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John M. Palmeri

Christopher P. Kenney

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CONSORTIUM CLAIMS INVOLVING CHILDREN: SHOULD COLORADO CONTINUE AN ARCHAIC CONCEPT OR CONFRONT A FAULTY CORNERSTONE?

JOHN M. PALMERI*
CHRISTOPHER P. KENNEY**

I. INTRODUCTION

In a tort system premised upon economic compensation for personal injuries, a child's rights are difficult to define. Under basic tort principles, one who is injured by a negligent tortfeasor is entitled to recover for pain and suffering, loss of wages and medical expenses. This is the rule of recovery in most modern jurisdictions except when, by happenstance, the victim is married in which case an additional category of recovery called consortium is recognized. A consortium action allows the non-injured spouse to sue for the intangible losses resulting from his or her deprivation of the affection, society, companionship and aid of the injured spouse. Within the last fifteen years, a minority of jurisdictions have extended the consortium claim to the parent-child relationship. This Article examines the claims of filial consortium (a parent's claims for a negligently injured child) and parental consortium (a child's claims for a negligently injured parent). It tracks the development of consortium at common law and through statutory enactments as the roles of husband, wife and child have evolved. This Article will conclude by contending that Colorado should refuse to expand the consortium concept to the parent-child relationship because to do so merely perpetuates archaic beliefs of Victorian England, stretches tort law beyond its intended boundaries and adversely impacts the present tort system.

II. HISTORICAL VIEW

A. *The Spousal Consortium Claim and the Master-Servant Analogy*

At common law, when a servant was tortiously injured, the master possessed a cause of action for lost services.[1] While the servant had a claim for his injuries, the master's claim was independent and in the

* John M. Palmeri, Partner, White and Steele, P.C., Denver, Colorado; A.B. 1981 Columbia University; J.D. 1984 University of Denver.

** Christopher P. Kenney, Associate, White and Steele, P.C., Denver, Colorado; B.A. 1986 University of Colorado; J.D. 1990 University of Denver. The authors wish to thank Joseph Cachey and Joseph King for their research and editorial work on the article.

1. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 125, at 931 (5th ed. 1984) (citing John H. Wigmore, *Interference With Social Relations*, 21 AM. L. REV. 764 (1887)).

master's own right.[2] This rule was a holdover from the feudal relationship between serf and lord.[3] The master's claim was based on the general principle of the common law that where a person sustains loss or damage through the wrong of another, he has an action to be remunerated for that loss in damages.[4] Because the servant owed to the master the duty of his service or labor,[5] it followed that the master was entitled to recover for the loss of services or expenses incurred as a result of the servant's injury.[6] At common law, a wife's relationship to her husband was similar to the relationship of the servant to his master in that the wife had a duty to provide her husband service or labor.[7] Because the common law viewed the wife as her husband's servant, with no status to sue on her own behalf, when a married woman was injured, the husband sued for the damages and joined his wife in the action.[8] By 1619, the master's cause of action for the services of his injured servant had extended to allow a husband's independent recovery for lost services caused by an injury to his wife.

In *Guy v. Livesey*,[9] a husband failed to join his wife in an action for damages arising from the defendant's assault and battery on both spouses. The defendant argued that the husband could not recover for the damage done to the wife unless she was joined in the action.[10] The court disagreed, holding that the husband had an independent action since "he lost the company of his wife, which is only a damage and loss to himself . . . ."[11] The court further reasoned by analogy that because a master has a valid cause of action for the loss of his servant's service, a husband should similarly have such a cause of action.[12] Thus, the claim for loss of consortium was born.

Although initially a pecuniary claim, consortium soon began to encompass intangible elements such as society, affection, conjugal relations, companionship and sexual relations.[13] The reasoning behind expanding the consortium claim in this manner appears in numerous decisions from the late 1800s[14] in which courts presented this extension as a self-evident, pre-existing right rooted in the common law principle that the husband not only is entitled to loss of services, but also intangible losses unique to the marital relationship. Many courts determined that when an injury infringed the husband's right to companionship, he

2. Joseph H. Radensky, *The Child's Claim for Loss of Parental Consortium—The Prospects for the Nineties (The Decade of a Kinder, Gentler Society?)*, 17 W. ST. U.L. REV. 277, 281 (1990).
3. *Id.*
4. Blair v. Chicago & Atl. Ry., 1 S.W. 367 (Mo. 1886).
5. Selleck v. City of Janesville, 80 N.W. 944, 946 (Wis. 1899).
6. *Blair*, 1 S.W. at 368.
7. *Selleck*, 80 N.W. at 946.
8. Radensky, *supra* note 2, at 282.
9. 79 Eng. Rep. 428 (K.B. 1619).
10. *Id.*
11. *Id.*
12. *Id.*
13. *See* KEETON ET AL., *supra* note 1, § 125 at 931; Radensky, *supra* note 2, at 282.
14. David P. Dwork, Note, *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, 724 n.22 (1976).

was entitled to compensation for loss of such right.[15] For example, the Wisconsin Supreme Court in *Selleck v. City of Janesville* stated:

> [f]rom before the days of Blackstone down to the present time, . . . the husband's recovery is for the loss or impairment of his right to conjugal society and assistance, and ordinarily, where the word 'services' is used, it signifies wifely services, such as are due from her, and includes the idea of her society.[16]

By the late nineteenth century nearly all American jurisdictions had passed Married Women's Acts.[17] These so-called "emancipation statutes," which allowed married women to sue and own property in their own name, cleared the way for the recognition of a wife's claim for lost consortium.[18] No longer was a wife seen as merely an appendage of her husband. It was not until the 1949 decision, *Hitaffer v. Argonne Co.*,[19] however, that a court first recognized that both husband and wife were entitled to the comfort, companionship and affection of the other.[20] Plaintiff, Lucia Hitaffer, brought an action against her husband's employer to recover for her loss of consortium. Her husband had sustained severe permanent injuries to his abdomen while in the employ of the defendant. Plaintiff's husband received compensation for his injuries pursuant to the provisions of the Longshoremen's and Harbor Workers' Compensation Act and was therefore barred from suing his employer. Ms. Hitaffer, however, initiated a claim in her own right for loss of her husband's aid, assistance, enjoyment and sexual relations. The court granted summary judgment for the defendant on the basis that plaintiff's consortium claim failed to state a cause of action upon which relief could be granted.[21] The Federal Court of Appeals for the D.C. Circuit reversed, holding there was no substantial rationale on which the court could predicate a denial of a wife's action for loss of consortium due to her husband's injury.[22] The primary basis for the court's decision was that a husband already had a cognizable action for consortium and therefore, the medieval concept that a husband is master should not survive in the "enlightened day and age" of 1949.[23] The court noted that marriage gives each spouse the same rights and therefore both are entitled to the comfort, companionship and affection of the other, not only as a natural right, but as a legal right arising from the marital relationship.[24] Thus, while noting that medieval and antiquated concepts should not be furthered, the court expanded a right of recovery based on just such an arcane theory.

