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Loss of Consortium in Admiralty: A Yet Unsettled Question

An action for loss of consortium, which is typically defined to include the right to one's spouse's society, love, services, affection, company, and companionship, including sexual relations, is generally allowed among American common law jurisdictions in the instance of the death or serious injury of the marriage partner.[1] In the American admiralty jurisdiction, however, the existence of such a cause of action when the spouse is seriously injured is unclear.

The Supreme Court's recent admiralty decision in *Sea-Land Services, Inc. v. Gaudet*,[2] which permitted recovery for loss of society and services by a longshoreman's widow, left confusion in its wake as to a loss of consortium action in maritime law by one whose spouse is injured but not killed. Admiralty courts subsequently facing the question in nonfatal cases are polarized. Some lower courts, in allowing the nonfatal action, have seen a natural progression from the Supreme Court's granting recovery for the societal losses encompassed in consortium in the case of the spouse's death[3] to extending relief in situations in which the spouse is seriously, but not fatally, injured.[4] A federal district court and a court of appeals, however, denied the cause of action, with the court of appeals interpreting *Gaudet* as suggesting that no recovery should be granted in nonfatal cases.[5]

This comment will examine the origins of the present uncertainty and will suggest a possible resolution of the question of recovery in admiralty for negligent invasion of consortium.

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1. For a discussion of the present status of consortium actions among the states, see notes 21-24 and accompanying text *infra*. For typical definitions of consortium, see, *e.g.*, Igneri v. Cie. de Transports Oceaniques, 323 F.2d 257, 260 n.2 (2d Cir. 1968), *cert. denied*, 376 U.S. 949 (1964); Hitaffer v. Argonne Co., 183 F.2d 811, 814 (D.C. Cir.), *cert. denied*, 340 U.S. 852 (1950) (overruled on other grounds, Smither & Co. v. Coles, 242 F.2d 220, 226 (D.C. Cir. 1957)).

2. 414 U.S. 573 (1974).

3. *Id.* at 584.

4. Lemon v. Bank Lines, Ltd., 411 F. Supp. 677, 680 (S.D. Ga. 1976) (loss of consortium recoverable even when spouse is only injured); Pesce v. Summa Corp., 54 Cal. App. 3d 86, 92, 126 Cal. Rptr. 451, 454-55 (1975) (wife's recovery allowable); *cf.* Francis v. Pan Am. Trinidad Oil Co., 392 F. Supp. 1252, 1257 n.8 (D. Del. 1975) (claim dismissed on other grounds).

5. Christofferson v. Halliburton Co., 534 F.2d 1147, 1150-51 (5th Cir. 1976) (wife's loss of consortium claim denied). The lower court decision from the United States District Court for the Western District of Louisiana is unreported.

I. Loss of Consortium at Common Law

The corpus of American maritime law is basically independent of the common law, but admiralty courts have often looked to the common law position in addressing unanswered questions in the maritime jurisdiction.[6] This practice has been specifically applied in admiralty to questions regarding the protection of consortium and other societal interests between spouses and other family members.[7]

The traditional rule at common law was that a husband could recover for loss of consortium caused by negligent injury to his wife.[8] A major element of damages was the lost services of his wife[9] in addition to the usual nonpecuniary entitlements such as society, companionship, and affection.[10] The wife, however, was held to have no property right in the services of her husband[11] and, lacking power to sue in her own right, could not maintain such a cause of action.[12]

Although the husband's right of action for loss of consortium was clear if his wife was not fatally injured, no cause of action existed if she died from the injuries.[13] If one's spouse was killed as a result of a tortfeasor's negligence, early common law denied any recovery for injury to the societal relationships of the family members, since torts were not considered to survive death.[14]

With the subsequent creation of wrongful death statutes, however, states gradually began to grant recoveries for negli-

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6. *See, e.g.*, Moragne v. States Marine Lines, Inc., 398 U.S. 375, 408 (1970); The Harrisburg, 119 U.S. 199, 213-14 (1886); Schaeffer v. Michigan-Ohio Navigation Co., 416 F.2d 217, 221 (6th Cir. 1969); Igneri v. Cie. de Transports Oceaniques, 323 F.2d 257, 259-60 (2d Cir. 1963). *See also* G. Gilmore & C. Black, The Law of Admiralty § 1-16, at 45-47 (2d ed. 1975).

7. *See, e.g.*, Sea-Land Servs., Inc. v. Gaudet, 414 U.S. 573, 587-88 & n.21 (1974); Igneri v. Cie. de Transports Oceaniques, 323 F.2d 257, 260 (2d Cir. 1963).

8. Lippman, *The Breakdown of Consortium*, 30 Colum. L. Rev. 651, 652-54 (1930).

9. Note, *Judicial Treatment of Negligent Invasion of Consortium*, 61 Colum. L. Rev. 1341, 1343 (1961).

10. *E.g.*, Acuff v. Schmit, 248 Iowa 272, 274, 78 N.W.2d 480, 481-82 (1956); Note, *Judicial Treatment of Negligent Invasion of Consortium*, 61 Colum. L. Rev. 1341, 1343 (1961).

11. *E.g.*, Turner v. Heavrin, 182 Ky. 65, 68, 206 S.W. 23, 24 (1918).

12. Note, *Judicial Treatment of Negligent Invasion of Consortium*, 61 Colum. L. Rev. 1341, 1344 (1961). In Acuff v. Schmit, 248 Iowa 272, 278, 78 N.W.2d 480, 484 (1956), wherein the Iowa high court granted a wife's recovery, it was aptly stated that "at common law the husband and wife were considered as one, and he was the one."

13. Baker v. Bolton, 170 Eng. Rep. 1033 (K.B. 1808); 1 S. Speiser, Recovery for Wrongful Death § 1:1 (2d ed. 1975).

14. *See* Baker v. Bolton, 170 Eng. Rep. 1033 (K.B. 1808); 1 S. Speiser, *supra* note 13, § 1:1.

gently inflicted death,[15] which often included compensation for the societal losses included in consortium.[16] Such statutory recoveries in death actions were not restricted to the husband as in the case of nonfatal actions for loss of consortium.[17]

The advent of the Married Women's Acts granting a wife the power to sue[18] produced changes in the nonfatal actions for loss of consortium. Gradually, most American jurisdictions altered their position to extend protection to the wife's marital consortium interests as well as the husband's.[19] Some states, however, placed the wife and husband on equal footing by denying recovery to both.[20]

Presently, only ten states continue to deny recovery for loss of consortium to both husband and wife.[21] Thirty-nine American jurisdictions, including the District of Columbia and Puerto Rico, recognize the cause of action of both husband and wife for loss of consortium in nonfatal injury cases.[22] Three states have taken no

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15. *See* 1 S. SPEISER, *supra* note 13, § 1:9.

