I. Introduction

In Durepo v. Fishman, two minor children filed suit to recover for the loss of parental consortium resulting from injuries allegedly suffered by their mother when she was negligently treated by a physician. The defendant moved to dismiss the claim for failure to state a claim upon which relief can be granted. The trial court granted the motion, and the plaintiffs appealed to the Supreme Judicial Court of Maine, sitting as the Law Court.

The case invited the Law Court to declare for the first time in

1. 533 A.2d 264 (Me. 1987).
2. The children, Chris and Travis, were represented by Patricia and Paul Durepo as next friends and parents. Id. at 264.
4. The claims of Patricia Durepo and Paul Durepo for their injuries were the subject of an action filed simultaneously with this one in the superior court. Patricia Durepo & Paul Durepo v. Eric Fishman, M.D., No. 85-256 (filed Oct. 23, 1985).
5. Durepo v. Fishman, 533 A.2d at 264 (citing M.R. Civ. P. 12(b)(6)).
Maine whether a minor child should possess an independent right of action for loss of parental consortium against a third person who negligently causes physical injury to a parent. The Law Court declined that invitation and deferred to the Legislature for consideration of the public policy issues involved in this proposed extension of tort liability. The question now becomes: what should the Legislature do?

This Note considers whether the Legislature should statutorily adopt a right of action for loss of parental consortium. The Note reviews the development of the claim for loss of consortium, tracing it from its origin in the property rights of men to the modern view which stresses relational interests in care, comfort, society, and companionship. Analysis of contemporary rulings and approaches with respect to parental consortium demonstrates the growth of a small but significant minority viewpoint recognizing the cause of action denied by the Law Court in Durepo. After weighing the variety of considerations on each side of the issue, this Note concludes that the Maine Legislature should indeed exercise its lawmaking power in order to create a right of action for loss of parental consortium.

II. DEVELOPMENT OF THE LOSS OF CONSORTIUM CAUSE OF ACTION

Courts have long recognized a husband’s right to recover damages for loss of consortium where a tortious injury to his wife resulted in injury to the spousal relationship. The husband’s interest in his relation with his wife first received recognition based on the value of the services she could provide him. As observed by Professors Prosser and Keeton, the husband’s interest eventually broadened into a bundle of legal rights consisting of “the alliterative trio of the services, society, and sexual intercourse of the wife.” To these, modern law added a fourth, that of conjugal affection. In Maine, the law has long provided a remedy for the husband’s loss of his wife’s consortium.

Since a woman could not bring a suit in her own name at common law, the wife had no right to bring an action for interference with

6. Id.
7. Id. at 265.
10. Id.
11. Id.
12. See, e.g., Wood v. Maine Central R.R., 101 Me. 469, 479-80 (1906) (upholding damages awarded to a husband for injuries to his wife and basing the computation of those damages largely on the “expense to supplement the household duties which could have been performed by his wife”).
her relationship with her husband.13 With the adoption of the married women's acts14 in the nineteenth century, the unity fiction of husband and wife15 dissolved, and women acquired independent legal stature. Some courts ruled that the abolition of the husband's proprietary interest in the wife foreclosed him from maintaining an action to recover for the loss of his wife's consortium.16 Most courts, however, followed the lead of Hitaffer v. Argonne Co.17 in which the court held that the wife could finally maintain an action, independent from that of her husband, for lost consortium caused by negligent injury to her husband.18 Since the Hitaffer decision, at least thirty-two jurisdictions have recognized the wife's right of action for loss of consortium resulting from negligent injury to the husband.19

