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Consortium and the Common Law

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CONSORTIUM AND THE COMMON LAW

Uncertainty is fundamental to human life and existence, and has been the only universally predictable element of all experience since the beginning; yet, in the quest for endurance and prevailance, there is a fundamental necessity for stability, for there must be some verity, even though an illusion, to meet the challenge.[1] The rules of conduct which govern the smaller lives of men reflect this conflict, and law is established primarily to provide stability and certainty in a system which, without it, is intrinsically variable and capricious, for, in order to establish and maintain profitable and peaceful intercourse, there must be rules which can be relied upon. All laws cannot be immutable, however, since interests must be protected as they exist: as a society changes, some of its laws must have the capacity to change also, or they will fail. Certain areas of the law appear to be invariable: no doubt there will always be the necessity of an acceptance to every offer in order to form a contract. In such cases, reliance upon prior decisions is the best assurance of both justice and security. On the other hand, the law of torts changes with each new decision, and history has little effect, overall, other than to trace the developing trend. Thus the rule of *stare decisis* is often tempered by society's reassessment of the interest tried, and the rock of precedent is carved by time.[2]

In 1231, in England, a wife could not sue for the loss of her husband's consortium due to the negligence of another;[3] in 1962, in South Carolina, she still cannot maintain the action.[4] The Supreme Court of South Carolina joined the great majority of jurisdictions[5] by denying her the action, and fol-

1. "I am the Lord, I change not." *Malachi* 3:6.

2. "'Cursed,' saith the law, 'is he that removeth the land-mark. The mislayer of a mere-stone is to blame.' But it is the unjust judge that is the capital remover of landmarks, when he defineth amiss of lands and property." BACON, OF JUDICATURE 1 (c.1618).

3. BRACTON, DE LEGIBUS ET CONSUETUDINIBUS ANGLIAE, Folio 155, 2 (apud Richard Tottellum, London 1569).

4. Page v. Winter, 240 S.C. 516, 126 S.E.2d 570 (1962).

5. "In the absence of statute, a wife has no cause of action for any loss sustained by her, including loss of consortium, in consequence of personal injuries inflicted on the husband." 41 C.J.S. *Husband and Wife* §404 (1944).

lowed the logic of many others[6] by holding that the wife had no right to her husband's consortium at the common law, and that "since there has been no legislative action in this state relating to the matter, we must be governed by the policy of the common law."[7]

Two issues arise from the decision: the first is a question of historical interpretation — whether or not the wife was, in fact, without a right to consortium at the common law. The second question is whether the Supreme Court of South Carolina should be bound to adhere to the statutes and case laws of England as they existed prior to the passage of the Act of 1712,[8] which adopted the common law of England as the common law of South Carolina. It should be noted at the beginning that there is a third issue, concealed in the twilight of judicial analysis, which has some effect upon the decision in this case: whether or not this area of tort liability should be extended to include the injury to the wife, an injury which is considered remote and incompensable by many courts.[9]

The important issue presented by *Page v. Winter* is not one of case interpretation, nor a judgment of social necessity, but the fundamental question of self-imposed limitation of decision by a judicial body, which, though inadvertent, becomes inflexible from its nature as a limitation; not only the rule of *stare decisis,* but the additional recital that *stare decisis* must be applied.

I.

Domestic interests, while real and valuable, are poorly defined and difficult to evaluate, and domestic problems are also social problems, with quasi-legal aspects, which have been dominantly and beneficially controlled by forces other than the law. Yet the law is required as an aid and control in many areas of domestic relations. It has been said that, "Whatever else marriage is, it is and will always be a creature of the law."[10] Interests in the marriage extend to all princi-

6. Smith v. United Constr. Workers, 271 Ala. 42, 122 So.2d 153 (1960); Ripley v. Ewell, 61 So.2d 420 (Fla. 1952); Seagraves v. Legge, 127 S.E.2d 605 (W.Va.1962).

7. Page v. Winter, 240 S.C. 518, 126 S.E.2d 572 (1962).

8. S.C. REV. STAT. 1872, c. 146, §10.

9. Giggey v. Gallagher Trans. Co., 101 Colo. 258, 72 P.2d 1100 (1937); Emerson v. Taylor, 133 Md. 192, 104 Atl. 538 (1918); Feneff v. New York Cent. & H. R. Ry., 203 Mass. 278, 89 N.E. 436 (1909).

