

Spring 1981

The Child's Right to Parental Consortium, 14 J. Marshall L. Rev. 341 (1981)

Robert J. Cooney

Kevin J. Conway

Follow this and additional works at: <http://repository.jmls.edu/lawreview>

 Part of the [Juvenile Law Commons](#), and the [Torts Commons](#)

Recommended Citation

Robert J. Cooney, The Child's Right to Parental Consortium, 14 J. Marshall L. Rev. 341 (1981)

<http://repository.jmls.edu/lawreview/vol14/iss2/3>

This Article is brought to you for free and open access by The John Marshall Institutional Repository. It has been accepted for inclusion in The John Marshall Law Review by an authorized administrator of The John Marshall Institutional Repository.

THE CHILD'S RIGHT TO PARENTAL CONSORTIUM

ROBERT J. COONEY* & KEVIN J. CONWAY**

Does a child have a cause of action against a third party for the loss of a parent's care, companionship, and services?¹ This question, long answered in the negative, has been reexamined recently by courts in California,² Illinois,³ Michigan,⁴ Massachusetts,⁵ Ohio,⁶ and elsewhere.⁷ A change in social attitudes has begun to produce a reevaluation of public policy and a change in the law regarding a child's loss of consortium. This article discusses the historical development of the loss of consortium action, the policy reasons for and against the cause of action as applied to minors, and the benefits of allowing the cause of ac-

* Partner, Cooney and Stenn; Fellow, American College of Trial Lawyers; Past Lecturer, University of Chicago Law School; J.D. University of Detroit, 1950; Member, American, Illinois State, and Chicago Bar Associations, American and Illinois Trial Lawyers Associations.

** Associate, Cooney and Stenn; J.D. Loyola University, 1976; Member, Illinois State and Chicago Bar Associations.

1. Parental consortium in this article refers to normal benefits received by a child from his parent, *i.e.*, care, society, and companionship. Spousal consortium includes benefits normally expected in the husband-wife relationship. Among these are care, companionship, society, and sexual relations.

2. *Borer v. American Airlines, Inc.*, 19 Cal. 3d 441, 563 P.2d 858, 138 Cal. Rptr. 302 (1977) (decided 5-4 against the cause of action for loss of parental consortium with extensive dissent).

3. *Koskela v. Martin*, 91 Ill. App. 3d 568, 414 N.E.2d 1148 (1st Dist. 1980). The court denied a child with learning disabilities a cause of action for loss of services, society, affection, and companionship she sustained when her father was seriously injured due to defendant's negligence.

4. *Berger v. Weber*, 82 Mich. App. 199, 267 N.W.2d 124 (1978) (sustained minor child's cause of action).

5. *Ferriter v. Daniel O'Connell's Sons, Inc.*, 413 N.E.2d 690 (Mass. 1980). The court compared the child's interest in the parent's society with the interest of a wife in spousal consortium. "We are skeptical of any suggestion that the child's interest in this setting is less intense than [the spouse's]." 413 N.E.2d at 692. Further support was found in statutes governing actions for wrongful death, where children are entitled to recover for "loss of the reasonably expected . . . society . . . of the decedent." *Id.* at 695, citing MASS. GEN. LAWS ANN. ch. 229, § 2 (West 1974).

6. *Orrison v. Tzong-Ling Huang*, No. 78-291 (Ohio Ct. of Common Pleas, Auglaize County May, 1979) (sustained cause of action for loss of parental consortium at trial; no appeal taken).

7. *E.g.*, *Scruggs v. Meredith*, 134 F. Supp. 868 (D. Hawaii 1955), *rev'd*, 244 F.2d 604 (9th Cir. 1957) in light of *Halberg v. Young*, 41 Hawaii 634 (1957) (denied child's cause of action).

tion to minors for loss of their parents' consortium due to the negligence of a third party.

HISTORICAL DEVELOPMENT

Spousal Loss of Consortium

At common law a husband could assert an action for loss of his wife's services or companionship.⁸ The wife had no similar right of action. The rationale underpinning the family relationship was that "husband and wife were one; and he was the one."⁹ The wife, in short, was the servant of her husband-master.¹⁰ He (the *pater familias*)¹¹ possessed all the legal rights (*patria potestas*)¹² in the family relation. Early in the twentieth century, courts began to allow the wife a cause of action for intentional injury to the husband.¹³ However, notwithstanding the changes in the social, economic, and legal status of married women during the ensuing centuries, the common law rules governing loss of consortium due to negligent injury remained unchanged until 1950.