13. W. PROSSER & W. KEETON, supra note 9, § 124, at 916.
14. For a collection of early examples of the married women's acts, see 3 C. VERNER, AMERICAN FAMILY LAWS § 167, at 171-85 (1935). These acts, adopted in the mid-1800s, generally gave a woman the right to own and control property apart from that of her husband and to sue and be sued without joinder of her husband. Id. at § 179 (discussing suits by and against the wife).
15. At common law, the husband and wife were regarded as one person, and that person was the husband. See 1 W. BLACKSTONE, COMMENTARIES *442.
16. See, e.g., Marri v. Stamford St. R.R., 84 Conn. 9, 78 A. 582 (1911). This action was brought to recover damages resulting from a collision between a trolley car operated by the defendant's servant and a horse-drawn carriage in which the plaintiff and his wife were riding. Id. at 10, 78 A. at 582. The superior court awarded damages to the plaintiff husband for the loss of his wife's consortium, distinguishing the right to consortium from that to services. Id. at 11, 78 A. at 582. The appellate court reversed the judgment, holding that the historic reasons for awarding damages based on the wife's service were no longer valid. Id. at 24, 78 A. at 587.
17. 183 F.2d 811 (D.C. Cir. 1950), cert. denied, 340 U.S. 852 (1950), overruled on other grounds, Smither & Co., Inc. v. Coles, 242 F.2d 220 (D.C. Cir. 1957), cert. denied, 354 U.S. 914 (1957). A wife brought this action against her husband's employer to recover for loss of consortium due to severe and permanent injuries to her husband caused by the employer's negligence. Id. at 812. The court of appeals held that a wife has a cause of action for loss of consortium due to a negligent injury to her husband, and that consortium includes not only marital services but also love, affection, companionship, and sexual relations. Id. at 819.
18. Id. at 816-17.
Like many states, Maine statutorily established the wife's right to recover for loss of consortium. In 1965, the Law Court refused to recognize the wife's right in *Potter v. Schafter*, stating a refusal to usurp legislative authority. Two years later, the Legislature responded to the Law Court's reticence and enacted a statute establishing the wife's right of action. More recently, the Law Court held in *Sawyer v. Bailey* that a person engaged to be married had no action for loss of consortium when his fiancee was injured.

Although parental recovery for lost filial consortium has been given less widespread recognition than the spousal right of action for marital consortium, some states have adopted statutes permitting recovery for non-pecuniary losses resulting from negligent disruption of filial consortium. As explained below, the parental right to recover for lost filial consortium has also been judicially recognized.

In 1975, the Wisconsin Supreme Court allowed parents to pursue a claim for loss of filial consortium. In *Shockley v. Prier*, the court
held that parents could sue two doctors and a hospital for injuries sustained by their infant son resulting in the loss of the child's aid, comfort, society, and companionship, provided that the parents' cause of action was combined with that of the child for the child's personal injuries. The court reasoned that the parents' requests for damages for lost society and companionship of a child should be sustained in negligence actions because the Wisconsin wrongful death statute contemplated lost society and companionship as an element of damages. The court also noted that the significance of children's relationships to the family had changed. The value of children to their parents no longer lies in the economic assets they provide, but in the emotional and sentimental needs they fulfill. Thus, the court concluded that the basis for a parent's action to recover lost filial consortium should be changed from loss of the child's services to lost companionship and society.

While no clear trend has emerged favoring the acceptance of a


37. Hay v. Medical Center Hosp., 145 Vt. 533, 496 A.2d 939 (1985). In Hay, a mother was injured while a patient at the defendant medical center, and as a result of her injuries, she was rendered permanently comatose. Her husband filed a complaint on behalf of his minor son for his loss of parental consortium resulting from the deprivation of his mother’s “physical, moral, and intellectual training” as well as the deprivation of her “affection, society, love, protection, and companionship.” Id. at 535, 496 A.2d at 940. The Vermont Supreme Court concluded that a minor child should have the right to sue for damages for loss of parental consortium when the parent has been rendered permanently comatose. Id. at 545, 496 A.2d at 946. See generally Note, Expanding Loss of Consortium in Vermont: Developing a New Doctrine, 12 VT. L. REV. 157 (1987).

38. Ueland v. Reynolds Metals Co., 103 Wash. 2d 131, 691 P.2d 190 (1984). In Ueland, a father suffered severe and permanent mental and physical disabilities when struck by a metal cable while employed as a lineman for Seattle City Light. Two minor children sued in separate causes of action for loss of parental consortium. Id. at 103, 691 P.2d at 191. The court held that the actions may be brought; however, such an action must be joined with the parent’s underlying claim unless the child can show why joinder is not feasible. Id. at 140, 691 P.2d at 195.

39. Theama v. City of Kenosha, 117 Wis. 2d 508, 344 N.W.2d 513 (1984). In that case, a father hit a pothole while riding his motorcycle, severely injuring his head and internal organs. He suffered permanent brain damage and impairment of visual, perceptual, motor, and speech functions, as well as other physical and emotional effects. He sued for his own damages, his wife sued for loss of consortium, and his children sued for loss of care, companionship, society, protection, training, and guidance because of their father’s extensive injuries. Id. at 509-10, 344 N.W.2d at 513. The Wisconsin Supreme Court held that a “child may bring a cause of action for the loss of a parent’s society and companionship resulting from another’s negligence.” Id. at 527, 344 N.W.2d at 522.