10. SELECTED ESSAYS ON FAMILY LAW iv (Sayre ed. 1950).

pal family members, and are among the most valuable and powerful of all social relationships, but only recently has there been an indication that the interests of the wife and child in these bonds might receive protection comparable to that afforded to the husband.[11]

Actions for intentional interference with the marital relationship have been available to the husband since early history,[12] and to the wife, generally, since the passage of the Married Women's Property Acts.[13] Actions for enticement, alienation of affections and similar causes are based upon a loss of consortium,[14] and are as much means of control as they are repairitive causes.[15]

The husband has had recourse for negligent interference with the marriage since the middle of the nineteenth century,[16] but a similar action was not available to the wife in any jurisdiction of common law origin until 1950.[17] As in

11. Miller v. Mousen, 228 Minn. 400, 37 N.W.2d 543 (1949); annot. 59 A.L.R.2d 455 (1958); annot. 12 A.L.R.2d 1180 (1950).

12. Vernon v. Atlantic Coast Line Ry., 218 S.C. 402, 63 S.E.2d 53 (1951); see also Cook v. Atlantic Coast Line Ry., 196 S.C. 230, 13 S.E.2d 1 (1941) and 4 INSTITUTES OF JUSTINIAN 4. II.

13. Married Women's Property Act of 1895 (S.C. CONST. of 1895 art. 17, §9); see also Holloway v. Holloway, 204 S.C. 565, 30 S.E.2d 596 (1944); Messervy v. Messervy, 82 S.C. 559, 64 S.E. 753 (1908); PROSSER, TORTS §103 (2d ed. 1955).

14. Lynch v. Knight, 9 H.L.C. 577, 588, 131 Rev.Rep. 347, 426 (1861).

15. "The threat to individual interests of substance of defendants from collusion between the spouses from false or engineered charges has proved to be great, and there has been a trend in some states to abolish the actions altogether and leave these claims to the protection of morals." STONE, THE PROVINCE AND FUNCTION OF LAW 526 (1950); see also Feinsinger, *Legislative Attack on the Heart Balm*, 33 MICH.L.REV. 979 (1935).

16. Brockbank v. The Whitehaven Junction Ry., 7 H.&N. 835, 150 Eng.Rep. 706 (1862).

17. Hipp v. DuPont Co., 189 N.C. 9, 108 S.E. 318, 18 A.L.R. 873 (1921) allowed the action previously but was overruled by Hinnant v. Tide Water Power Co., 189 N.C. 120, 126 S.E. 307, 37 A.L.R. 889 (1925). In 1950, the leading case of Hitaffer v. Argonne Co., 183 F.2d 811, 23 A.L.R.2d 1366 (D.C.Cir. 1950), *cert. denied*, 340 U.S. 852, 95 L.Ed. 624, permitted suit by the wife. Since that decision, two federal district courts and seven state courts have allowed the action by the wife: Duffy v. Lipsman-Fulkerson & Co., 200 F.Supp. 71 (D.Mont. 1961); Cooney v. Moomaw, 109 F.Supp. 448 (D.Neb. 1953) *modified by* Luther v. Maple, 250 F.2d 916 (8th Cir. 1958) *but reinstated by* Guyton v. Soloman Dehydrating Co., 302 F.2d 283 (8th Cir. 1962); Missouri-Pacific Trans. Co. v. Miller, 227 Ark. 351, 229 S.W.2d 41 (1957); Yonner v. Adams, 167 A.2d 717 (Del. 1961); Brown v. Georgia-Tenn. Coaches, Inc., 88 Ga.App. 519, 77 S.E.2d 24 (1957); Dini v. Naiditch, 20 Ill.2d 406, 170 N.W.2d 881 (1960); Acuff v. Schmit, 248 Iowa 272, 78 N.W.2d 408 (1956); Montgomery v. Stephan, 359 Mich. 33, 101 N.W.2d 227 (1961); Hoekstra v. Helgeland, 78 S.D. 82, 98 N.W.2d 669 (1959). Without comment on the consortium question, Delta Chevrolet Co. v. Waird, 211 Miss. 256,

the case for an intentional violation, the action for negligence is also based upon an act *per quod consortium amisit* — by which consortium is lost.[18]