8. W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 427-30 (2d ed. 1937). The action originally arose out of a property action accruing to the master for loss of his servant. The action was limited to the husband's loss of the wife's services resulting from an injury to the wife by the act of a third party. Recovery was later extended to include damages to society, fellowship, and affectionate relations. W. PROSSER, LAW OF TORTS § 119 (3d ed. 1964). See *Ames v. Union R. Co.*, 117 Mass. 541 (1875) (master has cause of action for loss of services of apprentice injured by third party's negligence); *Woodward v. Washburn*, 3 Denio 369 (N.Y. 1846) (master has cause of action for loss of services against one who unlawfully imprisons his servant); *Hodson v. Stallebrass*, 113 Eng. Rep. 429 (1840) (jury may award damages to master whose servant is wounded and thereby disabled from serving); *Robert Mary's Case*, 77 Eng. Rep. 895, 898-99 (1613) (master has no cause of action for injury to his servant unless the injury is so great that he loses the services of the servant).

9. 3 W. BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND 433-36 (3d ed. 1884). See generally Kahn-Freund, *Inconsistencies and Injustices in the Law of Husband and Wife*, 15 MOD. L. REV. 133 (1952).

10. 2 W. BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND 442-45 (3d ed. 1884).

11. BLACK'S LAW DICTIONARY 1282 (4th ed. 1951).

12. *Id.* at 1283.

13. *Dini v. Naiditch*, 20 Ill. 2d 406, 170 N.E.2d 881 (1960). Since the passage of Married Women's Acts in the early twentieth century, the wife did have an action for intentional deprivation of the husband's services as an alienation of affections. 41 AM. JUR. 2d *Husband and Wife* § 457 (1968). Actions for alienation of affections, criminal conversation, and selling to the spouse habit-forming drugs, as well as liquor in some cases, are included within the group of intentional injuries for which a wife could sue as the basis for loss of consortium. *Hitafer v. Argonne Co.*, 183 F.2d 811, 816 n.31 (2d Cir. 1950). See also *Betsler v. Betsler*, 186 Ill. 537, 58 N.E. 249 (1900) (wife received damages for alienation of affections).

In *Hitafter v. Argonne Co.*,¹⁴ the United States Court of Appeals for the Second Circuit first allowed a wife a cause of action for loss of consortium due to the negligent injury of her husband. The court reasoned:

The actual injury to the wife from loss of consortium, which is the basis for the action, is the same as the actual injury to the husband from that cause. His right to the conjugal society of his wife is no greater than her right to the conjugal society of her husband. Marriage gives each the same rights in that regard.¹⁵

In addition, the court thought it incongruous that the wife was allowed to sue for intentional invasion of her consortium, yet was denied the right to sue for negligent injury of the same interest.¹⁶ Following *Hitafter*, several jurisdictions adopted the modern rule allowing the wife to sue for loss of her husband's consortium due to a third party's negligence.¹⁷

Interference with the Parent-Child Relationship

The history of actions for interference with the parent-child relationship parallels the history of actions for interference with the husband-wife relationship in many respects. Early actions by the father for injury to his child were based upon the master-servant theory,¹⁸ when the child was injured, the father had a right of action for loss of the services of his injured child-servant. The father-master was entitled to the services of his child-servant as he was entitled to his wife's services. The parent-child relationship was viewed as similar to the husband-wife relationship at common law.

There is little in the common law, however, that addresses the child's right to parental consortium. This silence might indi-

14. 183 F.2d 811 (2d Cir. 1950).

15. *Id.* at 816, citing *Bennett v. Bennett*, 116 N.Y. 584, 590, 23 N.E. 17, 18 (1889).

16. *Id.*

17. *Cooney v. Moomaw*, 109 F. Supp. 448 (D.C. Neb. 1953); *Missouri Pac. Transp. Co. v. Miller*, 227 Ark. 351, 299 S.W.2d 41 (1957); *Brown v. Georgia-Tennessee Coaches, Inc.*, 88 Ga. App. 519, 77 S.E.2d 24 (1953); *Acuff v. Schmit*, 248 Iowa 272, 78 N.W.2d 480 (1956); *Hoekstra v. Helgeland*, 78 S.D. 82, 98 N.W.2d 669 (1959).

