administrative supervision over local governmental functions in other areas.[67] A system of state administrative supervision and control[68] would avoid many of the inadequacies of the present system of control, providing the desirable element of flexibility and at the same time protecting the higher interest of the state in seeing that local governments conform to the highest possible standards of efficiency.

The identity of local governments with the people must be preserved. The growing interdependence of communities economically and the costliness of services and functions demanded by citizens of local governments serve to illustrate also the broader responsibility of the state in protecting the welfare of its citizens. It is submitted that an amendment granting procedural powers will do much to relieve many of the problems arising as a result of the present system of control over the form and internal organization of cities and towns. The problems of state-local relations can best be solved, however, by creating an administrative board invested with the authority for a continuous determination of the proper functions of local governments. The ultimate solution depends, in a large measure, on an enlightened, voluntary cooperation between local authorities and state administrative agencies.

A CONSIDERATION OF THE PROBLEMS IN CONSORTIUM RECOVERY

From judicial decisions, scholarly texts, and journal writings a pressure is being generated leaving the law of consortium in unrest.[1] The impetus for this pressure is easily discernable in a typical situation in-

67. Administrative control is most pronounced in the areas of finance, education, highways, public health and social welfare. But no state has developed a systematic basis for administrative controls, encompassing all the major functions of government. See SCHULZ, AMERICAN CITY GOVERNMENT 148 (1949).

68. Two principal plans of administrative control have been used. One involves concentrating within a single state agency control over the various municipal functions. The plan followed in the United States is characterized by the distribution of control among existing administrative agencies. *Id.* at 149.

1. A recent leading case allowing a wife to recover for negligent invasion of consortium rights is Hitaffer v. Argonne Co., 183 F.2d 811 (D.C. Cir. 1950). Two jurisdictions have followed this judicial innovation. Brown v. Georgia Tennessee Coaches Inc., 88 Ga. App. 519, 77 S.E.2d 24 (1953); Cooney v. Moomaw, 109 F. Supp. 448 (D. Neb. 1953). For a discussion of the various aspects of consortium favoring the view of granting recovery to the wife see, HARPER, TORTS 566 (1933); PROSSER, TORTS 948 (1941); Holbrook, *The Change in the Meaning of Consortium,* 22 MICH. L. REV. 1 (1923); Lippman, *The Breakdown of Consortium,* 30 COL. L. REV. 651 (1930); Notes, 9 IND. L.J. 182 (1933), 5 CORNELL L.Q. 171 (1920), 39 CORNELL L.Q. 761 (1954), 35 KY. L.J. 220 (1947); 39 MICH. L. REV. 820 (1940), 23 U. OF CIN. L. REV. 108 (1954).

volving consortium loss. A man, injured negligently, recovers compensation for his bodily injury. His ability to perform any domestic duties is temporarily or permanently impaired. The frequently unrealistic compensation that he may recover for loss of earning power will indirectly inure to his family as a whole, but the individual harm each member of his domestic group suffers is an independent, personal loss.

Consortium signifies the legal rights characterized as services, society, sexual intercourse, and conjugal affection of the spouse.[2] Frequently inexact usage leaves the concept of consortium without fixed limits. In general an invasion of the consortium interest involves two elements: pecuniary loss, which refers primarily to services; and sentimental loss, including loss of society, affection, and chastity.[3] The former is economic injury affecting the pocket book, and the latter, often called solatium, is injury to the feelings.

One problem typical to all investigations of the marital relation is the fiction of the legal identity of husband and wife that was integrated into the early common law forms of action.[4] The status of the woman in the society of the sixteenth and seventeenth century guided the development of the court's attitude toward relational marital interests.

In the seventeenth century the wife was considered for many purposes a chattel of the husband; he was entitled to her services and society.[5] At first the usually recognized forms of interference with a husband's interest in his wife were abduction, criminal conversation, and assault and battery, all of which were intentional wrongs giving the husband a right to recover.[6] Later, to meet the changing social needs, new causes of action were developed giving him remedies for injury to his wife due to libel and slander, malicious prosecution, sale to her of habit forming drugs, and malpractice.[7]

Under the prevailing attitudes at early common law the wife was not

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2. PROSSER, TORTS 917 (1941).

3. Holbrook, *supra* note 1, *esp.* at 2.

4. At common law the legal existence of the woman was suspended or merged in that of the husband. 1 BL., COMM. 442; CO. LITT. 112; 2 KENT COMM. 129.

5. "[I]f the beating or other mal-treatment be very enormous, so that thereby the husband is deprived for any time of the company and assistance of his wife, the law then gives him a *separate* remedy by an action of trespass, in nature of an action upon the case, for this ill usage, *per quod consortium amisit;* in which he shall recover a satisfaction in damages." 3 BL., COMM. 140.

