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Statutory Consortium In Virginia

STATUTORY CONSORTIUM IN VIRGINIA

The Virginia statute controlling a married woman's recovery for personal injuries provides that "she may recover the *entire* damages sustained including the personal injury and expenses arising out of the injury... *notwithstanding* the husband may be entitled to the benefit of her *services about domestic affairs and consortium*... and no action for such injury, expenses or loss of services or consortium shall be maintained by the husband."[1] It is clear that under this statute a husband may not recover for the loss of his wife's consortium, but whether the wife may recover this element in his stead is open to question. Under the Virginia statute consortium and loss about domestic affairs are two distinct concepts. Since at common law services in the home were deemed to be an element of consortium, it is necessary to look at the historical development that led to this separation.

At common law the husband and wife were considered to be a single legal entity which was embodied in the person of the husband.[2] The husband had a property right in his wife, she being considered largely as a high grade household servant.[3] Thus, "the basis of the husband's action for interference with the marriage relation was the loss of his wife's services.... The action was one in trespass for *Consortium amisit* and the recovery was as a master's for the loss of his servant's services."[4] The society and affection of the wife was also an element of consortium,[5] although probably not the gist of the action.[6] Thus at common law the wife owed to her husband (1) domestic services and (2) society and affection; these were the elements of consortium.

Because of altered social customs and resulting statutes the duties

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[1]Va. Code Ann. § 55-36 (Repl. Vol. 1959). (Emphasis added).

[2]Marri v. Stamford St. Ry., 84 Conn. 9, 78 Atl. 582, 584 (1911); Palmer v. Turner, 241 Ky. 322, 43 S.W.2d 1017 (1931). In 1 Blackstone, Commentaries *422 (Lewis's ed. 1887) the following language appears: "By marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband: under whose wing, protection, and cover, she performs everything.... Upon the principle, of a union of person in husband and wife, depend almost all the legal rights, duties, and disabilities, that either of them acquire by the marriage."

[3]Prosser, Torts § 103 at 683 n.28 (2d ed. 1955); Article, The Breakdown of Consortium, 30 Colum. L. Rev. 651, 653 nn.9-15 (1930).

[4]Article, supra note 3, at 662.

[5]Rogers v. Smith, 17 Ind. 323 (1861); Skogland v. Minneapolis St. Ry., 45 Minn. 330, 47 N.W. 1071 (1891); Smith v. City of St. Joseph, 55 Mo. 465 (1874); Holbrook, The Change in the Meaning of Consortium, 22 Mich. L. Rev. 1, 2 (1923).

[6]Prosser, Torts § 103 at 683 (2d ed. 1955).

owed by a wife to her husband in the United States today are more diverse than at common law. Some states retain the original definition of consortium,[7] while others have abolished the action completely.[8] The primary problem arises in those states which have abolished only one of the two elements traditionally included in consortium. There are two basic groups of states in this "middle" area. One group has departed from the common law by allowing the husband to recover only for the loss of his wife's domestic services.[9] In these states the element of society and affection has been eliminated. The second group of states has held, when called upon to interpret various Married Women's Acts,[10] that the husband no longer has a property right in the household services of his wife and therefore cannot recover this element of damages in his separate action. In these states the wife recovers the loss of her domestic services in her own action for personal injuries.[11] If the courts of such a state are of the opinion that loss of services was the gist of the husband's common law action

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[7]Gist v. French, 136 Cal. App. 2d 247, 288 P.2d 1003 (Dist. Ct. App. 1955); Busby v. Winn & Lovett Miami, Inc., 80 So. 2d 675 (Fla. 1955); Commercial Carriers v. Small, 277 Ky. 189, 126 S.W.2d 143 (1939); Rea v. Feeback, 244 S.W.2d 1017 (Mo. 1952); Mattfeld v. Nester, 226 Minn. 106, 32 N.W.2d 291 (1948); Omaha & R. V. Ry. v. Chollette, 41 Neb. 578, 59 N.W. 921 (1894); Guevin v. Manchester St. Ry., 78 N.H. 289, 99 Atl. 298 (1916); Shuttler v. Reinhardt, 17 N.J. Super. 480, 86 A.2d 438 (1952); Milde v. Leigh, 75 N.D. 418, 28 N.W.2d 530 (1947); Ruland v. Zenith Constr. Co., 283 P.2d 540 (Okla. 1955); Nunamaker v. New Alexandria Bus Co., 371 Pa. 28, 88 A.2d 697 (1952); Vernon v. Atlantic Coast Line R.R., 218 S.C. 402, 63 S.E.2d 53 (1951); Butler v. Molinski, 198 Tenn. 124, 277 S.W.2d 448 (1955). See Pratt v. Daly, 55 Ariz. 535, 104 P.2d 147 (1940); Duffy v. Gross, 121 Colo. 198, 214 P.2d 498 (1950); West Chicago St. Ry. v. Carr, 170 Ill. 478, 48 N.E. 992 (1897).