42. Weitl v. Moes, 311 N.W.2d 259 (Iowa 1981). In Weitl v. Moes, a mother was rendered blind and severely brain damaged as a result of the defendants’ negligence. Id. at 261. The Iowa Supreme Court held that a minor has an independent cause of action in Iowa for loss of the society and companionship of a parent who is tortiously injured by a third party so as to cause a significant disruption or diminution of the parent-child relationship. Id. at 270.

Weitl v. Moes was overruled in part by Audubon-Exira Ready Mix, Inc. v. Illinois Cent. Gulf R.R., 335 N.W.2d 148, 152 (Iowa 1983) (stating that “[t]o the extent our
spite a growing interest in the issue, however, the great majority of states have not yet adopted a cause of action for loss of parental consortium. The Restatement (Second) of Torts also rejects the cause of action. Although courts have acknowledged the natural justice of a child's claim for loss of parental consortium and have been aware of the extensive commentary favoring such claims, the claims have generally been denied. The following arguments are most commonly advanced in opposition to the recognition of loss of

plurality opinion in Weitl (1) granted a child an independent right to bring such an action and (2) to the extent that it interpreted section 613.15 to exclude intangible consortium damages, and (3) to the extent it limited the period of damages to the child's minority, it is overruled.

The following states have rejected a cause of action for loss of parental consortium:

- Pleasant v. Washington Sand & Gravel Co., 262 F.2d 471 (D.C. Cir. 1953);

44. Restatement (Second) of Torts § 707A (1977). The Restatement provides: "One who by reason of his tortious conduct is liable to a parent for illness or other bodily harm is not liable to a minor child for resulting loss of parental support and care." Id.

45. See Borer v. American Airlines, Inc., 19 Cal. 3d 441, 453, 138 Cal. Rptr. 302, 310, 563 P.2d 858, 866 (1977) ("We are keenly aware of the need of children for the love, affection, society and guidance of their parents; any injury which diminishes the ability of a parent to meet these needs is plainly a family tragedy, harming all members of that community.").

46. Prosser and Keeton have noted:

[A]ble criticisms have been mounted against the traditional rule, and it must now be recognized that the more liberal view may well gain further adherents. In addition to this it must be said that a number of jurisdictions, including some which deny the child's consortium claim, do recognize a claim for emotional distress or at least psychic injury from such distress when one family member is injured in the presence of another, or a nervous shock to a family member has resulted from substantially contemporaneous observance of an injury or death to another family member.

parental consortium as a cause of action: (1) lack of precedent;\(^\text{47}\) (2) more properly a legislative decision;\(^\text{48}\) (3) difficulty in assessing damages;\(^\text{49}\) (4) likelihood of multiple claims and increased litigation;\(^\text{50}\) (5) potential for double recovery;\(^\text{51}\) and (6) probable increased insurance premiums and costs to society.\(^\text{52}\)

III. The Durepo Decision

In *Durepo v. Fishman*,\(^\text{53}\) Patricia and Paul Durepo brought an action on behalf of their two minor children, Chris and Travis Durepo, ages 4 and 11, for loss of parental consortium\(^\text{54}\) resulting from severe, permanent, and painful injury to Patricia's left leg, allegedly caused by the negligent treatment of a physician.\(^\text{55}\) After the supe-

\(^{47}\) See *Jeune v. Del. E. Webb Constr. Co.*, 77 Ariz. 226, 269 P.2d 723 (1954) (holding that there is no cause of action for mother or child because there has never been one recognized under the common law). See also *De Angelis v. Lutheran Medical Center*, 58 N.Y.2d 1053, 449 N.E.2d 406, 462 N.Y.S.2d 628 (1983) (explaining that there is no reason to grant a recovery not yet existing at common law and noting that logic, science, and policy all interact to limit exposure to tort liability in order to draw a line between granting recovery and extending liability).

