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I. INTRODUCTION

Granting a child’s loss of consortium claim for a negligently injured parent is a relatively young concept. In the past fifteen years since the first decision granting a child recovery was handed down, the courts have been slow to alter traditional wisdom prohibiting such recovery. In February 1993, the Nebraska Supreme Court in Guenther v. Stoll-

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LOSS OF CONSORTIUM

berg elected not to allow a child a right to recover loss of consortium for a negligently injured parent. The court chose to emulate a long-standing tradition held by a majority of states in denying a child such recovery. As of now, sixteen states do allow a child to recover loss of consortium for a negligently injured parent. Nebraska finds itself siding with the majority. The District of Columbia and twenty-two states, including Nebraska, deny such recovery.

In Guenther, Nebraska appears to have chosen a path in the opposite direction from the growing, albeit slow, trend across the country. Since the Michigan Court of Appeals first allowed a right to recovery in 1978, almost one state a year has decided to grant children the right to a claim for loss of consortium, and it seems likely that others


Eleven states are currently undecided on the issue but most likely will have to jump off of the fence on one side of the issue or the other in the next few years. Those states include Alabama, Delaware, Kentucky, Mississippi, New Hampshire, New Mexico, Rhode Island, South Carolina, South Dakota, Utah, and Virginia.
will follow. Moreover, in Nebraska, loss of consortium is allowed for a child in a wrongful death claim for a parent, and the parent is allowed to recover consortium for a negligently injured child. Logically, the next step would be to allow a child recovery for loss of consortium for a negligently injured parent. Indeed, those courts that now allow recovery have based their decision on the fact that refusing to allow a child's claim breeds logical inconsistencies in tort law which are based more on anachronisms than common sense.


6. In Gallimore v. Children's Hosp. Medical Ctr., 617 N.E.2d 1052 (Ohio 1993) the Ohio Supreme Court granted the plaintiff-mother the right of filial consortium for her negligently injured son. In so doing, the court immediately recognized that this decision was inconsistent with its denial of a child's right of consortium for a negligently injured parent in High v. Howard, 592 N.E.2d 818 (Ohio 1992) a case decided just a year earlier. Citing the logical inconsistencies that appear in allowing filial consortium and denying parental consortium, the court overturned High. While noting that the court had undergone a change in composition since the High decision, the court grounded its decision on the following factors:

Rather than perpetuate what we believe to be an unfair and legally unjustifiable conclusion in High, we have chosen to overrule that decision. . . . Our critics may wish to perpetuate an anachronistic and sterile view of the relationship between parents and children, but we seek to distance ourselves from that viewpoint. Either the common law must be modernized to conform with present-day norms, or it will engender a lack of respect as being out of touch with the realities of our time.

Gallimore v. Children's Hosp. Medical Ctr., 617 N.E.2d 1052, 1060 (Ohio 1993). In Guenther, the Nebraska Supreme Court cited High as foundation for its decision in denying recovery, prompting one to wonder if a similar change of heart could occur in Nebraska in the future, especially since this state already allows filial consortium. See infra note 116 and accompanying text. See also Ueland v. Pengo Hydra-Pull Corp., 691 P.2d 190, 192 (Wash. 1984)(expressing difficulty understanding reluctance to compensate child).

In Reagan v. Vaughn, 804 S.W.2d 463 (Tex. 1990) the Texas Supreme court rejected the argument that just because other jurisdictions did not allow a child a right of recovery, the state of Texas should follow suit. The court refuted the argument by stating "[T]hat is no sufficient reason why an action should be sustained.' Hill v. Kimball, 13 S.W.2d 69, 59 (Tex. 1890). This observation remains valid today." Reagan v. Vaughn, 804 S.W.2d 463, 465 (Tex. 1990).
The Nebraska Supreme Court refused to allow recovery based on three traditional arguments which have seemingly always arisen when any new type of tort cause of action has been launched: (1) lack of legal entitlement, (2) multiplicity of suits and double recovery, and (3) calculation of damages. The immediate result of the court’s decision to deny such loss of consortium claims is to permit several logical inconsistencies to run rampant through Nebraska tort law. A careful examination of each issue illuminates a rather unthoughtful decision based more on outstanding precedent than a fear of increased litigation or double recovery. The long-term effect of Guenther is the denial of a rational basis for providing a child with compensation. While opponents of recovery argue that the child recovers vicariously through the parent’s award of consortium for the injured spouse, the child’s award will never be argued before a jury nor will the child actually receive any compensation. Consequently, a child whose loss is real enough to her is denied any type of independent award.

This Note will examine the history behind the loss of consortium claim for a child and then discuss the three traditional notions the

In Theama v. City of Kenosha, 344 N.W.2d 513 (Wis. 1984) the Wisconsin Supreme Court equated the situation with that of overturning precedent in allowing the wife a right of recovery for consortium for a negligently injured husband years earlier. The court quoted Montgomery v. Stephan, 101 N.W.2d 227 (Mich. 1960), in which the court allowed a wife’s loss of consortium claim.

Were we to rule upon precedent alone, were stability the only reason for our being, we would have no trouble with this case. We would simply tell the woman to begone, and to take her shattered husband with her, that we need no longer be affronted by a sight so repulsive. In so doing we would have vast support from the dusty books. But dust the decision would remain in our mouths throughout the years ahead, a reproach to law and conscience alike. Our oath is to do justice, not to perpetuate error.


There is one court, however, that discussed the inconsistencies in denying loss of consortium for a negligently injured parent and dismissed those inconsistencies as irrelevant. Norwest v. Presbyterian Intercommunity Hosp., 652 P.2d 318, 333 (Or. 1982).

