Parent-Child Loss of Consortium Claims: It's Time to Bury an Antiquated Analogy

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I. INTRODUCTION
It was tragic — one moment changed a family forever. Mrs. Doe received the call just after 1:00 a.m. Her three sons had been involved in a car accident. Another driver had fallen asleep and crossed the median striking her son's car head-on. Her oldest (by two minutes), nineteen-year-old John, Jr., was dead. His twin brother James, who planned to become a Marine, was now a quadriplegic. James also suffered brain damage and was unable to speak. Her youngest, seventeen-year-old William, was in a coma.

Mrs. Doe consults with you, a family friend and newly minted lawyer, and you start researching possible claims she might bring. You discover that Ohio's wrongful death statute allows her to sue for loss of consortium and other damages for John, Jr.'s death and that she has a loss of consortium claim arising from William's injuries because he is a minor. Oddly, she has no loss of consortium claim arising from James's injuries because he is an adult and survived the accident. This anomaly bewilders you. It is puzzling that Mrs. Doe can't bring a loss of consortium claim for how the accident affected her relationship with James yet she can bring a loss of consortium claim for the effect the accident had on her relationship with her other two sons. You double check your research and consult with an experienced personal injury attorney. And you learn you're right — most Ohio courts have held that a parent cannot recover loss of consortium damages for injury to an adult child.

The preceding story is fictitious — except for the part about the anomaly in Ohio law. This article contends that the anomaly should be eliminated. Part two examines the development of parent-child loss of consortium claims in Ohio. Part three focuses on the reluctance to allow a parent to recover damages for loss of consortium for injury to an adult child. Part four points out that the Ohio Supreme Court has, in dicta, laid the groundwork for the recognition of the claim. Part five concludes that there is no sound legal reason to reject a parent's loss of consortium claim for damages resulting from injury to an adult child.

II. THE DEVELOPMENT OF PARENT-CHILD LOSS OF CONSORTIUM CLAIMS IN OHIO
As the example in the introduction shows, there are several categories of parent-child loss of consortium claims to consider: a parent's claim for damages arising from injury to a minor child, a parent's claim for damages arising from injury to an adult child, a parent's claim for damages arising from the wrongful death of a child. And there are others: a minor child's claim for loss of consortium damages for injury to a parent, and an adult child's claim for damages arising from injury to a parent. As we shall see, Ohio recognizes all of these claims save one.

Ohio's common law has recognized the right of a parent to sue a third-party tortfeasor for injury to a minor child for at least 131 years. The common law allowed the claim because the parent had the right to the child's services, i.e., labor. The claim allowed a parent to recover the monetary loss caused by the child injuries — just as a master could sue for the economic loss caused by a servant. Even the parent of an infant had a cause of action because the claim was based on the right to service, and not actual service. It took 116 years for the Ohio Supreme Court to expand the common law and allow a parent a cause of action for loss of filial consortium for injury to a minor child.

A. LOSS OF CONSORTIUM FOR INJURY TO A MINOR CHILD
Jo Ann Gallimore sued Children's Hospital Medical Center claiming the hospital's employees gave her eleven-month-old son Joshua a massive overdose of gentamicin that caused him to become permanently and pro-

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foundly deaf in both ears. Gallimore alleged a claim for loss of society. The trial court instructed the jury that "Society consists of communications, companionship, and comfort between a parent and child." The jury awarded Gallimore $200,000 on her loss of society claim. The hospital appealed and argued that Ohio did not allow a parent to recover for loss of society for non-fatal injury to a child. The court of appeals rejected the argument.

The Ohio Supreme Court granted jurisdiction to determine whether "the parents of a minor child who is injured by a third-party tortfeasor may recover damages in a derivative action for loss of filial consortium." The Court discussed a parent's right to recover for the loss of an injured child's services. It noted the right dated back to a time when children were viewed as economic assets; where the child's value to the family was as a laborer; a source of real or potential income to the family. The Court found these theories outdated:

"Times have changed and so should the law. Courts and commentators agree that the master-servant analogy to the relationship between parent and child is long overdue for judicial burial." Thus, the Court held that a parent of a minor child could bring a derivative action for loss of filial consortium and such claim included loss of service, society, companionship, comfort, love, and solace.

