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Loss of Parental Society and Companionship: Infant's Action against Person Who Negligently Injured Father

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LOSS OF PARENTAL SOCIETY AND COMPANIONSHIP: INFANT'S ACTION AGAINST PERSON WHO NEGLIGENTLY INJURED FATHER—*Ferriter v. Daniel O'Connell's Sons, Inc.*, 413 N.E.2d 690 (Mass. 1980)

I. INTRODUCTION

The rights of individuals to recover for nonpecuniary losses have evolved steadily since the inception of tort law. One of the first steps in this evolution was allowing recovery for loss of services under the master/servant relationship.[1] Under this doctrine, an employer or master could recover the value of his employee's services, if lost through a defendant's tortious conduct.[2] In order to recover, the plaintiff was required to show actual, measurable monetary loss, such as the replacement costs for his lost servant.[3]

The master/servant analogy was later transposed upon the familial relationship, with the husband in the role of master and the wife and children as servants.[4] If his spouse or child fell victim to a tortfeasor, the "man of the house" could recover the value of his loss from the tortfeasor. Recoverable losses included such damages as the costs of

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1. Ames v. Union Ry. Co., 117 Mass. 541, 19 Am. Rep. 426 (1875). *Ames* involved a master attempting to sue for lost services of his apprentice who was negligently injured by a common carrier. The Massachusetts Supreme Court held, "[t]he relation of master and apprentice . . . is such as will sustain an action in the name of the master for an injury to the apprentice causing disability, *per quod servituim amisit*." *Id.* at 543.

2. 117 Mass. 541, 19 Am. Rep. 426 (1875); Jones v. Waterman S.S. Corp., 155 F.2d 992, 1000 (3d Cir. 1946). The *Jones* case involved an employer seeking indemnity from a third party defendant for maintenance and cure, and wage payments it had to make to its injured employee. The employee stumbled on the employer's dock because of inadequate lighting, falling into the third party defendant's open ditch. Deciding to allow the employer to recover damages for loss of the employee's services as well as for money paid for maintenance and cure, the court stated: "We believe that the law of Pennsylvania follows the general law and will permit the employee to recover from a negligent tortfeasor for the value of the services of his injured employee." *Id.* at 1000.

3. Fluker v. Georgia R.R. & Banking Co., 81 Ga. 461, 8 S.E. 529 (1888). In *Fluker* an employee of a catering business was assaulted and physically ousted from a railroad's property, across a public street. Although the employee suffered no debilitating physical injuries, his employer nevertheless attempted to bring suit for assault under the Master/Servant Doctrine. Denying the employer's cause of action, the Georgia Supreme Court stated that although the employee would have a valid cause of action for assault, before the employer can maintain an action, he must show some loss of service or some impairment of the servant's capacity to render service. *Id.* at 465, 466, 8 S.E. at 531.

4. W. PROSSER, LAW OF TORTS § 124 (4th ed. 1971). Prosser states, "the husband's interest in his relation with his wife first received recognition as a matter of her services to him as a servant." *Id.* at 874. Over hundreds of years, however, the requirement of actual services was dropped. Currently the law recognizes the husband's interest in the society, sexual intercourse, and conjugal affection as well as the services of his wife. Recovery can be had for interference with any one of these four protected interests. *Id.* at 873-81.

replacing the son with a fieldhand or the wife with a maid.

Slowly, and coincidentally with the transformation from an agrarian to an industrial society, the requirement of showing actual lost services was eroded.[5] The husband became entitled to recover for such nonpecuniary losses as society, companionship, and consortium.[6] Although for an extended time these recoveries were only available to men, some jurisdictions eventually concluded there was no good reason to deny wives and children the opportunity to recover in limited, quasi punitive actions such as under Wrongful Death and Dramshop Acts.[7]

Recovery for loss of spousal consortium and loss of a child's society remained exclusively a male right for years after women and children gained the right to recover nonpecuniary damages under Wrongful Death and Dramshop Acts.[8] To justify this rule, courts continued to cite the archaic master/servant analogy or the equally antiquated theory that all familial actions and recoveries belonged to the husband.[9]

Eventually, however, as the equality of women was recognized and the master/servant analogy was dropped, courts began to allow women to maintain actions for loss of the husband's consortium in negligent injury actions.[10] During this liberalization of nonpecuniary loss rules

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5. *See* note 4 *supra; see also,* Kelley v. New York, N.H. & H.R.R., 168 Mass. 308, 46 N.E. 1063 (1897), in which a husband was allowed to bring suit for loss of his negligently injured wife's consortium even though she had already been fully compensated for her injuries through an action of her own. *See also* Bigaouette v. Paulet, 134 Mass. 123, 45 Am. Rep. 307 (1883), holding that a husband's action for loss of his spouse's consortium was maintainable even if he could not show loss of services or that he incurred expenses as a consequence of her injuries.

6. *See* note 5 *supra.*

7. For actions allowing a wife's recovery under Dramshop Acts *see* Benes v. Campion, 186 Minn. 578, 244 N.W. 72 (1932); Whipple v. Rosenstock, 99 Neb. 153, 155 N.W. 898 (1915); Wood v. Lentz, 116 Mich. 275, 74 N.W. 462 (1898). For cases involving actions brought under Wrongful Death Acts *see* notes 57 and 58 *infra.*

8. Pyle v. Waechter, 202 Iowa 695, 210 N.W. 926 (1926). In a mother's suit for alienation of her son's affections, the *Pyle* court concluded that although the father had a right to the child's society and affection the mother did not. *See also* Doe v. Roe, 82 Me. 503, 20 A. 83 (1890). The Maine Supreme Court in *Doe* did not allow a wife's cause of action for seduction of her husband although it acknowledged that husbands' actions for the seduction of their wives were commonly allowed. To justify continuing this seemingly inequitable rule, the court reasoned that "a wife's infidelity may impose upon her husband the support of another man's child, and, what is still worse, it may throw suspicion upon the legitimacy of his own children." *Id.* at ___, 20 A. at 84. For an excellent overview of the history of the common law refusal to allow a wife to sue for loss of consortium, *see* Sims v. Sims, 79 N.J.L. 577, 76 A. 1063 (1910).