[8]Horton v. Vickers, 142 Conn. 105, 111 A.2d 675 (1955), citing Marri v. Stamford St. Ry., 84 Conn. 9, 78 Atl. 582 (1911); Bea v. Russo, 21 So. 2d 530 (La. App. 1945).

[9]Bugbee v. Fowle, 277 Mich. 485, 269 N.W. 570 (1936); Curry v. Board of Comm'rs, 135 Ohio St. 435, 21 N.E.2d 341 (1939); Martin v. United Elec. Ry., 71 R.I. 137, 42 A.2d 897 (1945), citing Golden v. R. L. Greene Paper Co., 44 R.I. 231, 116 Atl. 579 (1922). See Martin v. Gurley, 74 Ga. App. 642, 40 S.E.2d 787 (1946); Mangrelli v. Italian Line, 208 Misc. 685, 144 N.Y.S.2d 570 (Sup. Ct. 1955), and Filer v. New York Cent. R.R., 49 N.Y. 47, 56 (1872); Martin v. Weaver, 161 S.W.2d 812 (Tex. Civ. App. 1941); Gilman v. Gilman, 115 Vt. 49, 51 A.2d 46 (1947), citing Lindsey v. Danville, 46 Vt. 144 (1873).

[10]Married Women's Acts have been passed in every state and have, speaking generally, abolished the husband's ancient property right in his wife. See 3 Vernier, American Family Laws §§ 167, 168, 173, 178 (1935). The typical Married Women's Act gives a wife the right to her own separate property and to sue as femme sole. Holbrook, supra note 5, at 2; 3 Vernier American Family Laws § 167 (1935).

[11]Jacobson v. Fullerton, 181 Iowa 1195, 165 N.W. 358 (1917); White v. Toombs, 162 Kan. 585, 178 P.2d 206 (1947); Alden v. Norwood Arena, Inc., 332 Mass. 267, 124 N.E.2d 505 (1955).

for consortium, the husband's recovery for the loss of his wife's society and affection has also been eliminated.[12]

Thus the duties, included under the term consortium, which a wife owes to her husband in modern times are: (1) services and society in states which have affirmed the common law; (2) services only in states in which the husband may collect for household services but not for society and affection; and (3) none whatever in those states where either a wife may recover for her own household services or consortium has been completely abolished by statute.

The single word *consortium* cannot adequately define the elements of *domestic services* and *mutual society and affection* as used in modern law. Today the word consortium is most closely linked with the idea of mutual society and affection,[13] a common definition being; "the right to her society, companionship, affectionate services and other conjugal relations. It is the voluntary, highly personal, mutually affectionate sympathy and cooperation normally expected to exist between married couples."[14] This definition is embodied in the Virginia Married Women's Act, which is as follows:

> "A married woman may contract and be contracted with and sue and be sued in the same manner and with the same consequences as if she were unmarried, whether the right or liability asserted by or against her accrued heretofore or hereafter. In an action by a married woman to recover for a personal injury inflicted on her she may recover the entire damage sustained including the personal injury and expenses arising out of the injury, whether chargeable to her or her husband, notwithstanding the husband may be entitled to the benefit of her services about domestic affairs and consortium, and any sum recovered

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[12]Alden v. Norwood Arena, Inc., 332 Mass. 267, 124 N.E.2d 505 (1955), citing Rodgers v. Boynton, 315 Mass. 279, 52 N.E.2d 576 (1943). See Rulison v. Victor X-Ray Corp., 207 Iowa 895, 223 N.W. 745 (1929); Jacobson v. Fullerton, 181 Iowa 1195, 165 N.W. 358 (1917). See also Marri v. Stamford St. Ry., 84 Conn. 9, 78 Atl. 582 (1911), in which the court stated that the husband could no longer recover for household duties under the Married Women's Act and that since services was the essence of the common law action of consortium, consortium was eliminated in Connecticut.

