

1992

Greg Hackford, Sherrie Hakford v. Utah Power and Light Company, a Utah Corporation, and Western Petroleum, Inc., a Utah Corporation, and Does I through X : Reply Brief

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_sc1

 Part of the [Law Commons](#)

Original Brief Submitted to the Utah Supreme Court; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Robert Gordon; David A. Westerby; Gary D. Stott; Michael K. Mohrman; Richards, Brandt, Miller & Nelson; Attorneys for Respondents.

C. Richard Henriksen, Jr.; David M. Jorgensen; Henriksen & Henriksen; Attorneys for Appellant.

Recommended Citation

Reply Brief, *Hackford v. Utah Power & Light Company*, No. 920208.00 (Utah Supreme Court, 1992).
https://digitalcommons.law.byu.edu/byu_sc1/4155

This Reply Brief is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

45.9

.99

DOCKET NO. 920208

IN THE SUPREME COURT

OF THE STATE OF UTAH

GREG HACKFORD,

Plaintiff,

SHERRIE HACKFORD,

Plaintiff-Appellant,

v.

UTAH POWER & LIGHT COMPANY,
a Utah corporation, and
WESTERN PETROLEUM, INC., a
Utah corporation,

Defendants-Respondents

and DOES I through X,

Defendants.

Case No. 20208

PLAINTIFF'S REPLY BRIEF

Appeal from and Order of Third Judicial
District Court of Salt Lake County
Honorable Dean E. Conder, Judge

Robert Gordon
David A. Westerby
UTAH POWER & LIGHT COMPANY
P.O. Box 899
Salt Lake City, Utah 84110
Attorneys for Respondent
Utah Power & Light Company

C. Richard Henriksen, Jr.
David M. Jorgensen
HENRIKSEN & HENRIKSEN, P.C.
320 1South 500 East
Salt Lake City, Utah 84102
Attorneys for Appellant
Sherrie Hackford

Gary D. Stott
Michael K. Mohrman
RICHARDS, BRANDT, MILLER & NELSON
P.O. Box 2465
Salt Lake City, Utah 84110
Attorneys for Respondent
Western Petroleum, Inc.

FILED
FEB 6 1985

Clerk, Supreme Court, Utah

IN THE SUPREME COURT
OF THE STATE OF UTAH

GREG HACKFORD,)	
)	
Plaintiff,)	
)	
<u>SHERRIE HACKFORD,</u>)	
)	
Plaintiff-Appellant,)	
)	
v.)	Case No. 20208
)	
<u>UTAH POWER & LIGHT COMPANY,</u>)	
a Utah corporation, and)	
<u>WESTERN PETROLEUM, INC.,</u> a)	
Utah corporation,)	
)	
Defendants-Respondents)	
)	
and DOES I through X,)	
)	
Defendants.)	

PLAINTIFF'S REPLY BRIEF

Appeal from and Order of Third Judicial
District Court of Salt Lake County
Honorable Dean E. Conder, Judge

Robert Gordon
David A. Westerby
UTAH POWER & LIGHT COMPANY
P.O. Box 899
Salt Lake City, Utah 84110
Attorneys for Respondent
Utah Power & Light Company

C. Richard Henriksen, Jr.
David M. Jorgensen
HENRIKSEN & HENRIKSEN, P.C.
320 1South 500 East
Salt Lake City, Utah 84102
Attorneys for Appellant
Sherrie Hackford

Gary D. Stott
Michael K. Mohrman
RICHARDS, BRANDT, MILLER & NELSON
P.O. Box 2465
Salt Lake City, Utah 84110
Attorneys for Respondent
Western Petroleum, Inc.

TABLE OF CONTENTS

TABLE OF AUTHORITIES	1a-1c
SUMMARY OF ARGUMENT.	2
I. LIBERAL CONSTRUCTION DOES NOT REQUIRE ABOLITION OF CONSORTIUM AND WOULD SUPPORT RECOGNITION OF SUCH CLAIMS.	4
A. Granting the Wife the Right to Claim Loss of Consortium also Results in Equalization	4
B. The Married Women's Act Was Never Intended to Achieve Equality by Denying Consortium Rights	6
II. EVALUATED IN ITS PROPER TIME FRAME, THE PRESENT INTERPRETATION OF SECTION 30-2-4 CAUSES IT TO BE INVALID UNDER THE INJURY REDRESS PROVISION. . .	9
III. THE REASONS ADVANCED FOR THE CONTINUATION FOR UTAH'S POLICY ARE NOT PERSUASIVE.	12
A. The Public Policy of Compensating the Injured for Their Damages Would be Furthered by Recognition of this Tort.	12
B. There is No Double Recovery in the Consortium Tort, and There is No Recovery for the Consortium Elements Through the Primary Case	14
C. The Remaining Rationale of <u>Black v. United</u> <u>States</u> is Not Persuasive	16
D. Defendant Utah Power & Light's Suggested Alternative is Obviously Inappropriate and Inadequate	17
IV. CONTINUATION OF THE PRESENT INTERPRETATION WOULD VIOLATE STATE AND FEDERAL EQUAL PROTECTION GUARANTEES.	17
A. Under the Rational Basis Test, Classifications Must be "Real" and Rationally Related to Legitimate Government Objectives.	18
1. The distinctions between classifications cannot be fanciful.	18

