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Back Up and Hit Him Again: Illinois' Problem with Parental Consortium Lost Because of Nonfatal Injury

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Comment

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I. INTRODUCTION

Children in Illinois benefit if tortfeasors kill, rather than severely injure, the children's parents. This paradox exists because, under Illinois law, children can recover loss of consortium[1] damages for the wrongful death of a parent but not for nonfatal injury to a parent, no matter how severe.[2] This situation calls to mind a tongue in cheek illustration sometimes used to illustrate the common law approach to wrongful death recovery.[3]

In the illustration, a motorist strikes and injures a pedestrian, and the motorist's lawyer advises him to "back up and hit him again."[4] The lawyer gives such advice because the common law permitted no recovery for the death of a human being.[5] Consequently, following the lawyer's advice put the motorist in a better economic position than the motorist would have been in had he only injured the pedestrian.[6] Similarly, in Illinois, children benefit economically if tortfeasors back up and hit their parents again because they may then recover for loss of consortium damages. However, just as the lawyer's advice in the above illustration is absurd, Illinois' position on loss of parental consortium in the case of nonfatal injury is equally absurd.

A significant minority of American states permit children to recover

1. Consortium, or society, is defined as service, companionship, affection, or sexual relations. 2 DAN B. DOBBS, LAW OF REMEDIES: DAMAGES—EQUITY—RESTITUTION § 8.1(5), at 400 (2d ed. 1993). Parental consortium is often more precisely defined to include training, guidance, and discipline. 2 *id.* § 8.1(5), at 403.

2. *See infra* part III.

3. Professor Frank M. Covey, Jr., Lecture in Torts II at Loyola University of Chicago School of Law (Spring 1992).

4. *Id.*

5. *Id.*; *see also infra* note 25.

6. *See* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 127, at 945 (5th ed. 1984).

for loss of parental consortium because of nonfatal injury.[7] A majority of states, including Illinois, deny children such recovery without adequate justification.[8] This Comment first traces the development of the consortium claim at English and American common law and then in Illinois.[9] It next examines current Illinois law on the question of whether children may recover for loss of parental consortium because of nonfatal injury.[10] Finally, the Comment surveys cases from American states that permit the "children's claim"[11] and proposes that Illinois courts adopt this emerging position.[12]

II. BACKGROUND

The common law developed primarily to protect interests of persons and property.[13] Nevertheless, it also recognized certain relational interests.[14] The common law often protected relational interests, such as the interest in one's familial relationships under the guise of protecting property.[15] Under the modern view, however, family relationships transcend any notion of property rights and are valuable in and of themselves.

Although English common law originally allowed recovery for loss of consortium only for a master's loss of his servant's labor,[16] courts eventually expanded the claim to permit men to recover for loss of

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7. *See infra* note 91.

8. *See infra* note 38.

9. *See infra* part II.

10. *See infra* part III.

11. *See infra* part IV. For brevity, the children's claim for loss of parental consortium because of nonfatal injury will be referred to as the "children's claim."

12. *See infra* part V.

13. Leon Green, *Basic Concepts: Persons, Property, Relations*, 24 A.B.A.J. 65, 65 (1938). Green lists four types of relational interests: family relations; trade relations; political and professional relations; and general social relations. *Id.* at 66.

14. Blackstone recognized "three great relations in private life . . . . That of *master and servant*; . . . . That of *husband and wife*; . . . . That of *parent and child*." 1 W. BLACKSTONE, COMMENTARIES *422.

15. Green, *supra* note 13, at 65-66. Courts considered relational interests as property largely because of the conflict between courts of law and courts of equity. *Id.* at 65. When suits to vindicate relational interests were brought before courts of equity, the chancellors often found it convenient to characterize the interests at stake as property interests because equity jurisdiction was limited to suits involving property. *Id.*; *see also* Abernethy v. Hutchinson, 47 Eng. Rep. 1313, 1313 (Ch. 1825) (enjoining publication of notes taken of the plaintiff's oral lectures as a violation of his property interest in the lecture); Gee v. Pritchard, 36 Eng. Rep. 670, 670 (Ch. 1818) (enjoining publication of the plaintiff's letters to the defendant based on the plaintiff's property interest in them).

16. *See infra* notes 21-23 and accompanying text.

consortium because of injury inflicted upon their wives[17] and children.[18] This section describes the development of the consortium claim at English and American common law[19] and its subsequent development in Illinois.[20]

A. At English and American Common Law

The right to recover for loss of consortium originally arose within the context of the master-servant relationship.[21] When the master lost the servant's labor because of injury, English common law courts permitted the master to recover the value of the servant's labor from the tortfeasor.[22] Courts considered loss of service essential to the master's action.[23] As an extension of the master's action, fathers were permitted to recover damages for service lost because of injury to their

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17. *See infra* notes 25-30 and accompanying text.

18. *See infra* note 24 and accompanying text.

19. *See infra* part II.A.

20. *See infra* part II.B.

21. PROSSER & KEETON, *supra* note 6, § 125, at 931; *see also* Hall v. Hollander, 107 Eng. Rep. 1206, 1206 (K.B. 1825) (denying a parent recovery for injury to a 2 1/2 year-old son because the child was too young to render service); John H. Wigmore, *Interference with Social Relations*, 21 AM. L. REV. 764, 765 (1887).

22. Wigmore, *supra* note 21, at 765. Wigmore reports that the master's action for lost service already existed by the reign of Henry III (1216-1272). *Id.*; *see also* PROSSER & KEETON, *supra* note 6, § 125, at 931.

23. PETER B. KUTNER & OSBOURNE M. REYNOLDS, JR., ADVANCED TORTS: CASES AND MATERIALS 26 n.1 (1989). Although the master enjoyed a suit for lost service, the servant retained the right to bring his own suit. Wigmore, *supra* note 21, at 765. The Ordinance of Labourers, 1349, 23 Edw. 3 (Eng.), underscores the importance of service in English society during this period. Enacted the year after the plague swept England, the Ordinance reflects the severe labor shortage that existed. It prohibited, among other things, enticing a servant away from his master. MARK A. ROTHSTEIN ET AL., CASES AND MATERIALS ON EMPLOYMENT LAW 14-15 (2d ed. 1991).

A few modern American cases permit the historic English action of a master's recovery for lost service, known at common law as an action *per quod servitium amisit*. *See, e.g.*, Jones v. Waterman Steamship Corp., 155 F.2d 992, 1000 (3d Cir. 1946) (holding that an employer may recover its payment of a seaman's medical expenses for injuries suffered because of the defendant's failure to maintain a pier); Darmour Prods. Corp. v. Herbert M. Baruch Corp., 27 P.2d 664, 665 (Cal. Dist. Ct. App. 1933) (holding that a movie producer may recover for an actress' lost service when defendant negligently injured her). American courts, however, currently tend to deny employers recovery in this situation. *See, e.g.*, Mattingly v. Sheldon Jackson College, 743 P.2d 356, 363 (Alaska 1987); Annotation, *Employer's Right of Action for Loss of Services or the Like Against Third Person Tortiously Killing or Injuring Employee*, 4 A.L.R. 4TH 504 (1981); Warren A. Seavey, *Liability to Master for Negligent Harm to Servant*, 1956 WASH. U. L.Q. 309, 311.

In 1982, England abolished by statute the master's right to recover for a servant's labor. Administration of Justice Act, 1982, ch. 53, § 2 (Eng. & N. Ir.).

children.[24]

By 1618, English courts permitted husbands to recover for loss of consortium because of negligent or intentional injury to their wives.[25] As with the master-servant and parent-child relationships, courts originally limited recovery for injury to the marital relationship to the value of lost services.[26] This limited recognition of the husband's right to recover for loss of his wife's services laid the foundation for later change.[27]

By the late nineteenth century, courts also permitted husbands to recover for emotional injuries, such as loss of companionship, society, and comfort.[28] These emotional elements soon became the dominant theme of consortium; the lost services became just another aspect of consortium.[29] In time, courts permitted husbands to recover for lost spousal consortium absent any showing of lost services.[30] Yet courts denied wives recovery for loss of consortium because of nonfatal injuries to their husbands.[31] Today, however, most American states

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24. Wigmore, *supra* note 21, at 768-69; *see also* Laurie J. Barsella, Comment, *Negligent Injury to Family Relationships: A Reevaluation of the Logic of Liability*, 77 NW. U. L. REV. 794, 799 (1983). The father as *pater familias* enjoyed an absolute right to the custody, care, education, and discipline of his children, even to the exclusion of the mother. Harry M. Fisher, *Pater Familias—A Cooperative Enterprise*, 41 ILL. L. REV. 27, 31 (1946). A father's recovery for injuries to his child was considered analogous to recovery for injuries to a servant because the father was legally entitled to the child's service. KUTNER & REYNOLDS, *supra* note 23, at 26 n.1.

25. *See* Hyde v. Scyssor, 79 Eng. Rep. 462, 462 (K.B. 1619); Guy v. Livesey, 79 Eng. Rep. 428, 428 (K.B. 1618). *Hyde* and *Guy* are among the earliest cases recognizing a husband's right to recover for lost spousal consortium. Note that courts at common law recognized no action for wrongful death. *See* KUTNER & REYNOLDS, *supra* note 23, at 57 n.1; *see also* Baker v. Bolton, 170 Eng. Rep. 1033, 1033 (K.B. 1808) ("In a civil Court, the death of a human being could not be complained of as an injury; and in this case the damages, as to the plaintiff's wife, must stop with the period of her existence."). An action for wrongful death was not recognized in England until the passage of Lord Campbell's Act (Fatal Accidents Act), 1846, 9 & 10 Vict., ch. 93 (Eng.). All American states have since enacted a version of Lord Campbell's Act. KUTNER & REYNOLDS, *supra* note 23, at 59 n.6.

26. Maureen Ann Delaney, Comment, *What About the Children? Toward an Expansion of Loss of Consortium Recovery in the District of Columbia*, 41 AM. U. L. REV. 107, 112-13 (1991).

27. *See* David P. Dwork, Comment, *The Child's Right to Sue for Loss of a Parent's Love, Care and Companionship Caused by Tortious Injury to the Parent*, 56 B.U. L. REV. 722, 724 (1976) (discussing the evolution of the consortium claim from the husband's claim for lost service).

28. Delaney, *supra* note 26, at 112-13; *see also* Dwork, *supra* note 27, at 724.

29. Delaney, *supra* note 26, at 113; *see also* Dwork, *supra* note 27, at 724.

30. Delaney, *supra* note 26, at 113; *see also* Dwork, *supra* note 27, at 724.

31. Married women could not bring an action at common law because they lacked independent legal status; their legal personality merged with their husband's. Dwork, *supra* note 27, at 724-25. Thus, Blackstone described the interests of husbands

permit women to recover for lost spousal consortium.[32]

B. In Illinois

Like many American states, Illinois adopted the common law of England by statute.[33] Thus, Illinois courts, like those in all other American jurisdictions, permitted husbands to recover damages for lost spousal consortium[34] but denied women a similar right of recovery.[35] Then in *Dini v. Naiditch*,[36] the Illinois Supreme Court

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("superiors") and wives ("inferiors") as follows: "[T]he inferior hath no kind of property in the company, care, or assistance of the superior, as the superior is held to have in those of the inferior . . . ." 3 WILLIAM BLACKSTONE, COMMENTARIES *143.

