1983) (holding that a child cannot sue for loss of consortium because there is no statute allowing for such an action); Mueller v. Hellring Construction Co., 437 N.E.2d 789, 792 (Ill. App. Ct. 1982) (stating that loss of parental consortium is not actionable in Illinois); Hickman v. Parish of East Baton Rouge, 314 So. 2d 486, 489 (La. Ct. App. 1975) (holding that children cannot recover for loss of the society and services of their mother); Monias v. Eddal, 623 A.2d 656, 662 (Md. 1993) ("[P]arents and children do not have a claim for loss of each other's consortium."); Salin v. Kloempken, 322 N.W.2d 736, 742 (Minn. 1982) (declining to recognize a cause of action for loss of parental consortium because of the extra burden it would create on society through increased insurance costs, added expenses for litigation and settlement, and for public policy reasons designed to limit liability to a controllable degree); Bradford v. Union Electric Co., 598 S.W.2d 149, 150-51 (Mo. Ct. App. 1979) (holding that, as a matter of public policy, the decision to create a new cause of action should be left to the legislature); General Electric Co. v. Bush, 498 P.2d 366, 371 (Nev. 1972) (stating that a cause of action for loss of parental consortium should be left for the legislature to create); Russell v. Salem Trasp. Co., 295 A.2d 862, 863 (N.J. 1972) (preventing minor children from recovering for loss of parental consortium); DeAngelis v. Lutheran Medical Ctr., 445 N.Y.S.2d 188, 195 (1981) (refusing to recognize child's action for loss of parental
courts of generally progressive states such as California\textsuperscript{70} and New Jersey\textsuperscript{71} still cling to the older doctrine. The basis for refusal in these jurisdictions is a blend of stare decisis,\textsuperscript{72} dated policy arguments,\textsuperscript{73} and the claim that this is really a legislative issue that would be inappropriate for the courts to decide.\textsuperscript{74}

One of the most frequently cited cases by courts in these jurisdictions is the California case of \textit{Borer v. American Airlines} \textsuperscript{75}. In \textit{Borer}, the mother of nine children was allegedly injured at Kennedy Airport when a lighting fixture in the American Airlines terminal fell on her head.\textsuperscript{76} Mrs. Borer claimed that she was no longer able to care for her children in the same manner as she had before the accident.\textsuperscript{77} Consequently, each child sought $100,000 in damages for the loss of "services, society, companionship, affection, tutelage, direction, guidance, instruction and aid in personality development" of their mother.\textsuperscript{78} The Supreme Court of California summarily rejected the children's claim.\textsuperscript{79} The court based its decision upon several policy arguments which permeate the decisions of courts that also reject such a cause of action.\textsuperscript{80}

The court first noted that allowing such a claim would substantially increase the number of claims in any given accident, thus making litigation and settlement more complicated and expensive.\textsuperscript{81} It stated that

\begin{itemize}
  \item \textsuperscript{70} See \textit{Borer v. American Airlines, Inc.}, 563 P.2d 858, 866 (Cal. 1977) (holding that a child does not have a nonstatutory cause of action for loss of parental consortium); infra notes 75-102 and accompanying text.
  \item \textsuperscript{71} See \textit{Russell v. Salem Trans. Co.}, 295 A.2d 862, 863 (N.J. 1972) (holding that a minor does not have a cause of action for damages arising out of injuries to parent).
  \item \textsuperscript{72} See supra note 45.
  \item \textsuperscript{73} See infra notes 81-86 and accompanying text.
  \item \textsuperscript{74} See infra notes 75-137 and accompanying text.
  \item \textsuperscript{75} 563 P.2d 858 (Cal. 1977).
  \item \textsuperscript{76} Id. at 861.
  \item \textsuperscript{77} Id.
  \item \textsuperscript{78} Id.
  \item \textsuperscript{79} Id.
  \item \textsuperscript{80} Id. at 862-65.
  \item \textsuperscript{81} Id. at 860.
the cost of administration for every accident would increase substantially because "virtually every serious injury to a parent would engender a claim for loss of consortium on behalf of each of his or her children." The court felt that this would unnecessarily add to the time and expense of both courts and parties to the litigation.

