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DAMAGES RECOVERABLE FOR INJURIES TO A SPOUSE IN COLORADO

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Until the passage of the Colorado Married Women's Act in 1868, this state presumably followed the common law doctrine that a married woman merges into the single legal entity represented by her husband. Apparently under the common law doctrine the wife had no cause of action for recovery for personal injuries. However, judicial recognition prior to the Married Women's Act did allow the wife to join with her husband in a suit to recover for her injuries. She could not bring such an action in her own behalf unless at the time of instituting action her husband was dead or had deserted her.

The Married Women's Act passed in 1868 in Colorado recognized that a wife had a right to own property, but limited its transfer by requiring that her husband join in any conveyance. Finally, in 1874, by legislative enactment, it was provided that a wife could sue or be sued in all matters as if she were sole. Provisions to the same effect are to be found in the Colorado Rules of Civil Procedure¹ and in the Colorado Statutes.²

In the case of *Rains v. Rains*,³ where a wife was allowed to sue her husband for damages for personal injuries caused by his negligence, the common law fiction of unity was clearly disavowed. The language used by the court in the *Rains* case was rather strong, and the court held: "Whatever may be the law elsewhere, if the common law fiction of unity ever existed in this state, it does not exist here now."

The strong language of this case was obviously not intended to afford a wife equal position with her husband in regard to the elements of damages which she may recover for injury to her husband by the negligent acts of third persons. In this respect, however, Colorado does not stand alone, since it appears to be the law of 47 of the 48 states that a wife is not entitled to recover for her loss of consortium and services resulting from injuries to her husband. Only in Georgia does the question remain unsettled.⁴

COMMON LAW RIGHTS REMAIN

Almost uniformly, then, the Married Women's Acts do not take away from the husband his common law right to recover against third persons for his loss sustained because of the deprivation of his wife's services, society and companionship. Likewise, because he is under an obligation to support his wife, the husband,

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¹ Rule 17 (1941).

² COLO. STAT. ANN., c. 108, § 2 (1935).

³ 97 Colo. 19, 46 P. 2d 740 (1935).

⁴ *McDade v. West*, 80 Ga. App. 481, 56 S.E. 2d 299 (1949).

in addition, is entitled to recover for any expenses incurred as a result of his wife's injury and for any expenses that may ultimately be incurred in cases of permanent injury. However, there can be no double recovery for such expenses; if the wife has in fact paid such expenses and anticipates paying future expense, she may recover those expenses in her own action.

In the case of *Denver Consolidated Tramway Co. v. Riley*,⁵ the court approved an instruction which rather clearly outlines the husband's elements of damages for injuries to his wife by third persons. This case followed by many years the enactment of the Married Women's Act, and tends to emphasize the husband's common law right. An instruction in the *Denver Consolidated Tramway Co.* case allowed the plaintiff husband to recover for expenses already incurred in endeavoring to effect a cure as well as for future expenses necessary to the same end, and for the loss—past, present and prospective—of the society of his wife caused by her injury.

Under the present status of the law in Colorado, a husband will be entitled to recover, against a third party whose negligence has caused injury to his wife, the following elements of damage: (1) The husband is allowed to recover for expenses incurred and for expenses which will be incurred in the future in the treatment of the wife's injury. (2) The husband may also recover for the past, present and prospective loss of his wife's services. (The term "services" is interpreted to mean financial loss resulting from the deprivation to the husband of his wife's services as housekeeper and mother of the children.⁶) (3) The husband may be allowed to recover for his loss of consortium, which is generally interpreted to mean the loss of society and companionship of his wife.

For injury to the wife, the wife herself may recover: (1) Damages for physical and mental pain and suffering. (2) Past and prospective loss of earnings. (Losses resulting from her inability to perform duties within the home are excluded.) (3) Medical expenses in fact paid or incurred by the wife personally. (4) In the case of *Duffy v. Gross*,⁷ it is indicated that a wife is entitled, independently of the husband's right, to recover damages for her inability to labor. From this it might seem to follow that a wife is entitled to recover for her loss of earnings whether or not she actually is engaged in employment outside the home. The case of *Duffy v. Gross* does not, however, rely upon the principle of loss of earnings as such, but states that the inability to perform labor is a form of mental suffering which is difficult to endure, particularly when the injured person prior to the accident is a normal, healthy person.

The husband's cause of action is a complete, separate cause of action which arises concurrently with the injury and is derivative only insofar as the wife's contributory negligence will

⁵ 14 Colo. App. 132, 59 P. 476 (1899).

⁶ *Guevin v. Manchester St. Ry.*, 78 N. H. 289, 99 A. 298 (1916).