While Gallimore did not extend the claim to a parent of an injured adult child, the Ohio Supreme Court has recognized a child's right to recover for loss of parental consortium, first by allowing a minor child to assert such a claim, and later extending the right to adult children.

B. A CHILD'S CLAIM FOR LOSS OF PARENTAL CONSORTIUM

Michael E. High, the father of two minor children, suffered severe injuries in a car wreck. His children sued the third-party tortfeasor for loss of parental consortium. The trial court dismissed the children's claim and the court of appeals affirmed.

The Ohio Supreme Court granted a motion to certify a conflict. The children argued that the Court should recognize their claim and eliminate an anomaly in the law — a child whose parent is killed by a tortfeasor could recover for loss of consortium under the wrongful death statute, but a child whose parent was severely injured — but not killed — had no claim. The Court rejected the children's argument and found that the children's claim rested upon a moral, not legal, obligation. That is, because there was no legal obligation for a parent to love his child, there was no basis to claim loss of consortium. The sole legal obligation running from a parent to a child was support, and:

*** unlike the case where a child's parent is killed, appellants' father is still living and can assert a claim of his own for his injuries. If a parent is compensated for loss of earnings and inability to care for his or her children, a child's injury resulting from the parent's duty to support the child will also be remedied. Where a parent does not survive an accident, the means by which a child can recover compensation for the loss of a parent's support and services is through a wrongful-death action.


The Court also gave a number of policy reasons for rejecting the children's claim and concluded such public policy decisions were best left to the General Assembly: Gallimore overruled High and found that a minor child had a cause of action for loss of parental consortium, including loss of society, companionship, affection, comfort, guidance, and counsel. Gallimore adopted the reasoning of Justice Resnick's dissent in High:

(1) since a minor child can recover similar damages under the wrongful death statute when a parent dies, he or she should also be allowed to recover for loss of parental consortium when a parent is injured but not killed; (2) since Ohio already recognizes spousal and filial consortium claims, it should likewise recognize a minor's loss-of-parental-consortium claim, since the claimant's loss consists of many of the same elements in each type of consortium claim, including the loss of love, affection, and companionship. Therefore, to deny a loss-of-parental-consortium claim would relegate the parent-child relationship to second-class status behind spousal consortium claims or filial consortium claims; and (3) a minor child should be allowed to recover for loss of parental consortium because the child suffers a very real and debilitating loss when a parent is injured and deserves to be compensated for that loss.

In Rolf v. Tri State Motor Transit Co., the Court extended Gallimore and allowed an adult child to recover for loss of parental consortium. Rolf rejected the argument that only a minor child should be able to recover for loss of parental consortium because a minor child depends on his parents for support but an adult child does not.

The fact that an adult child's relationship with a parent differs from that of a minor child does not provide us with justification for refusing to recognize an adult child's loss-of-parental-consortium. In Gallimore, we held that consortium may include service, society, companionship, comfort, love, guidance, and solace. The essence of a parental consortium claim is that a child is compensated for a harm done or for losses suffered as a result of injury to the parent and to the parent-child relationship. Certainly, both minor and adult children whose parent has been injured have suffered a loss that fits within this definition.

Yet most Ohio courts have failed to follow Gallimore's and Rolf's reasoning to its logical conclusion — that a parent has a loss of consortium claim for injury to an adult child.

III. THE RELUCTANCE TO ALLOW A PARENT TO RECOVER FOR LOSS OF CONSORTIUM FOR INJURY TO AN ADULT CHILD

John Cole was eighteen when he bought three cases of beer from Broomsticks. He drank some of the beer and then was involved in a car accident. Cole suffered serious injuries, including permanent brain damage. He sued Broomsticks alleging Broomsticks was negligent because its employees had violated a state law that prohibited selling alcohol to anyone under twenty-one. Cole's mother sued Broomsticks for loss of consortium. The trial court granted summary judgment for Broomsticks on both claims.

The court of appeals first affirmed the grant of summary judgment on Cole's claim, finding he had assumed the risk of his own voluntary intoxication. The court then strictly applied Gallimore and held that Ohio law does not allow a parent to recover for loss of consortium for injury to an adult child.