6. See 3 BL., COMM. 140.

7. Indiana recognizes an action by the husband for his damages arising from intentional injuries to the wife, including enticement, Higham v. Vanosdol, 101 Ind. 160 (1855); alienation of affection, Van Vacter v. McKillip, 7 Blackf. 578 (Ind. 1845); malicious prosecution, Rogers v. Smith, 17 Ind. 323 (1861); and libel, Hart v. Crow, 7 Blackf. 351 (Ind. 1845). See, MADDEN, PERSONS AND DOMESTIC RELATIONS 161, n.75 (1931).

sui juris and could not sue for loss of the services of the husband.[8] In recognition of the changed social status of woman, legislatures passed Women's Emancipation Acts removing their disability to sue.[9] Since then the wife has come to be allowed protection similar to that of the husband's for loss of consortium resulting from an intentional interference.[10]

In recognizing the rights of the wife to damages for the intentional injuries to consortium the courts tend toward the theory that this recovery exists as a mutual right flowing from the marital relationship rather than as an exclusive right of the husband. The right is founded not upon any master-servant principle but upon legally protected interests inherent in the conjugal relation.[11] The recoverable damages include not only the pecuniary items,[12] but also the sentimental elements.[13]

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8. One authority indicates: "One very good reason [that the wife was denied recovery at common law] was that she had not the capacity to maintain an action of her own against anyone. . . ." PROSSER, TORTS 927 (1941). An attempt to overcome this limitation by joining the husband in the action failed. See Lynch v. Knight, 9 H.L. Cas. 577, 11 Eng. Reprint 854 (1861).

Blackstone, in explaining the absence of the wife's rights in the matter of relative injuries suggests "[o]ne reason for which may be this: that the inferior hath no kind of property in the company, care, or assistance of the superior . . . and therefore the inferior can suffer no loss or injury." 3 BL. COMM., *op. cit. supra* note 6, at 143. This speculative comment is clearly the result of a groping for a rationale upon which to base the action by a spouse. At best it is an explanation of the existing society during that period when the status of a wife was comparable to that of a servant.

9. See MADDEN, *op. cit. supra* note 7, at 159 n.71; IND. ANN. STAT. § 38-101 *et seq.* (Burns 1949).

10. Haynes v. Nowlin, 129 Ind. 581, 29 N.E. 389 (1891) (enticement); Holmes v. Holmes, 133 Ind. 386, 32 N.E. 932 (1893) (alienation of affection).

Some courts point out that recovery is not granted to the wife where there is no direct injury to the marital relation. PROSSER, TORTS 947 (1941). One case indicates that because the malice in an intentional act to have the husband arrested was not in fact directed toward the wife's interests, she could not recover. Nieberg v. Cohen, 88 Vt. 281, 289, 92 Atl. 214, 218 (1914). Another interpretation of direct injury indicates that where there is no intentional tort the ordinary rule of damages goes no further than to compensate for injury directly done. Feneff v. New York Central & H.R.R., 203 Mass. 278, 281, 89 N.E. 436, 437 (1909). Following the *Feneff* concept the Connecticut court in Marri v. Stamford St. R.R., 84 Conn. 9, 18, 78 Atl. 582, 585 (1911) declares "[l]oss or impairment of conjugal affection is certainly not a natural result of physical injuries suffered by one of the parties to a marital union."

11. The court in describing this inherent interest states: "If there is any such thing as legal truth and legal right, a wronged wife may have her action in such a case as this, for in all the long category of human rights there is no clearer right than that of the wife to her husband's support, *society,* and *affection.* An invasion of that right is a flagrant wrong, and it would be a stinging and bitter reproach to the law if there were no remedy." (emphasis added) Haynes v. Nowlin, 129 Ind. 581, 582, 29 N.E. 389 (1891). The right to each other's society and comfort is reciprocal. Gregg v. Gregg, 37 Ind. App. 210, 75 N.E. 674 (1905). See MADDEN, *op. cit. supra* note 7 at 173.

12. Pecuniary loss is not necessary. In describing the action one Indiana case states: "[t]he action is not regarded in the nature of an action by a master for the loss of the services of his servant, and it is not necessary that there be any pecuniary loss whatever." Adams v. Main, 3 Ind. App. 232, 235, 29 N.E. 792, 793 (1892). For a collection of author-

Generally, the spouses are accorded nearly[14] equal treatment in the protection of their conjugal rights where their interests are invaded by willful conduct.[15] This is not the rule, however, where the injuries are occasioned by negligence.[16] With the growth of the law of negligence there was early recognition of the husband's right to recover for negligent harm to his conjugal interests.[17] Until 1950, the wife's recovery for loss of consortium due to another's negligent conduct was almost uniformly denied.[18] Dicta in a recent case indicates that this is the law in Indiana.[19]

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ity supporting this view see MADDEN, *op. cit. supra* note 7 at 167.

13. For a discussion of the measure of damages involved where a husband is suing for loss of consortium see Selleck v. Janesville, 104 Wis. 570, 80 N.W. 944 (1899); Indianapolis, & M. R. Transit Co. v. Reeder, 51 Ind. App. 533, 100 N.E. 101 (1912); Rogers v. Smith, 17 Ind. 323 (1861).