9. *See* note 8 *supra.*

10. Hitaffer v. Arzonne Co., Inc., 183 F.2d 811 (D.C. Cir. 1950), *cert. denied,* 340 U.S. 852 (1950). Plaintiff's husband was seriously injured while employed by defendant. The wife's claim for loss of consortium was not allowed by the district court. On appeal, the court of appeals reversed, holding that a husband and wife have equal rights which will receive equal protection under the law; *see also* Thill v. Modern Erecting Co., 284 Minn. 508, 170 N.W.2d 865 (1969). Mr. Thill was permanently paralyzed as a result of a work-related accident. His wife brought an action for loss of consortium. The Minnesota Supreme Court, recognizing that many other juris-

for women, children were left in the background.[11] Although some courts allowed recovery for loss of parental society in enticement actions,[12] until the case of *Ferriter v. Daniel O'Connell's Sons, Inc.*,[13] only one jurisdiction had allowed an action for this loss in a negligent injury case.[14]

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dictions now grant a wife's loss of consortium claim, overruled its previous decision refusing the cause; *see also* Eschenbach v. Benjamin, 195 Minn. 378, 263 N.W. 154 (1935). The *Eschenbach* court held that a wife has a right of action for loss of consortium against one who negligently injured her husband. The court further held that because the wife's action is a derivative right she may only recover if her husband recovers from the same defendant. To surmount the multiple litigation threat, the court ruled that it will only allow the wife's claim if it is joined with the husband's; *contra* Ripley v. Ewell, 61 So. 2d 420 (Fla. 1952). The plaintiff claimed loss of her husband's consortium due to injuries he suffered through defendant's negligence. The court traced the history of consortium claims noting that women have never had a common law right to a husband's consortium. The court, when refusing to recognize the cause of action, pointed to a Florida statute adopting English common law as the law of the state. The court determined that if change were to come it would have to come from the legislature.

11. Pound, *Individual Interests in Domestic Relations*, 14 MICH. L. REV. 177 (1916). Dean Pound noted that a child does have an interest in the family relationship that is valid and vital, "[b]ut the law has done little to secure these interests." *Id.* at 185.

12. The first case allowing a child recovery for loss of parental society in an enticement action was Daily v. Parker, 152 F.2d 174 (7th Cir. 1945). This was followed closely by Johnson v. Luhman, 330 Ill. App. 598, 71 N.E.2d 810 (1947), involving a child's suit for alienation of his father's affections. The Second District Illinois Appellate Court held that children are "entitled to both the tangible incidents of family life . . . and to the intangible, though equally significant elements of affection, moral support, and guidance from both parents." *Id.* at 605, 71 N.E. at 813. *See also* Russick v. Hicks, 85 F. Supp. 281 (W.D. Mich. 1949), involving a child's action against one who enticed his mother away; Miller v. Monsen, 228 Minn. 400, 37 N.W.2d 543 (1949), in which three minor children sued for enticement of their mother.

13. 413 N.E.2d 690 (Mass. 1980).

14. Although *Ferriter* was the first state supreme court decision to allow the child's cause of action, it was preceded by a Michigan Court of Appeals and the United States District Court for Hawaii. In 1955, the United States District Court in Hawaii heard the case of Scruggs v. Meredith, 134 F. Supp. 868 (D.C. Hawaii 1955). *Scruggs* involved a suit by five infants against the person who negligently injured their parent. Because there was no Hawaiian case law directly on point, the court drew upon analogous Hawaiian precedent to justify allowing the children's cause of action. Hawaiian courts had previously allowed a wife's cause of action for lost society and companionship due to the wrongful death of her husband, Kake v. Horton, 2 Hawaii 209 (1860), and a father's claim for nonpecuniary loss in the wrongful death of his child, Ferreira v. Honolulu R.T. & L. Co., 16 Hawaii 615 (1905). Based on these and other Hawaiian decisions under the Wrongful Death Act, the court reasoned that the Hawaii courts had evidenced their intention to protect the family members' interest in the relationship. But, within two years, and while the *Scruggs* case was pending appeal, the Hawaii Supreme Court had ruled that a child did not have a cause of action for lost society due to negligent injury. Halberg v. Young, 41 Hawaii 634 (1957). In a matter of months, the Ninth Circuit, applying the new Hawaiian case law, reversed the *Scruggs* decision in *Meredith v. Scruggs*, 244 F.2d 604 (9th Cir. 1957). Again, not one jurisdiction allowed the child's cause.

Michigan was the next jurisdiction to allow the cause, in the case of Berger v. Weber, 82 Mich. App. 199, 267 N.W.2d 124 (1978). The Michigan Appeals Court first examined United States Supreme Court and Michigan Supreme Court cases recognizing increased legal rights for children. The court noted that in many areas children now enjoy the same rights as do adults. The court next drew on Michigan statutory and case law which allows adults a cause of action for loss of spousal consortium in wrongful death and negligent injury actions. Applying the two principles

II. FACTS AND HOLDINGS

While working in his capacity as a carpenter for Daniel O'Connell's Sons, Inc., Michael Ferriter was struck on the neck by a wooden beam which slipped from an overhead crane. The injuries caused Mr. Ferriter, a husband and father of two, to be paralyzed from the neck down. Although worker's compensation provided Mr. Ferriter with benefits for his injury, his family received nothing. Hence, his family brought the present suit.[15]

The complaint alleged that as a result of Mr. Ferriter's injuries the children and wife were deprived of consortium and society. It further alleged the plaintiffs had suffered mental anguish upon viewing Mr. Ferriter lying injured in his hospital room shortly after the accident, and that this mental anguish had resulted in impairment of their mental and physical health.[16] The trial judge granted defendant's motion for summary judgment on impaired mental and physical health claims but overruled a similar motion on the claim for lost society and consortium.[17] The Massachusetts Supreme Court granted plaintiffs' request for direct appellate review.

