I. INTRODUCTION

To a child seeking redress for the loss of his parent's consortium occasioned by a negligent third party, the legal system must seem cruel indeed. Peering up at the bench, the child hears the judge admit the seriousness of his injury, but state that children have no remedy for such loss. On the other hand, the child may see the same judge allow a parent or spouse to recover for loss of consortium. Then, upon asking for an explanation for this inconsistency, the child hears the judge tell him that he must ask the legislators. Finally, upon asking the legislators why they allow parents but not children to recover, the child discovers that the legislators simply overlooked him.


Emphasizing sexual relations to the exclusion of other elements of consortium would obviously preclude a child from claiming damages for loss of consortium. Because the Washington Supreme Court did not emphasize sexual relations in Lundgren v. Whitney’s, Inc., 94 Wn. 2d 91, 614 P.2d 1272 (1980), however, and because Washington allows actions for loss of filial consortium, see note 4 infra, this comment does not discuss this possible barrier to a child's consortium action.


4. Parents in Washington can recover for the loss of their child's consortium when the child is injured or killed. WASH. REV. CODE § 4.24.010 (1979). This section states:

   The mother or father or both may maintain an action as plaintiff for the injury or death of a minor child, or a child on whom either, or both, are dependent for support.

   In such an action, in addition to damages for medical, hospital, medication expenses, and loss of services and support, damages may be recovered for the loss of love and companionship of the child and for injury to or destruction of the parent-child relationship in such amount as, under all the circumstances of the case, may be just.

This comment examines the reasons advanced by Washington courts to deny children a cause of action for loss of parental consortium when a parent is negligently injured. It discusses the inconsistent positions that courts and legislatures have taken in awarding or refusing to award recovery for loss of consortium by various classes of plaintiffs, and argues that children, like parents and spouses, should also have a separate consortium action. This comment then proposes guidelines for legislation creating a child's consortium action that limits any dangers of permitting children to recover. Finally, this comment concludes that, if the legislature fails to act, courts should nevertheless respond to the plight of the child by recognizing his consortium claim.

II. CHILDREN'S RECOVERY FOR LOSS OF PARENTAL CONSORTIUM IN WASHINGTON

Children have presented their claim for parental consortium to Washington appellate courts only twice. In 1958, the supreme court denied a separate action to children because there was no precedent and on the even more questionable ground that children could already recover for their loss of consortium in their parent's action. Then, in 1979, the court of appeals elaborated on the supreme court's decision and deferred any significant change in the law to the legislature.

A. The Questionable Rationale of Erhardt v. Havens, Inc.10

In Erhardt, a mother became paralyzed in an accident allegedly caused by a hospital's negligence. As a result of her paralysis, the mother could not care for or even recognize her children. The children, therefore, sued for damages resulting from loss of support, care, training, and education. Although the court had never permitted such damages in negli-

6. This comment is limited to discussion of the child's action for damages for loss of consortium when his parent is negligently injured, but not wrongfully killed. A Washington child currently can recover for loss of consortium in an action for the wrongful death of the parent. See note 13 infra.

For convenience, therefore, the phrase "negligently injured" will be omitted in reference to the consortium action unless inclusion of the phrase is necessary for clarity or comparison.


8. See note 21 and accompanying text infra.


11. Brief for Appellant, Erhardt v. Havens, Inc., 53 Wn. 2d 103, 330 P.2d 1010 (1958). The children specifically alleged loss of support, maintenance, education, nurture, care, training, attention, acts of kindness, comfort, solace and companionship of their natural mother. Id. at 6. The inclusion of support and maintenance in this list may have been a tactical error. A child's claim of
gences, the children pointed to judicial sanction of similar damages in wrongful death actions. They argued that since their mother could presently give them no more care than if she were dead, they were damaged to the same extent and should be permitted to recover. The children also contended that they should be permitted to recover because their action was no different from an action for alienation of affections that other courts permitted.

The Erhardt court, however, summarily rejected both analogies. Although the court recognized that the children had suffered actual injury, it was reluctant to create an action which did not exist at common law. The court did state that it might allow a child to maintain a separate consortium action if he could show a "compelling necessity." However, the Erhardt children could not show a "compelling necessity" since the respondent had conceded that all the children's damages were recoverable by the parent in the parent's own action. Despite the absence of precedent for such a concession, the Erhardt court evidently agreed that the parent could recover for the children's damages.

For loss of parental financial support is sure to provoke fear of double recovery since the same damages may be recovered by a parent in his own action. See note 33 infra.