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15. Furnish v. Missouri Pac. R.R., 15 S.W. 315, 316-17 (Mo. 1891); Kelley v. New York N.H. & H. R.R., 46 N.E. 1063, 1063 (Mass. 1897); Selleck v. City of Janesville, 80 N.W. 944, 946 (Wis. 1899).
16. *Selleck*, 80 N.W. at 946.
17. Dwork, *supra* note 14, at 725 n.28.
18. *Id.* at 725.
19. 183 F.2d 811 (D.C. Cir.), *cert. denied*, 340 U.S. 852 (1950).
20. 183 F.2d at 816.
21. *Id.* at 812.
22. *Id.* at 813.
23. *Id.* at 819.
24. *Id.* at 817-18.

B. *Expansion to the Parent-Child Relationship*

In the mid-1970s and beyond, law review commentators began calling for expansion of the consortium action to the parent-child relationship both in the form of filial consortium and parental consortium.[25] It was also during this time that courts began wrestling with the cognizability of parental and filial consortium claims.[26] At least with respect to the parental consortium claim, the expansionists had history on their side. From feudal times through the industrial revolution, a child was an economic asset to the family and often worked outside the home to contribute to the family economy. Thus, the common law considered children in the same way that it considered wives, as servants of the father or husband. The father, entitled to the services of the child, could recover for lost services or earning capacity when the child was tortiously injured.[27] A father was further entitled to recover for the child's medical expenses.[28] With the institution of child labor laws, however, children became a financial burden to the family unit thereby decreasing the importance of a father's right to recovery for services.[29] At no time prior to 1980, however, did the claim for the loss of the child's services expand to include recovery for intangible losses such as companionship, aid and comfort. Thus, within the context of modern society, the parent was equipped with what was essentially an inconsequential claim for lost services when his or her child was negligently injured. Historically, given that the child was viewed as a servant, he or she had no expectation of recovery for the negligent injury of a parent. Because the injured parent could recover for all economic losses, it was thought that the child's interest would be adequately protected, albeit indirectly.[30] Therefore, until recently, the right of recovery within the parent-child relationship was viewed as strictly pecuniary in nature.

In 1979, twenty-five years after the first judicial decision granting a wife's right to recovery for loss of consortium, a major step was taken concerning the same right within the context of the parent-child relationship. In *Shockley v. Prier*,[31] the Wisconsin Supreme Court overruled existing precedent and held that the parents of a blinded and disfigured

25. *See, e.g.*, KEETON ET AL., *supra* note 1 at 934-39 (1984); Jean C. Love, *Tortious Interference with the Parent-Child Relationship: Loss of an Injured Person's Society and Companionship*, 51 IND. L.J. 590 (1976); Radensky, *supra* note 2; Mary Lee Tayrien, Note, *The Child's Claim for Loss of Consortium Damages: A Logical and Sympathetic Appeal*, 13 SAN DIEGO L. REV. 231 (1975); Dwork, *supra* note 14; Shirley S. Simpson, Note, *The Parental Claim for Loss of Society and Companionship Resulting from the Negligent Injury of a Child: a Proposal for Arizona?*, 1980 ARIZ. ST. L.J. 909 (1980); William F. Ellis, Note, *Expanding Loss of Consortium in Vermont: Developing a New Doctrine*, 12 VT. L. REV. 157 (1987); Nancy Wanderer Mackenzie, Note, *Maine Refuses to Recognize a Cause of Action for Loss of Parental Consortium: Durepo v. Fishman*, 41 ME. L. REV. 165 (1988); Marilyn S. Duncan, Comment, *Davis v. Elizabeth General Medical Center: Loss of Consortium in the Parent-Child Relationship*, 43 ARK. L. REV. 405 (1990).

26. *See infra* note 35 (parental consortium claims); *infra* note 36 (filial consortium claims).

27. KEETON ET AL., *supra* note 1, at 934.

28. *Id.*

29. *Id.* at 947.

30. KEETON ET AL., *supra* note 1, at 934.

31. 225 N.W.2d 495 (Wis. 1975).

infant could maintain an action for loss of aid, comfort, society and companionship. The court reasoned that it would be inconsistent to refuse recovery for filial consortium due to a nonfatal injury when Wisconsin law by statute allowed such recovery for a child's death.[32]

Shortly after the *Shockley* decision, three more jurisdictions judicially recognized parental consortium claims.[33] Today, twelve jurisdictions recognize the claim for parental consortium,[34] while eleven recognize filial consortium claims.[35] These cases generally acknowledge that expansion of consortium to the parent-child relationship is a logical progression from the starting point of spousal consortium. For instance, sharing love, companionship, society, comfort and affection characterizes both the husband-wife and parent-child relationships.[36] With respect to filial consortium, some courts note that the modern relationship between parent and child is, or should be, closer than the relationship between master and servant.[37] "The origins of the pecuniary loss limitation 'are rooted in Charles Dickens'[s] England'."[38] Moreover, these courts often analogize parental-child consortium to wrongful death cases in which nonpecuniary damages are allowed.[39] "[I]t would be anomalous to take the position that, if a child is injured, but does not die, the parents may not recover."[40] Commentators have argued that the need to compensate the parent's loss may be even greater in cases of severe injury because the injury continually reminds them of their loss.[41] Courts have supported their decisions by citing constitutional concerns protecting the family unit, arguing that the right to associate with one's immediate family is a fundamental liberty protected by state

32. *Id.* at 499.