2. Elimination of the consortium tort does not serve any legitimate state purpose. .	19
B. As Presently Interpreted, Section 30-2-4 is an Invidious Attack Based on Sex.	20
CONCLUSION.	21
APPENDICES.	23
APPENDIX A - Cited Utah State Constitutional Provisions.	24
Utah Constitution, Article I, Section 11 . .	24
Utah Constitution, Article I, Section 24 . .	24
Utah Constitution, Article IV, Section 1. . .	24
Utah Constitution, Article XVI, Section 5. .	24
APPENDIX B - Cited Provisions of the Constitution of the United States of America	25
United States Constitution, Amendment XIV, Section 1.	25
APPENDIX C - Cited Utah Statutory Provisions. .	26
Utah Code Annotated, Section 30-2-4 (1976)	26
Utah Code Annotated, Section 68-3-2 (1978)	26
APPENDIX D - Cited Provisions from the Compiled Laws of Utah, 1888.	27
Section 2528 - Compiled Laws of Utah 1888. .	27
Section 2529 - Compiled Laws of Utah 1888. .	27

TABLE OF AUTHORITIES

CONSTITUTIONS

Utah Constitution, Article I, Section 11.	3,10,11,19,20,24
Utah Constitution, Article I, Section 24.	5,17,24
Utah Constitution, Article IV, Section 1.	5,6,11,24
Utah Constitution, Article XVI, Section 57,24
United States Constitution, Amendment XIV, Section 1.	17,25

STATUTES

Compiled Laws of Utah, 1888, Section 2529	6,27
Compiled Laws of Utah, 1888, Section 2528	6,27
Utah Code Annotated, Section 68-3-2 (1978).	26
Utah Code Annotated, Section 30-2-4 (1976).	9,20,21

CASES

<u>Aderhold v. Stewart,</u> 172 Okla. 77, 46 P.2d 346 (1935)	15
<u>Black v. United States,</u> 263 F. Supp. 470 (D. Utah, 1967)	15,16
<u>Brahan & Meridian L. & P. Company,</u> 121 Miss 269, 83 So. 467 (1917).	15
<u>Brown v. Georgia-Tennessee Coaches,</u> 88 Ga. App. 519, 77 S.E.2d 25 (1953);	5
<u>Califano v. Webster,</u> 430 U.S. 313, 51 L. Ed.2d 360, 97 S. Ct. 1192 (1977).	20
<u>Craig v. Boren,</u> 429 U.S. 190, 50 L. Ed.2d 397, 97 S.Ct. 451 (1976).	20
<u>Dillon v. Legg,</u> 68 Cal.2d 728, 69 Cal. Rptr. 72, 441 P.2d 912 (1968).	7
<u>Dini v. Naiditch,</u> 170 N.E.2d 881, 86 A.L.R. 2d 1184 (Ill., 1960)	15

<u>Dunn v. Blumstein</u> , 405 U.S. 330, 31 L. Ed. 2d 274, 92 S.Ct. 995 (1972)	20,21
<u>Ellis v. Hathaway</u> , 27 Utah 2d 143, 493 P.2d 986 (1972)	10
<u>Gregory v Oakland Motor Car Company</u> , 181 Mich 101, 147 N.W. 614 (1914)	15
<u>Hicklin v. Orbeck</u> , 565 P.2d 159 (Alaska, 1977) reversed on other grounds 437 U.S. 518, 57 L.Ed. 2d 397, 98 S.Ct. 2482 (1978).	21
<u>Hitafter v. Argonne Co.</u> , 183 F.2d 811 (D.C. App., 1950)	5,15
<u>Hoekstra v. Helgeland</u> , 98 N.W.2d 669 (S.D., 1959)	5,9
<u>Hoffman v. Dautel</u> , 388 P.2d 615 (Kan., 1964).	5
<u>In Re Griffiths</u> , 413 U.S. 717, 37 L.Ed.2d 910, 93a. S.Ct. 2851 (1973).	20
<u>Leong v. Takasaki</u> , 520 P.2d 758 (Haw., 1974).	7
<u>Lindsay v. Oregon Short Line Railroad Co.</u> 90 P.984 (Idaho, 1907).	8
<u>Malan v. Lewis</u> , No. 17606 (Utah, May 1, 1984).	18
<u>Matthew v. Central Pacific Railroad Co.</u> , 63 Cal. 450 (1883)	8
<u>McGinnis, Commissioner of Correction et. al. v. Royster</u> , 410 U.S. 263, 35 L.Ed.2d 282, 93 S.Ct. 1055 (1973)	19
<u>Mewhirter v. Hatten</u> , 42 Iowa 288, 20 Am. Rep. 618 (1875).	9
<u>Millington v. Southeastern Elevator Co.</u> , 22 N.Y.2d 498, 293 N.Y.S.2d 305, 239 N.E.2d 897, 36 A.L.R.3d 891 (1968).	8,13,14,15
<u>Montgomery v. Stephan</u> , 101 N.W.2d 227, (Mich., 1960).	9
<u>Moran v. Quality Aluminum Casting Co.</u> , 150 N.W.2d 137 (Wis., 1967).	15

<u>Omaha and Republican Valley Railroad Co. v. Chollette,</u> 59 N.E. 921 (Neb., 1894)	9,16
<u>Reed v. Reed,</u> 404 U.S. 71, 30 L. Ed.2d 225, 92 S.Ct. 251 (1971).	20
<u>Robinson v. Metropolitan St. Ry. Co.,</u> 69 N.Y.S. 891, 34 Misc. 795 (1901)	8
<u>Standen v. Pennsylvania R. Co.,</u> 63 A.467 (Pa., 1906)	8

