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## Recovery for Lost Parental Consortium: Nightmare or Breakthrough?

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# Recovery for Lost Parental Consortium: Nightmare or Breakthrough?

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## **Abstract**

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**KEYWORDS:** parental, nightmare, recovery

# Recovery for Lost Parental Consortium: Nightmare or Breakthrough?

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## I. Introduction

Loss of parental consortium is a cause of action which allows a child to recover damages against third parties who tortiously injure a child's parent.<sup>1</sup> Specifically, it provides a method of recovery for loss of parental "care, comfort, society and . . . companionship."<sup>2</sup> The child's recovery for loss of parental consortium is distinct from the parent's recovery of lost wages which already provides for the child's economic losses, such as food, clothing and shelter. The parent's recovery from the same tortfeasor replaces the money the parent would have earned and used to support his child.

In 1976, the Florida Second District Court of Appeal declined to recognize a child's right to recover for lost parental consortium in *Clark v. Suncoast Hospital, Inc.*<sup>3</sup> In 1979, and again in 1982, the Third District Court of Appeal issued per curiam decisions, following *Clark* without analysis.<sup>4</sup> In 1984, however, the Fifth District Court of Appeal, recognizing the signs of changing societal needs, and the beginnings of a trend, broke new ground in Florida by permitting a child to recover for lost parental consortium in *Rosen by and through Rosen v. Zorzos*.<sup>5</sup> The *Rosen* Court certified its decision to the Florida Supreme Court since it is in direct conflict with the *Clark* decision.<sup>6</sup> The Supreme Court has the opportunity to settle the conflict currently existing among the districts.

This note presents a general history of a child's right to recover for

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1. See, e.g., *Rosen by and through Rosen v. Zorzos*, 449 So. 2d 359 (Fla. 5th Dist. Ct. App. 1984).

2. *Id.* at 360.

3. 338 So. 2d 1117 (Fla. 2d Dist. Ct. App. 1976).

4. *Fayden v. Guerrero*, 420 So. 2d 656 (Fla. 3d Dist. Ct. App. 1979); *Ramirez v. Comm'l Union Ins. Co.*, 369 So. 2d 360 (Fla. 3d Dist. Ct. App. 1982).

5. 449 So. 2d at 359.

6. The Florida Supreme Court has discretionary jurisdiction to review a district court decision "that is certified by it to be in direct conflict with a decision of another district court of appeal." FLA. CONST. art. V, § 3(b)(4).

lost parental consortium in the United States, in general, and Florida in particular. The note traces the development of other relevant Florida law as a comparison. Finally, the article will review the arguments for and against acceptance of the derivative action which were raised in *Clark and Rosen*.<sup>7</sup>

## II. Historical Development of Children's Rights

In 1894, a child named Mary Ellen<sup>8</sup> lived in New York City. Her mother and father had beaten and starved Mary Ellen routinely. An interested social worker tried to protect the child but found there were no laws against child abuse. The social worker's compassion inspired her to find a way to protect the right of the child from abuse. Appalled that New York City protected its dogs and cats better than its children, the social worker went to the Society for the Prevention of Cruelty to Animals for help. She convinced the Society that children are a specie of animal and Mary Ellen, a child, was entitled to protection as an animal from cruelty and abuse. The state successfully prosecuted the parents under then existing cruelty to animals laws. Subsequent publicity prompted the enactment of child abuse laws throughout the country.<sup>9</sup> However, it was the court, not the legislature, who protected little

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7. In addition to the parties, *amicus curiae* briefs have been filed by the Florida Defense Lawyers Association, the Academy of Florida Trial Lawyers, and the American Trial Lawyers Association; Marjorie G. Graham, Post Office Drawer E, West Palm Beach, Florida, 33402; Professor Michael L. Richmond, Nova University Center for the Study of Law, 3100 S.W. Ninth Avenue, Fort Lauderdale, Florida, 33315 (for defendant/petitioner); Richard A. Kupfer, Esquire, Cone, Wagner, Nugent, Johnson, Hazouri & Roth, Post Office Box 3466, West Palm Beach, Florida, 33402 (for AFTL); Richard A. Kupfer; David S. Schragar, Esquire, co-counsel ATLA President, 17th Floor, 810 Center Plaza, Philadelphia, Pennsylvania, 19103 (for ATLA).

8. See generally L. HOULGATE, *THE CHILD & THE STATE* xi (1980); Paulsen, *Legal Protections Against Child Abuse*, 13 *CHILDREN* 42 (1966); B. GRUMET, *THE PLAINTIFFS: VICTIMS OF THE BATTERED CHILD SYNDROME, THE YOUNGEST MINORITY I* (S. Katz ed. 1974).

9. See, e.g., 42 U.S.C. § 5101 (1978); FLA. STAT. § 415.501 (1983); see also ALA. CODE § 26-14-2 (1975); ALASKA STAT. § 47.17.010 (1979); ARIZ. REV. STAT. ANN. § 13.3552 (1978); 1983 ARK. ACTS § 42-807; CAL. [PENAL] CODE § 273a (Deering 1984); COLO. REV. STAT. § 19-10-102 (1983); CONN. GEN. STAT. § 53-21 (1983); DEL. CODE ANN. tit. 31, § 301 (1982); FLA. STAT. § 768.21 (1983); GA. CODE ANN. § 49-5 (1984); HAWAII REV. STAT. § 350 (1983); IDAHO CODE § 16-1601 (1983); ILL. ANN. STAT. ch. 23 § 2052 (Smith-Hurd 1983); IND. CODE ANN. § 31-6-11 (Burns 1984); IOWA CODE § 235 (1984); KAN. STAT. ANN. § 38.716 (1981); KY. REV. STAT. § 405.030 (1982); LA. REV. STAT. ANN. tit. 14 § 403 (West 1984); ME. REV. STAT.

Mary Ellen.

Common law did not recognize the legal rights of wives and children as being on par with the rights of a man. The legal relationship between parent and child was essentially that of servant to master.<sup>10</sup> In fact, a man's dominion over his family was so absolute that a woman who killed her husband was not only subject to punishment for murder, but also for petit treason.<sup>11</sup> Ancient Greek and Roman fathers had the right to kill unwanted or defective children or to allow the children to die from starvation or exposure by leaving them in a field or on a hillside.<sup>12</sup> At the beginning of this century, a sixteen year old American boy was sent to reform school for an infraction which would have resulted in a twenty-five cents to one dollar fine if it had been committed by an adult.<sup>13</sup> His crime was swearing at a church meeting.