Indeed, at the time Erhardt was decided, no court had permitted children to recover for loss of parental consortium where the parent had not been killed.


The court did not even discuss the analogy to wrongful death. It distinguished recovery for alienation of affections on the ground that it is an intentional tort and the children had brought a negligence action. Erhardt v. Havens, Inc., 53 Wn. 2d 103, 106, 330 P.2d 1010, 1012 (1958).

Id. An example of such "compelling necessity" might be parental refusal to bring an action. See note 19 and accompanying text infra.

The plaintiffs urged the court to reevaluate the common law, but the court responded: This we might do under compelling necessity, but we find no occasion to do so here because the father himself, who is the guardian of the infant appellants, may maintain that action in his own name, and, by the respondent's concession, recover every item of damage claimed by the appellants.

See note 19 supra. The Erhardt court did not question the propriety of such recovery. However, the court may have impliedly assumed that the children's damages were the same as the parent's damages. If so, the court was not really allowing the parent to recover for the children's damages, but rather preventing children from recovering for what their parent had already recovered. Indeed, this is what the respondent argued. Brief for Respondent at 13-14, Erhardt v. Havens, Inc., 53 Wn. 2d 103, 106-07, 330 P.2d 1010, 1012 (1958).
Whether children can actually recover damages resulting from loss of consortium in the parent's action is doubtful. The remedy suggested by the Erhardt court is in fact contrary to the general principle that no person shall be permitted to recover for another person's injuries.\cite{footnote} Attorneys, therefore, should not be permitted to argue for the children's recovery when pursuing the parent's claim. Hence, any award of children's damages in the parent's action can only be made by the jury on its own initiative—certainly an unreliable and unlikely result.

Thus, although Erhardt holds only that children have no separate action for loss of parental consortium, the practical effect of the decision is to preclude recovery altogether.

B. The Legislative Deferral and Balancing Test of Roth v. Bell\cite{footnote}

Judy Roth ingested contraceptives that caused a stroke and subsequent impairment of her communicative and motor abilities. As a result of her injuries, she could not interact normally with her children. Alleging negligence by the prescribing doctor and contraceptive manufacturer, the children claimed damages for loss of support, loss of companionship, and destruction of the parent-child relationship.\cite{footnote}

Relying on Erhardt, the Roth court stated that no such cause of action existed.\cite{footnote} The Roth court, however, went further than Erhardt by suggesting that the children's cause of action should never be permitted.\cite{footnote} Although Erhardt had qualified its denial by retaining the option to permit children's recovery in cases of "compelling necessity," the Roth court did not even discuss whether the Roth children presented a compelling situation. Moreover, the Roth court suggested that the high cost of permitting children to recover\cite{footnote} necessitated denying them a cause of action.

To be sure, Roth deferred the ultimate decision to the legislature since the court believed that consortium actions raise public policy issues.\cite{footnote}

\footnote{103, 330 P.2d 1010 (1958). Nevertheless, a literal interpretation of the court's language is that the court permitted the parent to recover the children's damages.}
\footnote{21. See generally 86 C.J.S. Torts § 31 (1954).}
\footnote{22. 24 Wn. App. 92, 600 P.2d 602 (1979).}
\footnote{23. Id. at 93, 600 P.2d at 603. The children also claimed damages for loss of support, loss of companionship, and destruction of the parent-child relationship.}
\footnote{24. Id. at 96-100, 600 P.2d at 605-07.}
\footnote{25. See notes 32-36 and accompanying text infra.}
\footnote{26. See notes 32-36 and accompanying text infra.}
\footnote{27. Roth v. Bell, 24 Wn. App. 92, 101, 600 P.2d 602, 607-08 (1979).}

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Stating that "[t]he decision whether the imposition of harm shall result in legal liability essentially involves a 'balancing [of] the interest of the injured party to compensation against the view that a negligent act should have some end to its legal consequences,'" the Roth court argued that the legislature was the proper place to do the balancing.\(^2\)

Nevertheless, the Roth court concluded by weighing the competing policies itself.\(^2\) In so doing, it rejected a Michigan decision, Berger v. Weber,\(^3\) which permitted children's consortium actions. The Roth court stated that Berger ignored the danger of unlimited liability.\(^3\)

Both Berger and Roth were concerned about the threat of multiple litigation,\(^3\) the danger of overlapping recovery,\(^3\) the inadequacy\(^4\) and uncertainty\(^5\) of damages, and the societal cost\(^6\) of permitting children to recover.\(^7\) The Roth court, however, believed that the weight of each con-

\(^{28}\) Id. (quoting Hunsley v. Giard, 87 Wn. 2d 424, 435, 553 P.2d 1096, 1102 (1976)).
\(^{29}\) Roth v. Bell, 24 Wn. App. 92, 100-04, 600 P.2d 602, 607-09 (1979). For the competing policies, see notes 32-37 and accompanying text infra.