32. 2 DOBBS, *supra* note 1, § 8.1(5), at 400. The leading case is Hitaffer v. Argonne Co., 183 F.2d 811 (D.C. Cir.), *cert. denied*, 340 U.S. 852 (1950), *overruled on other grounds*, Smither & Co. v. Coles, 242 F.2d 220 (D.C. Cir. 1957). *Hitaffer* is the first American decision permitting women to recover damages for loss of spousal consortium because of injury to the husband. KUTNER & REYNOLDS, *supra* note 23, at 17 n.3. PROSSER & KEETON lists Kansas and Virginia as two states that deny an action for loss of consortium caused by personal injury to either spouse. PROSSER & KEETON, *supra* note 6, § 125, at 932 n.10 (citing Taylor v. S.H. Kress & Co., 12 P.2d 808, 809 (Kan. 1932)); Floyd v. Miller, 57 S.E.2d 114, 117 (Va. 1950)); *see also* Shuder v. McDonald's Corp., 859 F.2d 266, 273 n.4 (3d Cir. 1988) (stipulating no recovery for lost spousal consortium under Virginia law).

Most states deny a consortium claim for injury to a member of an unmarried couple even if they are engaged. KUTNER & REYNOLDS, *supra* note 23, at 39 n.1; *see also* Hendrix v. General Motors Corp., 193 Cal. Rptr. 922, 923 (Cal. Ct. App. 1983) (holding that an unmarried cohabitant may not recover loss of consortium damages); Sostock v. Reiss, 415 N.E.2d 1094, 1098 (Ill. App. Ct. 1980) (holding that a member of an engaged couple could not recover loss of consortium damages).

33. *See* Common Law Act, ILL. COMP. STAT. ch. 5, § 50/1 (West 1993) (originally enacted in 1845).

34. *See, e.g.*, Nixon v. Ludlam, 50 Ill. App. 273, 275-76 (1893) (holding that a husband may recover damages for his wife's lost service because of a negligently performed operation).

35. *See* Patelski v. Snyder, 179 Ill. App. 24, 26 (1913) (denying a wife recovery for loss of consortium because of nonfatal injury to her husband); *see also* Seymour v. Union News Co., 217 F.2d 168, 169 (7th Cir. 1954) (following *Patelski*). Interestingly, Illinois courts had earlier permitted wives to recover for loss of spousal consortium due to the alienation of the husband's affections. *See, e.g.*, Betser v. Betser, 58 N.E. 249, 250 (Ill. 1900); Bassett v. Bassett, 20 Ill. App. 543, 547 (1886). Those courts recognized the inconsistency of the earlier rule permitting husbands to recover damages for loss of consortium because of alienation of the wife's affections while denying that claim to women. In *Bassett*, for example, Justice Pillsbury observed that "it seems there never was any valid reason for holding that the loss of the *consortium* of the husband was any less an injury to the wife than the loss of the wife was to the husband." 20 Ill. App. at 547.

Most states passed legislation generically known as "Married Women's Acts" in the late nineteenth and early twentieth centuries. Barsella, *supra* note 24, at 797. Those statutes generally empowered women to sue and be sued, own property, execute contracts, and keep their own wages. PROSSER & KEETON, *supra* note 6, § 122, at 902. These statutes are collected in 3 CHESTER G. VERNIER, AMERICAN FAMILY LAWS § 167, at

finally recognized a woman's right to recover for loss of spousal consortium because of nonfatal injury.[37]

III. DISCUSSION

Since *Dini*, Illinois courts have declined to expand recovery of consortium damages for nonfatal injury to the filial relationship.[38] In

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171-83 (3d ed. 1935). *See, e.g.*, An Act to Revise the Law in Relation to Husband and Wife, ILL. REV. STAT. ch. 68, § 1 (1874). That act amended an earlier statute, An Act to Protect Married Women in Their Separate Property, 1861 ILL. LAWS 143 (codified as amended at ILL. COMP. STAT. ch. 750, § 65/9 (West 1993)), which allowed women to sue in their own names. Some courts interpreted Married Women's Acts as abolishing husbands' recovery for spousal consortium. *See, e.g.*, Marri v. Stamford St. R.R., 78 A. 582, 587 (Conn. 1911), *overruled by* Hopson v. St. Mary's Hosp., 408 A.2d 260, 265 (Conn. 1979).

Most courts, however, held that the husband's consortium claim survived the Married Women's Acts. *See, e.g.*, Brahan v. Meridian Light & Ry., 83 So. 467, 468 (Miss. 1919). In those states, the only change due to the Married Women's Acts was that any claim for the wife's lost wages or earning capacity was to be recovered in her own action. Evans Holbrook, *The Change in the Meaning of Consortium*, 22 MICH. L. REV. 1, 7-8 (1923).

36. 170 N.E.2d 881 (Ill. 1960).

37. *Id.* at 893. The plaintiff's husband in *Dini* was a Chicago fireman who suffered severe burns in a fire that started because of the defendants' negligence. *Id.* at 882-84. The *Dini* court noted that *Patelski* was the only other reported Illinois decision considering whether women may recover spousal consortium. *Id.* at 888.

38. Illinois follows the position taken by a majority of American states. *See* 2 STUART M. SPEISER ET AL., THE AMERICAN LAW OF TORTS § 8:23, at 590 (1985). American courts have offered the following reasons for denying children recovery for loss of consortium because of nonfatal injury to a parent: (1) the danger of double recovery; (2) the remoteness or speculative nature of damages; (3) the difficulty in apportioning damages among children; (4) an undue increase in the number of lawsuits; (5) an adverse impact upon families; (6) the need for legislatures, rather than courts, to speak to this issue; and (7) the inadequacy of damages or the judicial system in general to provide adequate compensation to children for such a loss. 2 *id.* § 8:23, at 590-91.

The RESTATEMENT (SECOND) OF TORTS echoes the majority view: "One who by reason of his tortious conduct is liable to a parent for illness or other bodily harm is not liable to a minor child for resulting loss of parental support and care." RESTATEMENT (SECOND) OF TORTS § 707A (1977). The American Law Institute ("ALI") explains that the child's interest in parental consortium is weaker than an adult's interest in spousal consortium, and that permitting children to recover for parental consortium increases the probability of overlap between the injured parent's and the child's recovery. RESTATEMENT (SECOND) OF TORTS § 707A cmt. a (1977). The following colloquy shows the ALI's discussion before adopting § 707A:

> DEAN PROSSER: Well, I gather that nobody wants to reverse the position of 707A and allow the child to recover for loss of the equivalent of consortium when the father or mother is personally injured. One federal case in Hawaii did that once, and presently got reversed when the state law changed, and all of the cases have refused to allow recovery, so we would have no case support whatever for taking the position that the action would lie.
>
> I don't hear any voices uplifted in favor of reversing 707A, so I would assume that it is approved, and proceed.

Koskela v. Martin,[39] the Illinois Appellate Court expressly rejected the children's claim.[40] LeAnn Koskela, a minor, sought to recover loss of consortium damages resulting from injuries her father suffered in a collision between his car and a garbage truck.[41] She alleged that she was especially dependent upon her father because of her mother's ill health and because she suffered from autism.[42] The trial court dismissed the consortium count of the daughter's complaint for failure to state a cause of action.[43]

The appellate court affirmed the dismissal of the daughter's consortium claim for several reasons.[44] Noting that the plaintiff requested the court to recognize a new cause of action in Illinois,[45] it urged that "[t]his action, like the wrongful death and the alienation of affections actions, would best be provided by the legislature so that all aspects are considered and protected."[46] The court reasoned that even if damages could compensate children for impairment of the filial

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PRESIDENT DARREL: Is there any comment on 707A?

MR ELDREDGE: I move its adoption.

PRESIDENT DARREL: Maybe it isn't necessary. There is no opposition to it, so we will assume that it is approved tentatively.

AMERICAN LAW INSTITUTE, 1969 JOURNAL OF PROCEEDINGS 179. Dean Prosser refers above to Scruggs v. Meredith, 134 F. Supp. 868 (D. Haw. 1955), *rev'd*, 244 F.2d 604 (9th Cir. 1957), in light of Halberg v. Young, 41 Haw. 634 (1957).

Prosser later criticized the void in the law which § 707A condones:

> The interest of the child in proper parental care has run into a stone wall where there is merely negligent injury to the parent.
>
> It is not easy to understand and appreciate this reluctance to compensate the child who has been deprived of the care, companionship and education of his mother, or for that matter his father, through the defendant's negligence. This is surely a genuine injury, and a serious one, which has received a great deal more sympathy from the legal writers than from the judges.

WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS § 125, at 896 (4th ed. 1971) (footnotes omitted).

39. 414 N.E.2d 1148 (Ill. App. Ct. 1980).

40. *Id.* at 1152.

41. *Id.* at 1149. Although the opinion does not state whether Mr. Koskela suffered permanent disability, it lists his injuries as contusions, lacerations, broken bones, and aggravation to pre-existing ailments. *Id.*

42. *Koskela*, 414 N.E.2d at 1149. The daughter specifically alleged that she suffered not only because the father's injuries prevented him from providing her with love, affection, and guidance, but also because he could no longer drive her to a special education class. *Id.*

43. *Id.*

44. *Id.* at 1150-52.

45. *Id.* at 1150. The plaintiff asked the court to go beyond the most recent expansion of the consortium claim in Dini v. Naiditch, 170 N.E.2d 881 (Ill. 1960). *Koskela*, 414 N.E.2d at 1150. See *supra* notes 36-37 and accompanying text for a discussion of *Dini*.

46. *Koskela*, 414 N.E.2d at 1150.

relationship, the intangible nature of consortium made damages for loss of consortium difficult to calculate.[47] The court also expressed concern that the injured parent's damages and the child's consortium damages might overlap.[48] For example, the court hypothesized that a jury might award a parent damages for lost future earnings but also increase a child's consortium award by the amount of financial support the child would have received from the parent but for the injury.[49] Finally, the court observed that permitting the children's claim would increase litigation and consequently place a financial burden on society.[50]

Later appellate court decisions that deny the children's claim place varying degrees of emphasis on the reasons set forth in *Koskela*.[51] Courts from other states that deny children recovery for loss of parental consortium because of nonfatal injury rely on the same or similar reasons as those advanced in *Koskela*.[52]

Although the Illinois Supreme Court has yet to decide whether children can recover damages for loss of parental consortium because of nonfatal injury, it recently decided the converse question. In *Dralle*

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47. *Id.* at 1151.

