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Eric Ernest Ostling

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Loss of Parental Consortium: Why Children Should Be Compensated

A loss of consortium occurs when a legally recognized relationship is harmed because of an injury to one member of the relationship.¹ The relationships of marriage and between parent and child are both examples of legally recognized relationships that could be harmed by a serious injury to a member.² In a loss of consortium action, the damages usually include compensation for loss of support, services, love, companionship, affection, society, solace, and sexual relations between the husband and wife.³ Although several American jurisdictions now recognize a cause of action for loss of consortium in the parent-child context,⁴ the California Supreme Court still limits the cause of action to the husband-wife relationship.⁵

The loss to a child of the companionship and affection of a parent is very similar to that suffered by a spouse in the context of spousal consortium.⁶ In fact, the loss suffered by a child may be even more serious because of the possibility of diminished psychological growth potential in the parentally deprived child.⁷ Psychological studies⁸ have discovered that a significant percentage of psycho-therapy patients⁹

1. See, e.g., *Rodriguez v. Bethlehem Steel Corp.*, 12 Cal. 3d 382, 385-86, 525 P.2d 669, 670-71, 115 Cal. Rptr. 765, 766-67 (1974) (husband of plaintiff partially paralyzed in one arm and totally paralyzed below midpoint of chest).

2. See, e.g., *id.* (wife brings loss of consortium action because of negligent injuries to her husband); *Borer v. American Airlines, Inc.*, 19 Cal. 3d 441, 444-45, 563 P.2d 858, 860-61, 138 Cal. Rptr. 302, 304-05 (1977) (children bring action for loss of parental consortium resulting from negligently inflicted injuries to their mother); *Nix v. Preformed Line Products Co.*, 170 Cal. App. 3d 975, 976-77, 216 Cal. Rptr. 581, 581-82 (1985).

3. See *Borer*, 19 Cal. 3d at 443, 563 P.2d at 860, 138 Cal. Rptr. at 304 (court discusses elements of loss of consortium). *Id.* at 445, 563 P.2d at 861, 138 Cal. Rptr. at 305 (each plaintiff child requested \$100,000 in damages for the loss of parental consortium).

4. See *infra* notes 138-85 and accompanying text (discussion of cases in other jurisdictions permitting recovery for loss of parental consortium).

5. *Borer*, 19 Cal. 3d at 451, 563 P.2d at 865, 138 Cal. Rptr. at 309 (court rejecting recognition of a cause of action for loss of parental consortium).

6. See *Ferriter v. Daniel O'Connell's Sons, Inc.*, 413 N.E.2d 690, 692 (Mass. 1980) (interest of the child in the parent's consortium is analogous to that of the husband or wife).

7. See *id.* The child-parent relationship is no less significant than that of the husband-wife. *Id.*

8. See *Psychological Problems and Parental Loss*, 113 SCI. NEWS 21 (1978). Parental loss is one common thread among people who receive psycho-therapy. Parental loss was defined as either death or separation of one month or longer due to injury or illness. *Id.* See also Roy, *Specificity of Risk Factors for Depression*, 138 AM. J. PSYCHIATRY 961 (1981) (early parental loss is a contributing factor in adult depression).

9. *Psychological Problems and Parental Loss*, 113 SCI. NEWS 21 (1978) (70% of the pa-

had suffered some form of parental loss by age twelve.¹⁰ This research concluded that premature parental loss is a significant factor in the development of neurosis.¹¹ In many instances, the loss of parental consortium causes an arrest in the emotional development in a child.¹² Although parental loss may not be the sole cause of emotional problems in all instances, the loss may be a preexisting condition that contributes to the development of neurosis.¹³

Although the harm that children may suffer as a result of a loss of parental consortium is substantial, recovery in tort presently is not allowed in California.¹⁴ In *Borer v. American Airlines, Inc.*,¹⁵ the California Supreme Court held that no cause of action exists for loss of parental consortium.¹⁶ No court in California has deviated from the *Borer* decision.¹⁷ One California appellate court, however, recently has questioned the current validity of the *Borer* decision.¹⁸

In *Nix v. Preformed Line Products, Co.*,¹⁹ a California court of appeal affirmed a trial court decision which dismissed an action for loss of parental consortium.²⁰ Although the appellate court denied a cause of action for loss of parental consortium, that court questioned the present validity of certain aspects of the *Borer* decision.²¹ The *Nix* court gave several reasons for questioning *Borer*.²² First, a significant trend in decisions in other jurisdictions favors recovery for loss of parental consortium.²³ Second, the general expansion of tort

tients in the study had a parental loss in childhood). Parental loss was defined as either death or separation of one month or longer due to injury or illness. *Id.*

10. *Id.* The remaining patients all had at least one parent which had suffered a parental loss in childhood. *Id.*

11. *Id.* BLAKISTON'S, GOULD MEDICAL DICTIONARY 909 (4th ed. 1979) (definition of neurosis). In psychiatry, neurosis is one of the two major categories of emotional maladjustments, classified according to the predominant symptom or defense mechanism. Anxiety is the chief symptom, and though no gross disorganization of personality in relation to external reality exists, some impairment of thinking and judgment may occur. A neurosis usually represents an attempt at resolving unconscious emotional conflicts in a way that diminishes the individuals effectiveness in living. *Id.*

12. *Psychological Problems and Parental Loss*, 113 SCI. NEWS 21 (1978).

13. *Id.* See Roy, *supra* note 8, at 961 (either death or separation due to serious injury).

14. See *Borer*, 19 Cal. 3d at 451, 563 P.2d at 865, 138 Cal. Rptr. at 309 (court denying a cause of action for loss of parental consortium).

15. 19 Cal. 3d 441, 563 P.2d 858, 138 Cal. Rptr. 302.

16. 19 Cal. 3d at 451, 563 P.2d at 865, 138 Cal. Rptr. at 309.

17. See *Nix*, 170 Cal. App. 3d at 981, 216 Cal. Rptr. at 585.

18. *Id.* at 985, 216 Cal. Rptr. at 588.

19. 170 Cal. App. 3d 975, 216 Cal. Rptr. 581.

20. *Id.* at 986, 216 Cal. Rptr. at 588.

21. *Id.*

22. *Id.* See *infra* notes 238-52 and accompanying text.

23. *Nix*, 170 Cal. App. 3d at 981, 216 Cal. Rptr. at 584. See *infra* notes 138-85 and accompanying text.

law to allow recovery in cases involving nonpecuniary and intangible injuries and the commentary favoring recovery for loss of parental consortium have also helped to undermine the foundations of *Borer*.²⁴ Finally, the *Nix* court stated that the support that the dissent of Justice Mosk in *Borer* has received in other jurisdictions calls for a review of *Borer*.²⁵ The *Nix* court nevertheless felt compelled to follow *Borer*, concluding that no cause of action exists for loss of parental consortium.²⁶ The *Nix* court, however, called for the California Supreme Court to review and either modify or overrule the *Borer* decision.²⁷

This comment will examine the theory of loss of consortium²⁸ and the application of that theory in California.²⁹ In addition, this comment will discuss *Borer*³⁰ and the recent California decisions that undermine the reasons for denial of recovery for loss of parental consortium.³¹ The decisions of other jurisdictions concerning loss of parental consortium also will be explored.³² Finally, this comment will conclude that *Borer* should either be modified or overruled to allow recovery for loss of parental consortium in California.³³ The starting point of this discussion must be a short history of loss of consortium in American courts.

HISTORICAL DEVELOPMENT OF LOSS OF CONSORTIUM

At common law, under the doctrine of *paterfamilias*,³⁴ any injuries to the family were injuries to the father.³⁵ Only the father could bring

24. *Nix*, 170 Cal. App. 3d at 985, 216 Cal. Rptr. at 587-88. See *infra* notes 226-37 and accompanying text.

25. *Nix*, 170 Cal. App. 3d at 986, 216 Cal. Rptr. at 584, 588 (discussion of refutation of the allegations of the majority opinion by Justice Mosk in the *Borer* dissent by *Nix* court); see *Borer*, 19 Cal. 3d at 452-61, 563 P.2d at 866-71, 138 Cal. Rptr. at 310-15; see *infra* notes 247-49 and accompanying text.

26. *Nix*, 170 Cal. App. 3d at 986, 216 Cal. Rptr. at 588.

27. *Id.*

28. See *infra* notes 34-51 and accompanying text.

29. See *infra* notes 52-126 and accompanying text.

30. See *infra* notes 91-125 and accompanying text.

31. See *infra* notes 226-37 and accompanying text. See also Diamond, Dillon v. Legg Revisited: Toward a Unified Theory of Compensating Bystanders and Relatives for Intangible Injuries, 35 HASTINGS L.J. 477, 497-98 (1984).

32. See Weitz v. Moes, 311 N.W.2d 259, 270 (Iowa 1981); Ferriter, 413 N.E.2d at 695; Berger v. Weber, 303 N.W.2d 424, 426 (Mich. 1981); Ueland v. Reynolds Metals Co., 691 P.2d 190, 193 (Wash. 1984); Theama By Bichler v. City of Kenosha, 344 N.W.2d 513, 522 (Wis. 1984); see *infra* notes 140-73 and accompanying text.

33. See generally *Nix*, 170 Cal. App. 3d at 986, 216 Cal. Rptr. at 588 (*Borer* is ripe for review).

34. See Ferriter, 413 N.E.2d at 692 (definition of *paterfamilias*).

35. *Id.* at 692-93.