14. See note 10 *supra*.

15. "Heart Balm" statutes, have abolished the remedy of damages for seduction, breach of promise to marry, alienation of affection, and criminal conversation. IND. ANN. STAT. § 2-508 (Burns 1946). It cannot reasonably be supposed that the legislature by this act meant that consortium in its general sense should not be protected. For a discussion of the Indiana statute see Feinsinger, *Legislative Attack on "Heart Balm,"* 33 MICH. L. REV. 979, 998 (1935). This legislation was prompted by fear of judicial misemployment by the unscrupulous, who, by threats of unsavory proceedings, might be able to obtain large settlements regardless of the guilt or innocence of the accused party. Only a minority of jurisdictions have enacted Heart Balm statutes, and those statutes passed serve to abolish only actions specifically prescribed and nothing more. For a discussion of the constitutionality of Heart Balm statutes abolishing the common law remedies see Note, 22 IND. L.J. 186 (1947).

16. "Our court is agreed that when a wife is tortiously injured by another either negligently or designedly, the husband has an independent right of action against the tort-feasor, for his loss of the services, society, companionship and all that is contained in the word 'consortium' of the wife, resulting from such injury." Burk v. Anderson, 232 Ind. 77, 80, 109 N.E. 2d 407, 407 (1952). See PROSSER, TORTS § 102 (1941); MADDEN, *supra* note 7, at 161. However, the wife is not allowed recovery where consortium loss is occasioned by negligence. Brown v. Kistleman, 177 Ind. 692, 98 N.E. 631 (1912). For a collection of authority denying the wife recovery see Hitaffer v. Argonne Co., 183 F.2d 811, 812 n.5 (D.C. Cir. 1950); PROSSER, TORTS 946 (1941).

17. Negligence evolved as a separate action about 1825. PROSSER, TORTS 171 (1941). Actions by a husband for negligent injury to his wife resulting in loss of consortium were recognized shortly thereafter. *Id.* at 939.

18. One decision did allow a wife recovery, Hipp v. E. I. DuPont de Nemours & Co., 182 N.C. 9, 108 S.E. 318 (1921), but was later overruled. Hinnant v. Tidewater Power Co., 189 N.C. 120, 126 S.E. 307 (1925).

19. Indiana has denied the wife's right to recover for loss of consortium due to negligence. Brown v. Kistleman, 177 Ind. 692, 98 N.E. 631 (1912). In a recent case the court failed to cite this precedent in an action by a wife. While the decision concerned consortium loss, the wrongful act that caused the loss also caused the immediate death of the husband. Since the courts have ruled that recovery for consortium loss is limited to the time between the injury and death, there could be no recovery in this case. See *infra* p. 283. Concerning consortium recovery by a wife the judge stated: "It is the belief of the writer of this opinion that when a husband is tortiously injured by another either negligently or designedly the wife, under our enabling statutes, has an independent right of action against the tort-feasor, for her loss of support, society and maintenance of the husband, resulting from such injuries. . . . Notwithstanding the weight of authority to the contrary I think this should be the law. . . . However, a majority does not agree with this idea." Burk v. Anderson, 232 Ind. 77, 80, 109 N.E.2d 407, 408 (1952).

It is difficult to justify this unequal treatment in view of the enhanced social status of women and the prior recognition of mutual rights for intentional injuries.

In 1950, in *Hittaffer* v. *Argonne Co.*,[20] the United States Court of Appeals for the District of Columbia handed down a most persuasive opinion allowing the wife to recover for loss of consortium due to negligent conduct. Since this decision, however, the courts of all but two of the jurisdictions deciding the same question have rejected the *Hitaffer* logic, and in so doing have refused to follow the view urged by various legal scholars and writers.[21]

Realizing the problem of justifying this disparity of treatment some courts have gone so far as to deny the husband his traditional cause of action for negligent invasion of marital interest.[22] This result is reached by relating the husband's action to one by a master for loss of services of a servant[23] and, reasoning from this that, since the increased social status of women did away with the master-servant concept, justification for allowing the husband to recover no longer exists. Perhaps it is true that originally the theory of the action for loss of consortium was loss of services, but it is clear that the modern view of recovery is not grounded on the same theory.[24] While conjugal benefits to a husband include services that might be furnished by hired servants, they also involve services that the wife alone can render.[25] Damages are allowed for the sentimental elements which are clearly not a part of the master-servant concept. The use of a restricted interpretation of consortium to justify denial of recovery to the husband is as arbitrary as granting recovery to one spouse and not the other.

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20. 183 F.2d 811 (D.C. Cir. 1950).