Common law afforded no protection to children except as property owned by the parents.<sup>14</sup> Children owed their labor to their father.<sup>15</sup> A child could not sue his parents for committing torts against the child.<sup>16</sup> Parents had no statutory duty to support their children prior to the

ANN. tit. 15 § 3501 (1983); MD. [Crimes & Punishment] CODE ANN. § 35A (1983) tit. 27; MASS. GEN. LAWS ANN. ch. 119 § 1 (West 1984); MICH. COMP. LAWS § 722.561 (1984); MINN. STAT. § 260 (1984); MISS. CODE ANN. § 93-21-15 (1983 Supp.); MO. ANN. STAT. § 210.125 (Vernon 1984); MONT. CODE ANN. § 41-3 (1984); NEB. REV. STAT. § 28-707 (1977); NEV. REV. STAT. § 200.501 (1983); N.H. REV. STAT. ANN. § 169-C-2 (1983); N.J. STAT. ANN. § 9:6-8.8 (West 1984); N.M. STAT. ANN. § 30-6-1 (1984); N.Y. (Soc. Serv.) LAW § 411 (McKinney 1983); N.C. GEN. STAT. § 7A-542 (1983); N.D. CENT. CODE § 50-25.1 (1983); OHIO REV. CODE ANN. § 2151.01 (Page 1983); OKLA. STAT. tit. 21, § 843 (1983); OR. REV. STAT. § 418.740 (1983); 11 PA. CONS. STAT. ANN. § 2202 (Purdon 1984); R.I. GEN. LAWS § 40-11 (1983); S.C. CODE ANN. § 20-7-10 (Law Co-op. 1983); S.D. CODIFIED LAWS ANN. § 26-10 (1983); TENN. CODE ANN. § 37-1-402 (1983); TEX. (Fam.) CODE ANN. § 34.05 (Vernon 1983); UTAH CODE ANN. § 78-3a-19 (1983); VT. STAT. ANN. tit. 13 § 1351 (1984); VA. CODE § 63.1-248 (1984); WASH. REV. CODE ANN. § 26.44.010 (1984); W. VA. CODE 49-6 (1984); WIS. STAT. § 940.201 (1983); WYO. STAT. § 14-3-201 (1978).

10. See, e.g., F. POLLOCK, EXPANSION OF THE COMMON LAW 150-51 (1904); T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 545 (5th ed. 1956).

11. See F. POLLOCK, *supra* note 10, at 151.

12. See, e.g., B. GRUMET, *supra* note 8.

13. Roberts v. State, 82 Neb. 651, 118 N.W. 574 (1908).

14. See, e.g., Wilkie v. Roberts, 91 Fla. 1064, 109 So. 225 (1926).

15. *Id.*

16. See, e.g., Hewlett v. George, 68 Miss. 703, 9 So. 885 (1891); *but see* Ard v. Ard, 414 So. 2d 1066 (Fla. 1982) and Streenz v. Streenz, 106 Ariz. 86, 471 P.2d 282 (1970), which propound the view that a parent may be liable to his children for negligently-caused injuries.

passing of the British Statute, 43rd Elizabeth Ch. 2.<sup>17</sup> Similarly, modern parents have a right to the earnings of their minor children, and can even sue to recover those earnings from third parties whose wrongful conduct deprive them of the earnings.<sup>18</sup> Courts recognized a man's right to sue third parties for wrongfully causing familial loss of consortium as early as 1619 in England<sup>19</sup> and 1852 in America.<sup>20</sup> Society thought that a man's right to his family's society and fellowship was so important to his well-being that negligent or intentional interference was actionable.

American courts first protected a wife's right to her husband's society in 1950 in *Hittafier v. Argonne Co.*<sup>21</sup> The *Hittafier* court allowed a woman to recover against her husband's employer for negligently-inflicted injuries. In *Hittafier*, the court merely applied standard negligence and proximate cause tests in holding that an employer was liable for a wife's loss of her husband's consortium when the husband was injured by the employer's negligence.<sup>22</sup> *Gates v. Foley*<sup>23</sup> gave the Florida Supreme Court an opportunity to recognize the right of a woman to recover for loss of her husband's consortium in 1971. Writing for an unanimous court, Justice Adkins said, "[m]edieval concepts which have no justification in our present society should be rejected."<sup>24</sup> With that decision, Florida became the twenty-fifth state to recognize a wife's right to recover for loss of her husband's consortium.<sup>25</sup>

17. See, e.g., *Borchet v. Borchet*, 185 Md. 586, 45 A.2d 463, 465 (1946); see also 1 W. BLACKSTONE, COMMENTARIES \*449.

18. See, e.g., *Lessard v. Great Falls Woolen Co.*, 83 N.H. 576, 578, 145 A. 782, 784 (1929); *Youngblood v. Taylor*, 89 So. 2d 503, 506 (Fla. 1956); *Wilkie*, 91 Fla. at 1064, 109 So. at 225; *Tucker v. Shelby Mut. Ins. Co. of Shelby, Ohio*, 343 So. 2d 1357 (Fla. 1977).

19. *Hyde v. Scyssor*, 79 Eng. Rep. 462 (1619).

20. See *Fuller v. Naugatuk R. Co.*, 21 Conn. 557 (1852).

21. *Hittafier*, 87 App. D.C. at 57, 183 F.2d at 811 (D.C. Cir. 1950), *overruled on other grounds*, *Smither & Co. v. Coles*, 100 App. D.C. 68, 242 F.2d 220, *cert. denied*, 354 U.S. 914 (1957).

22. *Id.*

23. *Gates*, 247 So. 2d at 40 (Fla. 1971).

24. *Id.* at 44.

25. The cases which previously recognized the wife's cause of action are: *Missouri Pac. Transp. Co. v. Miller*, 227 Ark. 351, 299 S.W.2d 41 (1957); *Stenta v. Leblang*, 55 Del. 181, 185 A.2d 759 (1962); *Brown v. Geo.-Tenn. Coaches, Inc.*, 88 Ga. App. 519, 77 S.E.2d 24 (1953); *Nichols v. Sonneman*, 91 Idaho 199, 418 P.2d 562 (1966); *Dini v. Naiditch*, 20 Ill. 2d 406, 170 N.E.2d 881 (1960); *Troue v. Marker, Inc.*, 252 N.E.2d 800 (Ind. 1969); *Acuff v. Schmit*, 248 Iowa 272, 78 N.W.2d 480 (1956); *Kotsiris, v. Ling*, 451 S.W.2d 411 (Ky. 1970); *Deems v. Western Md. R. Co.*,

It was not until *Yordon v. Savage*<sup>26</sup> in 1973 that Florida recognized that a wife's right to recover for loss of an injured minor child's consortium applied equally to the husband's. There, the parents sued for damages allegedly caused to their son by medical malpractice. The defendant moved successfully to strike the mother from the plaintiffs' complaint as an improper party. On direct appeal, the Florida Supreme Court held that either or both parents had a cause of action for loss of a child's consortium.<sup>27</sup>

Today, Florida law is beginning to recognize and protect the rights of children in much the same way as the law developed rights for women. Children have the right to freedom from abuse.<sup>28</sup> They are protected by child labor laws.<sup>29</sup> They have the right to parental support.<sup>30</sup> Florida children have a statutory right to counsel in juvenile proceedings.<sup>31</sup> Florida has consistently recognized children's needs for nurturing, special care and sensitivity.<sup>32</sup> Children also have the right to a free public education.<sup>33</sup>