48. *Id.*

49. *Id.*

50. *Koskela*, 414 N.E.2d at 1151. The *Koskela* court stated three additional reasons for its holding. First, it opined that courts had historically permitted the consortium claim primarily to compensate married couples for the impairment or destruction of their sex lives. *Id.* Second, the court noted that recognition of this cause of action would be unprecedented. *Id.* Third, it chose to follow the majority of states, which deny children recovery for loss of parental consortium because of nonfatal injury. *Id.*

Moreover, the *Koskela* court rejected the plaintiff's argument that Article I, § 12 of the Illinois Constitution requires the creation of the children's claim. *Koskela*, 414 N.E.2d at 1152. Although that section of the constitution states that every person should enjoy a remedy for injury to person or property, the court noted that the Illinois Supreme Court has held that § 12 and its predecessors state only a philosophy, rather than a mandate for any specific remedy. *Koskela*, 414 N.E.2d at 1152 (citing Sullivan v. Midlothian Park Dist., 281 N.E.2d 659, 662 (Ill. 1972)).

51. *See, e.g.*, Van De Veire v. Sears, Roebuck & Co., 533 N.E.2d 994 (Ill. App. Ct. 1989); Hearn v. Beelman Truck Co., 507 N.E.2d 1295 (Ill. App. Ct.), *appeal denied*, 515 N.E.2d 108 (Ill. 1987); Huter v. Ekman, 484 N.E.2d 1224 (Ill. App. Ct. 1985); Block v. Pielet Bros. Scrap & Metal, 457 N.E.2d 509 (Ill. App. Ct. 1983); Mueller v. Hellrung Const. Co., 437 N.E.2d 789 (Ill. App. Ct. 1982); McNeil v. Diffenbaugh, 434 N.E.2d 377 (Ill. App. Ct. 1982).

52. *See, e.g.*, Borer v. American Airlines, 563 P.2d 858 (Cal. 1977); Zorzos v. Rosen, 467 So. 2d 305 (Fla. 1985); Powell v. American Motors Corp., 834 S.W.2d 184 (Mo. 1992); DeAngelis v. Lutheran Medical Ctr., 449 N.E.2d 406 (N.Y. 1983); High v. Howard, 592 N.E.2d 818 (Ohio 1992); Norwest v. Presbyterian Intercommunity Hosp., 652 P.2d 318 (Or. 1982). *Norwest* provides the most detailed discussion of the reasons for denying the children's consortium claim. *See* 652 P.2d at 319-31.

v. Ruder,[53] the supreme court held that a parent cannot recover loss of consortium damages for nonfatal injuries to a child.[54]

In *Dralle*, the plaintiffs' son was born with severe birth defects, including brain damage.[55] The parents alleged that their obstetricians' negligence and the medication the mother took during pregnancy caused the defects.[56] The trial court dismissed the parents' claim for loss of consortium and the appellate court reversed.[57]

On review, the supreme court acknowledged that it had earlier recognized parents' recovery of consortium damages for the wrongful death of a child,[58] but declined to extend parents' consortium recovery to cases of nonfatal injury.[59] The court reasoned that the primary distinction between a loss of society claim in a wrongful death action and the same claim in an action based on a nonfatal injury is that the nonfatally injured victim retains his own cause of action against the tortfeasor.[60] Thus, for cases of nonfatal injury, the court saw no danger that the wrongdoer could avoid compensating the victim or that similar tortious conduct would go undeterred.[61] An action under the Wrongful Death Act, on the other hand, would provide the only remedy for a decedent's family.[62]

The *Dralle* court also posited a fundamental difference between marital and filial relationships which justified recovery for impairment of the former but not the latter.[63] The court maintained that spousal consortium "'includes, in addition to material services, elements of

53. 529 N.E.2d 209 (Ill. 1988).

54. *Id.* at 212.

55. Dralle v. Ruder, 500 N.E.2d 514, 515 (Ill. App. Ct. 1986).

56. *Dralle*, 529 N.E.2d at 210. The complaint alleged that the child's injuries were caused by anoxia (lack of oxygen) at birth and his mother's use of the prescription drug Bendectin during pregnancy. *Id.* The *Dralle* court considered only the consortium claim arising from the mother's use of Bendectin. *Id.*

57. *Id.*

58. *Id.* at 211 (citing Bullard v. Barnes, 468 N.E.2d 1228, 1233 (Ill. 1984)). Loss of consortium damages generally may be recovered under wrongful death statutes. 2 DOBBS, *supra* note 1, § 8.1(5), at 400 n.1. The Illinois Wrongful Death Act, for example, permits children to recover for "pecuniary injuries" resulting from a parent's wrongful death. ILL. COMP. STAT. ch. 740, § 180/1 (West 1993). Illinois courts hold that pecuniary injuries under the Wrongful Death Act include loss of consortium. Bullard v. Barnes, 468 N.E.2d 1228, 1233-34 (Ill. 1984) (creating a rebuttable presumption of lost filial consortium in wrongful death); Elliott v. Willis, 442 N.E.2d 163, 170 (Ill. 1982) (creating a rebuttable presumption of lost spousal consortium in wrongful death).

59. *Dralle*, 529 N.E.2d at 212.

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.* at 214.

companionship, felicity and sexual intercourse, all welded into a conceptualistic unity.'"[64] It therefore concluded that the marital relationship was sufficiently different from the filial relationship to justify denying consortium damages to the latter.[65]

The court also advanced policy reasons for declining to extend parents' consortium claims to cases of nonfatal injury.[66] First, the court urged that recognizing claims for loss of society because of nonfatal injury would inappropriately enlarge tort liability by laying the groundwork for a broad range of persons, such as grandparents, siblings, and friends, to bring similar claims.[67] Second, the court anticipated difficulties in assessing damages.[68] It stated that a trier of fact could not accurately quantify the diminution in the quality of a parent-child relationship.[69] Additionally, permitting both the injured child and the parents to bring separate claims invited duplicate recoveries.[70] The court reasoned that a jury would encounter great difficulty in distinguishing the child's claim for pain and suffering from the parents' claim for loss of consortium;[71] consequently, the jury might erroneously award damages for both.[72]

Although in *Dralle* the supreme court addressed only the parents' claim, it likely would apply the same reasoning to deny the children's claim for loss of parental consortium because of nonfatal injury.[73]

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64. *Dralle*, 529 N.E.2d at 214 (quoting *Dini*, 170 N.E.2d at 891).

65. *Id.*

66. *Id.* at 213-14.

67. *Id.* at 213. "'Every injury has ramifying consequences, like the ripplings of the waters, without end. The problem for the law is to limit the legal consequences of wrongs to a controllable degree.'" *Id.* (quoting Cockrum v. Baumgartner, 447 N.E.2d 385, 390 (Ill.), *cert. denied*, 464 U.S. 846 (1983)). Seventy-five years earlier, the Illinois Appellate Court had voiced a similar objection to permitting a wife a consortium claim for injury to her husband:

> If the wife can recover, why not each of the minor children dependent on [the injured] for support and education? If the minor children, why not those family relations whose support, in case of their indigence, is placed on him by law? Or why not each of his creditors, who suffers a pecuniary loss in his inability to pay? Or even the societies or charitable associations to which he is no longer able to contribute? Where would the right of action for a single injury end?

Patelski v. Snyder, 179 Ill. App. 24, 27 (1913).

68. *Dralle*, 529 N.E.2d at 213.

69. *Id.* The court suggested that in some cases such an injury could strengthen a family by creating a greater appreciation of life. *Id.*

70. *Id.*

71. *Id.*

72. *Dralle*, 529 N.E.2d at 213.

73. In Van De Veire v. Sears, Roebuck & Co., 533 N.E.2d 994 (Ill. App. Ct. 1989), the appellate court cited *Dralle* in support of its decision to deny a minor child recovery

Indeed, the *Dralle* court twice cited *Koskela* with approval.[74]

IV. ANALYSIS

This part analyzes the approach taken in states that, unlike Illinois, permit children to recover loss of consortium damages for nonfatal injury to their parents.[75] Generally, courts that recognize the children's claim reject any distinctions between marital or filial relationships and between fatal or nonfatal injury.[76] These courts also reject policy arguments offered in opposition to the children's claim.[77] This part also evaluates Illinois' approach to filial consortium, as set forth in *Dralle* and *Koskela,* in light of the approach taken in the states that recognize the children's claim[78] and in light of earlier Illinois decisions.[79]

A. The Approach in Other States

In *Ferriter v. Daniel O'Connell's Sons, Inc.*,[80] the Supreme Judicial Court of Massachusetts became the first state court of last resort to recognize a child's right to recover damages for loss of parental consortium because of nonfatal injury.[81] In *Ferriter*, the father of two minor children suffered a permanently disabling injury as a result of an accident at a construction site.[82] The trial court recognized the

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for loss of parental consortium because of nonfatal injury. *Id.* at 995-96. *See also* Hutson v. Bell, 702 F. Supp. 212 (N.D. Ill. 1988).

74. *Dralle*, 529 N.E.2d at 210-11, 213. *Dralle* might not be followed in suits under 42 U.S.C. § 1983 (1988). In Hutson v. Bell, 702 F. Supp. 212 (N.D. Ill. 1988), the district court declined to follow *Dralle* because it found that the parent-child relationship was a protected liberty interest under the Due Process Clause of the Fourteenth Amendment. *Id.* at 214. The court therefore held that impairment of that interest through nonfatal injury to a child could support a § 1983 action despite *Dralle*. *Id.*

75. *See infra* part IV.A.

76. *See infra* note 92 and accompanying text.

77. *See infra* note 93 and accompanying text.

78. *See infra* parts IV.B.1-3.

79. *See infra* part IV.B.4.

80. 413 N.E.2d 690 (Mass. 1980).

81. *Id.* at 696. Although the Massachusetts Supreme Judicial Court was the first state supreme court to validate the children's claim, the Michigan Court of Appeals became the first court of review in the nation to do so. *See* Berger v. Weber, 267 N.W.2d 124, 126 (Mich. Ct. App. 1978). The Supreme Court of Michigan affirmed the Michigan Court of Appeals' decision in *Berger* after the Massachusetts court's decision in *Ferriter*. *See* Berger v. Weber, 303 N.W.2d 424, 427 (Mich. 1981).

82. 413 N.E.2d at 691. The father in *Ferriter* worked as a carpenter for the defendant. A one to two-hundred-pound load of wooden beams fell approximately fifty feet and struck him on the neck, paralyzing him below that point. *Id.*

children's claim for the loss of their father's consortium.[83] On direct review, the supreme judicial court affirmed the children's right to recover consortium damages conditioned on proof of their minority and dependency upon their father.[84]

The *Ferriter* court rejected the argument that the childrens' interest in the relationship with their parents was somehow less intense than the parents' interest in each other.[85] The court discerned no appreciable difference between the marital and filial relationship and therefore found no reason to deny the children's claim.[86]

Moreover, the court found no reason to distinguish between fatal and nonfatal injury.[87] In view of a Massachusetts statute granting children the right to recover for loss of parental consortium because of wrongful death,[88] the court found it appropriate to protect childrens' reasonable expectation of parental consortium when the parent suffered negligent injury rather than death.[89]

In addition to rejecting arguments based on alleged differences between marital and filial consortium and fatal and nonfatal injury, the *Ferriter* court also rejected arguments recognizing that the children's claim would cause an unreasonable expansion of tort liability, a multiplicity of lawsuits, difficulty in assessing damages, and would constitute an unwarranted failure to defer to the legislature.[90]

Since *Ferriter*, twelve additional state supreme courts have recognized the children's claim.[91] Like the *Ferriter* court, these courts have

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83. *Id.*

84. *Id.* at 696. The court noted here that *dependency* includes not only economic dependency, but also dependence upon the father for the "filial needs [of] closeness, guidance, and nurture." *Id.* Some courts recognizing the children's claim do not require that the child be a minor or economically dependent on the parent. *See, e.g.*, Ueland v. Reynolds Metals Co., 691 P.2d 190, 195 (Wash. 1984).