We cannot ignore the social burden of providing damages for loss of parental consortium merely because the money to pay such awards comes initially from the "negligent" defendant or his insurer. Realistically the burden of payment of awards for loss of consortium must be borne by the public generally in increased insurance premiums or, otherwise, in the enhanced danger that accrues from the greater number of people who may choose to go without any insurance.


\(^{37}\) The Roth court also mentioned five other considerations that weigh against creation of a child's right of action. These are: the fact that the child has no enforceable claim to the parent's services; the absence of precedent; the possibility of upsetting parent-tortfeasor settlements; the danger of fabricated actions; and the public policy expressed in the enactment of "heart balm" statutes.
cern was greater than Berger had supposed them to be. The Roth court suggested that the costs of permitting children's consortium recovery would outweigh the projected benefits. Because of this imbalance, the court believed that children should not be permitted a cause of action—that is, unless the legislature should reach a contrary conclusion.

Thus, despite twenty-one years of inaction since the Erhardt court first brought attention to the issue, the Roth court would continue to await a legislative solution. More damaging from the child's perspective, however, is the policy balance struck by Roth, which concluded that the costs of permitting the action outweigh the possible benefits. Such a conclusion tends to discourage future action by litigants—and perhaps more importantly, by the legislature.

III. CRITICISM OF WASHINGTON'S DENIAL OF CHILDREN'S RECOVERY

Although Washington is not alone in permitting spouses and parents, but not children, to sue for loss of consortium, the courts receive little support from commentators. Most commentators argue that the societal cost of a child's action has been excessively overweighted and can be ameliorated. Furthermore, allowing parents but not children to recover for loss of consortium is senseless. If anyone should recover, it should be the children. They need their parents more than their parents need them.

A. The Excessive Weight Given to Adverse Societal Costs

One reason advanced by the majority of courts that deny children a

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Although the Roth court cited the reasons, the reasons contradict the rationale in the rest of the court's opinion. Throughout the opinion, the court suggested that common law was not a bar. It also admitted the seriousness of the injury. Arguably, the inclusion of the citation to the Michigan Law Review note was just a convenient way to summarize arguments that courts historically have used. The arguments discussed in the text are those that have modern vitality.


41. See notes 87 & 88 and accompanying text infra.
claim for loss of parental consortium is that defendants would face multiple lawsuits. Courts argue that each child might bring an action after the tortfeasor settled with the injured parent. Although such multiplicity is theoretically possible, it could easily be avoided by requiring children to join in the parent's action. Indeed, some courts already use joinder as a means of minimizing litigation when a spouse has a consortium claim.

Secondly, courts are sometimes fearful of the possibility that the child's recovery would overlap with the parent's. Most significantly, courts are concerned that juries will first award a parent his loss of income, and then award the child loss of support. To be sure, such an award would amount to compensating for the same damage twice. Secondarily, some courts, especially the Erhardt court, believe juries may already award damages for the children's loss of consortium in the parent's award. Again, the courts argue, the family would receive double recovery.

Even under the present law, however, there is no assurance against double recovery. Arguably, under the present system where juries might award consortium damages without clear instruction on the law, the chance of double recovery is greater. Only open argument of each claim will prevent the jury from blindly awarding damages. Moreover, under the present law, there is no assurance that the child will be adequately compensated.

Overlapping recovery, like the possible multiplicity of suits, can be easily avoided. Clear jury instructions could specify which damages were properly recoverable by the parent, and which by the child. Joinder would prevent any discrepancy in interpretation between juries. Furthermore, the adversary system and the allocation of the burden of proof would ensure equitable awards.