But Cole lacks persuasive authority for several reasons. First, the court failed to analyze the rationale underlying Gallimore, especially in light of the fact that Gallimore...
involved a minor child and thus, the Court did not have reason to determine whether a parent could recover for loss of consortium for damages arising from injury to an adult child. Second, Cole found the cause of action had not been extended to the parent of an adult child because parents bear a natural and legal burden of care for minor children.\(^{29}\) Cole failed to consider the changed nature of the parent-child relationship; the same change that served as the rationale for the Ohio Supreme Court’s expansion of the basis for a loss of consortium claim for injury to a minor child.\(^{26}\) Third, a loss of consortium claim is a derivative action. The court had already found Cole’s claim was barred because he had assumed the risk of his own voluntary intoxication. Because Cole’s claim was barred, so was his mother’s loss of consortium claim.\(^{43}\) Thus, the court didn’t need to address the issue.

In Moroney v. State Farm Mutual Automobile Ins. Co.,\(^{44}\) the Fifth District Court of Appeals rejected the loss of consortium claim of the parents of an adult child injured in a motorcycle accident. The parents relied on Rolf\(^ {45}\) and argued that the court should extend consortium claims to allow parents to recover for injury to an adult child. While the court seemed inclined to accept the parents’ argument, it refused to do so because the Ohio Supreme Court had stopped short of that conclusion in Rolf.\(^ {45}\)

Likewise, the Seventh District has refused to recognize a parent’s claims for loss of consortium for injury to an adult child.\(^ {46}\) John Williams was eighteen when he was injured in a car accident.\(^ {41}\) His mother, Susan Carpenter, sought compensation for loss of consortium under the uninsured motorist provision of her automobile insurance policy.\(^ {46}\) The trial court granted summary judgment for the insurer, finding Ohio did not recognize Carpenter’s claim.\(^ {46}\) The Seventh District affirmed stating:

Consortium is the conjugal fellowship of husband and wife and the right of each to the company, cooperation, and aid of the other in every conjugal relationship. A cause of action will lie in favor of a spouse deprived of those benefits from another spouse by reason of the negligent act of a third party. Such claims include emotional components, medical expenses, and compensation for care. The relationship between parent and adult child does not provide the same basis for relief as that between the spouses, and considerations which are identified under the definition of consortium are not applicable to the relationship between parent and adult child.

In Paroline, the Second District Court of Appeals explained the reason that courts distinguish between parents of adult children and parents of minor children for the purpose of consortium claims:

"Though parents may be compensated for the loss of company and services of their minor children, the law views minor children as persons for whom parents naturally, and legally, bear a burden of care. That same burden does not apply to an emancipated, adult child. Also, while parents are entitled to the benefit of the labors of their minor children, they have no such right in respect to their adult children. For those reasons, the common law right to relief for loss of consortium does not support a cause of action by parents for injuries and losses suffered by their emancipated, adult children."\(^ {46}\)

The primary support for the Seventh District’s opinion was Cole and Paroline v. DeLong Assoc.\(^ {46}\) and as we will see, the Second District no longer follows Paroline.

The courts that have rejected a parent’s loss of consortium claim for injury to an adult child have failed to afford the parent-child relationship the reciprocal rights it deserves.

IV. THE OHIO SUPREME COURT HAS LAID THE GROUNDWORK FOR A PARENT’S LOSS OF CONSORTIUM CLAIM FOR INJURY TO AN ADULT CHILD

There is no logical reason to conclude that the parent of an injured adult child suffers no loss, or suffers less loss, than the parent of an injured minor child does. The Ohio Supreme Court has recognized as much in dicta.\(^ {41}\) Rolf recognized an adult child’s right to maintain a loss of consortium claim for injury to a parent.\(^ {46}\) In doing so, the Court, with six of seven justices concuring,\(^ {41}\) quoted a commentator who said, "The parent-child relationship does not end when the child becomes eighteen. It endures and can be characterized by love, care and affection for the duration."\(^ {41}\) That reasoning leads to the conclusion that the parent of an injured adult child should be allowed to recover for loss of consortium — just as the parent of an injured minor can. And Rolf quoted an Arizona case that reached that conclusion:

Surely nature recoils from the suggestion that the society, companionship and love which compose filial consortium automatically fade upon emancipation[,] while common sense and experience teach that the elements of consortium can never be commanded against a child’s will at any age. The filial relationship, admittedly intangible, is ill-defined by reference to the ages of the parties and ill-served by arbitrary age distinctions. Some filial relationships will be blessed with mutual caring and love from infancy through death while others will always be bereft of those qualities. Therefore, to suggest as a matter of law that compensable consortium begins at birth and ends at age eighteen is illogical and inconsistent with common sense and expression.\(^ {52}\)

V. THERE IS NO SOUND LEGAL REASON TO REJECT A PARENT’S LOSS OF CONSORTIUM CLAIM FOR INJURY TO AN ADULT CHILD

It seems the Second District Court of Appeals is the only Ohio appellate court to apply Rolf’s reasoning and hold that a parent has a loss of consortium claim for injury to an adult child.\(^ {41}\) Thomas Brady sued Dr. Miller and others for medical malpractice for a missed diagnosis of testicular cancer.\(^ {41}\) Brady’s parents asserted a loss of consortium claim\(^ {41}\) but the trial court refused to submit the parents’ claim to the jury.\(^ {41}\) The parents appealed and the Second District reversed. It noted that it and other intermediate appellate courts had refused to recognize a parent’s loss of consortium claim for injury to an adult child\(^ {41}\) but revisited the issue in light of Gallimore and Rolf.\(^ {41}\) The court found it irrational to deny recovery simply because the child had reached the age of majority.\(^ {41}\)

The court concluded:

\(***\) we find no legitimate reason to limit recovery for loss of filial consortium claims to cases of injury to minor children. Surely, Brady’s parents were equally capable of suffering a loss of society, companionship, comfort, love, and solace as a result of his misdiagnosis and his life threatening battle with cancer regardless of whether he was seventeen or twenty-one years old.\(^ {41}\)

In addition to the reasoning in Gallimore, Rolf, and Brady, Ohio’s wrongful
death statute supports the conclusion that a parent should be allowed to recover loss of consortium damages for injury to an adult child. The wrongful death statute presumes a parent of an adult child suffers damages because of the child’s wrongful death. Such damages include “Loss of the society of the decedent, including loss of companionship, consortium, care, assistance, attention, protection, advice, guidance, counsel, instruction, training, and education.”

Gallimore cited the wrongful death statute as support for its conclusion that the parent of an injured minor child could recover for loss of consortium:

In addition, Ohio’s Wrongful Death Act specifically permits wrongful death claimants to recover for loss of earning capacity, services and society of the decedent as elements of compensable damage. Thus, in the present day, it would be inequitable to deny parents recovery for loss of the society and companionship of a seriously injured child while recognizing that such losses are compensable in cases involving death.

It is equally inequitable to deny parents of injured adult child recovery for loss of consortium when such claims are recognized — indeed presumed — in the wrongful death statute.

Some will say such decisions are best left to the legislature. But as the Ohio Supreme Court noted when it found that the common law should recognize a wife’s co-equal right to maintain a claim for loss of spousal consortium:

Either we must hold that the common law is fixed, unchangeable and immutable, that it possesses no such flexibility as will permit its ready adaptability to changing conditions of human affairs, or that when every reason and every theory for denying the wife the same rights as the husband has entirely disappeared from our jurisprudence, that she is now equally entitled with her husband to every remedy that the common law affords, and we have no hesitation in adopting the latter view.

In Gallimore the Court noted, “Times have changed and so should the law. Courts and commentators agree that the master-servant analogy to the relationship between parent and child is long overdue for judicial burial.” Despite this rhetoric, the Court included the right to service as part of the basis for recovery of loss of filial consortium,” thus giving the master-servant-parent-child analogy a shallow burial. The Court should give this antiquated analogy a proper burial because “Romance fails us and so do friendships, but the relationship of parent and child, less noisy than all the others, remains indelible and indestructible, the strongest relationship on earth.”