33. *See* Weitl v. Moes, 311 N.W.2d 259 (Iowa 1981), *overruled by* Audibon-Extra Ready Mix, Inc. v. Illinois C.G.R. Co., 335 N.W.2d 148 (Iowa 1983) (*Weitl* was overruled on grounds other than the recognition of a parental consortium claim); Ferrieter v. Daniel O'Connell's Sons, Inc., 413 N.E.2d 690 (Mass. 1980); Berger v. Weber, 303 N.W.2d 424 (Mich. 1981).

34. Hibpshman v. Prudhoe Bay Supply, Inc., 734 P.2d 991 (Alaska 1989); Villareal v. State Dept. of Transp., 774 P.2d 213 (Ariz. 1989); *Weitl*, 311 N.W.2d 159; *Ferriter*, 413 N.E.2d 690; Williams v. Hook, 804 P.2d 1131 (Okla. 1990); Reagan v. Vaughn, 804 S.W.2d 463 (Tex. 1990); Hay v. Medical Ctr. Hosp., 496 A.2d 939 (Vt. 1985); Ueland v. Reynolds Metals Co., 691 P.2d 190 (Wash. 1984); Belcher v. Goins, 400 S.E. 2d 830 (W. Va. 1990); Theama v. City of Kenosha, 344 N.W.2d 513 (Wis. 1984); Nulle v. Gilette-Campbell County Joint Powers Fire Bd., 797 P.2d 1171 (Wyo. 1990).

35. Reben v. Ely, 705 P.2d 1360 (Ariz. 1985); Yorden v. Savage, 279 So. 2d 844 (Fla. 1973); Masaki v. General Motors Corp., 780 P.2d 566 (Haw. 1989); Dymek v. Nyquist, 469 N.E.2d 659 (Ill. App. 1984); Davis v. Elizabeth Gen. Medical Ctr., 548 A.2d 528 (N.J. Super. Ct. Law Div.); First Trust Co. v. Scheels Hardware, 429 N.W.2d 5 (N.D. 1988); Noruel v. Cuyahoga County Hosp., 463 N.E.2d 111 (Ohio App. 1983); Hall v. Birchfield, 718 S.W.2d 313 (Tex. App. 1986), *rev'd.*, 747 S.W.2d 361 (Tex. 1987); Shockley v. Prier, 225 N.W.2d 495 (Wis. 1975).

36. Simpson, *supra* note 25, at 922.

37. *Shockley*, 225 N.W.2d at 500.

38. Siciliano v. Capitol City Shows, Inc., 475 A.2d 19, 26 (N.H. 1984) (Douglas, J., dissenting).

39. *See, e.g.*, *Masaki*, 780 P.2d at 577; Frank v. Superior Ct., 722 P.2d 955, 957 (Ariz. 1987) (en banc); *Shockley*, 225 N.W.2d at 498.

40. *Masaki*, 780 P.2d at 577.

41. *See, e.g.*, Simpson, *supra* note 25, at 923.

and federal constitutions.[42]

Despite these arguments, the majority of American jurisdictions continue to disallow claims for parental and filial consortium. Twenty-seven jurisdictions have expressly rejected parental consortium claims,[43] while numerous others have rejected filial claims.[44] Courts have denied these claims for various reasons, the most often cited being: (1) adoption of the right to such claims is properly a legislative function; (2) increased litigation through multiple claims; (3) possibility of double recovery; (4) difficulty in assessing damages; (5) inherent differences in the spousal and parent-child relationships; (6) potential expansion to distant relatives; and (7) increased societal costs in the form of insurance and expenses of litigation.[45] The merit of these arguments has been the subject of considerable commentary and, as noted below, has been criticized.

III. COLORADO LAW

A. *The Spousal Consortium Claim and the Master-Servant Analogy*

Until 1874, married women in Colorado had no legal existence.[46] This was a holdover from the common law view that a wife was a husband's servant and had no separate legal identity.[47] As noted by the Colorado Supreme Court, this legal theory derived from the view that marriage made a husband and wife one person.[48] A husband was therefore seated "as the head and governor of the family."[49] He had control of his wife, her property, children and labor.[50] In fact, a husband's control was so pervasive at common law that he possessed "by law power and dominion over his wife, and may keep her by force within the bounds of duty, and may beat her, but not in a violent or cruel manner."[51] The 1868 enactment of the "Act Concerning Married Women"[52] emancipated a wife in Colorado from the condition of thraldom

42. Nulle v. Gillete-Campbell County Joint Powers Fire Bd., 797 P.2d 1171, 1173 (Wyo. 1990) (citing Stanley v. Illinois, 405 U.S. 645, 651 (1972)). *See also* Villareal v. State Dept. of Transp., 774 P.2d 213, 217 (Ariz. 1989).

43. For a list of such cases, see Williams v. Hook, 804 P.2d 1131, 1133, n.2 (Okla. 1990); *see also* Donald D. Schneider, *Loss of Parental Consortium*, FOR THE DEFENSE, August 1991 at 11; moreover, some commentators have agreed with this view; *see, e.g.*, Don E. Burrell, Note, *Parental Consortium: A House Built on Sand*, 58 UMKC L. REV. 145 (1989); Greg A. Guthrie, Comment, *Should Pennsylvania Recognize a Cause of Action for Loss of Parental Consortium?*, 28 DUQ. L. REV. 697 (1990).

44. *See* Todd R. Smyth, Annotation, *Parent's Right to Recover for Loss of Consortium in Connection with Injury to Child*, 54 A.L.R. 4th 112 (1987).

45. The seminal decisions advancing public policy concerns to support the rejection of such claims include: Borer v. American Airlines, Inc., 563 P.2d 858 (Cal. 1977)(en banc)(parental consortium claim); Baxter v. Superior Court, 563 P.2d 871 (Cal. 1977) (filial consortium claim).

46. Schuler v. Henry, 94 P. 360 (Colo. 1908).

47. Wells v. Caywood, 3 Colo. 487 (1887).

48. *Schuler*, 94 P. at 360.