Although they agreed that children should recover damages for loss of parental consortium because of nonfatal injury, three justices each wrote a separate dissenting opinion in *Ferriter* because they doubted that loss of consortium damages should be recoverable in actions under the Massachusetts Workmen's Compensation Act. *Ferriter*, 413 N.E.2d at 703-11 (Quirico, Hennessey, Wilkins, JJ., dissenting).

85. *Id.* at 692.

86. *Id.*

87. *Id.* at 695.

88. *Id.* (citing MASS. GEN. L. ch. 229, § 2 (1973)).

89. *Ferriter*, 413 N.E.2d at 695. The court noted that a principal reason for denying recovery of lost parental consortium in an earlier alienation of affections case, Nelson v. Richwagen, 95 N.E.2d 545 (Mass. 1950), was that children enjoyed no legal right to their parents' society. *Ferriter*, 413 N.E.2d at 695.

90. *Id.* at 694-96 (citing Diaz v. Eli Lilly & Co., 302 N.E.2d 555 (Mass. 1973); *Nelson*, 95 N.E.2d at 545).

91. Hibpshman v. Prudhoe Bay Supply, Inc., 734 P.2d 991, 997 (Alaska 1987);

rejected distinctions between marital and filial relationships and between fatal and nonfatal injury.[92] These courts have focused on whether they should deny the children's claim because of the four policy arguments rejected in *Ferriter*.[93] The four common objections to the children's claim are examined below.

1. Undue Burden on Defendants

Some courts have denied the children's claim because of their unwillingness to expand tort liability.[94] According to this view,

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Villareal v. Arizona, 774 P.2d 213, 216 (Ariz. 1989); Berger v. Weber, 303 N.W.2d 424, 427 (Mich. 1981); Pence v. Fox, 813 P.2d 429, 433 (Mont. 1991); Gallimore v. Children's Hosp. Medical Ctr., 617 N.E.2d 1052, 1060 (Ohio 1993); Williams v. Hook, 804 P.2d 1131, 1138 (Okla. 1990); Reagan v. Vaughn, 804 S.W.2d 463, 465-66 (Tex. 1990); Hay v. Medical Ctr. Hosp., 496 A.2d 939, 946 (Vt. 1985); Ueland v. Reynolds Metals Co., 691 P.2d 190, 195 (Wash. 1984); Belcher v. Goins, 400 S.E.2d 830, 841 (W. Va. 1990); Theama v. City of Kenosha, 344 N.W.2d 513, 522 (Wis. 1984); Craft v. Hermes Consol., Inc., 797 P.2d 559, 560 (Wyo. 1990); *see also* Higley v. Kramer, 581 So. 2d 273, 283 (La. Ct. App.), *appeal denied*, 583 So. 2d 483 (La. 1991).

92. Indeed, even courts that deny children recovery for loss of parental consortium because of nonfatal injury often recognize the justice of the children's claim. *See, e.g.*, Hill v. Sibley Memorial Hosp., 108 F. Supp. 739, 741 (D.D.C. 1952); Hankins v. Derby, 211 N.W.2d 581, 582 (Iowa 1973); Hoffman v. Dautel, 368 P.2d 57, 59 (Kan. 1962). For example, the Kansas Supreme Court stated in *Hoffman* that:

> It is common knowledge that a parent who suffers serious physical or mental injury is unable to give his minor children the parental care, training, love and companionship in the same degree as he might have but for the injury. Hence, it is difficult for the court, on the basis of natural justice, to reach the conclusion that this type of action will not lie. Human tendencies and sympathies suggest otherwise. Normal home life for a child consists of complex incidences in which the sums constitute a nurturing environment. When the vitally important parent-child relationship is impaired and the child loses the love, guidance and close companionship of a parent, the child is deprived of something that is indeed valuable and precious. No one could seriously contend otherwise.

Hoffman, 368 P.2d at 59.

93. *See supra* text accompanying note 90. Virtually all courts recognizing the children's claim address these four issues. *See, e.g., Belcher*, 400 S.E.2d at 837. Courts often also reject arguments opposing the children's claim based on the weight of precedent, possible adverse effect on the family, and possible increased liability insurance premiums. *See, e.g., id.*

94. In Russell v. Salem Transp. Co., 295 A.2d 862 (N.J. 1972) the New Jersey Supreme Court stated:

> If the [children's consortium] claim were allowed there would be a substantial accretion of liability against the tortfeasor arising out of a single transaction (typically the negligent operation of an automobile). Whereas the assertion of a spouse's demand for loss of consortium involves the joining of only a single companion claim in the action with that of the injured person, the right here debated would entail adding as many companion claims as the injured parent had minor children, each such claim entitled to separate appraisal and award. The defendant's burden would be further enlarged if the

permitting the injured parent's children to recover would expand liability by giving rise to claims by new classes of plaintiffs, including grandparents and even neighbors who somehow benefited from the injured parent's companionship.[95] As the Illinois Appellate Court lamented in *Patelski v. Snyder*,[96] "[w]here would the right of action for a single injury end?"[97] Proponents of this view maintain that courts open a Pandora's Box by permitting the children's claim because other persons having a more remote relationship to the injured would undoubtedly seek to recover consortium damages.[98] In essence, then, this argument against the children's claim charges that courts create a slippery slope by recognizing the claim.

The slippery slope argument, however, is a fallacy.[99] Slippery slope arguments simply ignore the complexity of long chains of events.[100] To be convincing, one who predicts that an action necessarily leads to an undesirable result should demonstrate precisely how such a result would occur. Otherwise, the proponent commits the slippery slope fallacy.[101]

Courts that accept the argument that permitting the children's claim will unduly broaden consortium recovery commit the slippery slope fallacy. Those courts accept, without evidence, that permitting the children's claim will extend recovery to those with an attenuated relationship to the injured person. They fail, however, to consider factors, such as courts' control over the development of the common

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> claims were founded upon injuries to both parents. Magnification of damage awards to a single family derived from a single accident might well become a serious problem to a particular defendant as well as in terms of the total cost of such enhanced awards to the insured community as a whole.

Id. at 864; *see also* Borer v. American Airlines, 563 P.2d 858, 863 (Cal. 1977); *Belcher*, 400 S.E.2d at 835.

95. Dwork, *supra* note 27, at 736-37.

96. 179 Ill. App. 24 (1913).

97. *Id.* at 27; *see also supra* note 67.

98. *See, e.g.*, *Borer*, 563 P.2d at 862; Dralle v. Ruder, 529 N.E.2d 209, 213 (Ill. 1988). For a discussion of this aspect of *Dralle*, see *supra* note 67 and accompanying text.

99. ANNETTE T. ROTTENBERG, ELEMENTS OF ARGUMENT: A TEXT AND READER 185 (1985).

100. *Id.*

101. *Id.* Rottenberg provides an example: in 1941, some predicted that conscription would lead to fascism in the United States. *Id.* After World War II ended and the United States demobilized, it became clear that conscription inadequately predicted fascism. *Id.* Rottenberg notes that this incorrect prediction could have been avoided if other influences indicating the strength of democracy in this country were given sufficient weight. ROTTENBERG, *supra* note 99, at 185.

law,[102] that could limit unreasonable expansion of the consortium claim. Absent any solid evidence that permitting the children's claim will necessarily broaden the class of persons who may recover loss of consortium damages, the slippery slope argument remains unpersuasive.[103]

Undoubtedly, severe injury affects others beyond the injured person's nuclear family. Relatives, friends, acquaintances, and coworkers often suffer some loss from another's severe injury or death.[104] Thus, a line limiting liability to certain relationships must be drawn. It is the role of courts to draw this somewhat arbitrary line, and with respect to the children's claim, most have drawn it incorrectly.[105]

Moreover, allowing the children's claim will not substantially expand defendants' liability. Defendants are already held liable for loss of spousal consortium because of fatal or nonfatal injury.[106] In wrongful death cases, defendants are frequently held liable for lost parental consortium.[107] Thus, making defendants liable for loss of parental consortium because of nonfatal injury will not significantly increase tort liability, because defendants are already liable for loss of consortium in other types of actions.[108]

Still other courts deny the children's claim because permitting each

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102. As the *Ferriter* court recognized, "[a]s claims for injuries to other relationships come before us, we shall judge them according to their nature and their force." *Ferriter*, 413 N.E.2d at 696.

103. Those who credit the slippery slope argument against expansion of consortium damages should note that although from the founding of the United States, husbands could recover for loss of spousal consortium because of nonfatal injury, wives could not so recover until 1950. *See supra* notes 25-32 and accompanying text.

104. "Every injury has ramifying consequences, like the ripplings of the waters, without end." Cockrum v. Baumgartner, 447 N.E.2d 385, 390 (Ill.) (quoting Tobin v. Grossman, 249 N.E.2d 419, 424 (N.Y. 1969)), *cert. denied*, 464 U.S. 846 (1983); *see also supra* note 67.

105. "In delineating the extent of a tortfeasor's responsibility for damages under the general rule of tort liability, the courts must locate the line between liability and nonliability at some point, a decision which is essentially political." Suter v. Leonard, 120 Cal. Rptr. 110, 112 (Cal. Ct. App. 1975). Thus, the decision whether to protect a given relationship by granting consortium recovery for its impairment resembles the question of how to determine proximate cause. *See* Palsgraf v. Long Island R.R., 162 N.E. 99, 103-04 (N.Y. 1928) (Andrews, J., dissenting). Although a tortfeasor's injury to another will be the cause in fact of emotional injury to a great many third persons, the law, by limiting the availability of loss of consortium damages, limits the tortfeasor's liability. *See id.*

106. *See supra* part II.A.; *see also supra* note 58.

107. Dwork, *supra* note 27, at 737. Illinois courts also permit children to recover for lost parental consortium in wrongful death. *See infra* note 191 and accompanying text.

108. Dwork, *supra* note 27, at 737.

of an injured parent's children to recover also might overwhelm tortfeasors with increased liability.[109] Those courts distinguish the claim for spousal consortium, where, at most, one person may recover. For instance, the California Supreme Court determined in *Borer v. American Airlines*[110] that recognizing a right of action for each child would unreasonably expand liability.[111] Yet the *Borer* court reasoned from a faulty premise: that Americans typically have many children.