Although the defendants argued plantiffs' claims for mental anguish and impaired mental health failed to state a claim for which relief could be granted, no such attack was made on the claims for lost society and consortium.[18] The defendant instead argued both of plaintiffs' claims were barred by the state's Worker's Compensation Act.[19]

The Massachusetts Supreme Court reasoned, based on the holding of *King v. Viscolid Co.*,[20] that even though Mr. Ferriter waived his common law rights of action by accepting benefits under the Worker's Compensation Act, he did not and could not waive his spouse's and children's rights.[21] The court also held that mental anguish brought on by the shock of seeing an injured family member in the hospital was compensable. The court interpreted previous holdings to find authority

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to the case before it, the court held that a child does have a protectable interest in the society of his parents and may sue for infringement upon that interest through negligent injury. The decision was upheld shortly after release of the *Ferriter* decision. Berger v. Weber, 411 Mich. 1, 303 N.W.2d 424 (1981).

15. ___ Mass. ___, 413 N.E.2d 690, 691.

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.* at ___, 413 N.E.2d at 692.

20. 219 Mass. 420, 106 N.E. 988 (1914). In *King*, a young man was injured on the job and received worker's compensation. The mother of the injured youth sued his employer for the costs of caring for him. The court ruled that the mother sought recovery for her own injury and not her son's. Her action was not waived by her son's waiver of his rights to sue.

21. Mass. ___, 413 N.E.2d at 692.

for this decision[22] but added the qualification that the shock for which recovery is sought must closely follow the accident.[23]

The most significant aspect of the *Ferriter* court holding was allowing the children of a negligently injured person to maintain a suit for loss of parental society against the tortfeasor. The court held that a minor child of a negligently injured person may have a claim for loss of society if he is dependent upon the injured person for the filial needs of closeness, guidance, and nurture, as well as for economic well being.[24] In contrast to the decisions on expansion of mental anguish claims and suits that can be filed while receiving worker compensation benefits, the decision on loss of society and companionship was not simply an interpretation of existing case law. The court had to distinguish many cases and depart from long standing statements of public policy to allow the children's cause of action.

III. ANALYSIS

A. The Court's Rationale

Previous to *Ferriter,* not one state supreme court or federal court had ever allowed a child's cause of action for loss of parental society in negligent injury cases.[25] This is evidence of the strong opposition to the cause of action and an indication of the obstacles that stood in the *Fer-*

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22. *Id.* at ___, 413 N.E.2d at 696, 697.

23. *Id.* at ___, 413 N.E.2d at 697.

24. *Id.* at ___, 413 N.E.2d at 696.

25. Many jurisdictions have addressed the question whether a child has a cause of action against the injurer of his parent and have answered a resounding no. The reasons for the rejection vary among the courts. A partial listing of the courts that have rejected the cause and the considerations they found dispositive follows: Suter v. Leonard, 45 Cal. App. 3d 744, 120 Cal. Rptr. 110 (1975) (the injured parent has a cause of action in which the child can share); *see also* Borer v. American Airlines, Inc., 19 Cal. 3d 441, 138 Cal. Rptr. 302, 563 P.2d 858 (1977) (the court is without power to grant new causes of action, and the line has to be drawn somewhere); Taylor v. Keefe, 134 Conn. 156, 56 A.2d 768 (1947) (claims are too susceptible of fabrication); Ripley v. Ewell, 61 So. 2d 420 (Fla. 1952) (potential of child pressing claim could upset settlements made between parents and tortfeasor); Halberg v. Young, 41 Hawaii 634 (1957) (allowing child's claim is similar to splitting parent's cause of action, creating a danger of double payment); Hoffman v. Dautel, 189 Kan. 165, 368 P.2d 57 (1962) (dangers of double recovery and multiplicity of suits); Hayrynen v. White Pine Copper, 9 Mich. App. 452, 157 N.W.2d 502 (1968) (there is no interest of a child that can be legally protected); Russell v. Salem Township, 61 N.J. 502, 295 A.2d 862 (1972) (child is totally deprived of a parent's benefit when parent is killed but not, except in unusual circumstances, when he survives); Morrow v. Yannantuono, 152 Misc. 134, 273 N.Y.S. 912 (1934) (allowing the claim would lead to increased litigation); Hennant v. Tidewater Power Co., 189 N.C. 120, 126 S.E. 307 (1925) (the child's injury is too remote from the wrong actually done); *see also* Henson v. Thomas, 231 N.C. 173, 56 S.E.2d 432 (1949) (the child's injury is the type that cannot and should not be compensated for); Gibson v. Johnston, 75 Ohio L. Abs. 413, 144 N.E.2d 310 (1956) (duty of the parent to support, educate, and protect his child was given recognition at common law, but reciprocal rights of the child in his interest in the society and affection of his parents were not recognized under common law).

riter court's path.[26] Although the defendant did not argue against the existence of the cause, the court still had to deal with the concerns put forth in previous analogous cases and inherent in public policy considerations.[27] The *Ferriter* court dissected each of these arguments, and either distinguished them on the facts of *Ferriter* or dismissed them as meritless.