21. See note 1 *supra*.

22. Marri v. Stamford St. R.R., 84 Conn. 9, 78 Atl. 582 (1911); Whitcomb v. New York, N.H. & H.R.R., 215 Mass. 440, 102 N.E. 663 (1913); Blair v. Steiner Dry Goods Co., 184 Mich. 304, 151 N.W. 724 (1915); Golden v. R.L. Greene Paper Co., 44 R.I. 231, 116 Atl. 579 (1922); *But cf.* Bolger v. Boston Elevated Ry., 205 Mass. 420, 91 N.E. 389 (1910) recovery allowed for actual medical expenses only.

23. The courts discount the seemingly clear language—loss of society, chastity and other sentimental elements—which appear in pleadings in the early actions claiming loss of consortium because of the recognized history of verbiage and redundancy in common law pleading. See Lippman, *supra* note 1, at 668.

24. The modern view of recovery includes both sentimental and pecuniary elements. Citizens St. Ry. v. Twiname, 121 Ind. 375, 23 N.E. 159 (1890); Indianapolis & M.R. Transit Co. v. Reeder, 51 Ind. App. 533, 100 N.E. 101 (1912); See also Selleck v. Janesville, 104 Wis. 570, 80 N.W. 944 (1899).

25. The Indiana Appellate Court has admitted extensive evidence of both pecuniary and sentimental loss in a negligence action by a husband. One element for example was the loss of the wife's talent for music in the home that added to its attractiveness since her efforts in this regard were a source of comfort, enjoyment, and happiness to the husband. Indianapolis, & M.R. Transit Co. v. Reeder, *supra* note 24.

Reasoning along lines created in the law by the status of the wife in the seventeenth century other courts combine various rationales to maintain the inequality by denying only the wife recovery for loss of consortium due to negligent conduct.[26]

Often the action by the husband is narrowly defined as one by a master for loss of services. The wife, thought of as a mere servant, has no legal claim to the master's services.[27] This argument fails to recoguize that recovery by the husband is not limited to services and also that since the Emancipation Acts the master-servant analogy is no longer applicable to the wife.

Some opinions insist that the wife had no claim at common law, and that the later removal of the wife's disability did not create new rights.[28] Historically there is a conflict as to whether the right did not exist or whether it existed but that the wife lacked the capacity to sue.[29] In either event the common law argument does not justify denial of the wife's recovery. The lack of precedent for an action does not mean that the interests involved are not worthy of protection.[30] The wife's interests have been recognized where intentional injury is concerned, and the harm involved where the injury is incurred by negligence is no less real. Another argument is that the damage to the wife is too remote and inconsequential.[31] It is not clear how this reasoning can be applied to the wife's

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26. Despite the strong language used by the Indiana court in recognizing the wife's independent action for willful invasion of consortium in Haynes v. Nowlin, 129 Ind. 581, 29 N.E. 389 (1891) this inequality of treatment for negligent loss of consortium was upheld in Boden v. Del Mar Garage, 205 Ind. 59, 185 N.E. 860 (1933); Brown v. Kistleman, 177 Ind. 692, 98 N.E. 631 (1912). *See* Burk v. Anderson 232 Ind. 77, 109 N.E.2d 407 (1952).

27. The traditional action of the husband is characterized as one for only the pecuniary loss embodied in the action for services. The court refuses to recognize that the husband had legal rights enforceable separately for the sentimental elements of consortium. This makes the action identical to one by a master for injury to a servant. Stout v. Kansas City Term. Ry., 172 Mo. App. 113, 121, 157 S.W. 1019, 1022 (1915).

28. Sobolewski v. German, 32 Del. 540, 127 Atl. 49 (1924); Cravens v. Louisville & N.R.R., 195 Ky. 257, 242 S.W. 628 (1922); Emerson v. Taylor, 133 Md. 192, 104 Atl. 538 (1918); Nash v. Mobile & O.R.R., 149 Miss. 823, 116 So. 100 (1928); Bernhardt v. Perry, 276 Mo. 612, 208 S.W. 462 (1919); Howard v. Verdigris Valley Elec. Co-op., 201 Okla. 504, 207 P.2d 784 (1949); Sheard v. Oregon Electric Ry., 137 Ore. 341, 2 P.2d 916 (1931).

29. In an English case Lord Campbell argues that the wife has the right but lacks the legal capacity to enforce it. See Lynch v. Knight, 9 H.L.Cas. 577, 11 Eng. Reprint 854 (1861).

30. See Daily v. Parker, 152 F.2d 174 (7th Cir. 1945); Oppenheim v. Kridel, 236 N.Y. 156, 140 N.E. 227 (1923).

31. Brown v. Kistleman, 177 Ind. 692, 98 N.E. 631 (1912); Feneff v. New York Central & H.R.R., 203 Mass. 278, 89 N.E. 436 (1909); Kosciolek v. Portland Ry. Light Power Co., 81 Ore. 517, 160 Pac. 132 (1916).

and not the husband's cause of action for loss of rights of consortium.[32]

Several jurisdictions deny recovery on the ground that the husband is compensated in his own action for the loss of his earnings which are the source of the wife's support and that any recovery by the wife for the same injury would amount to double recovery.[33] It is true that, where loss of support has been compensated in a previous judgment, the wife has no further claim from the tort-feasor for her pecuniary loss.[34] However, invasion of consortium is independent of the invasion of personal bodily security and has been shown to involve more than pecuniary elements of damage.[35] Recovery by the husband in an action for his personal injuries should not bar consortium recovery by the wife for the simultaneous, direct, and independent harm she suffers. The fact that some of the pecuniary elements of the wife's consortium action may have been redressed—perhaps only partially—in a previous suit by another is no justification for denying compensation for the remainder of the harm she has sustained.

