IN THE SUPREME COURT OF FLORIDA



In the matter of use by the
trial courts of the

CASE NO: 94,654

STANDARD JURY INSTRUCTIONS
(CIVIL CASES)
_____/

SUPPLEMENTAL REPORT (NO. 98-4) OF THE COMMITTEE ON STANDARD JURY INSTRUCTIONS (CIVIL) RE: 6.1(e)—UNMARRIED DEPENDENT'S CLAIM UNDER FLA. STAT. §768.0415; 6.2(h)—UNMARRIED DEPENDENT'S DAMAGES UNDER FLA. STAT. §768.0415; AND ADDITION TO NOTE ON USE OF 2.4—MULTIPLE CLAIMS, NUMEROUS PARTIES, CONSOLIDATED CASES

TO THE CHIEF JUSTICE AND JUSTICES OF
THE SUPREME COURT OF FLORIDA:

Your committee on Standard Jury Instructions (Civil) recommends that The Florida Bar be authorized to publish as revisions to *Florida Standard Jury Instructions (Civil)*, as follows:

A. "6.1(e), Unmarried Dependent's Claim Under Fla. Stat. §768.0415"

B. "6.2(h), Unmarried Dependent's Damages Under Fla. Stat. §768.0415"

C. Addition To Note On Use Of 2.4, Multiple Claims, Numerous Parties, Consolidated Cases

The proposed instructions are attached at Tab A to this supplemental report.

These proposed jury instructions 6.1(e) and 6.2(h) were published on August 1, 1998, for comment in the *The Florida Bar News.* A copy of the publication is attached at Tab B. In addition, the committee specifically sought input from the Florida Defense Lawyers' Association and from the Academy of Florida Trial Lawyers. A copy of that letter is attached at Tab C. A copy of the responses to the publication are attached at Tab D. These comments were considered by the committee. The addition to the note on use of 2.4 regarding multiple claims was not published because the committee determined that this was not necessary.

These instructions received committee approval after consideration at meetings that occurred between July 1996, and October 1998, and, comprehensive review of applicable decisions and numerous revisions. Materials considered by the committee are attached at Tab E. The pertinent excerpts from the committee's minutes are attached at Tab F. As noted at Tab F, page 9 of the minutes, §786.0415 refers to "permanent" damages, but this term does not seem to have any meaning. The committee therefore left the term "permanent" out of the 6.2(h) instruction. The committee approved the omission of the term "permanent."

On behalf of the committee, the undersigned respectfully requests approval of these instructions for publication as Florida Standard Jury Instructions for use in civil cases.

Submitted this 30th day of December, 1998.

Respectfully submitted,

MARJORIE GADARIAN GRAHAM
Marjorie Gadarian Graham, P.A.
Oak Park - Suite D 129
11211 Prosperity Farms Road
Palm Beach Gardens, FL 33410
(561) 775-1204

By: Marjorie Gadarian Graham
Marjorie Gadarian Graham
Florida Bar No. 142053

Chair, Supreme Court Committee
on Standard Jury Instructions
(Civil)

## TABLE OF CONTENTS

TAB A.

Submitted instructions 6.1(e), Unmarried Dependent's Claim Under Fla. Stat. §768.0415; 6.2(h), Unmarried Dependent's Damages Under Fla. Stat. §768.0415; and Addition To Note On Use of 2.4, Multiple Claims, Numerous Parties, Consolidated Cases

*e. Unmarried dependent's claim under Fla. Stat. § 768.0415:*

**If you find for the (defendant)(s), you will not consider the claim of (unmarried dependent). However, if you find for (claimant parent), you shall next consider the claim of (unmarried dependent). The issue for your determination on this claim is whether the injury sustained by (claimant parent) was a significant permanent injury resulting in a permanent total disability.**

**If the greater weight of the evidence does not support the claim of (unmarried dependent), then your verdict should be for (defendant)(s) on that claim. However, if the greater weight of the evidence does support the claim of (unmarried dependent), then you should award to (unmarried dependent) an amount of money which the greater weight of the evidence shows will fairly and adequately compensate (unmarried dependent) for damages caused to [him] [her] by the incident in question. You shall consider the following elements of damage:**

NOTE ON USE ON 6.1e

If issues arise as to the child's marital status, parentage or dependency, this instruction should be modified.

*Comments on 6.1e*

1. Fla. Stat. § 768.0415 does not define "significant permanent injury," "dependent" or "permanent total disability." Therefore, the instructions do not attempt to define the terms.

2. Fla. Stat. § 768.0415 refers only to "negligence." The committee takes no position as to whether the statute is limited to negligence cases or the definition of "negligence" in this statutory context. For example, see Fla. Stat. § 768.81(4)(a), defining "negligence cases."

**6.2**

*h. Unmarried dependent's damages under Fla. Stat. § 768.0415:*

**Any loss by reason of (claimant parent's) injury of (claimant parent's) services, comfort, companionship and society in the past and in the future.**

*Comment on 6.2h*

1. Pending further development of the law, the committee takes no position as to whether there may be elements of damage not specifically enumerated in the statute.

2. The duration of future damages for which the child may recover is unclear. Pending further development of the law, the committee takes no position as to whether the statute limits recovery of future damages to the life of the parent or the duration of the claimant's dependency.