We may observe that, in these relative injuries (i.e., injuries to the master-servant, husband-wife, and parent-child relationships), notice is only taken of the wrong done

actions or recover damages for personal injuries to the wife or the children.³⁶ The wife and children had no legal existence independent of the father.³⁷

The action for loss of spousal consortium developed from the actions that the husband was entitled to maintain against those who invaded the conjugal relationship by adultery or a similar act.³⁸ The theory behind these claims was that invasion of the conjugal relationship deprived the husband of the household and other services that the wife owed to the husband.³⁹ Subsequently, the grounds for a loss of consortium action were broadened to include the loss of the society of the wife and the impairment of sexual relations.⁴⁰

Eventually, courts abandoned the requirement that the defendant infringe upon the marital relation by adultery or a similar act before a loss of consortium action could be maintained.⁴¹ The husband also was allowed to recover against a defendant for intentional or negligent torts inflicted on the wife.⁴² Although the husband was able to recover for injuries to the wife, the wife had no cause of action analogous to that of the husband.⁴³

When married women's acts were passed in the mid-nineteenth century,⁴⁴ women became competent to sue in their own names for personal injury and could retain the proceeds from those actions.⁴⁵ Many

to the superior of the parties related, by the breach and dissolution of either the relation itself, or at least the advantages accruing therefrom; while the loss of the inferior by such injuries is totally unregarded. One reason for which may be this: that the inferior hath no kind of property in the company, care, or assistance of the superior, as the superior is held to have in those of the inferior; and therefore the inferior can suffer no loss or injury.

3 W. BLACKSTONE, COMMENTARIES 142-43 (1768).

36. *Id.* (historical discussion of loss of consortium); See 3 W. BLACKSTONE, COMMENTARIES 142-43 (1768) (discussion of loss of consortium actions).

37. See *Acuff v. Schmit*, 78 N.W.2d 480, 484 (Iowa 1956) (discussion of loss of consortium at common law). "[A]t common law the husband and wife were considered as one, and he was the one . . ." *Id.* See also *Rodriguez*, 12 Cal. 3d at 588, 525 P.2d at 672, 115 Cal. Rptr. at 768.

38. *Diaz v. Eli Lilly & Co.*, 302 N.E.2d 555, 556 (Mass. 1973) (originally the invasion was criminal conversation with or abduction of the wife); *Bigaouette v. Paulet*, 134 Mass. 123, 124-25 (1883).

39. *Diaz*, 302 N.E.2d at 556. The action was similar to that of a master for the enticement of a servant. *Id.* See *Igneri v. Cie. de Transports Oceaniques*, 323 F.2d 257, 263 (2nd Cir. 1963).

40. See W. PROSSER, TORTS § 124, at 873 (4th ed. 1971). Emphasis gradually shifted away from loss of services or earning capacity as more intangible elements of spousal relationships became recognized as grounds for a loss of consortium. *Id.*

41. See W. PROSSER, TORTS § 124, at 873 (4th ed. 1971). See *Kelly v. New York*, 46 N.E. 1063, 1063-64 (N.Y. 1897); see generally *Diaz*, 302 N.E.2d at 556 (historical discussion of cases concerning loss of consortium).

42. *Diaz*, 302 N.E.2d at 556.

43. *Id.*

44. *Id.* at 577 (historical discussion of women's acts).

45. See *id.* (consortium loss caused by negligent injury not actionable).

courts, however, were slow accepting the new position of women in society and consequently refused to allow the wife to recover for the loss of consortium.⁴⁶ Eventually, however, many jurisdictions began to permit a wife to recover for a loss of spousal consortium.⁴⁷

At the present time, a majority of jurisdictions, including California,⁴⁸ permit both spouses to recover for loss of consortium.⁴⁹ Some jurisdictions additionally have extended recovery for loss of consortium to the parent-child relationship.⁵⁰ The historical development of loss of consortium in California has paralleled that of other jurisdictions.⁵¹

A. Loss of Consortium in California

Early California cases on loss of consortium permitted the husband, but not the wife, to recover for loss of spousal consortium.⁵² The California Supreme Court first addressed whether to extend or deny the loss of consortium action to the wife in 1958 in *Deshotel v. Atchison, Topeka & Santa Fe Railroad Co.*⁵³ In *Deshotel*, the plaintiff wife sued the defendant railway company, alleging that the injuries to her husband resulted in a denial of his care, protection, consideration, companionship, aid, and society.⁵⁴ Because of these losses, the wife claimed that she had been damaged in the sum of \$100,000.⁵⁵

In denying the plaintiff wife recovery, the court discussed four policy considerations.⁵⁶ First, the overwhelming weight of authority in other jurisdictions supported the denial of a recovery for the loss of consortium damages to the wife in the event that the husband was seriously injured.⁵⁷ Second, departure from a well settled rule of common law such as denial of recovery by the wife for a loss of spousal con-

46. See *id.*

47. See *Rodriguez*, 12 Cal. 3d at 390-91 n.5, 525 P.2d at 673 n.5, 115 Cal. Rptr. at 769 n.5 (list of states permitting recovery for loss of spousal consortium).

48. *Id.*

49. *Id.* (list of states permitting recovery for loss of spousal consortium).

50. See *infra* notes 140-86 and accompanying text.

51. See *infra* notes 53-126 and accompanying text.

52. See, e.g., *Gist v. French*, 136 Cal. App. 2d 247, 256, 288 P.2d 1003, 1009 (1955).

53. *Deshotel v. Atchison T. & S. Fe R.R. Co.*, 50 Cal. 2d 664, 664-67, 328 P.2d 449, 449-52 (1958) (issue one of first impression in California).

54. *Id.* at 665, 328 P.2d at 449.

55. *Id.*

56. See *id.* at 665-69, 328 P.2d at 449-52 (1958) (discussion of policy reasons for denying a wife the right to recover damages for loss of consortium: multiplicity of damages, intangibility of injuries, possibility of double recovery, and lack of precedential support).

57. *Id.* at 666, 328 P.2d at 450. The reason that recovery was denied was that the wife did not suffer a compensable damage rather than the archaic notion that a woman could not sue in her own name. *Id.* See *Smith v. Nicholas Building Co.*, 112 N.E. 204, 206 (Ohio 1915).

tium should be left to the legislature.⁵⁸ Third, the speculative nature of the damages for injuries to things such as companionship, love, and society made their monetary value difficult to determine, thus making the determination of a specific amount for an award nearly impossible.⁵⁹ Finally, great difficulty existed in determining what types of claims should be upheld.⁶⁰ For example, brother-sister, grandparent-grandchild, and parent-child relationships are similar to the husband-wife relationship and arguably should also provide a basis for a loss of consortium action.⁶¹

The *Deshotel* court denied the cause of action for loss of consortium to a wife.⁶² The court, however, specifically refused to decide whether precedent permitting a husband recovery for loss of consortium damages stemming from tortious injury to the wife under precedent should also have been rejected.⁶³ This issue was addressed in *West v. City of San Diego*.⁶⁴

In 1960, the California Supreme Court in *West* denied the right of a husband to recover for a loss of spousal consortium.⁶⁵ The reasons for the *West* decision were nearly identical to those put forward to support the *Deshotel* decision.⁶⁶ The *West* court, however, could not discuss the same precedents against permitting recovery from other states because many other states then permitted a husband to recover for a loss of consortium resulting from tortious injury to the wife.⁶⁷

The *West* court thought that allowing the husband and not the wife to recover for a loss of consortium would be inequitable, and would ignore the modern view that the wife is not in a subservient position

58. *Deshotel*, 50 Cal. 2d at 668, 328 P.2d at 451.

59. *Id.* at 667, 328 P.2d at 450-51.

60. *Id.* at 667-68, 328 P.2d at 451.

61. *Id.*

62. *Id.* at 668, 328 P.2d 451.

63. *Id.*

64. *West v. City of San Diego*, 54 Cal. 2d 469, 477, 353 P.2d 929, 934, 6 Cal. Rptr. 289, 294 (1960).

65. *Id.*

66. Compare *West*, 54 Cal. 2d at 475-78, 353 P.2d at 932-34, 6 Cal. Rptr. at 292-94 (loss of consortium recovery denied to a husband because of the inequity of allowing a husband and not a wife to recover for loss of consortium, the danger of double recovery, the indirectness of the damages, the difficulty of determining a monetary award, and the difficulty of drawing a line with respect to permitting other close relations recovery) with *Deshotel*, 50 Cal. 2d at 666-69, 328 P.2d at 449-52 (loss of consortium recovery denied to a wife because of the lack of precedential support, the danger of double recovery, the indirectness of the damages, the difficulty of determining a monetary award, and the difficulty of drawing a line with respect to permitting other close relations recovery).

67. Compare *West*, 54 Cal. 2d at 476-77, 353 P.2d at 933, 6 Cal. Rptr. at 293 (a number of American jurisdictions follow the common law rule of permitting the husband and not the wife recovery for loss of consortium) with *Deshotel*, 50 Cal. 2d at 666-69, 328 P.2d at 449-52 (the vast majority of American jurisdictions deny the wife recovery for loss of consortium).

in the marital relationship.⁶⁸ Thus, California denied both the husband and the wife recovery for loss of consortium. *Deshotel* and *West* were followed in California until 1974, when both cases were overruled.⁶⁹

In 1974, the California Supreme Court decided *Rodriguez v. Bethlehem Steel Corp.*, which explicitly overruled both *Deshotel* and *West*, thereby permitting recovery for loss of consortium by either spouse.⁷⁰ The husband of the plaintiff in *Rodriguez* was totally paralyzed below the midpoint of his chest, and partially paralyzed in one arm as a result of the negligence of the defendant.⁷¹ The *Rodriguez* court rejected the policy foundations of the *Deshotel* decisions by concluding that *Deshotel* merely invented policy reasons to support the continued denial of recovery for a loss of spousal consortium by a wife.⁷²

First, the *Rodriguez* court noted that *Deshotel* relied heavily upon the weight of authority at the time of the decisions.⁷³ The *Rodriguez* court found that since *Deshotel* and *West* were decided, the weight of authority on the issue of loss of consortium had shifted from a majority of jurisdictions denying recovery for loss of consortium damages by a wife, to a majority of jurisdictions allowing recovery.⁷⁴ Second, the *Rodriguez* court noted that another reason for the denial of recovery for loss of consortium articulated by *Deshotel* was that changing well settled rules of common law was the job of the legislature rather than the courts.⁷⁵ The *Rodriguez* court stated that this policy was untenable because the courts are the primary instruments of evolution in the common law system, and that whenever an old rule of common law is found to be unsound or unsuited to present conditions, the rule should be set aside and a new rule declared by the courts.⁷⁶ Third, the *Rodriguez* court rejected the arguments made in

68. *West*, 54 Cal. 2d at 477, 353 P.2d at 934, 6 Cal. Rptr. at 294.