16. *E.g.*, Lithgow v. Hamilton, 69 So. 2d 776, 778 (Fla. 1954); Graysonia-Nashville Lumber Co. v. Carroll, 102 Ark. 460, 470, 144 S.W. 519, 522 (1912); Fuchs v. Kansas City S. Ry., 132 La. 782, 794, 61 So. 790, 794 (1912). *See generally* 1 S. SPEISER, *supra* note 13, § 3:49.

17. *E.g.*, Davis v. North Coast Transp. Co., 160 Wash. 576, 584-85, 295 P. 921, 924 (1931); Brickman v. Southern Ry., 74 S.C. 306, 319, 54 S.E. 553, 557 (1904); Wells v. Denver & R.G.W. Ry., 7 Utah 482, 485-86, 27 P. 688, 689 (1891). *See generally* 1 S. SPEISER, *supra* note 13, § 3:49.

18. Under the Married Women's Acts married women were released from common law disabilities and granted the same legal rights as if they were unmarried. *E.g.*, ARIZ. REV. STAT. § 25-214 (1976); COLO. REV. STAT. § 14-2-202 (1973); MASS. GEN. LAWS ANN. ch. 209, § 6 (West Cum. Supp. 1976); WASH. REV. CODE § 26.16.150 (1961).

19. For a discussion of the states extending a right of action to wives for loss of consortium, see note 22 and accompanying text *infra*.

20. *E.g.*, Baldwin v. State, 125 Vt. 317, 215 A.2d 492 (1965); Lockwood v. Wilson H. Lee Co., 144 Conn. 155, 128 A.2d 330 (1956); UTAH CODE ANN. § 30-2-4 (1976).

21. Connecticut: Lockwood v. Wilson H. Lee Co., 144 Conn. 155, 128 A.2d 330 (1956); Louisiana: McKey v. Dow Chem. Co., 295 So. 2d 516 (La. Ct. App. 1974); New Mexico: Roseberry v. Starkovich, 73 N.M. 211, 387 P.2d 321 (1963); North Carolina: Hinnant v. Tidewater Power Co., 189 N.C. 120, 126 S.E. 307 (1925); Texas: Garrett v. Reno Oil Co., 271 S.W.2d 764 (Tex. Ct. App. 1954); Utah: UTAH CODE ANN. § 30-2-4 (1976); Vermont: Baldwin v. State, 125 Vt. 317, 215 A.2d 492 (1965); Virginia: VA. CODE § 55-36 (1974); Washington: Ash v. S.S. Mullen, Inc., 43 Wash. 2d 345, 261 P.2d 118 (1953); Wyoming: Bates v. Donnafield, 481 P.2d 347 (Wyo. 1971).

22. The following jurisdictions judicially declared the right to recover for loss of consortium: Alabama: Swartz v. United States Steel Corp., 293 Ala. 439, 304 So. 2d 881 (1974); Alaska: Schreiner v. Fruit, 519 P.2d 462 (Alas. 1974); Arizona: City of Glendale v. Bradshaw, 108 Ariz. 582, 503 P.2d 803 (1972); Arkansas: Missouri Pac. Transp. Co. v. Miller, 227 Ark. 351, 299 S.W.2d 41 (1957); California: Rodriguez v. Bethlehem Steel Corp., 12 Cal. 3d 382, 525 P.2d 669, 115 Cal. Rptr. 765 (1974); Delaware: Yonner v. Adams, 167 A.2d 717 (Del. Super. Ct. 1961); Florida: Gates v. Foley, 247 So. 2d 40 (Fla. 1971); Georgia: Brown v. Georgia-Tennessee Coaches, Inc., 88 Ga. App. 519, 77 S.E.2d 24 (1953);

definitive stand, although two of these have implied that recovery would be granted, and the third has granted recovery to the husband.[23] In the case of the spouse's death, a majority of the states allow recovery for injury to a widow's or widower's consortium interests in wrongful death actions.[24]

II. Societal Losses at Early Admiralty

A. Wrongful Death Actions

Early admiralty cases recognized a general maritime cause of action for wrongful death. Some of the first admiralty references to elements of damage included in consortium were in those cases wherein recovery for lost society, services, and comfort was granted to parents, husbands, wives, and siblings of persons injured in maritime accidents.[25] Illustrative of the rationale used in

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Idaho: Nichols v. Sonneman, 91 Idaho 199, 418 P.2d 562 (1966); Illinois: Dini v. Naiditch, 20 Ill. 2d 406, 170 N.E.2d 881 (1960); Indiana: Troue v. Marker, 253 Ind. 284, 252 N.E.2d 800 (1969); Iowa: Acuff v. Schmit, 248 Iowa 272, 78 N.W.2d 480 (1956); Kentucky: Kotsiris v. Ling, 451 S.W.2d 411 (Ky. Ct. App. 1970); Maryland: Deems v. Western Md. Ry., 247 Md. 95, 231 A.2d 514 (1967); Massachusetts: Diaz v. Eli Lilly & Co., 364 Mass. 153, 302 N.E.2d 555 (1973); Michigan: Montgomery v. Stephan, 359 Mich. 33, 101 N.W.2d 227 (1960); Minnesota: Thill v. Modern Erecting Co., 284 Minn. 508, 170 N.W.2d 865 (1969); Missouri: Novak v. Kansas City Transit, Inc., 365 S.W.2d 539 (Mo. 1963); Montana: Duffy v. Lipsman-Fulkerson & Co., 200 F. Supp. 71 (D. Mont. 1961) (applying Montana law); Nebraska: Cooney v. Moomaw, 109 F. Supp. 448 (D. Neb. 1953) (applying Nebraska law); Nevada: General Elec. Co. v. Bush, 88 Nev. 360, 498 P.2d 366 (1972); New Jersey: Ekalo v. Constructive Serv. Corp., 46 N.J. 82, 215 A.2d 1 (1965); New York: Millington v. Southeastern Elevator Co., 22 N.Y.2d 498, 239 N.E.2d 897, 293 N.Y.S.2d 305 (1968); Ohio: Clouston v. Remlinger Oldsmobile Cadillac, Inc., 22 Ohio St. 2d 65, 258 N.E.2d 230 (1970); Pennsylvania: Hopkins v. Blanco, 224 Pa. Super. Ct. 116, 302 A.2d 855 (1973); Puerto Rico: Gonzalez v. Fireman's Fund Ins. Co., 385 F. Supp. 140 (D.P.R. 1974) (applying Puerto Rican law); South Dakota: Hoekstra v. Helgeland,78 S.D. 82, 98 N.W.2d 669 (1959); Wisconsin: Moran v. Quality Aluminum Casting Co., 34 Wis. 2d 542, 150 N.W.2d 137 (1967).