A third major concern of the courts is that damages for loss of consortium are too uncertain. Although they believe the child is actually injured, the courts question the jury's ability to accurately measure the

42. See note 32 supra.
43. See Note, 56 B.U.L. REV., supra note 40, at 733 n.91. Joinder is also desirable because the comparative negligence of the parent should offset the child's recovery. See notes 106–07 and accompanying text infra.
44. See note 33 and accompanying text supra.
45. See note 33 and accompanying text supra.
46. See Note, 56 B.U.L. REV., supra note 40, at 736.
47. See notes 89–93 and accompanying text infra.
48. See note 108 and accompanying text infra.
49. See note 43 and accompanying text supra.
50. See note 35 and accompanying text supra.
damage. Moreover, courts argue that money cannot restore parental love and companionship anyway. Such arguments are thin.

While the difficulty of measuring intangible damages points to a weakness of the legal system, the difficulty is even weaker as an excuse for awarding nothing to compensate injured children. The inadequacy of money is also a weak excuse since some compensation is better than none at all. The courts have rightfully concerned themselves with limiting actions for intangible injuries, but here the limit is arbitrarily narrow. Acknowledging this present problem, courts and legislatures already permit spouses and parents to recover intangible consortium awards. The child's injury can hardly be characterized as more intangible than those awards.

A final major concern of courts is that permitting children's recovery, in addition to permitting other consortium actions, would be an unwarranted financial burden on tortfeasors and society. Actuality of the child's injury aside, courts are fearful of increasing insurance rates and unfairly burdening tortfeasors. They justify permitting parents and spouses to recover, but not children, by suggesting the typical parent is akin to "the old woman in the shoe." Each parental injury would supposedly spawn several children's actions.

Disregarding for the moment the questionable discrimination between family members, this comment and other commentators submit that the courts' conception of the typical family is inaccurate. Almost half of American families are childless and only five percent have more than four minor children. Indeed, the average family size includes only slightly

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51. See note 34 and accompanying text supra.
53. See, e.g., Hunsley v. Giard, 87 Wn. 2d 424, 436, 553 P.2d 1096, 1103 (1976) (to be compensable, mental suffering must at least be manifested by objective symptoms).
56. See note 36 supra.
58. See notes 62–63 and accompanying text infra (discussing this discrimination).
59. BUREAU OF CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 47 (100th ed. 1979) (1978 data) [hereinafter cited as 1979 STATISTICAL ABSTRACT]. Forty-six and nine tenths percent of American families have no children; 20.3 percent have one child; 19.0 percent have two children; and 8.8 percent have three children. Id. See Borer v. American Airlines, Inc., 19 Cal. 3d 441, 457–58, 563 P.2d 858, 868–69, 138 Cal. Rptr. 302, 312–13 (1977) (Mosk., J., dissenting) (making the same argument).

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more than one child. Consequently, the cost to society and tortfeasors is much less than some courts believe. To be sure, it is likely that society will face some increased cost if children are permitted to recover. The actual increase, however, will be much less than purported by courts—and might even be insubstantial since juries may already award some form of children’s consortium damages.

Even if the cost of the children’s actions were substantial, there is no difference in cost to justify discriminating between children and other consortium claimants. The number of children recovering for loss of parental consortium actually would be comparable to the number of spouses or parents recovering in their respective actions. The time period for which children would be allowed to recover could also be comparable if courts simply limited the child’s recovery to the period of his minority. Thus, the overall individual financial burden of the child’s action would be no greater than either the parent’s or the spouse’s action.

When added to the costs of the consortium actions already permitted, the cost of the child’s action may affect insurance costs; but it certainly seems unfair to deny the child a cause of action merely because other family members beat him to the courts.

B. The Inconsistency in Washington Law

Washington recognizes a wide range of familial consortium recovery rights. As aforementioned, a spouse and parent can recover when the

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60. This figure is based on a weighted average derived from the statistics compiled in 1979 STASTICAL ABSTRACT, supra note 59, at 47.

61. See note 20 and accompanying text supra.

62. The number of people likely to recover under each consortium action can be estimated by multiplying the number of potential accident victims by the average number of potential consortium claimants per accident victim, yielding the following figures: 100 million spousal consortium claimants, 70 million parents who can claim loss of filial consortium, and 90 million children who can claim loss of parental consortium (figures based on 1979 STASTICAL ABSTRACT, supra note 59, at 8, 42, 47, 49). These calculations show that the potential number of claimants under each consortium action is roughly equal.

63. This limitation counters arguments that the child would have a longer joint life expectancy with his parent than one spouse has with another spouse. As limited by the suggestion in the text, the period of recovery by the child would probably be less than the joint life expectancy of a husband and wife.