The *Ferriter* court first had to decide whether to recognize a new cause of action for a nonpecuniary loss. Because damages are extremely difficult to set when nonpecuniary awards are sought, courts are hesitant to allow such awards. The dangers of allowing fabricated claims and unduly burdening the defendant must be balanced against the social policies of compensating for injuries. In balancing these competing interests, many courts have decided against allowing a child's cause of action for nonpecuniary damages.[28] The *Ferriter* court, however, decided that the children did suffer a bona fide injury worthy of compensation. In reaching its decision, the court looked to analogous situations in which nonpecuniary losses have been ruled recoverable and reasoned that the loss the children had suffered was so similar that denial of the claim would be irrational.[29]

The court compared the children's claim to that of the wife's claim for loss of her husband's consortium.[30] This claim had been attempted but rejected in the early case of *Feneff v. New York Central & Hudson River Railroad*.[31] The *Feneff* court dealt with a case in which the husband had been injured through negligence, and was fully compensated in a lawsuit which followed. Feneff's wife brought an action against the tortfeasor alleging loss of consortium due to her husband's injuries. Although the court recognized both wives and children suffer injury when the father is negligently injured,[32] it pointed out that the law had never allowed them recovery.[33] The court reasoned that these actions should be allowed only when injury resulted from an intentional act as through

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26. ___ Mass. ___, 413 N.E.2d at 692.

27. As mentioned, the defendant did not attack the child's claim to his father's society as being a claim for which relief cannot be granted. The question of sufficiency of the claim was nevertheless fully considered by the court. After acknowledging that the defendant had not attacked on this basis, the court itself thoroughly canvassed the pertinent area of the law and carefully reasoned out its decision. *Id.*

28. *See* note 25 *supra.*

29. The court first considered actions in which a wife sought compensation for lost spousal consortium. ___ Mass. ___, 413 N.E.2d at 692. The court also considered awards made under the Wrongful Death Act. *Id.* at ___, 413 N.E.2d at 695.

30. *Id.* at ___, 413 N.E.2d at 692.

31. 203 Mass. 278, 89 N.E. 436 (1909).

32. *Id.* at 281, 89 N.E. at 437.

33. *Id.* at 282, 89 N.E. at 437.

seduction, enticement, or criminal conversion of a spouse or parent.[34] It further held that recovery should never be allowed when the father has already been fully compensated for his injuries.[35] The *Feneff* court concluded when a spouse or parent is negligently injured, injury to the remaining spouse and child is too remote to support an action.[36]

The *Feneff* decision represented the law of Massachusetts for over sixty years.[37] Thus neither children nor wives were allowed recovery for damages done to the familial relationship caused by negligent injury of the husband/father. This rule was altered, however, in 1973 when the Massachusetts Supreme Court allowed a wife to seek recovery in the case of *Diaz v. Eli Lilly & Co.*[38] The *Diaz* court took exception to the *Feneff* opinion on two important points. First, the court noted that if the wife was injured by a third party's actions, she should have the opportunity to recover. The court reasoned further that the validity of the wife's claim should not turn on whether the tortfeasor's actions were "intentional" or "negligent."[39] As the court noted: the "dominant . . . theme of our modern law of torts . . . [is that] presumptively there should be recourse for a definite injury to a legitimate interest due to lack of the prudence or care appropriate to the occasion."[40]

The *Diaz* court also found the *Feneff* decision excessive in its concern over the threat of double recovery if a consortium claim were allowed.[41] The *Diaz* court disposed of this risk by suggesting that joinder of a spouse's claim with the husband's claim be mandatory, or that the judge carefully instruct the jury.[42] The court further suggested that even if courts did nothing in the way of forcing joinder, defendants could still protect themselves from double recovery by moving for consolidation of suits.[43]

Through its interpretation of *Diaz* and *Feneff*, the *Ferriter* court found precedent for allowing the new cause of action. The *Feneff* court likened a child's claim for loss of parental society to a wife's claim for loss of her husband's consortium but denied both. *Diaz* refuted *Feneff's* rationale for denial, allowing a wife's loss of consortium claim. The

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34. *Id.* at 280, 89 N.E. at 437.

35. *Id.*

36. *Id.* at 280, 89 N.E. at 438.

37. A wife was not allowed to recover for loss of spousal consortium until 1973 in the case of *Diaz v. Eli Lilly & Co.*, 364 Mass. 153, 302 N.E.2d 555 (1973). *Diaz* is discussed at length in the text accompanying notes 38-43 *infra*.

38. *Id.*

39. *Id.* at 159, 302 N.E.2d at 559.

40. *Id.* at 165, 302 N.E.2d at 562.

41. *Id.* at 161, 162, 302 N.E.2d at 560, 561.

42. *Id.* at 162, 302 N.E.2d at 560.

43. *Id.* at 162, 302 N.E.2d at 561.

Ferriter court could not grant the children a cause of action, however, until it addressed the Massachusetts case law that said a child had no legal right to the care and presence of a parent.[44]

The major case in this area with which the *Ferriter* court had to deal was *Nelson v. Richwagen*,[45] involving a minor's suit against a third party who had enticed her mother into desertion. The child's action alleged her mother's absence deprived her of support, maintenance, and maternal care and affection. When deciding that the child had no right to the care and presence of her parent, the Massachusetts Supreme Court discussed its overall dislike for enticement actions. It listed problems with such actions, including the possibility for multiplicity of suits, the possibility of extortionary litigation, the inability to define the point at which the child's right to parental society would cease, and the inability to assess damages accurately.[46]

The *Ferriter* court addressed these arguments individually and found them to be either inapplicable to the case before it or no longer valid. The first concern of the *Nelson* court, that enticement actions are extortionary and similar to the prohibited intra-family tort suits, was found completely inapplicable to the *Ferriter* case.[47] The *Ferriter* court found the other concerns of the *Nelson* court, such as the potential problem of multiple litigation, to have been resolved in *Diaz*.[48] The real problem facing the *Ferriter* court was the *Nelson* conclusion that children do not have a protectable interest in their parents' society.

To deal with this issue the court analogized the action before it to one brought under the Wrongful Death Act.[49] Under the Act, a child is

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44. Nelson v. Richwagen, 326 Mass. 485, 95 N.E.2d 545 (1950). This case is discussed in the text accompanying notes 45 and 46 *infra*.