Ten states have statutorily created the cause of action: Colorado: Colo. Rev. Stat. § 14-2-209 (1973); Kansas: Act of May 4, 1976, ch. 172, § 5, 1976 Kan. Sess. Laws 663; Maine: Me. Rev. Stat. tit. 19, § 167-A (Cum. Supp. 1976); Mississippi: Miss. Code Ann. § 93-3-1 (1972); New Hampshire: N.H. Rev. Stat. Ann. § 507:8-a (1968); Oklahoma: Okla. Stat. Ann. tit. 32, § 15 (West 1976); Oregon: Or. Rev. Stat. § 108.010 (1975); South Carolina: S.C. Code § 10:2593 (Cum. Supp. 1975); Tennessee: Tenn. Code Ann. § 25-109 (Cum. Supp. 1976); West Virginia: W. Va. Code § 48-3-19a (1976).

23. Hawaii: Nishi v. Hartwell, 52 Hawaii 188, 473 P.2d 116 (1970) (implying wife's right to recover for loss of consortium); North Dakota: Milde v. Leigh, 75 N.D. 418, 28 N.W.2d 530 (1947) (granting a husband's recovery); Rhode Island: Mariani v. Nanni, 95 R.I. 153, 185 A.2d 119 (1962) (implying wife's right to recover for loss of consortium).

24. Speiser identifies at least 30 states that permit recovery for the damage elements normally included in consortium. 1 S. Speiser, *supra* note 13, § 3:49.

25. *E.g.*, The E.B. Ward, Jr., 23 F. 900, 901-02 (C.C.E.D. La. 1885); The Sea Gull, 21 F. Cas. 909, 910 (Chase, Circuit Justice, 1865) (No. 12,578); Plummer v. Webb, 19 F. Cas. 891, 892 (Story, Circuit Justice, 1827) (No. 11,233); The Garland, 5 F. 924, 925 (E.D.

justifying such recoveries was the principle espoused by Chief Justice Chase in *The Sea Gull.*[26] He commented that "it better becomes the humane and liberal character of proceedings in admiralty to give than to withhold the remedy, when not required to withhold it by established and inflexible rules."[27]

In a later case, *The Harrisburg,* the Supreme Court abolished the general maritime wrongful death cause of action,[28] holding that any such action would have to be created by statute as in land based law.[29] The Court did not question the propriety of the damage elements, such as loss of society, which had been previously pursued in wrongful death actions, but merely required statutory authorization for wrongful death suits before further recoveries could be contemplated for societal or any other losses arising from death.[30]

B. Consortium Recoveries by Husbands in Injury Cases

In addition to the pre-*Harrisburg* recoveries for loss of comfort, society, and services in cases of fatality, compensation was also awarded to husbands in admiralty courts for these elements in cases of nonfatal injuries to their wives.[31] In 1912, the right of a husband to maintain such a claim in admiralty was challenged in *New York & Long Branch Steamboat Co. v. Johnson,*[32] wherein the United States Court of Appeals for the Third Circuit affirmed a damage award to an injured steamboat passenger's husband for his loss of her aid, comfort, and society.[33] In upholding the existence of the husband's cause of action in admiralty, the court cited

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Mich. 1881); Cutting v. Seabury, 6 F. Cas. 1083, 1084 (D. Mass. 1860) (No. 3521) (dismissed on other grounds).

26. 21 F. Cas. 909 (Chase, Circuit Justice, 1865) (No. 12,578).

27. *Id.* at 910.

28. 119 U.S. 199, 213 (1886).

29. *Id.*

30. *Id.*

31. *E.g.,* The Little Silver, 189 F. 980, 987 (D.N.J. 1911) (recovery for loss of injured wife's aid, comfort, and society), *aff'd sub nom.* New York & Long Branch Steamboat Co. v. Johnson, 195 F. 740 (3d Cir. 1912); Maryland v. Miller, 180 F. 796, 811 (D. Md. 1910) (recovery for loss of injured wife's services and companionship), *modified,* 194 F. 775 (4th Cir. 1911) (husband's recovery affirmed), *cert. denied,* 225 U.S. 703 (1912); The St. Nicholas, 49 F. 671, 673 (S.D. Ga. 1891) (action included claim for husband's loss of comfort and services); *accord,* Plummer v. Webb, 19 F. Cas. 891, 892 (Story, Circuit Justice, 1827) (No. 11,233); Cutting v. Seabury, 6 F. Cas. 1083, 1084 (D. Mass. 1860) (No. 3521).

32. 195 F. 740 (3d Cir. 1912).

33. *Id.* at 742. The district court's decision enumerated the elements of Mr. Johnson's claim, *i.e.,* deprivation of the aid, comfort, and society of his wife. The Little Silver, 189 F. 980, 987 (D.N.J. 1911).

The Sea Gull,[34] *The Highland Light*,[35] and *Plummer v. Webb*[36] —all admiralty death cases that had recognized loss of services or society as proper damage elements in admiralty.[37] Although *The Harrisburg* had invalidated the general maritime wrongful death action, the court in *Johnson* found that the damage elements of lost aid, comfort, and society were still proper since the husband's cause of action was a valid maritime tort.[38]

After the *Johnson* decision, courts continued to allow maritime claims of husbands in nonfatal injury cases for loss of consortium, services, and society.[39] In *Allen v. Matson Navigation Co.*,[40] for example, the Ninth Circuit allowed an injured passenger and her husband to recover for her injuries and his loss of society, services, and consortium, which had been occasioned by the wife's shipboard fall.[41] Similarly, the Eighth Circuit has affirmed a maritime recovery for loss of an injured wife's services.[42]

Although injuries to the consortium interests of husbands have been compensated in admiralty courts, no early cases have been identified granting the same relief to the wife of a man injured at sea.[43]

III. Contemporary Developments in Admiralty

Since 1960, there have been two pivotal cases in admiralty bearing on the question of consortium. *Igneri v. Cie. de Transports Oceaniques*[44] is the leading case denying a wife's maritime claim for loss of consortium based on nonfatal injury to her husband. *Sea-Land Services, Inc. v. Gaudet*[45] marked the redeclara-

34. 21 F. Cas. 909 (Chase, Circuit Justice, 1865) (No. 12,578).