[13]In cases wherein the elements of common law consortium have been split, there is often reference to household services and consortium. Bugbee v. Fowle, 277 Mich. 485, 269 N.W. 570 (1936); Curry v. Board of Comm'rs, 135 Ohio St. 435, 21 N.E.2d 341 (1939). The only reasons apparent to this writer for associating consortium with *affection* rather than with *services* in modern law is that consort implies companionship. (F., fr. L. Consors,-sortis, fr. con-[plus]sors, lot, fate, share.) Another possible reason is that at common law consortium was collectible by the husband only; thus when a court allows the wife to recover for domestic services, it is natural that the part of common law consortium that remained in the husband, the right to society, became associated with consortium in modern law.

[14]Alsop v. Eastern Air Lines Inc., 171 F. Supp. 180, 183 (E.D. Va. 1959).

> therein shall be chargeable with expenses arising out of the injury, including hospital, medical and funeral expenses, and any person, including the husband, partially or completely discharging such debts shall be reimbursed out of the sum recovered in the action, whensoever paid, to the extent to which such payment was justified by services rendered or expenses incurred by the obligee... and no action for such injury, expenses or loss of services or consortium shall be maintained by the husband."[15]

The Virginia law bearing on the interpretation of this statute has been recently discussed by a Federal District Court in *Alsop v. Eastern Air Lines Inc.*[16] In *Alsop* the issue was whether a husband and wife can sue jointly for the wife's injuries, she recovering for her personal injuries and inability to pursue her usual occupation, and the husband recovering for the loss of her consortium. The court held that such a joinder was expressly barred by statute; but before reaching this conclusion it discussed at some length the existence of consortium in Virginia. The historical development of consortium in Virginia was was traced through *Richmond Ry. & Elec. Co. v. Bowles,*[17] *Floyd v. Miller,*[18] and *Ford Motor Co. v. Mahone.*[19] These were cited as controlling the law.

In 1896, when the *Richmond Ry.* case arose, the pertinent section of the Married Women's Act was as follows:

> "As to all matter connected with, relating to, or affecting... [her] separate estate... she may sue and be sued in the same manner, and there shall be the same remedies in respect thereof, for and against her and her said estate, as if she were unmarried."[20]

Construing this statute strictly, it being in derogation of common law, the court held improper an instruction that the wife could recover for her "loss of time." The court said that "the husband is still entitled to the services of his wife."[21] The Married Women's Act as it existed

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[15]Va. Code Ann. § 55-36 (Repl. Vol. 1959).
[16]171 F. Supp. 180 (E.D. Va. 1959).
[17]92 Va. 738, 24 S.E. 388 (1896).
[18]190 Va. 303, 57 S.E.2d 114 (1950).
[19]205 F.2d 267 (4th Cir. 1953).
[20]Va. Code § 2288 (1887).
[21]92 Va. 738, 744, 24 S.E. 388, 390 (1896). More specifically the court said: "it has been held that the married women's act leaves the rights, duties, and obligations of the husband and wife as at common law, except in so far as the act itself has changed or modified them.... The wife is still entitled to support at the hands of her husband. Therefore, in estimating the damages, the jury should not have taken into consideration the loss of time or pecuniary expenses incurred."

in Virginia in 1896 had not altered the common law concept of consortium.

With the express intention of changing the law as interpreted in *Richmond Ry.*, the statute was reworded in the Code revision of 1919, so as to provide:

> "In an action by a married woman to recover for a personal injury inflicted on her, she may recover the entire damage sustained, notwithstanding the husband may be entitled to the benefit of her services about domestic affairs; and no action for such services shall be maintained by the husband."[22]

The revisors' comment on this addition was,

> "It is very difficult to sever the damage in a case of this kind, and tell what part should be recovered by the wife and what part by the husband, and as it is the wife who suffers both the physical and mental injury, it is deemed best to give her the entire damage."[23]

The purpose of this provision was to include the husband's right to his wife's domestic services, an element of common law consortium, within the wife's prospective damages. Traditional consortium had been split into two elements: (1) domestic services, the loss of which was recoverable by the wife, and (2) mutual society and affection, the loss of which was apparently still recovered by the husband in a separate action.[24]

In 1932 the statute was again amended.