OTHER AUTHORITIES

Harper and James, <u>Law of Torts,</u> section 8.9 p.638.	15
41 Am. Jr. 2d "Husband and Wife", Section 17	4
21 A.L.R. 1519 "Husband's Right to Damages for Loss of Consortium," supplemented 133 A.L.R. 1157.	9

IN THE SUPREME COURT
OF THE STATE OF UTAH

GREG HACKFORD,)	
)	
Plaintiff,)	
)	
<u>SHERRIE HACKFORD,</u>)	
)	
Plaintiff-Appellant,)	
)	
v.)	Case No. 20208
)	
<u>UTAH POWER & LIGHT COMPANY,</u>)	
a Utah corporation, and)	
<u>WESTERN PETROLEUM, INC.,</u> a)	
Utah corporation,)	
)	
Defendants-Respondents)	
)	
and DOES I through X,)	
)	
Defendants.)	

PLAINTIFF'S REPLY BRIEF

SUMMARY OF ARGUMENT

Defendants' argument that the purpose of Utah's Married Womens's Act was to "place a husband and wife on equal footing" presumes that the critical ambiguous language of Utah's Married Women's Act should be interpreted in the way that it has been interpreted. Plaintiff asserts that the language at issue simply clears up the questions then existing concerning whether the husband could bring an action on behalf of his wife or whether he could or had to join in an action brought by the wife. The language was not intended to remove any separate rights which the husband had for his own injuries under common law, and even if "complete"

equalization were a purpose of the Married Women's Act, a recognition of the consortium claims of both spouses would accomplish that task in addition to its clear primary purpose of removing all the common law disabilities from married women.

Defendants' argument that no problem with Article I Section 11 of the Utah Constitution exists is based upon court decisions of the 1960's and 1970's which were based upon the very legislation in question rather than the state of the law prior to 1898. Both the statutory construction and Married Women's legislation would have to comply with the appropriate constitutional provisions, and resolution of some of the Constitutional questions requires inquiry into the situation existing in 1898 and before.

Unquestionably, consortium was an integral part of the pre-1898 common law. Even where emancipation acts had been enacted, the overwhelming majority of United States court decisions continued to recognize and have continued to recognize the husband's consortium interest. Even the wife's consortium interest had been recognized at that time in the intentional tort context. Nothing indicates that a Utah court would have decided prior to 1898 to disavow the common law as it then existed in this country. In fact, the decisions relied upon by defendants recognize that in Utah prior to 1898, a husband's right to consortium existed.

Whatever the common law origins of consortium, the consortium interest is now recognized as a real interest deserving judicial support. It is no longer viewed as a relic. The basic purpose of our tort system of allowing people to be compensated for their injuries far outweighs the various objections to consortium which defendants have asserted.

With respect to equal protection concerns, it is not enough, even under the rational basis test, to point out distinctions between categories. The distinctions have to be real and rationally related to some valid governmental objective. Under our State Constitution, elimination of a common law claim for such reasons as defendants have advocated, is not such an objective.

With sex classification, much more stringent standards apply. Although equality results by denying rights to both spouses, ~~under~~ the relevant language of the Married Women's Act, if it is to continue to be interpreted as it has been, applies only to the husband, and equality results only by eliminating male rights not related to the emancipation objective. Under such an interpretation, the Act is directed at one sex on its face. Since equality can be achieved without taking away a husband's claim by recognizing similar rights for the wife, the discriminatory language does not survive the stricter test applied to sex-based discrimination.

I. LIBERAL CONSTRUCTION DOES NOT REQUIRE ABOLITION OF CONSORTIUM AND WOULD SUPPORT RECOGNITION OF SUCH CLAIMS

The purpose of the Married Women's Acts was to free women from their common law disabilities, 41 Am. Jr. 2d "Husband and Wife", Section 17. As the period of time which passed between passage of the Married Women's Acts and the recognition of their right to maintain a consortium illustrates, there was no expressed intent to "equalize" all aspects of the male-female relationship, although much intended equalization occurred with emancipation.

A. Granting the Wife the Right to Claim Loss of Consortium also Results in Equalization.

Any "complete equalizing" intent is as adequately accomplished by bringing both spouses up to the same level as by reducing one spouse's rights. Indeed, numerous courts have answered the contention that no action for a wife's loss of consortium existed at common law by asserting that however demeaning the wife's position was at ancient common law, by the time the Married Women's Acts began to be enacted, the woman's condition had improved to the point that she had a recognized interest in the "marriage relationship" as evidenced by the recognition of her right to maintain an action for intentional alienation. See the discussion in Hoekstra v. Helgeland, 98 N.W. 2d 669 (S.D., 1959). In addition, other inroads into the disabilities of the medieval common law had been accomplished by statute. As a result, the view has been stated that during the relevant time period just before and around the time that Married Women's Acts were being enacted, the wife had the lawful right to the consortium of the husband, but simply could not maintain a claim while the relationship existed because of those disabilities of coverture which still remained. Hoekstra v. Helgeland, 98 N.W.2d 669, 673-679, 681-682 (S.D., 1959); Brown v. Georgia-Tennessee Coaches, 88 Ga. App. 519, 77 S.E.2d 25, 28-29 (1953); Hitaffer v. Argonne Co., 183 F.2d 811, 816 (D.C. App., 1950); see also Hoffman v. Dautel, 388 P.2d 615, 619 (Kan., 1964) where the analysis is succinctly articulated but not agreed to by that court.