64. Because Washington permits a parent to claim damages for loss of filial consortium when a child is injured, Washington’s range of familial consortium recovery rights is already one of the widest. Although recovery for loss of spousal consortium is almost unanimously allowed, Washington is one of only eight jurisdictions that permit recovery for loss of filial consortium—and one of only three jurisdictions to do so by statute. See Baxter v. Superior Court, 19 Cal. 3d 461, 465 n.1, 563 P. 2d 871, 873 n.1, 138 Cal. Rptr. 315, 317 n.1 (1977). See also note 84 and accompanying text infra.
other spouse or children are injured. Similarly, spouses, parents, and children can recover for loss of consortium in an action for wrongful death. Furthermore, courts permit a "consortium-like" recovery in an action for alienation of affections. Yet, Washington fails to permit children to recover for loss of consortium when the parent is only nonfatally injured. Such a stand is inconsistent.

Washington is not only inconsistent in permitting spouses and parents, but not children, to recover; it is also inconsistent in rationale. For instance, children's consortium damages are too intangible, but parent's damages are not. One court rejected traditional reasons for denying children recovery for destruction of the parent-child relationship when it discussed the alienation of affections action. Then, a later court relied on those same reasons to deny the children's consortium action. The aphorism "what's good for the goose is good for the gander" apparently does not always apply in Washington.

An instance where the aphorism did apply is Lundgren v. Whitney's, Inc. In that case the supreme court permitted a wife to recover for loss of consortium in large part because the husband has always had a consortium action. The Lundgren court also rejected other traditional reasons for denying consortium actions. As a result of Lundgren, the rationale of Roth and Erhardt is even more questionable. For example, the Roth and Erhardt courts relied partially on lack of precedent to deny children a cause of action. The Lundgren court, however, said the common law should change to reflect justice. Roth said the problem was legislative; Lundgren said the courts also had responsibility.

Although defendants may attempt to distinguish Lundgren from the

65. See notes 5 & 35 supra.
66. See note 13 supra.
69. It may also violate the federal equal protection clause or the state privileges and immunities provision. See WASH. CONST. art. 1, § 12; Love, supra note 1, at 593 n.12.
74. 94 Wn. 2d 91, 614 P.2d 1272 (1980).
75. Id. at 96, 614 P.2d at 1275.
76. See notes 77–80 and accompanying text infra.
80. 94 Wn. 2d 91, 95, 614 P.2d 1272, 1275 (1980).
children’s consortium cases because a spouse suffers loss of a sexual relationship, the facts of Lundgren should prevent them from doing so. The injury to the husband in Lundgren did not affect his sexual capabilities. Moreover, the Lundgren court stressed the loss of companionship and changed lifestyle occasioned by the husband’s injury.

Finally, Washington is unusual in that it is one of only three states that have laws permitting parents to recover for loss of consortium when a child is injured. While none of these states permits children to recover in a corresponding situation, Washington is the only one to have denied the children’s action recently.

In denying the children’s action, the Roth court simply disavowed responsibility for the inconsistency. Indeed, no state has provided a valid reason for permitting parents, but not children, to recover.

On the contrary, the California Supreme Court suggested that such a practice is based on a “historical atavism.” Permitting parents, but not children, to recover for loss of consortium suggests that parents are more likely to suffer severe emotional damages in corresponding situations. In reality, however, the distinction militates the other way. Children are more likely than parents to suffer permanent damages from loss of consortium.


82. The husband in Lundgren suffered from foot drop. Foot drop does not interfere with normal sexual functions.

83. 94 Wn. 2d 91, 93, 614 P.2d 1272, 1274 (1980). For instance, the Lundgren court mentioned that the couple could no longer go dancing after the husband’s injury occurred.


87. Baxter v. Superior Court, 19 Cal. 3d 461, 465, 563 P.2d 871, 874, 138 Cal. Rptr. 315, 318 (1977). The “historical atavism” the court referred to was reliance on the common law notion that while parents had a right to recover for the loss of children’s services, children had no correlative right.