2. Id.
3. Clark v. Bayer (1877), 32 Ohio St. 299, 311. While the Court in Gallimore v. Children’s Hosp. Med. Ctr., 67 Ohio St. 3d at 244, 599 Ohio St. 3d at 205-206, concluded that, because parents of infants could bring such a claim, including, at least, at some point, the right to recover for loss of society, comfort, love, and solace, Clark does not support that conclusion.
4. Gallimore v. Children’s Hosp. Med. Ctr., 67 Ohio St. 3d at 244, 599 Ohio St. 3d at 205-206, paragraph one of the syllabus.
5. Id. at 244.
6. Id.
7. Id. at fn. 3.
8. Id. at 245.
9. Id. at 245.
10. Id.
11. Id. at 246.
12. Id. at 250.
13. Id.
14. Id.
15. Id. at paragraph one of the syllabus.
16. Id. at paragraph two of the syllabus.
18. High v. Howard (1995), 64 Ohio St. 3d 392, 21 Ohio St. 3d at 244, 599 Ohio St. 3d at 205-206, paragraph one of the syllabus.
19. Id.
20. Id. at 83, overruled, Gallimore v. Children’s Hosp. Med. Ctr., 67 Ohio St. 3d at 244, 599 Ohio St. 3d at 205.
21. Id. at syllabus, overruled, Gallimore v. Children’s Hosp. Med. Ctr., 67 Ohio St. 3d at 244, 599 Ohio St. 3d at 205.
22. Id. at 83, overruled, Gallimore v. Children’s Hosp. Med. Ctr., 67 Ohio St. 3d at 244, 599 Ohio St. 3d at 205.
23. Id.
24. Id. at 83-84, overruled, Gallimore v. Children’s Hosp. Med. Ctr., 67 Ohio St. 3d at 244, 599 Ohio St. 3d at 205.
25. Id. at 85, overruled, Gallimore v. Children’s Hosp. Med. Ctr., 67 Ohio St. 3d at 244, 599 Ohio St. 3d at 205.
26. Id.
27. Gallimore v. Children’s Hosp. Med. Ctr., 67 Ohio St. 3d at 244, 599 Ohio St. 3d at 205, paragraph two of the syllabus.
28. Id. at 255, 599 Ohio St. 3d at 205-206, Rolfe v. Tri State Motor Transit Co., 91 Ohio St. 3d 380, 2001-Ohio-44, syllabus.
30. M. at 382.
32. Id. at 574-575.
33. Id. at 575.
34. Id.
35. Id.
36. Id.
37. Id. at 577.
38. Id.
39. Id.
40. Gallimore, 67 Ohio St. 3d at 250 (“I [[the gist of an action] by the parents of an injured child was for monetary losses occasioned by the tortfeasor’s conduct. This is no longer the case.”)
41. Mason v. Monarch Med. Tel Co. (1983), 11 Ohio App. 3d 68-69 (***a cause of action based upon a loss of consortium is a derivative action. That means that the derivative action is dependent upon the existence of a primary cause of action and can be maintained only so long as the primary action continues.”)
42. 5th Dist. Nos. 01CA99, 2002-Ohio-3629.
43. See also, McCutchens v. Progressive Cas. Ins. Co. (Dec. 6, 1988), 2nd Dist. No. 22-C-88, 1986 WL 135540 (stating, “We do not construe, as do appelleants, from Ohio cases allowing recovery for loss of parental consortium as to minor children, that parents may also recover for the loss of consortium of their adult children. See Sowers v. Dinkham (1938), 141 Ohio App. 567, Norrel v. Cuyahoga County Hospital (1983), 11 Ohio App. 3d. 70. See also, Auto-Owners Mutual Ins. Co. v. Lewis (1984), 10 Ohio St. 3d 156. We agree with the trial court that logic dictates that parents should not be allowed to recover for the loss of companionship of their adult children.”)
45. Id. at *7.
46. Id.
47. Id.
51. Justice Sweeney wrote the decision, Chief Justice Moyer and Justices Douglas, Resnick, Fieker, and Lundberg concurred, Justice Cook concurred in the judgment.
55. Id. at *7.
56. Id.
57. Id. at *7.
58. Id. at *15.
59. Id. at *15-19.
60. Id. at *19, citing Rolfe, at 381.
61. Id. at *19.
62. R.C. 2125.02.
63. R.C. 2125.02(A)(1).
64. R.C. 2125.02(B)(3).
66. Gallimore v. Children’s Hosp. Med. Ctr., 67 Ohio St. 3d 244, 599 Ohio St. 3d at 205, quoting Landemeyer v. Cooper (1912), 85 Ohio St. 327, 140.
67. Id. at 250.
68. Id. at paragraph one of the syllabus.
69. Theodore Reit, Of Love and Lust, 11.