69. See *Rodriguez*, 12 Cal. 3d at 408, 525 P.2d at 686, 115 Cal. Rptr. at 782 (overruling *West* and *Deshotel*).

70. *Id.*

71. *Id.* at 385-87, 525 P.2d at 670-71, 115 Cal. Rptr. at 766-67.

72. *Id.* at 388-89, 525 P.2d at 672-73, 115 Cal. Rptr. at 768-69. The denial of loss of consortium damages for the wife continued after the original reasons for the rule had ceased. *Id.*

73. *Id.* at 389-92, 525 P.2d at 673-74, 115 Cal. Rptr. at 769-70. The precedential value of *Deshotel* is not only undermined, but destroyed. *Id.* See *Deshotel*, 50 Cal. 2d at 665-66, 328 P.2d at 449-50 (the vast majority of American jurisdictions deny the wife recovery for loss of consortium).

74. *Rodriguez*, 12 Cal. 3d at 389-93, 525 P.2d at 672-75, 115 Cal. Rptr. at 769-71.

75. *Rodriguez*, 12 Cal. 3d at 394, 525 P.2d at 676-77, 115 Cal. Rptr. at 772-73; see *Deshotel*, 50 Cal. 2d at 668, 328 P.2d at 451.

76. *Rodriguez*, 12 Cal. 3d at 394, 525 P.2d at 676-77, 115 Cal. Rptr. at 772-73. See also *People v. Pierce*, 61 Cal. 2d 879, 882, 395 P.2d 893, 897, 40 Cal. Rptr. 845, 847 (1964); *Katz v. Walkinshaw*, 141 Cal. 116, 123-24, 74 P. 766, 767-68 (1904).

Deshotel that the monetary value of companionship, love, and society is too speculative.⁷⁷ The court found that several decisions after *Deshotel* have permitted recovery for intangible losses even though some of those damages are somewhat speculative⁷⁸ and, in addition, pointed out that juries are capable of determining the appropriate recovery in cases of intangible loss.⁷⁹ The court concluded that the speculative nature of the damages for loss of consortium could not support a denial of recovery.⁸⁰ The final argument made in *Deshotel* and rejected in *Rodriguez* was that the difficulty of deciding what relationships would be recognized as a basis for the loss of consortium action made recovery for loss of consortium impractical.⁸¹ The *Rodriguez* court stated first that the recognition of the claim of a spouse rests on equality.⁸² The court stated that the possibility that the law might be urged to go too far in allowing recovery is an unacceptable excuse for not moving at all.⁸³

In addition, the court expressly stated that the recovery for loss of consortium envisioned in *Rodriguez* was not a double recovery.⁸⁴ The physically injured spouse could recover for lost wages and earning power, but the other spouse was recovering for the loss of love, companionship, affection, society, sexual relations, and solace.⁸⁵ These latter interests, said the court, are personal to the spouse seeking recovery for the loss of consortium.⁸⁶

The *Rodriguez* court found the reasons for denying recovery for loss of consortium no longer valid.⁸⁷ Accordingly, that court overruled both *Deshotel* and *West*⁸⁸ and permitted recovery for loss of spousal consortium.⁸⁹ The *Rodriguez* court, however, did not discuss whether recovery should be granted for loss of parental consortium.⁹⁰

77. *Rodriguez*, 12 Cal. 3d at 401, 525 P.2d at 671, 115 Cal. Rptr. at 777; *Deshotel*, 50 Cal. 2d at 667, 328 P.2d at 450.

78. *Id.* See *Beagle v. Vasold*, 65 Cal. 2d 166, 172, 417 P.2d 673, 675, 53 Cal. Rptr. 129, 131 (1966) (determining intangible injuries is precisely what a jury is called upon to do).

79. *Rodriguez*, 12 Cal. 3d at 401, 525 P.2d at 671, 115 Cal. Rptr. 765, 777 (1974); see *Dillon v. Legg*, 68 Cal. 2d 728, 752, 441 P.2d 912, 69 Cal. Rptr. 72 (1968) (jury called upon to determine intangible damages in a personal injury action).

80. *Rodriguez*, 12 Cal. 3d at 401-02, 525 P.2d at 681-82, 115 Cal. Rptr. at 777-78.

81. *Id.* See *Deshotel*, 50 Cal. 2d at 668-69, 328 P.2d at 451-52.

82. *Rodriguez*, 12 Cal. 3d at 404, 525 P.2d at 673-74, 115 Cal. Rptr. at 779-80.

83. *Id.* See also *Ekalo v. Constructive Services Co.*, 215 A.2d 1, 6-7 (N.J. 1965).

84. *Rodriguez*, 12 Cal. App. 3d at 408, 525 P.2d at 686, 115 Cal. Rptr. at 782.

85. *Id.* at 404-06, 525 P.2d at 673-75, 115 Cal. Rptr. at 779-81.

86. *Id.*

87. *Id.*

88. *Id.* at 408, 525 P.2d at 676, 114 Cal. Rptr. at 782 (if recovery may be had for one spouse then the other spouse should recover also).

89. *Id.*

90. *Rodriguez*, 12 Cal. App. 3d at 408, 525 P.2d at 686, 115 Cal. Rptr. at 782; see *Borer*,

B. Loss of Parental Consortium in California

The California Supreme Court did not address the issue of loss of parental consortium until 1977 in *Borer v. American Airlines, Inc.*⁹¹ In *Borer*, the plaintiff children brought a tort action against the defendant airline, alleging that negligent injuries to their mother deprived them of services, society, affection, tutelage, guidance, and aid in personality development.⁹² Although the children arguably were injured, the California Supreme Court concluded that children could not maintain an action for loss of parental consortium.⁹³

The *Borer* court stated that the decision whether to limit liability for loss of consortium to the husband-wife relationship or to permit the extension of that action to the parent-child relationship is a question of policy rather than law.⁹⁴ The court noted that aspects of the spousal relationship are similar to aspects of the parent-child relationship and that a significant loss is suffered by a child deprived of the society and care of a parent.⁹⁵ According to the *Borer* court, however, any judicial decision must consider more than "logical symmetry" and "sympathetic appeal."⁹⁶

The *Borer* court found that several policy arguments existed that weighed against extension of liability for loss of consortium to the parent-child relationship.⁹⁷ According to the court, loss of consortium is an intangible, nonpecuniary loss that cannot be compensated adequately by monetary recovery.⁹⁸ Damages for loss of parental consortium would be difficult to determine because of the intangible nature of the loss to the child.⁹⁹ In addition, the court thought that an extension of liability to loss of parental consortium would sizeably increase accident costs.¹⁰⁰ For instance, the court thought that permitting an action for loss of parental consortium would create problems of multiplicity of damages not inherent in an action for spousal consortium.¹⁰¹ The right of action would add as many claims to a

19 Cal. 3d at 443-44, 563 P.2d at 860-61, 138 Cal. Rptr. at 304-05 (*Rodriguez* decision carefully avoided resolving whether a child could maintain a cause of action for loss of parental consortium).

91. *Borer*, 19 Cal. 3d at 444, 563 P.2d at 861, 138 Cal. Rptr. at 305.

92. *Id.* at 444-45, 563 P.2d at 861-62, 138 Cal. Rptr. at 305-06.

93. *Id.* at 451, 563 P.2d at 865, 138 Cal. Rptr. at 309.

94. *Id.* at 446, 563 P.2d at 861-62, 138 Cal. Rptr. at 305-06.

95. *Id.*

96. *Id.* (citing *Suter v. Leonard*, 45 Cal. App. 3d 744, 746, 120 Cal. Rptr. 110, 111 (1975)).

97. *Id.* at 447, 563 P.2d at 852-53, 138 Cal. Rptr. at 306-07.

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.* at 448-49, 563 P.2d at 863-64, 138 Cal. Rptr. at 307-08 (citing *Russell v. Salem*

personal injury action as the injured parent had minor children, but the spousal action for loss of consortium could add only a maximum of one more claim to the action.¹⁰² The *Borer* court concluded that the inadequacy of monetary damages, the intangible nature of the injury and the costs to society of paying damages outweighed any potential benefits that could be derived from compensating the child.¹⁰³

The *Borer* court also noted that the action for loss of parental consortium was unsupported by precedent or statute in California or other jurisdictions.¹⁰⁴ At the time *Borer* was decided, the action for loss of spousal consortium found support in a majority of other jurisdictions.¹⁰⁵ No jurisdiction, however, permitted a child to recover for loss of parental consortium in a personal injury action.¹⁰⁶

Finally, the *Borer* court considered whether the denial of an action for loss of parental consortium in a personal injury action violated equal protection of the law under the United States and California Constitutions.¹⁰⁷ The California wrongful death statute¹⁰⁸ permitted a child to recover for the loss of consortium of the deceased parent.¹⁰⁹ If the plaintiff children in *Borer* had a parent who was killed rather than injured, they would have recovered damages for loss of parental consortium.¹¹⁰ The plaintiffs argued that this inconsistency in the law between the wrongful death statute and the common law in California was inequitable and unconstitutional.¹¹¹ They contended that no rational basis existed for permitting the child of a negligently killed parent to recover while denying recovery to the child of a negligently injured parent.¹¹²

The *Borer* court found that the question to be considered was whether the classification rested upon some ground of difference having

Transportation Co., 295 A.2d 862, 864 (1972)). Each claim by a child would be entitled to a separate appraisal of award. Therefore, for every additional child, there would be an additional claim added to each action. *Id.*

102. *Id.* at 449, 563 P.2d at 864, 138 Cal. Rptr. at 308.