The appellants in Roth also cited several psychological studies analyzing the importance of a parent-child relationship. Brief for Appellant at 9–13, Roth v. Bell, 24 Wn. App. 92, 600 P.2d 602 (1979).
C. The Need for a Child’s Separate Action

A reading of Erhardt suggests that a child can recover damages for loss of parental consortium in his parent’s own personal injury action.89 Despite this suggestion, it is unlikely that a child can adequately recover unless he is given his own separate action. Unless the child has a separate action, the jury probably will not award him damages since he cannot argue for them. Further, even if the jury includes some of the child’s damages in the parent’s award, the child is not assured of receiving it. Only a direct award to the child can ensure benefit to the child. Furthermore, there may be instances where the injured parent cannot or does not bring an action. In such cases, the child has no possibility of recovery at all.90

Courts admit that children suffer a great loss when a parent is severely injured. They understand that crippling injuries to parents can be devastating to children. Of course, compensating the injured parent for his loss of income helps the child. In many instances, however, parental love and companionship are more necessary to the child than parental financial support.91 Indeed, the United States Supreme Court has recognized that children have a basic right to receive a parent’s love and companionship.92 Yet, only two state courts have permitted children to recover for loss of that right when a parent is seriously injured.93

Corrective action is overdue.

IV. SUGGESTED GUIDELINES FOR STATUTORY ACTION

The legislature is a proper place for corrective action. If it were to analyze a child’s cause of action, the legislature could hear all points of view and balance competing interests. It could minimize potential problems for the courts and address any legitimate policy concerns. It could also place limitations on the action that would lessen the impact on tortfeasors’ and society’s pockets. Finally, it could provide a single source of clear guidance in a murky area.

Although no state currently has a statute allowing children to recover for loss of parental consortium, several states have statutory spousal consortium actions.94 These spousal consortium statutes have been brief.

89. See notes 18–20 and accompanying text supra.
90. Unless this is the Erhardt court’s “compelling necessity.” See note 19 supra.
91. See note 88 supra.
Consequently, courts in those jurisdictions have continued to wrestle with avoidable questions after the statute's enactment. If the Washington legislature would instead enact a detailed parental consortium statute, those problems might be averted.

Statutory specificity is particularly valuable when litigants claim consortium damages. Arguably, every injury to a parent causes the child some loss of consortium. But in most cases, the damages would be less than the costs required to litigate them. Here the legislature's ability to balance competing interests proves most effective. By limiting recovery to situations where the injury to the parent is severe, the legislature could minimize societal costs without ignoring serious injury.

In the following subsections, this comment proposes guidelines for a limited action by children to recover for loss of parental consortium. Some of these limitations are more restrictive than limitations on other existing consortium actions. The proposed restrictions, however, are intended to provide equitable treatment to both the tortfeasor and the child.

A. Class of Litigants

Only dependent children should be able to sue for loss of parental consortium. Doubtless, an independent adult child also loses love and companionship when his parent is injured, but in most cases consortium loss decreases with age. A child's emotional dependence is much greater when he is younger. Limiting the consortium action to dependent children would compensate serious injury and avoid argument over less severe or nonexistent injuries. Permitting adult children to recover would be theoretically ideal, but practically wasteful. The legislature properly can avoid that waste.


96. Some of the guidelines proposed here were previously proposed in Love, supra note 1. Nevertheless, no legislature has acted to create a child's action, and courts are generally no more receptive. This comment attempts to expand on Professor Love's analysis to meet more recently expressed concerns—especially in Washington.

97. For example, none of the spousal consortium statutes cited in note 94 supra contain restrictive limitations (except in some cases with regard to retroactivity and double recovery). Similarly, the only limitation that the court in Lundgren v. Whitney's, Inc., 94 Wn. 2d 91, 614 P.2d 1272 (1980), placed on recovery for loss of spousal consortium is that the claimant must be married.


99. See studies cited in note 88 supra.

100. See, e.g., WASH. REV. CODE §§ 51.04.010–.98.080 (1979) (worker's compensation laws). The limitations on actions under worker's compensation statutes are much more severe than the limitations proposed in this comment.
B. Severity of Injury

Recovery should be allowed only when the parent is severely injured.\textsuperscript{101} Although a child may suffer some loss of consortium when his parent is not severely injured, it is not likely that the child’s damages would warrant litigation. For instance, one child whose parent suffers a broken leg may temporarily be unable to participate in normal activities with his parent. On the other hand, another child whose parent is paralyzed from the waist down is likely to see his former parent-child lifestyle disintegrate. In the latter case the child’s injury is much more compelling and the damages are less likely to be disputed. By refusing to permit the child’s recovery when the parent is less severely injured, the legislature would not be unfairly ignoring injury. Rather, it would be acknowledging its responsibility to balance the injury against the cost of providing relief.\textsuperscript{102} Limiting the action would avoid needless consideration of minor damages.\textsuperscript{103}

Determining which injuries are severe, of course, presents a problem for the courts. One approach would be for the statute to rely on judicial discretion.\textsuperscript{104} Alternatively, the legislature could define “severe injury” just as worker’s compensation statutes define “permanent disability.”\textsuperscript{105} For example, parental blindness, deafness, or paralysis caused by a tort-


> Probably in the vast majority of cases involving parental injury, the injury will not be so severe that the child suffers a loss of society and companionship. But in cases, for example, where a parent is severely crippled or suffers brain damage a child will be deprived of parental guidance, love and affection.