Probably the real reason for denying the wife recovery for loss of consortium in an action for negligence is *precedent*. In view of historical and judicial precedent, right or wrong, courts are led to declare that any change should be made by the legislature.[36] While legislation has not dealt with this matter directly, the trend is to make the wife and the husband social equals.[37] It would seem that the judiciary need not wait

32. Concerning those jurisdictions which state negligence theory in causation terms, the tortfeasor's act is clearly the cause in fact of damage to the consortium interest impaired. Where the risk theory applies it would seem logical to argue that since the husband was a person within the risk of harm when the woman is injured, conversely the wife would be a person within the risk of harm where a man is injured. See Note, 29 IND. L.J. 622 (1954).

33. Giggey v. Gallagher Transp. Co., 101 Colo. 258, 72 P.2d 1100 (1937); Gearing v. Berkson, 223 Mass. 257, 111 N.E. 785 (1916); Eschenbach v. Benjamin, 195 Minn. 378, 263 N.W. 154 (1935); Bernhardt v. Perry, 276 Mo. 612, 208 S.W. 462 (1919); Helmstetler v. Duke Power Co., 224 N.C. 821, 32 S.E.2d 611 (1945); Tobiassen v. Polley, 96 N.J. 66, 114 Atl. 153 (1921); Goldman v. Cohen, 30 Misc. 336, 63 N.Y. Supp. 459 (1900).

34. In Indiana a husband is required by statute to furnish support for his wife. IND. ANN. STAT. § 38-116 (Burns 1949). Where a tortfeasor has compensated the husband for his loss of earning power, the wife's pecuniary recovery is limited to the statutory action against her husband for the portion to which she is entitled.

35. The independent existence of recovery for sentimental damage is indicated where a husband has been allowed an action for criminal conversation though living apart from his wife. Michael v. Dunkle, 84 Ind. 544 (1882); Pierce v. Crisp, 260 Ky. 519, 86 S.W.2d 293 (1935); Cross v. Grant, 62 N.H. 675 (1883).

36. In the language of one court: "The subject of woman's rights and torts has been so frequently before the Legislature, and the common laws relative thereto have been so frequently modified, that we must assume that those remnants of the common law not changed have met with general approval." Ripley v. Ewell, 61 So.2d 420, 421 (Fla. 1952). See also Franzed v. Zimmerman, 127 Colo. 381, 256 P.2d 897 (1953).

37. Buchanan, *The Legal Status of Women In the United States of America* (1941) Dept. of Labor, Women's Bureau, Bulletin No. 157.

for legislation to correct judicially created inconsistencies founded upon outmoded concepts.[38]

In addition to the unequal treatment for the wife's consortium recovery, there are other chronic problems that pervade the entire field of relational torts. The courts falter in theory where they fail to treat the spouses consortium action independently and erroneously employ bars of limitations applicable only to the action by the victim.

Under Anglo-American common law a right of action for personal injury did not survive the victim's death, and no civil action accrued to anyone on account of his death; but this rule has been generally modified by statutes.[39] Recovery is limited under those statutes to only the pecuniary loss suffered by those for whose benefit the action may be maintained.[40]

Not considering relational torts the common law rule as modified by survival statutes limiting recovery for personal injury damages to the lifetime of the injured party seems rational.[41] However, application of

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38. "When the reason for any rule of law ceased, the rule should be discarded." Randolph v. Randolph, 146 Fla. 491, 495, 1 So.2d 480, 481 (1941); "We act in the finest common-law tradition when we adapt and alter decisional law to produce common-sense justice." Woods v. Lancet, 303 N.Y. 349, 355, 102 N.E.2d 691, 694 (1951). In Cooney v. Moomaw, 109 F. Supp. 448 (D. Neb. 1953), a Federal District Court in Nebraska, a jurisdiction without precedent for such an action, determined without difficulty that the action would lie in favor of the wife where her consortium interests are invaded by the negligence of a third person.

39. Indianapolis, P. & C. R.R. v. Keely's Adm., 23 Ind. 133 (1864); Baker v. Bolton, 1 Campb. 493, 170 Eng. Reprint 1033 (1808); Schumacher, *Rights of Action under Death and Survival Statutes*, 23 MICH. L. REV. 114 (1924); Oppenheim, *The Survival of Tort Actions and the Action for Wrongful Death—A Survey and a Proposal*, 16 TULANE L. REV. 386 (1942); Voss, *The Recovery of Damages for Wrongful Death at Common Law, at Civil Law, and in Louisiana*, 6 TULANE L. REV. 201, 203-212 (1932); Note, *Proposed Acts Concerning Wrongful Death and Survival of Actions in Indiana*, 26 IND. L.J. 428 (1951). See IND. ANN. STAT. § 2-404 (Burns 1951).