103. *Id.* at 453, 563 P.2d at 866, 138 Cal. Rptr. at 310.

104. *Id.* at 449, 563 P.2d at 864, 138 Cal. Rptr. at 308.

105. *Id.*

106. *Id.* No state then permitted a child to sue for a loss of parental consortium; a total of 18 jurisdictions had rejected the cause of action. *Id.*

107. *Id.* at 451, 563 P.2d at 865, 138 Cal. Rptr. at 309.

108. CAL. CIV. PROC. CODE § 377.

109. *Id.*; see *Borer*, 19 Cal. 3d at 451, 563 P.2d at 865, 138 Cal. Rptr. at 309 (discussion of CAL. CIV. PROC. CODE § 377).

110. See *Borer*, 19 Cal. 3d at 451, 563 P.2d at 865, 138 Cal. Rptr. at 309 (children permitted recovery for loss of parental consortium under CAL. CIV. PROC. CODE § 377); *Krouse v. Graham*, 19 Cal. 3d 59, 67-69, 562 P.2d 1025, 1028-29, 137 Cal. Rptr. 863, 866-67 (1977) (loss of parental consortium permitted under wrongful death statute). See also *Griott v. Gamblin*, 194 Cal. App. 2d 577, 578-79, 15 Cal. Rptr. 228-30 (1961).

111. See *Borer*, 19 Cal. 3d at 451, 563 P.2d at 865, 138 Cal. Rptr. at 309.

112. *Id.*

a fair and substantial relation to the object of the legislation.¹¹³ Applying this test, the court discussed two significant distinctions between recovery for loss of parental consortium in the wrongful death context and recovery in the context of a personal injury action.¹¹⁴ First, in a wrongful death action the child is precluded from any recovery other than loss of consortium, but in a personal injury case, the child is not without recovery since the parent may recover for the personal injury, thus indirectly benefiting the child.¹¹⁵ Second, before the statute permitting a child recovery for loss of consortium in a wrongful death action was enacted, tortfeasors were in a better position if they killed rather than injured the parent.¹¹⁶ The court concluded that because of these two differences, the denial of recovery for loss of consortium to a child whose parent was disabled rested on a rational basis and withstood constitutional challenge.¹¹⁷

Finally, the *Borer* court denied recovery for a loss of parental consortium as a matter of methodology.¹¹⁸ The court held that permitting recovery for a new cause of action could not be decided on foreseeability alone, but that the costs of permitting recovery should be weighed against the benefits of a recovery.¹¹⁹ If the costs outweigh the benefits, the new action should not be permitted.¹²⁰ In applying this balancing test to the facts in *Borer*, the court admitted the reality and the magnitude of the injury suffered by the plaintiffs, but concluded that the need to compensate the children of negligently disabled parents for loss of consortium is outweighed by the policy reasons supporting the denial of recovery.¹²¹

At the time that *Borer* was decided, no other jurisdiction permitted recovery for a loss of parental consortium.¹²² Although a few jurisdictions agree with *Borer* and deny recovery for loss of parental consortium,¹²³ other jurisdictions have begun a trend toward permit-

113. *Id.* See also *Reed v. Reed*, 404 U.S. 71, 75-76 (1971) (discussion of standard for determining whether a state law is unconstitutional); *Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920).

114. *Borer*, 19 Cal. 3d at 451, 563 P.2d at 865, 138 Cal. Rptr. at 309.

115. *Id.* at 452, 563 P.2d at 865-66, 138 Cal. Rptr. at 309-10.

116. *Id.* at 452-55, 563 P.2d at 866, 138 Cal. Rptr. at 310.

117. *Id.* at 453, 563 P.2d at 866, 138 Cal. Rptr. at 310.

118. *Id.* The Court admitted that children need the love, affection, society, and guidance of their parents, and that any injury which diminishes the ability of the parent to meet those needs is a tragedy which harms all members of the community. *Id.*

119. *Id.*

120. *Id.*

121. *Id.* The court did not doubt the reality and magnitude of the injury. *Id.*

122. *Id.* at 449, 563 P.2d at 863-64, 138 Cal. Rptr. at 307-08; *Nix*, 170 Cal. App. 3d at 981, 216 Cal. Rptr. at 585.

123. *Zorzos v. Rosen By and Through Rosen*, 467 So. 2d 305, 307 (Fla. 1985); *Salin v.*

ting recovery.¹²⁴ In addition, Justice Mosk's strong dissent in *Borer*, which refuted the contentions of the majority point by point, has received recognition in jurisdictions that permit a child to recover for a loss of parental consortium.¹²⁵

DECISIONS IN OTHER JURISDICTIONS CONCERNING LOSS OF PARENTAL CONSORTIUM

As noted, at the time that *Borer* was decided, no other American jurisdiction permitted recovery for loss of parental consortium.¹²⁶ Since *Borer*, several other jurisdictions have permitted this extension of the traditional loss of consortium action.¹²⁷ Some jurisdictions, however, have concurred with the *Borer* conclusions.¹²⁸ In analyzing the soundness of *Borer* today, this comment will review the reasoning of courts from other jurisdictions beginning with an analysis of decisions agreeing with *Borer*.¹²⁹

A. Decisions Denying Recovery for Loss of Parental Consortium

Although a recognizable trend exists among American courts to allow recovery for loss of parental consortium,¹³⁰ several jurisdictions recently considering the issue have denied recovery to the child.¹³¹ One of the primary reasons advanced by courts denying the cause of action is that extension of the law should be made by the legislature.¹³² The theory advanced in these cases was that an expansion of liability was

Kloempken, 322 N.W.2d 736, 737-38 (Minn. 1982); *Dengelis v. Lutheran Medical Center*, 449 N.E.2d 406, 407-08 (N.Y. 1983); *Morgel v. Winger*, 290 N.W.2d 266, 267 (N.D. 1980); *Norwest v. Presbyterian Intercommunity Hosp.*, 652 P.2d 318, 324 (Or. 1982); see *infra* notes 131-37 and accompanying text (discussion of decisions denying recovery for loss of parental consortium).

124. *Weitl*, 311 N.W.2d at 270; *Ferriter*, 413 N.E.2d at 695; *Berger*, 303 N.W.2d at 426; *Ueland*, 691 P.2d at 193; *Theama*, 344 N.W.2d at 522; see *infra* notes 140-73 and accompanying text.

125. See generally *Borer*, 19 Cal. 3d at 453-60, 563 P.2d 866-71, 138 Cal. Rptr. 310-15 (Justice Mosk dissenting); *Weitl*, 311 N.W.2d at 270; *Ferriter*, 413 N.E.2d at 695; *Berger*, 303 N.W.2d at 426; *Ueland*, 691 P.2d at 193; *Theama*, 344 N.W.2d at 522; see *infra* notes 140-73 and accompanying text.

126. *Borer*, 19 Cal. 3d at 449, 563 P.2d at 863-64, 138 Cal. Rptr. at 307-08; *Nix*, 170 Cal. App. 3d at 981, 216 Cal. Rptr. at 585.

127. See *infra* notes 140-73 and accompanying text.

128. See *infra* notes 131-37 and accompanying text.

129. See *infra* notes 131-37 and accompanying text.

130. See *infra* notes 140-73 and accompanying text.

131. See *infra* notes 132-33 and accompanying text.

132. See, e.g., *Norwest*, 652 P.2d at 324; *Morgel*, 290 N.W.2d at 267.

in the realm of social policy and that deciding social policy was the job of the legislature rather than the courts.¹³³

Other jurisdictions deny recovery for loss of parental consortium as a means of limiting liability.¹³⁴ These courts thought that they had a responsibility to draw a line on the extension of liability.¹³⁵ They concluded that the line limiting liability for the loss of consortium should be drawn at the children.¹³⁶ While the courts denying recovery for loss of parental consortium developed various policy arguments to justify their positions, the courts permitting recovery refuted these arguments and in addition discussed reasons why recovery should be permitted.¹³⁷

B. Decisions Permitting Recovery for Loss of Parental Consortium

The cases which extend liability for loss of consortium to the parent-child relationship are more persuasive than the cases denying recovery. These cases extend liability to new areas in response to observed changes in societal views rather than keeping old limits that are not in line with current societal opinions.¹³⁸ The cases permitting recovery for loss of parental consortium also refute the logic employed by the courts denying the cause of action.¹³⁹

The cause of action for loss of parental consortium was first recognized in 1980 by the Supreme Judicial Court of Massachusetts in the case of *Ferriter v. Daniel O'Connell's Sons, Inc.*¹⁴⁰ The *Fer-*

133. See, e.g., *Norwest*, 652 P.2d at 324; *Morgel*, 290 N.W.2d at 267. See *contra*, e.g., *Pierce*, 61 Cal. 2d at 882, 395 P.2d at 895, 40 Cal. Rptr. at 847 (the courts should not abdicate responsibility for the upkeep of the common law); *Butcher v. Superior Court*, 139 Cal. App. 3d 58, 62-63, 188 Cal. Rptr. 503, 506-07 (1983) (the development of the common law is determined by the needs of society); *Weill*, 311 N.W.2d at 266-68 (an action for loss of consortium is a creation of the courts and as such may be changed by the courts); *Ferriter*, 413 N.E.2d at 695-96 (in a field left long to the common law, change may well come about from the same medium); *Berger*, 303 N.W.2d at 427 (a lack of precedent does not relieve a court of the responsibility of adjudicating each case on the merits); *Ueland*, 691 P.2d at 193 (when courts do not develop new law for changing situations, the courts are abdicating their responsibility to reform the common law to meet evolving standard of justice); *Theama*, 344 N.W.2d at 514 (discussing how the genius of the common law is the ability to adapt to the changes in society).