7. Indeed, primary examples of the threat of increased litigation haunting the genesis of new tort claims can be found without looking further than consortium claims in general. The same fears surrounded allowing the spouse a right of recovery for a negligently injured husband, Maureen Ann Delaney, What About the Children? Toward an Expansion of Loss of Consortium Recovery in the District of Columbia, 41 Am. U.L. Rev. 107, 108 (1991), and date back to wrongful death claims for a spouse. Perhaps the Michigan Court of Appeals summed the situation up best when it stated "[t]he rights of a new class of tort plaintiffs should be forthrightly judged on their own merits, rather than engaging in gloomy speculation as to where it will all end." Berger v. Weber, 267 N.W.2d 124, 129 (Mich. Ct. App. 1978).

court employed to deny recovery: (1) lack of legal entitlement, (2) multiplicity and double recovery, and (3) calculation of damages. In addition, the fear that insurance premiums will greatly increase as a consequence of allowing an award will be discussed. Finally, some consideration will be given to the likelihood of the court reversing itself and allowing recovery sometime in the future.

II. BACKGROUND

A child's claim for loss of consortium for a negligently injured parent sprouted from pre-existing consortium claims from other members of the negligently injured victim's family. At common law, a claim for loss of consortium by a child did not exist. However, a parent could bring a cause of action for a negligently injured child.9 This discrepancy arose due to the lost services provided by the child to the parent in economic terms which were not reciprocated from the parent to the child.10 Over time, Nebraska modified this approach and determined that a child is not only a source of pecuniary benefit but a fountain of companionship and love.11 As a result, parents were allowed to recover for this loss of companionship.12

A member of a family has a value to other members of a family both socially and economically. The social value is of a definite and ascertainable pecuniary value which results in parents being compensated for the interruption of this social value when a child has been negligently injured.13 The next logical step in this process is to bring a claim for loss of a parent's society by a child when the parent has

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9. Originally, loss of consortium claims date back to the 1600s. First, a husband was allowed to recover for loss of his wife's domestic services. At common law, a husband was allowed to recover loss of services for his wife or his children as a result of the master-servant relationship. Wives and children were equated with servants. Wives, however, were denied recovery for the loss of their husbands' services. Courts expanded the common law by permitting the husband to recover for the loss of companionship, society, and comfort. Gradually, courts allowed recovery in situations where the husband did not lose the domestic services of his wife. Eventually, this type of consortium claim became dominant, although a cause of action could only be brought by the husband. Courts expanded this notion as well, eventually allowing wives and then children to recover. Delaney, supra note 7 at 111-12. See also David P. Dwork, 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)(detailing history of consortium claims).

11. Id. at 422, 495 N.W.2d at 289-90.
12. See Selders v. Armentrout, 190 Neb. 275, 207 N.W.2d 686 (1973). If recoverable damages were restricted solely to a monetary value of a child's services, a child's life would have little if any value. Thus, the court decided that Nebraska would allow recovery for the tortious loss of consortium for a child. Id.
been negligently injured. If a parent could recover for the loss of her child's affection and companionship, then it would appear that the similarity of the relationships would authorize a court to grant recovery to a child for the loss of a parent's care and affection. It seems logical that no matter at which end the flow of care and affection is interrupted, the tortfeasor causing the cessation of this companionship should be liable for the damages to the injured parties.

III. CASE LAW OUTSIDE NEBRASKA

In 1978, Michigan was the first state to allow a child the right to recover loss of consortium for a negligently injured parent in Berger v. Weber.14 In Berger, a father brought an action on behalf of his daughter claiming loss of society and companionship from her mother who was negligently injured in a car accident. The trial court granted the defense's motion for summary judgment, denying the child a cause of action for loss of consortium. The Michigan Court of Appeals overturned the trial court and granted recovery. On appeal to the Michigan Supreme Court,15 the court of appeals' decision was affirmed. The court reasoned that the child's loss of companionship from a negligently injured parent was no more remote than that which occurred in a child's wrongful death suit. The court also was not convinced that a child's award for consortium was any more speculative or harder to calculate than other consortium claims. Seeking to rid the courts of the logical inconsistencies that resulted in allowing a child a right of recovery in a wrongful death suit but not for a negligently injured parent, the court granted the child a right of recovery.16

Massachusetts soon followed the Michigan decision in Ferriter v. Daniel O'Connell's Sons, Inc.17 in 1980. In Ferriter, the plaintiffs' parent was paralyzed from the neck down in a work related accident.18 The Supreme Judicial Court of Massachusetts recognized that the common law at times protected the parent's sentiments in the parent-child relationship but was silent as to the child's sentiments for an injured parent. Notwithstanding years of precedent, the court determined that a child was legally entitled to relief and granted recovery to the children.19

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16. Id. at 427.
17. 413 N.E.2d 690 (Mass. 1980).
18. Id. at 691.
19. Id. at 695-96.
IV. BORER v. AMERICAN AIRLINES, THE FOUNDATION FOR NEBRASKA CASE LAW

The Nebraska Supreme Court ruled on the issue in Guenther on February 12, 1993. Before discussing the facts and holding in Guenther, it is necessary to discuss two previous cases, Hoesing v. Sears, Roebuck & Co.\(^\text{20}\) and Borer v. American Airlines, Inc.\(^\text{21}\) Guenther relies extensively upon Hoesing which in turn relies heavily upon Borer. In order to gain more insight into the basis for the court's decision, it is necessary to begin with a brief examination of Borer.