Florida's legislature and its courts have expressly recognized that a

247 Md. 95, 231 A.2d 514 (1967); *Montgomery v. Stephan*, 359 Mich. 33, 101 N.W.2d 227 (1960); *Thill v. Modern Erecting Co.*, 284 Minn. 508, 170 N.W.2d 865 (1969); *Delta Chevrolet Company v. Waid*, 211 Miss. 256, 51 So. 2d 443 (1951); *Novak v. Kansas City Tr.*, 365 S.W.2d 539 (Mo. 1963); *Duffy v. Lipsman-Fulkerson & Co.*, 200 F.Supp. 71 (D. Mont. 1961); *Cooney v. Moomaw*, 109 F.Supp. 448 (D. Neb. 1953); *Ekalo v. Constructive Serv. Corp. of America*, 46 N.J. 82, 215 A.2d 1 (1965); *Millington v. Southeastern Elevator Co.*, 22 N.Y.2d 498, 239 N.E.2d 897, 293 N.Y.S.2d 305 (1968); *Clem v. Brown*, 3 Ohio Misc. 167, 32 Ohio Op. 2d 477, 207 N.E.2d 398 (1965); *Ross v. Cuthbert*, 239 Or. 429, 397 P.2d 529 (1964); *Hayes v. Swenson*, Pa. 14 D. & C.2d 708 (1957); *Mariani v. Nanni*, 95 R.I. 153, 185 A.2d 119 (1962); *Hoekstra v. Helgeland*, 78 S.D. 82, 98 N.W.2d 669 (1959); *Page v. Scaramozi*, 288 S.W. 2d 909 (Tex. Civ. App. 1956); *Moran v. Quality Aluminum Casting Co.*, 34 Wis. 2d 542, 150 N.W.2d 137 (1967).

26. 279 So. 2d at 846 (Fla. 1973).

27. The *Yordon* court adopted the *Wilkie* reasoning and held that loss of parental consortium includes medical, hospital and related expenditures, costs of caring for the child, as well as loss of the child's companionship, society and services.

28. FLA. STAT. § 768.21 (1983); see generally *supra* note 9.

29. See, e.g., 29 U.S.C. § 212 (1982); FLA. STAT. § 450 (1983).

30. See, e.g., FLA. STAT. § 742.031 (1983).

31. FLA. STAT. § 39.071 (1983); see also *State ex rel Alton v. Conkling*, 421 So. 2d 1108 (Fla. 5th Dist. Ct. App. 1982) (construing FLA. STAT. § 39.071 (1979)).

32. FLA. STAT. § 39.04(2)(e)(4) (1983) (child's right to have criminal charges transferred for adjudicatory proceedings as a child).

33. *School Bd. of Orange County v. Blackford*, 369 So. 2d 689 (Fla. 1st Dist. Ct. App. 1979).

child's need to have its parents' comfort, society and guidance to grow into a healthy adult is "crucial."<sup>34</sup> Obviously, the law cannot force parents and their children to love each other. However, the beliefs expressed by the actions of the legislature and the courts clearly show their recognition of the importance of such love.<sup>35</sup> Furthermore, they create a public policy which announces a desire to encourage family strength and unity.<sup>36</sup> Consequently, a spouse has a cause of action against third parties for loss of consortium<sup>37</sup> even though a spouse could not get a mandatory injunction for love and affection or involuntary services. In addition, parents can sue third parties for tortiously causing a loss of their children's services and consortium, even though they cannot sue their child for a mandatory injunction to enforce such right to services.<sup>38</sup>

### III. Modern Law Developments

There are more laws today than ever before which recognize and protect children's rights.<sup>39</sup> Every state has laws against child abuse.<sup>40</sup> Nevertheless, twenty-nine states have not even considered the issue of whether a child should have the right to recover for lost parental consortium against third parties.<sup>41</sup> Seventeen states have refused to recognize a child's right to recover for tortiously caused loss of his parents'

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34. *Finn v. Finn*, 312 So. 2d 726 (Fla. 1975). FLA. STAT. § 23.131 (1983).

The Legislature finds and declares that the early childhood years are crucial to the mental, physical and emotional development of children, and that the experiences of early childhood years are highly significant with respect to later development, including educational and vocational success. The Legislature further recognizes the primary role and responsibility of the family for the development of children and the importance of strengthening the family members' abilities to foster the development of young children. . . .

FLA. STAT. § 23.131 (1983).

35. *See supra* note 34.

36. *See supra* note 34.

37. *See, e.g., Gates*, 247 So. 2d 40.

38. *See, e.g., Fox v. City of West Palm Beach*, 383 F.2d 189 (5th Cir. 1967).

39. *See generally supra* note 9.

40. *Id.*

41. States which have not yet decided the issue are: Alabama, Alaska, Arkansas, Colorado, Delaware, Florida, Idaho, Indiana, Kentucky, Maine, Maryland, Missouri, Montana, Nebraska, New Hampshire, New Mexico, North Carolina, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, West Virginia and Wyoming.



consortium.<sup>42</sup> The District of Columbia also refused to recognize the child's right based on statutes which have since been repealed.<sup>43</sup> An Iowa court recognized the cause of action,<sup>44</sup> but the Iowa decision was later overruled in *Audubon-Exira Ready Mix, Inc. v. Ill. Central Gulf R.R. Co.*<sup>45</sup> As a result of statutory construction, the *Audubon* court decided that the Iowa legislature already granted the right.<sup>46</sup> The Iowa court did not disturb the reasoning of its previous case, however. Iowa now recognizes the cause of action as a derivative, but not an independent, cause of action. Federal courts sitting in Alaska,<sup>47</sup> Nebraska<sup>48</sup> and South Carolina<sup>49</sup> rejected the cause of action, but none of the state courts in those states have specifically addressed the issue. In each of those three states, the Federal courts presumed that those states would probably reject the cause of action if they had to address the issue.<sup>50</sup>

42. *Turner v. Atlantic Ry. Co.*, 159 F.Supp. 590 (N.D. Ga. 1958); *Jeune v. Dell E. Webb Construction Co.*, 77 Ariz. 226, 269 P.2d 723 (1954), *overruled on other grounds*, 108 Ariz. 580, 503 P.2d 803 (1972); *Borer v. American Airlines, Inc.*, 19 Cal.3d 441, 138 Cal. Rptr. 302, 563 P.2d 858 (1977); *Hinde v. Butler*, 35 Conn. Supp. 292, 408 A.2d 668 (Conn. Super. Ct. 1979); *W.J. Bremer, Co., Inc. v. Graham*, 169 Ga. App. 115, 312 S.E.2d 806 (1984), *cert. denied*, 312 S.E.2d 787; *Halberg v. Young*, 41 Hawaii 634 (1957); *Koskela v. Martin*, 91 Ill. App. 3d 568, 414 N.E.2d 1148 (1980); *Schmeck v. City of Shawnee*, 647 P.2d 1263 (Kan. 1982); *Kelly v. United States Fidelity & Guaranty Co.*, 353 So. 2d 349 (La. Ct. App. 1977), *appeal dismissed*, 357 So. 2d 1144 (La.); *Salen v. Klomempken*, 322 N.W.2d 736 (Minn. 1982); *Stout v. Kansas City Terminal R. Co.*, 172 Mo. App. 113, 157 S.W. 1019 (1913); *General Electric Co. v. Bush*, 88 Nev. 360, 498 P.2d 366 (1972); *Russell v. Salem Transportation Co.*, 61 N.J. 502, 295 A.2d 862 (1972); *DeAngelis v. Lutheran Medical Center*, 58 N.Y.2d 1053, 449 N.E.2d 406, 462 N.Y.S.2d 626, (1983); *Morgel v. Winger*, 290 N.W.2d 266 (N.D. 1980); *Gibson v. Johnston*, 75 Ohio L. Abs. 413, 144 N.E.2d 310, (1956), *appeal dismissed for want of debatable question*, 166 Ohio St. 288, 2 Ohio Ops.2d 174, 141 N.E.2d 767; *Northwest v. Presbyterian Intercommunity Hospital*, 631 P.2d 1377, *aff'd*, 652 P.2d 318 (Or. 1982).