As noted by the dissent in *Borer*, few accident victims will have the large number of children that the injured parent in *Borer* had.[112] To the contrary, at that time the majority of American households had far fewer minor children.[113] As of 1974, over 65% of families in the United States had one or zero minor children and only 7% had more than four minor children.[114]

The argument advanced by the *Borer* dissent is even stronger today. As of 1990, 51% of American families had no children and 71% had one or zero children.[115] Only 3% of families had more than four children.[116] Thus, because of the low number of children found in typical American families, recognizing the children's claim will not significantly expand liability.

As the dissenting opinion in *Borer* further noted, permitting the children's consortium claim will probably expand tort liability less than when courts extended the consortium claim to wives.[117] First, not all married couples will have children.[118] Second, those couples that do have children will likely be parents of minor children for a shorter time than they will be spouses.[119] Consequently, recognizing a children's claim for loss of parental consortium because of nonfatal injury will have a lesser effect on overall liability than when courts extended the analogous claim to wives.[120]

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109. *See, e.g.*, Juene v. Del E. Webb Constr. Co., 269 P.2d 723, 724 (Ariz. 1954); *Borer*, 563 P.2d at 864; Hoffman v. Dautel, 368 P.2d 57, 59-60 (Kan. 1962); Russell v. Salem Transp. Co., 295 A.2d 862, 864 (N.J. 1972).

110. 563 P.2d 858 (Cal. 1977).

111. *Id.* at 863-64.

112. *Id.* at 868-69 (Mosk, J., dissenting). The injured parent in *Borer* had nine children. *Id.* at 860.

113. *Id.* at 868-69 (Mosk, J., dissenting).

114. *Borer*, 563 P.2d at 868-69 (Mosk, J., dissenting).

115. UNITED STATES DEPARTMENT OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 52 (112th ed. 1992).

116. *Id.*

117. *Borer*, 563 P.2d at 869 (Mosk, J., dissenting).

118. *Id.* (Mosk, J., dissenting).

119. *Id.* (Mosk, J., dissenting).

120. *Id.* (Mosk, J., dissenting).

2. Increased Litigation

Many courts deny the children's claim because they fear that litigation will increase if children enjoy an independent right of action.[121] These courts maintain that permitting each child to recover for lost parental consortium will unduly increase the number of lawsuits.[122]

Nonetheless, courts that permit the children's claim recognize that they can limit the number of actions by requiring that all dependent children join in the injured parent's suit.[123] If children should enjoy a right to recover for lost parental consortium, justice requires that courts not deny recovery simply because there may be multiple claims.[124]

3. Difficulty in Assessing Damages Accurately

a. Intangible Nature of the Loss

Some courts deny the children's claim because juries find it difficult to calculate accurately the value of the parent-child relationship.[125] Granted, juries will encounter difficulty in precisely determining loss of consortium damages. Nonetheless, juries regularly award money damages for intangible injuries such as physical pain, mental anguish, impairment, and disfigurement resulting from personal injuries.[126] Because our tort system requires that injuries be compensated despite difficulty in calculating damages,[127] courts should not deny the

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121. Delaney, *supra* note 26, at 107-08.

122. *See, e.g., Borer*, 563 P.2d at 863; *Hoffman*, 368 P.2d at 60.

123. *See, e.g., Hibpshman*, 734 P.2d at 997 (stating that "a practical and fair solution to the problem is to require joinder of the minors' consortium claim with the injured parent's claim whenever feasible"). Illinois permits joinder of claims arising from a single transaction. ILL. COMP. STAT. ch. 735, § 5/2-404 (West 1993); *see also* FED. R. CIV. P. 20(a).

124. "[I]t is no objection to say, that it will occasion multiplicity of actions; for if men will multiply injuries, actions must be multiplied too; for every man that is injured ought to have his recompense." Ashby v. White, 92 Eng. Rep. 126, 137 (K.B. 1703) (Holt, C.J., dissenting); *see also* Delaney, *supra* note 26, at 131-32.

125. Delaney, *supra* note 26, at 107-08; *see also* Salin v. Kloempken, 322 N.W.2d 736, 740 (Minn. 1982) (stating that the intangible nature of the child's loss counsels against recognizing his right of action); Reagan v. Vaughn, 804 S.W.2d 463, 483-84 (Tex. 1990) (Hecht, J., concurring and dissenting) (stating that assessing damages for loss of consortium is more difficult than for other sorts of intangible losses).

126. *See* Dwork, *supra* note 27, at 734.

127. One commentator stated that:

> Where the tort itself is of such a nature as to preclude the ascertainment of the amount of damages with certainty, it would be a perversion of fundamental principles of justice to deny all relief to the injured person, and thereby relieve the wrongdoer from making any amend for his acts.

CHARLES T. MCCORMICK, HANDBOOK ON THE LAW OF DAMAGES § 27, at 102 (1935) (quoting Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555, 563

children's claim merely because damages may be difficult to calculate.

Additionally, because juries place a value on the marital relationship in calculating damages for lost spousal consortium[128] and value the filial relationship in wrongful death actions,[129] no reason exists to deny the children's claim because it is difficult to value.[130] Difficulty in assessing damages therefore is an insufficient basis for denying the children's claim.

b. Danger of Double Recovery

Courts have also opposed the children's claim because of a perceived danger of double recovery.[131] These courts reason that double recovery is possible because, for example, a jury might award a child damages for lost financial support and also award the injured parent damages for lost earnings.[132] Alternatively, a jury might include damages for the child's emotional loss in both the parent's award and the child's award.[133] Just as courts can avoid the perceived problem of increased litigation through means less drastic than denying the children's claim altogether, less drastic means exist for avoiding the problem of double recovery.

For example, courts can use jury instructions designed to avoid double recovery.[134] Precise instructions would make clear to the jury that the parent's and the child's claims are distinct. Carefully drafted jury instructions could ensure that children recover damages only for their lost parental consortium, and parents will recover damages only

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(1931)).

128. *See supra* notes 25-32 and accompanying text.

129. *See infra* notes 185-91 and accompanying text.

130. *Hibpshman*, 734 P.2d at 996 ("We see no reason to consider the calculation of damages for a child's loss of parental consortium any more speculative or difficult than that necessary in other consortium, wrongful death, emotional distress, or pain and suffering actions." (footnote omitted)); *see also* Berger v. Weber, 303 N.W.2d 424, 427 (Mich. 1981); Hay v. Medical Ctr. Hosp., 496 A.2d 939, 943-44 (Vt. 1985); Theama v. City of Kenosha, 344 N.W.2d 513, 519-20 (Wis. 1984). *But see* Reagan v. Vaughn, 804 S.W.2d at 483 (Hecht, J., concurring and dissenting) (doubting that juries would find the factors the majority set forth helpful in determining loss of consortium damages).

131. By double recovery, courts refer to the possible overlap between the child's and the parent's damages. *See, e.g.*, Salin v. Kloempken, 322 N.W.2d 736, 740 (Minn. 1982); High v. Howard, 592 N.E.2d 818, 820 (Ohio 1992), *overruled by Gallimore*, 617 N.E.2d at 1052; *Borer*, 563 P.2d at 863.

132. *See, e.g.*, Koskela v. Martin, 414 N.E.2d 1148, 1151 (Ill. App. Ct. 1980).

133. *See, e.g.*, *Borer*, 563 P.2d at 863.

134. *See, e.g.*, *Hay*, 496 A.2d at 944 (discussing the trial court's ability to give instructions allowing juries to properly compute and allocate damages).

for their own injuries.[135]

4. Legislative Deference

Although courts generally recognize the appeal of the children's claim,[136] many refuse to recognize it, reasoning that legislatures, rather than courts, should create new rights of action.[137] Illinois courts rely principally on such reasoning in refusing to recognize the children's claim.[138] This reluctance to act is surprising given that courts, not legislatures, created and expanded the consortium claim.[139]

Since 1980, however, courts that recognize the children's claim have rejected this argument.[140] Indeed, courts have traditionally created new rights and remedies in response to changes in society that legislatures have not yet addressed.[141] American courts, therefore,

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135. Delaney suggests the following as a model jury instruction:

> To answer the question pertaining to loss of parental consortium with the parent, you should name such sum as you feel will fairly and reasonably compensate the children for such loss as they have sustained by being deprived of the parent's aid, assistance, comfort, society, and companionship during such period as the parent was unable to render such services because of the injuries. In considering the amount to be awarded, you will bear in mind the evidence as to the relationship which existed between the parent and the child before the injury.
>
> You will not include in your finding any sum which you are required to determine in any other question, representing loss of earning capacity sustained by the parent by reason of his injuries. To do so would allow double damages for such loss of earning capacity, which you must not do.

Delaney, *supra* note 26, at 131 n.173.

136. *See supra* note 92.

137. *See, e.g.*, DeAngelis v. Lutheran Medical Ctr., 449 N.E.2d 406, 408 (N.Y. 1983); Norwest v. Presbyterian Intercommunity Hosp., 652 P.2d 318, 323 (Or. 1982). However, at least one state legislature has provided for the children's claim. After the Florida Supreme Court rejected the children's claim in Zorzos v. Rosen, 467 So. 2d 305 (Fla. 1985), the Florida Legislature enacted legislation providing in part: "A person who, through negligence, causes significant permanent injury to the natural or adoptive parent of an unmarried dependent resulting in a permanent total disability shall be liable to the dependent for damages, including damages for permanent loss of services, comfort, companionship, and society." FLA. STAT. ANN. § 768.0415 (West Supp. 1994).

138. *See supra* part III.

139. *See supra* part II.

140. *See, e.g.*, *Hibpshman*, 734 P.2d at 995 (recognizing the court's responsibility to adapt the common law to address changed societal views where the legislature fails to act), *modified*, Truesdell v. Halliburton Co., 754 P.2d 236 (Alaska 1988); *see also* Ueland v. Reynolds Metals Co., 691 P.2d 190, 193 (Wash. 1984) (stating that when justice requires courts to recognize a new right of action they abdicate their responsibility by deferring to the legislature).

141. *See Hay*, 496 A.2d at 945 (stating that "[t]he main characteristic of the common law is its dynamism").

should not await legislative action before recognizing the children's claim.[142]

B. Problems With the Illinois Approach

The reasons set forth in *Dralle* and *Koskela* for denying protection to the filial relationship are unpersuasive. Two distinctions upon which the court in *Dralle* relied—those between marital and filial relationships and between fatal and nonfatal injury[143]—are distinctions without a difference and therefore provide no basis for denying the children's claim.

1. Filial and Marital Consortium Are Similar

Illinois courts perpetuate an insupportable inconsistency by permitting adults to recover loss of consortium damages for nonfatal injury to a spouse while denying children recovery for nonfatal injury to a parent. In *Dralle*, the Illinois Supreme Court posited a fundamental difference between marital and filial relationships that justified legal protection of one but not the other.[144] Yet, this unequal treatment of marital and filial consortium is unjustified because those relationships

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142. Justice Cardozo recognized courts' responsibility to reform the common law in response to change:

> That court best serves the law which recognizes that the rules of law which grew up in a remote generation may, in the fullness of experience, be found to serve another generation badly, and which discards the old rule when it finds that another rule of law represents what should be according to the established and settled judgment of society, and no considerable property rights have become vested in reliance upon the old rule. It is thus great writers upon the common law have discovered the source and method of its growth, and in its growth found its health and life. It is not and should not be stationary. Change of this character should not be left to the legislature.