134. See, e.g., *Zorzos*, 467 So. 2d at 307; *Salin*, 322 N.W.2d at 737-38; *Dngelis*, 449 N.E.2d at 407-08; see *infra* notes 135-36 and accompanying text.

135. See, e.g., *Zorzos*, 467 So. 2d at 307; *Salin*, 322 N.W.2d at 737-38; *Dngelis*, 449 N.E.2d at 407-08.

136. See, e.g., *Zorzos*, 467 So. 2d at 307; *Salin*, 322 N.W.2d at 737-38; *Dngelis*, 449 N.E.2d at 407-08.

137. See *infra* notes 140-73 and accompanying text.

138. See *infra* notes 140-73 and accompanying text.

139. See *infra* notes 140-73 and accompanying text.

140. 413 N.E.2d at 695.

riter court stated that minor children have a strong interest in the society of their parents that is as significant as the interest that spouses have in the society of one another.¹⁴¹ The court stated that protecting the reasonable expectation of the child in the consortium of the parent by allowing recovery for loss of parental consortium is appropriate when the parent is negligently injured.¹⁴² Additionally, the court noted that since damages under a wrongful death statute are available to a child for loss of parental consortium, damages should be available to a child who suffers a loss of parental consortium from a tortious injury to the parent.¹⁴³ Addressing the issue of deference to the Massachusetts Legislature, the court stated that in a field historically left to the common law, sensible reform may be instituted by the courts.¹⁴⁴ As a prerequisite to recovery for loss of parental consortium, the *Ferriter* court held that the child must have been dependent upon the parent both economically and emotionally.¹⁴⁵ Similar arguments were developed by the Supreme Court of Michigan, the next court to permit recovery for loss of parental consortium.¹⁴⁶

In 1981, the Michigan Supreme Court recognized a cause of action for loss of parental consortium in *Berger v. Weber*.¹⁴⁷ The *Berger* court concluded that the lack of precedent supporting loss of parental consortium did not relieve the court of the responsibility to decide the issue on the merits.¹⁴⁸ The court then decided that because the loss of parental consortium could not be distinguished from the loss of spousal consortium, a loss of parental consortium also should be actionable.¹⁴⁹ In addressing the issue of increased liability from the new action, the *Berger* court found that resulting higher insurance rates would be justified because immediate compensation of injuries to the parent-child relationship would allow the child to better function without emotional handicap, thus benefitting society.¹⁵⁰

The *Ferriter* and *Berger* cases highlight the social importance of compensating a child for the loss of society and companionship of a parent.¹⁵¹ The concern for social policy is not as evident in the

141. *Id.* at 692.

142. *Id.* at 695.

143. *Id.*

144. *Id.* at 695-96.

145. *Id.* at 696.

146. See *infra* notes 147-52 and accompanying text.

147. 303 N.W.2d at 426.

148. *Id.*

149. *Id.* at 426.

150. *Id.*

151. See *supra* notes 140-50 and accompanying text.

other decisions permitting recovery for loss of parental consortium.¹⁵² Other courts have provided recovery for loss of parental consortium by refuting different policy arguments advanced by courts denying recovery to the child.

The Iowa Supreme Court recognized the action for loss of parental consortium in *Weitl v. Moes*.¹⁵³ The *Weitl* court first rejected the policy arguments used by the *Borer* court to deny recovery,¹⁵⁴ and then discussed the trend toward recognition of certain personal rights for minor children.¹⁵⁵ The view that children should enjoy the same protections and opportunities for legal redress as adults was also mentioned in the *Weitl* opinion.¹⁵⁶ The *Weitl* court found that a child is damaged when the parent-child relationship is harmed; a separate award for those losses would both insure that the interests of the child are protected and that any recovery is used to benefit the child.¹⁵⁷ The court reasoned that if the recovery was not separately allocated, the parent might have used the money for some purpose other than the compensation of the injuries of the child.¹⁵⁸

The *Weitl* court admitted that permitting recovery could lead to multiplicity of actions and expansion of accident costs because of the resultant increase of liability.¹⁵⁹ The court concluded, however, that these difficulties could be cured by limiting the cause of action to the parent-child relationship, limiting recovery to the minority of the child, and requiring joinder of the loss of parental consortium claim to the original personal injury suit of the parent.¹⁶⁰ The *Weitl* court decided that the reasons for permitting recovery for loss of parental consortium outweighed the problems the action might create.¹⁶¹ Other courts have employed similar balancing tests, but have used slightly different criteria to achieve the same result.

The Wisconsin Supreme Court allowed recovery for loss of parental consortium in 1984 in *Theama By Bichler v. City of Kenosha*.¹⁶²

152. See *infra* notes 153-73 and accompanying text.

153. 311 N.W. at 270.

154. *Id.* at 267-68.

155. *Id.* at 268-69. See, e.g., *Carey v. Population Services International*, 431 U.S. 678, 691-702 (1977); *Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503, 511-14 (1969).

156. *Weitl*, 311 N.W.2d at 268-69.

157. *Id.* at 266-68.

158. *Id.* at 269.

159. *Id.* at 270.

160. *Id.* (the children must join their claim to the action of the injured parent).

161. *Id.*

162. *Theama*, 344 N.W. 513, 522.

The *Theama* court discussed three main reasons supporting recovery.¹⁶³ First, the child increasingly is being recognized as a person deserving of constitutional rights and protection by the courts.¹⁶⁴ Second, the great importance of the family unit in modern society makes protection of the integrity of the unit important.¹⁶⁵ Finally, the love, care, education, and protection of a parent is a necessary contribution to the complete development of the child.¹⁶⁶ The *Theama* court concluded that the reasons for allowing recovery outweighed the reasons advanced in *Borer* for denying recovery.¹⁶⁷

A slightly different approach was used by the most recent court to permit recovery for loss of parental consortium.¹⁶⁸ The Washington Supreme Court permitted recovery in *Ueland V. Reynolds Metal Co.*¹⁶⁹ The *Ueland* court first explained that undue deference to the legislature on the issue of loss of parental consortium would be an abdication of the judicial responsibility to reform the common law since loss of consortium was a creation of the common law rather than the legislature.¹⁷⁰ The court then analogized the loss of parental consortium tort recovery to the recovery permitted for loss of parental consortium under a wrongful death statute,¹⁷¹ and concluded that no difference existed between the loss of parental love, care, companionship, and guidance by the child in either situation.¹⁷² Furthermore, the *Ueland* court explained that permitting a spouse to recover for loss of consortium while denying a recovery to a child suggested the false premise that a child is less likely to suffer serious emotional injury than an adult.¹⁷³

All of the recent decisions concerning loss of parental consortium, including those denying recovery, have discussed the seriousness of the injury to the child.¹⁷⁴ The courts that denied recovery thought that policy considerations, including limitation of liability and deference to the legislature on social policy issues, were more important than

163. *Id.* at 518.

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.* at 522.

168. *Ueland*, 691 P.2d at 193.

169. 691 P.2d 190.

170. *Id.* at 193.

171. *Id.* at 192.

172. *Id.* at 192-93.

173. *Id.*

174. See *supra* notes 131-73 and accompanying text (discussion of out of state loss of parental consortium decisions).

compensating the injured children.¹⁷⁵ The courts that permit recovery rejected these policy justifications advanced for the denial of recovery.¹⁷⁶

All of the courts that allowed recovery agreed that because loss of consortium was an invention of the common law, the courts rather than the legislature should be the instrument of change.¹⁷⁷ These courts recognized the procedural difficulties inherent in the loss of parental consortium action,¹⁷⁸ but discussed remedies to these problems.¹⁷⁹ Most courts allowing recovery admitted a lack of precedential support for their decisions,¹⁸⁰ but still concluded that the rights of a new class of plaintiffs should be judged on their own merits.¹⁸¹

The importance of the parent in the growth of the child was also noted by the courts permitting recovery.¹⁸² Finally, these courts concluded that the interest of the child is so important that a cause of action for loss of parental consortium must be recognized¹⁸³ regardless of any problems inherent in the action.¹⁸⁴ Accordingly, the present validity of the arguments used to support the denial of recovery in *Borer* is currently open to question.¹⁸⁵

THE WEAKENED BASIS OF *BORER*

The California Supreme Court decided *Borer v. American Airlines, Inc.* by balancing several policy considerations.¹⁸⁶ The detriments of a recovery for loss of parental consortium were held to outweigh the benefits of the action.¹⁸⁷ If the weight initially given to each of the *Borer* policy considerations has changed, then the outcome of the *Borer* case must be reexamined.¹⁸⁸

175. See *supra* notes 131-37 and accompanying text.

176. See *supra* notes 140-73 and accompanying text. *Weill*, 311 N.W.2d at 270; *Ferriter*, 413 N.E.2d at 695; *Berger*, 303 N.W.2d at 426; *Ueland*, 691 P.2d at 193; *Theama*, 344 N.W.2d at 522.

177. *Weill*, 311 N.W.2d at 270; *Ferriter*, 413 N.E.2d at 695; *Berger*, 303 N.W.2d at 426; *Ueland*, 691 P.2d at 193; *Theama*, 344 N.W.2d at 522. See *supra* notes 140-73 and accompanying text (discussion of out of state decisions permitting recovery for loss of parental consortium).