The particularly strong constitutional protection provided by Article 1 Section 24 and Article 4 Section 1 of the Utah Constitution makes the analysis not followed by the Kansas court but approved by the others, especially appropriate to Utah.

In this respect, Utah's equal rights provision contained in Article 4 Section 1, deserves special mention. The only Utah cases that plaintiff is aware of dealing with this section, relate to voting. But voting and the right to hold office are guaranteed by the first sentence of Article 4 Section 1, and the second sentence goes on to more broadly guaranty rights by stating that both sexes shall "enjoy equally all civil, political and religious rights and privileges." (emphasis added). The application of this Constitutional provision should be interpreted by the words it uses and not just the captions around it, and the most plausible reading of the second sentence of Article 4 Section 1 would include in its results married women having the right to maintain an action for loss of consortium the day our Utah Constitution came into effect since married men had the same right under common law.

B. The Married Women's Act Was Never Intended to Achieve Equality by Denying Consortium Rights.

To argue that the Married Women's Act was designed to put husbands and wives on a "completely equal" basis, ignores the interpretation issue.

Equalizing and emancipating, (or in Utah's case, more fully emancipating as far as legislation is concerned)*, are related

* The territorial legislature had enacted some incomplete laws covering domestic relations. Compiled Laws of Utah, 1888, Section 2529, provided that "either spouse may sue or be sued" but did not address the joinder question then existing, at least in community property states, on personal injury claims and could well be interpreted of giving the right to sue to either or both spouses. Compiled Laws of Utah, 1888 Section 2528 provided that property acquired by either spouse before marriage and certain property, not including personal injury claims, acquired after the marriage relationship was property of that spouse and could be dealt with as separate property during the marriage or otherwise. Neither statute even mentioned personal injury claims.

concepts, and with emancipation came more equality. Yet if there is to be any significance whatsoever in the "complete equalization" theory advanced by defendants, it must first be shown that the ambiguous language: "There shall be no right of recovery by the husband on account of personal injury or wrong to his wife, or for expenses therewith..." really should be interpreted the way defendants assert.

Plaintiff has discussed the recognized ambiguity present in that wording. As pointed out in plaintiff's original brief, (P.14-18) non-physically injured spouses suffer their own very real injuries when their companions suffer physically. The language of Utah's statute is not clear like others where the right has been abolished, and applying the same interpretation applied in consortium cases would eliminate psychic injury cases and wrongful death claims.

Certainly, the legislature did not mean to rule out a wrongful death claim by the husband if the wife were killed. Under our Constitution, by language specific to wrongful death claims, it could not do so even if it had desired. Utah Constitution Article XVI, Section 5. One would also be safe in presuming that it did not even contemplate the possibility of a bystanding husband observing traumatic injury to his wife being compensated for his psychic injuries, as has been recognized in Dillon v. Legg, 68 Cal.2d 728, 69 Cal. Rptr. 72, 441 P.2d 912 (1968), Leong v. Takasaki, 520 P.2d 758 (Haw., 1974) and numerous other cases.

Additionally, the "the-husband-may-not-recover-but-the-wife-may" phraseology of Section 30-2-4, makes it apparent that the

legislature was only considering those damage elements that would give the wife full compensation for her own injuries. As is discussed in plaintiff's original brief and later herein, the elements which comprise the consortium claim are totally different from anything that the physically injured wife, suing for her own injuries, would be compensated for. Millington v. Southeastern Elevator Co., 22 N.Y.2d 498, 293 N.Y.S.2d 305, 239 N.E.2d 897, 899, 36 A.L.R.3d 891, 893 (1968).

The statutory wording needs to be examined in light of conditions existing at the time the statutes were enacted. Under the common law, a husband had to file a claim for the wife's injuries, and it was the law in other jurisdictions around the turn of the century that had not enacted the comprehensive Married Women's Acts that we see today that the husband could maintain his own actions to recover medical expenses and loss of earning capacity when the wife was injured, e.g., Robinson v. Metropolitan St. Ry. Co., 69 N.Y.S. 891, 34 Misc. 795 (1901); see also Standen v. Pennsylvania R. Co., 63 A.467 (Pa., 1906). In some community property states, at least, the wife had to be joined by her husband, unless they were separated, e.g. Matthew v. Central Pacific Railroad Co., 63 Cal. 450 (1883); Lindsay v. Oregon Short Line Railroad Co., 90 P.984 (Idaho, 1907). The pre-1898 Utah territorial statutes did not settle questions such as these either. Plaintiff asserts that the particular wording of Utah's Married Women's Act was intended simply to make it clear that not only could the wife sue for her own injuries, but that she alone could bring that suit.

Complete equality as opposed to complete removal of common law disabilities was not the purpose of our Married Women's Act.

Further, if consortium claims were recognized when either spouse is injured, both spouses would be on an equal footing. Under such circumstances, and given the ambiguity of the statute, a liberal interpretation would be the one which recognized the policy of allowing compensation when marital relationship is negligently harmed. As was well stated in Montgomery v. Stephan, 101 N.W.2d 227, 232 (Mich., 1960), an act "designed as to shield women from...inequitable and degrading disability" should not be used as a "sword" to shake down the cause of action which embraces "the very heart core of her married existence."