A special consideration to the court appeared to be a sort of sympathy toward the tortfeasor and an unwillingness to burden him or her with a large number of claims for a single injury. The court found it bothersome that the number of claims and the amount of liability would increase solely because of the number of children an injured parent happened to have. "Magnification of damage awards to a single family derived from a single accident might well become a serious problem to a particular defendant." Ultimately the court seemed to be following a "one injury, one recovery" rule.

A second major argument reasoned that recovery of money damages can never adequately compensate a child for the loss of an emotional attachment. The court stated that any amount of money won in a jury award or settlement would not make up for the loss of love and affection no longer provided by an injured parent. Essentially, the court implied that this injury is non-compensable by any means and should not be allowed. The court concluded that the consequences of such a settlement or award would be to "simply establish a fund so that upon reaching adulthood, when plaintiffs will be less in need of maternal guidance, they will be unusually wealthy men and women."

The California court also applied a traditional burden/benefit analysis to justify its decision. It noted that the burden on society through increased insurance premiums and the consequent risk that more people will choose to go without insurance outweighs the benefit conferred upon the children, especially since money is not adequate compensation for loss of maternal companionship.

---

82 Id. at 862.
83 Id.
84 Id. at 863.
85 Id.
87 Id. at 860.
88 Id. at 862.
89 Id.
90 Id.
91 Id.
92 Id.
93 Id.
The court also feared the danger of double recovery as a potential problem which could be created by recognition of this new claim. In the Borer case the father of the children could recover for loss of his wife's consortium, and it appears that the court decided that a jury would take the children into consideration when deciding how much money to award the father. Additionally, the mother herself had a legitimate cause of action as the injured party. If the mother had died, then the children would have been allowed to recover under the state's wrongful death statute. The court stated, "[T]o ask the jury, even under carefully drafted instructions, to distinguish the loss to the mother from her inability to care for her children from the loss to the children from the mother's inability to care for them may be asking too much."

A line must be drawn somewhere to limit potential plaintiffs in a tort action. The court did not want a slippery slope to develop so that every legally recognized relationship merited compensation when a party was injured. The court stated that the line for consortium claims was best drawn at the marriage relationship. Opening the door to children would also open the door to claims from "brothers, sisters, cousins, inlaws, friends, colleagues, and other acquaintances."

Further elaborating on the need to keep the line drawn for consortium claims at the marital relationship, the Supreme Court of Indiana in Dearborn Fabricating v. Wickham ruled against recognition of a child's right to consortium. In Dearborn, the father of two children was seriously injured when he fell through a hole in a catwalk. The court relied on the old "services" idea of consortium and the lack of sexual relations to distinguish the parent-child relationship from the husband-wife relationship. The court went on to state that the crucial

---

94 Id. at 863.
95 Id. at 864.
96 Id. at 865. The primary distinction the court saw between a child "whose parent is killed and one whose parent is disabled . . . [is] the fact that in the latter case the living victim retains his or her own cause of action." Id.
97 Id. at 863.
98 Id. at 862.
99 Id. at 860.
100 Id. at 862.
101 Id. at 862.
102 Id.
103 551 N.E.2d 1135 (Ind. 1990).
104 Id. at 1139.
105 Id. at 1136.
106 Id. at 1136-37.
distinction between a child's and a spouse's claim was that a child could not choose to "voluntarily" bring the claim.\textsuperscript{107} "[A]n adult pursuing a claim for loss of society and companionship or spousal consortium takes on the risk of litigation assault upon the familial relationship knowingly and voluntarily. But this is not so for the child."\textsuperscript{108}

Thus, the Indiana court feared that a child would be exposed to some of the more unpleasant aspects of litigation when the child may not want to be involved in the first place.\textsuperscript{109} They thought that in order to reduce the potential amount of damages, defense attorneys would seek to portray the familial relationships of parent and child as particularly weak.\textsuperscript{110} The idea being that the more estranged the children were from their injured parent before the injury, then the less consortium they were actually losing.\textsuperscript{111} The pressures from "pretrial investigation, depositions, trial testimony, and final argument"\textsuperscript{112} would be too great a burden to impose on a child who had no choice in entering the litigation.\textsuperscript{113} "Many loving children heretofore content would thus be likely to suffer significant emotional harm inflicted by the litigation process itself, in addition to that already resulting from the parent's injuries."\textsuperscript{114}