45. *Id.*

46. In reaching the decision that a minor child has no legal right to the presence and care of a parent, the *Nelson* court reasoned that such rights arise as a right of the marital relationship only and "[d]esertion alone, without more, is a matrimonial wrong." *Id.* at 487, 95 N.E.2d at 546.

47. The *Nelson* court's concern with extortionary litigation was dispelled by the *Ferriter* court. The *Ferriter* court reasoned, "when a third party's negligence causes injury to a parent and the child suffers loss of society, the litigation does not typically set family members against each other." ___ Mass. ___, 413 N.E.2d at 694.

48. *Id.* at ___, 413 N.E.2d at 695. The *Diaz* court, cited in *Ferriter*, suggested that a wife's claim for consortium be mandatorily joined to the husband's action for negligent injury. The court further suggested that double recovery could be prevented by careful jury instructions or by the defendant moving for consolidation of the negligent injury and consortium claims into a single trial. *Id.* at 161-63, 302 N.E.2d at 560-61.

49. The *Ferriter* court reasoned that since a child's interest in the family relationship is now protected by statute, at least when the parent is tortiously killed, the *Nelson* holding that a child has no protectable interest is no longer valid. *Id.* at ___, 413 N.E.2d at 695.

The Massachusetts Wrongful Death Statute provides in pertinent part that one who is responsible for the wrongful death of another "shall be liable in damages in the amount of: (1) the fair monetary value of the decedent to the persons entitled to receive the damages recovered, as provided in section one, including but not limited to compensation for the loss of the reasonably

allowed to recover for nonpecuniary loss. The court reasoned it was illogical to protect a child's interest in the family relationship when the parent was negligently killed, but not when he was severely injured through negligence.[50] Thus, by overruling that portion of *Nelson* which had held a child has no legal right to his parent's society, and by distinguishing or reasoning away the *Nelson* court's concern of multiple litigation and double recovery, the court was free to allow the child's cause of action to stand.

B. Application of Ferriter *to Other Jurisdictions*

Although three justices submitted dissenting opinions on other issues,[51] the *Ferriter* court unanimously held a child should be allowed a cause of action for the loss of society of his negligently injured parent. The *Ferriter* decision is based on an interpretation of a Massachusetts decision allowing a wife's action for loss of consortium,[52] a Massachusetts statute providing for a child's recovery of nonpecuniary losses when his parent is negligently killed,[53] and a conspicuous absence of adverse Massachusetts decisions that are on point.[54] Because the *Ferriter* decision is based on case law that is peculiar to Massachusetts instead of widely accepted public policy, it may not be well received by other jurisdictions.

Although there are many jurisdictions which allow nonpecuniary recovery under Wrongful Death Acts,[55] there remain some which do

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expected net income, services, protection, care, assistance, society, companionship, comfort, guidance, counsel, and advice of the decedent to the persons entitled to the damages recovered." MASS. ANN. LAWS ch. 229, § 2 (Michie/Law Co-op 1979).

Children of the deceased are considered as "persons entitled to recover" under the statute. MASS. ANN. LAWS ch. 229, § 1 (Michie/Law Co-op 1979).

50. ___ Mass. ___, 413 N.E.2d at 695. An excellent article discussing the potential equal protection arguments to be used in jurisdictions allowing a child's claim for lost society under wrongful death, but not when the parent is negligently injured, is Love, *Tortious Interference with the Parent-Child Relationship: Loss of An Injured Person's Society and Companionship*, 51 IND. L.J. 590 (1976).

51. Chief Justice Hennessey along with Justices Quirico and Wilkins filed individual dissents to the *Ferriter* opinion. All of the justices agreed that the children's claim for lost society should be allowed, however, Justice Quirico disagreed with allowing the children's claim when the injured person has accepted benefits under worker's compensation. Chief Justice Hennessey and Justice Wilkins also disagreed with allowing family members additional recovery when worker's compensation has given benefits. Further, the two justices dissented to allowing recovery for mental anguish and physical impairment when the plaintiffs were not at the scene of the accident. ___ Mass. ___, 413 N.E.2d at 703-10.

52. 364 Mass. 153, 302 N.E.2d 555 (1973).

53. MASS. ANN. LAWS ch. 229, §§ 1, 2 (Michie/Law Co-op 1979).

54. The *Ferriter* court noted that the question whether a child can recover for loss of a parent's companionship and society caused by a defendant's negligence was a matter of first impression in Massachusetts. ___ Mass. ___, 413 N.E.2d at 692.