Literally translated, consortium means "casting lots together,"[19] and at the Roman law, consortium was regarded as the essence of the marriage.[20] There is disagreement among modern authorities as to what legal connotation should be given to the term. Acceptance of such a definition as "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," [21] indicates that the right to consortium is a mutual interest of both husband and wife. It has been one of the main contentions of those jurisdictions which presently allow the wife to bring the action that the right has always been a mutual one, but enforcement was not available to the wife at common law because of the disability of converture. Logically, the Married Women's Property Act removed this procedural disability, and in so doing, gave the wife the ability to sue for the loss.[22] However, another definition has been developed, based upon the traditional concept of the status of the wife at the common law: that the wife was the chattel of her husband, with no rights or standing at law, and that all of the husband's interests in her were interests of substance, dominantly, her domestic service. Since a wife has no interest in the domestic service of her husband, the right is and was exclusively his, and the wife gained no new right of this kind from the removal of the disability of coverture.[23]

Authority relating to this question is scarce, and the basis

51 So.2d 443 (1951), stated that the jury was warranted to consider "damages resulting from loss of society and companionship" of the husband to make award to the wife and children, 51 So.2d 447. See also ORE. REV. STAT. §108.010 (1955).

18. III BLACKSTONE, COMMENTARIES 8. 139; see Weedon v. Timbrell, St. R. 357, 101 Eng.Rep. 199 (1793).

19. CASSELL, LATIN-ENGLISH DICTIONARY (1958).

20. "Coniunctio maris et feminae et consortium omnis vitae, divinae et humani iuris communicatio." 23 DIGEST OF JUSTINIAN, MODESTINUS, 2. I.; see also BUCKLAND & MCNAIR, ROMAN LAW AND COMMON LAW (1936).

21. Flendermeyer v. Cooper, 85 Ohio St. 327, 98 N.E. 102, 105 (1908); see Messervy v. Messervy, 204 S.C. 565, 30 S.E.2d 596 (1944), and 41 C.J.S. *Husband and Wife* §11 (1944).

22. Brown v. Georgia-Tennessee Coaches, Inc., *supra* note 17.

23. Boden v. Del Mar Garage, 205 Ind. 59, 185 N.E. 860 (1933); Feneff v. New York Cent. & H. Ry., 203 Mass. 278, 89 N.E. 436 (1909).

of either interpretation, at its origin, is narrow and speculative.

The earliest reported case presently available which dealt with a separate cause of action by either spouse was *Chomley and Conges Case*,[24] decided in 1586, in which the husband sued for the battery of his wife. The defense was that the husband must join his wife in the suit; in a brief decision, the court allowed the suit without joinder.

In 1618, the case of *Guy v. Livesey*[25] was reported in more detail, and was an action brought by the husband against the defendant "for that he assaulted and beat the wife of the plaintiff, *per quod consortium uxoris suae* for three days *amisit*."[26] In reply to the defense of non-joinder, the court held that the action was brought "for the particular loss of the husband, for that he lost the company of his wife, which is only a damage to himself, for which he shall have this action, as the master shall have for the loss of his servant's service."[27] Again, in 1619, the separate action was affirmed in *Hyde v. Scyssor*,[28] which held that "the action is not brought for the battery of the wife, but for the loss and damage of the husband, for want of her company and aid."[29] One of the earliest references to this concept of derivative injury was made by Bracton,[30] c.1131, and, although he suggests a slightly different basis for the action than the cases outlined, apparently the type of suit was the same and was permitted prior to the sixteenth century:

> One may suffer damage not only through his own injury, however, but also through others over whom he has power, as through his children and his wife. Thus a husband may bring an action for the damage done to his wife, but not the contrary. This is proper, for a wife to be defended by her husband, but not a husband by his wife. In a similar manner, one suffers damage through those he has in his household, such as his subjects and his servants, if they have been struck or

24. 4 Leon 88, 74 Eng.Rep. 748 (1586).
25. Cro. Jac. 501, 79 Eng.Rep. 428 (1618).
26. *Ibid.*
27. *Ibid.*
28. Cro. Jac. 538, 79 Eng.Rep. 462 (1619).
29. *Ibid.*
30. BRACTON, DE LEGIBUS ET CONSUETUDINIBUS ANGLIAE, *supra* note 3.

beaten as an outrage to him, or insofar as it was to his interest not to have lacked in their work.[31]

Perhaps the most often cited early authority for the view that the basis of the husband's action was loss of services is Blackstone, writing his *Commentaries* after the decision of *Hyde v. Scyssor*.[32] Blackstone summarized the basis of the action in much the same manner as these early cases, also drawing the procedural analogy made in *Guy v. Livesey*.[33] Blackstone observed that the actions for loss of consortium and loss of servitium accrued to the superior — parent, husband, master or guardian — rather than to the inferior — child, wife, servant or ward:

> . . . one reason for which may be this: that the inferior hath no kind of property in the company care or assistance of the superior . . . and therefore the inferior can suffer no loss or injury. The wife cannot recover damages for [the] beating [of] her husband, for she hath no separate interest in anything during her coverture.[34]

It is difficult to establish the basis of Blackstone's grouping of these "inferiors" into one class, as well as the basis of his statement that the wife had no separate interests during her coverture. In fact, the wife did have separate interests,[35] not the least of which her husband, of whom she was seised.[36] Also, the unity of being concept, that the husband and wife were one person in the law, has been explained to some degree.[37] However, major authorities are

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31. *Ibid.* Translated with the assistance of Prof. Ruby M. Ott, Dept. of Foreign Languages, U.S.C. Original text: "Patitur autem iniuriam quis, non solum per seipsum ,sed etiam per alios quos habet in potestate, sicut per liberos suos, et uxoram suam. Vir autem agere poterit de iniuria facta uxori suae, sed non e contrario. Defendi enim uxorem a viro, non virum ab uxore dignu est. Item in iniuriam patitur quis, per illos quos in famillia sua habuerit, sicut servientes suos et servos, si pulsati fuerint, et verberati in contumeliam suam, vel quatenus sua interfuit operibus eorum non caruisse."

32. Cro. Jac. 538, 79 Eng.Rep. 462 (1619).

33. Cro. Jac. 501, 79 Eng.Rep. 428 (1618).

34. III BLACKSTONE, COMMENTARIES 8. 143.

35. *Dower*, for instance; the concept was early stated by BRACTON, *supra* note 3 at folio 429b, "For the thing is the wife's own, and the husband is guardian."

36. II POLLOCK & MAITLAND, HISTORY OF ENGLISH LAW 147 (1898).

37. "Quia una caro sunt vir et uxor." GLANVILLE, DE CONSUETUDINIBUS ET LEGIBUS REGNI ANGLIAE 14. 3.; "The law looks upon the husband and the wife as but one person." I BACON, ABRIDGEMENT 694 (1832); "The wife was not reduced to a position in law of, say, a dog." Williams, *The Legal Unity of Husband and Wife*, 10 MOD.L.REV. 16 (1947).

somewhat contradictory as to just what position the wife occupied at the common law. Statements by Glanville, Blackstone and Holdsworth have been interpreted as indicating that the wife was virtually powerless, that ". . . all show that the action which the law gives the husband for loss of *consortium* is founded on the proprietary right which from ancient times it was considered the husband had in his wife. It was in fact based on the same ground that gave a master a right to sue for an injury to his servant."[38] The following expression of the popular concept of the wife's place at common law conforms to this view.

> At common law the husband had almost absolute control over the person of his wife; she was in a position of complete dependence; she could not contract in her own name; was bound to obey; she had no will of her own and legal existence was merged into that of her husband so that they were termed and regarded as one in the law, "the husband being that one."[39]

Clearly, certain factual elements of the wife's legal disability cannot be disputed, and it is probable that the wife was regarded by the law as subject to her husband's authority.[40] But she was not devoid of rights, nor do authorities such as Chaucer and Shakespeare show that the wife occupied a position of substantial actual subservience.[41] What seems to be one of the best summaries of the husband and wife relationship during the middle ages is found at the conclusion of Pollock and Maitland's discussion of domestic relations in their HISTORY OF ENGLISH LAW:

> If we look for any one thought which governs the whole of this province of law, we shall hardly find it. In particular, we must be on guard against the common

38. Best v. Samuel Fox Co. (1952) A.C. 716; see 8 HOLDSWORTH, HISTORY OF ENGLISH LAW 147.

39. King v. City of Owensboro, 187 Ky. 21, 218 S.W. 297, 301 (1920).

40. "Clearly a wife was regarded as being subject to her husband's authority; and it is probable that the guardianship which he thus exercised led to incapacity to her own property. That incapacity, in turn, led to her inability to contract, or to sue or be sued without joining her husband." Brett, *Consortium et Servitium*, 29 AUST.L.JOUR. 322 (1955).

41. "And whan that I had getten unto me,
By mistrie, al the soveraynetee
And that he seyde, 'Myn owne trewe wyf,
Do as thee lust the terme of al thy lyf.
Keep thyn honour, and keep eek myn estaat.'
After that day we hadden never debaat." CHAUCER, THE WIFE OF BATH'S PROLOGUE (c.1370); see SHAKESPEARE, THE TAMING OF THE SHREW (1594).