Patricia Borer was struck by a lighting fixture at the American Airlines terminal at Kennedy Airport. As a result of her injuries, her nine children each filed a separate suit for loss of Ms. Borer's companionship and affection. Each individual child's suit sought damages of $100,000. American Airlines demurred, contending that the children failed to state a cause of action. The trial court sustained American Airlines' demurrer and dismissed the suit.\(^\text{22}\) The California Supreme Court affirmed the decision. The opinion, authored by Judge Tobriner, denied recovery based on three grounds. First, Tobriner reasoned that consortium is an intangible injury for which money cannot provide suitable recompense.\(^\text{23}\) Second, the growth of litigation in ordinary accident claims as a result of children seeking recovery places too great a cost on society.\(^\text{24}\) Third, a child was not entitled to recovery under common law.\(^\text{25}\) Judge Tobriner continued to comment that the increased insurance premiums resulting from children's consortium claims would force more people to go without insurance. Such a result, coupled with the expenditure of resources in litigating these claims, would prove too great a social burden to allow recovery.\(^\text{26}\)

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22. Id. at 861.
LOSS OF CONSORTIUM

1994]

V. HOESING v. SEARS, ROEBUCK & CO., PRECURSOR TO GUENTHER

The first significant case in Nebraska concerning a child's loss of consortium claim occurred in the United States District Court for Nebraska in February 1980 in Hoesing v. Sears, Roebuck & Co.27 In Hoesing, children brought an action seeking damages for negligently inflicted injuries to their parents by a third party tortfeasor. Since the Nebraska Supreme Court had yet to rule on the issue, the district court turned its attention to other jurisdictions. Based on this survey, the court concluded that the children did not have a cause of action for loss of parental consortium.28 Hoesing relied heavily on Tobriner's reasoning in Borer.29 Consequently, recovery was denied based in large part on the three recurring themes previously discussed: (1) legal entitlement, (2) multiplicity of suits and double recovery, and (3) calculation of damages.30 Quoting extensively from Borer, the district court determined that the costs to society outweighed any purported benefits that the children would receive through their award.31

VI. UE Land v. PENGO HYDRA-PULL CORP., BASIS FOR THE DISSENT IN GUENTHER

In 1984, the Washington Supreme Court granted a child a right to recover lost consortium for a negligently injured parent in Ueland v. Pengo Hydra-Pull Corp.32 Eric Ueland, the father of two minor children, Kimberly and William Ueland, suffered severe and permanent mental and physical injuries when he was struck by a metal cable on a job site while employed for Seattle City Light. Kimberly and William brought an action for loss of consortium. Reynold's Metal Company and Superior Electric Company moved for a dismissal in Washington Superior Court. This motion was denied. A motion for discretionary review was granted by the Washington Court of Appeals and the case was then transferred to the Washington Supreme Court for disposition on the merits.33

Previously in Washington, the courts had held that the adoption of a cause of action for loss of consortium for a negligently injured parent was an issue of public policy and best left to the discretion of the legis-

28. Id.
31. Id. at 479.
32. 691 P.2d 190 (Wash. 1984).
33. Id. at 191.
The Washington Supreme Court rejected this notion and allowed the Uelands to recover the companionship and affection they lost as a result of their father's injuries.

The court attacked the three traditional arguments of lack of legal entitlement, multiplicity of suits, and calculation of damages and succinctly refuted each claim. In regards to any lack of common law entitlement for a child's consortium claim, the court cited the logical inconsistencies in allowing a child to recover lost consortium for the wrongful death of a parent, but not a negligently injured parent. Further, the opinion noted that it is the court's responsibility to expand the common law and recognize a cause of action when appropriate instead of deferring to the legislature in abrogation of this responsibility. By joining claims, the court reasoned that the problem of multiplicity of suits could be significantly reduced. Finally, the court concluded that evaluating a child's consortium claim for a negligently injured parent is no more speculative than other consortium claims recognized in Washington.

VII. GUENTHER, A CHILD'S CLAIM REJECTED

The Nebraska Supreme Court borrowed large portions of its reasoning from both Borer and Hoesing in rendering a decision in Guenther. In fact, the court borrowed large portions of verbatim text from Hoesing in drafting its opinion. Consequently, the same three arguments used in both Borer and Hoesing reappear almost word for word in Guenther.

In Guenther, a minor child, six year old William Guenther, through his father, Marvin Guenther, sued Shelly R. and Gail Stollberg, alleging that they had negligently injured the child's mother, Janis, causing the child to endure the loss of his mother's consortium. Janis had been injured in a motor vehicle accident and sustained severe mental and physical injuries. The district court held that the child had not stated a cause of action and sustained the Stollbergs' demurrer. The Guenthers decided not to amend, and the petition was dismissed. The Guenthers then appealed to the Nebraska Supreme Court, asserting that the dismissal was erroneous and asking the

34. See Roth v. Bell, 600 P.2d 602 (Wash. Ct. App. 1979) (holding that the legislature would determine when a cause of action for loss of parental consortium is appropriate).
36. Id.
38. Id. at 415, 495 N.W.2d at 286.
39. Id. at 419-21, 495 N.W.2d at 288-89. Appellant's Brief at 3, Guenther v. Stollberg (No. S-90-551). The facts of this case are limited at best. Even the appellant's brief fails to state any facts surrounding the accident.
court to recognize a cause of action for a minor child’s loss of consortium for a negligently injured parent.\textsuperscript{40}

The Nebraska Supreme Court, with Justice Shanahan and Justice White dissenting, applied the logic employed in \textit{Borer} and \textit{Hoesing} and affirmed the decision of the district court. The court determined that the difficulty in calculating awards, the multiplication of actions, and lack of legal entitlement were sufficient reasons in themselves to deny recovery.\textsuperscript{41} The court reasoned that the lost care and affection a child suffers when a parent is negligently killed is recoverable as a separate award while the same care and affection a child loses when a parent is negligently injured is not.\textsuperscript{42} The aggravated costs and increased expenditure of resources supposedly far outweighed any benefits of such a claim.\textsuperscript{43} The court concluded that an arbitrary line needed to be established to limit liability, and it decided to draw one in this case. The court maintained that the social burden placed upon society would be too great to allow recovery. Any award to a child was supposedly factored in with a spouse’s claim for loss of consortium for a negligently injured spouse.\textsuperscript{44} Supporting the court is an extensive body of case law which suggests that these three traditional arguments are well founded upon legal precedent.\textsuperscript{45}