Similarly, the Pennsylvania high court in \textit{Steiner v. Bell Telephone}\textsuperscript{115} also relied on what it considered to be significant distinctions between the parent-child and husband-wife relationships to deny a child's claim for loss of parental consortium.\textsuperscript{116} In \textit{Steiner}, the mother of two children had been raped by an intruder while she was in the process of trying to phone the police.\textsuperscript{117} The operator had put her on hold twice while she was trying to get the phone number for the police station.\textsuperscript{118} As a result of the rape, Mrs. Steiner suffered emotional problems and the Steiner's marriage fell apart.\textsuperscript{119} The children were suing for injury to their "family relationship."\textsuperscript{120} Like the Indiana court, the Pennsylvania

\textsuperscript{107} Id. at 1138.
\textsuperscript{108} Id.
\textsuperscript{109} Id. at 1137.
\textsuperscript{110} Id.
\textsuperscript{111} Id.
\textsuperscript{112} Id.
\textsuperscript{113} Id.
\textsuperscript{114} Id.
\textsuperscript{116} Id. at 1355.
\textsuperscript{117} Id. at 1349.
\textsuperscript{118} Id.
\textsuperscript{119} Id.
\textsuperscript{120} Id.
court held that a spousal relationship was voluntarily entered into by both parties, while a child had "no control over the commencement of the parent/child relationship." ¹²¹ Also of significance to the court was the fact that a child "perpetually strives to develop from a totally dependent person to one which is entirely independent." ¹²² Since these relationships are formed differently, the court felt that they were not comparable.¹²³ Therefore, they dismissed the argument that the objectives of both relationships, to seek love and companionship, are similar and should be recognized to support consortium claims.¹²⁴

However, the Pennsylvania court based its decision on the argument that such a claim should be established by the legislature, not the courts.¹²⁵ The court believed that the primary issue in such a claim is "how far we will extend liability beyond the ordinary principles of negligence" ¹²⁶ which is based on the idea of foreseeability.¹²⁷ Such an extension of tort liability inevitably involves a weighing of benefits and burdens on society as a whole, and thus, must be done very carefully and based on all available information. The court, therefore, noted that the state legislature was better able to set up a system of recovery in these situations which would be just to children with the least amount of impact on society as a whole.¹²⁸ "It is illusory to believe the public does not pay for tort recoveries, or that resources for such are limitless. As it is with everything, a balance must be struck — certain limits drawn." ¹²⁹

At least one commentator, questioning the great weight of scholarly authority and opposing a child's claim for loss of parental consortium, has placed great weight on the argument that recognizing such a claim will extend the limits of liability too far.¹³⁰ His argument is supported by Prosser and Keeton, who also acknowledge that although the purpose of tort law is to compensate injured parties, "legal responsibility must be limited to those causes which are so clearly connected with the result and

¹²¹ Id. at 1355.
¹²² Id.
¹²³ Id.
¹²⁴ Id.
¹²⁵ Id. at 1356.
¹²⁶ Id.
¹²⁷ Id.
¹²⁸ Id.
¹²⁹ Id. at 1357.
of such significance that the law is justified in imposing liability.\textsuperscript{113} This argument compares the nature of other secondary claims — claims where someone other than the physically injured party is making the claim — to the child’s claim for loss of consortium.

The author argues that loss of consortium and emotional distress are the primary examples of secondary claims in our tort system.\textsuperscript{132} These actions are strictly limited for two reasons. First, every injury to a person results in secondary injuries to relatives, friends, or people who rely on the injured party.\textsuperscript{133} Next, the injured party has his or her own right to make a claim for the injury.\textsuperscript{134} Therefore, the benefit to be conferred, when recognizing a new secondary claim, must greatly outweigh the costs to society.\textsuperscript{135} As a result, the focus shifts from looking at the plaintiff’s point of view to the burden imposed upon society by increased insurance premiums and extended litigation.\textsuperscript{136} Consequently, courts recognizing a child’s right to sue for loss of parental consortium need to define a new point at which liability will end. Otherwise, “what distinguishes the parental consortium claim from other non-marital consortium claims that have been rejected?”\textsuperscript{137}