43. *Pleasant v. Washington Sand & Gravel Co.*, 104 App. D.C. 374, 262 F.2d 471 (1958).

44. *Weitl v. Moes*, 311 N.W.2d 259 (Iowa 1981) (permitting an independent cause of action for lost parental consortium).

45. 335 N.W.2d 148 (Iowa 1983).

46. IOWA CODE ANN. § 611.22 (West 1983) (permitting the cause of action as a derivative claim only).

47. *Early v. United States*, 474 F.2d 756 (9th Cir. 1973).

48. *Hoelsing v. Sears, Roebuck & Co.*, 484 F. Supp. 478 (D. Neb. 1980).

49. *Turner v. Atlantic Coastline Ry. Co.*, 159 F. Supp. 590 (N.D. Ga. 1968).

50. *Early*, 474 F.2d at 758; *Hoelsing*, 484 F. Supp. at 478; *Turner*, 159 F. Supp. at 590.

The three federal court decisions were in 1973, 1980 and 1958.<sup>51</sup> Of the cases which rejected the cause of action, five were decided in the 1950's,<sup>52</sup> six in the 1970's,<sup>53</sup> two in 1980,<sup>54</sup> three in 1982,<sup>55</sup> one in 1983,<sup>56</sup> and one in 1984.<sup>57</sup> The District of Columbia last addressed the issue in 1958.<sup>58</sup>

Of the seventeen states which rejected a cause of action for a child's loss of his parents' consortium, seven did not recognize the wife's right to consortium at the time, either.<sup>59</sup> Recognition of the wife's cause of action seems to be almost a prerequisite for recognition of a child's right to recover for the loss of parental consortium. Every state which recognized the child's cause of action first recognized the wife's cause of action for loss of her husband's consortium.<sup>60</sup> Some of these courts rejected only an independent cause of action for loss of parental consortium, fearing double recovery.<sup>61</sup> In this context, double recovery means that the child would recover once when the child's economic, and arguably, non-economic, damages are recovered in the parent's cause of action, and a second time when the child recovers for his own cause of action for loss of parental consortium.

51. *Early*, 474 F.2d at 756; *Hoising*, 484 F. Supp. at 478; *Turner*, 159 F. Supp. at 590.

52. *Jeune*, 77 Ariz. at 226, 269 P.2d at 723; *Turner*, 159 F. Supp. at 590; *Halberg*, 41 Hawaii at 634; *Gibson*, 75 Ohio L. Abs. at 413, 144 N.E. 2d at 310.

53. *Borer*, 19 Cal. 3d at 441, 563 P. 2d at 858, 138 Cal. Rptr. at 302; *Hinde*, 35 Conn. Supp. at 242, 408 A. 2d at 668; *Kelly*, 353 So. 2d at 349; *Bush*, 88 Nev. at 360, 448 P. 2d at 366; *Russell*, 61 N.J. at 502, 295 A. 2d at 862.

54. *Koskela*, 91 Ill. App. 3d at 568, 414 N.E. 2d at 1148; *Morgel*, 290 N.W. 2d at 266.

55. *Schmeck*, 647 P.2d at 1263; *Salen*, 322 N.W.2d at 736; *Northwest*, 631 P.2d at 1377.

56. *De Angelis*, 58 N.Y.2d at 1053, 449 N.E.2d at 406, 462 N.Y.S.2d at 626.

57. *Bremer*, 169 Ga. App. at 115, 312 S.E.2d at 806. Florida's Fifth District Court of Appeal recognized the child's cause of action in *Rosen*, 449 So. 2d 359. However, it would be inaccurate to say that the State of Florida has recognized the action, since the Florida Supreme Court has not yet resolved the issue.

58. *Pleasant*, 262 F.2d at 471.

59. These states are Arizona, Hawaii, Ohio, Washington, Connecticut, Louisiana and Kansas. See *supra* note 42.

60. See *supra* note 25, which lists the cases from Iowa, Michigan and Wisconsin. The Massachusetts case recognizing the wife's right is *Diaz v. Eli Lilly & Co.*, 364 Mass. 153, 302 N.E.2d 555 (1973).

61. The states rejecting the cause of action for fear of double recovery are: California, Washington, D.C., Hawaii, Kansas, New Jersey and Washington. See *supra* note 42.

Five states have recognized a child's right to recover for loss of a parent's consortium.<sup>62</sup> In *Weitl v. Moes*<sup>63</sup> a pregnant mother of three children suffered permanent brain damage and permanent blindness as the result of medical malpractice. Her fetus was stillborn. In allowing her three children to maintain a cause of action for loss of parental consortium, the court reviewed Iowa law which already allowed causes of action for spousal loss of consortium and for parental loss of a child's consortium and found that loss of parental consortium is consistent with these holdings. In addition, the Iowa court made a thorough analysis of the reasoning for and against the child's cause of action which was later presented in *Rosen*.<sup>64</sup>

In *Berger v. Weber*,<sup>65</sup> the court analyzed the arguments that damages were too speculative, that double recovery would result from recognition of the cause of action and that any changes should be made by the legislature instead of the court. In *Berger*, the mother of a mentally retarded girl was severely injured in an auto accident. The court held that the child's damages were comparable to pain and suffering, intangible losses in wrongful death actions and spousal loss of consortium. The court went on to say "[e]valuating the child's damages is no more speculative than evaluating these other types of intangible losses."<sup>66</sup> Addressing the issue of double recovery the court held that recognition of the child's cause of action would lessen the possibility of double recovery, since the jury would be required to consider the child's loss separately from the parent's loss.<sup>67</sup>

Finally, the *Berger* court noted that other loss of consortium claims were developed by the judiciary, and the child's claim was appropriately decided there, too.<sup>68</sup> In recognizing the child's cause of action for loss of parental consortium, the *Berger* court said "[c]onvinced as we are that we have too long treated the child as [sic] second-class citizen or some sort of nonperson, we feel constrained to remove the disability we have imposed."<sup>69</sup>

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62. *Weitl*, 311 N.W.2d at 259; *Ferriter v. Daniel O'Connell's Sons, Inc.*, 413 N.E.2d 690 (Mass. 1980); *Berger v. Weber*, 303 N.W.2d 424 (Mich. 1981); *Theama* by *Bichler v. City of Kenosha*, 344 N.W.2d 513 (Wis. 1984).