\textbf{VIII. ANALYSIS}

The Nebraska Supreme Court’s decision not to allow a child to recover the loss of consortium for a negligently injured parent appears to be rather unthoughtful when examined in light of other loss of consortium claims. A child should be able to recover loss of consortium for an injured parent because it is logically inconsistent to allow a parent to recover for loss of consortium for a negligently injured child and not

\begin{itemize}
\item \textsuperscript{40} Guenther v. Stollberg, 242 Neb. 415, 415-16, 495 N.W.2d 286, 286 (1993).
\item \textsuperscript{41} Id. at 419-20, 495 N.W.2d at 287-88.
\item \textsuperscript{42} Id. at 419, 495 N.W.2d at 288.
\item \textsuperscript{44} The court did not explicitly state this reasoning in the case. However, the court concluded its opinion by stating that “for the reasons articulated by the federal district court in \textit{Hoesing v. Sears, Roebuck & Co., supra}, we elect not to modify the common law by recognizing a cause of action . . . .” Guenther v. Stollberg, 242 Neb. 415, 421, 495 N.W.2d 286, 289 (1993). Consequently, this reasoning follows from the decision in \textit{Hoesing v. Sears, Roebuck & Co.}, 484 F. Supp. 478, 481 (D. Neb. 1980).
\item \textsuperscript{45} However, Justice Shanahan wrote a stinging dissent. Justice Shanahan criticized his fellow judges for their logical inconsistencies in denying recovery and proceeded to explain the flaws in allowing a parent to recover loss of consortium for an injured child but not a child for an injured parent. Guenther v. Stollberg, 242 Neb. 415, 422-25, 495 N.W.2d 286, 289-91 (1993) (Shanahan, J., dissenting).
\end{itemize}
the reverse. 46 Theoretically, the care and affection in a parent-child relationship are expressed and shared by both the child and the parent. Denying recovery to a child suggests that the parent suffers a greater loss when the child's consortium is interrupted by a negligent tortfeasor. At the least, the child is as equally affected by the interruption of the parent's care and affection as the parent is in the reverse situation. Realistically, the child probably suffers greater harm from the cessation of the parent's companionship due to the naive and defenseless nature of the child. 47

Even more perplexing and contradictory is the ability of a child to recover consortium for the wrongful death of a parent but not for an injury to a parent when the relationships between the two are identical. The delineating criteria for recovery appears to be the death of a parent. As Justice Shanahan stated, "a casket cannot be the solitary standard for compensating a child's loss of parental consortium." 48 Further, the three traditional counter arguments used to refute children's claims, (1) lack of legal entitlement, (2) multiplicity of suits, and (3) the difficulty of calculating damages, 49 fail to withstand scrutiny when compared to the logic supporting the award of other consortium claims. 50

46. Gallimore granted a child a consortium claim expressly on these grounds. Gallimore v. Children's Hosp. Medical Ctr., 617 N.E.2d 1052 (Ohio 1993). See supra note 6 and accompanying text.

47. Other courts place great emphasis on the parent-child relationship. In Villareal v. State Department of Transportation, 774 P.2d 213 (Ariz. 1989), minor children brought a cause of action for loss of consortium for their negligently injured father who had suffered severe injuries when his motorcycle crashed into a highway construction site. The trial court granted the state's motion for summary judgment on the grounds that a child did not have a cause of action for loss of parental consortium. The children filed an appeal with the court of appeals and the case was removed to the Arizona Supreme Court. The Arizona Supreme Court vacated the decision and remanded the case to the trial court, thereby establishing a cause of action for a child's consortium claim in Arizona. The court stated that "[w]hile all family members enjoy a mutual interest in consortium, the parent-child relationship is undeniably unique. . . . It is the parent-child relationship which most deserves protection and which, in fact, has received judicial protection in the past." Villareal v. State Dep't of Transp., 774 P.2d 213, 217 (Ariz. 1989)(quoting Frank v. Super. Ct., 722 P.2d 955, 956 n.3 (Ariz. 1986)). See also Theama v. City of Kenosha, 344 N.W.2d 513, 516 (Wis. 1984)(observing that while an adult is capable of seeking out new relationships, a child is virtually helpless in seeking out a new adult companion to take the place of a negligently injured parent).


49. Id. at 418, 495 N.W.2d at 287.

A. Legal Entitlement

The court first and foremost relied on the traditional argument that children are not legally entitled to recover for a negligently injured parent. While the court followed the line of logic used in *High v. Howard*, the idea that a parent is not legally obliged to provide love and affection for her children no longer appears valid in light of recent litigation. Moreover, this reasoning becomes especially suspect since *High* has since been overturned in *Gallimore v. Children’s Hospital Medical Center*.

Children who were often considered to be without rights in the eyes of the law have made rapid gains in recent years. For instance, the United States Supreme Court has recognized that a child has a due process right to notice and an informal hearing in school disciplinary procedures and that equal protection exists for illegitimate children to maintain an action for nonsupport of a parent. In Nebraska, the parental duty to provide care and affection has been recognized in proceedings to terminate parental rights. As Justice Shanahan emphasized in his dissent, such recognition of the failure of a parent to provide care and affection for a child as a basis for terminating parental rights leads to a conclusion that the interference of the duty by a tortfeasor provides a right for compensation to the child. If a parent is injured to such an extent that the recognized