35. 12 F. Cas. 138 (Chase, Circuit Justice, 1867) (No. 6477).

36. 19 F. Cas. 891 (Story, Circuit Justice, 1827) (No. 11,233).

37. 195 F. 740, 742 (3d Cir. 1912).

38. *Id.* at 741.

39. *E.g.*, Allen v. Matson Navigation Co., 225 F.2d 273, 274 (9th Cir. 1958); *In re* Wood, 145 F. Supp. 848, 861 (W.D. Mo. 1956), *aff'd sub nom.* Loc-Wood Boat & Motors, Inc. v. Rockwell, 245 F.2d 306 (8th Cir. 1957).

40. 255 F.2d 273 (9th Cir. 1958).

41. *Id.* at 274, 282. Although the court declined to specify whether maritime law or state law was applied in measuring the defendant's liability, the court did note that the husband and wife would be permitted to bring their suit under either maritime or state law. *Id.* at 277 & n.5.

42. Loc-Wood Boat & Motors, Inc. v. Rockwell, 245 F.2d 306, 311 (8th Cir. 1957). The district court decision specified that the recovery included damages for loss of services. *In re* Wood, 145 F. Supp. 848, 861 (W.D. Mo. 1956).

43. *See* Igneri v. Cie. de Transports Oceaniques, 323 F.2d 257, 265-66 (2d Cir. 1963).

44. 323 F.2d 257 (2d Cir. 1963).

45. 414 U.S. 573 (1974).

tion of the right to recover in admiralty for injury to consortium interests in the instance of the spouse's death. Since these cases significantly affect the resolution of the consortium issue in nonfatal cases, they merit close examination.

A. *Initial Denial of the Wife's Claim for Loss of Consortium*

In the 1963 case of *Igneri v. Cie. de Transports Oceaniques,* the Second Circuit expressly denied a wife's maritime action for loss of consortium.[46] In addition to denying the wife's cause of action, which sought recovery based on injuries to her longshoreman husband, the court indicated that it would also deny a claim for loss of consortium brought by the husband of an injured woman seaworker.[47] The court disagreed with the *Johnson* holding, criticizing *Johnson's* use of overruled wrongful death cases to support recovery for loss of consortium in an injury action, but did not comment on any of the other cases that had awarded damages to husbands of injured women in admiralty.[48] The *Igneri* court contended that the precedents cited in *Johnson* had been overruled in *The Harrisburg* and went beyond the traditional damages allowed in admiralty by granting relief for nonpecuniary elements, such as loss of comfort and society.[49] No authority was provided from general maritime law to support the claim that nonpecuniary damages were not the tradition in admiralty, but rather the court cited cases that construed federal wrongful death statutes to deny such damages.[50]

The court based its denial of the consortium claim on three grounds. First, it found the common law jurisdictions in conflict. At the time of the decision, thirty-one American jurisdictions had decided the question of a wife's consortium action: nineteen had denied the wife's action and twelve had allowed it.[51] With such a lack of uniformity among the jurisdictions, the court was unpersuaded that the common law position supported granting the wife's claim.[52] However, the court noted that if uniformity had existed, it would have created a "gravitational pull" on admiralty to allow the action.[53]

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46. 323 F.2d 257, 268 (2d Cir. 1963).
47. *Id.*
48. *Id.* at 265.
49. *Id.*
50. *Id.*
51. *Id.* at 260-61.
52. *Id.* at 267.
53. *Id.*

Second, the court looked to the Jones Act[54] and the Death on the High Seas Act (DOHSA)[55] for analogy. The Jones Act was established in 1920 to allow seamen or their beneficiaries to recover from employers for injury or death caused by the employer's negligence.[56] Negligence actions had been previously permitted under general maritime law,[57] but not when brought by a seaman.[58] DOHSA, which was also enacted in 1920, provided wrongful death relief for negligently caused death occurring on the high seas.[59] Both statutes, as *Igneri* noted,[60] have been construed to deny relief for nonpecuniary losses such as loss of society or consortium.[61] *Igneri* asserted that it would be anomalous to allow recovery for loss of consortium under a general maritime negligence action when it is denied in the statutory remedies of both the Jones Act and DOHSA.[62]

Third, the court refused to extend the coverage of the doctrine of unseaworthiness to the wife's claim for loss of consortium.[63] The doctrine of unseaworthiness places an absolute duty on the shipowner to provide a seaworthy vessel.[64] The shipowner is held strictly liable for injuries to seamen caused by the unseaworthiness of the ship. Justification for such special protection has generally been based on the high risk work of the seaman.[65] *Igneri* found it appropriate to limit the scope of the absolute protection of the doctrine of unseaworthiness to the one directly or physically injured.[66]

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54. 46 U.S.C. § 688 (1970).

55. 46 U.S.C. §§ 761-768 (1970).

56. For a discussion of the Jones Act and its purposes, see G. GILMORE & C. BLACK, *supra* note 6, § 6-20, at 325-28.

57. *Id.* § 6-4, at 278.

58. *E.g.*, The Osceola, 189 U.S. 158, 175 (1903).

59. 46 U.S.C. § 761 (1970). For a general discussion of DOHSA, see G. GILMORE & C. BLACK, *supra* note 6, § 6-31, at 364-65.

60. 323 F.2d at 266 & n.21.

61. *E.g.*, First Nat'l Bank v. National Airlines, Inc., 288 F.2d 621, 624 (2d Cir. 1961); Middleton v. Luckenback S.S. Co., 70 F.2d 326, 330 (2d Cir. 1934); Tate v. C.G. Willis, Inc., 154 F. Supp. 402, 403 (E.D. Va. 1957); Gerardo v. United States, 101 F. Supp. 383, 385 (N.D. Cal. 1951); Westerberg v. Tide Water Assoc. Oil Co., 304 N.Y. 545, 110 N.E.2d 395 (1953).

62. 323 F.2d at 267.

63. *Id.* at 267-68.