II. EVALUATED IN ITS PROPER TIME FRAME, THE PRESENT
INTERPRETATION OF SECTION 30-2-4 CAUSES IT TO
BE INVALID UNDER THE INJURY REDRESS PROVISION.

Consortium has been part of the English-American common law for as long as modern authorities care to consider. See Hoekstra v. Helgeland, 98 N.W.2d 669 (S.D., 1959). Absent clear statutory language, the Married Women's Acts generally did not alter that fact, e.g. 21 A.L.R. 1519 "Husband's Right to Damages for Loss of Consortium," supplemented 133 A.L.R. 1157. The overwhelming number of states recognize this fact. Some of the decisions holding that emancipation legislation did not remove a husband's consortium claim, were decided before 1898, e.g. Omaha and Republican Valley Railroad Co. v. Chollette, 59 N.E. 921 (Neb., 1894); Mewhirter v. Hatten, 42 Iowa 288, 20 Am. Rep. 618 (1875).

Plaintiff is not aware of any pre-1898 consortium claims brought to Utah's highest court, but given the state of the common law generally, and the fact that it is the relevant statutory wording of Utah's Married Women's Act which has caused courts in the 1960's and 1970's to refuse to recognize consortium, it is incon-

ceivable that prior to 1898, the highest Utah court would not have recognized a consortium claim had the issue been presented. In fact, the existence of a husband's claim would not even have been questioned. Under these circumstances, it would not take a declaration of Utah's highest court to let us know what the common law was. Further, it is inconsistent to argue that the legislature intended to eliminate the consortium right and to also maintain that no such right existed.

Although plaintiff disputes the statutory interpretation of the Married Women's Act assumed in Ellis v. Hathaway, 27 Utah 2d 143, 493 P.2d 986 (1972), by asserting that the women had no right to consortium at common law and that the ambiguous wording of the Married Woman's Act at issue here "placed husband and wife on an equal basis", this Court recognized that prior to the effective date of the 1898 Acts, a husband had the right to maintain a loss of consortium claim. Judge Christensen also recognized the obvious in Black v. United States, 263 F. Supp. 470 (D. Utah, 1967) when he stated that the interpretation of Utah's Married Women's Act which plaintiff asserts is the most logical and only Constitutionally permissible construction would result in a "resuscitation of the common law rule". Id. at 480. It is only the interpretation of the Married Women's Act that has caused consortium not to have been recognized in Utah at the appellate level, and this Court and the U.S. District Court clearly realized that a husband's pre-1898 rights included consortium.

One of the points of plaintiff's original brief was that the Injury Redress provision found in Article I Section 11 of

the Utah Constitution was to put an outside limit on what the legislature could do to a common law claim. Similar provisions have been interpreted as preventing the legislature from cutting off a common law right without providing an alternative. The Married Women's Act and statutory construction sections relied upon by defendants obviously must comply with all the Constitutional guaranties. Their validity cannot logically depend on the state of the law which they created after enactment.

The Utah Constitution was adopted in 1896, and the body of common law then in existence recognized consortium. The common law continued between 1896 and 1898 when the statutory construction statutes and the Utah Married Women's Act in its present full form were enacted. Statutes which affected common law rights would have to comply with the Utah Constitution whether they were enacted before or after a legislative recognition of the common law in general.

As far as the application to a woman's consortium claim of Article I, Section 11 is concerned, when a woman's right historically arose or whether women had a common law consortium right is not important. Under the Utah and United States equal protection clauses and under the wording of Article 4 Section I of the Utah Constitution, the rights of the husband and the wife in this area would be the same. Moreover, it is no answer to the Article I, Section 11 challenge to say that the Injury-Redress provisions of Article 1, Section 11 do not apply on the grounds that courts had not recognized the women's right to maintain a consortium claim when the rationale for that ruling is that the husband's common law

rights were taken away by statute. If the husband's rights cannot be taken away, the expressed reason for denying those same rights to the wife disappears.

III. THE REASONS ADVANCED FOR THE CONTINUATION FOR UTAH'S POLICY ARE NOT PERSUASIVE.

A. The Public Policy of Compensating the Injured for Their Damages Would be Furthered by Recognition of this Tort.

Defendant Utah Power & Light lists reasons which have been advanced from time to time against consortium claims generally. The short answer to this litany is that it has been rejected with virtual unanimity by the states, and for good reason. There is no indication that meaningful difficulties have been encountered in these states in affecting settlements or judicial resolutions because of consortium claims.

Virtually all of the concerns voiced by defendants simply require the court to make a decision. In most of the cases, the particular way that the court eventually chooses to resolve a legal question will not have any impact beyond actual litigants who do not follow the court's decision on how such questions are to be resolved.

In answer to defendants' concern that there is no stopping point for awarding compensation for injuries to a relationship once a court decides to allow consortium claims, not only is the marriage relationship clearly distinguishable historically, sociologically and legally from all the others cited by defendants, but it is simply not wise decisional policy for a court to fail to make the right decision on a case before it based upon allegations that it will not be able to control itself when faced with different

decisions involving completely different kinds of relationships years down the road. This court is always in control of its own destiny, and has the responsibility to make the correct decision on the cases that come up, as they come up, and the marriage relationship is a distinction with real differences from all the others listed.

Balanced against these concerns is the fact that continuing reliance on ambiguous language to deny compensation for the very real damages which the non-physically injured spouse suffers when there is injury to this relationship is at odds with the philosophy underlying our entire tort system. Our system seeks to make individuals responsible for the injuries which they inflict and to compensate those harmed. Recognizing the consortium interest would further this policy, and virtually every other state recognizes that this tort is worthy of judicial support.