51. Id.
52. 592 N.E.2d 818 (Ohio 1992), overruled by *Gallimore v. Children’s Hosp. Medical Ctr.*, 617 N.E.2d 1052 (Ohio 1993). In this case, two children brought an action for loss of consortium when their father was injured in an automobile accident. The trial court dismissed the claim. The court of appeals and the Ohio Supreme Court affirmed, citing that a child had no legal entitlement to the parent’s consortium. Further, no common law action existed for the child’s recovery of consortium.
53. 617 N.E.2d 1052 (Ohio 1993). The court, in reversing itself, stated, "Regardless of who suffers the physical injury (parent or child), the other member of the parent-child relationship may suffer loss of the consortium for the injured victim.” *Id.* at 1060.
57. *Guenther v. Stollberg*, 242 Neb. 415, 423, 495 N.W.2d 286, 290 (1993)(Shanahan, J., dissenting). Justice Shanahan relied heavily upon *In re A.G.G.*, 230 Neb. 707, 433 N.W.2d 185 (1988). There, in a juvenile proceeding to terminate parental rights under the Nebraska Juvenile Code, the court recognized the parental duty to provide a child with love and companionship. Judge Shanahan reasoned that because of the judicial recognition of consortium, it is therefore impossible to deny the child the right to expect a parent’s love and companionship. The child is therefore entitled to these benefits that a parent is legally obligated to provide. Consequently, tortious interference with the child’s expectation of a parent’s love and companionship should be subject to a remedy under civil law. *Guenther v. Stollberg*, 242 Neb. 415, 423-24, 495 N.W.2d 286, 290 (1993)(Shanahan, J., dissenting).
obligation to provide care and affection is interrupted in any way by the negligence of a third party, a child must then have a right to seek adequate compensation from that third party.

Even if the court insists that there is no common law right to the care and affection of a parent, the Iowa Supreme Court has ruled that it is not necessary for an interest to be a legally entitled interest for there to be compensable damages. In *Weitl v. Moses*, children sought loss of consortium damages stemming from injuries sustained by their mother when she was treated for bronchitis and experienced cardiac arrest, resulting in permanent brain damage and blindness. The trial court dismissed the children's claim, but the Iowa Supreme Court reversed, allowing recovery. The court concluded that even if a child did not have legal entitlement to a parent's consortium, the child only needed to show that there was a reasonable certainty of receiving a parent's care and affection in order to be compensated. If there was a reasonable certainty of receiving benefits, which a tortfeasor denied, then compensation should result. A child ordinarily and usually without exception expects the care and affection of a parent. Consequently, it would appear to be a matter of mere formality for a child to establish this expectation in court and thus be entitled to compensation for the denial of the expected consortium.

Moreover, the inconsistency in allowing a child to recover for the wrongful death of a parent and not for a negligently injured parent further crumbles the foundation of the court's logic in *Guenther*. If a child is compensated for the love and affection lost in the wrongful death of a parent, then the same love and affection which is lost when a parent is negligently injured is compensable as well. The relationships are exactly the same. Justice Shanahan makes reference to this inconsistency in quoting *Ueland* in his dissent. In fact, the court's opinion appears to be less an inconsistency but more an unimaginative decision which disregards all notion of logic or balance.

58. 311 N.W.2d 259, 267 (Iowa 1981).
59. *Id.*
60. *Id.*
62. *Id.*
63. *Guenther v. Stollberg* 242 Neb. 415, 423, 495 N.W.2d 286, 290 (1993)(Shanahan, J., dissenting). Justice Shanahan uses *Ueland* extensively because it succinctly attacks the three traditional arguments employed by the majority. Further, it incorporates relevant case law on both sides of the issue in promulgating an opinion that justifies a loss of consortium claim for a child. Perhaps a little unrealistic in believing that a consortium claim can heal a child's emotional wounds, it directly uncovers the fallacies behind the traditional logic of multiplicity, legal entitlement, and calculation of damages in denying a consortium award.
While a child cannot recover for loss of consortium, a parent can recover for a negligently injured child. This suggests that a child's loss of love and affection is remote and ineffectual when compared to the loss a parent feels when a child is injured. Yet the relationship is essentially the same. In fact, depriving a child of care and affection may be more detrimental than the parent's loss of these same intangibles. According to the court in Villareal v. State Department of Transportation, the parent-child relationship is not only unique but it is the wellspring from which all other family relationships develop. If any relationship deserves protection, it is the parent-child relationship. The loss of a parent's care and affection can greatly affect a child's development and her mental perspective for the rest of her life. Since the child suffers most from the interruption of parental care, it necessarily follows that a child ought not to be denied recovery.

B. Multiplicity of Suits and Duplication of Awards

Once it has been established that children are entitled to recover for lost consortium, other policy reasons used by the court to deny recovery fall prey to similar logical inconsistencies discussed previously. The court opines that allowing a child to recover consortium will lead to an explosion of suits and the possibility of double recovery by the

66. Id. at 217 (quoting Frank v. Super. Ct., 722 P.2d 955, 956 (Ariz. 1986)). See also Theama v. City of Kenosha, 344 N.W.2d 513, 515-16 (Wis. 1984) (opining that it is of highest importance to child and society that the child's right to receive benefits derived from its parents are protected).

Although the Nebraska Supreme Court did not raise the issue, one wonders if the majority felt it best to leave the decision on whether to grant consortium to a child to the Legislature. However, both the upkeep of common law and the expansion of tort law are well within the jurisdiction of the courts. Villareal v. State Dep't of Transp., 774 P.2d 213, 219 (Ariz. 1989); Ueland v. Pengo Hydra-Pull Corp., 691 P.2d 190, 193 (Wash. 1984). The court should not refuse to accept this responsibility in light of the logical inconsistencies evident in refusing to allow loss of consortium for a negligently injured parent when compared to other consortium claims.
plaintiff. Therefore, any award made to the spouse will or should include the recovery for the child.

There will be a degree of increase in the amount of suits if no restrictions are placed upon who may maintain a cause of action for a negligently injured parent. More than likely, a claim will be raised in practically all situations in which a parent is negligently injured. Some courts have gone as far in their opposition to paint nightmarish scenes of a family with nine children bringing nine separate loss of consortium claims for one injured parent. The possibility exists that claims will increase two-fold if both parents are negligently injured, entitling each child to a separate award for each individual parent. Even without multiple children and injuries to both parents, the problem still exists that a child's claim will be brought separately from the parent's loss of spousal consortium. If the court allows this scenario to unfold without any restrictions, the administrative costs and expendi-


71. In Borer, the court worried extensively about the multiplication of suits, stating: [w]hereas the assertion of a spouse's demand for loss of consortium involves the joining of only a single companion claim in the action with that of an injured person, the right here debated would entail as many companion claims as the injured parent had minor children, each claim entitled to separate appraisal and award. The defendant's burden would be further enlarged if the claims were founded upon injuries to both parents.