64. *E.g.*, Seas Shipping Co. v. Sieracki, 328 U.S. 85, 94-95 (1946); Mahnich v. Southern S.S. Co., 321 U.S. 96, 103-05 (1944).

65. *E.g.*, Seas Shipping Co. v. Sieracki, 328 U.S. 85, 94-95 (1946); Mahnich v. Southern S.S. Co., 321 U.S. 96, 103-04 (1944). *See generally* G. GILMORE & C. BLACK, *supra* note 6, § 6-41, at 392-93.

66. *Igneri* recognized that the wife's relational interests may have been real, but those interests ranked lower in qualifying for economic protection than the person of the hus-

Some courts hearing injury cases subsequent to *Igneri* and prior to *Gaudet* adopted the Second Circuit view that loss of consortium is not recoverable in admiralty.[67]

B. Re-creation of the General Maritime Wrongful Death Action

In 1970, the Supreme Court removed the barrier that prevented admiralty recoveries for loss of consortium in wrongful death cases. In *Moragne v. States Marine Lines, Inc.*,[68] the Court unanimously overturned *The Harrisburg,* which had proscribed a maritime wrongful death action absent statutory authorization.[69] In judicially declaring the existence of a general maritime wrongful death action, *Moragne* resurrected the admiralty concept of liberal and humanitarian relief, which had been embraced in the pre-*Harrisburg* wrongful death cases.[70] *Moragne's* broad declaration of a general maritime cause of action for wrongful death has been described as reducing the specific maritime wrongful death statutes, *i.e.*, the Jones Act and DOHSA, to the status of non-statutory restatements of the law.[71] *Moragne* left the various potential damage elements of the re-created wrongful death action to be sifted in the lower courts.[72] After some years of refining the permissible damages, the lower courts had arrived at no clear consensus regarding societal losses.[73]

C. Recovery of Societal Losses in Wrongful Death Cases

In 1974, the Supreme Court's decision in *Sea-Land Services, Inc. v. Gaudet* permitted a longshoreman's widow to maintain a *Moragne* wrongful death action under the doctrine of unseaworthiness.[74] The widow's claim was allowed despite a recovery by

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band. 323 F.2d at 268. As justification for that decision, the court stated, "When our law imposes strict liability, it often accompanies this with limitations, not existing in the case of liability based on fault, as to amount, as to person benefited, or as to both." *Id.*

67. *E.g.*, Sanseverino v. Alcoa S.S. Co., 276 F. Supp. 894, 896 (D. Md. 1967); Davidson v. Schlussel Reederei KG, 295 So. 2d 700 (Fla. Dist. Ct. App. 1974); Rogers v. City of New York, 46 Misc. 2d 373, 377, 295 N.Y.S.2d 604, 609 (Sup. Ct. 1965).

68. 398 U.S. 375 (1970).

69. *Id.* at 378, 404-05.

70. *Id.* at 387. *See* note 27 and accompanying text *supra.*

71. G. GILMORE & C. BLACK, *supra* note 6, § 6-32, at 367-68.

72. 398 U.S. at 408.

73. Most courts were denying recovery for societal losses. *E.g., In re* M/V Elaine Jones, 480 F.2d 11 (5th Cir. 1973); *In re* United States Steel Corp., 436 F.2d 1256 (6th Cir. 1970); Savard v. Marine Contracting, Inc., 296 F. Supp. 1171 (D. Conn. 1969). *Contra, In re* Farrell Lines, Inc., 339 F. Supp. 91 (E.D. La. 1971); *In re* Sincere Navigation Corp., 329 F. Supp. 652 (E.D. La. 1971).

74. 414 U.S. 573, 574-75 (1974).

the husband for his personal injuries prior to his death.[75] The Court announced that appropriate damages in a general maritime wrongful death case could include compensation for loss of support, services, and society, as well as funeral expenses.[76]

Gaudet did not face the issue of loss of consortium or society in nonfatal cases. Recognizing, however, that wrongful death recoveries for injuries to relational interests were relied on in *Johnson* to justify such a recovery in a nonfatal case,[77] a review of the *Gaudet* decision is appropriate.

The traditional objections to consortium actions, which had been raised and refuted in most land courts by 1974,[78] were likewise rejected in *Gaudet* for maritime wrongful death actions for loss of society. First, the Court dismissed the contention that societal damages would be too speculative by pointing out that juries often calculate damages for pain and suffering and that consortium losses would be no more difficult to compute.[79] The Court noted that admiralty courts, as well as common law courts, had previously awarded damages for loss of consortium in nonfatal injury cases.[80]

Second, the Court perceived no threat of double recovery by husbands and wives that could not be remedied by procedural

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75. *Id.*

76. *Id.* at 584. The Court indicated that consortium encompasses society, and society was defined to include "love, affection, care, attention, companionship, comfort, and protection." *Id.* at 585 & n.17, 589. The Supreme Court's recognition of services and society as compensable interests is relevant to an analysis of loss of consortium or society in nonfatal admiralty cases and will be more fully examined. The recovery allowed for loss of support and funeral expenses has only incidental impact on the present question.

77. Notes 34-37 and accompanying text *supra.*

78. State courts have faced and resolved the following four basic objections to the cause of action for loss of consortium. First, there is a potential for double recovery from defendants if both spouses can maintain actions based on one physical injury. Second, damages to the spouse who claims loss of consortium may be too speculative or remote to justify compensation. Third, if the relational interests between spouses are granted protection, a barrage of others with similar relational interests may descend on the courts also seeking protection for their interests. Fourth, some have urged that the decision to grant or deny consortium actions should be left to the legislatures.

For penetrating analyses and treatment of these objections in favor of allowing the cause of action, see Rodriguez v. Bethlehem Steel Corp., 12 Cal. 3d 382, 525 P.2d 669, 115 Cal. Rptr. 765 (1974); Diaz v. Eli Lilly & Co., 364 Mass. 153, 302 N.E.2d 555 (1973); Millington v. Southeastern Elevator Co., 22 N.Y.2d 498, 239 N.E.2d 897, 293 N.Y.S.2d 305 (1968).

79. 414 U.S. at 589.