IV. THE TREND TOWARD RECOGNITION

Currently, at least fourteen jurisdictions have been able to counter the arguments set out above and recognize that a child has a cause of action for loss of parental consortium due to another’s negligence.\textsuperscript{138} In fact, over the last five years, nine jurisdictions have ruled in favor of such a claim, while only two courts have continued to follow stare decisis and increasingly unjustifiable policy reasons to disallow such a claim.\textsuperscript{139} Three of these decisions are of special note, as they collectively address and refute all of the substantial arguments against recognition of a child’s right to consortium.

In 1984, with its decision in \textit{Ueland v. Reynolds Metals},\textsuperscript{140} the Supreme Court of Washington became the fifth jurisdiction to recognize

\begin{footnotes}
\item[113] Keeton \textit{et al.}, supra note 33, § 41, at 264.
\item[131] Gainor, \textit{supra} note 130, at 830.
\item[132] \textit{Id.}
\item[133] \textit{Id.}
\item[134] \textit{Id.}
\item[135] \textit{Id.}
\item[136] \textit{Id.} at 831.
\item[137] \textit{Id.} at 832.
\item[138] See \textit{supra} note 3.
\item[139] See \textit{supra} notes 68, 103, 115.
\item[140] 691 P.2d 190 (Wash. 1984).
\end{footnotes}
a child's claim for loss of parental consortium. Ueland involved a suit by the two minor children of a man injured in the course of his employment. Since the husband and wife were separated, the wife chose not to bring a consortium action herself, but instead let the children make the claim. The trial court ruled in favor of allowing the children to bring such a claim. The Washington Supreme Court bypassed the court of appeals and took immediate review of the case. In their decision, the court addressed several of the major policy issues set forth in the California court's Borer decision.

First, the court rejected the notion that such a claim should be established by the legislature holding that since they had created the right to consortium for the wife of a negligently injured husband, there was no good reason why they could not exercise that right to create such a claim for a child of a negligently injured parent. The court stated that it is the duty of the courts to update the common law when necessary and not to resist the need to expand it.

Next, the court addressed the contention that allowing the cause of action would result in multiple lawsuits. It followed the suggestion of the Iowa Supreme Court in Wettl v. Moes to require that the child's claim be joined with the parent's own personal injury claim whenever possible. This would alleviate any need for multiple proceedings and any fear of increased administrative costs. The court also considered the plaintiffs' right to have their claims judged on the merits, and said that courts should not engage "in gloomy speculation as to where it will all end."

Third, the court refuted the claim that damages would be too speculative and difficult to measure. Since assessing damages in a parental consortium claim would be no more difficult than determining

\[\text{\footnotesize\cite{141}}\] Id.
\[\text{\footnotesize\cite{142}}\] Id. at 191.
\[\text{\footnotesize\cite{143}}\] Id.
\[\text{\footnotesize\cite{144}}\] Id.
\[\text{\footnotesize\cite{145}}\] Id.
\[\text{\footnotesize\cite{146}}\] See supra notes 75-102 and accompanying text.
\[\text{\footnotesize\cite{147}}\] Ueland, 691 P.2d at 193.
\[\text{\footnotesize\cite{148}}\] Id.
\[\text{\footnotesize\cite{149}}\] Id.
\[\text{\footnotesize\cite{150}}\] 311 N.W.2d 259 (Iowa 1981); see supra note 62 and accompanying text.
\[\text{\footnotesize\cite{151}}\] Ueland, 691 P.2d at 194.
\[\text{\footnotesize\cite{152}}\] Id. at 193 (quoting from Berger v. Weber, 303 N.W.2d 424, 426 (Mich. 1981)).
\[\text{\footnotesize\cite{153}}\] Id. at 194.
Loss of Consortium damages in the already sanctioned claim of spousal consortium, the court felt that this argument only deserved minimal attention.\textsuperscript{154} Next, the Washington Supreme Court addressed the idea that a monetary award would not adequately compensate the suffering children for their injury.\textsuperscript{155} The court noted that this was true but felt that "it is the only workable way that our legal system has found to ease the injured party's tragic loss."\textsuperscript{156} Furthermore, the award could help ensure the child of normal development until adulthood by covering expenses for medical and psychiatric treatment.\textsuperscript{157} Although the money would not completely compensate the child for his or her loss, it could certainly "lessen the impact of the loss."\textsuperscript{158}