\textsuperscript{103} An alternative to the limitation proposed here would be to allow consortium recovery only when the child is severely injured. Such a limitation would recognize that a child may suffer greatly when a parent is less severely injured. This case might occur if the child was unusually dependent on the parent.

The disadvantage of this alternative is that determining the child’s injury is more subjective than determining the parent’s physical injury. The result may be to permit argument of damages for loss of consortium in all cases where the parent is injured.


\textsuperscript{105} See WASH. REV. CODE §§ 51.08.150, .160 (1979).
feasor could trigger the child's consortium action. Mental impairment of
the parent should also trigger the child's recovery. However, since such
injury is more difficult to measure than physical injury, all cases of
proven mental impairment to the parent should be considered severe.

Rigidifying the standards that permit a child to sue for loss of con-
sortium may appear to some skeptics to superficially, and perhaps decep-
tively, make an abstract injury seem concrete. Such rigid standards, how-
ever, provide a clear guide, and decrease the chance of unwarranted
recovery.

C. Offset for the Parent's Comparative Negligence

The comparative negligence of the parent should offset the child's re-
covery. For example, if a jury finds that a parent is ten percent negli-
gent, not only the parent's but the child's award should be reduced
by ten percent. The child’s injury results from the injury to the parent. It
would therefore be unfair to hold the tortfeasor responsible for all of the
child's damages when he may be only partially responsible for the par-
ent's injury.

Permitting tortfeasors to use the negligence of the parent as a partial
defense to an action by a child would not only be equitable, but it would
also comport with the predominant treatment of spousal consortium
claims—the tortfeasor simply should not pay for another party’s negli-
gence.

107. See Annot., 21 A.L.R.3d 469 (1968) for cases where contributory and comparative negli-
gence have offset spousal consortium recovery. See also Handel v. Brown, 216 N.W.2d 574,
parative negligence would most adequately rectify the injustice] that applying, or not applying, con-
tributory negligence in consortium actions causes. Id. at 579.

But see F. HARPER & F. JAMES, JR., THE LAW OF TORTS § 8.9, at 640 (1956) (suggesting that a
husband should not be barred by a wife’s negligence from bringing an action for loss of consortium).
Similarly, Love, supra note 1, at 628–33, suggested the better view is that contributory negligence
should not be a bar. Professor Love argued that the action for loss of consortium is independent, and
not derivative. Defenses asserted against the physically injured party could therefore not be used to
bar the party claiming damages for loss of consortium.

Washington, however, did not go so far as to state that a spouse’s action is independent of the
Moreover, RCW § 4.22.020 seemingly does not apply to derivative actions. WASH. REV. CODE §
4.22.020 (1979) (stating that comparative negligence of a spouse should not be imputed to another
spouse). Furthermore, even Professor Love suggested that comparative negligence may be the best
solution from a policy standpoint. Love, supra note 1, at 631–32 n.237.
D. Procedural Guidelines

Several procedural rules should be incorporated into any statute authorizing a child to sue for loss of parental consortium. First, all family members should be required to join in one personal injury action. Such a limitation prevents multiple litigation and double recovery.

Second, the court should appoint a guardian ad litem, other than a parent, to represent the child. Since the child’s interests are not identical to his parent’s, the guardian ad litem would ensure that the child was fully represented.

Third, the statute should prescribe a model jury instruction that delimits the damages which are properly recoverable by the child. The instruction should stress emotional damage, and unambiguously exclude economic damages. For example, recoverable damages should include loss of love, companionship, advice, and affection. On the other hand, loss of economic support, loss of the parent’s services, and compensation for any of the child’s future services to the parent should not be recoverable and should be expressly excluded. These excluded economic items are all fully recoverable by the parent in his own action. To permit the jury to consider such damage again in the child’s action would substantiate the judicial fear of double recovery.