49. *Id.* at 360.

50. *Id.*

51. *Id.*

52. This act, originally codified at R. S. 1868, ch. LX, § 3, is now codified at COLO.

in which she was placed at common law.[53] This act granted to the wife many essential rights but had no effect on the rule denying her the right to sue for consortium.

In the late 1800s, Colorado recognized that the consortium concept included the right to recover for various intangible losses. In *Denver Consolidated Tramway Co. v. Riley*,[54] the Colorado Court of Appeals reasoned that compensation for pecuniary loss resulting from a wife's inability to continue to perform household duties does not, by itself, fully compensate a husband's loss.[55] A wife makes a husband's "home cheerful and inviting, and ministers to his happiness in a multitude of ways outside of the drudgery of household labor . . . . All the work of the house may be done by hired employees, and her services still give character to the home."[56] The court recognized the intangible nature of a consortium award, but reasoned that a jury could capably determine the amount, not from evidence of value, but from their own observation, experience and knowledge.[57]

Thus, by 1899, Colorado's definition of consortium came to include society and companionship.[58] Until 1970, however, a married woman was not allowed to bring an action for loss of consortium based on injuries to her husband. The justification for this denial of a right to sue for loss of consortium was two-fold. First, this right of action was not recognized under the common law. Second, statutes that allowed women to sue on their own behalf did not specifically create the consortium right. Accordingly, the courts held that the action could not be maintained without legislative grant.[59] The Colorado legislature subsequently enacted Colorado Revised Statute (C.R.S.) § 90-2-11 in 1961, which codified a woman's right for consortium.[60] This enactment led to the 1970 decision, *Crouch v. West*,[61] wherein the Colorado Court of Appeals held that the enactment of C.R.S. § 90-2-11 expressly overruled the denial of the wife's right to sue for loss of consortium. The court also held that a wife's right was "a separate right similar to that held by married men."[62] Today, like the vast majority of jurisdictions,[63] Colorado recognizes

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REV. STAT. § 14-2-202 (1987) and provides: "Any woman, while married, may sue and be sued, in all matters having relation to her property, person, or reputation, in the same manner as if she were sole."

53. *Wells*, 3 Colo. at 493.

54. 59 P. 476 (Colo. Ct. App. 1899).

55. *Id.* at 479.

56. *Id.*

57. *Id.*

58. *Id.*

59. Franzen v. Zimmerman, 256 P.2d 897, 898 (Colo. 1953); Giggey v. Gallagher Transp. Co., 72 P.2d 1100, 1102 (Colo. 1937).

60. COLO. REV. STAT. § 90-2-11 (1963), which is now codified at COLO. REV. STAT. § 14-2-209 (1987), and provides: "In all actions for tort by a married woman, she shall have the same right to recover for loss of consortium of her husband as is afforded husbands in like actions."

61. 477 P.2d 805 (Colo. Ct. App. 1970).

62. *Id.* at 806.

63. Five American jurisdictions do not recognize a claim for loss of spousal consortium. *See* Carey v. Foster, 221 F. Supp. 185 (E.D. Va. 1963) (holding that the Married

both spouses' right to recover for lost consortium. Under current Colorado law, consortium encompasses "noneconomic damages in the form of loss of affection, society, companionship, and aid and comfort of the injured spouse, and . . . economic damages in the form of lost household services the injured spouse would have performed . . . ."[64]

B. *Direct Actions by Parents and Children*

Although consortium recovery has not been expanded to the parent-child relationship in Colorado, a negligently injured child's parent is not without a form of recovery. In Colorado, when a child is negligently, but not fatally, injured the parent can recover pecuniary loss in the form of reasonable medical expenses,[65] the child's past and future earnings[66] and lost services.[67] The right to recover for injuries sustained by a child lies exclusively with the parent. Furthermore, when a parent is negligently injured, the child has no independent cause of action under the theory that the child's economic loss will be compensated in the parent's own action. *Burdsall v. Waggoner*[68] is one of the first Colorado cases to expressly rule that "the father is entitled to the earnings of his son during minority."[69] The court noted that the father may relinquish the right to claim the wages when "such minor son contracts on his own account for his services, and the father knows of it and makes no objection."[70] Under such circumstances "there is an implied assent that the son shall be entitled to his earnings."[71] In *Burdsall*, the issue arose as to whether the son was entitled to the purchase price of a lot that he had earned as wages during his minority. Because he had lived away from home without parental control, earning his own living with his fa-

Women's Act divested the husband of his common law right of recovery for loss of consortium as a result of his wife's disabilities caused by negligently inflicted injury, and the wife should not be exclusive treasurer of the right to recover for consortium); Hoffman v. Dautel, 388 P.2d 615 (Kan. 1965) (citing the standard drawbacks to any loss of consortium award, including indefinite nature and amount of damages and possible double recovery based on an award to the husband as justification for holding that the common law stands until it has been specifically overruled or modified by the legislature); Roseberry v. Starkovich, 387 P.2d 321 (N.M. 1963) (deciding not to endorse the right due to uncertain and indefinite nature of the recovery; the general and communal nature of the recovery; possibilities of double recovery; the fact that the legislature had not seen fit to speak on the subject); Cozart v. Chapin, 241 S.E.2d 144 (N.C. 1978) (holding that no cause of action for loss of consortium survived the transfer effected by North Carolina's Married Woman's Act of a husband's common law right of action to recover for the wife's services); Hackford v. Utah Power & Light Co., 740 P.2d 1281 (Utah 1987) (relying on previous Utah decisions which held that the common law cause of action for loss of consortium had been abolished in Utah by the Married Women's Act of 1898, and stating that if the cause of action were to be created anew, it should be done by the legislature).

64. COLO. JURY INSTRUCTIONS - Civ. 3d § 6:6 (1988) [hereinafter CJI].

65. *Id.* at 6:3.

66. Burdsall v. Waggoner, 4 Colo. 261 (1878); Pawnee Farmers' Elevator Co. v. Powell, 227 P. 836, 839 (Colo. 1924); CJI, *supra* note 65, at § 6:3.