According to the Washington court, the fear of double recovery could be overcome by proper jury instructions.\textsuperscript{159} The court did not agree that all juries consider the children when fixing damages for a personal injury award.\textsuperscript{160} At least, there was no guarantee. The court held: "The proper approach is to bring out in the open the children's damages and properly instruct the jury that they are separate and distinct from the parent's injury."\textsuperscript{161}

Additionally, the Ueland court noted that it was not proper to limit the possibility of recovery to minor children.\textsuperscript{162} The court decided that the jury should consider the age of the children in their award, as such a decision was consistent with the right of adult children to recover under the Washington court's prior wrongful death decisions.\textsuperscript{163}

Finally, the court dismissed the argument that acknowledgment of such a claim would put too much of a burden on society through increased insurance rates.\textsuperscript{164} "When considering the recognition of a new cause of action, the specter of increased insurance rates is one of our least concerns."\textsuperscript{165} Ultimately, the court stated that the benefits conferred on society by the normal development of the child would far

\textsuperscript{154} Id.
\textsuperscript{155} Id.
\textsuperscript{156} Id. (quoting Theama v. Kenosha, 344 N.W.2d 513, 520 (Wis. 1984)).
\textsuperscript{157} Id.
\textsuperscript{158} Id.
\textsuperscript{159} Id. at 194-95.
\textsuperscript{160} Id.
\textsuperscript{161} Id.
\textsuperscript{162} Id. at 195.
\textsuperscript{163} Id.
\textsuperscript{164} Id.
\textsuperscript{165} Id.
outweigh the burden on society as a result of increased insurance costs.\(^{166}\)

In agreement with the Washington court, the Supreme Court of Ohio in *Gallimore v. Children's Hospital*\(^{167}\) declined to follow stare decisis. In one fell swoop the court reversed precedent from a year earlier and recognized both a parent’s right to loss of a child’s consortium, and a child’s right to loss of parental consortium.\(^{168}\) The lack of regard for precedent was justified by the court as overruling “an unfair and legally unjustifiable conclusion.”\(^{169}\)

In recognizing a child’s claim for loss of consortium, the Ohio court refuted the traditional arguments against allowing such a claim. They also reflected on arguments made by previous courts in support of the claim. Of primary importance to the court was the fact that Ohio’s Wrongful Death Act\(^{170}\) permitted “claimants to recover for loss of earning capacity, services and society of the decedent.”\(^{171}\) To deny recovery when a parent was injured but allow it when the parent died, presented an unfair situation to the court.\(^{172}\)

When it came to the issue of drawing a line on liability so that the class of foreseeable plaintiffs would not stretch on infinitely, the court drew the line at the parent-child relationship.\(^{173}\) This would prohibit collateral relatives, distant ancestors, and further descendants from recovering. Integral to this conclusion was the idea that “[t]he parent-child relationship is unique, and it is particularly deserving of special recognition in the law.”\(^{174}\) Furthermore, the court felt that recovery should be limited to minor children only.\(^{175}\)

The Ohio court justified its right to create such an action without legislative sanction on the same basis as the court in *Ueland*.\(^{176}\) Since the wife’s right to loss of consortium for her spouse’s injury had been

\(^{166}\) *Id.*

\(^{167}\) 617 N.E.2d 1052 (Ohio 1993).

\(^{168}\) *Id.* at 1060. The Ohio Supreme Court expressly rejected a child’s claim for loss of parental consortium in *High v. Howard*, 592 N.E.2d 818, 820 (Ohio 1992). A change in the makeup of the court was the ultimate reason for the complete reversal. See *Gallimore*, 617 N.E.2d at 1062-67 (Wright, J., dissenting).

\(^{169}\) *Gallimore*, 617 N.E.2d at 1060.


\(^{171}\) *Gallimore*, 617 N.E.2d at 1057.

\(^{172}\) *Id.*

\(^{173}\) *Id.* at 1058.