\(^{48}\) See *Zorzos v. Rosen*, 467 So. 2d 305, 306-307 (Fla. 1985) (where a father was injured in an auto accident and his children sued for the lost care, comfort, society, parental companionship, instruction, and guidance of their injured father, the court held that it was up to the Legislature to create an action for the loss of parental consortium); *Graham v. Ford Motor Co.*, 721 S.W.2d 554, 555 (Tex. Ct. App. 1986) (where a father was seriously injured and his wife sued on behalf of their three minor children for loss of "'society, companionship, nurture, moral support and parental guidance,'" the court held that it was not for the intermediate court to create a new cause of action since creating such an action was for the Legislature or Supreme Court of Texas).

\(^{49}\) See *Borer v. American Airlines, Inc.*, 19 Cal. 3d 441, 563 P.2d 858, 138 Cal. Rptr. 302 (1977). In *Borer*, the court rejected nine children's claims for loss of parental consortium when their mother was injured. While sympathetic to the children's need for love, affection, society, and guidance from a parent, the court concluded that monetary compensation would inadequately alleviate the tragedy; that damages would be difficult to measure; and that extended and disproportionate liability might result. *Id.* at 447-49, 563 P.2d at 862-63, 138 Cal. Rptr. at 307-308.


\(^{51}\) See *Hoffman v. Dautel*, 189 Kan. 165, 169, 368 P.2d 57, 60 (1962) (holding that children should have no right to sue because of double recovery possibilities).

\(^{52}\) See *Mueller v. Hellrung Constr. Co.*, 107 Ill. App. 3d 337, 437 N.E.2d 789 (Ct. App. 1982) (denying the child's independent claim for loss of consortium when his parent was injured because of the potential for burgeoning insurance, court and social costs).

\(^{53}\) 533 A.2d 264 (Me. 1987).

\(^{54}\) Loss of parental consortium was defined by the court as loss of a parent's "'love, society, companionship, guidance and care.'" *Id.* at 264.

\(^{55}\) Brief of Appellee at 1, *Durepo v. Fishman*, 533 A.2d 264 (Me. 1987) (No. ARO-87-68).
rior court granted the defendant’s motion to dismiss the complaint, the plaintiffs appealed to the Maine Law Court, which affirmed the dismissal, declining to recognize a child’s independent right of action for the loss of parental consortium.

The plaintiffs advanced a variety of arguments on appeal in order to establish that the action for loss of parental consortium possessed “a sound basis in existing law.”

They pointed analogically to Maine’s wrongful death statute which allows recovery “for the loss of comfort, society and companionship of the deceased to the persons for whose benefit the action is brought,” including minor children. They also quoted the opinion in Hay v. Medical Center Hospital, which stated that “it is inappropriate that a minor child may recover such a loss if a parent is killed, but not if the parent is permanently comatose.”

The plaintiffs asserted that the common law allowed compensation for injury to the parent-child relationship. They further ar-

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Every such action shall be brought by and in the name of the personal representative of the deceased person, and the amount recovered in every such action, except as otherwise provided, shall be for the exclusive benefit of the surviving spouse, if no minor children, and of the children if no surviving spouse, and one-half for the exclusive benefit of the surviving spouse and one-half for the exclusive benefit of the minor children to be divided equally among them, if there are both surviving spouse and minor children, and to the deceased’s heirs to be distributed as provided in section 2-106, if there is neither surviving spouse nor minor children. The jury may give such damages as it shall deem a fair and just compensation with reference to the pecuniary injuries resulting from such death to the persons for whose benefit the action is brought, and in addition thereto shall give such damages as will compensate the estate of the deceased person for reasonable expenses of medical, surgical and hospital care and treatment and for reasonable funeral expenses, and in addition thereto may give damages not exceeding $50,000 for the loss of comfort, society and companionship of the deceased to the persons for whose benefit the action is brought, provided that the action shall be commenced within 2 years after the decedent’s death. If a claim under this section is settled without an action having been commenced, the amount paid in settlement shall be distributed as provided in this subsection. No settlement on behalf of minor children shall be valid unless approved by the court, as provided in Title 14, section 1605. Me. Rev. Stat. Ann. tit. 18-A, § 2-804(b) (Supp. 1988-1989) (emphasis added).
59. Id. (stating that “the Massachusetts Supreme Judicial Court observed that the actions of abduction and seduction protected the parent’s sentiments by compensating tortious injury to the relationship with a child.” (citing Ferriter v. Daniel O’Connell’s Sons, Inc., 381 Mass. 510-11 & 512-13 n.7, 413 N.E.2d 692-93 & 693-94 n.7 (1980))). The appellants also stated that an action for seduction had historically
argued that the child's loss of parental consortium is at least as deserving of judicial recognition as the spouse's loss of consortium, citing the Hay court's insistence that the child is even more dependent on such a relationship than a spouse, and probably less likely to be able to remedy a loss by independent action. The plaintiffs recognized countervailing considerations such as the possibility of increased litigation and the difficult task of measuring monetary compensation for an intangible loss. But they also maintained that those concerns, if given determinative weight, would arbitrarily restrict the rights of a class of persons otherwise satisfying the usual tests of foreseeability and causation. They urged the Law Court not to leave the question to the Legislature, asserting that "the Court's action in recognizing this claim would . . . bring common law rights in line with contemporary conceptions of the family unit and its internal relationships."