> belief that the ruling principal is that which sees an 'unity of person' between husband and wife . . . a consistently operative principle it can not be. We do not treat the wife as a thing or as somewhat that is neither thing nor person . . . . The husband is the wife's guardian:-that we believe to be the fundamental principle; and it explains a great deal, when we remember that guardianship is a profitable right . . . . But . . . we can not explain the marital relationship as being simply the subjugation of the wife to the husband's will . . . . To this we must add that there is a latent idea of community between husband and wife which can not easily be suppressed.[42]

Apart from the contradictory historical basis, many courts have denied this action to the wife on other grounds, all of which evince a reluctance to expand the tort-feasor's liability to members of the injured's family.

Many courts have held that an action by the wife for loss of consortium would result in a double recovery.[43] Since the husband supposedly recovers for any loss of ability to fulfill his marital obligations through his own action, the wife is also compensated, and any additional recovery by her would be excessive. Conversely, others have held that the injury is a double loss,[44] for which each should recover, and that instructions to the jury could limit either party's award to preclude duplication of damages.[45]

Other jurisdictions take the position that the wife's injury is too remote to be compensable,[46] that damages are intended to compensate the injured for direct consequences of the wrong,[47] and since the wife has no pecuniary interest in her husband's services,[48] she suffers no injury to an interest of substance. While the question of services is unsettled, it has been pointed out that there is an inconsistency in allowing the husband to sue for the loss while withholding the action from

42. II POLLOCK & MAITLAND, *supra* note 36 at 405ff.
43. RESTATEMENT, TORTS §695 (1934); see Hartmann v. Cold Spring Granite Co., 247 Minn. 515, 77 N.W.2d 651 (1956).
44. Hitaffer v. Argonne Co., 183 F.2d 811 (D.C.Cir. 1950).
45. Cooney v. Moomaw, 109 F.Supp. 448 (D.Neb. 1953).
46. Gambrino v. Manufacturers Coal & Coke Co., 175 Mo.App. 653, 158 S.W. 77 (1913).
47. Howard v. Verdigris Valley Elec. C-op., 201 Okl. 504, 207 P.2d 784 (1949).
48. Boden v. Del Mar Garage, 205 Ind. 59, 185 N.E. 860 (1933).

the wife on the basis of remoteness,[49] however, it appears to be equally anomalous to allow recovery by one and not the other in any case.[50] In addition, South Carolina,[51] and substantially all other jurisdictions,[52] have allowed the wife to bring an action for intentional interference with the marriage relation since the passage of the Married Women's Acts, on the basis that the Acts gave new rights to the wife.[53] Since the basis of these actions is also a loss of consortium,[54] there has been some uncertainty as to why the wife of an adulterous husband has the right to his consortium, which does not extend to her when he is injured negligently.[55]

Finally, a few courts have stated that the interest in consortium, as a whole, is at issue, and that the question is whether this element of damage is compensable.[56] The arguments utilized are similar to those involved in the issues surrounding pain and suffering, mental anguish, and other nonpecuniary injuries.[57] These courts have decided the question with equal consideration to the interests of the husband and the wife.

One of the most compelling propositions in support of the position that the wife had no right to consortium at the common law also expose one of the primary sources of confusion in the entire inquiry. In *Page v. Winter*, the court stated that "if such a right had existed under the common law, the wife could have maintained the action prior to the Married Women's Property Act by simple joinder of the husband."[58] Such a suggestion would probably have had the same effect upon a common law attorney as the suggestion to a contemporary lawyer that he submit his pleadings written in longhand[59] and appear in court habited in a black coat.[60] The impracticality of such a solution is evident. The husband had a right to his wife's choses in action, and would

49. Dini v. Naiditch, 20 Ill.2d 406, 170 N.E.2d 881 (1961).
50. Hoekstra v. Helgeland, 78 S.D. 82, 98 N.W.2d 669 (1959).
51. Messervy v. Messervy, 82 S.C. 559, 64 S.E. 753 (1908).
52. PROSSER, TORTS, §103 (2d ed. 1955).
53. Westlake v. Westlake, 34 Ohio St. 621, 34 Am.Rep. 397 (1878).
54. Acuff v. Schmit, 248 Iowa 272, 78 N.W.2d 408 (1956).
55. Montgomery v. Stephan, 359 Mich. 33, 101 N.W.2d 227 (1961).
56. Marri v. Stamford Street Ry., 84 Conn. 9, 78 Atl. 582 (1911).
57. Martin v. United Elec. Ry., 71 R.I. 137, 42 A.2d 897 (1945).
58. Page v. Winter, 240 S.C. 516, 126 S.E.2d 570 (1962).
59. S.C. CIR. CT. R. 13.
60. *Id.* R. 8.

have recovered for the loss of his own consortium.[61] In addition, an interesting situation would have resulted if the husband had joined his wife in an enticement action against his own mistress.[62] Thus the difficulty in reaching any supportable conclusion to the question is largely due to the vast changes which have taken place in the law with respect to domestic relations. The few cases which are available offer little information of a practical nature, and in all probability, the question will never be fully answered. The law reflects the attitudes of those who apply it, and a true understanding of the actual result of a rule of law in an earlier time is difficult, if not impossible, to determine.