80. *Id.* at 589 & n.25. Although the Supreme Court cited *Johnson* as an admiralty case granting recovery for loss of consortium, it should be mentioned that the Court did not thereby necessarily express approval of the *Johnson* decision, since the Court also noted that *Igneri* represented a contrary view.

controls and, in fact, declared that the only risk of a second recovery was for the loss of Mr. Gaudet's support, since he had previously obtained a personal injury recovery.[81] The Court emphasized that there was no threat of overlap between the husband's personal injury action and the wife's recovery for services or society, as the right of action for those elements accrued not to the husband, but uniquely to his dependants.[82] The opinion underscored the fact that no overlap could have existed in this case by commenting that the wife's claims for services, society, and funeral expenses "could not accrue until the [husband's] death."[83]

Third, a frequent objection to common law consortium actions has been that defendants would be subjected to a multiplicity of suits by any number of others with some relationship to the physically injured person.[84] The *Gaudet* decision did not raise this issue, but the Court apparently did not share such an apprehension. The Court indicated that remedy should be extended not only to the spouse, but to all of the decedent's other dependents as well.[85]

Fourth, some courts *terrane* have argued that if change is desirable, it should be effectuated by the legislatures.[86] The Supreme Court did not embrace this view. In fact, the *Gaudet* opinion judicially declared the right to recover societal losses despite legislative implication to the contrary. The dissent noted that the Jones Act and DOHSA have been read to deny consortium claims,[87] but the majority was not deterred from permitting the cause of action.[88]

In addition to resolving the above objections, the Court also turned to the common law position on wrongful death recovery to find support in granting relief for loss of society. The Court

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81. *Id.* at 591-92.

82. *Id.*

83. *Id.* at 592. This dictum was subsequently relied on by the Fifth Circuit as a clear expression by the Supreme Court that the loss of consortium should not be recoverable in admiralty unless the claimant's spouse is killed. *See* Christofferson v. Halliburton Co., 534 F.2d 1147, 1150-51 (5th Cir. 1976). For a discussion of *Christofferson*, see notes 92-96, 116-122 and accompanying text *infra*.

84. *E.g.*, McKey v. Dow Chem. Co., 295 So. 2d 516, 518 (La. Ct. App. 1974).

85. 414 U.S. at 584.

86. *E.g.*, Bates v. Donnafield, 481 P.2d 347, 349 (Wyo. 1971); Roseberry v. Starkovich, 73 N.M. 211, 218, 387 P.2d 321, 326-27 (1963); Ash v. S.S. Mullen, Inc., 43 Wash. 2d 345, 350, 261 P.2d 118, 120 (1953).

87. 414 U.S. at 605-06 (Powell, J., dissenting).

88. The decision expressly noted that DOHSA recoveries were restricted to pecuniary losses, but the Court opted to permit claims for nonpecuniary losses under the general maritime wrongful death action. *Id.* at 586-87.

found what was referred to as a "clear majority" of the jurisdictions granting such recoveries.[89] Besides aligning the maritime position with the majority of the states, *Gaudet* reaffirmed admiralty's adherence to the earlier proclaimed principles of humanitarian and liberal relief. The Court commented that it felt compelled to allow the remedy to comply with the "humanitarian policy of the maritime law to show 'special solicitude' for those who are injured within its jurisdiction."[90]

Thus, the Supreme Court clearly established protection of relational interests in admiralty cases involving death.[91] But the question of a claim for loss of consortium in cases of serious injury was not answered. In cases subsequent to *Gaudet,* divergent views on the issue have arisen.

D. The Present Uncertain Status of Consortium in Nonfatal Cases

In *Christofferson v. Halliburton Co.,*[92] the only federal appellate decision since *Gaudet* addressing recovery for loss of consortium in a nonfatal situation, the Fifth Circuit took a strict stare decisis approach. The court relied on *Igneri* as the most recent precedent relating to a wife's claim in nonfatal cases, but did not reevaluate that case's rationale.[93] Further, *Christofferson* simply distinguished the recovery in *Gaudet* as a death action[94] and ignored a plea that the principles of liberality and humanitarian relief affirmed by the Supreme Court should apply equally where the spouse is only seriously injured.[95] Instead of seeing support in *Gaudet* for the nonfatal claim, the court interpreted *Gaudet* as being authority to deny the claim by relying primarily on the Supreme Court's dictum in *Gaudet* that the wife's loss of society and services did not "accrue until [her husband's] death."[96]

In contrast, one federal district court and one state court in post-*Gaudet* admiralty cases have declared the right of spouses

89. *Id.* at 587 & n.21.

90. *Id.* at 588.

91. Lower courts have consistently followed the *Gaudet* decision in wrongful death cases. *E.g.,* Skidmore v. Grueninger, 506 F.2d 716, 728-29 (5th Cir. 1975); Renner v. Rockwell Int'l. Corp., 403 F. Supp. 849, 852 (C.D. Cal. 1975); Hammill v. Olympic Airways, S.A., 398 F. Supp. 829, 837-38 (D.D.C. 1975).

92. 534 F.2d 1147 (5th Cir. 1976).

93. *Id.* at 1149-50.

94. *Id.* at 1150.

95. *Id.* at 1152-53 (Freeman, J., dissenting).

96. *Id.* at 1150 (quoting from *Gaudet,* 414 U.S. at 592).

to recover in injury cases for lost consortium.[97] These courts were unable to justify granting relief to the widow or widower while denying it to one whose spouse is severely injured. Another federal district court implied that loss of consortium upon nonfatal injury is recoverable in admiralty and noted that although *Gaudet* did not directly face this issue, it apparently did not disapprove of such relief since the Supreme Court relied on *Johnson* in justifying relief for the fatal cases.[98]

The present uncertainty generated by these opposing opinions is compounded by the conflict between the Second Circuit's stand in *Igneri* against consortium claims by either spouse[99] and the Third, Fourth, Eighth, and Ninth Circuits' past histories of granting recovery to husbands for loss of society, consortium, or services.[100]

A resolution of the conflict can best be suggested following an examination of three factors: (1) the effect of admiralty's past treatment of the consortium question, (2) the impact of the changing common law position on consortium, and (3) the influence of the wrongful death recoveries for loss of consortium in admiralty.

IV. Justifications for Nonfatal Consortium Actions in Admiralty

A. Consortium's Past in Admiralty

A basic justification for a remedy for lost consortium in injury cases is the simple fact that such recoveries have been previously allowed in admiralty. Despite the Second Circuit's ill-supported statement that the tradition of admiralty is to restrict damages to those of a pecuniary nature,[101] there is a substantial history of recoveries of nonpecuniary damages in maritime courts, which have been based on relational interests in both fatal[102] and nonfatal[103] cases. Although the past recoveries cannot necessarily

97. Lemon v. Bank Lines, Ltd., 411 F. Supp. 677, 680 (S.D. Ga. 1976); Pesce v. Summa Corp., 54 Cal. App. 3d 86, 92, 126 Cal. Rptr. 451, 454-55 (1975).