18. *See Ferriter v. Daniel O'Connell's Sons, Inc.*, 413 N.E.2d 690, 692-93 (Mass. 1980). Prosser points out an even earlier basis for an abduction action: a writ "giving an action for the taking away of an heir, which apparently was based upon the pecuniary loss to the parent of the heir's marriage prospects, and so did not apply to any other children." W. PROSSER, *LAW OF TORTS* § 124 (4th ed. 1971). *See Barham v. Dennis*, 78 Eng. Rep. 1001 (1600) (father cannot maintain action of trespass for taking of a child, except his heir). *See also Grable v. Morggrave*, 4 Ill. 372 (1842) (while action originally given to master for loss of services of his servant, it has been extended to allow father to recover for loss of society and comfort of his daughter, against one who seduced her).

cate a refusal by the courts to stand the master-servant analogy on its head, substituting the child for the parent as master.¹⁹ As early as 1916, however, Dean Pound criticized the common law's shortcomings in failing to protect the child's familial rights:

As against the world at large a child has an interest . . . in the society and affection of the parent, at least while he remains in the household. But the law has done little to secure these interests. . . . It will have been observed that legal securing of the interests of children falls far short of what general considerations would appear to demand.²⁰

Presently, both parents may recover for loss of the services, society, and companionship of their child resulting from tortious injury to him by a third party.²¹ However, as a result of a recent trend in the law, the child may recover in only a small minority of jurisdictions for loss of the services, society, and companionship of his tortiously injured parent.²² As the wife's action for loss of her husband's society and companionship once lagged behind the reciprocal husband's action, so too the child's action for loss of parental consortium now lags behind the parent's.

POLICY BASIS FOR REJECTION OF CHILD'S LOSS OF CONSORTIUM ACTION

The courts have given many reasons for denying a child's action for negligent loss of parental society and companionship.²³ The most common are (1) lack of legal entitlement of a child to parental consortium; (2) possibility of double recovery; (3) creation of a major increase in litigation; and (4) deference to the legislature.²⁴ At common law the child had no legal entitlement to his parents' services and companionship. Since losses were expressed in terms of deprivation of ownership in-

19. *Ferriter v. Daniel O'Connell's Sons, Inc.*, 413 N.E.2d 690 (Mass. 1980).

20. Pound, *Individual Interests in the Domestic Relations*, 14 MICH. L. REV. 177, 185-86 (1916).

21. 59 AM. JUR. 2d *Parent and Child* § 112 (1971). See *Yordon v. Savage*, 279 So. 2d 844 (Fla. 1973) (action for injury to child available to either parent, or both together). *Contra*, *Baxter v. Superior Court of Los Angeles County*, 19 Cal. 3d 461, 563 P.2d 871, 138 Cal. Rptr. 315 (1977) (parent has no cause of action in negligence to recover damages for loss of child's consortium).

22. See notes 3-7 *supra*. See also *Daily v. Parker*, 152 F.2d 174 (7th Cir. 1945) (federal court may recognize child's action in absence of state ruling upholding such cause of action); *Russick v. Hicks*, 85 F. Supp. 281 (W.D. Mich. 1949) (novelty of an asserted right and lack of common law precedent are not valid reasons for denying an action's existence); *Johnson v. Luhman*, 330 Ill. App. 598, 71 N.E. 810 (2d Dist. 1947) (lack of binding precedents not grounds for denying child's cause of action).

23. 69 A.L.R.3d 528-45 (1976). The majority of states deciding this question (10) still deny the child a cause of action.

24. *Id.*

terests, the child suffered no loss because he had no ownership interest in his parents. Blackstone described the common law relationship of parent and child: "The inferior hath no kind of property in the company, care, or assistance of the superior, as the superior is held to have in those of the inferior; and therefore, the inferior can suffer no loss or injury."²⁵

In modern times, the concept of a child's legal entitlement to parental consortium has undergone significant changes. Children are increasingly recognized as people who possess many of the same rights as adults.²⁶ "Minors, as well as adults, are protected by the Constitution and possess constitutional rights;"²⁷ "neither the Fourteenth Amendment nor the Bill of Rights is for adults alone."²⁸ The United States Supreme Court has ruled that children have the rights of freedom of speech,²⁹ equal protection against racial discrimination,³⁰ and due process in civil contexts.³¹ The Court has also ruled that minors have many significant rights in the context of criminal procedure, including the right to be proven guilty beyond a reasonable doubt,³² prohibition of double jeopardy;³³ the right to notice, counsel, and cross examination; the right against self-incrimination;³⁴ and protection against coerced confessions.³⁵