40. The Indiana act provides, ". . . the provisions of this act, shall inure to the exclusive benefit of the widow or widower, as the case may be, and to the *dependent* children, if any, or *dependent* next of kind. . . ." [emphasis added] IND. ANN. STAT. § 2-404 (Burns 1946). "The damages are not to be estimated at the value of the life lost, but at such a sum as will compensate the persons on whose behalf the action is brought for the pecuniary injury which they have sustained by the death." Consolidated Stone Co. v. Staggs, 164 Ind. 331, 337, 73 N.E. 695, 697 (1905).

41. It might be pointed out that survival statutes are not involved in consideration of consortium recovery in that they would only apply to actions individual in the deceased person surviving for the benefit of the estate. The individual consortium recovery by the surviving spouse is not an action that could have been brought by the deceased spouse.

Some jurisdictions have interpreted the Women's Emancipation Statutes as shifting the cause of action for loss of services from the husband to the wife for her personal bodily injury. However, she cannot recover for sentimental loss. See Ford Motor Co. v. Mahone, 205 F.2d 267 (4th Cir 1953).

this rule to relational torts is difficult to accept.[42] Conduct that results in injury to a married person may directly interfere with protected interests of two parties: first, the victim's interest in bodily security, and second, the consortium interest of the spouse. The death of the party suffering bodily injury should not bar recovery to the spouse who actually suffers an independent wrong.[43] There are numerous examples where a single tortious act gives rise to several independent causes of action, *e.g.*, slandering two parties or negligently injuring a car load of people. In the latter case the death of one of the injured persons does not preclude recovery by the others. Each is entitled to seek redress for their independent damages. The rights of consortium should be treated the same way.

While Wrongful Death Acts provide limited compensation for a surviving spouse,[44] the recovery is not to be confused with that recovery in an independent action for consortium loss. The Acts allow certain named dependents recovery in actions that could have been maintained by the deceased had he lived. These acts were not intended to bar independent actions that may have accrued simultaneously. In addition, these statutes are inadequate as a substitute for consortium recovery because they are limited to pecuniary loss and do not contemplate recovery for sentimental loss.[45] It is illogical to diminish a tortfeasor's liability for sentimental injury where he successfully kills instead of merely injuring the spouse.

Where the injury or death is in the course of employment another limiting factor is the "exclusive recovery" feature of Workmen's Com-

42. In a recent decision the District of Columbia Court refused to extend the logical result of the independent rights theory proferred in the *Hitaffer* case. The court admitted: "While the loss [of consortium] is just as great, in fact, greater in the case of death than, perhaps, in the case of an injury not resulting in death, the fact remains that we are confronted with the rule that in case of death there can be no recovery by the surviving spouse except for pecuniary losses." Brown v. Curtin and Johnson, Inc., 117 F. Supp. 830, 831 (D.C. 1954).

43. In an action for loss of consortium, recovery is limited to the loss accruing between the time of injury and the death of the spouse. Long v. Morrison, 14 Ind. 595, 597 (1860); Burk v. Anderson, 232 Ind. 77, 109 N.E.2d 407 (1952); Graham v. Central of Georgia Ry., 217 Ala. 658, 117 So. 286 (1928).

44. Those statutes patterned after "Lord Campbell's Act" create a new cause of action for the benefit of certain named beneficiaries. The purpose of this type of provision is to compensate these persons for the actual pecuniary loss, up to a specified limit, suffered because of the wrongful death of the decedent. Northern Ind. Power Co. v. West, 218 Ind. 321, 32 N.E.2d 713 (1941); Lindley v. Sink, 218 Ind. 1, 30 N.E.2d 456 (1940).

A few statutes allow recovery to the estate for the personal injury to the decedent. Brown v. Perry, 104 Vt. 66, 156 Atl. 910 (1931). See Note, 15 Mo. L. Rev. 315 (1950).

45. See *supra* notes 40, 42.

pensation Acts.[46] The acts are designed to replace the common law tort action with statutorily fixed payments for personal injuries or death arisng out of and in the course of employment.[47] The employee or his dependents are assured speedy compensation irrespective of the employer's fault, and the employer in return is freed from any other liability.[48] Whether or not the advantages of Workmen's Compensation Acts outweigh the limitation placed upon common law recovery is a policy question for determination by the legislature. The plain langnage of many of the acts would seem to support the view that the consortium action of the wife is precluded so far as the employer is concerned, and courts considering the issue have generally reached this result.[49]

A third limiting factor in an action for loss of consortium, that plagues all relational tort actions, is the application of the common law defenses, namely, assumption of risk and contributory fault.[50] Those cases considering the issue of imputed contributory negligence have

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46. The Indiana Act provides: "The rights and remedies herein granted to an employee subject to this act . . . shall exclude all other rights and remedies of such employee, his personal representatives, dependents or next of kin, at common law or otherwise, on account of such injury or death." IND. ANN. STAT. § 40-1206 (Burns 1952).