67. Colorado Utilities Corp. v. Casady, 300 P. 606 (Colo. 1931); CJI, *supra* note 65, at § 6:3.

68. 4 Colo. 261 (1878).

69. *Id.* at 262.

70. *Id.*

71. *Id.*

ther's full knowledge and consent, he was essentially emancipated. He was therefore legally and justly entitled in his own right to his wages, which were applied to the purchase price of the property.[72]

In *Pawnee Farmers' Elevator Co. v. Powell*[73] a father brought an action as his minor's next friend rather than joining as an individual plaintiff. The court noted that there could be no recovery for the amount of the minor's lost wages since the father was not a plaintiff in the action.[74] According to the court, the minor had a cause of action in his own name for the injuries he sustained, but it was exclusively the father who was entitled to recover for the minor's lost earnings.[75] The rules set forth in *Burdsall* and *Pawnee* are the present state of the law in Colorado regarding direct actions by parents and children, although, as noted below, attempts were made to broaden those actions.

C. *Parental and Filial Claims in Colorado*

By the early 1980s, as courts began recognizing parental-filial consortium claims, the stage seemed set for judicial acceptance in Colorado. Spousal consortium claims had become a common form of recovery. Moreover, both the judiciary and legislature recognized recovery for derivative noneconomic loss, i.e. injury such as pain and suffering, inconvenience, emotional stress and impairment of the quality of life.[76] Furthermore, proponents of the claim found significance in *Miller v. Subia*,[77] often cited as a case that implicitly recognizes a filial consortium claim. In *Miller*, a father brought an action on behalf of himself and his minor son for damages arising from the son's automobile-motorcycle accident. After a $1,000 jury award, the father appealed, contending that the trial court erred in failing to instruct the jury on his entitlement to damages for loss of companionship. The court of appeals affirmed, finding no merit in the father's contention that the jury was not instructed on all elements of his damages.[78] The court did not specifically rule on the validity of the father's consortium action. Rather, it merely stated that there was inadequate evidence to support his claim.[79] For many, *Miller* stood for the proposition that damages for filial consortium could be recovered if adequately supported by the evidence.

Further inroads toward recognition were made in *Reighley v. International Playtex, Inc.*[80] In this wrongful death action, the district court affirmed the right of children to bring an independent claim for loss of parental consortium and companionship. Stephen Reighley sued the

72. *Id.*
73. 227 P. 836 (Colo. 1924).
74. *Id.* at 839.
75. *Id.*
76. *See* Towns v. Anderson, 579 P.2d 1163 (Colo. 1978)(en banc)(recognizing the claim of negligent infliction of emotional distress); COLO. REV. STAT. § 13-21-102.5(3)(a)(1987).
77. 514 P.2d 79 (Colo. Ct. App. 1973) (N.S.F.O.P.).
78. *Id.* at 80.
79. *Id.*
80. 604 F. Supp. 1078 (D. Colo. 1985).

defendant individually and on behalf of his two minor children for injuries resulting in the death of his wife as a result of "toxic shock" caused by the defendant's product. The defendant sought partial summary judgment seeking dismissal of the children's claim for loss of consortium. The *Reighley* decision, however, came four years before the enactment of C.R.S. § 13-21-203, allowing a spouse or heir to recover for nonpecuniary damages such as loss of consortium in wrongful death claims. The *Reighley* court conducted an analysis of parental consortium case law from other jurisdictions. The court found cases supporting the cause of action to be persuasive and additionally noted "the family unit has been recognized by the Supreme Court to bear constitutionaly protected aspects."[81] The court further opined that Colorado tort law had "evolved by legislation and judicial decision to impose duties and liabilities on individual conduct interfering with the family relationship."[82] This includes the judicial recognition of the spousal consortium claim[83] as well as the child's right to a secure home environment as manifested in the preamble to Colorado's Children's Code.[84] The court noted that "[f]or the state to declare its responsibility to protect and foster the parent-child relationship in this context and to ignore it when a third party negligently injures the family unit is too anomalous to be countenanced."[85] The court dismissed concerns about multiple suits, unlimited liability and the difficulty of calculating damages as knee-jerk reactions that arise each time a new cause of action is considered.[86] Moreover, if a spouse is entitled to recover for loss of consortium and a parent is allowed to recover for the intangible loss sustained due to the negligent death of a child, "[t]he child's loss of parental consortium is no more intangible . . . ."[87] The court adopted certain guidelines set forth by other jurisdictions for the management and determination of these actions, including joinder, wherever feasible, of the child's claim with that of the parent and a requisite showing that the minor child was dependent on the deceased parent for both economic and emotional support.[88]

81. *Id.* at 1081, citing Moore v. East Cleveland, 431 U.S. 494 (1977). *But see* Dearborn Fabricating & Eng'g Corp. v. Wickham, 551 N.E.2d 1135 (Ind. 1990) (reversing a lower court ruling that recognized a claim for parental consortium. The Indiana Supreme Court noted that recognizing the claim would only invite defendants to minimize its validity by proving inadequacies in the familial relationship, resulting in pretrial investigation attacking the quality of parent-child relationship enjoyed by the child before the parent's injuries, and these attacks could lead to children suffering significant emotional harm from the litigation process).

82. *Reighley*, 604 F. Supp. at 1081.

83. *Id.*

84. COLO. REV. STAT. §§ 19-1-101 to 116 (1986), which provides in part that the purposes of the Children's Code are to "secure for each child . . . such care and guidance, preferably in his own home, as will best serve his welfare and the interests of society; [and] [t]o preserve and strengthen family ties . . . including improvement of home environment." *Id.* at § 19-1-102(1)(a) & (b).

85. *Reighley*, 604 F. Supp. at 1083-84.

86. *Id.* at 1082.

87. *Id.* at 1082-83.

88. *Id.* at 1084.