55. Seventeen jurisdictions allow the recovery of nonpecuniary losses under their Wrongful Death

not.[56] In addition, many jurisdictions have adverse decisions that are

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Acts are listed below. Statutes that specifically provide for recovery of nonpecuniary loss are listed alone, those that have been interpreted to allow the recovery are supplemented with cases so interpreting. ALASKA STAT. § 09.55.580 (Michie Supp. 1981); ARIZ. REV. STAT. ANN. § 12-613 (West Supp. 1981); Kemp v. Pinal County, 8 Ariz. App. 41, 442 P.2d 864 (1968) (holding surviving parties may recover for loss of decedent's companionship, society, comfort, and guidance); ARK. STAT. ANN. § 27-909 (Bobbs-Merrill Supp. 1981); CAL. CIV. PROC. CODE § 377 (West Supp. 1981); FLA. STAT. ANN. § 768.21 (West Supp. 1981); HAWAII REV. STAT. § 663-3 (Supp. 1974); IDAHO CODE § 5-311 (Bobbs-Merrill Supp. 1981); Wyland v. Twin Falls Canal Co., 48 Idaho 789, 285 P. 676 (1930) (allowing recovery for loss of companionship); IOWA CODE ANN. § 633.336 (West 1976); KAN. CIV. PRO. CODE ANN. § 60-1904 (Vernon 1967); LA. CIV. CODE ANN. art. 2315 (West 1979); Law v. Sea Drilling Corp., 510 F.2d 242 (5th Cir. 1975) (under Louisiana law, a widow and children may recover for loss of decedent's love and affection); MD. CTS. & JUD. PROC. CODE ANN. § 3-904 (Michie 1974); MASS. ANN. LAWS ch. 229 § 2 (West Supp. 1980); MICH. STAT. ANN. § 27A. 2922 (Callaghan 1980); MINN. STAT. ANN. § 573.02 (West 1981); Fussner v. Andert, 261 Minn. 347, 113 N.W.2d 355 (1962) (allowing nonpecuniary loss for death of a child); *see also* Gunderson v. Northwestern Elevator Co., 47 Minn. 161, 49 N.W. 694 (1891) (denying nonpecuniary loss if adult dies); MISS. CODE ANN. § 11-7-13 (Harrison 1980); Gulf Ref. Co. v. Miller, 153 Miss. 741, 121 So. 482 (1929) (companionship and society held recoverable); MO. ANN. STAT. § 537.090 (Vernon Supp. 1981); MONT. REV. CODES ANN. § 93-2810 (Allen-Smith Supp. 1977); Mize v. Rocky Mountain Bell Tel. Co., 38 Mont. 521, 100 P. 971 (1909) (loss of consortium and society are in the list of "pecuniary" losses a wife may recover); NEB. REV. STAT. § 30-809 (1979); Selders v. Armentrout, 190 Neb. 275, 207 N.W.2d 686 (1973) (when a minor dies, parents can recover for loss of comfort and companionship); N.J. STAT. ANN. § 2A: 31-5 (West Supp. 1981); Suarez v. Berg, 117 N.J. Super. 456, 285 A.2d 68 (1971) (reading statute to include recovery for loss of care, guidance, and advice of decedent under appellation of pecuniary loss); N.C. GEN. STAT. § 28A-18-2 (Michie Supp. 1981); 42 PA. CONS. STAT. ANN. § 8301 (Purdon Supp. 1981); DeVite v. United Air Lines, 98 F. Supp. 88 (D.N.Y. 1951) (holding nonpecuniary losses recoverable); S.C. CODE § 15-51-40 (Lawyers Co-op Supp. 1980); Smith v. Wells, 258 S.C. 316, 188 S.E.2d 470 (1972) (the statute allows recovery for loss of society, comfort, and companionship plus grief; sorrow, wounded feelings, mental shock and suffering in addition to pecuniary loss). S.D. CODIFIED LAWS ANN. § 21-5-7 (Allen-Smith Supp. 1980); Halvorsen v. Dunlap, 495 F.2d 817 (8th Cir. 1974) (loss of advice, assistance and protection are proper elements of damage in an action for wrongful death of son); UTAH CODE ANN. § 78-11-6, 7 (Allen-Smith Supp. 1978); Corbett v. Oregon Short Line R. Co., 25 Utah 449, 71 P. 1065 (1903) (parent may recover for loss of society and comfort for daughter's death); VA. CODE § 8.01-52 (Michie Supp. 1981); W. VA. CODE § 55-7-6 (Michie Supp. 1981); WIS. STAT. ANN. § 895.04 (West Supp. 1981).

56. States whose statutes or case law have never allowed recovery of nonpecuniary losses include: ALA. CODE § 6-5-410 (Michie 1975); Bonner v. Williams, 370 F.2d 301 (5th Cir. 1966) (only punitive damages are recoverable not actual damages); COLO. REV. STAT. ANN. § 13-21-203 (Bradford Supp. 1980); Mosley v. Prall, 158 Colo. 504, 408 P.2d 434 (1965) (damages are compensatory only, a pecuniary loss must be shown); CONN. GEN. STAT. ANN. § 52-555 (West Supp. 1981); DEL. CODE ANN. tit. 10; § 3704 (Michie Supp. 1980); Reynolds v. Willis, 58 Del. 368, 209 A.2d 760 (1965) (loss of consortium is not considered pecuniary); GA. CODE ANN. § 105-1308 (Harrison Supp. 1981); ILL. ANN. STAT. ch. 70, § 2 (Smith-Hurd 1979); Wilcox v. Bierd, 330 Ill. 571, 162 N.E. 170 (1928), *overruled on other grounds,* 34 Ill. 2d 487, 216 N.E. 2d 140 (1966) (recovery is limited to pecuniary losses); IND. CODE ANN. § 34-1-1-2 (Bobbs-Merrill 1973); Huff v. White Motor Corp., 609 F.2d 286, 291 (7th Cir. 1979) (legislature did not intend recovery of loss of care, love, and affection or training and guidance loss for children); KY. REV. STAT. ANN. § 411.130 (Baldwin Supp. 1979); N.M. STAT. ANN. § 41-2-1 (Michie 1978); Kilkenney v. Kenney, 68 N.M. 266, 361 P.2d 149 (1961) (husband's loss of wife's consortium not recoverable); N.Y. EST. POWERS & TRUSTS LAW § 5-4.3 (Consol. Supp. 1980); Liff v. Schildkrout, 49 N.Y.2d 622, 427 N.Y.S.2d 746 (1980) (recovery for loss of society and companionship is not

directly on point.[57] In these jurisdictions the *Ferriter* decision will have little persuasive power.

Some of the jurisdictions that have decided against granting a child's cause of action for lost parental society through negligent injury have done so for reasons not addressed by the *Ferriter* court.[58] Increased costs for tortfeasors, higher insurance premiums,[59] the potential for disruption of settlements made between the tortfeasor and the child's parents,[60] and the fear that allowing a child an award of his own will lead to family disruption[61] are arguments that have found favor in other jurisdictions. These arguments, although not addressed by the *Ferriter* court, could still be countered by utilizing some of the court's rationale.