The defendant, on appeal, argued that the Law Court had already recognized that sound public policy required limitation of the right of recovery for loss of consortium to those who are in a marital relationship at the time of the occurrence of the tortious conduct. He listed some of the policy considerations often cited in opposition to the extension of liability for the loss of parental consortium: (1) loss of consortium is an intangible, non-pecuniary loss, and monetary compensation will not enable the plaintiffs to regain the companionship and guidance of their mother; (2) there is a dual threat of double recovery by the child since juries may already compensate the child for both loss of economic support and emotional loss by an award to the parent; and (3) the social burden of providing damages for loss of parental consortium is too high, including excessive insurance costs and social costs incurred by expending valuable judicial resources to settle the claims that would clog the courts.

Furthermore, he pointed to the inherent differences between an action for loss of spousal consortium and an action for loss of parental consortium, focusing on the key issue of impairment or destruction of the sexual life of a couple in spousal consortium. The defendant also emphasized the potential for multiplication of actions and damages if parental consortium claims are allowed, there being

been available under Maine law. Id. (citing Beaudette v. Gagne, 87 Me. 534, 93 A. 758 (1895)).
62. Id. at 8.
63. Id. at 8-7.
64. Id. at 6-7.
65. Id. at 7.
only one spouse but potentially many children.66 Finally, the defendant urged the Law Court to defer the question to the Legislature as the court had previously done with respect to the cause of action for loss of spousal consortium.67

Citing Potter v. Schafter68 and MacDonald v. MacDonald,69 the Durepo court acknowledged that it "would not exceed the scope of its powers as a common law court by newly creating for Maine a child's cause of action for the loss of parental society and affection."70 Nevertheless, the court declined to expand the common law in this area in which "judicial decree is no substitute for the exhaustive gathering of socio-economic facts and the public debate upon the import of those facts that would occur before the Maine Legislature enacted so sweeping an embellishment on the existing tort law of this state."71 The court reasoned that the Legislature, and not the judiciary, is institutionally equipped to gather information on such questions as the following:

(i) whether there is any practical necessity for creating a separate cause of action for a child whose parent has been negligently injured, (ii) what limiting principles as, for example, the age of the child should circumscribe such a cause of action, (iii) what impact would such a cause of action have on insurance rates and other costs to the general public, and (iv) what, if any, limit on allowable damages should be imposed as a matter of social policy.72

Maintaining that evaluation of the foregoing considerations was "essentially a political judgment," the court declined the plaintiff's invitation to recognize a right to recovery for lost parental consortium.73

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66. Id. at 7-8.
67. Id. at 9. See supra notes 20-23 and accompanying text.
68. 161 Me. 340, 342-43, 211 A.2d 891, 892-93 (1965) (explaining that the proposed creation of a new cause of action for a wife's loss of consortium occasioned by her husband's injuries merited consideration by the Legislature rather than judicial action).
69. 412 A.2d 71, 74 n.4 (Me. 1980) (noting that "the decision [in Potter v. Schafter] was basically wrong in its intimations that action by the judiciary to change the common law where there is involved a 'collision between the principle of stare decisis and contemporary legal philosophy' is 'to usurp legislative authority.' ") (quoting Potter v. Schafter, 161 Me. 340, 342-43, 211 A.2d 891, 892-93 (1965)).
70. Durepo v. Fishman, 533 A.2d 264, 265 (Me. 1987).
71. Id.
72. Id.
73. Id. at 265-66. The court explained: "When as here that job depends so overwhelmingly on socioeconomic facts and questions of desirable social policy, rather than on the application of established legal principles, the legislature, not the court, should draw those lines." Id. at 266.