The most obvious recognition of a child's right to the society and companionship of his parent is exemplified by his right to maintain an action under state wrongful death statutes when a parent is killed. In wrongful death actions a child can recover against a tortfeasor for the lost society and companionship of a deceased parent. When a parent is seriously and permanently injured, the child is also tortiously deprived of the society and companionship of his parent. An anomalous situation now exists, however: the child's action for loss of parental society and

25. 3 W. BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND 142 (3d ed. 1884).

26. *Berger v. Weber*, 82 Mich. App. 199, 203, 267 N.W.2d 124, 126 (1978), citing *Carey v. Population Servs. Int'l*, 431 U.S. 678, 692 (1977).

27. *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 74 (1976).

28. *In re Gault*, 387 U.S. 1, 13 (1966).

29. *Tinker v. Des Moines School Dist.*, 393 U.S. 503 (1969).

30. *Brown v. Board of Educ.*, 347 U.S. 483 (1954).

31. *Goss v. Lopez*, 419 U.S. 565 (1975).

32. *In re Winship*, 397 U.S. 358 (1970).

33. *Breed v. Jones*, 421 U.S. 519 (1975).

34. *In re Gault*, 387 U.S. 1 (1967).

35. *Gallegos v. Colorado*, 370 U.S. 49 (1962); *Hall v. Gillins*, 13 Ill. 2d 26, 147 N.E.2d 352 (1958) (interpreting Illinois wrongful death statute, ILL. REV. STAT. ch. 70, §§ 1, 2 (1969) to include injury to support, guidance, companionship, advice, and affection received by child).

companionship can be maintained in a wrongful death case, but not in the case of serious injury.³⁶

Another argument against allowing a child's cause of action for loss of parental society and companionship is the contention that recovery in such an action would overlap the award to the parent of compensation for lost earnings.³⁷ The identical argument against granting a wife the right to bring an action for loss of consortium has been unsuccessful. The shortcomings of this double-recovery argument were exposed when the wife's action was allowed.³⁸ The courts reasoned that the elements of the wife's cause of action for loss of consortium posed no danger of double-recovery because they were in no way compensable in the husband's action for lost income.³⁹ There is no argument that a double-recovery occurs when a husband brings a cause of action for loss of his wife's consortium. Similarly, there should be no double-recovery problem when such damages are awarded to the wife or the child.

It has also been argued that sustaining the child's cause of action for negligent loss of his parent's society and companionship would greatly increase the number of such claims.⁴⁰ Contrary to this "floodgates" argument, however, allowing such a cause of action to a child would probably not add substantially to the number of claimants, nor significantly congest the court

36. *Berger v. Weber*, 82 Mich. App. 199, 202, 267 N.W.2d 124, 127 (1978). As stated by Prosser, "[i]t is not easy to understand and appreciate this reluctance to compensate the child who has been deprived of the care, companionship and education of his mother, or for that matter his father. . . . This is surely a genuine injury, and a serious one. . . ." W. PROSSER, *LAW OF TORTS* 896 (4th ed. 1971). See also P. MUSSEN, J. CONGER & J. KAGEN, *CHILD DEVELOPMENT AND PERSONALITY* 163-64, 397-98 (3d ed. 1961); McCord, McCord, & Thurber, *Some Effects of Paternal Absence on Children*, 64 J. ABNORMAL SOC. PSYCH. 361 (1962).

37. See *Early v. United States*, 474 F.2d 756, 759 (9th Cir. 1973) (children of injured mother had no claim for loss of consortium under Federal Tort Claims Act); *Cambell v. Silver Bay*, 315 F.2d 568, 572 (8th Cir. 1963) (children have no claim for loss of consortium under Minnesota Dram Shop Act); *Hoffman v. Dautel*, 189 Kan. 165, 169, 368 P.2d 57, 60 (1962) (minor children cannot recover for loss of consortium of father because of possibility of multiplicity of actions and double-recovery). See also Note, *The Child's Right to Sue for Loss of Parent's Love, Care and Companionship Caused by Tortious Injury to the Parent*, 56 B.U. L. REV. 722, 735 (1976).