The reality of the damages to each spouse which occurs when the other suffers significant injuries and the propriety of awarding damages when that relationship is negligently harmed is well summarized by the New York Court of Appeals in Millington v. Southeastern Elevator Company, 22 N.Y.2d 498, 293 N.Y.S.2d 305, 239 N.E.2d 897, 36 A.L.R.3d 891 (1968). After stating that the alleged double recovery problem said by opponents to be involved in consortium claims could be taken care of simply by recognizing that compensation given the physically injured party for impairment of ability to provide financial support is not part of the consortium claim, the New York Court of Appeals went on to state that the other elements in a consortium claim such as the loss of love, companion-

ship, affection, society, sexual relations, and solace are certainly deserving of compensation. The Court stated:

Disparagingly described as 'sentimental' or 'parasitic' damages, the mental and emotional anguish caused by seeing a healthy loving companionable mate turned into a shell of a person is real enough. To describe the loss as 'indirect' is only to evade the issue. The loss of companionship, emotional support, love, felicity and sexual relations are real injuries. The trauma of having to care for a permanent invalid is known to have caused mental illness...Even in the case of a husband the 'sentimental' damages may predominate over the loss of support or material element. Thus to describe these damages as merely parasitic is inaccurate and cruel...

It is also contended that the 'sentimental' damages such as the diminution of the value of her husband's society and affection and the deprivation of sexual relationship and the attendant loss of child-bearing opportunity are too personal, intangible, and conjectural to be measured in pecuniary terms by a jury. The argument has no merit. The logic of it would also hold a jury incompetent to award damages for pain and suffering.

Money is a poor substitute for the loss of a child or the pain resulting from serious injuries. Likewise, it cannot truly compensate a wife for the destruction of her marriage, but it is the only known means to compensate for the loss suffered and to symbolize society's recognition that a culpable wrong - even if unintentional - has been done. (239 N.E.2d 897, 899, 902)

Whatever its ancient origins, "consortium now represents the interest of the injured party's spouse in the continuance of a healthy and happy marital life." Millington v. Southeastern Elevator Co., 239 N.E.2d 897, 900. Once this is recognized, "it becomes evident that the cause of action is not a relic." Id.

- B. There is No Double Recovery in the Consortium Tort, and There is No Recovery for the Consortium Elements Through the Primary Case.

The fear of double recovery raised by Judge Christensen in Black v. United States, 263 F.Supp. 470 (D.Ut., 1967) and carried forward by defendants, has been answered resoundingly by the courts. Beginning with Hitafter v. Argonne Co., Inc., 183 F.2d 811 (D.C. Appl, 1950) and continuing thereafter, the courts have recognized that the only real possibility for double recovery occurs in the area of loss of outside earning capacity. The courts have responded either by deducting the award to the physically injured spouse for loss of earning capacity from the consortium claim or by simply not recognizing loss of earning capacity as an element of the consortium claim. See Harper and James, Law of Torts, section 8.9 p.638; Gregory v Oakland Motor Car Company, 181 Mich 101, 147 N.W. 614 (1914); Brahan & Meridian L. & P. Company, 121 Miss 269, 83 So. 467 (1917); Aderhold v. Stewart, 172 Olka. 77, 46 P.2d 346 (1935). In the case of Millington v. Southeastern Elevator Co., supra, the New York Court of Appeals laid the double recovery argument to rest when it approvingly quoted the Supreme Court of Wisconsin's opinion in Moran v. Quality Aluminum Casting Co., 150 N.W.2d 137 (Wis., 1967), who had quoted the language of the Illinois Supreme Court in the case of Dini v. Naiditch, 170 N.E.2d 881, 86 A.L.R. 2d 1184 (Ill., 1960):

Any conceivable double recovery...can be avoided by deducting from the computation of damages in the consortium action any compensation given her husband in his action for the impairment of his ability to support... Since the possibility of double recovery can be eliminated by the simple adjustment of damages, it should not constitute a basis for denying [the wife's] action, which includes many elements which are in no way compensable in the husband's action. Millington v. Southeastern Elevator Co., supra, 239 N.E.2d 897, 899, 36 A.L.R.3d 891, 893 (1968). (Emphasis was added in the Millington case but was not in

the other cases from which the quote was taken).

C. The Remaining Rationale of Black v. United States is Not Persuasive.

Defendants rely heavily on Judge Christensen's considered opinion in Black v. United States, 263 F. Supp. 470 (D. Ut., 1967). Placed in the difficult position of having to guess what Utah's law might be, and not having been presented with all the issues that are involved, Judge Christensen took an understandably conservative approach. His concerns about double damages and unlimited recognition of other types of claims in different types of relationships have been discussed, as has the ambiguity present in Utah's Married Women's Act.

Judge Christensen recognized the ambiguity present in Utah's Married Women's Act. Admittedly, he resolved that ambiguity against consortium, but his uncertainties were such that he had to rely upon such things as his experience to resolve it. Before formerly recognized consortium rights are abolished, the intent to do so should be clear. Omaha and Republican Valley Railroad Company v. Chollette, 59 N.W. 921, 925 (Neb. 1894). At the very least, our statute is not clear.