63. 311 N.W.2d at 259.

64. *Id.* at 265-70.

65. 303 N.W.2d at 424.

66. *Id.* at 427.

67. *Id.*

68. *Id.*

69. *Id. But cf. id.* (Levin, J., dissenting), for a thorough analysis of the reasoning

The Supreme Court of Wisconsin addressed the issue in 1984 in *Theama by Bichler v. City of Kenosha*.<sup>70</sup> Robert Theama was severely and permanently injured as the result of a motorcycle accident. Allegedly, a pothole in a negligently maintained road was the proximate cause of the accident. The *Theama* court adopted the cause of action for a child's loss of consortium primarily because the court perceived an increasing recognition and protection of children's rights throughout society.<sup>71</sup> The *Theama* court also analyzed arguments similar to those propounded in *Weitl*<sup>72</sup> and *Berger*, and approved the reasoning of those courts.<sup>73</sup>

In *Ferriter v. Daniel O'Connell's Sons, Inc.*,<sup>74</sup> a father was negligently injured while at work. The court recognized the children's right to recover for loss of parental consortium where the children could show that their dependence was not only economic, but also rooted in "filial needs for closeness, guidance and nurture."<sup>75</sup> The *Ferriter* court analyzed the traditional arguments similarly to the *Weitl*, *Berger* and *Theama* courts, reaching the same conclusion that a minor child has a cause of action for lost parental consortium where the parent is tortiously injured.<sup>76</sup>

In *Rosen by and through Rosen v. Zorzos*,<sup>77</sup> a negligently caused automobile collision killed a young mother and severely injured her husband. The parties settled before trial and the settlement included damages for the children's loss of consortium for their deceased mother, which is a recognized cause of action under Florida's Wrongful Death Act.<sup>78</sup> After settling with Michael Zorzos on the other claims, Stephen Rosen filed a lawsuit on behalf of his children for their loss of his companionship, guidance, love and the like.<sup>79</sup> The lawsuit for the children's loss of Mr. Rosen's consortium was dismissed for failure to state a cause of action.<sup>80</sup> On appeal, the Florida Fifth District reversed,

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against acceptance of the child's cause of action.

70. See 344 N.W.2d at 513.

71. *Id.* at 517.

72. 311 N.W.2d at 259.

73. 303 N.W.2d at 424.

74. 413 N.E.2d at 690.

75. *Id.*

76. *Id.*

77. 449 So. 2d at 359.

78. FLA. STAT. § 768.21(3) (1983).

79. *Rosen*, 449 So. 2d at 359.

80. *Id.*

adopting reasoning similar to *Weitl*, *Berger* and *Ferriter*.<sup>81</sup>

The most recent case addressing the issue whether a child should be permitted a cause of action for lost parental consortium is *Ueland v. Pengo Hydra-Pull Corp.*<sup>82</sup> In *Ueland*, the court held that the child's cause of action is consistent with other Washington law, which permits a husband's cause of action for loss of his wife's services, a wife's cause of action for loss of her husband's consortium and Washington's wrongful death statute, which permits a cause of action for intra-family loss of consortium. The *Ueland* court cited *Rosen*, *Theama*, *Berger* and *Ferriter* and held that "the emerging trend is to recognize the child's cause of action."<sup>83</sup> In permitting the cause of action, the *Ueland* court held that the child's claim must be joined with the parent's claim unless there is just cause not to join the child's claim.

In contrast to the older cases rejecting the cause of action the cases recognizing the child's right are relatively new.<sup>84</sup> Arguably, this contrast indicates the beginnings of a trend toward recognizing a minor child's right to recover from third parties for tortiously caused loss of parental consortium when the parent is injured but does not die. Perhaps those courts which have recognized the cause of action are judicial renegades, as some charge.<sup>85</sup> On the other hand, it is at least equally probable that they are the leading edge of the American judicial system in this area. They do comprise almost forty percent of the states which have addressed the issue in the last five years. These recent cases, together with the increasing number of judicial decisions and statutes recognizing and enforcing children's rights, suggest an increasing legal recognition of children as persons. In addition, there is an apparent heightened public interest in children's rights in general, as evidenced by the almost daily media coverage of programs and events concerning the needs and rights of children.

#### IV. Analysis of Arguments Against Recognition

There are eight reasons generally offered in opposition to recogniz-

81. *Id.*

82. *Ueland v. Pengo Hydra-Pull Corp.*, 103 Wash. 2d 131 (1984).

83. *Id.*

84. Cases which rejected the cause of action are an average of more than twelve years old. In contrast, those decisions which recognize the action were written, on an average, less than four years ago. In Florida, *Clark* was decided nine years ago (1976), whereas *Rosen* was decided only last year (1984).

85. Brief for Petitioner at 11, *Rosen*, 449 So. 2d 359 (Fla. 5th DCA 1984).

ing a child's right to recover for lost parental consortium. They are: 1) The child has no enforceable claim for the parents' services; 2) Absence of precedent; 3) Speculative nature of damages; 4) Double Recovery; 5) Multiplicity of litigation; 6) Possible upset of settlements with parents; 7) Fabrication of claims; 8) Increased insurance costs.<sup>86</sup> These reasons also form the basis of the petitioner's position in *Rosen*,<sup>87</sup> and are the same arguments used in opposition to recognizing a wife's right to recover for lost consortium in *Gates*.<sup>88</sup>

In Florida, the *Clark* court rejected a claim for lost parental consortium based on the above eight reasons. In addition, the *Clark* court held that public policy as announced by the so-called heart balm<sup>89</sup> statute proscribed the child's cause of action.<sup>90</sup> This statute abolished the torts of alienation of affection, criminal conversation, seduction and breach of contract to marry. The express legislative intent in the heart balm statute was to stop the harassment, embarrassment, blackmail and other abuses which resulted from the torts. The *Clark* court did not analyze the reasons it listed. It merely accepted them. However, even the *Clark* court held that the argument for recognizing a child's right to recover against third parties for lost parental consortium could have merit from a public policy viewpoint if the "[c]laims asserted by the plaintiffs were properly circumscribed."<sup>91</sup>

#### A. The Argument That A Child Has No Enforceable Claim for His Parents' Services.

It is true that a Florida child cannot obtain an injunction to force his parents to love him and care for him.<sup>92</sup> On the other hand, a child in Florida does have an enforceable right to physical support.<sup>93</sup> That right is based on either parentage or contract.<sup>94</sup> By way of analogy, it should be noted that Florida's Wrongful Death Act<sup>95</sup> does create the

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86. See, e.g., *Clark*, 338 So. 2d at 1117.

87. 449 So. 2d at 359.

88. 247 So. 2d at 40.

89. FLA. STAT. § 771 (1983) (originally enacted as Ch. 23138, LAWS OF FLA. (1945)).

90. *Clark*, 338 So. 2d at 1119.