II.

Every judicial decision based upon facts requires some degree of creative analysis, since no two factual situations are ever completely consistent. Over a period of time, recurring situations become classified, and applied rules become familiar as they are developed, and, from a purely logical aspect, law naturally tends toward codification. But this natural tendency is not the sole regulator; there is a policy inherent, founded on the theory that security and certainty require that accepted and established legal principles, under which rights accrue, be recognized and followed, which demands stability.[63] Yet the circumstances out of which law is formed are constantly changing, and, even though the letter of the law may remain the same, application alters with the time and circumstances. Thus there are two urges: law must be stable, and yet it cannot stand still.[64]

> The law of our day faces a two-fold need. The first is the need of some restatement which will bring certainty out of a wilderness of precedent. This is the task of legal science. The second is the need of a philosophy that will mediate between the conflicting claims of stability and progress, and supply a principle of growth.[65]

61. "No recovery could be had without joining the husband in the suit, who himself must receive the money, which would not advance the wife's remedy." Lynch v. Knight, 9 H.L.C. 577, 588 (1861).

62. "For an alienation of affections suit, a wife was doubly barred at common law (a) because she could not sue for any tort without her husband's joinder, and (b) because he was not permitted to join her in a suit for that specific tort." Yonner v. Adams, 167 A.2d 717 (Del. 1961).

63. Otter Tail Power Co. v. VonBank, 72 N.D. 497, 8 N.W.2d 599, 145 A.L.R. 1343 (1942).

64. ROSCOE POUND.

65. CARDOZO, THE GROWTH OF THE LAW 1 (1927).

The rule of *Page v. Winter* compels adherence to the common law of England as it existed prior to the Act of 1712,[66] except as changed by legislative enactment. This is not an unfamiliar application of the rule of *stare decisis,* however, the rule has not been applied so strictly in any previous South Carolina case. *Stare decisis* is of unquestioned value and validity in the common law system, but only insofar as reliance upon prior decisions does not defeat justice.[67]

> I am ready to concede that the rule of adherence to precedent, though it ought not to be abandoned, ought to be in some degree relaxed. I think that when a rule, after it has been duly tested by experience, has been found to be inconsistent with the sense of justice or with the social welfare, there should be less hesitation in frank avowal and full abandonment.[68]

Stare decisis is an ethical, rather than a logical, consideration.[69] However, some courts have regarded the rule as compelling strict logical analysis of prior decisions and application of the developed rule in every case.[70] Philosophically, consistency is the essence of legal certainty, but "the proposition that courts ought always to decide 'in accordance with precedent or statute' is an ethical proposition, the truth of which can only be demonstrated by showing that in every case the following of statute or precedent does less

66. Page v. Winter, 240 S.C. 516, 126 S.E.2d 570 (1962); S.C. REV. STAT. 1872, c.146, §10.

67. "In applying the rules [of the English common law], we must take care that they do not violate some other fixed rule growing out of our own peculiar habits and institutions." Lester v. Frazer, 2 Hill's Eq. 529 (S.C. 1837).

68. CARDOZO, NATURE OF THE JUDICIAL PROCESS 150 (1921).

69. "For law is the just distinction between right and wrong, made conformable to that most ancient nature, the original and principal regulator of all things, by which the laws of men should be measured, whether they punish the guilty or protect and preserve the innocent." II CICERO, LAWS 5. 433. (Bohn 1853); "Is it not the duty of the court, if it possess the power, to decide in accordance with present day standards of wisdom and justice rather than in accordance with some outworn and antiquated rules of the past?" Justice Sutherland in Funk v. United States, 290 U.S. 371, 381, 382, 78 L.Ed. 369, 375, 93 A.L.R. 1136 (1934).