The impact of the typical Workmen's Compensation Act is to limit recovery to the pecuniary elements allowed under the Act and to deny recovery for the sentimental loss.

47. Horovitz, *Modern Trends in Workmen's Compensation,* 21 IND. L.J. 473, 477 (1946).

48. IND. ANN. STAT. § 40-1202 (Burns 1952); for a listing of comparative legislation, see the annotation at this section.

49. In Hitaffer v. Argonne Co., 183 F.2d 811 (D.C. Cir. 1950), it is admitted that literal interpretation of the exclusive recovery section could be construed to bar recovery by a spouse. However, placing emphasis upon the separate and independent duty of care to the spouse's interests, the court indicated that if the exclusive recovery provision barred the spouse's recovery it would lead to absurd consequences. *Id.* at 819.

Whether a consortium action by a spouse is barred by the "exclusive recovery" feature is a matter of statutory interpretation. The interpretation in the *Hitaffer* case not applying the bar to the consortium action by a spouse presupposes that the Congress failed to consider consortium interests in proper perspective as an independent cause of action. However, the issue of consortium rights under the New York Workman's Compensation Law that served as a model for the Longshoremen's and Harbor Worker's Compensation Act involved in the *Hitaffer* case (See H.R. REP. No. 1422, 70th Cong., 1st Sess. (1928)), had been litigated in the Supreme Court of New York prior to the passage of the Federal Act. Swan v. F. W. Woolworth Co., 129 Misc. 500, 222 N.Y. Supp. 111 (1927). The decision upheld the exclusive recovery feature of the act over the claim for loss of consortium by a husband. It might be pointed out that since this decision in 1927, legislative action has not been taken to correct the interpretation if in error. For a discussion of the exclusive recovery feature of the New York Act see Note, 36 CORNELL L.Q. 148 (1950).

For a listing of recent authority refusing to follow the *Hitaffer* interpretation of the Workmen's Compensation Acts "exclusive recovery" feature, see Ash v. S. S. Mullen, Inc., 43 Wash.2d 345, 349, 261 P.2d 118, 120 (1953).

50. In an action for loss of consortium the negligence or assumption of risk of the husband or wife receiving the bodily injury bars recovery in an action for personal injury. This bar has been applied to the action by the spouse who has received simultaneous injury to consortium from the same tortfeasor. Herko v. Uviller, 114 N.Y.S.2d 618 (1953).

held it to be a bar to the recovery by a parent or a spouse.[51] Struggling with the relational aspects of the actions the courts have developed such words as "derivative"[52] to explain the source of action of the spouse and to reach a preconceived result denying recovery.

The action for loss of consortium has been shown to be independent of the action for personal injury by the victim.[53] The sentimental elements of consortium benefiting the husband never belonged to the wife. These elements could not be the subject of recovery by the wife in connection with an action for her personal injuries, for they are more nearly like property of the husband in the wife's possession.[54] Contributory negligence of the wife in this instance should not be a bar to the husband's recovery anymore than it is where the wife as bailee and driver of the husband's car, is involved in a negligent collision and is contributorily negligent.[55] Where a defendant negligently injures a wife in this situation, contributory negligence merely bars her recovery; it does not dissipate the defendant's initial wrong. A wife can be similarly thought of as a bailee of the husband's consortium interest and his independent claim should not be barred in the absence of contributory negligence on his part.[56]

It is true that the common law did not grant the wife the same recovery in consortium actions granted to the husband. The idea of equality between husband and wife is a product of the thinking of the last century and a half. The wife today is the social equal of the husband

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51. Chicago & G.E. Ry. v. Harney, 28 Ind. 28 (1867): "In order to subject one to liability to a husband for illness or bodily harm done to his wife, all the elements of a tort action in the wife must exist, including the tortious conduct of the actor, the resulting harm to the wife and the latter's freedom from such fault as would bar recovery by her. . . ." Herko v. Uviller, 114 N.Y.S.2d 618, 619 (1953); RESTATEMENT, TORTS § 693, Comment *c* (1938).

See also Fleming, *Imputed Contributory Negligence*, 14 LA. L. REV. 340, 355 (1954); Gregory, *The Contributory Negligence of Plaintiff's Wife or Child in an Action for Loss of Services*, 2 U. OF CHI. L. REV. 173 (1935); Gilmore, *Imputed Negligence*, 1 WIS. L. REV. 193 (1921); see Note, 42 A.L.R. 717 (1926).

52. One court expressed the theory as follows: "Whenever the plaintiff derives his cause of action from an injury to a third person, the contributory negligence of such third person is imputable to him, so as to charge him with the consequences." Pratt Coal & Iron Co. v. Brawley, 83 Ala. 371, 374, 3 So. 555, 557 (1887). For a discussion of "derivative" causes of actions see, Gregory, *supra* note 51, at 182.