178. See *supra* notes 140-73 and accompanying text.

179. See *supra* notes 140-73 and accompanying text.

180. See *supra* notes 140-73 and accompanying text.

181. See *supra* notes 140-73 and accompanying text.

182. See *supra* notes 140-73 and accompanying text.

183. See *supra* notes 140-73 and accompanying text.

184. See *supra* notes 140-73 and accompanying text.

185. See *supra* notes 186-237 and accompanying text (discussion of present validity of *Borer*).

186. See *Borer*, 19 Cal. 3d at 453, 563 P.2d at 866, 138 Cal. Rptr. at 310.

187. "[T]aking into account all considerations which bear on this question, . . . we should not recognize an action for loss of parental consortium." *Id.*

188. See *id.* See also *Rodriguez*, 12 Cal. 3d at 394, 525 P.2d at 676-77, 115 Cal. Rptr.

The first major policy consideration the *Borer* court marshalled against permitting recovery was that a monetary award could not compensate a plaintiff adequately for the loss of parental consortium.¹⁸⁹ The reason that monetary compensation was considered inadequate in *Borer* was that the damages resulting from loss of consortium were intangible and therefore could not be measured in monetary terms.¹⁹⁰ Furthermore, no amount of money will enable a child to regain the companionship and guidance of the injured parent.¹⁹¹ The same argument, however, may be raised in the context of spousal consortium.¹⁹²

Money cannot truly compensate a wife for the destruction of her marriage through injury to her husband, but California courts allow a wife to recover monetary damages¹⁹³ because, as the *Rodriguez* court stated, "[m]oney . . . is the only known means to compensate for the loss suffered and to symbolize society's recognition that a culpable wrong . . . has been done."¹⁹⁴ The *Rodriguez* court concluded: "That the law cannot do enough, in short, is an unacceptable excuse for not doing anything at all."¹⁹⁵ Furthermore, spousal loss of consortium is not the only area in which the law recognizes a monetary award as a legitimate means of compensating a plaintiff for intangible injuries.¹⁹⁶

The California Supreme Court has held that intangible damages may be compensated by monetary recovery in numerous situations.¹⁹⁷ For example, pain and suffering damages comprise a major part of many tort actions, and awards that do not compensate for pain and

at 772-73 (citing 15 AM. JUR. 2d *Common Law* § 2, at 797).

The nature of the common law requires that each time a rule of law is applied, it be carefully scrutinized to make sure that the conditions and the needs of the times have not so changed as to make further application of it the instrument of injustice.

Id.

189. *Borer*, 19 Cal. 3d at 447, 563 P.2d at 862-63, 138 Cal. Rptr. at 306-07.

190. *Id.*

191. *Id.*

192. See *infra* notes 193-96 and accompanying text.

193. See, e.g., *Rodriguez*, 12 Cal. 3d at 408, 525 P.2d at 676, 115 Cal. Rptr. at 782.

194. *Id.* at 402, 525 P.2d at 671-72, 115 Cal. Rptr. at 777-78 (citing *Millington v. Southeastern Elevator Co.*, 239 N.E.2d 897, 902 (N.Y. 1968)).

195. *Id.*

196. See *infra* notes 197-98 and accompanying text.

197. See *Hedlund v. Superior Court*, 34 Cal. 3d 695, 706 n.8, 669 P.2d 41, 47 n.8, 194 Cal. Rptr. 805, 811 n.8 (1983) (recovery permitted for purely psychological damages); *Molien v. Kaiser Found. Hosp.*, 27 Cal. 3d 916, 919, 616 P.2d 813, 814, 167 Cal. Rptr. 831, 832 (1980) (husband received damages for emotional trauma resulting from a doctor erroneously diagnosing syphilis in his wife); *Dillon v. Legg*, 68 Cal. 2d 728, 731, 441 P.2d 912, 914, 69 Cal. Rptr. 72, 74 (1968) (mother received damages for emotional injury resulting from witnessing an injury to a child).

suffering have been held inadequate as a matter of law.¹⁹⁸ Similarly, the problems defining the intangible damages involved in a loss of parental consortium action should not be accorded undue importance.¹⁹⁹

In *Borer*, the California Supreme Court held that the difficulty of defining intangible damages weighed in favor of denying recovery.²⁰⁰ This court, however, at the present time allows loss of consortium damages to spouses.²⁰¹ In comparing the intangible damages for loss of spousal consortium with those for loss of parental consortium, no significant difference appears to exist.²⁰² Furthermore, the California Supreme Court allows measurement of intangible losses in other contexts.²⁰³

In many decisions, the California Supreme Court found a jury capable of determining intangible or nonphysical damages.²⁰⁴ Additionally, loss of consortium damages are determined by a jury in the context of a wrongful death action.²⁰⁵ Therefore, no reasons exist for preventing a jury from determining loss of parental consortium damages in a personal injury action.²⁰⁶

Additionally, the *Borer* court was influenced by the possibility of a double recovery if the child received compensation for loss of parental consortium.²⁰⁷ The court reasoned that juries would most likely add money to the recovery of an injured parent because of the existence of the children.²⁰⁸ The appropriate response to this argument

198. See, e.g., *Capelouto v. Kaiser Found. Hosp.*, 7 Cal. 3d 889, 892-93, 500 P.2d 880, 882-83, 103 Cal. Rptr. 856, 858-59 (1972).

199. See *infra* notes 202-08 and accompanying text.

200. *Borer*, 19 Cal. 3d at 447-48, 563 P.2d at 862-63, 138 Cal. Rptr. at 306-07.

201. *Rodriguez*, 12 Cal. 3d at 408, 525 P.2d at 686, 115 Cal. Rptr. at 782.

202. Compare *id.* at 402, 525 P.2d at 681-82, 115 Cal. Rptr. at 777-78 (court discussing intangible nature of loss of spousal consortium damages) with *Borer*, 19 Cal. 3d at 447-48, 563 P.2d at 862-63, 138 Cal. Rptr. at 306-07 (court discussing intangible nature of loss of parental consortium action).

203. See *infra* notes 219-26 and accompanying text.

204. See, e.g., *Hedlund*, 34 Cal. 3d at 706, 669 P.2d at 47, 194 Cal. Rptr. at 811 (recovery permissible for purely psychological damages to a child that witnessed the killing of a parent); *Molien*, 27 Cal. 3d at 919, 616 P.2d at 814, 167 Cal. Rptr. at 832 (husband may receive damages for emotional trauma resulting from a doctor erroneously diagnosing syphilis in his wife); *Krouse*, 19 Cal. 3d at 76, 562 P.2d 1022, 1031, 137 Cal. Rptr. at 892 (1977) (recovery permissible for mental suffering); *Dillon*, 68 Cal. 2d at 731, 441 P.2d at 914, 69 Cal. Rptr. at 74 (mother may receive damages for emotional injury resulting from witnessing an injury to a child).

205. See CAL. CIV. PROC. CODE § 377; see also *Krouse*, 19 Cal. 3d at 62-68, 562 P.2d at 1022-25, 137 Cal. Rptr. at 863-66.

206. See generally *Krouse*, 19 Cal. 3d at 62-68, 562 P.2d at 1022-25, 137 Cal. Rptr. at 863-66 (jury determines damages for loss of parental consortium in a wrongful death action).

207. *Borer*, 19 Cal. 3d at 448, 563 P.2d at 863, 138 Cal. Rptr. at 307 (juries award seriously injured parents more money because of their children).

208. *Id.*

is best stated in the Iowa case of *Weitl v. Moes*,²⁰⁹ and in the Massachusetts case of *Ferriter v. Daniel O'Connell's Sons, Inc.*²¹⁰

Both *Weitl* and *Ferriter* discussed possible means to avoid the possibility of double recovery in an action for loss of parental consortium.²¹¹ The Iowa Supreme Court in *Weitl* concluded that a jury informed that the children have an action of their own would feel no need to compensate the children in the suit brought by the parent, thus avoiding a double recovery.²¹² In *Ferriter*, the Massachusetts high court reasoned that procedural devices, including mandatory joinder of actions and appropriate jury instructions, would also reduce the risk of double recovery.²¹³ The reasoning of these recent decisions lessens the weight that the second *Borer* policy consideration would receive in a balancing test.²¹⁴

The next policy argument that the *Borer* court utilized to argue against permitting a recovery for loss of parental consortium was the possibility of multiplicity of actions.²¹⁵ Each child that a negligently injured parent had would add one more claim to a tort action.²¹⁶ The *Borer* court feared that the recognition of a loss of parental consortium action would give rise to numerous law suits arising from one negligent act.²¹⁷ Justice Mosk's dissent in *Borer* marshalls persuasive statistics to oppose the conclusion of the majority that the loss of parental consortium action would greatly multiply the liability of a tortfeasor.²¹⁸

Justice Mosk found that while between 77.8% and 89.7% of all men in this country between the ages of 25 and 65 are married, 46% of the families in the United States have no minor children and an additional 19.2% have only one minor child.²¹⁹ Additionally, only 9.5% of families have three minor children, and the entire class of families with four or more children comprises 7.4%.²²⁰ These pro-

209. *Weitl*, 311 N.W.2d at 266-68.

210. *Ferriter*, 413 N.E.2d at 694. See also *Theama*, 344 N.W.2d at 522.

211. See *infra* notes 212-14 and accompanying text.

212. *Weitl*, 311 N.W. at 266-68. See *supra* notes 147-52 and accompanying text.

213. *Ferriter*, 413 N.E.2d at 694. See *supra* notes 140-46 and accompanying text.

214. See generally *Borer*, 19 Cal. 3d at 447-48, 563 P.2d at 862-63, 138 Cal. Rptr. at 306-07 (discussion of second policy support for denial of recovery for loss of parental consortium).

215. *Id.* at 448-49, 563 P.2d at 863-64, 138 Cal. Rptr. at 307-08.

216. *Id.*

217. *Id.*

218. *Id.* at 457-58, 563 P.2d at 868-69, 138 Cal. Rptr. at 312-13. See *infra* notes 219-21 and accompanying text.

219. *Borer*, 19 Cal. 3d at 457-58, 563 P.2d at 870-71, 138 Cal. Rptr. at 312-13. See STATISTICAL ABSTRACT OF THE UNITED STATES, at 42, table 56 (96th ed. 1975).