The court dismissed the analogy drawn by the appellants between Maine's wrongful death statute and the loss of parental consortium claim, pointing to the wrongful death statute as an example of the sort of legislative decisionmaking that arguably is warranted before creating a new torts claim. Id. at 265-66. See supra note 57 and
Justice Nichols in dissent, joined by Justice Glassman, sharply criticized the court's reticence and argued that the court should exercise its common law power and recognize the tort. He stressed the guarantee made to Maine children by the Declaration of Rights in the Maine Constitution: "Every person for an injury done him in his person . . . shall have remedy by due course of law . . . ." He further noted that the Law Court had not hesitated to deal with questions of tort liability in the past and had courageously recognized causes of action in prior decisions. Believing that the court possessed a responsibility to recognize the children's cause of action, Justice Nichols maintained that "[t]o abrogate this responsibility today is to 'shirk [our] duty and retreat into the safe haven of deference to the legislature.'"

Justice Nichols asserted that the "right of these little children to seek a remedy for their loss is one that should be judicially recognized now." The dissent supported the latter assertion by advancing several convincing arguments. First, Justice Nichols maintained that a remedy "should not be summarily dismissed because our courts are already overcrowded or because it is possible insurance costs may rise." Second, he argued that recovery should not be denied simply because parental consortium damages may be speculative. He noted: "Patently, the damages for loss of parental consortium are no more speculative or difficult to calculate than damages accompanying text.


75. He stated specifically that the Law Court "historically has not hesitated to deal with similar questions of tort liability and courageously has recognized causes of action in areas where the law previously afforded no precedent." Durepo v. Fishman, 533 A.2d at 266 (Nichols, J., dissenting). As examples of the latter, he cited Davies v. City of Bath, 364 A.2d 1269, 1273 (Me. 1976), in which the Law Court "abrogated the doctrine of governmental immunity with all its economic consequences" and Estate of Berthiaume v. Pratt, 365 A.2d 792, 794 (Me. 1976), in which "our Court did not hesitate to declare that a violation of one's right to privacy was an actionable tort, notwithstanding manifold questions of desirable social policy." Durepo v. Fishman, 533 A.2d at 266 (Nichols, J., dissenting). Justice Nichols also cited several instances in which the Law Court had not deferred to legislative judgment in the family law context:

Recovery for a husband's loss of consortium was judicially recognized without legislative action. Our Court also recognized a father's right to recover damages resulting from the loss of services of an unemancipated minor child. See, e.g., Emery v. Gowen, 4 Me. 33 (1826); Kennard v. Burton, 25 Me. 39 (1845); Beaudette v. Gagne, 87 Me. 534, 33 A. 23 (1895).

Id. at 268.

76. Id. (quoting Hay v. Medical Center Hosp., 145 Vt. 533, 543-44, 496 A.2d 939, 945 (1983)).

77. Id. at 267.

78. Id.
for the loss of spousal consortium, wrongful death, emotional distress or pain and suffering."80 Justice Nichols also insisted that the double recovery argument was similarly unpersuasive.80

The dissent agreed with the majority's statement that the Law Court possessed sufficient judicial power to create a cause of action for loss of parental consortium.81 Moreover, the dissent insisted that the power should be exercised in this instance in order to remedy incongruity in the law:

Adult children as well as minor children have a statutory right in Maine to recover for the loss of comfort, society and companionship of a deceased parent. 18-A M.R.S.A. § 2-804(b) (Supp. 1986). How anomalous it is to deny that relief to these minor children when a parent may remain severely disabled or even comatose! A child's loss is similar in both situations. . . . Whenever the injury to the parent is relatively minor, the fact-finder can determine what, if any, injury resulted to the child. As long as the injury is severe enough to deprive the child of his parent's companionship and guidance, the parent should not have to die for the child to gain relief.82

Because of the evident anomaly resulting from denial of the claim, Justice Nichols concluded his dissent by reiterating that the court should "adapt[] the common law to meet new social demands . . . [rather than] retreat into the safe haven of deference to the legislature."83