70. "It is often the function of the courts by their judgements to establish public policy where none on the subject exists. But overthrow by the courts of existing public policy is quite another matter. That its establishment may have resulted from decisional, rather than statutory, law is immaterial. Once firmly rooted, such policy, in effect, becomes a rule of conduct or property within the state. In the exercise of proper judicial restraint, courts should leave it to the people, through their elected representatives in the General Assembly to say whether or not it should be revised or discarded." Justice Legge in Rogers v. Florence Printing Co., 233 S.C. 567, 106 S.E.2d 258 (1958).

harm than any possible alternative."[71] Thus, in any given situation, the interest sought to be protected must be considered in the light of the need for certainty in the particular area. Property law, contracts, commercial transactions, are primary fields for legislation, restatement and code, for in these areas rights are established in reliance upon rules, and are valueless if the pertinent rules cannot be depended upon to remain stable. "But where the questions are not of interests of substance, but of the weighing of human conduct and passing upon its moral aspects, legislation has accomplished little . . . for the certainty attained by mechanical application of fixed rules to human conduct has always been illusory."[72] Thus, the ideal judicial decision would combine logic and actuality to arrive at a median rule providing the best of stability and currency. But the law is not a machine, and as Justice Holmes stated:

> The actual life of the law has not been logic; it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow men, have had a good deal more to do than the syllogism in determining the rules by which law shall be governed.[73]

One of the earliest cases in South Carolina expressing a policy and philosophy of *stare decisis* was decided in 1812. In the case of *Shecut v. McDowell*,[74] Judge Nott stated a rule of adherence which appears to be without logical or practical flaw:

> Our Act of Assembly, passed in the year 1712, says the common law of England shall be as in full force and virtue in this State as in England . . . I do not mean to say that we are bound by every decision made by the courts of England. We have a right to take our own view of the common law; but when a principle of law has been settled for ages, by a series of uniform decisions, the reason must be very strong, that would authorize a departure from it; and in no case ought an

71. COHEN, ETHICAL SYSTEMS AND LEGAL IDEALS 33 (1959).
72. POUND, AN INTRODUCTION TO THE PHILOSOPHY OF LAW 69, 71 (1959).
73. HOLMES, THE COMMON LAW 1 (1881).
74. 1 Tread. Const. 35 (S.C. 1812).

> established rule be given up without substituting another in its place. It would be launching into a boundless sea of uncertainty; without a compass to direct our course.[75]

In 1837, a similar view of the impact of the English common law upon South Carolina was adopted by Chancellor Johnson, who further limited adherence to the English law in holding that, "The Act of 1712, while incorporating the body of English common law into our jurisprudence, renders it obligatory no further than it is applicable to our own conditions and circumstances; and in applying the rules, we must take care that they do not violate some other fixed rule growing out of our own peculiar habits and institutions."[76] However, ninety years later, in 1927, the South Carolina Supreme Court took a more restricted view of its ability to interpret and amend the common law. In passing upon the question of a wife's liability for the funeral expenses of her husband, the court found that the wife had no duty to provide for this expense at the common law, and that, "Where there has been no legislative action, we must look back to the common law, for the principles of the law there stated are of force in this state, until there has been some repeal or modification thereof by the law-making body."[77] However, four years later, the ruling of *Shecut v. McDowell*[78] was revived and the strictness of this last ruling was somewhat modified in *State v. Wilson*,[79] in which it was stated that "the courts of this state, in construing the common law, are not bound by the decisions of the courts of England."[80]

If the rule of *stare decisis* is to be relaxed at all, the area of law requiring the greatest degree of flexibility and change, and thus the area in which the rule would have the least application, would be that of the negligent tort. The concept of negligence is such that the Reasonable Man may change his character as quickly as juries change, and the legal concepts of what interests of the individual in personality and property should be protected are in a constant state of development. Thus, the South Carolina Supreme

75. *Id.* at 38.
76. Lester v. Frazer, 2 Hill's Eq. 539 (S.C. 1837).
77. O'Hagen v. Fraternal Aid Union, 144 S.C. 84, 141 S.E. 893, 57 A.L.R. 397 (1927).
78. 1 Tread. Const. 35 (S.C. 1812).
79. 162 S.C. 413, 161 S.E. 104, 81 A.L.R. 580 (1931).
80. 162 S.C. 413, 161 S.E. 104, 81 A.L.R. 580 (1931), quoting from Shecut v. McDowell, 1 Tread. Const. 35 (S.C. 1812).