⁷ 121 Colo. 198, 214 P. 2d 498 (1950).

defeat his recovery. Accordingly, a finding of contributory negligence in the action of one spouse against the third person is not *res judicata* to a later action brought by the other spouse.⁸

There appears to be no cause of action for the wife's recovery against third persons for injuries to her husband. In the case of *Giggey v. Gallagher Transportation Company*,⁹ the husband had recovered in an earlier action for his injuries, and his wife had brought this action for the alleged loss of the society and the consortium of her husband. The defendant's demurrer on the grounds that the complaint did not state facts sufficient to constitute a cause of action was sustained by the trial court. Such ruling was affirmed by the Supreme Court of Colorado. In this affirmation the court did point out that there might be one instance in which a wife could recover for the loss of consortium. This exception would obtain where there has been direct impairment of the right of consortium, i.e., in an action based upon alienation of affections. This decision was made in view of the latest provisions of the Married Women's Act and indicates quite clearly that the act has not, to date, been interpreted to strengthen the wife's position to recover for injuries to her husband.

WHERE INJURY CAUSES DEATH

So much for damages for injury to a spouse caused by third persons—. This discussion logically leads to the question of what may be recovered when the injury to the spouse results in death. Covering the husband's rights, we have the case of the *American Insurance Company v. Naylor*¹⁰ wherein the husband brought two actions for the injuries and death of his wife caused by the defendant's negligence. The death action, of course, was brought under the Wrongful Death Statute. The second action was for damages to compensate the husband for the loss of his wife's services, companionship and society between the date of her injury and the date of her death, and also for compensation to him covering medical expenses, including hospital and nursing costs, necessarily incurred by him during that period. The cases were tried together, and the plaintiff recovered judgments on both causes of action. Upon appeal the defendant contended that recovery by the plaintiff under the Wrongful Death Statute barred his action for loss of consortium and expenses. Upon this point the court ruled that the causes of action were separate and did not exclude each other.

Although it is clear that a wife cannot collect damages for an injury to a husband, she is certainly entitled to recovery under the Wrongful Death Statute; she is, in fact, one of the class of persons named who has a right of action for the death of her husband under that statute. Under the statute, a wife was entitled to recover from a third person her pecuniary loss resulting from her husband's death.

⁸ *Gilman v. Gilman*, 51 A. 2d 46 (Vt., 1947).

⁹ 101 Colo. 258, 75 P. 2d 1100 (1937).

¹⁰ 101 Colo. 41, 70 P. 2d 353 (1937).

Until the case of *Fish v. Liley*,¹¹ it was generally believed that a cause of action for wrongful death to a husband did not survive the death of a tort-feasor, inasmuch as the survival statute barred all actions for injuries to the person upon the death of the tort-feasor. In *Fish v. Liley*, recovery was allowed against the deceased tort-feasor's estate on the grounds that the right to recover against the deceased tort-feasor was a property right which survived and was therefore not an action for trespass for injuries to the person. It is to be presumed that this doctrine may be extended to include all persons who were entitled to recover under the Wrongful Death Statute, including parents, children, and a suit by the husband against the deceased tort-feasor for the death of his wife.

Perhaps the *Fish v. Liley* case has further extensions. The reasoning in the case might open a new avenue for a wife to seek recovery for injuries which do not result in death. Strictly construed, this case recognizes that a wife has a property right in the continued life of her husband, the amount of which is measured by her pecuniary loss upon his death. It does not take a great deal of imagination on the basis of this case to see the possibility that the court might find that the wife has a property right in the continued physical well-being of her husband and in his continued availability as a handyman, chauffeur, mechanic and father. Such loss can be measured with some degree of certainty in much the same way as the courts measure a husband's right to recover for the loss of his wife's services as housekeeper, nurse and mother.

CASE COMMENTS

DAMAGES—RECOVERY OF EXPENSES OF LITIGATION IN A SUBSEQUENT ACTION—Landis was sued in a tort action by McGowan. Pikes Peak Company was joined as a defendant, and cross claimed against Landis as an indemnitor and for costs of defending against McGowan's action. Costs were awarded the Pikes Peak Company, as well as to McGowan, who was successful in that litigation. An appeal was taken by Landis, and Pikes Peak Company only participated to defend the costs awarded by the lower court.¹ Landis paid the judgments. Sun Indemnity Co., as subrogee of Pikes Peak Co. now sues Landis for expense of taking depositions for use in the prior trial, and attorney fees and disbursements, including \$250 for services of attorneys in connection with the appellate proceedings wherein Pikes Peak Co. obtained affirmance of its judgment against Landis.

¹¹ 120 Colo. 156, 208 P. 2d 930 (1949).

¹ *Landis v. McGowan*, 114 Colo. 355, 165 P. 2d 180 (1946).