D. *Lee v. Colorado Department of Health*

The uncertainty surrounding parental-filial consortium claims in non-fatal injury cases in Colorado appeared to end with the Colorado Supreme Court's decision in *Lee v. Colorado Department of Health*.[89] In *Lee*, an injured driver's five children joined their father's suit and requested an award of damages for their loss of companionship and support resulting from the father's injury in the car accident. The supreme court upheld the trial court's determination that the children's claims were not cognizable under Colorado law. Chief Justice Joseph A. Quinn, writing for a unanimous court, recited the standard difficulties with recognizing the claim, including: efficacy of monetary compensation as a substitute for companionship and guidance; intangible character of the loss; societal costs and risk of double recovery.[90] Moreover, the court noted that the legislature was in the best position to determine the viability of the claim.[91] Without reference to the modern trend, the *Reighley* opinion or views of legal scholars and commentators, the Colorado Supreme Court left little doubt that the claims for parental consortium, and by analogy, filial consortium, were not judicially recognized in Colorado.

E. *Post-Lee v. Colorado Department of Health Developments*

On the heels of *Lee*, the district court also retreated from the *Reighley* opinion, holding that under Colorado law a minor had no independent right of action to recover for loss of parental consortium in a wrongful death action.[92] In *Beikman v. International Playtex, Inc.*, Judge Jim R. Carrigan held that in light of *Lee*, any reform within the context of parental consortium claims would have to await legislative action.[93] It is obvious from Judge Carrigan's opinion, however, that he favors the child's right to recover for parental consortium. Labelling the modern trend of authority "the more persuasive cases,"[94] Judge Carrigan reasoned that the child's need for protection under the law is even greater than a spouse's, since the spouse is more able to fend for himself or herself.[95]

Another significant development in the parental-filial consortium controversy occurred in 1989 when the Colorado General Assembly amended the wrongful death statute[96] to permit a surviving party's recovery for noneconomic loss, including grief, loss of companionship,

89. 718 P.2d 221 (Colo. 1986).

90. *Id.* at 233.

91. *Id.* at 234. The Colorado Supreme Court agreed with the Kansas Supreme Court's reasoning for denying a child's claim for loss of consortium in Hoffman v. Dautel, 368 P.2d 57 (Kan. 1962). The Colorado court cited the Kansas court's decision in *Hoffman* for denial of the consortium claim due to "[t]he possibility of multiplicity of actions based upon a single tort and one physical injury, when added to the double-recovery aspect of such situation in the absence of some statutory control . . . ." *Id.* at 234.

92. Beikman v. International Playtex, Inc., 658 F. Supp. 255 (D. Colo. 1987).

93. *Id.* at 259.

94. *Id.* at 258.

95. *Id.*

96. COLO. REV. STAT. § 13-21-201 to 204 (1987).

pain and suffering and emotional stress.[97] Although the enactment of similar provisions in other jurisdictions may have provided an analogy for compensating familial consortium claims for personal injuries, these provisions were not often construed as pronouncements by the legislature that damages for lost consortium could be recovered in nonfatal cases. This is similarly true in Colorado where the wrongful death statute and its amendments do not create new causes of action; rather, they merely allow causes already recognized to survive death.[98] Because Colorado does not recognize filial and parental consortium claims under the auspices of *Lee*, it is doubtful that the wrongful death statute and the amendments thereto could logically be construed to create a new action in nonfatal cases.

The Colorado Court of Appeals was asked recently to consider the propriety of the *Lee* decision in *McGee v. Hyatt Legal Services, Inc.*[99] The *McGee* plaintiffs, a mother and her daughter, charged that the negligence of the Hyatt law firm caused temporary custody orders to be issued contrary to the mother's wish for sole legal custody, and as a result, there was a wrongful interference with her parental relationship. Citing *Lee v. Department of Health*, the court rejected the claim, because of the impossibility of ascertaining whether any tangible damages were or would be sustained by the mother because of the custodial order.[100] Although certiorari in *McGee v. Hyatt* was denied by the Colorado Supreme Court, given the immense judicial attention the consortium claim has caused of late, it is appropriate to consider whether or not the Colorado Supreme Court should re-examine its decision not to extend consortium recovery to the parent-child relationship.

IV. CRITIQUE OF COLORADO LAW

A critical analysis of *Lee* provides ample support for the proposition that the court has not been intellectually honest in rejecting consortium claims and that the basis for its decision is inherently flawed. As noted, the primary reasons for the court's decision are the intangible character of the loss, threats of double recovery and that legislative action is the proper means by which extensions of law should be accomplished.[101] Courts and legal scholars have rejected these arguments, espousing countervailing methods and considerations, which reveal *Lee's* flawed analysis.[102]

The double recovery argument in support of nonrecognition is that, as a practical matter, the jury implicitly awards an amount of damages for the impairment of the child-parent relationship when it considers its award for the injured family member. To the extent that implicit recov-

97. 1989 COLO. SESS. LAWS 752 (codified at COLO. REV. STAT. § 13-21-203 (1991 Cum. Supp.)).
98. *Id.*
99. 813 P.2d 754 (Colo. Ct. App. 1990).
100. *Id.* at 758.
101. *See* Guthrie, *supra* note 44, at 705.
102. *See infra* notes 103-17 and accompanying text.

ery presents a problem, it can be remedied by the use of narrowly tailored jury instructions that distinguish between nonderivative pecuniary loss and consortium damages.[103] "The specter of double recovery can be easily eliminated by the trial court's distinctly specifying in proper jury instructions the respective elements of damages to which the parent and the child are each entitled."[104] Moreover, there is a presumption that the jury reads and follows its instructions.[105] This procedure is used successfully in spousal claims. Parental-filial claims should pose no greater problems.

The concern for multiple claims and protracted litigation can be minimized by requiring joinder where feasible.[106] The perceived threat of multiple suits is primarily concerned with parental consortium claims where numerous children seek recovery. It has been suggested that there is no difference between these claims and tort claims involving numerous victims such as bus accidents or airline accidents.[107] Requiring all children in a family to sue as a class would solve this problem.[108]

The intangible nature of the award seems to be an artificial distinction when state law compensates similar losses such as pain and suffering, spousal consortium, emotional distress and nonpecuniary loss in wrongful death actions.[109] Thus, the same judicial rules which guide the jury in these instances can be applied relative to parental-filial consortium claims.[110] Along these lines it has been suggested that monetary compensation will merely make the consortium deprived child or parent a wealthy person rather than enabling them to regain the lost companionship and guidance.[111] Proponents of consortium claims eschew this argument, claiming that although a monetary award may be a poor substitute, it is the only workable way our legal system has found to ease an injured party's tragic loss.[112] One court has expressly stated that allowing such an award is preferable to complete denial.[113]

The *Lee* court additionally believed that recognition was best left to the legislature.[114] Causes of action for loss of consortium have historically been allowed or denied by common law.[115] Courts have long recognized their responsibility to adapt common law to the needs of society

103. *See, e.g.*, Williams v. Hook, 804 P.2d 1131, 1135 (Colo. 1990); Belcher v. Goins, 400 S.E.2d 830, 838 (W. Va. 1990); Radensky, *supra* note 2, at 293-94.