BENJAMIN CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 151-52 (1921) (quoting Dwy v. Connecticut Co., 92 A. 883, 891 (Conn. 1915) (Wheeler, J., concurring)).

In expanding the consortium claim, Justice Liacos in *Ferriter* recognized the same responsibility:

> "In a field long left to the common law, change may well come about by the same medium of development. Sensible reform can here be achieved without the articulation of detail or the creation of administrative mechanisms that customarily comes about by legislative enactment . . . . In the end the Legislature may say that we have mistaken the present public understanding of the nature of the [parent-child] relation, but that we cannot now divine or anticipate."

413 N.E.2d at 695-96, *superseded by* MASS. GEN. L. ch. 152, § 24 (1989) (quoting Diaz v. Eli Lilly & Co., 302 N.E.2d 555, 563 (Mass. 1973)) (alterations in original).

143. *See supra* text accompanying notes 60-65.

144. 529 N.E.2d at 214. "[T]here is no inconsistency . . . in denying recovery for loss of filial . . . society and companionship and in allowing recovery for loss of spousal consortium." *Id.*

are not sufficiently different to warrant unequal protection.

In his concurring opinion in *Dralle*, Justice Clark recognized that any differences between the marital and filial relationships cannot justify unequal protection.[145] The *Dralle* majority reasoned that the filial relationship merits less protection because it lacks many of the marital relationship's attributes, such as "companionship, felicity and sexual intercourse."[146] Yet, as Justice Clark pointed out, the modern parent-child relationship surely includes felicity and companionship as key ingredients.[147]

Justice Clark stressed that the majority predicated its distinction between the relationships on the issue of sexual intercourse alone.[148] He correctly concluded that this difference cannot justify distinguishing between marital and filial relationships.[149] Sexual relations are only one aspect of consortium.[150] Marriage is a basic right,

145. *Dralle*, 529 N.E.2d at 216 (Clark, J., concurring). "A difference which makes no difference is no difference." *Id.* (Clark, J., concurring). Although Justice Clark rejected the majority's denial of consortium damages for impairment of the filial relationship because of nonfatal injury, he concluded that Woodill v. Parke Davis & Co., 402 N.E.2d 194 (Ill. 1980), which bars recovery for emotional distress in strict products liability actions, would bar recovery in *Dralle*. *Dralle*, 529 N.E.2d at 215 (Clark, J., concurring). Loss of consortium is "principally a form of mental suffering." Rodriguez v. Bethlehem Steel Corp., 525 P.2d 669, 681 (Cal. 1974).

146. *Dralle*, 529 N.E.2d at 214 (quoting Dini v. Naiditch, 170 N.E.2d 881, 891 (Ill. 1960)).

147. *Id.* at 217 (Clark, J., concurring); *see also* Bullard v. Barnes, 468 N.E.2d 1228, 1234 (Ill. 1984) ("[T]he chief value of children to their parents is the intangible benefits they provide in the form of comfort, counsel and society."). The current nature of the filial relationship differs from its nature in the past, when parents valued children largely for their service. *See supra* note 24 and accompanying text. Today, child protection laws, such as those governing child labor and compulsory education, prevent children from functioning as economic assets to their parents. Instead, parents value children today for their society and companionship. Thus, the significance of the parents' action for loss of consortium today is that it compensates them for emotional, rather than economic, loss because of injury to their child. Dwork, *supra* note 27, at 731-32.

148. *See Dralle*, 529 N.E.2d at 217 (Clark, J., concurring). Justice Clark acknowledged that the majority opinion never expressly stated this: "[R]eticence apparently prevents [the majority] from making the distinction explicit . . . ." *Id.* (Clark, J., concurring).

149. *Id.* (Clark, J., concurring) ("[T]he term 'consortium,' contrary to the belief of many lawyers, never has been limited to sexual intercourse. Compensation for loss of consortium must be made even in circumstances where, for physical or other reasons, intercourse is not even a factor . . . .") *See also* JEROME MIRZA, ILLINOIS TORT LAW AND PRACTICE § 17:5, at 479-80 (2d ed. 1988).

150. *Dralle*, 529 N.E.2d at 214 (describing spousal consortium as including sexual intercourse, but also elements of companionship and felicity). Other courts agree. *See, e.g.*, Berger v. Weber, 303 N.W.2d 424, 426 (Mich. 1981) ("We are not persuaded that [the distinction between spousal and filial consortium] is significant enough to deny the child's claim. Sexual relations are but one element of the spouse's consortium action.

"fundamental to our very existence and survival,"[151] but "[a]n injury to an interest in the companionship of a child is no less wounding than an injury to an interest in the companionship of a spouse."[152] Although Justice Clark considered the value of the filial relationship in the context of parents' claims for nonfatal injuries to a child, his view remains persuasive when considered in the converse situation of a child's claim for nonfatal injuries to a parent.[153]

In fact, allowing loss of consortium damages for the filial relationship may be more appropriate than for the marital relationship because children may rely on parents even more than spouses rely on each other.[154] Unfortunately, money damages cannot repair damage to a child's relationship with his or her parent,[155] but our legal system can offer no better remedy.[156] Simply because children cannot be completely compensated for their loss cannot justify ignoring the children's claim altogether.[157]

2. Nonfatal Injury Can Diminish Consortium as Much as Death

Illinois courts perpetuate another insupportable inconsistency by permitting children to recover for lost parental consortium in wrongful

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The other elements . . . are similar in both relationships and in each are deserving of protection."); Borer v. American Airlines, 563 P.2d 858, 868 (Cal. 1977) (Mosk, J., dissenting) (doubting "that sexual activity is more worthy of the law's concern than the affection, comfort, and guidance which loving parents bestow on their children"); *see also* Jean C. Love, *Tortious Interference with the Parent-Child Relationship: Loss of an Injured Person's Society and Companionship*, 51 IND. L.J. 590, 614-15 (1976) (stating that although marital consortium includes sexual relations, sex is irrelevant to whether children should recover for loss of parental consortium because of nonfatal injury).

Justice Clark, however, declined to completely equate the marital and filial relationships. "While [the relationships] share much in common, they differ in the texture of their emotional fabric." *Dralle*, 529 N.E.2d at 217 (Clark, J., concurring).

151. Loving v. Virginia, 388 U.S. 1, 12 (1967).

152. *Dralle*, 529 N.E.2d at 217 (Clark, J., concurring). As noted above, by the late nineteenth century, emotional loss became the dominant theme of the consortium claim. *See supra* text accompanying note 29.

153. *See supra* note 73 and accompanying text.

154. *See* Dwork, *supra* note 27, at 742 (arguing that children deserve greater damages than spouses because their emotional underdevelopment requires that they receive more nurturing to develop properly).

155. Theama v. City of Kenosha, 344 N.W.2d 513, 520 (Wis. 1984) (rejecting the argument that the inadequacy of money damages justifies denying the children's claim).

156. *See* Kent H. Bigler, Note, *Washington Expands A Child's Cause Of Action For Loss Of Parental Consortium.* Ueland v. Reynolds Metals Co., 103 Wn. 2d 131, 691 P.2d 190 (1984), 20 GONZ. L. REV. 601, 605 (1984-85) (acknowledging the inadequacy of damages but stating that some writers believe they may help).

157. Berger v. Weber, 267 N.W.2d 124, 128-29 (Mich. Ct. App. 1978) (noting that money damages cannot truly compensate for other intangible losses such as pain, suffering, or death).

death actions but not for nonfatal injury.[158] A disabling injury can deprive a child of parental consortium just as surely as death.[159] As the Arizona Supreme Court put it, "[o]ften death is separated from severe injury by mere fortuity; and it would be anomalous to distinguish between the two when the quality of consortium is negatively affected by both."[160] Consequently, it is misguided to distinguish between injuries that are fatal and those that are severe, yet nonfatal, in allowing loss of consortium damages.

Imagine a parent left in a persistent vegetative state as a result of a defendant's negligence. Although that parent's children are deprived of consortium just as much as if the defendant had killed that parent, Illinois courts would deny the children any recovery for the value of the parent-child relationship. Indeed, commentators have urged that living with a severely injured person may affect family members more than if that person had been killed.[161]

In distinguishing between fatal and nonfatal injuries, the *Dralle* court failed to recognize the significance of the consortium claim altogether. By denying a parent loss of consortium damages, the court in effect ruled that since the child survived, he should bring his own action to recover damages.[162] The court discerned no reason to permit the parents to recover because the child's action provided the family with

158. In considering *Dralle* one commentator stated "[t]here is no reasonable basis to rationalize the current Illinois Supreme Court's decision in *Dralle* denying a parental claim for loss of companionship with the court's previous rulings authorizing such a recovery in wrongful death cases." 4 ILLINOIS PERSONAL INJURY § 403:20, at 111 (George L. Bounds et al. eds. 1989) (Mirza Practice Commentary).

159. Justice Clark suggested that the distinction between fatal and nonfatal injury is perhaps more unjustified than that between spousal and filial consortium. *Dralle*, 529 N.E.2d at 217 (Clark, J., concurring). He stated that "[t]he distinction between fatal and nonfatal injury is not rational." *Id.* at 218 (Clark, J., concurring); *see also Ferriter*, 413 N.E.2d at 695, *superseded by* MASS. GEN. L. ch. 152, § 24 (1989); Berger v. Weber, 303 N.W.2d 424, 426 (Mich 1981).

160. Frank v. Superior Court, 722 P.2d 955, 957 (Ariz. 1986).

161. *See, e.g.*, Shirley S. Simpson, Comment, *The Parental Claim for Loss of Society and Companionship Resulting From the Negligent Injury of a Child: A Proposal for Arizona*, 1980 ARIZ. ST. L.J. 909, 923 (1980). The Arizona Supreme Court in *Frank* stated that:

> Perhaps the loss of companionship and society experienced by the parents of a child permanently and severely injured . . . is in some ways even greater than that suffered by the parents of a deceased child. Not only has the normal family relationship been destroyed, as when a child dies, but the parent is also confronted with his loss each time he is with his child and experiences again the child's diminished capacity to give comfort, society, and companionship.

722 P.2d at 958 (quoting Simpson, *supra*, at 923).

162. *See Dralle*, 529 N.E.2d at 212; *see also supra* text accompanying notes 60-62.

an adequate remedy against the tortfeasor.[163]

However, impairment of a relationship by fatal or nonfatal injury amounts to a separate and independent harm to the injured person's family. The parents in *Dralle*, therefore, should have enjoyed a right of action for loss of consortium regardless of whether their son survived to enforce his rights against the tortfeasor.[164] By the same logic, children must enjoy a right of action against those who impair the filial relationship by severely injuring their parents.[165]

3. Policy Arguments Against the Children's Claim Fail

Cases from the thirteen states that recognize the children's claim illustrate the flaws in the policy arguments set forth in *Dralle* and *Koskela*.[166] First, slippery slope arguments are often fallacious,[167] and in *Dralle*, the supreme court succumbed to just such an argument.[168] The court offered no support for its conclusion that permitting parents to recover loss of consortium damages for nonfatal injury to their children would inevitably result in consortium recovery by those with a more distant relationship to the child.[169] Moreover, the *Dralle* court completely discounted its ability to expand consortium recovery to the proper extent while avoiding harmful or unwarranted expansion.[170]

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163. *Dralle*, 529 N.E.2d at 212; *see also Borer*, 563 P.2d at 866 (stating that a surviving victim can and should vindicate his family's rights against the tortfeasor through his own action).