However appropriate it may have been for a Federal District Judge finding himself in his position to rely upon personal experience, the number of reported consortium claims raised in both the Federal District Court and this Court actually reported and cited by defendants demonstrate the weakness of the rationale. Moreover, this court is in the position of making such determinations without the need to depend on informal perceptions of

attorney opinions. Plaintiff submits that a careful re-examination of Utah's position on consortium, would lead it to adopt a different position.

D. Defendant Utah Power & Light's Suggested Alternative is Obviously Inappropriate and Inadequate.

Utah Power & Light's suggested alternative to consortium claims ignores fundamental reality. In the present case, it is Sherrie Hackford, not Greg Hackford, that has seen her husband severely and permanently injured and his mind and abilities turned into that of a child. She has lost his comfort, society, and companionship and this is her own injury.

Only by focusing the trier of fact's attention to the real issues, can any award be adequate. Lumped in with her husband's general damages, simply by a jury instruction, the consortium issues would get lost. Moreover, Greg Hackford has suffered his own damages, and compensation for his damages and hers would not likely be sorted out. Sherrie has suffered her own damages and is entitled to have them considered separately and awarded to her alone.

The alternative suggested by defendants would be nothing more than a reversion to the situation that the Married Women's Acts abolished where one spouse was recovering for another's injuries. Ironically, it would not resolve all of the questions which have been advanced for not recognizing consortium in the first place.

IV. CONTINUATION OF THE PRESENT INTERPRETATION WOULD VIOLATE STATE AND FEDERAL EQUAL PROTECTION GUARANTEES.

Utah State Constitution Article 1, Section 24 and the Equal Protection Clause of the Fourteenth Amendment to the United

States Constitution, place restrictions on governmental exercise of authority in passing legislation.

In the case of Malan v. Lewis, No. 17606 (Utah, May 1, 1984) the Utah Supreme Court, in a unanimous opinion, stated concerning these restrictions:

Basic principles of equal protection of the law are inherent in the very concept of justice and are a necessary attribute of a just society. Id. at 12.

A. Under the Rational Basis Test, Classifications Must be "Real" and Rationally Related to Legitimate Government Objectives.

1. The distinctions between classifications cannot be fanciful.

It is difficult to imagine any thing or category that cannot be distinguished in some way from another thing or category. As a result, to be valid, classifications must be based on "real distinctions" and not on artificial or irrelevant ones. Malan v. Lewis, No. 17606 (Utah, May 1, 1984).

Defendants' argument that a valid distinction can be found between intentional alienation of affections, and consortium reveals a distinction without a legally meaningful difference. The mere fact that only one person suffers a legal injury in the intentional tort case, while both suffer in a negligent tort case is merely a descriptive distinction devoid of legal significance. Indeed, as the state of the law in the United States reveals, of the two torts, the consortium tort is clearly the most relevant to today's society, and it is consortium rather than intentional alienation of the affections that is recognized as the more meaningful by today's legal community.

2. Elimination of the consortium tort does not serve any legitimate state purpose.

To pass equal protection muster, classifications must be rationally related to a "legitimate articulated state purpose." McGinnis, Commissioner of Correction et. al. v. Royster, 410 U.S. 263, 270, 35 L.Ed.2d 282, 288, 93 S.Ct. 1055, 1059 (1973).

With respect to the wrongful death situation, plaintiff concedes the need to fully and adequately compensate heirs who suffer as a result of a wrongful death, especially in light of Utah's Constitutional wrongful death command. As a result, plaintiff does not argue that the distinction between wrongful death and consortium is anything but real. What plaintiff does argue is that both in comparison to wrongful death situations and in the alienation of affections situation, no legitimate governmental purpose is served by treating the negligent loss of consortium any differently in the two kinds of cases.

As has been discussed, the purpose of the Married Women's Act was to legislatively remove common law disabilities and the purpose of the Wrongful Death Act is to compensate heirs. Neither of these purposes is furthered by denying the consortium claim to a spouse who must deal with a severely injured but living companion.

In addition, given the protection embodied in Article I, Section 11, and given the fact that "complete" equality, (even if that were a purpose of the Married Women's Act), could be achieved without destroying the husband's common law consortium claim by recognizing it in the wife, something more stringent than a showing of any conceivable rational basis ought to be required. To be sure,

common law tort rights are not fundamental rights under U.S. Constitutional law, but under Utah's Constitution, a greater showing of need than what has been shown should be required under an equal protection concept, regardless of the way in which the legal questions might be resolved under Article 1 section 11 itself.

B. As Presently Interpreted, Section 30-2-4 is an Invidious Attack Based on Sex.

By its express terms, if interpreted as it has been, Section 30-2-4 is directed at the husband because of his sex. Sex classification is subject to scrutiny under equal protection clauses. Reed v. Reed, 404 U.S. 71, 75, 30 L. Ed.2d 225, 92 S.Ct. 251 (1971). The fact that the classification discriminates against men rather than women does not protect it from scrutiny. Craig v. Boren, 429 U.S. 190, 50 L. Ed.2d 397, 97 S.Ct. 451 (1976). To withstand scrutiny under the Equal Protection Clause, classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives. Califano v. Webster, 430 U.S. 313, 316-317, 51 L. Ed.2d 360, 97 S.Ct. 1192 (1977).