\(^{174}\) *Id.*

\(^{175}\) *Id.* at 1060.

\(^{176}\) *Id.* at 1059; see *supra* notes 140-49 and accompanying text.
court-created in Ohio, the court found nothing wrong with recognizing a
similar right for a child. The court stated: “The common law is not static.
It is dynamic, and it must continue to evolve to keep up with the
times.”\textsuperscript{177} As a result, the court overruled its earlier decision and joined
the growing number of jurisdictions recognizing a child’s right to loss of
consortium for a negligently injured parent.

Perhaps the most thorough opinion in this area of the law is the
Wisconsin Supreme Court’s 1984 decision in \textit{Theama v. Kenosha}.\textsuperscript{178} In
this case the father of two minor children was seriously injured in a
motorcycle accident due to a deep pothole in the street.\textsuperscript{179} In a unani-
mous decision, the court upheld the claim by two minor children for loss
of their father’s consortium.\textsuperscript{180}

In reaching its decision the court noted a significant distinction
between the parent-child and husband-wife relationships which suggested
that the parent-child relationship was the most deserving of compensa-
tion.\textsuperscript{181} The court considered an adult more capable than a child in
forming new relationships “to fill in the void of his or her loss.”\textsuperscript{182}
Consequently, the monetary compensation received by a child “may be
the child’s only method of reducing his or her deprivation of the parent’s
society and companionship.”\textsuperscript{183}

Additionally, the court pointed out that the legal rights of children in
the United States have been constantly evolving away from the master-
servant common law model.\textsuperscript{184} Various decisions by the U.S. Supreme
Court have recognized that children are persons under the Constitu-
tion, that they have First Amendment rights, and have the protection of the due
process and equal protection clauses of the Fourteenth Amendment.\textsuperscript{185}

\begin{itemize}
\item \textsuperscript{177} Gallimore, 617 N.E.2d at 1059.
\item \textsuperscript{178} 344 N.W.2d 513 (Wis. 1984).
\item \textsuperscript{179} Id. at 513.
\item \textsuperscript{180} Id. at 522. The majority of decisions in favor of this new cause of action are often
followed by multiple dissenting opinions. The fact that the Wisconsin court has been able
to agree on the question of a child’s claim for loss of parental consortium suggests that
it is possible to extend the consortium claim to children without exceeding the reasonable
and foreseeable limits of liability for a particular claim.
\item \textsuperscript{181} Id. at 516.
\item \textsuperscript{182} Id.
\item \textsuperscript{183} Id.
\item \textsuperscript{184} Id. at 517.
\item \textsuperscript{185} Id. See Goss v. Lopez, 419 U.S. 565, 574 (1975) (stating that “the State is
constrained to recognize a student’s legitimate entitlement to a public education as a
property interest which is protected by the Due Process Clause and which may not be
taken away for misconduct without adherence to the minimum procedures required by that
Clause”); \textit{In re} Winship, 397 U.S. 358, 368 (1970) (holding that a twelve year-old child

\end{itemize}
The court felt that these legal developments, as well as the importance of the family unit to society, demanded that the court recognize "the gravity of harm suffered by a child who is deprived of his or her parent's society and companionship due to another's negligence."\(^8\)

The Wisconsin court also believed that drawing a new line for recovery at the parent-child relationship would clearly prevent claims from relatives who are further removed. The court, quoting one scholar, stated:

The distinction between the interests of children and those of other relatives is rational and easily applied. Most children are dependent on their parents for emotional sustenance. This is rarely the case with more remote relatives. Thus, by limiting the plaintiffs in the consortium action to the victim's children, the courts would ensure that the losses compensated would be both real and severe.\(^7\)

The court also reasoned that the emotional importance of the parent-child relationship would always outweigh any attendant burdens on society through increased insurance premiums because it would give the child a better chance of growing up normally.\(^6\) "The family relationship 'is the relationship on which all society must depend for endurance, permanence, and well-being.'\(^8\) Thus, the Wisconsin court provided a sound argument for limiting claims for loss of consortium to immediate family members, thereby preventing the slide of consortium claims down the detractors' slippery slope.