164. This disregards for the moment, of course, that under Illinois law, loss of consortium damages generally may not be recovered in products liability suits. *See supra* note 145.

165. Commenting on Justice Clark's concurring opinion in *Dralle*, the United States District Court for the Northern District of Illinois stated that his "opinion strikes this Court as both cogent and persuasive, and if it were free to decide the issue from first principles it would likely adopt [his] views." Alber v. Illinois Dept. of Mental Health, 786 F. Supp. 1340, 1365 (N.D. Ill. 1992); *see also* Hutson v. Bell, 702 F. Supp. 212, 214 (N.D. Ill. 1988).

166. *See supra* parts IV.A.1-4.

167. *See supra* part IV.A.1.

168. *See Dralle*, 529 N.E.2d at 213; *see also supra* note 67 and accompanying text.

169. *See Dralle*, 529 N.E.2d at 213; *see also supra* note 67 and accompanying text.

170. "[T]his court has never held that . . . loss of society . . . [damages are] always compensable. Rather, it has proceeded on a case-by-case basis when determining whether plaintiffs may recover damages for this type of . . . injury." Seef v. Sutkus, 583 N.E.2d 510, 512 (Ill. 1991) (Miller, C.J., concurring); *see also supra* note 102 and accompanying text. In considering the argument that recognizing the children's claim would permit "maiden aunts" and "second cousins" to recover, the Michigan Court of Appeals observed that "[t]his make-weight argument has probably been made whenever a new cause of action was proposed." Berger v. Weber, 267 N.W.2d 124, 129 (Mich. Ct. App. 1978), *modified*, 303 N.W.2d 424 (Mich. 1981). *But see* Frank I. Powers, Note,

Second, recognizing the children's claim will not flood Illinois courts with litigation. The decisions of courts that recognize the children's claim show that permitting the claim will not significantly increase the number of lawsuits.[171] The *Dralle* court failed to recognize that it could easily avoid this problem by requiring joinder of the parent's consortium claim with the child's suit for personal injuries.[172]

Third, juries can adequately calculate loss of consortium damages despite the intangible nature of such damages. The *Dralle* court urged that both the intangible nature of the consortium claim and the potential for a double recovery rendered loss of consortium damages too difficult to calculate.[173] This argument, however, ignores that juries routinely award damages for intangible injuries, such as for physical pain or severe mental distress.[174] Significantly, Illinois juries already valuate spousal and filial consortium in wrongful death suits.[175] Moreover, courts can easily avoid double recovery by requiring mandatory joinder of the parent's and child's claims and jury instructions that explain the separate components of their damages.[176]

Fourth, Illinois courts must not leave to the General Assembly issues more properly decided by the judiciary, such as expansion or interpretation of the common law.[177] Rather, Illinois courts should actively police the common law. Although in *Dralle* the supreme court failed to discuss whether deference to the General Assembly barred it from recognizing the children's claim, the appellate court in *Koskela* reasoned that the General Assembly, rather than the judiciary, must

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Dralle v. Ruder: *Did the Decision Close the Book on Recovery for Society and Companionship in Illinois or Just Turn the Page?*, 22 J. MARSHALL L. REV. 721, 730 (1989) (agreeing with the decision in *Dralle* to avoid expansion of liability by limiting recovery to the injured).

171. *See supra* part IV.A.2.

172. Such a requirement should not be considered unreasonable. The Illinois Supreme Court required joinder of a spouse's claim for loss of consortium with the injured spouse's claim for personal injury in Brown v. Metzger, 470 N.E.2d 302, 304 (Ill. 1984). Illinois' joinder requirement, as articulated in *Brown*, mirrors that in RESTATEMENT (SECOND) OF TORTS § 693(2) (1977).

173. *Dralle*, 529 N.E.2d at 213; *see also supra* notes 68-72 and accompanying text.

174. *See* Dwork, *supra* note 27, at 734.

175. *See infra* notes 185-91 and accompanying text.

176. *See supra* parts IV.A.2, IV.A.3.b.

177. *See* David H. Hollander et al., *Survey: Developments in Maryland Law, 1988-89*, 49 MD. L. REV. 509, 811 (1990) ("By refusing to address [an] issue, [courts ignore their] 'responsibility to face a difficult legal question and accept judicial responsibility for a needed change in the common law.'" (quoting Hay v. Medical Ctr. Hosp., 496 A.2d 939, 945 (Vt. 1985))).

expand the consortium claim.[178]

Illinois courts should not wait for the General Assembly to reform the common law.[179] Busy legislatures often lack the time and resources to consider reforms of the common law and may fail to do so when no influential interest group promotes such reform.[180] Illinois courts should, therefore, recognize the children's claim.[181] The Illinois Supreme Court has expanded tort liability without approval from the General Assembly before and should not hesitate to do so now.[182]

4. Illinois' Current Position Conflicts with Earlier Decisions

The Illinois courts' denial of the children's claim conflicts with earlier Illinois decisions. As stated earlier, the distinction between fatal and nonfatal injury is a distinction without a difference.[183] When a parent suffers a severely disabling injury, any distinction between the effect of that injury and the effect of death on the parent-child relationship becomes meaningless.[184] Consequently, to the extent that Illinois courts permit children to recover loss of consortium damages for a parent's death, they act inconsistently by denying consortium recovery for severe nonfatal injury.

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178. *Koskela*, 414 N.E.2d at 1150; *see also supra* note 46 and accompanying text.

179. *See supra* note 142.

180. *See* Michael M. Neltner, *Ohio Rejects a Child's Cause of Action for Loss of Parental Consortium:* High v. Howard, 592 N.E.2d 818 (Ohio 1992), 61 U. CIN. L. REV. 1097, 1133 (1993) (stating that legislatures traditionally respond slowly when a needed change in the common law will affect only a small number of constituents).

181. Even if the General Assembly disagrees with a judicial expansion of the consortium claim, it remains free to reverse or modify that expansion by statute. For example, the General Assembly at ILL. COMP. STAT. ch. 735, § 5/2-1116 (West 1993), modified the holding in Alvis v. Ribar, 421 N.E.2d 886 (Ill. 1981) (abolishing contributory negligence in favor of comparative negligence); *see also* Ferriter v. Daniel O'Connell's Sons, Inc., 413 N.E.2d 690, 695-96 (Mass. 1980) (stating that courts should modify the common law without regard to possible legislative reversal); *cf.* FLA. STAT. ANN. § 768.0415 (West Supp. 1994) (reversing the Florida Supreme Court's denial of the children's claim in Zorzos v. Rosen, 467 So. 2d 305 (Fla. 1985)).

182. The Illinois Supreme Court has stated:

> We find no wisdom in abdicating to the legislature our essential function of re-evaluating common-law concepts in the light of present day realities. Nor do we find judicial sagacity in continually looking backward and parroting the words and analyses of other courts so as to embalm for posterity the legal concepts of the past.

Dini v. Naiditch, 170 N.E.2d 881, 892 (Ill. 1960) (expanding consortium damages to wives for nonfatal injury to their husbands); *see also* Elliott v. Willis, 442 N.E.2d 163, 168 (Ill. 1982) (construing "pecuniary injury" under Illinois' Wrongful Death Act to include loss of consortium); *Alvis*, 421 N.E.2d at 896-97 (abolishing contributory negligence in favor of comparative negligence).

183. *See supra* part IV.B.2.

184. *See supra* text accompanying note 160.

The Illinois Supreme Court first permitted recovery of loss of consortium damages in wrongful death actions in *Elliott v. Willis*.[185] The *Elliott* court held that pecuniary injury under the Wrongful Death Act includes lost spousal consortium.[186] Next, in *Bullard v. Barnes*,[187] the supreme court built upon *Elliott* by recognizing a rebuttable presumption of parents' loss of filial consortium for the wrongful death of a minor child.[188] Furthermore, in *Ballweg v. City of Springfield*,[189] the supreme court approved the same presumption of lost consortium for the wrongful death of an adult child.[190] Although the supreme court has not yet directly decided the converse question of whether children may recover loss of consortium damages for the wrongful death of a parent, the Illinois appellate courts have permitted children to so recover.[191] Since children in Illinois may recover parental consortium in wrongful death actions, Illinois courts act inconsistently by denying children recovery for loss of parental consortium because of nonfatal injuries that have virtually the same effect as death.

On a more immediate note, the Illinois courts' failure to recognize the children's claim conflicts with two recent decisions of the Illinois Supreme Court. In *Seef v. Sutkus*,[192] the supreme court held that parents enjoy a rebuttable presumption of lost consortium for the wrongful death of a viable stillborn child.[193] The *Seef* court determined that the relationship between parent and unborn child is worthy of legal protection[194] and held that juries could adequately determine damages to that relationship despite its intangible and underdeveloped nature.[195]

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185. 442 N.E.2d 163 (Ill. 1982).

186. *Id.* at 168.

187. 468 N.E.2d 1228 (Ill. 1984).

188. *Id.* at 1234.

189. 499 N.E.2d 1373 (Ill. 1986).

190. *Id.* at 1379.

191. *See, e.g.*, Jackson v. Pellerano, 569 N.E.2d 167, 172-73 (Ill. App. Ct.), *appeal denied*, 575 N.E.2d 915 (Ill. 1991); Adams v. Turner, 555 N.E.2d 1040, 1043-44 (Ill. App. Ct. 1990); Cooper v. Chicago Transit Auth., 505 N.E.2d 1239, 1244 (Ill. App. Ct. 1987).

192. 583 N.E.2d 510 (Ill. 1991).

193. *Id.* at 512. The plaintiffs in *Seef* alleged that their obstetrician's failure to monitor the condition of the unborn child and to perform a timely cesarean delivery resulted in its death. *Id.* at 511.

194. *Id.* at 511. The court stated that logic required it to permit loss of society damages for the wrongful death of a viable stillborn because it permitted such damages for infants. *Id.*

195. *Seef*, 583 N.E.2d at 514 (Miller, C.J., concurring). "While damages for loss of society are not as susceptible to in-depth analysis and calculation as future earnings,

The decision in *Seef* makes the Illinois courts' refusal to recognize the children's claim appear even more unjust. In *Seef*, the supreme court expanded consortium recovery for impairment of a relationship whose existence is difficult to discern.[196] If the court permitted recovery of consortium damages where the filial relationship has not yet developed, it should permit children to recover for loss of parental consortium because of nonfatal injury.[197] Additionally, in light of the *Seef* court's confidence that juries can calculate damages for loss of consortium between parents and fetuses,[198] can anyone doubt that juries can adequately perform "the sensitive, and perhaps impossible, task"[199] of quantifying the diminution of the parent-child relationship caused by nonfatal injury?