91. *Id.*

92. See, e.g., *Fox v. City of West Palm Beach*, 383 F. 2d 189 (5th Cir. 1967).

93. *Armour v. Allen*, 377 So. 2d 798 (Fla. 1st Dist. Ct. App. 1979).

94. *Albert v. Albert*, 415 So. 2d 818 (Fla. 2nd Dist. Ct. App. 1982).

95. FLA. STAT. § 768.21(3) (1983).

right of a child to recover for lost parental consortium when the parent dies. A child certainly could not enforce that right against his dead parent, but can recover against third parties.

### B. Absence of Precedent.

“Every public action which is not customary, either is wrong or, if it is right, is a dangerous precedent. It follows that nothing should ever be done for the first time.”<sup>96</sup> While precedent is an important factor in considering the wisdom of a decision, it should not be controlling. If everyone failed to act until a precedent was set, there would be no great legal decisions. On the other hand, previous landmark decisions by the Florida Supreme Court such as abolition of contributory negligence and *lex loci* conflicts of law, and the recognition of products liability causes of action and the seat belt defense show that lack of precedent is not a sufficient reason to fail to make a sound judicial decision.<sup>97</sup> Even if lack of precedent were a valid argument, it cannot be applicable when the Florida Supreme Court decides *Rosen*. When *Clark* was decided, there were no states that recognized the derivative action. At this time five states judicially recognize such recovery for the minor child.<sup>98</sup> Nonetheless, at this time there are clearly more states against a child’s right to recover for loss of parental consortium than are in favor of the cause of action.

### C. Speculative Nature of the Award

The third argument is that damages for loss of consortium are too speculative. One would expect that a jury would decide damages based upon evidence of the parent-child relationship, *viz*: time spent together, closeness, overall quality of the relationship.<sup>99</sup> Admittedly, it is impossible to put an absolute value on a father’s or mother’s love for a child. However, the same valuation problem exists in measuring punitive damages, physical and mental pain and suffering, diminished capacity

96. THE OXFORD DICTIONARY OF QUOTATIONS, 162.23 (1979).

97. *Gates*, 247 So. 2d at 40; *Hoffman v. Jones*, 280 So. 2d 431 (Fla. 1973) (abrogation of contributory negligence); *Bishop v. Florida Specialty Paint Co.*, 389 So. 2d 999 (Fla. 1980) (abrogation of *lex loci* conflicts of law doctrine); *West v. Caterpillar Tractor Co.*, 336 So. 2d 80 (Fla. 1976) (adopting strict product liability); *Ins. Co. of North America v. Pasakarnis*, 451 So. 2d 457 (Fla. 1984) (seat belt defense).

98. See *supra* note 62.

99. See, e.g., *Berger*, 303 N.W.2d at 424.

to earn, parents' loss of a child's consortium and spousal loss of consortium. The courts have for several years permitted recovery for these damages and, in fact, have found them necessary to insure fair and adequate compensation.<sup>100</sup> The real issue is whether the speculation can be reduced to tolerable levels.<sup>101</sup> Arguably, our country and our judicial system have been modernized by allowing such noneconomic damages. It is hard to see how loss of parental consortium is radically different. Proper jury instructions and other safeguards, such as an elemental definition and special verdicts, would keep speculation within tolerable limits.

#### D. Double Recovery

A major concern with permitting a child's right for loss of parental consortium is that the minor child will recover again for damages which are already included in the parents' verdict for lost wages when the child sues the same defendant.<sup>102</sup> This could, and probably would, happen if the tort were to be recognized as an independent cause of action. A child's loss of parental consortium, however, is more properly classified as a derivative action. Requiring the child to join his claim with the primary claim,<sup>103</sup> along with a limiting jury charge on the child's claim and perhaps a special verdict, will obviate the problem. Double recovery is a potential problem in any complicated or multiple plaintiff case, but just as with the problem of speculation, courts are sophisticated enough to deal with the complexities of each case to avoid the occurrence of double recovery. The jury should always be alert to guard against double recovery.<sup>104</sup>

#### E. Multiplicity of Litigation

The opponents of the child's cause of action for lost parental consortium fear that each child will bring separate suits and further tax the already overburdened court system. Multiplicity of litigation was a legitimate concern of the *Gates* court as well when that court recog-

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100. See generally FLA. STAT. § 768.21 (1983).

101. See, e.g., *General Rent-A-Car, Inc. v. Dahlman*, 310 So. 2d 415 (Fla. 3d Dist. Ct. App. 1975); *Bould v. Touchette*, 349 So. 2d 1181 (Fla. 1977).

102. See, e.g., *Halberg v. Young*, 41 Hawaii 634 (1957).

103. This notion is consistent with the requirement for spousal loss of consortium claims and claims under Florida's Wrongful Death Act, FLA. STAT. § 768.21 (1983).

104. See, e.g., *Berger*, 303 N.W.2d at 427.



nized a wife's cause of action for lost spousal consortium.<sup>105</sup> The *Gates* court addressed the problem by requiring the spouse to join her claim in the primary complaint. The *Rosen* court could take the same approach with the child's claim for lost parental consortium. The Florida legislature has also addressed this concern in a similar context. In enacting Florida's Wrongful Death Act,<sup>106</sup> the legislature addressed the issue by requiring all parties who have claims arising out of the death to raise them in a single complaint through the personal representative of the estate. The same process of compulsory joinder will work effectively in *Rosen* and its progeny. The children should be required to join their claims for loss of parental consortium with the parent's claim.

#### F. Red Tape

Because a Florida statute requires court approval of all settlements in excess of \$5,000, made on behalf of minors, opponents of a cause of action for a child's loss of parental consortium argue that the cause of action will increase red tape.<sup>107</sup> The statute would require approval in loss of parental consortium cases as well as others. However, such approval does not preclude the child's claim for loss of parental consortium in wrongful death cases. Arguably, there would be an increased burden on the courts, but its impact would be minimal. Moreover, the very existence of this statute illuminates Florida's public policy of recognizing and protecting the rights of its minor citizens. In enacting such a safeguard, the Florida legislature demonstrated its recognition of the vulnerability of children and its desire to guard their best interests.

#### G. Upset of Previous Settlements

The opponents of recognition of a child's right to recover for lost parental consortium argue that such recognition will upset previous settlements.<sup>108</sup> Unquestionably, retroactive recognition would cause such results. The same concern arose in *Gates v. Foley*,<sup>109</sup> but the court stated that "[t]he problem has not troubled other courts seriously and

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105. *Gates*, 247 So. 2d at 40.