In Russell v. Salem Transportation Co., 295 A.2d 862, (N.J. 1972), the court concluded that "the right here debated would entail adding as many companion claims as the injured parent had minor children, each such claim entitled to separate appraisal and award." Id. at 864.

However, the fear of an explosion of litigation almost always accompanies new tort causes of action. To prevent a rise in litigation, Nebraska could establish ground rules utilized in other jurisdictions. First, liability should be limited to the immediate family, that being only children of the injured parent. In this way, cousins, nieces, and nephews are prohibited from bringing claims for loss of consortium.

An interesting question arises as to whether children who live outside the home of the injured parent as part of a divorce settlement should be entitled to loss of consortium. Perhaps the best answer is to allow a claim and let the jury ultimately decide the value of that relationship. More questionable, however, is whether a stepchild living in the home of the injured parent can recover. Once again, a claim should probably be allowed. The jury should be able to make an adequate determination of the value of that relationship. It seems unjust to allow one child in the home to recover but not another due solely to the fact that one child is biologically related to the parent. In some cases, the relationship to the stepchild will be closer than that of the biologically related child. In any event, the loss of care and affection denied by the tortfeasor to either child should be compensated.

Second, a working definition must be established that will prevent claims from arising from minor or insignificant injuries. If a child is allowed to file suit for the two-day hospital stay of a parent, then the expenditure of resources in administering such a suit far outstrip any possible benefits. Nebraska could adopt the definition used by the


74. Theama v. City of Kenosha, 344 N.W.2d 513, 521 (Wis. 1984). See Dwork, supra note 9, at 732. But is such a notion, if true, sufficient to deny the child a right to recover the loss of companionship of a negligently injured parent? Justice White in his dissent did not think so. He stated that Nebraska should be guided by article I, section 13 of the Nebraska Constitution, which says "[a]ll courts shall be open, and every person, for any injury done him in his...person...shall have remedy by due course of law, and justice shall be administered without denial or delay." Guenther v. Stollberg, 242 Neb. 415, 421, 495 N.W.2d 286, 289 (1993)(White, J., dissenting).


court in Villareal. In Villareal, the court limited recovery to only those situations in which there is "serious, permanent and disabling injuries." The parent's injuries must sever any ability to render love, companionship, and guidance to the child. In effect, the parent-child relationship is altogether destroyed or nearly destroyed. In this way, claims for a two-day hospital stay are eliminated. Such claims deprive the child of a parent's consortium for such a limited time that litigating them proves to be an unnecessary waste of judicial resources.

Additionally, claims could be limited to minor children. This would further reduce the number of claims. An older child hypothetically suffers less of a loss than a younger child such as a pre-schooler. Yet no matter what the age of the child, there still will be a certain degree of care and affection afforded that child. However, in the interest of conserving resources and in light of a modern day society in which children have often left the home by the age of majority, it appears prudent to limit any awards to minor children. After all, it is the parent-child relationship to the minor child which will hinder or help his or her development and which must be protected. The adult child has already received the majority of the benefit of the parental relationship. Consequently, the adult child's loss is not as devastating, nor is the recovery as important.

77. Id. at 216. See also Keele v. St. Vincent Hosp. and Health Care Center, 852 P.2d 574 (Mont. 1993)(limiting recovery to situations in which parent suffers serious, permanent, disabling mental or physical injury in which the parent's condition is so overwhelming that the parent-child relationship is destroyed or very nearly destroyed); Hay v. Medical Ctr. Hosp. of Vermont, 496 A.2d 939, 941 (Vt. 1985)(allowing recovery only when parent rendered permanently comatose); Theama v. City of Kenosha, 344 N.W.2d 513, 515 (Wis. 1984)(allowing recovery when father's permanent mental and physical injuries essentially deprived minor children of any further parent-child exchange).


82. But, by limiting recovery, the same logical inconsistencies again rear their heads. To be consistent, all children should be allowed to bring a claim for loss of consortium regardless of the age of the child. Audubon-Exira v. Illinois Cent. Gulf. R. Co., 335 N.W.2d 148, 152 (Iowa 1983). While awards may vary significantly, it is impossible to limit the recipients without manufacturing the same inconsistencies that should be avoided in the first place.

Another interesting proposition is that of the adult mentally retarded or physically handicapped child that is still dependent upon the parent. A severing of
Once claims have been limited to a workable definition, the problem of nine children bringing nine different suits for two injured parents still remains. Such a problem may be addressed in one of three ways. The best solution to this problem lies in the compulsory joinder of the child's or children's claims with those of the spouse. Usually, the child's claim will be brought with the parent's claim similar to the joining of the injured spouse's negligence claim and the other spouse's loss of consortium claim. In those instances when both suits are not brought together, the child should be allowed to bring a claim only if it is joined with the parent's claim. A second possible option is to require joinder whenever it is feasible. Only if the child can show good cause for not joining her claim, will she be allowed to bring it later. A third method of eliminating multiplicity permits the defendant faced with separate claims to insist that the spouse's claim be joined with that of the child's. In this way, the defendant would not be left facing an outstanding consortium claim. Adoption of one of these three joinder rules eliminates nine separate consortium claims brought at different times.

If the multiplicity problem has been solved, there still remains the issue of double recovery. In those courts which have decided against separate recovery for children, they have theorized that the parent or the parent's love and affection could prove devastating to the adult child. In such a situation, a court should allow recovery, even if the court has previously determined that only minor children should be allowed recovery. Perhaps then the best rule is to leave all such decisions concerning age to the jury.