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allowed); N.D. CENT. CODE § 32-21-02 (Allen Smith Supp. 1981); Stejskal v. Darrow, 55 N.D. 606, 215 N.W. 83 (1927) (jury may consider pecuniary value of services the beneficiary might reasonably have expected had decedent lived); OHIO REV. CODE ANN. § 2125.01 (Page Supp. 1980). At the time of this writing, a bill has passed the Ohio House of Representatives to amend OHIO REV. CODE ANN. §§ 2125.01, 2125.02, 2125.03. The bill is currently pending in the Senate. If passed, the wrongful death act will allow a plaintiff to recover for loss of financial support, loss of services, and loss of society including companionship, consortium, care, assistance, attention, protection, advice, guidance, counsel, instruction, training, and education. Further, next of kin will be allowed to recover for mental anguish and pain and suffering. H.B. No. 332, 114th General Assembly (1981).

The legislation, if enacted, will apply to tortiously caused deaths occuring after January 1, 1982. It will be one of the most liberal wrongful death acts in the country and could provide Ohio attorneys with powerful arguments for allowing a child's claim for lost parental society.

OKLA. STAT. ANN. tit. 12, § 1054 (West Supp. 1980); Kaw Boiler Works v. Frymyer, 100 Okla. 81, 227 P. 453 (1924) (plaintiff may only recover for pecuniary losses he realizes). OR. REV. STAT. § 30.020 (1979); R.I. GEN. LAWS § 10-7-1.1 (Bobbs-Merrill Supp. 1980); TENN. CODE ANN. § 20-5-113 (Michie 1980); TEX. REV. CIV. STAT. ANN. art. 4671 (Vernon Supp. 1981); Hayward v. Southwest Arkansas Elec. Co-op Corp., 476 F. Supp. 1008 (D.C. Tex. 1979) (no recovery for loss of parental society or grief and suffering); VT. STAT. ANN. tit. 14, § 1492 (Supp. 1981); *See* Bassett v. Vermont Tax Dep't, 135 Vt. 257, 376 A.2d 731 (1977) (recovery is limited to pecuniary loss); WASH. REV. CODE ANN. § 4.20.020 (West Supp. 1981); Woodbury v. Hoquiam Water Co., 138 Wash. 254, 244 P. 565 (1926) (recovery is limited to pecuniary loss).

57. *See* note 26 *supra.*

58. In addition to arguments that were not even considered in *Ferriter,* such as the ones set forth in notes 59-62 *infra,* the court mentioned two arguments to which it never responded. In detailing the "four practical objections to the child's action" that the *Nelson* court considered, the *Ferriter* court listed "[i]nability to define the point at which the child's right would cease, . . . [and] [i]nability of a jury adequately to cope with the question of damages. . . ." ___ Mass. ___, 413 N.E.2d at 694. The court's raising these concerns and failing to answer them, does not present a weakness in its reasoning. The court had before it the sole question whether the children had a cause of action, not what damages were appropriate. The *Ferriter* decision only allowed the children to get into court; decision on the merits was still to follow. Only if the defendant were found liable to the children, would the question of how to set damages become ripe.

59. Borer v. American Airlines Inc., 19 Cal. 3d 441, 138 Cal. Rptr. 302, 563 P.2d 858 (1977). For a detailed exploration of *Borer see* note 67 *infra.*

60. Morrow v. Yannantuono, 152 Misc. 134, 273 N.Y.S. 912 (1934); *cf.* Ripley v. Ewell, 61 So. 2d 420 (Fla. 1952) (concerning wife's action for lost consortium).

61. Russell v. Salem Transportation Co., 61 N.J. 502, 295 A.2d 862 (1972).

The concerns of higher insurance premiums, increased costs for tortfeasors, and family disharmony due to a child's recovery of a sizable award, for example, are all public policy concerns. The *Ferriter* court pointed out that its decision was in accord with public policy as expressed by Massachusetts General Law ch. 119 § 1.[62] This statute provides that the welfare of the state's children has top priority. If, indeed, the public has set children's welfare as top priority, the interest the community has in seeing that the children are fairly treated should, arguably, override the economic interests in lower insurance premiums or the concern that tortious conduct not be dealt with too severely. Furthermore, this public interest should outweigh the somewhat flimsy argument that a compensated child would disrupt the family.

The *Ferriter* decision can also be used to counter the argument that settlements between the tortfeasors and the children's parents would be susceptible to disruption. In deciding that the threat of multiple suits was without merit, the *Diaz*[63] decision, cited by *Ferriter*,[64] pointed out that multiple litigation could be avoided by mandatory joinder of claims.[65] This rule would also preclude a child from pressing a claim that would destroy his parents' valid settlement.

Despite the rationale of *Ferriter*, there are still many prominent courts that have well reasoned cases opposing the cause of action.[66] California has consistently refused to allow a child to collect nonpecuniary awards for such simple but powerful reasons as the necessity of drawing the line somewhere and the fact that the award would really not compensate the child anyway.[67] Other jurisdictions, such as Ohio,[68]

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62. ___ Mass. ___, 413 N.E.2d at 695. MASS. ANN. LAWS ch. 119, § 1 (Michie Law/Co-op 1979) provides:

> the policy of this commonwealth [is] to direct its efforts, first, to the strengthening and encouragement of family life for the protection and care of the children; to assist and encourage the use by any family of all available resources to this end; and to provide substitute care of children only when the family itself or the resources available to the family are unable to provide the necessary care and protection to insure the rights of any child to sound health and normal physical, mental, spiritual and moral development.

63. 364 Mass. 153, 302 N.E.2d 555 (1973).

64. ___ Mass. ___, 413 N.E.2d at 695.

65. 364 Mass. at 161-63, 302 N.E.2d at 560-61.

66. *See* note 26 *supra*.