220. *Borer*, 19 Cal. 3d at 457-58, 563 P.2d at 868-69, 138 Cal. Rptr. at 312-13. See STATISTICAL ABSTRACT OF THE UNITED STATES, at 42, table 56 (96 ed. 1975).

portions have remained nearly constant over the last twenty-five years.²²¹ Thus, the fear of the *Borer* court that allowing recovery for loss of parental consortium would result in a dramatic increase in the number of lawsuits appears unfounded.

The *Borer* court also denied recovery because of lack of precedent for the action.²²² At the time of the *Borer* decision, no jurisdiction permitted recovery for loss of parental consortium.²²³ Subsequent to the *Borer* decision, five other jurisdictions have permitted recovery.²²⁴ These decisions not only create a trend in favor of loss of parental consortium but also refute most of the reasons given in *Borer* for denial of recovery.²²⁵

At the time of *Borer*, the Supreme Court did not allow actions founded upon purely intangible injury.²²⁶ In *Borer*, the court concluded that *Dillon v. Legg*²²⁷ and subsequent authority support the decision in *Borer* to deny a cause of action founded on purely intangible injury.²²⁸ Decisions subsequent to *Borer*, however, have permitted recovery for purely intangible injury.²²⁹ In *Molien v. Kaiser*,²³⁰ the California Supreme Court permitted recovery for the negligent infliction of emotional or mental distress unaccompanied by physical injury in a case in which a doctor misdiagnosed syphilis in the wife of the plaintiff and thus caused the plaintiff emotional damages.²³¹ In *Hedlund v. Superior Court*,²³² the court permitted a child to recover for purely mental damages in a case in which the plaintiff child witnessed an injury inflicted on the parent.²³³

221. *Borer*, 19 Cal. 3d at 457-58, 563 P.2d at 868-69, 138 Cal. Rptr. at 312-13.

222. *Id.* at 449, 563 P.2d at 863-64, 138 Cal. Rptr. at 307-08.

223. *Id.*

224. *Weill*, 311 N.W.2d at 270; *Ferriter*, 413 N.E.2d at 695; *Berger*, 303 N.W.2d at 426; *Ueland*, 691 P.2d at 193; *Theama*, 344 N.W.2d at 522; *See supra* notes 140-73 and accompanying text.

225. *See supra* notes 140-73 and accompanying text.

226. *Borer*, 19 Cal. 3d at 447-48, 563 P.2d at 862-63, 138 Cal. Rptr. at 306-07.

227. *Dillon*, 68 Cal. 2d at 731, 441 P.2d at 914, 69 Cal. Rptr. at 74 (cause of action limited to a case in which plaintiff suffered physical injury).

228. *Borer*, 19 Cal. 3d at 450, 563 P.2d at 864-65, 138 Cal. Rptr. at 308-09; *see, e.g., Krouse*, 19 Cal. 3d at 77-78, 562 P.2d at 1031-32, 137 Cal. Rptr. at 872-73.

229. *See, e.g., Hedlund*, 34 Cal. 3d at 706 n.8, 669 P.2d at 47 n.8, 194 Cal. Rptr. at 811 n.8; *Molien*, 27 Cal. 3d at 928-30, 194 P.2d at 819-21, 167 Cal. Rptr. at 837-39. *See Diamond*, *supra* note 31, at 496-99. By abolishing the physical injury requirement in *Molien* and *Hedlund*, the California Supreme Court undermines the rationale in the earlier *Borer v. American Airlines, Inc.*, for distinguishing the tort of negligent infliction of emotional distress from other torts giving rise to independent claims for intangible damages. *Id.*

230. *Molien*, 27 Cal. 3d at 916, 194 P.2d at 813, 167 Cal. Rptr. at 831.

231. *Id.* at 928-30, 194 P.2d at 819-21, 167 Cal. Rptr. at 837-39.

232. *Hedlund*, 34 Cal. 3d at 695, 669 P.2d at 41, 194 Cal. Rptr. at 805.

233. *Id.* at 706 n.8, 669 P.2d at 47 n.8, 194 Cal. Rptr. at 811 n.8. The rule that requires physical injury as a prerequisite to recovery for mental distress has been abrogated. *Id.*

The recent trends in California tort law as well as decisions of other jurisdictions cast doubt on the significance of the policy considerations originally given in *Borer*.²³⁴ Since the relative weights given the policy considerations for the *Borer* decision have changed, the outcome of the balancing test used in *Borer* may be different today.²³⁵ Therefore the present validity of the decision may be questioned.²³⁶ At least one California appellate court has recognized the need to reevaluate *Borer*.²³⁷

*Nix v. Preformed Line Products Co.*²³⁸ was a case in which the father of the plaintiff children was severely injured while working for a power company when a wooden utility pole broke and caused him to fall to the ground.²³⁹ After the accident, Nix could neither speak nor take care of himself.²⁴⁰ The children brought a suit, alleging that the injuries to their father caused them a loss of consortium.²⁴¹ The trial court granted demurrers to the claim without leave to amend.²⁴² Although the decision of the trial court was affirmed, the *Nix* court noted recent criticism of the *Borer* decision.²⁴³

The *Nix* court noted a significant trend in other jurisdiction to allow the child to recover for loss of parental consortium.²⁴⁴ The general expansion of tort law to allow recovery in cases involving intangible, nonpecuniary injuries was also discussed in *Nix*.²⁴⁵ The *Nix* court specifically noted that the California Supreme Court no longer required physical injury as a prerequisite for recovery in psychological damage action.²⁴⁶ In addition, the *Nix* court noted that commentators

234. *Borer*, 19 Cal. 3d at 453, 563 P.2d at 866, 138 Cal. Rptr. at 310 (summary of policy considerations used to justify denial of recovery for loss of parental consortium).

235. See *Nix*, 170 Cal. App. 3d at 986, 216 Cal. Rptr. at 588 (discussion of problems with *Borer* decision).

236. See *id.* (court questions validity of *Borer*).

237. See *id.* at 985-86, 216 Cal. Rptr. at 581-82 (court discussing criticisms and inconsistencies of *Borer*). See *infra* notes 238-52 and accompanying text (discussion of *Nix*).

238. 170 Cal. App. 3d at 975, 216 Cal. Rptr. at 581.

239. *Id.* at 976, 216 Cal. Rptr. at 581-82.

240. *Id.*

241. *Id.*

242. *Id.*

243. *Id.* at 986, 216 Cal. Rptr. at 588. See *infra* notes 244-49 and accompanying text.

244. *Nix*, 170 Cal. App. 3d at 981, 216 Cal. Rptr. at 585. See *Weill*, 311 N.W.2d at 270; *Ferriter*, 413 N.E.2d at 695; *Berger*, 303 N.W.2d at 426; *Ueland*, 691 P.2d at 193; *Theama*, 344 N.W.2d at 522. See *supra* notes 140-73 and accompanying text.

245. *Nix*, 170 Cal. App. 3d at 985, 216 Cal. Rptr. at 587-88. See, e.g., *Hedlund*, 34 Cal. 3d at 706 n.8, 669 P.2d at 47 n.8, 194 Cal. Rptr. at 811 n.8; *Molien*, 27 Cal. 3d at 928-30, 194 P.2d at 819-21, 167 Cal. Rptr. at 837-39.

246. *Nix*, 170 Cal. App. 3d at 985-86, 216 Cal. Rptr. 588. See *Hedlund*, 34 Cal. 3d at 706 n.8, 669 P.2d at 47 n.8, 194 Cal. Rptr. at 811 n.8 (court permitting recovery for purely intangible damages); *Molien*, 27 Cal. 3d at 928-30, 194 P.2d at 819-21, 167 Cal. Rptr. at 837-39 (court permitting recovery for purely intangible damages).

favor recovery in cases involving loss of parental consortium.²⁴⁷ Finally, the *Nix* court mentioned other jurisdictions that have been persuaded by the dissent of Justice Mosk in *Borer* to permit recovery for loss of parental consortium.²⁴⁸ In light of these criticisms, the *Nix* court concluded that the *Borer* decision had lost validity in recent years.²⁴⁹

Nevertheless, the *Nix* court was required to follow *Borer*, because the *Borer* decision had not been overruled or modified by the California Supreme Court.²⁵⁰ While reluctantly following *Borer*, the *Nix* court stated that the time was ripe for the California Supreme Court to review *Borer*.²⁵¹ In view of the need to reconsider *Borer*, several policy justifications for permitting recovery for loss of parental consortium will now be discussed.²⁵²

POLICY REASONS FOR PERMITTING RECOVERY FOR LOSS OF PARENTAL CONSORTIUM

The damages to a child who loses the society of a parent are serious.²⁵³ Children need the love, affection, society, and guidance of their parents to mature into adults without emotional handicap.²⁵⁴ Any injury that diminishes the ability of a parent to meet these needs harms all members of the community.²⁵⁵ Children have a reasonable expectation that their interest in the consortium of their parent will be protected.²⁵⁶ Denying children recovery for damages to these interests ignores the recognition that children should enjoy the same protections and opportunities for legal redress that adults enjoy.²⁵⁷

In addition, although juries may award extra money to injured parents with children,²⁵⁸ the only way to insure that the children are

247. *Nix*, 170 Cal. App. 3d at 986, 216 Cal. Rptr. at 588. See Comment, *The Supreme Court of California: Limiting the Cause of Action for Loss of Consortium*, 66 CALIF. L. REV. 430-46 (1978); Diamond, *supra* note 31 at 497-98.

248. *Nix*, 170 Cal. App. 3d at 986, 216 Cal. Rptr. at 588.

249. *Id.*

250. *Id.* at 981, 216 Cal. Rptr. at 585. No court in California has overruled *Borer*. *Id.*

251. *Id.* at 986, 216 Cal. Rptr. at 588.

252. See *infra*, notes 253-80 and accompanying text.

253. See *Psychological Problems and Parental Loss*, *supra* note 9, at 21 (parental loss is one common thread among people who receive psycho-therapy). Parental loss was defined as either death or separation for one month or longer due to accident or illness. *Id.* See also Roy, *supra* note 8, at 961 (early parental loss a contributing factor in adult depression). Parental loss was defined as either death or separation for one month or longer due to accident or illness. *Id.*

254. *Berger*, 303 N.W.2d at 426. See *supra* note 253 and accompanying text.