104. Nulle v. Gillette-Campbell Fire Bd., 797 P.2d 1171, 1176 (Wyo. 1990).

105. *Id.*

106. *See* Dearborn Fabricating & Eng'g Corp. v. Wickham, 532 N.E.2d 16, 17 (Ind. Ct. App. 1988), *rev'd.*, 551 N.E.2d 1,135 (Ind. 1990); Hibpshman v. Prudhoe Bay Supply, Inc., 734 P.2d 991, 997 (Alaska 1987); *Nulle*, 797 P.2d at 1175-76.

107. Simpson, *supra* note 25, at 925.

108. Love, *supra* note 25, at 604.

109. *See* Simpson, *supra* note 25, at 925.

110. *Id.*

111. Borer v. American Airlines, Inc., 563 P.2d 858, 862 (Cal. 1977).

112. Theama by Bichler v. City of Kenosha, 344 N.W.2d 513, 520 (Wis. 1984).

113. *Id.*

114. *Lee*, 718 P.2d at 234.

115. Dearborn Fabricating & Eng'g v. Wickham, 532 N.E.2d 15, 17 (Ind. Ct. App. 1988), *rev'd.*, 551 N.E.2d 1135 (1990).

when the legislature has not spoken.[116] As noted by one court, "when the crowd is marching in the wrong direction, it is time to break ranks and strike out on our own."[117] Deference to the legislature flies in the face of the common law responsibilities of the judiciary. In all, there exist well-reasoned rebuttals for the policy arguments set forth in *Lee* and in other cases rejecting filial-spousal consortium claims. As previously noted, a majority of courts have had occasion to consider and deny parental and filial claims and are no doubt aware of these countervailing arguments. Why then are courts continuing to cling to the seemingly "artificial" concerns of double recovery, multiple claims and intangible recovery? What should Colorado's position be in this regard?

V. RECOMMENDATIONS

A. *The Original Analogy to Master-Servant Should Not Be Extended*

As noted above, spousal consortium recovery was based on an outdated and faulty premise that a woman was the servant of her husband with no independent legal identity. The claim grew from this erroneous idea when so-called enlightened courts recognized the fallacy of the husband's role as master, but chose to demonstrate their enlightenment by extending the consortium claim to the wife rather than eliminating it altogether. As such, the consortium claim has been imbedded in legal jurisprudence despite the archaic concept behind its early recognition. Extending it to the parental-child relationship only perpetuates an aberration in the law. The mere existence of a suspect form of recovery should not be the basis for its unrestricted expansion. Thus, any analogy to the spousal claim is not persuasive, and parental and filial consortium actions should not be recognized.

B. *Basic Tort Principles and Costs To Society Should Be Considered*

If the Colorado Supreme Court re-examines its position and does not reverse *Lee*, it should be intellectually honest and acknowledge the procedural mechanisms and considerations that exist to remedy the concerns raised in *Lee*. It could be that the *Lee* court and other courts that reject parental-filial claims are using these policy concerns in an attempt to limit spiraling tort recovery for those not directly injured, but who stand in a special relationship with the victim. Allowing secondary tort victims to sue is somewhat of an idiosyncracy in the law, extending liability from those who are immediately and directly injured to those whose liability is established by some source other than foreseeability.[118] While it is true that secondary claims are allowed in most jurisdictions for spousal consortium, wrongful death and emotional distress, recogni-

116. Hibpshman v. Prudhoe Bay Supply, Inc., 734 P.2d 991, 995 (Alaska 1987); *see also Theama*, 344 N.W.2d at 519 (noting that in defering to the legislature, the court would be shirking its responsibilities).

117. Berger v. Weber, 267 N.W.2d 124, 128 (Mich. Ct. App. 1978).

118. *Cf.* Guthrie, *supra* note 43, at 699 (noting Pennsylvania's attitude towards extended liability).

tion of those claims does not necessarily support the abandoning of traditional tort concepts in favor of creating a consortium claim within the parent-child context.

Compensating a secondary victim who views a tragic accident for his or her emotional distress requires physical manifestations of injury as well as the observer being physically present or in the "zone of danger."[119] With respect to parental-filial consortium, the child sitting in school across town, or for that matter in an entirely different state, is allowed to recover for injuries sustained solely by his or her parent. The child has suffered no cognizable physical injury, yet is allowed to recover in his or her own name against the tortfeasor. Thus, if parental-filial claims are viewed as independent claims, recognition would seem to be entirely contrary to the bounds of tort law and the reasons for their existence. In the words of Justice Benjamin J. Cardozo in *Palsgraf v. Long Island Railroad*,[120]

> the conduct of the defendant's guard, if a wrong in its relation to the holder of the package, was not a wrong in its relation to the plaintiff, standing far away. Relatively to her it was not negligence at all. Nothing in the situation gave notice that the falling package had in it the potency of peril to persons thus removed. . . . The plaintiff sues in her own right for a wrong personal to her, and not as the vicarious beneficiary of a breach of duty to another.[121]

With respect to the analogy to wrongful death causes of action, it has been pointed out that the policy considerations are different where a victim is killed and therefore can bring no direct action of his own.[122] The wrongful death action serves as the only means by which the family unit can recover compensation for the loss of parental care and services, whereas when the parent or child lives, the tangible aspects of the child's care can be compensated in an independent cause of action.[123]

Recognition of the parental-filial consortium claim also effectively creates a tort claim and extends liability beyond the ordinary principles of negligence, which limit recovery to those who are immediately injured and liability to those for whom liability is established by some legal source.[124] In essence, the spousal consortium claim, a legal idiosyncrasy, would be allowed to abrogate the sound principles of duty and foreseeability. Recognition would necessarily create a cause of action for psychic or emotional injury not accompanied by any actual or threatened physical harm or any injury to another legally protected interest.[125] In regard to the bounds of tort law, Judge Charles D. Breitel

119. Towns v. Anderson, 579 P.2d 1163 (Colo. 1978).

120. 162 N.E. 99 (N.Y. 1928).