38. See *Dini v. Naiditch*, 20 Ill. 2d 406, 416, 170 N.E.2d 881, 891 (1960) (fear of double-recovery does not bar wife's action for loss of consortium).

39. *Id.* at 427, 170 N.E.2d at 891. See *Johnson v. Hi-Way Dispatch Co.*, 352 F. Supp. 929, 930 (E.D. Ill. 1972) (the gist of the consortium action is the wife's loss resulting from personal injuries of the husband, that is, elements of companionship, felicity, and sexual intercourse in addition to material services); *Winkler v. Hyster Co.*, 54 Ill. App. 3d 282, 286, 369 N.E.2d 606, 610 (1977) (wife has action for loss of consortium resulting from husband's personal injuries).

40. Comment, *The Child's Cause of Action for Loss of Consortium*, 5 SAN. FERN. V. L. REV. 449, 453 (1977).

dockets. One reason why this is true is that statistics show many adults are not married, many adults have no minor children, and few adults have families with many minor children. Citing the statistical abstract of the United States Bureau of Census, Judge Mosk stated in his dissent in *Borer v. American Airlines, Inc.*:

That document showed . . . that during the peak working years of ages 25 to 65, the proportion of all men who were married ranged between 77.8 percent and 80.7 percent . . . as of 1974, 46 percent of the families in the United States had no minor children and 19.2 percent had only 1 such child, making over 65 percent of the total; conversely, only 9.5 percent of families had three minor children, and the entire class of "4 or more" such children comprised a mere 7.4 percent.⁴¹

Comparing the class of child claimants with spousal claimants, Judge Mosk concluded:

Upon reflection, it will be seen that such children inevitably comprise a much more limited class than spouses, for two reasons: not all married persons have children; and of those who do, they are parents of *minor* children for a far shorter period of time than they are spouses. It is therefore not surprising that although more than three-quarters of the adult population is married, almost half of such households—46 percent—have no minor children whatever. It follows that recognition of the cause of action for loss of parental consortium will result in a lesser rather than a greater effect on individual liability and overall insurance costs than our approval of the corresponding action by a spouse.⁴²

In jurisdictions where a child is allowed to recover for lost society and companionship in an alienation of affections case, the flood of litigation simply has not materialized.⁴³

Finally, the contention that legislative action should be a prerequisite to recognition of the child's right of action is not persuasive. Sustaining the child's cause of action is not a reform calling for the legislature's particular abilities or administrative mechanisms. The action for loss of consortium was created and developed by the judiciary. In extending it to children there is, therefore, no reason to defer to the legislature because the courts are competent to achieve the change.⁴⁴

41. *Borer v. American Airlines, Inc.*, 19 Cal. 3d 441, 457, 563 P.2d 858, 868-69, 138 Cal. Rptr. 302, 312 (1977) (Mosk, J., dissenting).

42. *Id.* at 457-58, 563 P.2d at 869, 138 Cal. Rptr. at 313.

43. See Note, *Torts: Domestic Relations: Interference with the Family Relation: Right of a Child to Parental Care: Scruggs v. Meredith*, 42 CORNELL L. Q. 115, 117-18 (1956); Comment, *The Child's Cause of Action for Loss of Consortium*, 5 SAN FERN. V. L. REV. 449, 457 (1977). An additional consideration that would ameliorate any fear of docket congestion is joinder, which would be feasible in most cases.

44. See generally 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 (1976). But see *Hoffman v. Dautel*, 189 Kan. 165, 169, 368 P.2d

In *Dini v. Naiditch*, the Illinois Supreme Court rejected the "deference to the legislature" argument when it was cited as a basis for denying the wife's cause of action for loss of consortium: "Inasmuch as the obstacles to the wife's action were 'judge invented,' there is no conceivable reason why they cannot be 'judge destroyed'. We find no wisdom in abdicating to the legislature our essential function of re-evaluating common law concepts in the light of present day realities."⁴⁵

POLICY BASIS FOR SUSTAINING A CHILD'S LOSS OF CONSORTIUM ACTION

The benefits of allowing the child's cause of action outweigh the suggested drawbacks. The reasons to grant the child a cause of action for negligently caused loss of parental society and companionship are several: (1) The child has a significant interest which may be injured. (2) Recovery is allowed to children in analogous cases. (3) The trend of the law is toward protection of familial interests. (4) Money damages provide benefits to a child who has suffered the loss of parental society and companionship.