106. FLA. STAT. § 768.21-.27 (1983).

107. FLA. STAT. § 744.387 (1983).

108. Brief for Petitioner at 32, *Rosen*, 449 So. 2d at 359. Oral argument was heard January 10, 1985 (case no. 65239).

109. 247 So. 2d at 40.

may be easily resolved.”<sup>110</sup> The court allowed the wife’s claim to be joined with the husband’s claim only if the wife’s claim was not time-barred and the husband’s claim was still pending. Where the husband’s claim “has been terminated by adverse judgment on the merits, this should bar the wife’s cause of action for consortium.”<sup>111</sup>

In *Rosen*, the children brought their claim for loss of their father’s consortium after all other issues were settled out of court. However, the *Rosen* family has had the willingness to pursue the issue. In addition, the Florida Supreme Court has the unquestioned authority to recognize this cause of action in *Rosen* and pending and prospective cases only.<sup>112</sup> Arguably, this is the only logical approach to take since it would avoid reopening cases already settled. This method would also be consistent with the court’s decision in *Gates*,<sup>113</sup> giving direction and stability to Florida jurisprudence. In any case, the child’s cause of action is only for lost consortium, and not for anything the parent recovered. In addition, a jury instruction will clarify the fact that recovery for the children should not include loss of financial support, which is already covered in the parent’s settlement or verdict.

## H. Fabrication of Claims

Fabrication of claims is a traditional argument in opposition to causes of action arising from intra-family relationship.<sup>114</sup> The Florida Supreme Court addressed the argument in *Ard v. Ard*, when it partially abrogated parent-child tort immunity.<sup>115</sup> The *Ard* court held that the possibility of fraud does not constitute a valid justification to reject the child’s cause of action for negligent torts of the parent, since the court can capably guard against fraud.<sup>116</sup> The court went on to reason

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110. *Id.* at 45.

111. *Id.*

112. *See, e.g.*, *Lawrence v. Florida East Coast Ry. Co.*, 346 So. 2d 1012 (Fla. 1977) (prospective application of new rule requiring special verdicts in all comparative negligence cases); *In re Beverly*, 342 So. 2d 481 (Fla. 1977) (change in standard of proof for civil commitment prospective application only); *State ex rel Dade County v. Nunzum*, 372 So. 2d 441 (Fla. 1979) (prospective only application of revenue sharing court order); *Aldana v. Holub*, 381 So. 2d 231 (Fla. 1980) (declaration of unconstitutionality of medical malpractice act prospective only).

113. 247 So. 2d at 40.

114. *Ard v. Ard*, 414 So. 2d 1066 (Fla. 1982).

115. *Id.*

116. *Id.* at 1069.

that the testimony of the family members would be extremely vulnerable to impeachment and that juries are fully able to use their common sense to arrive at the truth.<sup>117</sup> The *Ard* court plainly discounted the possibility of fraudulent claims as a good reason to bar a cause of action or to grant relief.<sup>118</sup> The opinion seems to state the court's feeling in general, unrestricted to the *Ard* decision.

## I. Insurance Rates

The final argument made in opposition to recognizing a child's right to recover for lost parental consortium is that recoveries will raise insurance rates. The argument is that society cannot afford to pay for all types of losses. Assuming that recognition of the derivative action would impact on insurance rates, a conflict of public policies arises. On one hand, members of society want to be able to afford insurance. On the other hand, they should be able to seek recovery for certain losses, including insured losses. The issue then becomes whether recognition of the derivative action would have a prohibitively adverse effect on insurance rates.

Arguably, every insured loss affects insurance rates. Examples include a burning house, a destroyed car, appendicitis and thousands more. Insurance rates are an important concern to the public, as are all expenses. On the other hand, the public, through its purchase of numerous types of non-required insurance coverages has arguably demonstrated that it is far more interested in having insurance coverage in the event of a loss than it is concerned about increased rates. The child's right to recovery for lost parental consortium is consistent with other allowable losses. The only reason to deny the action is that some demarcation should be made to limit a wrongdoer's liability, and here is where public policy draws the line.<sup>119</sup>

There is no reported or available evidence that the child's cause of action will have a significant impact, if at all, on insurance rates. It is a matter of common knowledge that rates differ according to risk categories. Drivers with bad driving records will pay higher rates than those

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117. *Id.* (citing *Brooks v. Robinson*, 259 Ind. 16, 284 N.E.2d 794 (1972)).

118. *Ard*, 414 So. 2d at 1069.

119. Last year, the Florida Medical Association sponsored Proposition 9, a constitutional amendment which would have limited recovery for non-economic damages to \$100,000.00. However, it did not meet the constitutional requirements to be allowed on the ballot.

with good records, and they should. There is no credible argument that children should be denied full and fair compensation merely to maintain insurance rates for negligent wrongdoers.

The Florida Supreme Court has reviewed and rejected each of the arguments raised in opposition to the child's cause of action in *Clark*<sup>120</sup> and repeated in *Rosen*,<sup>121</sup> at one time or another and rejected them.<sup>122</sup> While some of these arguments present valid concerns, they are not, individually or in aggregate, sufficient to bar a child's right to recover for lost parental consortium.

## V. Analysis of Arguments in Favor of Recognition

There should be a rational, positive basis to recognize a cause of action. The reasons given in favor of the action in *Rosen* are: 1) Recognition is consistent with Florida legislative enactment which recognizes the claim when the parent dies;<sup>123</sup> 2) Recognition is consistent with Florida law which recognizes a claim for loss of a wife's consortium;<sup>124</sup> 3) Recognition is consistent with Florida law which recognizes a parent's right to recover for loss of a child's consortium;<sup>125</sup> and 4) Recognition is required by the Florida Constitution.<sup>126</sup>

### A. Legislative Enactments Recognize The Cause of Action

The Florida Wrongful Death Act<sup>127</sup> allows minor children of the decedent to "[r]ecover for lost parental companionship, instruction, and guidance and for mental pain and suffering . . ."<sup>128</sup> The legislative intent is clearly stated in the statute. "It is the public policy of the State to shift the losses resulting when wrongful death occurs from the survivors of the decedent to the wrongdoer. . ."<sup>129</sup> *Turlington v.*

120. 338 So. 2d at 1117.

121. 449 So. 2d at 359.

122. *Gates*, 247 So. 2d at 40; *Rosen*, 449 So. 2d at 359.

123. FLA. STAT. § 768.21 (1983).

124. *Gates*, 247 So. 2d at 40.

125. *See Wilkie*, 109 So. at 225.

126. *Rosen*, 449 So. 2d at 359. The Florida Constitution declares that: "The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay." FLA. CONST. art. I, § 21.

127. FLA. STAT. § 768.16-.27 (1983).

128. FLA. STAT. § 768.21(3) (1983).

129. FLA. STAT. § 768.17 (1983).

*Tampa Electric Co.*<sup>130</sup> stated similar public policy. In *Tampa Electric Co.* the court stated, “[w]here, by virtue of the relationship toward each other existing between parties, the law implies a duty from one to another, a breach of that duty that proximately causes or contributes to causing a substantial injury to another may constitute” an actionable wrong. Thus, the legislative and judicial view in Florida is wholly consistent with the general view that a person is responsible for all the injuries that he negligently inflicts upon others.<sup>131</sup>

Some argue that consortium always includes the husband-wife sexual relationship and, therefore, excludes children.<sup>132</sup> However, Florida’s Wrongful Death Act lists each of the elements of consortium recoverable by minor children and, of course, omits conjugal relations.<sup>133</sup> Logically, if the legislature allows the recovery, then it certainly recognizes the real injury to a child who is deprived of his parents’ “companionship, instruction and guidance.”<sup>134</sup> Any material disruption of the parent-child relationship causes injury to the child. Providing a remedy for the child whose parent is injured, but not killed, is consistent with Florida public policy as stated in the Wrongful Death Act.