84. Diaz v. Eli Lilly and Co., 302 N.E.2d 555, 560 (Mass. 1973). In a claim for spousal consortium, the court reasoned that multiplicity of suits was a nonfactor because the claim for consortium will most likely be brought at the same time as the injured spouse's negligence claim. Id.
86. Diaz v. Eli Lilly and Co., 302 N.E.2d 555, 560-61 (Mass. 1973). Similar reasoning was employed in a spouse's consortium claim. The same argument regarding multiplicity of suits became a central point of the case. The court concluded that allowing the defendant to insist that claims be joined eliminates the issue from essentially being litigated at different times.
87. There remains one possible stumbling block to consolidation of claims. Dearborn Fabricating & Engin. v. Wickham, 551 N.E.2d 1135, 1137 (Ind. 1990). See also Salin v. Kloempken, 322 N.W.2d 736 (Minn. 1982)(citing statute of limitations concerns as a reason for denying child's consortium claim). Most states, like Nebraska, have a statute tolling the statute of limitations for minors. Neb. Rev. Stat. § 25-213 (Reissue 1989). The statute of limitations would then have to be altered to allow for a uniform limitations period for both the parent's action and the child's loss of consortium claim.
parents' claims will cover any loss of consortium for the child. 88 Protection then is afforded the defendant from having to pay the parent's claim with the child's loss of consortium calculated in the award and then having to pay a child's separate award. Yet, to capitulate to these protective measures admits that juries are incapable of following instructions. 89 The danger of double recovery does exist when a judge does not properly instruct the jury, and the jury considers all damage done to the family unit in the parent's claim rather than just considering the damage to the spouse bringing the claim. In his dissent, Justice Shanahan promptly refuted the threat of double recovery when he stated "the specter of double recoveries, as one of the 'things that go bump in the night' vanishes in the light of adequate jury instructions to provide the correct standard for awarding damages." 90 Consequently, in order to eliminate this danger, the jury needs to be instructed that the child's claim covers only the loss of the parent's care and affection, and the parent's recovery is limited to the injured parent's loss of pecuniary ability to support the family unit. 91

A separate recovery may be better for all parties concerned. Providing for two separate, distinct awards allows both the parent's claim and the child's claim to be openly argued and debated. 92 Before, the child's award was lumped together with that of the parent's without any discussion as to what the child's recovery should have been. Now, both sides can present evidence to establish what value should be placed on the child's consortium claim. Further, the separate awards allow for the child to use her award for her benefit rather than giving it to the parent to use as the parent sees fit. 93

Overall, it may be better for the defendant to allow a separate claim for the child's consortium. By allowing separate discussion on the award of consortium to a child, it is conceivable that in this separate debate the defendant may be forced to pay a judgment that is less than what would have been awarded had the claim not been separated from that of the parent.

C. Calculation of the Award

In any consortium claim, money cannot replace the loss suffered by the individual party. This is the logic utilized in denying recovery for a child's consortium claim.94 Consortium is an intangible award for which there cannot be a precise monetary value.95 It is also true that money damages alone will never allow a child to regain the loss of care and affection a severely injured parent can no longer offer.96 As speculative as a consortium claim is for a child, it is no more speculative than a consortium claim for a parent in regard to a negligently injured child, or consortium in a wrongful death suit.97 Those courts which have allowed a child to recover loss of consortium have recognized the uncertainty of placing a dollar value on the care and affection provided by a parent.98 However poor a money substitute may be, "it is the only workable way to ease loss."99

It would appear to be inaccurate to label the award for a child's claim of consortium for a negligently injured parent more difficult to calculate than the same award in a wrongful death claim by the child, since the basis of each claim is the same. Further, the child's consortium claim cannot be any more difficult to calculate than the award for a parent's claim of consortium for a child or for a negligently injured spouse. As Justice Shanahan pointed out, the idea that the calculation of consortium is too speculative is without merit.100 In Nebraska, the matter is left to the discretion of the jury, and there is no reason

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95. Consortium is defined in Nebraska as comfort, society, love, and protection. Creason v. Myers, 217 Neb. 551, 350 N.W.2d 526 (1984) (citing Sowle v. Sowle, 115 Neb. 796, 215 N.W. 123 (1927) and Larsen v. Larsen, 115 Neb. 601, 213 N.W. 971 (1927)). Obviously, such intangible items as love and companionship are indeed difficult to price in terms of value. Each individual has a different definition of each of these terms. As Elizabeth Barrett Browning so aptly stated, "How do I love thee? Let me count the ways." Elizabeth B. Browning, Sonnets from the Portuguese, #43.


100. Justice Shanahan stated, "[T]hus, if a fact finder, especially a jury, is competent to assess the damages for the loss of society, comfort, and companionship suffered by a parent or spouse, there is no legal reason that ascertaining damages to a child is impossible when the child's parent is injured." Guenther v. Stollberg, 242 Neb. 415, 424-25, 495 N.W.2d 286, 291 (1993)(Shanahan, J., dissenting).
why a jury could not likewise place a dollar value on a child’s consortium claim.\(^\text{101}\)

Some courts, including *Guenther*, have raised a valid concern about the actual effect the award would have on a child. These courts have complained that any award for loss of consortium allows a child to establish a fund which will enable that child to be wealthy upon reaching adulthood.\(^\text{102}\) The dissenting opinion in *Ueland* remarked that the award will most probably be placed in some type of trust fund which will not offer direct compensation to the child. It could be ten or fifteen years before the child receives any amount of the award. By that time, the opinion argued, the child will be adjusted to the loss and the award will serve merely as a pleasure account.\(^\text{103}\)

Courts are reluctant to establish such trust funds solely to make a child independently wealthy upon reaching adulthood. Yet, this seems an improper if not unjust reason for denying recovery and letting the negligent tortfeasor off the hook. The negligent party still must be forced to pay a penalty. The problem revolves around how to distribute the award.