V. POLICY CONSIDERATIONS IN KENTUCKY

It is within the Kentucky Supreme Court's prerogative to recognize a child's right to make a claim for loss of parental consortium. Consor-

\(^{186}\) Theama, 344 N.W.2d at 518.

\(^{187}\) Id. at 521 (quoting David P. Dwork, The Child's Right to Sue for Loss of a Parent's Love, Care and Companionship Caused by Tortious Injury to the Parent, 56 B.U. L. REV. 722, 738 (1976)).

\(^{188}\) Id. at 521 (quoting Dwork, supra note 187, at 741).
Loss of Consortium is a basic common law cause of action, and the state’s high court is responsible for bringing Kentucky in line with developments in the common law. The right to make a claim for loss of consortium by wives, although it is presently established by statute, was first recognized by the judiciary in the *Kotsiris* decision. The Kentucky courts can also no longer deny this claim due to lack of precedent. There are at least fourteen jurisdictions that have judicially recognized a child’s right to compensation for loss of parental consortium and the number is likely to rise. The Kentucky Supreme Court, when making a major shift in the state’s common law by adopting pure comparative negligence, stated in *Hilen v. Hays*: “The common law is not a stagnant pool, but a moving stream. . . . *We are responsible for its directions.*”

While it is true that Kentucky does not recognize secondary claims (e.g., bystander recovery) for negligent infliction of emotional distress without some sort of physical contact, the court has been very generous in its application of what appears to be a rather strict rule. In *Wilson v. Redken Laboratories, Inc.*, the Supreme Court of Kentucky upheld a $30,000 jury verdict for purely cosmetic damage to the plaintiff’s hair. There was no injury causing physical pain to the plaintiff herself. In *Murray v. Lawson*, the plaintiff’s alleged “phobic

---

190 *See supra* notes 40-54 and accompanying text.
191 The Supreme Court’s expressed reason for denying the claim in *Brooks* was that no other jurisdiction had yet recognized it. *Brooks v. Burkeen*, 549 S.W.2d 91, 91 (Ky. 1977).
192 *Keeton et al.*, *supra* note 33, § 125, at 936. “[I]t must now be recognized that the more liberal view may well gain further adherents.” *Id.*
193 673 S.W.2d 713, 717 (Ky. 1984) (emphasis added).
194 The court of appeals refused to allow bystander recovery without physical contact in *Wilhoite v. Cobb*, 761 S.W.2d 625, 626 (Ky. Ct. App. 1988). In that case a mother saw a negligent truck driver run over and kill her child, but she was not allowed to recover damages for emotional distress because she had not suffered any physical injury or contact with the truck. *Id.* The court noted that the distinction between the x-rays that caused a recoverable injury in *Deutsch v. Shein*, 597 S.W.2d 141 (Ky. 1980), and the light rays which caused the mother her distress in this case “is that the thing which causes the injury to a victim must also come in contact with the witness for that witness to recover for mental distress.” *Id.*
195 “It is well established in this jurisdiction that ‘an action will not lie for fright, shock or mental anguish which is unaccompanied by physical contact or injury.’” *Deutsch*, 597 S.W.2d at 145-46 (citing *Morgan v. Hightower’s Adm’r*, 163 S.W.2d 21, 22 (Ky. 1942)).
196 562 S.W.2d 633 (Ky. 1978).
197 *Id.* at 636.
198 441 S.W.2d 136 (Ky. 1969).
reaction" to an injury from which she had completely recovered was held relevant to prove damages.\textsuperscript{199} In the greatest stretch of all, the court in \textit{Deutsch v. Shein}\textsuperscript{200} held that x-rays to a plaintiff's abdomen satisfied the physical contact requirement.\textsuperscript{201} The plaintiff was pregnant and feared that the x-rays would damage her unborn child.\textsuperscript{202} In upholding the plaintiff's claim for mental suffering, the court stated: "We find no difficulty in concluding that the physical contact necessary to support the claim for mental suffering occurred when . . . Mrs. Deutsch's person was bombarded by x-rays."\textsuperscript{203}

The preceding cases demonstrate the court's willingness to loosely interpret its rules regarding recovery for mental suffering due to another's negligence and, thereby, increase the pool of foreseeable plaintiffs. If x-rays can be said to make enough physical contact to satisfy a crucial requirement for recovery under negligent infliction of emotional distress, surely it would not be incongruent for the court to thus extend loss of consortium recovery to children of injured parents. This author posits that often the injury to the child will be easily discernable and the court will not have to push the definition of "physical contact" to extremes in order to justify compensation, as it did in \textit{Deutsch}. In fact, the court should have a clear guideline based on the family relationships of parent/child and husband/wife.