Finally, the legislature should permit only limited retroactive application of the statute. Only those children whose injured parents have not filed their own action prior to the effective date should be permitted to recover. Neither reopening concluded parents’ cases nor disturbing actions in progress should be permitted. Reopening concluded cases could result in double recovery since the jury in the child’s action may not know what was awarded in the parent’s action. Disturbing actions between the tortfeasor and parent which began before the effective date would be economically wasteful. Limited retroactivity is an equitable method of lessening the impact of the child’s consortium action.

108. See note 43 and accompanying text supra.
109. For example, a parent may be tempted to settle with the defendant by dropping any claim of the children for loss of consortium.
110. Such an instruction was also suggested in Note, 56 B.U.L. Rev., supra note 40, at 736. One commentator advocates a more concise jury instruction. Love, supra note 1, at 617.
111. See note 11 supra.
113. See note 46 and accompanying text supra.
E. An All-Inclusive Consortium Statute

Instead of only enacting a statute pertaining to loss of parental consortium, the legislature should consider enacting a statute that addresses all consortium actions. By doing so, the legislature could settle many problems before they develop. For example, even after *Lundgren v. Whitney's, Inc.*,114 questions concerning spousal consortium remain. Washington courts have yet to decide whether a spouse should be required to join in the injured spouse's action or whether the injured spouse's negligence should offset the other spouse's recovery. A statute with the guidelines proposed here would answer these questions.

An all-inclusive consortium statute would also designate which actions are allowable.115 The arguments why the legislature should analyze children's actions116 apply equally to other possible consortium actions. Although the legislature would have to balance the merits of each proposed action separately, it could limit all consortium actions similarly. Therein lies the value of an all-inclusive statute—comprehensive legislative action is more efficient than separate attention to each new consortium claim.

V. THE COURT'S ROLE IN RECOGNIZING CHILDREN'S RECOVERY

In the face of continued legislative inaction, the courts should allow children to recover for loss of parental consortium. Although the legislature may be better able to frame an appropriately limited cause of action, it has not acted. This inaction should not relieve the courts from their responsibility.

Indeed, current judicial sentiment in Washington almost makes judicial action imperative. The supreme court in *Lundgren* permitted spousal consortium recovery.117 In so doing, it stated that when a court refuses to reconsider an old and unsatisfactory court-made rule, it abdicates judicial responsibility.118 The *Lundgren* court specifically stated that the common law limits on actions for loss of consortium should not be left unchanged

114. 94 Wn. 2d 91, 614 P.2d 1272 (1980).
115. Without such a statute, persons likely to ask for recovery of lost consortium in the near future are unmarried cohabitants, homosexual spouses, and siblings.
116. See introduction to Section IV in text.
118. *Id.* at 95, 614 P.2d at 1275 (quoting Rodriguez v. Bethlehem Steel Corp., 12 Cal. 3d 382, 393–94, 525 P.2d 669, 676, 115 Cal. Rptr. 765, 772 (1974)).
in hopes that the legislature might act. Far from the hesitancy of the Roth court to deviate from the common law, the Lundgren court emphasized the overriding importance of compensating for a serious injury.

The legislature may act on the matter, but it has accomplished little so far. Washington courts ought to follow the spirit of the Lundgren court—they should stop passing the buck.

VI. CONCLUSION

Although the legal system is not a panacea, it has a responsibility to compensate for the most serious injuries. It must consider competing considerations, but should not ignore serious injury by pointing to problems that can easily be controlled.

Courts first admit that a child who loses his parent’s love is seriously injured. Then, the courts refuse to allow the child to recover for that injury. At the same time, other members of the child’s family can recover for arguably less serious consortium losses. Such inconsistency is irrational and unjust. It is time that the interests of children be equally protected.

Gino L. Gabrio

119. When Washington denied a spouse a cause of action for loss of consortium in Ash v. S.S. Mullen, Inc., 43 Wn. 2d 345, 261 P.2d 118 (1953), it chose to ignore the then recent decision of Hitaffer v. Argonne Co., 183 F.2d 811 (D.C. Cir.), cert. denied, 340 U.S. 852 (1950), which first permitted such actions. It was not until nearly 30 years later that the court realized the unfairness of denying spousal consortium actions. Lundgren v. Whitney’s, Inc., 94 Wn. 2d 91, 614 P.2d 1272 (1980).


After Hitaffer, the majority of courts permitted spouses to recover. Since Berger, at least one more court has allowed children to recover. Ferriter v. Daniel O’Connell’s Sons, Inc., 413 N.E.2d 690 (Mass. 1980). Washington should be wary of again being on the tail end of a trend in the development of the law of consortium.