It is undisputed that a minor child suffers when his parents are seriously injured. The Supreme Court of Kansas, though it denied the child's cause of action for negligent loss of parental society and companionship, expressed a human sympathy for the dependent child whose parents suffer serious injury:

It is common knowledge that a parent who suffers serious physical or mental injury is unable to give his minor children the parental care, training, love and companionship in the same degree as he might have but for the injury. Hence, it is difficult for the court, on the basis of natural justice, to reach the conclusion that this type of action will not lie. Human tendencies and sympathies suggest otherwise. Normal home life for a child consists of complex incidences in which the sums constitute a nurturing environment. When the vitally important parent child relationship is impaired and the child loses the love, guidance and close companionship of a parent, the child is deprived of something that is indeed valuable and precious. No one could seriously contend otherwise.⁴⁶

The effect on the child of an injury to the parent has been examined by forums other than the courts. Studies of families with an ill parent showed that the children themselves had

57, 60 (1962) (children denied consortium recovery absent statutory condonation).

45. *Dini v. Naiditch*, 20 Ill. 2d 406, 428-29, 170 N.E.2d 881, 892 (1960) (citation omitted).

46. *Hoffman v. Dautel*, 189 Kan. 165, 168, 368 P.2d 57, 59 (1962). See also Note, *The Child's Cause of Action for Loss of Consortium*, 5 SAN FERN. V. L. REV. 449 (1977).

higher rates of illness.⁴⁷ The children also exhibited a higher incidence of juvenile delinquency⁴⁸ and psychiatric disorders.⁴⁹

The child's interest in the society and companionship of his parents is as great as the interest of spouses in the society and companionship of each other.⁵⁰ In cases involving either a very young child or a retarded child,⁵¹ the dependence of the child upon his parents is much greater than the dependence of one spouse upon the other. In fact, for the very young or retarded child, physical existence itself depends upon the care provided by the parent.

Moreover, in the analogous action for alienation of affections, the child is awarded damages for loss of parental society and companionship.⁵² The same protection is given to the child as to the injured spouse. The basis for that protection is that "the father, the mother and the children ordinarily constitute the family. Each is entitled to the society and companionship of the other."⁵³ No distinction was thought to be justifiable between the right of the parent and the right of the child to the society and companionship of his respective family members.

Since a child possesses a recognizable right to the society and companionship of his parents in cases of intentional deprivation of those rights (*i.e.*, alienation of affections), it follows that an action should be sustained where the same rights have been violated by negligence. Precedent for this rationale is found in early cases where the wife was granted a cause of action for loss of consortium due to a third party's negligence: "If the law protects the wife's conjugal interest from so called intentional invasions as in the alienation of affections cases, it cannot deny the same interest where it has been injured by a negligent invasion."⁵⁴

Furthermore, the trend in the law is toward protection of familial interests, and toward recognition of changing familial obligations.⁵⁵ The husband is no longer the "master" of his wife

47. M. RUTTER, CHILDREN OF SICK PARENTS: AN ENVIRONMENTAL AND PSYCHIATRIC STUDY 13 (1966).

48. *Id.* at 14.

49. *Id.* at 16.

50. Ferriter v. Daniel O'Connell's Sons, Inc., 413 N.E.2d 690 (Mass. 1980).

51. Koskela v. Martin, 91 Ill. App. 3d 568, 414 N.E.2d 1148 (1st Dist. 1980) (autistic child); Berger v. Weber, 82 Mich. App. 199, 267 N.W.2d 124 (1978) (retarded child).

52. Daily v. Parker, 152 F.2d 174 (7th Cir. 1945) (child has enforceable right to damages arising out of destruction of family relationship by third party).

53. *Id.* at 175.