255. *Borer*, 19 Cal. 3d at 453, 563 P.2d at 866, 138 Cal. Rptr. at 310.

256. *Ferriter*, 413 N.E.2d at 695.

257. *Weill*, 311 N.W.2d at 269.

258. *Borer*, 19 Cal. 3d at 448, 563 P.2d at 862, 138 Cal. Rptr. at 307.

compensated for their damages is to grant them a separate recovery.²⁵⁹ Provisions to protect the interests of the child may be made more easily in a separate award for the damages to the child because the award is made specifically for the child and is not a mere afterthought by a jury.²⁶⁰ Finally, permitting a child to recover loss of consortium damages in a wrongful death action and not permitting recovery for loss of consortium damages in a personal injury action seems extremely inconsistent.²⁶¹

In either instance, when a child experiences the loss of the affection and society of a parent, the child is suffering actual psychological harm.²⁶² At present, however, the child may recover for loss of parental consortium only in a wrongful death action.²⁶³ In general, the goal of tort law is to compensate victims of negligently caused injury.²⁶⁴ Denying compensation to the victims of a loss of parental consortium in a personal injury action ignores the serious injury to the child.²⁶⁵ In addition, recovery for loss of parental consortium in a personal injury action would make the law more consistent, because loss of consortium would then be permitted under both the wrongful death statute and the common law.²⁶⁶

The other jurisdictions permitting recovery for loss of parental consortium provide excellent examples of the workability of the action in the common law system.²⁶⁷ The concerns that the *Borer* court raised regarding the action have been responded to successfully by those jurisdictions allowing recovery for loss of parental consortium.²⁶⁸ These practical examples of solutions to the problems associated with the loss of parental consortium action effectively refute the arguments raised in *Borer* for denying the existence of the cause of action.²⁶⁹

The California Supreme Court has stated that the upkeep of the

259. *Weitl*, 311 N.W.2d at 269.

260. *Id.*

261. See CAL. CIV. PROC. CODE § 377; *Weitl*, 311 N.W.2d at 269; *Ferriter*, 413 N.E.2d at 695; *Ueland*, 691 P.2d at 193. *Contra*, *Borer*, 19 Cal. 3d at 451-52, 563 P.2d at 864-66, 138 Cal. Rptr. at 308-10.

262. See *supra*, notes 8-14 and accompanying text.

263. See CAL. CIV. PROC. CODE § 377; see also *Krouse*, 19 Cal. 3d at 62-68, 562 P.2d at 1022-25, 137 Cal. Rptr. at 863-66.

264. *Acuff*, 78 N.W.2d at 483. "[W]here there is a wrong there must be a remedy. . . ." *Id.*

265. See *supra* notes 8-14 and accompanying text.

266. See CAL. CIV. PROC. CODE § 377; *Krouse*, 19 Cal. 3d at 62-68, 562 P.2d at 1022-25, 137 Cal. Rptr. at 863-66 (loss of consortium permitted in wrongful death action); *Weitl*, 311 N.W.2d at 269; *Ferriter*, 413 N.E.2d at 695; *Ueland*, 691 P.2d at 193.

267. See *supra* notes 140-73 and accompanying text.

268. See *supra* notes 140-73 and accompanying text.

269. See *supra* notes 140-73 and accompanying text.

common law is the duty of the courts.²⁷⁰ When an old rule of common law is found to be unsound or unsuited to present conditions, the rule should be set aside and a new rule that is sound and that corresponds to existing conditions should be declared.²⁷¹ Common law tort rules that lack current validity have been abrogated by the California Supreme Court in numerous instances.²⁷² When a previous Supreme Court decision is out of line with present conditions, the Supreme Court should not hesitate to overrule the earlier decision.²⁷³ Because the weight of the elements of the *Borer* balancing test have changed,²⁷⁴ *Borer* is out of step with the present conditions of society.²⁷⁵ Furthermore, important reasons exist for allowing recovery to an injured child for loss of parental consortium.²⁷⁶

The potential difficulties with allowing recovery for loss of parental consortium could be avoided by limiting the cause of action to the minority of the child.²⁷⁷ Children over sixteen could be required to prove that they are psychologically dependant on their parents.²⁷⁸

270. *People v. Pierce*, 61 Cal. 2d 879, 882, 395 P.2d 893, 895, 40 Cal. Rptr. 845 (1964).

271. *Rodriguez*, 12 Cal. 3d at 394, 525 P.2d. at 676-77, 115 Cal. Rptr. at 772-75; *see, e.g., Weill*, 311 N.W.2d at 266-68 (an action for loss of consortium is a creation of the courts and therefore may be changed by the courts); *Ferriter*, 413 N.E.2d at 695-96 (in a field left long to the common law, change may come from the same medium); *Berger*, 303 N.W.2d at 426 (a lack of precedent does not relieve a court of the responsibility of adjudicating each case on the merits); *Ueland*, 691 P.2d at 193 (when courts do not develop new law for changing situations, the courts are abdicating their responsibility to reform the common law to meet evolving standards of justice); *Theama*, 344 N.W.2d at 514 (the genius of the common law is the ability to adapt to the changing needs of society). *See generally Pierce*, 61 Cal. 2d at 882, 395 P.2d at 895, 40 Cal. Rptr. at 847 (the courts should not abdicate responsibility for the upkeep of the common law); *Butcher*, 139 Cal. App. 3d at 62-63, 188 Cal. Rptr. at 506-07 (the development of the common law is determined by the needs of society).

272. *See, e.g., Rowland v. Christian*, 69 Cal. 2d 108, 121, 443 P.2d 561, 70 Cal. Rptr. 97 (1968) (abandoning distinction between business invitee, social guest, and trespasser, with regard to liability for conditions of the land); *Dillon*, 68 Cal. 2d at 731, 441 P.2d at 914, 69 Cal. Rptr. at 74 (mother received damages for emotional injury resulting from witnessing an injury to a child); *Klein v. Klein*, 58 Cal. 2d 692, 697-99, 376 P.2d 70, 72-73, 26 Cal. Rptr. 102, 104-05 (1962) (abrogating rule of interspousal unity for negligent torts); *Muskopf v. Corning Hospital Dist.*, 55 Cal. 2d 211, 218-19, 359 P.2d 457, 462-63, 11 Cal. Rptr. 98, 94-95 (1961) (abolition of sovereign immunity).

273. *See Pierce*, 61 Cal. 2d at 882-83, 395 P.2d at 895-97, 40 Cal. Rptr. at 847.

274. *See supra* notes 253-73 and accompanying text (discussion of policy reasons for permitting recovery for loss of parental consortium).

275. *See supra* notes 186-237 and accompanying text (discussion of how policy considerations have evolved since *Borer*).

276. *See supra* notes 253-73 and accompanying text (discussion of policy support for loss of parental consortium recovery). *See also Borer*, 19 Cal. 3d at 453, 563 P.2d at 866, 138 Cal. Rptr. at 310 (court discussing policy reasons supporting recovery for loss of parental consortium).

277. *See Weill*, 311 N.W.2d at 266-68; *Ferriter*, 413 N.E.2d at 694; *see also Theama*, 344 N.W.2d at 522.

278. *See Ferriter*, 413 N.E.2d at 694.

Joinder of the loss of consortium action to the personal injury action of the parent could be made mandatory.²⁷⁹ Finally, any monetary recovery by a minor for loss of consortium could be placed under the control of a court appointed trustee.²⁸⁰ Consequently, the California Supreme Court should review and ultimately overrule the *Borer* decision.

CONCLUSION

Damages for loss of spousal consortium may be recovered in California. The extension of the loss of consortium theory to the parent-child relationship would be logical and equitable. Children who lose the society of a parent are psychologically damaged. These children have greater difficulty becoming productive members of society than other children. Although loss of parental consortium damages are recoverable in the context of a wrongful death action, recovery of damages for loss of parental consortium in personal injury action is not allowed under the rule of *Borer v. American Airlines, Inc.*

The *Borer* court applied a balancing test to determine whether the action for loss of parental consortium should be permitted and concluded that the detriments of permitting recovery outweighed the benefits. As a result, recovery for loss of parental consortium was denied. Because *Borer* was decided by a balancing of policy considerations, any change in the weight given to those considerations would call into question the present validity of the outcome of the balancing test. Recent expansions of tort remedies and changes in the way society views children have altered the weight of the elements of the balancing test applied in *Borer*.

The California court of appeal in *Nix* explored recent changes in the law that have undermined *Borer*, and discussed the various reasons given by the commentators and the other state supreme courts to support recovery for loss of parental consortium. As a result, the *Nix* court questioned the current validity of *Borer*. In the nine years since the *Borer* decision, other jurisdictions have permitted recovery for loss of parental consortium. These decisions have underlined the great importance of the interests of the child in the consortium of a parent. These decisions also have recognized the logic of the dissent of Justice Mosk in *Borer*. Children have been recognized as deserving the same legal rights and remedies as adults. Psychological studies have shown

279. See *id. Weill*, 311 N.W.2d at 266-68; *Theama*, 344 N.W.2d at 522.

280. See *Weill*, 311 N.W.2d at 266-68.

that children deprived of their parents do not grow into well balanced adults as easily as children with both parents. In addition, recovery for intangible injuries has been permitted in California without the prerequisite of a physical injury. Consequently, the *Nix* court was compelled to question the continuing validity of *Borer*.

The *Borer* decision is not consistent with recent expansions in California tort law. In addition, a growing recognition of the need to adequately protect the parent-child relationship undermines the major premise of the case. Accordingly, the *Borer* decision should be overruled and children should be permitted to recover for loss of parental consortium in California.

Eric Ernest Ostling

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