Court had no difficulty with the question of common law precedent in allowing the wife to bring an action for enticement. In *Messervy v. Messervy*, the court stated that "In view of the sweeping changes made by modern legislation in regard to the property and personal rights of married women, I fail to see any reason why her husband should be joined with her in the action."[81] The Married Women's Property Act[82] did not specifically grant this cause of action to the wife; unless by implication of statute and other circumstances, the action could not have been established on any certain authority. But the South Carolina Supreme Court has since stated that the common law cannot be abrogated by implication of statute, and that the language must express a clear and unequivocal intention to change the rules of the common law.[83] *Page v. Winter* not only involves the same change of personal and property rights upon which the holding in *Messervy v. Messervy* was predicated, but the action in *Page v. Winter* was based upon a negligent act. It would be illogical to suggest that an individual acts negligently in reliance upon established rules of law relating to negligent conduct, or, in particular, that one who negligently injures a husband does so safe in the knowledge that he will be liable only to him, and not to his wife. The only possible reliance upon this rule has been the acts of settlement and judgments by attorneys which did not account for this element of damages, and change, without regard for this store of litigation, might give rise to a number of suits for recovery.

It is interesting to note that the English courts also regard the common law as a body of rules which ceased to develop at some unspecified time.[84] While the date of congealing is designated by statute in South Carolina,[85] it is difficult to determine when the case law of England ceased to be their common law and became simply the reapplication of formerly established rules. It is also difficult to understand how

81. Messervy v. Messervy, 82 C.C. 559, 64 S.E. 753, 755 (1908).
82. Married Women's Property Act of 1895, S.C. CONST. of 1895 art. 17, §9.
83. Coakley v. Tidewater Construc. Co., 194 S.C. 284, 9 S.E.2d 724 (1940).
84. "At the common law, the consortium and servitium of the wife were the property of the husband, any encroachment on which conferred on him a cause of action in the nature of trespass. The husband's right being deeply entrenched by authority, and the wife's never having been affirmed, the intervention of the legislature would be ncessary to produce equality." Best v. Samuel Fox Co., Ltd. (1951), L.R. 2 K.B. 639.
85. S.C. REV. STAT. 1872, c.146, §10.

many of the basic rules of the common law can be applied if the common law is to remain unchanged. "It has been said so often as to have become axiomatic that the common law is not immutable but flexible, and by its own principles adapts itself to varying conditions."[86] The rule of *stare decisis* as applied in the *Page v. Winter* case completely defeats the possibility of developing case law, and as a practical fact, legislation is not likely to be forthcoming in this area.

It can hardly be argued that legal certainty in South Carolina is dependent upon the marital rights of the medieval wife. Inherently, domestic relations and negligent injuries are not susceptible to the rule of *stare decisis*,[87] and even if it were definitely established that the wife had no right to her husband's consortium at the common law, there would be reason enough to discard the old rule, but in the ample precedent of this state, and in the principles of legal philosophy relating to the concept of *stare decisis*.

Whether or not this interest is sufficiently substantial to be compensable is another question, not considered directly in *Page v. Winter*. Though the action has served the husband for many years, it is possible that the South Carolina Supreme Court has found the interest to be unprotectable. If this is true, then perhaps the rule established in the case will not be strictly applied. Clearly, such an unequivocal denial of change would end the developing case law of this state, and just as clearly, the court has no intention of effecting that end.[88]

> These precedents are venerable. Their chains may be moss encrusted and rusty, but only a few courts have held that they no longer control or confine. Thus again we reach the conflict that divides us, for the law, as Dean Pound put it, must be stable, and yet it cannot

86. Litwak v. United States, 344 U.S. 604, 97 L.Ed. 593 (1953).

87. "There are not many rules in tort law as to which one may say that there is no better reason for their existence than that they were laid down by Lord Mildew three centuries since, at a time when the world was a very different place, but they do exist." PROSSER, TORTS §17 (1955).

88. "Counsel desiring to attack or argue against a decision of this court, with a view to asking the court to review, overrule or modify the same, must petition the court in writing, at least four days before the call of the case in which such argument is to be made, asking permission to do so, and set forth the reasons why the decision in question should be reviewed, modified or overruled." S.C. SUP. CT. R. 8 §10.

stand still. Were we to rule on precedent alone, were stability the only reason for our being, we would have no trouble with this case. We would tell the woman to begone, and to take her shattered husband with her, that we no longer be affronted by a sight so repulsive. In so doing, we would have vast support from the dusty books. But dust the decision would remain in our mouths through the years ahead, a reproach to law and conscience alike. Our oath is to do justice; not to perpetrate error.[89]

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89. Montgomery v. Stephan, 359 Mich. 33, 37, 101 N.W.2d 227, 228 (1960).