## B. Florida Recognizes Loss of Spousal Consortium

The issue of a wife’s claim for loss of her husband’s consortium which was presented in *Gates*<sup>135</sup> is parallel to the issue of lost parental consortium in *Rosen*.<sup>136</sup> The *Gates* court recognized that societal changes in the woman’s status required recognition of her right to recover for loss of her husband’s consortium. Like *Rosen*, the *Gates* court referred to Florida Constitution Article I Section 21, as well as Sections 2 and 9. Unlike *Rosen*, *Gates* went on to discuss the wife’s rights under the United States Constitution and various federal statutes.<sup>137</sup> The *Gates* court reasoned that, in addition to state law and public policy, the federal constitution and federal laws against discrimination<sup>138</sup> mandated recognition of the wife’s claim. The court held that discrimi-

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130. 62 Fla. at 398, 56 So. at 696.

131. *See, e.g.*, *Barnfield v. Addington*, 104 Fla. 661, 140 So. 893 (1932).

132. *See, e.g.*, *Tremblay v. Carter*, 390 So. 2d 816 (Fla. 2d Dist. Ct. App. 1980).

133. FLA. STAT. § 768.21 (1983).

134. *Id.*

135. 247 So. 2d at 40.

136. 449 So. 2d at 359.

137. *Gates*, 247 So. 2d at 40.

138. 42 U.S.C. § 2000e.

nation on the basis of sex by not allowing a wife's cause of action for loss of her husband's consortium was against federal law and was unconstitutional.

Florida's recognition that a loss of a husband's consortium injures a wife supports the view that loss of parental consortium injures a child. Whereas a wife is supposedly a mature adult, the minor child does not have the benefit of life's experience. The child is far more dependent for guidance and nurture than the wife. Since the law recognizes that a wife's loss of her husband's consortium is a real loss, *a fortiori*, the child's loss of parental consortium is cognizable also for the same reason.

### C. Florida Recognizes A Parent's Right to a Child's Consortium

In Florida, a parent has the right to sue for loss of a child's consortium.<sup>139</sup> In *Wilkie*,<sup>140</sup> the court noted that such right was not a common-law right, but it decided that, "[t]he father's right to the custody, companionship, services, and earnings of his minor child are valuable rights, constituting a species of property in the father, a wrongful injury to which by a third person will support an action in favor of the father."<sup>141</sup> This cause of action was independent of the injured child's right to recover for his direct injuries.

Arguably, an adult, who is also a parent, is far better equipped to deal with emotional and financial crises. Yet Florida recognizes that the injury of one's child creates a palpable loss in the parent. The same reasoning leads to the conclusion that a child's injury caused by the loss of parental consortium would be no less than a parent's loss. Recognizing the child's right to recover for lost parental consortium is consistent with recognition of the parent's right to recover for loss of a child's consortium. It is equivalent to recognizing a child as a complete person.

### D. The Florida Constitution Guarantees Redress of Any Injury.

The *Rosen* court held that recognition of a child's right to recover

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139. *Wilkie*, 109 So. at 225.

140. *Id.*

141. *Id.* But see petitioner's brief, *Rosen*, 449 So. 2d at 359, which asserts that recovery is limited to economic damages.

for loss of parental consortium is required by the Florida Constitution.<sup>142</sup> Article I, Section 21, states “[t]he courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay.”<sup>143</sup> The article’s simplicity seems to defy any attempt to interpret away the right insured by the provision.

The Constitution guarantees such an opportunity of redress for any injury.<sup>144</sup> Therefore, the question is whether the Florida Supreme Court will decide that a child’s loss of parental consortium is an injury. If the decision is yes, then the court seems bound to affirm *Rosen*. Arguably, the Florida Constitution does not require recognition if public policy is better served by rejection of the child’s cause of action.<sup>145</sup> Of course, if the court decides there is no injury as a matter of law, public policy or otherwise, then it will not recognize the cause of action anyway. The court could probably recognize the injury but limit recovery without violating the Florida Constitution.<sup>146</sup>

### Conclusion

Studies demonstrate conclusively that parents’ love, society, support, training, role model and the like are essential to the physical, mental and emotional health of children.<sup>147</sup> The incidence of juvenile delinquency and psychological problems increases when there is a reduced functioning of the family unit.<sup>148</sup> This increased awareness and scientific knowledge should contribute to the recognition of a child’s right to recover for loss of parental consortium.

By affirming the Fifth District Court of Appeal in *Rosen*, the Florida Supreme Court can write another important chapter in the history of Florida jurisprudence. Recognition of the child’s natural right to his

142. FLA. CONST. art I, § 21 (1968).

143. *Id.*

144. *Accord* Ellison v. Northwest Eng’g Co., 521 F. Supp. 199 (S.D. Fla. 1981) (construing Fla. Const. art. I § 21 to allow workman to sue a manufacturer for breach of implied warranty, negligence and strict liability).

145. *See, e.g.*, Abdin v. Fischer, 374 So. 2d 1379 (Fla. 1979) (statute limiting liability of owners and lessees who provide public park areas does not violate the constitutional provision that the courts shall be open to every person for redress of any injury).

146. *See generally id.*

147. B. BERELSON & G. STEINER, HUMAN BEHAVIOR: AN INVENTORY OF SCIENTIFIC FINDINGS 316-17 (1964).

148. *Id.*

parents' love, companionship, education and protection, will signal the Court's continued belief that government is a servant of the people rather than people the servants of government. Affirmance will be consistent with the court's policy of protecting the rights and needs of Florida's fast changing society. This policy was previously laid down in cases where the Court abrogated the contributory negligence rule,<sup>149</sup> where it abrogated the obsolete doctrine of *lex loci delecti*,<sup>150</sup> where it adopted strict liability in tort and product cases,<sup>151</sup> and where it adopted the seat belt defense,<sup>152</sup> to name a few.

When little Mary Ellen had nowhere to turn, the courts protected her natural rights, even though previous law did not. The case of "Mary Ellen" was a social breakthrough in 1894.<sup>153</sup> Now, the Florida Supreme Court is presented with the opportunity to make another positive social breakthrough. By affirming *Rosen*, the court will continue society's movement toward recognizing and protecting the rights and needs of its children.

*Rodney Guy Romano*

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149. *Hoffman v. Jones*, 280 So. 2d 431 (Fla. 1973).

150. *Bishop v. Fla. Specialty Plant Co.*, 389 So. 2d 999 (Fla. 1980).

151. *West v. Caterpillar Tractor Co.*, 336 So. 2d 80 (Fla. 1976).

152. *Pasakarnis*, 451 So. 2d at 457.

153. *See supra* note 8.