54. Dini v. Naiditch, 20 Ill. 2d 406, 430, 170 N.E.2d 881, 892 (1960).

55. *Id.* at 430, 170 N.E.2d at 892-93.

and child "servants." Today it is recognized that all family members derive benefits from their membership in the family. It is unjust, therefore, to protect some of them but leave others unprotected when their familial relationships are damaged. After analyzing the present status of the loss of consortium action, one commentator concluded:

The present day action for loss of consortium is primarily concerned with affording compensation for the loss of a family member's love, care and companionship when his ability to provide these has been impaired by the defendant. Therefore, it is anomalous and inequitable to afford an action to protect these benefits to the husband, wife and parent and yet deny one to the child.⁵⁶

Finally, monetary compensation could make the difference between a child who suffers a permanent handicap due to the loss of a parent's love and guidance, and a child who is able to make a reasonable adjustment to his loss. One obvious use of the monetary award might be to defray costs of child care services while the parent is unable to care for the child. Extra schooling or tutoring might replace some of the benefits the parent provided before the injury. Though it certainly is impossible to purchase all the benefits that a loving parent bestows upon his child, the fact that a child may never be compensated fully for his loss does not justify ignoring the loss entirely.⁵⁷

CONCLUSION

The common law concepts which once governed family relationships seem extremely unjust today. The wife and child are no longer considered servants of the husband. The notion of family servitude for the wife and child violates the modern norms of family life, as well as the constitutional fabric of our legal system.⁵⁸ Though the twentieth century has seen the cause of action for loss of familial benefits granted to women, it

56. 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, 744 (1976). See *Benjamin v. Cleburne Truck & Body Sales, Inc.*, 424 F. Supp. 1294, 1298 (D.V.I. 1976) (wife's right of action for loss of consortium is generally accepted right); *Winkler v. Hyster Co.*, 54 Ill. App. 3d 282, 369 N.E.2d 606 (1977) (common law cause of action for loss of consortium for wife). For additional favorable comment, see Love, *Tortious Interference with the Parent-Child Relationship: Loss of an Injured Person's Society and Companionship*, 51 IND. L. J. 590 (1976); Comment, *The Child's Claim for Loss of Consortium Rights: A Logical and Sympathetic Appeal*, 13 SAN DIEGO L. REV. 231 (1975); Note, *Family Law: Loss of Consortium of the Parent: Right of Child to Recover Against a Negligent Defendant*, 6 VAND. L. REV. 926 (1953).

57. *Berger v. Weber*, 82 Mich. App. 199, 209, 267 N.W.2d 124, 129 (1978) (difficulty of damage calculations does not bar consortium action).

58. A possible constitutional argument is that denial of a child's consortium action, while granting it to others, violates the equal protection guar-

has only recently begun to recognize the cause of action for the child.

The policy arguments used to deny this cause of action to children are suspect. They deny that children are people with basic human and legal rights. They weigh the speculative increase in the number of claims more heavily than the welfare of the child. They deny the child's remedy in damages for his real injuries because of a groundless fear of double-recovery. And they contend that the child's remedy is in the legislature, where he has no direct representation. In short, the policy reasons advanced to deny children a cause of action leave unprotected the most vulnerable person in the family—the child. Childhood encompasses the years from infancy to adulthood, during which children are forming their personalities and characters. The most influential figures in this development are the parents who assist their children through this period. When a parent is negligently injured and thus prevented from performing his parental functions, the child is deprived of his natural guide. The child suffers a clear, identifiable, and often substantive injury when his parent is injured.

Dean Prosser has criticized the failure of the courts to recognize a cause of action for children: "It is not easy to understand and appreciate this reluctance to compensate the child who has been deprived of the care, companionship and education of his mother, or for that matter his father, through the defendant's negligence."⁵⁹ The law now protects husbands and wives from losses of each other's society and companionship, and protects them from losses of their children's society and companionship.⁶⁰ The recent trend is also to protect a child from losses of his parent's society and companionship. Clearly the trend which protects all members of the nuclear family from negligent losses of familial benefits is more reasonable and equitable than the rules which exclude the child from this protection.

The recent decisions granting the child's cause of action have attempted to remedy the loss of a relationship that is of unquestionable value. The authors hope that the trend will continue in Illinois and other jurisdictions. Surely the benefits resulting from these decisions will be reaped by our society for many generations.

antee of the fourteenth amendment. See Comment, *The Child's Cause of Action for Loss of Consortium*, 5 SAN FERN. V. L. REV. 449, 467 n. 109 (1977).

59. W. PROSSER, LAW OF TORTS § 125 (4th ed. 1971).

60. *Stephens v. Weigel*, 336 Ill. App. 36, 82 N.E.2d 697 (2d Dist. 1948) (plaintiff recovered for damages arising from wife's and daughter's hospital expenses and loss of their services and society). See note 21 *supra*.