> "In an action by a married woman to recover for a personal injury inflicted on her, she may recover the entire damage sustained including the personal injury, expenses arising out of the injury (whether chargeable to her or her husband) notwithstanding the husband may be entitled to the benefit of her services about domestic affairs and consortium; and no action for such injury, expenses, or loss of services or consortium shall be maintained by the husband."[25]

The effect of this addition was to eliminate any action for loss of consortium that might formerly have remained in the husband. It is doubtful, however, whether the common law recovery for consortium

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[22]Va. Code Ann. § 5134 (1919).

[23]Revisor's note, Va. Code Ann. § 5134 (1919). Judge Burks appeared before the Virginia State Bar Association in 1919 for the purpose of explaining the revised code. He quoted the revisor's note changing it as follows: "it was deemed best to give her the entire damages, and to take away the present right of the husband to bring a separate action for the loss of such services." Burks, the Code of 1919, 5 Va. L. Reg. (n.s.) 97, 109 (1919).

[24]Floyd v. Miller, 190 Va. 303, 308, 57 S.E.2d 114, 116 (1950).

[25]Va. Acts 1932, c. 25.

was completely eliminated. There appears to be no ground for concluding that the intent of the General Assembly differed in any way from that expressed by the 1919 revisors, *i.e.,* that the purpose of the amendment was anything other than to include the recovery for loss of consortium as an element of the wife's damages, thereby eliminating the husband's separate action. One element of common law consortium, household services, had already been transferred to the wife; now the two elements, which formerly had been improperly split apart, were reunited. The case of *Floyd v. Miller,* decided in in 1950 by the Virginia Supreme Court of Appeals, assumed this to be a proper interpretation of the statute.[26]

In *Floyd* the wife had previously recovered for injuries inflicted by the negligence of a third party, including medical expenses paid by the husband. In a subsequent action the husband sought reimbursement of these expenses. The court held that under the Married Women's Act as it then existed, there could be no recovery. An able dissent challenged the constitutionality of the majority's opinion.

The significance of the *Floyd* case lies in the General Assembly's recognizing the constitutional problem posed by the dissenting opinion and amending the Married Women's Act to provide for the husband's recovery of "hospital, medical and funeral expenses."[27] This new amendment was interpreted by *Ford Motor Co. v. Mahone,* a case decided in 1953 by the Court of Appeals for the Fourth Circuit. In the *Mahone* case the question of the wife's recovery for her husband's loss of consortium was directly in issue. The majority of the court felt bound by the *Floyd* case on this point and upheld an instruction by the trial court that consortium was a proper element of the damages. Chief Judge Parker, writing the majority opinion, stated that he did not agree with the *Floyd* holding, but thought that consortium had been eliminated in Virginia by the recent amendment. He reasoned that if consortium existed in Virginia, then it would have been made recoverable by the husband along with funeral, medical and hospital expenses. Since the new amendment did not technically control in the *Mahone* case, it was possible for Judge Parker to write the majority opinion and yet disagree with it in principle.[28] His reasoning, however, appears questionable. The framers of the 1950 amendment intended to change the law as expressed in the *Floyd* case. There is no

[26]190 Va. 303, 57 S.E.2d 114 (1959).

[27]Va. Acts 1950, c. 281.

[28]The injury to the plaintiff in the Mahone case took place on August 9, 1949, prior to the passage of the amendment to the code which was caused by the Floyd case. Thus the 1950 amendment had no application in Mahone.

indication that they intended to rebut the statements of the 1919 revisors and abolish the element of consortium as part of the wife's damages by subtle implication.

Alsop v. Eastern Air Lines, Inc., after tracing the history of the Virginia Married Women's Act through the *Mahone* case, ably rebutted the views of Judge Parker. In *Alsop* the court, reasoning in much the same manner as the 1919 revisors, saw merit in not allowing the husband to recover consortium from the wife along with medical expenses, and saw nothing in the 1950 amendment that was inconsistent with the continued existence of consortium in Virginia.

> "When the nature of the rights of the husband is considered, the wisdom of the statute is readily apparent. If the desirable personal relationship exists between the parties to the marital contract, it is unimportant which recovers. In less fortunate relationships the loss of services and consortium would be of no ascertainable value."[29]

With this observation it would seem that the Virginia Court in *Alsop* has effectively answered the logic of the *Mahone* case and has rejected the idea proposed by the federal court that consortium did not exist in Virginia. Thus it may be assumed that consortium is a proper element of damages in Virginia and that a wife suing for personal injuries may recover as part of her damages her husband's loss of her "services about domestic affairs and consortium," consortium being defined as mutual society and affection.

JOHN PARKER HILLS

[29] 171 F. Supp. at 184.