When a strict scrutiny test is applicable, the proponent of the statute must show that the purpose of the statute is "constitutionally permissible and substantial" and that the classification is "necessary...to the accomplishment of its purpose." In Re Griffiths, 413 U.S. 717, 722, 37 L.Ed.2d 910, 915, 93a. S.Ct. 2851, 2855 (1973). If there are alternative means available which achieve a legislation's goals without the intrusion or discrimination complained of, the state must choose the "less drastic means." Dunn v. Blumstein, 405 U.S. 330, 342-43, 31 L. Ed. 2d 274, 284-85,

92 S.Ct. 995, 1003-04 (1972); Hicklin v. Orbeck, 565 P.2d 159, 163 (Alaska, 1977) reversed on other grounds 437 U.S. 518, 57 L.Ed. 2d 397, 98 S.Ct. 2482 (1978).

Certainly emancipating women from common law disabilities meets these tests. But achieving "complete" equality (even if that were the purpose) by the removal of common law rights of the other sex, when it is not necessary to take away rights to achieve that equality, could not possibly withstand "scrutiny" or "strict scrutiny." The alternative of recognizing the right in the other spouse to achieve equality being available, accepted, and in strict conformity with recognized public policy, the taking away of a husband's right just so that equality will be achieved at a lower level cannot withstand the strict test which exists for sex-based discrimination.

The result obtained by following the present interpretation of Section 30-2-4 is not even like the constitutionally-questionable affirmative action programs where some taking from one group is necessary to help a group that society has discriminated against. In the consortium area, taking is not necessary to achieve equality. The mere fact that equality is reached does not mean that equal protection concerns are satisfied as the dispute over the constitutionality of affirmative action illustrates. Discrimination cannot be allowed when equality can be achieved without it.

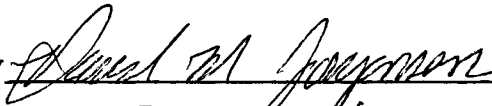

CONCLUSION

Plaintiff is aware of the arguments raised in opposition in consortium claims in general and to Utah consortium claims in particular. Plaintiff asserts, however, that none of those reasons

are compelling and that they should not be used to keep damages to the marital relationship suffered in Utah uncompensable. Moreover, following the continued interpretation of Utah's Married Women's Act places that Act in conflict with fundamental Constitutional protections.

DATED this 6th day of February, 1985.

HENRIKSEN & HENRIKSEN, P.C.

By 
By 

APPENDICES

Appendix A

Cited Utah State Constitutional Provisions

I. Utah Constitution, Article I, Section 11

All courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law, which shall be administered without denial or unnecessary delay; and no person shall be barred from prosecuting or defending before any tribunal in this State, by himself or counsel any civil cause to which he is a party.

II. Utah Constitution, Article I, Section 24

All laws of a general nature shall have uniform operation.

III. Utah Constitution, Article IV, Section 1

The rights of citizens of the State of Utah to vote and hold office shall not be denied or abridged on account of sex. Both male and female citizens of this State shall enjoy equally all civil, political and religious rights and privileges.

IV. Utah Constitution, Article XVI, Section 5

The right of action to recover damages for injuries resulting in death, shall never be abrogated, and the amount recoverable shall not be subject to any statutory limitation, except in cases where compensation for injuries resulting in death is provided for by law.

Appendix B

Cited Provisions of the Constitution of the United States of America

Amendment XIV, Seciton 1 of the United States Constitution

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Appendix C

Cited Utah Statutory Provisions

I. Utah Code Ann. Section 30-2-4 (1976)

A wife may receive the wages for her personal labor, maintain an action therefor in her own name and hold the same in her own right, and may prosecute and defend all actions for the preservation and protection of her rights and property as if unmarried. There shall be no right of recovery by the husband on account of personal injury or wrong to his wife, or for expenses connected therewith, but the wife may recover against a third person for such injury or wrong as if unmarried, and such recovery shall include expenses of medical treatment and other expenses paid or assumed by the husband.

II. Utah Code Ann. Section 68-3-2 (1978)

The rule of the common law that statutes in derogation thereof are to be strictly construed has no application to the statutes of this state. The statutes establish the laws of this state respecting the subjects to which they relate, and their provisions and all proceedings under them are to be liberally construed with a view to effect the objects of the statutes and to promote justice. Whenever there is any variance between the rules of equity and the rules of common law in reference to the same matter the rules of equity shall prevail.

Appendix D

Cited Provisions from the Compiled Laws of Utah, 1888

I. Section 2528 of the Compiled Laws of Utah, 1888

All property owned by either spouse before marriage, and that acquired afterwards by purchase, gift, bequest, devise or descent, with the rents, issues and profits thereof, is the separate property of that spouse by whom the same is so owned or acquired, and separate property owned or acquired as specified above, may be held, managed, controlled, transferred and in any manner disposed of by the spouse so owning or acquiring it, without any limitation or restriction by reason of marriage.

II. Section 2529 of the Compiled Laws of Utah, 1888

Either spouse may sue or be sued, plead and be impleaded, or defend and be defended at law.

CERTIFICATE OF MAILING

I hereby certify that four copies of the foregoing Reply Brief were mailed, postage prepaid, this 6th day of February, 1985, to Robert Gordon and David Westerby, attorneys for defendant-respondent Utah Power and Light, P.O. Box 899, Salt Lake City, Utah 84110 and to Gary D. Stott and Michael K. Mohrman of Richards, Brandt, Miller & Nelson, attorneys for defendant-respondent Western Petroleum, Inc., CSB Tower, Suite 700, 50 South Main Street, P.O. Box 2465, Salt Lake City, Utah 84110.