67. Borer v. American Airlines Inc., 19 Cal. 3d 441, 138 Cal. Rptr. 302, 563 P.2d 858 (1977). The *Borer* decision involved a suit for loss of society, companionship, and other nonpecuniary losses by nine children of a negligently injured woman. The California Supreme Court ruled the children could not maintain a cause of action for these losses. The court took a pragmatic approach, deciding a line must be drawn somewhere. It reasoned, "[l]oss of consortium is an intangible, nonpecuniary loss, monetary compensation will not enable the plaintiffs to regain the companionship and guidance of a mother; it will simply establish a fund so that upon reaching adulthood, when plaintiffs will be less in need of maternal guidance, they will be unusually wealthy men and women." *Id.* at 447, 563 P.2d at 862. The court also contended that no matter who the defendant is, the public foots the bill in the long run through higher insurance premiums

have not allowed nonpecuniary loss even in Wrongful Death Actions.[69] In these jurisdictions the *Ferriter* decision will have little effect.

The *Ferriter* decision is a milestone in the field of children's rights, but it may not be the trend setter that it seems. Although it is true that commentators have been urging this new cause of action for years,[70] it is doubtful that the courts across the country are ready to recognize it.

In *Berger v. Weber*,[71] the Michigan Supreme Court followed the *Ferriter* decision almost immediately after it was handed down and it appeared as though a trend was about to begin, but this appearance is deceiving. First, the Michigan decision, although citing *Ferriter*, was actually upholding a lower court decision which was well reasoned in its own right. Second, the fact that two state supreme courts ruled the same way within a matter of months does not make a trend.

In June of 1981, just three months after the Michigan Supreme Court handed down the *Berger* decision, an Oregon court of appeals ruled the complete opposite, in *Norwest v. Presbyterian Intercommunity Hospital*,[72] which dealt with a child whose mother was allegedly brain damaged by a physician's negligence. The child claimed that, as a result of the physician's negligence, he was "deprived of his mother's society, companionship, support, and education and has incurred an obligation to support her after her own funds are exhausted."[73] The court refused, however, to allow the cause of action, claiming that the legislature, not the courts, should make the change.

The Oregon court's holding completely contradicts the *Ferriter* holding and typifies the unwillingness of many courts to recognize new causes of action absent a legislative pronouncement to that effect. The *Ferriter* court also considered the propriety of a court creating a new cause of action yet concluded "[i]n a field long left to the common law,

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and the greater cost of settling and litigating the increased claims for parental consortium that would follow. One of the interesting things about the *Borer* decision is that, like Massachusetts, California had previously ruled that wives have a claim to their husbands' consortium. Rodriquez v. Bethlehem Steel Corp., 12 Cal. 3d 382, 115 Cal. Rptr. 765 (1974). Further, California's Wrongful Death Statute also allows recovery for nonpecuniary loss. CAL. CIV. PROC. CODE § 377 (West Supp. 1981).

68. *See* note 57 *supra*.

69. *See* discussion on Ohio's proposed Wrongful Death Act at note 57 *supra*.

70. *See* Pound, *Individual Interests in Domestic Relations*, 14 MICH. L. REV. 177 (1916); W. PROSSER, LAW OF TORTS § 124 (4th ed. 1971); Love, *Tortious Interference with the Parent-Child Relationship: Loss of an Injured Person's Society and Companionship*, 51 IND. L.J. 590 (1976).

71. *See* note 14 *supra*.

72. Norwest v. Presbyterian Intercommunity Hosp., 52 Or. App. 853, 631 P.2d 1377 (1981).

73. *Id.* at 2048.

change may well come about by the same medium of development."[74]

IV. CONCLUSION

The Massachusetts Supreme Court decision in *Ferriter v. Daniel O'Connell's Sons, Inc.* represents a milestone in the protection of children's rights. By allowing the child to seek damages for loss of parental society from the tortfeasor who negligently injured his parent, the court has adopted a view long advocated by legal scholars but resisted by the courts. Although the commentators have seen this cause of action as a logical extension of the rapidly growing body of law concerned with torts against the family, the courts have taken a very conservative, pragmatic, approach toward expansion of the law in this sector. Some courts still hold that a child has no protectable interest in a parent's society and refuse the new cause on that ground alone. Most courts, however, recognize the child's right to parental society in actions such as wrongful death but deny the right of action in negligent injury cases because they believe the practical problems the cause would generate outweigh the interests of the child.

The *Ferriter* court recognized the potential for problems such as double recovery, multiplicity of suits, and extortionary claims, but was able to overcome them by offering methods to lessen the probability of their arising. The *Ferriter* logic in reasoning away these pragmatic concerns has already been cited with approval in the Michigan case of *Berger v. Weber* as that jurisdiction became the second to recognize the child's cause of action.

Problems such as increased insurance premiums, speculativeness of damages and the potential for disruption of settlements between the tortfeasor and other family members, which continue to concern other courts, were not considered in *Ferriter*. Some of these concerns, plus the lack of legislative pronouncements on the new cause of action, have led Oregon to be the first state to enter a post-*Ferriter* rejection of the child's right of action.

Although the *Ferriter* decision was a well reasoned one which effectively dealt with some of the concerns voiced by other courts, it is probably not the trend setter the commentators have hoped for. The decision has added little to the arsenals of plaintiffs who hope to recover for lost parental society due to negligent injury in states that do not allow nonpecuniary recovery under Wrongful Death statutes. In states that do not allow recovery for loss of consortium, or states that have expressed strong preference for statutory rather than judicially recognized causes of action, the decision will also have little persuasive

74. ___ Mass. ___, 413 N.E.2d at 695.

power.

The value of *Ferriter* is that it is now the law of Massachusetts and Michigan that a child can seek recovery for loss of parental society when his parent is negligently injured. If the law works and the legion of predicted problems does not descend upon these two states, perhaps other courts or legislatures will be persuaded to follow their lead in the future. Although no sweeping trends may be forthcoming, at least future commentators can monitor the progress of the *Ferriter* experiment and have some empirical data to support their theories.

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