121. *Id.* at 99-100.

122. Schneider, *supra* note 43.

123. *Id.*

124. Steiner v. Bell Tel. Co., 517 A.2d 1348, 1356 (Pa. Super. Ct. 1986), *allocatur granted*, 532 A.2d 437 (Pa. 1987), *aff'd without opinion*, 540 A.2d 266 (Pa. 1988).

125. *See* Norwest v. Presbyterian Intercommunity Hosp., 652 P.2d 318, 327 (Or. 1982).

of the Court of Appeals of New York in *Tobin v. Grossman*[126] wrote a poignant and persuasive opinion wherein, with regard to emotional distress damages, he stated:

> Beyond practical difficulties there is a limit to attaining essential justice in this area. While it may seem that there should be a remedy for every wrong, this is an ideal limited perforce by the realities of this world. Every injury has ramifying consequences, like the ripplings of the waters, without end. The problem for the law is to limit the legal consequences of wrongs to a controllable degree. The risks of indirect harm from the loss or injury of loved ones is pervasive and inevitably realized at one time or another. Only a small part of that risk is brought about by the culpable acts of others. This is the risk of living and bearing children. It is enough that the law establishes liability in favor of those directly or intentionally harmed.[127]

It is further instructive to note that in the context of actions not brought by the primary victim, concerns about the uncertainty of the intangible loss alleged and the inherent inadequacies of money damages as compensation loom larger, especially since the primary victim may also recover a sum for intangible, uncertain damages, i.e. pain and suffering, etc. Additionally, it may not be far-fetched to say that the cost of being a human being in a modern society could become too expensive, since one negligent mistake could lead to a tort award not only to the injured party but also to all those with whom he has relationships. Of course there is insurance. The insurance company raises its premiums and the public pays for the jury awards. It soon becomes too expensive for the average person to obtain liability insurance. Taxation, prices paid for consumer goods and medical service necessarily increase.[128] If the manufacturing industry is too adversely affected it could result in the loss of jobs.[129] Suggestions are made that these factors should not stand in the way of an enlightened tort system, which must be properly administered in terms of natural justice.[130] However, according to one commentator, this is not necessarily true: "A sound and viable tort system—generally what we now have—is a valuable incident to our free society, but we must protect it from excess lest it become unworkable and alas we find it replaced with something far from desirable."[131]

Of course, if compensation should prove too costly, the legislature could also put a ceiling on the amount of damages recoverable,[132] as the Colorado legislature has done in wrongful death actions for lost society

126. 249 N.E.2d 419 (N.Y. 1969).

127. *Id.* at 424.

128. *See* Guthrie, *supra* note 43, at 702.

129. *Id.* at 702.

130. *See* Love, *supra* note 25, at 604.

131. Guthrie, *supra* note 43, at 702 (citing Steiner v. Bell Tel. Co., 517 A.2d 1348 (Pa. Super. Ct. 1986)).

132. *Id.* at 702.

and companionship.[133] Nevertheless, once done, another secondary victim will be allowed to recover and an additional ripple of tort law will reverberate toward an unknown shore.

C. *Children Should Be Fully Compensated For Direct Injuries*

While the earlier consortium cases were consistent with English common law dealing with master-servant relationships, the more recent cases are simply not in step with modern trends. Very few minors at the present time would be considered an economic asset. Under Colorado law, when a child is negligently injured, medical expenses and past and future earnings are recoverable by the parent who must bring an independent action. Thus, Colorado law has continued the antiquated idea that the child is a servant of his or her parents and, like the servant in common law, can only recover for his or her injuries. When a parent is negligently injured, the child has no cause of action and, it is submitted, needs none since any economic losses will be compensated in the parent's own action. In both instances, however, the tortfeasor is held liable for all damages cognizable under general tort principles. Accordingly, Colorado courts simply need to address the issue that a minor, as with any injured party, should be entitled to complete and full compensation for his or her own losses. All earnings, during minority or following emancipation, should be awarded to a child. Of course, these earnings, as with any personal injury award, should be held in trust for the minor. Applying such a formula would provide the child with the same right of tort recovery as all other tort victims. Under this rule, both parent and child would be entitled to obtain the fullest recovery allowed within the proper boundaries of common law tort principles.

VI. CONCLUSION

Historically, derivative claims for consortium were premised upon archaic views of master-servant and husband-wife relationships. Society should no longer tolerate such views. Expansion of the concept of consortium to include filial or parental claims merely continues this fiction. As noted by Judge Breitel, the law today must recognize that, although injuries impact many people, difficult and somewhat arbitrary lines must be drawn.[134] Direct injury to a child must be fully compensated. Similarly, an injured parent should be entitled to recover in his or her own action for the change he or she experiences in dealing with a child in the form of expenses incurred in caring for the child. Derivative consortium claims, however, should not be expanded. Such claims would necessarily entail the abandonment of common law tort principles in favor of extending liability for psychic injuries not accompanied by actual or threatened physical harm. If such claims were recognized, liability would be improperly extended from those who are immediately and di-

133. COLO. REV. STAT. §§ 13-21-102.5(2)(b) and 203(1) (1991 Cum. Supp.).
134. *See supra* note 127.

rectly injured and whose cause of action is established by foreseeability, to those whose only connection with the accident is their fortuitous relationship with the primary victim. The tort concepts of duty and foreseeability and the reasons for which they exist would necessarily be abandoned. Recognition would mean disregarding the fundamental concepts which limit the legal consequences of wrongs to a controllable degree. In sum, the ripples from an injury must end if the tort system that we find so valuable is to remain effective.