The court in *Theama v. City of Kenosha*\(^\text{104}\) half-heartedly attempted to dispel this concern by explaining that the award does not ensure financial prosperity but instead assures the child’s continued normal development.\(^\text{105}\) That may be a little unrealistic. It is hard to imagine a lump sum of money ensuring that the child’s emotional wounds from losing the companionship of a crippled parent will heal without a scar.

A better solution to this problem is to allow the funds to be used for any psychiatric treatment or domestic help now needed to aid the child to cope with the loss of care and affection of the parent.\(^\text{106}\) The remainder of the award could remain in a trust fund to help pay for a child’s higher education which the negligently injured parent could have helped provide. This is probably the most practical application of the award.

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104. 344 N.W.2d 513 (Wis. 1984). Minor children brought an action for loss of parental consortium when their father was injured in a motorcycle accident on a dimly lit highway. The circuit court granted summary judgment to the defendants and the court of appeals affirmed. The Wisconsin Supreme Court reversed.
105. *Id.* at 520.
D. Insurance Premiums

A final issue which the court raises vicariously through its quotations of *Hoesing*107 is the burden of paying for consortium claims by the general public through increased insurance premiums. The evidence is not available to complete a study to determine if insurance premiums have risen because of other consortium claims. Additionally, that subject is beyond the scope of this Note. However, it would certainly appear better to allow recovery for a child who has lost the care and comfort of the parent than to forbid it based on a notion that insurance premiums will skyrocket because of the theoretical increase in claims that opponents declare would occur if recovery is allowed.

Moreover, if a child is denied a separate recovery on such a theory and is allowed to recover under the parent or parents' claim, then is the assumption to be made that insurance premiums will not rise in this instance?108 The theory behind the fear of increased insurance premiums is taken one step further in raising the idea that only those tortfeasors with adequate liability insurance will be able to make payments for a separate loss of consortium claim. Especially in automobile accidents, the policy limits will supposedly be exhausted before the child's claim can be brought to fruition. Only those children's parents who are injured by deep pockets will be able to recover. In the end, awards will be distributed unevenly.109

But if the child's claim is simply a component of the parent's claim, it is difficult to see why recovery will be any less uneven in that instance. Whether the child is allowed a separate claim or not, the recovery should theoretically be the same, and any fears that recovery will be unevenly distributed or insurance premiums will skyrocket should already be the same in both cases. If insurance premiums are exhausted because of a separate claim, they will be exhausted if the child's loss of consortium is correctly calculated in an award to a parent. This brings the discussion back to the original argument in which it would appear to be better for the factors listed above to allow a separate recovery to be argued in full view of the court so a more valid determination could be made of the actual value of recovery.110

Some courts have argued that any increase in premiums will be more than offset by the benefit to society. The hope is that the child will be able to handle the parent's injury and subsequent loss of affection without emotional difficulty, and these benefits are best borne by

109. Id.
110. *See supra* notes 76-82 and accompanying text.
society as a whole.\textsuperscript{111} Realistically, the notion that a child will be able to function without emotional complications as a result of an award may be more hopeful than practical. Nonetheless, if an award can be used to provide counseling and treatment to help a child handle the loss effectively, then any increases are best handled by placing the burden on society as a whole.

\textbf{IX. CONCLUSION}

The logical inconsistencies which abound by prohibiting a child to recover loss of consortium for a negligently injured parent signal the need for the Nebraska Supreme Court to rethink its position. The only apparent reason for the court’s decision rests on the precedential weight of previous decisions in other state courts. Remarkably, the court relied so much on this precedent that it quoted almost entire pages from previous decisions.\textsuperscript{112} Whether this evidences a lack of reflection on the issue or strong agreement with earlier decisions is left open to debate.

The three historical arguments for denying a child to recover are irreparably flawed when scrutinized. Even if a child is not entitled to consortium under common law, a child which expects the companionship and affection of a parent (rare will be the cases it will not) is entitled to compensation when these benefits are interrupted.\textsuperscript{113} Multiplicity and double recovery should not be a problem with proper joinder rules and jury instructions,\textsuperscript{114} and the calculation of the award is no less difficult than in other consortium claims.\textsuperscript{115}

Nebraska should allow recovery for a child’s consortium claim in the case of a negligently injured parent. As a result of Guenther, such an action is presently prohibited. The future remains another matter. Perhaps as more states allow a child’s claim, the court may alter its position, especially if Borer were to be overturned in California. Since both the Hoesing and Guenther opinions rely so heavily on that case, a reversal in California may prompt the Nebraska Supreme Court to reexamine its decision. Moreover, if enough states will permit children’s consortium claims in the future so that the majority of the jurisdictions would allow recovery, quite possibly the court would reverse

\textsuperscript{112} Guenther v. Stollberg, 242 Neb. 415, 419-20, 495 N.W.2d 286, 288-89 (1993). Justice White, in his dissent, criticized the court for relying so heavily on Hoesing. He stated “[t]he concern of a non-common law court for the difficulties of a court administering the common law is neither persuasive or controlling.” Id. at 421, 495 N.W.2d at 289 (White, J., dissenting).
\textsuperscript{113} See supra notes 51-68 and accompanying text.
\textsuperscript{114} See supra notes 69-93 and accompanying text.
\textsuperscript{115} See supra notes 94-105 and accompanying text.
LOSS OF CONSORTIUM

itself. The unimaginative opinion in Guenther leads one to believe that any significant changes in other states or possibly in the composition of the court would invite the Nebraska Supreme Court to reconsider Guenther. The logical inconsistencies in Guenther should be reversed and Nebraska should permit a child to recover the loss of care and affection of a negligently injured parent.\textsuperscript{116}

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\textsuperscript{116} In light of the recent decision in Gallimore, a similar scenario could take place in Nebraska, especially if the court undergoes a significant change in the coming months. It should be noted, however, that the most ardent critic of Guenther, Justice Shanahan, has since left the court for a federal judgeship.