98. Francis v. Pan Am. Trinidad Oil Co., 392 F. Supp. 1252, 1257 n.8 (D. Del. 1975).

99. 323 F.2d 257, 268 (2d Cir. 1963). Notes 46-47 and accompanying text *supra*.

100. Allen v. Matson Navigation Co., 255 F.2d 273, 274, 282 (9th Cir. 1958); Loc-Wood Boat & Motors, Inc. v. Rockwell, 245 F.2d 306, 311 (8th Cir. 1957); New York & Long Branch Steamboat Co. v. Johnson, 195 F. 740, 742 (3d Cir. 1912); Maryland v. Miller, 194 F. 775 (4th Cir. 1911). Notes 31, 39 and accompanying text *supra*.

101. Igneri v. Cie. de Transports Oceaniques, 323 F.2d 257, 265 (2d Cir. 1963). Notes 49-50 and accompanying text *supra*.

102. Note 25 and accompanying text *supra*.

103. Notes 31, 39 and accompanying text *supra*.

demand a like result today, deviation therefrom should not be made lightly.

The past recoveries in nonfatal injury cases have involved only husbands, but it is doubtful today that a restriction based on sex could be maintained.[104] If a husband's cause of action for loss of consortium has continued viability in admiralty, the wife should not be denied equivalent protection for her entitlement to the elements of consortium in the marriage relation. Certainly the loss to a wife, who is deprived of the love, comfort, society, and companionship of her spouse, is no less severe than a similar loss sustained by a husband.

Both the Second Circuit in *Igneri* and the Fifth Circuit in *Christofferson* felt justified in denying consortium recoveries to spouses under the general maritime law, since recoveries for injury under the Jones Act provisions have traditionally been limited to the one directly injured.[105] Thus, it is argued that the apparent intent of Congress to deny a statutory recovery for loss of consortium should be carried over to the general maritime negligence action. Following this rationale would avoid the anomaly of granting compensation to some spouses under the general maritime law but denying it to others under the Jones Act.

In contrast to this reasoning it should first be noted that historically recoveries for loss of consortium and services have been allowed under the general maritime law despite the existence of the Jones Act and its restrictive rule.[106] Second, the Supreme Court undermined any reliance on analogy to the Jones Act by expressly granting a recovery for loss of society in a fatal injury case, despite the denial of such relief under both the Jones Act and DOHSA.[107] If an analogy to the statutes was unpersuasive in the case of general maritime wrongful death actions, the same result should be expected in a negligent injury case.

In addition to consortium actions based on negligence, the propriety of such claims based on unseaworthiness should be examined. The Second Circuit hesitated to expand the strict liability doctrine of unseaworthiness to provide protection for the marital interests of the spouse, particularly since that doctrine imposes strict liability on shipowners.[108] The Supreme Court,

104. *See, e.g.*, Duncan v. General Motors Corp., 499 F.2d 835 (10th Cir. 1974) (equivalent treatment of husband and wife constitutionally demanded).

105. 534 F.2d 1147, 1148-49 (5th Cir. 1976); 323 F.2d 257, 266-67 (2d Cir. 1963).

106. Notes 31, 39 and accompanying text *supra*.

107. Notes 87-88 and accompanying text *supra*.

108. Igneri v. Cie. de Transports Oceaniques, 323 F.2d 257, 267-68 (2d Cir. 1963).

however, undermined this position when it allowed recovery for loss of society and services under this very doctrine in *Gaudet*.[109] The application of the unseaworthiness doctrine is arguably as appropriate in the nonfatal case. In fatal and nonfatal cases alike, the consortium interests of a seaman's spouse are subject to the same probability of injury as is the person of the seaman in the hazardous work at sea. As long as *Gaudet* remains the law for wrongful death, it would be difficult to justify a contrary result in injury cases.

B. The "Gravitational Pull" of the Common Law

Although the common law is not determinative in admiralty, it is persuasive. The Second Circuit found a lack of uniformity among the courts *terrane* in 1963 when *Igneri* was decided, but these courts are presently approaching unanimity in granting relief for loss of consortium in nonfatal cases.[110] This increasing number of states permitting recovery has intensified the common law's "gravitational pull" on admiralty.

The strength of the common law stand, with forty jurisdictions having allowed nonfatal consortium actions, should not be ignored, particularly in light of the Supreme Court's willingness in *Gaudet* to align the maritime position with a majority of only twenty-seven of forty-four land jurisdictions.[111] Certainly if admiralty is to take a position opposite the onrushing tide of states that allow recovery in injury cases, substantial justification should be forthcoming. Additionally, it would seem highly inconsistent for the admiralty courts, which profess liberality and humanitarian relief, to be more strict than the courts *terrane*, which now generally grant relief for injury to a spouse's consortium interests.

C. Analogy to the General Maritime Wrongful Death Action

With consortium interests so clearly protected under the general maritime wrongful death action,[112] it is worthwhile to assess whether a like or contrary result is appropriate in the case of nonfatal injury. The early general maritime wrongful death cases provided protection for relational interests. Although *The*

Notes 63-66 and accompanying text *supra*.

109. 414 U.S. 573, 574-75 (1974).

110. Note 22 and accompanying text *supra*.

111. 414 U.S. 573, 587 & n.21 (1974). Text accompanying note 89 *supra*.