IV. LEGISLATIVE RECOMMENDATIONS

While many commentators question the validity of leaving the decision concerning the creation of the loss of parental consortium claim to legislatures,84 there are some valid reasons that the Law Court chose to proceed in this direction. In addition to the reasons the court provided, two concerns suggest that the objectives of fairness and logical consistency in consortium recovery would be better achieved through legislative action.85 The first involves the fact that the options available to the courts are arguably limited by existing legislation. For example, the wife's right to recover for lost consor-

79. Id. at 268.
80. Id.
81. Id.
82. Id. at 268-69 (citations omitted).
83. Id. at 269. Compare supra note 76 and accompanying text.
85. Comment, supra note 8, at 311.
tium in Maine was established by statute and the courts therefore may not be free to expand such recovery judicially. A second, related concern is the unlikelihood that a single case would present all the issues with which a comprehensive solution should be concerned.

Despite such countervailing considerations, the Maine Legislature should act to create a child's right to bring an action for loss of parental consortium. As observed by Justice Nichols, a variety of arguments warrant adoption of the cause of action. One argument is most persuasive: the claim should be extended beyond the spousal relationship in order to recognize the vital importance of other relationships within the family. Although the family unit may be a singular concept, it consists of various members. Incongruity results when recovery is restricted to the husband and wife.

The family has been cited as perhaps this country's "most deeply rooted social institution." The United States Supreme Court has repeatedly recognized the integrity of the family unit and afforded it constitutional protection. In order to safeguard family autonomy, natural parents possess a fourteenth amendment liberty interest in the care and custody of their children. Although there was once some doubt about whether children had constitutional rights of their own, it is now well established that the Constitution affords protection to children independent of the protection it affords to parents. The change in the legal status of children has come even more slowly than that of women, with many of the rights of minors

86. See supra notes 20-23 and accompanying text.
87. Comment, supra note 8, at 311.
88. Id. at 312.
89. See supra notes 74-83 and accompanying text.
91. See, e.g., Stanley v. Illinois, 405 U.S. 645, 651 (1972) (explaining that the right of a man "in the children he has sired and raised, undeniably warrants deference and, absent a powerful countervailing interest, protection."); Prince v. Massachusetts, 321 U.S. 158, 166 (1944) ("It is cardinal with us that the custody, care and nurture of the child reside first in the parents."); Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (right "to marry, establish a home and bring up children").
being recognized only recently. Nevertheless, the trend seems clear. Just as the married women’s acts afforded women the opportunity to bring causes of action independent of their husbands, the expansion of children’s rights in recent years, coupled with the legal recognition of the importance of the parent-child relationship, suggests that children should be afforded the right to bring an independent cause of action for the loss of parental consortium.

By leaving the decision about the establishment of an action for loss of parental consortium to the Legislature, the Law Court has provided the Legislature with an opportunity to take a comprehensive look at familial interests generally, and to make some determinations about whose interests should be protected and to what extent. Unlike the courts, which can only rule on the narrow facts presented in a particular case, the Legislature can explore the nature of family relationships on a broader basis. Not only may the Legislature examine the traditional nuclear family, but also non-traditional contexts such as single-parent households and heterosexual and homosexual relationships in which the partners are not legally married. The Legislature could settle the questions concerning what constitutes a family unit and how close a familial relationship must be to warrant a claim for loss of consortium.

The Legislature could also determine the limits of liability and how the statute of limitations should govern the cause of action, thus quieting some of the concerns expressed about soaring insurance rates, increased litigation, and multiple claims. More importantly, however, the public debate preceding the passage of legislation that would allow recovery to family members for lost consortium could air issues concerning Maine’s public policy of protecting children’s rights and family relationships, as well as determine the probable effects on insurance rates. Rather than permitting loss of consortium to continue to develop in a piecemeal fashion, Maine could take the lead in declaring a consistent, comprehensive plan aimed at the protection of all recognized relational interests.

Legislation affecting consortium recovery has been prompted more than once in the past by judicial reticence. The Legislature should seize the opportunity afforded by the court’s decision in


95. See supra note 14.

96. For a discussion of liability insurance issues, see Petrilli, supra note 76, at 342-43.

97. Comment, supra note 8, at 312 n.74. See also supra notes 20-23 and accompanying text.
Durepo to establish consistency in the law by means of statutory enactment. Failing to assume this responsibility will merely deflect decisions about consortium and familial relations back to the Law Court where progress is slow and comprehensiveness impossible.

Nancy Wanderer Mackenzie