Furthermore, in *In re Estate of Finley*[200] the Illinois Supreme Court held that siblings may recover proven[201] loss of consortium damages in wrongful death actions.[202] Thus, in *Finley*, the court extended loss of consortium damages to collateral relatives. This expansion makes the denial of the children's claim appear more unjust because the parent-child relationship involves greater emotional and financial dependence and thus deserves greater protection than the relationship between siblings. The relationship between siblings, although important, generally lacks the intensity of the parent-child relationship. Consequently, if Illinois courts permit siblings to recover proven loss of consortium damages in wrongful death actions, children should be allowed to recover loss of consortium damages for nonfatal injury to their parents. Society benefits more from a healthy filial relationship

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they are 'not immeasurable,' and a jury is capable of assigning monetary value to this element of pecuniary injury." *Id.* (Miller, C.J., concurring) (quoting Elliott v. Willis, 442 N.E.2d 163, 168 (Ill. 1982)).

196. One commentator noted: "*Seef* has restored the pre-*Bullard* importance of the presumption [of lost society] by extending it from a relationship whose pecuniary value is difficult to estimate to a relationship whose existence is difficult to determine." Harry Poulos, Comment, *Is There Consortium Before Birth? Expanding the Availability of Loss of Society Damages in Wrongful Death Actions*, 24 LOY. U. CHI. L.J. 559, 578 (1993) (footnote omitted).

197. One should note that frequently no meaningful distinction exists between injury that causes the death of an unborn child and injury that causes severe nonfatal injury. *See supra* part IV.B.2.

198. 583 N.E.2d at 514-15 (Miller, C.J., concurring) (citing Elliott v. Willis, 442 N.E.2d 163, 168 (Ill. 1982)).

199. *Dralle*, 529 N.E.2d at 213; *see also supra* text accompanying note 69.

200. 601 N.E.2d 699 (Ill. 1992).

201. *Id.* at 703. The court in *Finley* declined to extend a presumption of lost society to siblings. *Id.* at 702.

202. *Id.* at 703. The plaintiffs in *Finley* alleged that the defendant's negligent operation of a truck caused the death of a six-year-old t child. *Id.* at 699.

and therefore should offer it greater protection.[203]

Moreover, the *Dralle* court based its decision on a questionable distinction between direct and indirect interference with the filial relationship.[204] The court distinguished the facts before it from those in *Dymek v. Nyquist*.[205] In *Dymek*, an Illinois Appellate Court permitted a father to recover loss of consortium damages for the intentional impairment of his relationship with his son.[206] In *Dymek*, the *Dralle* court noted, the defendant's tortious acts directly deprived the plaintiff of his son's society.[207] Yet, the defendants' acts in *Dralle* indirectly deprived the plaintiff parents of their son's consortium.[208] The *Dralle* court found this distinction between direct and indirect impairment of the filial relationship significant; consequently, it denied recovery for indirect impairment of the parent-child relationship.[209]

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203. Studies show that impairment of the parent-child relationship negatively affects the child's personality and development. *See, e.g.*, PAUL H. MUSSEN ET AL., CHILD DEVELOPMENT AND PERSONALITY 492-94 (3d ed. 1969) (reporting that parental absence negatively affects children by causing emotional disorders, delinquency and poor academic performance); David R. Dietrich, *Psychological Health of Young Adults Who Experienced Early Parent Death: MMPI Trends*, 40 J. CLINICAL PSYCHOL. 901, 901 (1984) (stating that early parental death may have substantial negative effects); Joan McCord et al., *Some Affects of Paternal Absence on Male Children*, 64 J. ABNORMAL & SOC. PSYCHOL. 361 (1962) (noting that many studies document the negative effect of paternal absence); Alec Roy, *Specificity of Risk Factors for Depression*, 138 AM. J. PSYCHIATRY 959, 961 (1981) (stating that childhood parental loss contributed to adult depression); *Psychological Problems and Parental Loss*, 113 SCI. NEWS 21, 21 (1978) (reporting that those receiving psychotherapy often suffered a childhood parental loss).

204. *Dralle*, 529 N.E.2d at 214-15.

205. *Id.* (discussing *Dymek v. Nyquist*, 469 N.E.2d 659 (Ill. App. Ct. 1984)).

206. *Dymek*, 469 N.E.2d at 666. The plaintiff in *Dymek* was a divorced father who alleged that his former wife took their nine-year-old son to see the defendant psychiatrist for treatment and that the psychiatrist brainwashed the son. *Id.* at 661. The complaint in *Dymek* originally alleged that the defendant "alienate[d] and destroy[ed]" the son's affections, but was amended to allege that the acts complained of tended "to injure and destroy the society and companionship" of the minor child. *Id.* at 661-62. The plaintiff in *Dymek* apparently amended his complaint because the Alienation of Affections Act, ILL. COMP. STAT. ch. 740, § 5/4 (West 1993), bars recovery of loss of consortium damages in alienation of affections suits.

207. *Dralle*, 529 N.E.2d at 214.

208. *Id.* In *Dralle*, the son's physical and mental injuries directly resulted from the defendants' acts, but the parents' loss of consortium only resulted indirectly. *Id.*

209. *Id.* at 214-15. The court in *Dralle* otherwise offered no criticism of *Dymek*, suggesting its partial approval of loss of consortium damages in cases of nonfatal injury. PROSSER & KEETON notes the disparate legal treatment of direct and indirect impairment of relationships:

> [T]hough such intangible values are recognized, they are not afforded the same degree of protection in every case. Where companionship and affection are interfered with indirectly, through physical injury to a family member, the more traditional view affords somewhat less protection than where the interference is directly aimed at the relationship itself . . . .

The distinction between direct and indirect impairment, however, cannot justify the supreme court's decision in *Dralle*. As with the spousal/filial and the fatal/nonfatal injury distinctions, the distinction between direct and indirect impairment of the filial relationship is not persuasive. Parents or children suffer loss of consortium regardless of whether a defendant's tortious acts directly or indirectly caused their loss.[210] Consequently, Illinois courts should not deny the children's claim on the basis of a distinction between direct and indirect impairment of the filial relationship.

V. PROPOSAL

Illinois courts should permit children to recover for lost parental consortium in cases of nonfatal injury, just as they permit such recovery in cases of wrongful death. Quite simply, no meaningful distinction exists between the effects that death and severe nonfatal injury have on the filial relationship.[211] Nor does any distinction between the marital and filial relationships justify providing less protection to the filial relationship.[212] By permitting such recovery for loss of consortium, Illinois courts would more fully protect the parent-child relationship and also make Illinois law more consistent.

An obvious objection to the children's claim is that it could permit children to recover loss of consortium damages when the parent's injuries fail to impair the filial relationship. Admittedly, in most cases the injury will not be severe enough to deprive the child of the parent's society or companionship.[213] But in some cases, such as when the parent suffers severe brain damage, the child obviously will lose the parent's love, guidance and affection.[214] The task for Illinois courts, therefore, is to fashion a remedy that permits children to recover for parental consortium only when consortium is truly lost.[215]

PROSSER & KEETON, *supra* note 6, § 124, at 916.

210. The Illinois Appellate Court in *Dralle* considered it "anomalous" to permit consortium recovery in *Dymek* and *Bullard* but not in that case. *Dralle*, 500 N.E.2d at 516.

211. *See supra* part IV.B.2.

212. *See supra* part IV.B.1.

213. Berger v. Weber, 267 N.W.2d 124, 128 (Mich. Ct. App. 1978) (explaining that although the vast majority of parental injuries will not impair the filial relationship, some severe injuries undoubtedly will deprive children of parental consortium).

214. *Id.*

215. Note that the Florida statute authorizing children's recovery for loss of parental consortium because of nonfatal injury requires "significant permanent injury." FLA. STAT. ANN. § 768.0415 (West Supp. 1994); *see also supra* note 137 for the text of that statute.

Establishing a presumption of lost parental consortium would provide such a remedy. As in wrongful death actions, defendants could rebut the presumption of lost filial consortium by proving that the parent's injuries were not so severe as to impair the parent-child relationship or that the parent and child were estranged. Estrangement from the parent will arise most often with consortium claims brought by adult children.[216] A rebuttable presumption of lost filial consortium will thus protect the filial relationship but also protect defendants by permitting them to challenge and overcome exaggerated claims of injury.

It is tempting to limit the presumption of lost filial consortium to minor children because they generally depend on their parents much more than do adult children. Since *Ballweg* authorizes recovery for loss of consortium for the wrongful death of an adult child,[217] Illinois courts should permit adult children to recover loss of consortium damages for severe nonfatal injury to their parents. Permitting adult children such a recovery recognizes that many adult children enjoy close and significant relationships with their parents. Indeed, disabled children often depend financially and emotionally on their parents throughout life.

Moreover, *Dralle* and *Koskela* should not discourage Illinois courts from recognizing the children's claim. Adverse precedent has not discouraged other jurisdictions from so doing. For example, in *High v. Howard,*[218] the Ohio Supreme Court denied the children's claim.[219] One year later, in *Gallimore v. Children's Hospital Medical Center,*[220] that court expressly overruled *High*, permitting children to recover for loss of parental consortium because of nonfatal injury.[221] Since Illinois courts recognize that *stare decisis* should not inhibit reform of the common law, they are free to recognize the children's claim despite adverse precedent.[222]

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216. With respect to viable stillborn infants, however, the supreme court in *Seef* essentially created an irrebuttable presumption of lost filial society because of the impossibility of proving estrangement. *See supra* notes 192-99 and accompanying text.

217. Ballweg v. City of Springfield, 499 N.E.2d 1373, 1379 (Ill. 1986).

218. 592 N.E.2d 818 (Ohio 1992).

219. *Id.* at 821.

220. 617 N.E.2d 1052 (Ohio 1993).

221. *Id.* at 1060.

222. "*[S]tare decisis* cannot be so rigid as to incapacitate a court in its duty to develop the law." Alvis v. Ribar, 421 N.E.2d 886, 896 (Ill. 1981).

VI. CONCLUSION

Denial of the children's claim conflicts with earlier Illinois decisions, Illinois' approach to consortium recovery in wrongful death actions, and the emerging trend in other states. Additionally, any distinction between filial and marital relationships, or between fatal and nonfatal injury, cannot justify disparate legal protection. Many courts that deny the children's claim acknowledge the value of the parent-child relationship and agree that it merits protection.[223] This recognition demonstrates that the parent-child relationship is valuable in its own right and therefore merits legal protection.[224] Accordingly, Illinois courts should fully protect the filial relationship by permitting children to recover loss of consortium damages for severe nonfatal injuries to their parents.[225]

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223. *See supra* note 92.

224. *See* Green, *supra* note 13, at 66 (discussing relational interests). In fact, "[s]ome [relational interests] are modern society's substitute for property." *Id.*

225. It would also be appropriate, of course, if the Illinois General Assembly followed the example of the Florida Legislature by enacting a statute recognizing children's right to recover for loss of parental consortium because of nonfatal injury. *See supra* note 137.