53. Henneger v. Lomas, 145 Ind. 287, 290 (1896); "At common law two actions lie for personal injuries to married women. . . . One by the husband . . . for the loss of services, &c; the other, by the husband and wife . . . for the personal injury." Long v. Morrison, 14 Ind. 595, 597 (1860).

54. See Gregory, *supra* note 51 at 174.

55. Lee v. Layton, 95 Ind. App. 663, 167 N.E. 540 (1929).

56. Gilmore, *supra* note 50 at 213; Keeton, *Imputed Contributory Negligence*, 13 TEX. L. REV. 161, 176 (1935); Notes, 24 MICH. L. REV. 592 (1926); 80 U. OF PA. L. REV. 1123, 1130 (1932).

and should enjoy coextensive legal rights.[57]

The marital relation, itself, involves many interests. A good marriage is a definite social and economic advantage to the parties involved and to society in general. The sentimental elements of consortium involving such things as counsel, society, sexual intercourse, and affection have an important role in the family organization, and loss of these by any member invokes a serious disadvantage that should be compensated in some form.[58] The family in our society is a cooperative enterprise with reciprocal rights and obligations between the members,[59] and present socio-economic efforts should be directed to promote this basis of our culture. The courts clearly have a place in fostering this program.

Some values when lost may not easily be compensated in that no definite money value can be assigned them. The sentimental benefits of the conjugal relation fall into this category. There is no easy way to translate such things as lost love and companionship into cash values, and courts show reluctance to entrust such determinations to the hazards of excessive verdicts occasiond by the emotions of a sympathetic jury.[60] Similar difficulties are encountered, however, where pain, suffering, and mental anguish are concerned.

It might be questioned if the granting of increased consortium recovery for the husband with similar rights in the wife really fills a need in society. The present status of the law, tending to disallow the sentimental elements whether because of the difficulty of assessment or the fear of misuse of the remedy, places the largest recovery in the hands of the spouse of the victim who earned the highest income. Allowing consortium actions would increase recovery independent of the injured individual's capacity to provide income, and would bolster the security of a family unit from the misfortune of negligent injury.

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57. See Pound, *Individual Interests in the Domestic Relations,* 14 MICH. L. REV. 177 (1916); "The principles of justice also lead us to give the wife an authority equal to that of the husband. The subordination of the woman to the man in the marriage relation is the only example remaining among Anglo-Saxon peoples of the subjection of one individual of full mental powers to another, on account of an accident of birth." THWING, THE FAMILY AN HISTORICAL AND SOCIAL STUDY 149 (Revised ed. 1913).

58. "Our approach to the question must be based on a study of the rights and obligation of *all* who are parties to a *family*. The father, the mother, and the children ordinarily constitute the family. Each is entitled to the society and the companionship of the others. Within the limits of the others' abilities, each is entitled to the financial aid and support of the others. . . ." Daily v. Parker, 152 F.2d 174, 175 (7th Cir. 1945).

59. See Pound, *supra* note 57 at 185.

60. "The damages from the loss of the services, society, and companionship of a wife is not in its nature susceptible of direct proof, but when the facts are shown, the assessment of compensation must be committed to the sound discretion and judgment of the trial court or jury." Indianapolis Traction and Terminal Co. v. Menze, 173 Ind. 31, 36, 88 N.E. 929, 930 (1909).

Insurance can play an important role in alleviating the hardship imposed by loss of consortium. As the law now stands, to fully protect his wife's interest each male spouse is required to insure for his own loss of physical capacity. Because of the longer life expectancy the greater burden falls upon the young husband during early married life who can least afford to pay. If consortium interests were uniformly protected, the insurance burden would be dispersed to all carriers of liability insurance.[61] A great percentage of this class is business enterprises that bear the insurance costs as part of operating expenses. Consequently, the cost is ultimately passed on to the general public.

General recognition of the wife's cause of action for loss of consortium interest due to negligent injury of the husband is desirable in that the inequality of the present treatment of the wife cannot be justified either by logic or policy. Present legislative efforts have not adequately compensated for consortium loss.[62] Where the judiciary is unwilling to extricate itself from this self-imposed inconsistency, the legislature must be called upon to eliminate the existing inequality and to remove outmoded bars to recovery. Injuries to the mutual advantages of partners to a conjugal relation should not be allowed to go without compensation.

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61. At present an action by a husband for negligent injury to his wife is subject of recovery under a tortfeasor's auto insurance.

62. Indiana at one time provided for civil liability for loss of support due to the sale of intoxicating liquors. This action was an independent right of the wife where her loss of support was involved but was limited to pecuniary loss. There is doubt whether this statute is still in effect. For a discussion of the validity of this Act see, the Note on Civil liability in connection with IND. ANN. STAT. § 12-610 (Burns Supp. 1953).