112. Note 91 and accompanying text *supra*.

Harrisburg overruled those decisions, the Supreme Court has subsequently exonerated the reasoning and policy of those early cases. *Igneri* criticized the Third Circuit's use of the pre-*Harrisburg* wrongful death cases in justifying an inter vivos recovery for the elements of consortium, but it should again be noted that *The Harrisburg* had not questioned the compensability of lost society, services, or consortium for admiralty torts.[113] It only announced that future wrongful death cases (whether for consortium or otherwise) could not be maintained without statutory authorization. Thus, the Third Circuit's reliance in *Johnson* on the declarations that societal relationships were protected interests in admiralty was probably not misplaced. In any case, the Supreme Court saw the error of the *Harrisburg* rule by reinstating the general maritime wrongful death action in *Moragne*[114] and redeclaring the propriety of allowing recovery for societal losses in *Gaudet*.[115]

The most likely justification for overruling the *Johnson* view and restricting recovery to fatal cases would be a reliance on the Supreme Court's statement in *Gaudet* that loss of services and society (and thus consortium) could not accrue until death. Such was the Fifth Circuit's rationale in *Christofferson*.[116] Several factors, however, appear to discredit *Christofferson's* interpretation of the *Gaudet* statement. First, the context of the statement does not concern the issue of maintaining a nonfatal action for loss of services or society. The Court was not facing that issue. In the portion of the opinion containing the statement, the Supreme Court was drawing the clearest possible distinction between the husband's inter vivos recovery and the wife's postmortem recovery to prove the absence of overlap between the claims. The crux of the argument was that her claims for society and services were unique to her, and he had no part therein.[117] No suggestion whatever was made that overlap would have existed had she made an inter vivos claim for loss of consortium, joined with his personal injury claim.

Second, elsewhere in the opinion the Court supported its position that loss of society was a proper and measurable element of loss in the case of fatality by stressing that admiralty courts

113. 119 U.S. 199, 213 (1886). Note 30 and accompanying text *supra*.
114. 398 U.S. 375, 378, 404-05 (1970).
115. 414 U.S. 573, 584 (1974).
116. 534 F.2d 1147, 1150 (5th Cir. 1976). Note 96 and accompanying text *supra*.
117. 414 U.S. 573, 591-92 (1974). Notes 81-83 and accompanying text *supra*.

had previously granted recoveries for loss of consortium in injury cases.[118] If the Court was not expressing approval of the nonfatal consortium actions, at least it recognized the reality of their past existence. Similarly, numerous admiralty actions have been maintained for loss of services in nonfatal cases, and the Supreme Court did not quarrel with the propriety of these suits.[119] Certainly the loss of domestic and household services described by the Supreme Court,[120] for which compensation is permitted in a wrongful death case, would be potentially a very real element of damage in a case where the spouse is seriously disabled.

Finally, if the dictum regarding accrual of loss was intended to preclude inter vivos recoveries for loss of consortium, no supporting justification was provided. It is unlikely that the Court would summarily abolish future consortium claims in nonfatal injury cases without some explanation, especially since the Court had expressly recognized their prior occurance in admiralty.[121]

Perhaps the better explanation is the one urged by the dissent in *Christofferson*[122]—that the Supreme Court was speaking to the accrual of the wrongful death cause of action as a whole, which occurs after death. In any case, whatever the Supreme Court intended in its dictum, it is not likely that it was a prohibition of nonfatal consortium actions.

Another possible justification for drawing the line of recovery at death lies in the assertion that the injury to the marriage relationship is remedied through the claim of the physically injured spouse in the nonfatal case, but that in the case of fatality, the spouse can recover independently for societal losses through a wrongful death action. It is not only difficult to formulate plausible support for that position, but such an assertion is also inconsistent with the *Gaudet* proceeding. If in admiralty an inter vivos recovery includes compensation for both the physical injuries and the injury to the marital relationship, then Mr. Gaudet made full recovery for Mrs. Gaudet in his personal injury suit before his death. However, a personal injury action in admiralty apparently does not rectify the societal losses of the spouse. Otherwise, Mrs. Gaudet's subsequent recovery would have been denied. It is

118. *Id.* at 589 & n.25. Note 80 and accompanying text *supra.*

119. Notes 31, 39 and accompanying text *supra.*

120. The Supreme Court enumerated the loss of "the nurture, training, education, and guidance" of children as well as "[s]ervices . . . performed at home or for [the] spouse" as compensable services. 414 U.S. 573, 585 (1974).

121. *Id.* at 589 & n.25.

122. 534 F.2d 1147, 1153 (5th Cir. 1976) (Freeman, J., dissenting).

doubtful that Mr. Gaudet was held to recover for injury to his wife's consortium interests up to the point of death and that she was allowed to recover for the lost society only as it was intensified by his death. There was, in fact, no clarification that her damages were to be only for any increment of loss caused by death.

The existence of a cause of action for loss of consortium in the case of death argues strongly for its uniform recognition by admiralty courts in cases of nonfatal injury. The losses sustained by the spouse of one who is injured may often be more intense than those of the widow or widower, particularly in the face of the possibility of remarriage by one whose spouse was killed, where some possible fulfillment in a subsequent marriage relationship is possible. For the one who remains faithful and devoted to a permanently incapacitated spouse, however, there is no such opportunity. As great as the total loss at death may be, the surviving spouse is not left with the lifelong nursing of a loved one who is now incapable of reciprocating with comfort, companionship, services, and society in some degree. Thus, if the widow and widower are entitled to remedy for lost consortium, relief is just as appropriate for spouses of the maimed and crippled.

V. Conclusion

Admiralty boasts of providing "special solicitude" for those injured within its jurisdiction.[123] A remedy for one who is harmed under that umbrella should be liberally granted, according to the Supreme Court, unless it is precluded by "established and inflexible rules."[124] A severe physical injury to a man or woman may result in a real and distinct injury to the spouse who loses the consortium of the physically injured spouse. There are no "established and inflexible rules" in admiralty that would preclude compensation for such harm. In fact, the history of past recoveries in admiralty, the present trends among land jurisdictions, and the current decisions permitting such claims in maritime wrongful death cases all argue convincingly for a clear declaration of the right of spouses to pursue claims for loss of consortium in nonfatal cases.[125] Although a clarification of the law would

123. Sea-Land Servs., Inc. v. Gaudet, 414 U.S. 573, 588 (1974).

124. *Id.* at 583.

125. It is significant to note that when the Fifth Circuit recently denied a consortium claim that was based on a nonfatal injury, the court indicated that such a stand against the action may not persist. The opinion stated, "Persuasive as the arguments may be that

be proper for congressional action, legislative intervention is not required. Congress has left the shaping of the law of admiralty primarily to the courts,[126] and a judicial declaration of the right of spouses to recover for loss of consortium in admiralty, based on nonfatal injury, is not only permissible, but clearly warranted.

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the law is changing, we hold that it has not changed yet . . . ." Christofferson v. Halliburton Co., 534 F.2d 1147, 1151 (5th Cir. 1976).

126. Sea-Land Servs., Inc. v. Gaudet, 414 U.S. 573, 588 n.22 (1974); Fitzgerald v. United States Lines Co., 374 U.S. 16, 20 (1963).