The state's statutory law regarding juveniles further reflects the appropriateness of drawing the line at the immediate family relationships. For example, the introductory section of the Kentucky Unified Juvenile Code reads: "The Commonwealth shall direct its efforts to the strengthening and encouragement of family life for the protection and care of children,"\textsuperscript{204} and "It also shall be declared to be the policy of this Commonwealth that all efforts shall be directed toward providing each child a safe and nurturing home."\textsuperscript{205} Thus, the Kentucky legislature appears to recognize the value of children to families and to the state as a whole. Although it is unclear why the legislature has not specifically authorized a child's loss of consortium claim for an injured parent, it does seem that the General Assembly appreciates the value of the parent-child relationship.

\textsuperscript{199} Id. at 138.
\textsuperscript{200} 597 S.W.2d 141 (Ky. 1980).
\textsuperscript{201} Id. at 146.
\textsuperscript{202} Id. at 142-43.
\textsuperscript{203} Id. at 146.
\textsuperscript{205} Id. § 600.010(2)(b).
Another consideration that has not been adequately addressed by the courts, but has been noted by one commentator in Kentucky, is the rise of single-parent families across the United States.\textsuperscript{206} In these families, if the mother or father is seriously injured, the children will have no other parent to rely upon. It hardly seems fair to deprive the child of any possible remedy for this situation. At the very least a monetary settlement would provide the opportunity for the child to obtain counseling as well as equipping him or her with the usual accoutrements of youth.\textsuperscript{207} The money could also be put in trust for their use upon reaching majority.\textsuperscript{208} For example, a child could be assured of college tuition and thereby potentially increase his value to society as a whole. Yet, as the law now stands, such a child could only acquire monetary compensation for loss of his or her parent in an action for wrongful death. If the parent remains alive, but injured, the child may realize no recovery for the loss of guidance, companionship, and affection.

**Conclusion**

In *Brooks v. Burkeen*,\textsuperscript{209} Kentucky's Supreme Court indirectly considered a child's right to sue for loss of consortium when a parent is injured by another's negligence. With the trend in so many jurisdictions toward recognizing this cause of action, however, the foundation for the court's holding in *Brooks* is now questionable. It would seem that a reexamination of this issue would now lead to recognition of such a cause of action.

The courts in Kentucky have the authority to create this cause of action. It has been judicially created in fourteen other jurisdictions, and it is a natural result of the common law development of consortium claims. Moreover, Kentucky's Supreme Court was among the minority of jurisdictions in 1970 when it recognized a wife's cause of action for loss of her husband's consortium\textsuperscript{210} as well as when it made pure comparative negligence the law of the Commonwealth in 1984.\textsuperscript{211} Now, the

\textsuperscript{207} Id. at 346.
\textsuperscript{208} Id.
\textsuperscript{209} 549 S.W.2d 91 (Ky. 1977).
\textsuperscript{210} See Kotsiris v. Ling, 451 S.W.2d 411 (Ky. 1970).
\textsuperscript{211} See Hilen v. Hays, 673 S.W.2d 713 (Ky. 1984).
Kentucky Supreme Court must accept its ability to change what has become an unjustifiable and dated concept regarding Kentucky’s common law of loss of consortium.

It is highly incongruent to allow a spouse to recover for loss of love and companionship, for parents to recover for loss of their children’s affection, and for children to recover when a parent dies, but to deny a consortium claim for a child who is deprived of a parent’s love and companionship due to another’s negligence. The claim is a natural extension of established statutory law in the Commonwealth and the growing trend in the common law. Kentucky can no longer hide behind outdated policy and irrational justification. It must recognize and embrace the new day in loss of consortium claims, and it must allow children to recover for the loss of parental consortium.

*Bruce Gehle*