## 2.4

## MULTIPLE CLAIMS, NUMEROUS PARTIES, CONSOLIDATED CASES

**In your deliberations, you are to consider [several]** [(state the number)] **distinct claims.** (Identify claims to be considered.) **Although these claims have been tried together, each is separate from the other[s], and each party is entitled to have you separately consider each claim as it affects that party. Therefore, in your deliberations, you should consider the evidence as it relates to each claim separately, as you would had each claim been tried before you separately.**

NOTE ON USE

This instruction is applicable to two or more consolidated actions as well as to two or more claims in the same action by or against different persons or by or against the same person in different capacities. The committee recommends that this charge not be given to distinguish between a primary claim and a derivative claim (*e.g.*, that of the injured party and that of his or her spouse) or between a claim against a party primarily liable and a claim against a party liable only vicariously (*e.g.*, claims against a party actively negligent and against his employer) or claims under Fla. Stat. § 768.0415.

TAB B.

Official notice of proposed changes published in *The Florida Bar News*, August 1, 1998.

# Notice

## Amendments proposed to Standard Jury Instructions in Civil Cases

The Supreme Court Committee on Standard Jury Instructions in Civil Cases proposes the following amendments to the standard jury instructions. After reviewing the comments received in response to this publication, the committee will make its final proposal to the Florida Supreme Court. Please submit all comments to Marjorie Gadarian Graham, Chair, Oakpark-Suite D129, 11211 Prosperity Farms Road, Palm Beach Gardens 33410. Your comments must be received by August 24.

1.5
INSTRUCTION WHEN FIRST ITEM OF DOCUMENTARY, PHOTOGRAPHIC OR PHYSICAL EVIDENCE IS ADMITTED

**The (describe item of evidence) has now been received in evidence. Witnesses may testify about or refer to this or any other item of evidence during the remainder of the trial. This and all other items received in evidence will be available to you for examination during your deliberations at the end of the trial.**

NOTE ON USE

This instruction should be given when the first item of evidence is received in evidence. It may be appropriate to repeat this instruction when items received in evidence are not published to the jury. It may be combined with 1.6 in appropriate circumstances. It may also be given in conjunction with 1.7 if a witness has used exhibits which have been admitted in evidence and demonstrative aids which have not.

1.6
INSTRUCTION WHEN EVIDENCE IS FIRST PUBLISHED TO JURORS

**The (describe item of evidence) has been received in evidence. It is being shown to you now to help you understand the testimony of this witness and other witnesses in the case, as well as the evidence as a whole. You may examine (describe item of evidence) briefly now. It will also be available to you for examination during your deliberations at the end of the trial.**

NOTE ON USE

This instruction may be given when an item received in evidence is handed to the jurors. It may be combined with 1.5 in appropriate circumstances.

1.7
INSTRUCTION REGARDING VISUAL OR DEMONSTRATIVE AIDS

*a. Generally*

**This witness will be using (identify demonstrative or visual aid(s)) to assist in explaining or illustrating [his][her] testimony. The testimony of the witness is evidence; however, [this] [these] (identify demonstrative or visual aid(s)) [is] [are] not to be considered as evidence in the case unless received in evidence, and should not be used as a substitute for evidence. Only items received in evidence will be available to you for consideration during your deliberations.**

b. Specially Created Visual or Demonstrative Aids Based On Disputed Assumptions

**This witness will be using (identify demonstrative aid(s)) to assist in explaining or illustrating [his] [her] testimony. [This] [These] item[s] [has] [have] been prepared to assist this witness in explaining [his][her] testimony. [It] [They] may be based on assumptions which you are free to accept or reject. The testimony of the witness is evidence; however, [this] [these] (identify demonstrative or visual aid(s)) [is] [are] not to be considered as evidence in the case unless received in evidence, and should not be used as a substitute for evidence. Only items received in evidence will be available to you for consideration during your deliberations.**

NOTE ON USE

1.Instruction 1.7*a* should be given at the time a witness first uses a demonstrative or visual aid which has not been specially created for use in the case, such as a skeletal model.

2.Instruction 1.7*b* is designed for use when a witness intends to use demonstrative or visual aids which are based on disputed assumptions, such as a computer-generated model. This instruction should be given at the time the witness first uses these demonstrative or visual aids. This instruction should be used in conjunction with 1.5 or 1.6 if a witness uses exhibits during testimony, some of which are received in evidence, and some of which are not.

6.1
*e. Unmarried dependent's claim under Fla. Stat. § 768.0415:*

**If you find for the (defendant)(s), you will not consider the claim of (unmarried dependent). However, if you find for (claimant parent), you shall next consider the claim of (unmarried dependent). The issue for your determination on this claim is whether the injury sustained by (claimant parent) was a significant permanent injury resulting in a permanent total disability.**

**If the greater weight of the evidence does not support the claim of (unmarried dependent), then your verdict should be for (defendant)(s) on that claim. However, if the greater weight of the evidence does support the claim of (unmarried dependent), then you should award to (unmarried dependent) an amount of money which the greater weight of the evidence shows will fairly and adequately compensate (unmarried dependent) for damages caused to [him] [her] by the incident in question. You shall consider the following elements of damage:**

NOTE ON USE ON 6.1e

If issues arise as to the child's marital status, parentage or dependency, this instruction should be modified.

*Comments on 6.1e*

3.Fla. Stat. § 768.0415 does not define "significant permanent injury," "dependent" or "permanent total disability." Therefore, the instructions do not attempt to define the terms.

4.Fla. Stat. § 768.0415 refers only to "negligence." The committee takes no position as to whether the statute is limited to negligence cases or the definition of "negligence" in this statutory context. For example, see Fla. Stat. § 768.81(4)(a), defining "negligence cases."

6.2
h. Unmarried dependent's damages under Fla. Stat. § 768.0415:

**Any loss by reason of (claimant parent's) injury of (claimant parent's) services, comfort, companionship and society in the past and in the future.**

*Comment on 6.2h*

1. Pending further development of the law, the committee takes no position as to whether there may be elements of damage not specifically enumerated in the statute.

2. The duration of future damages for which the child may recover is unclear. Pending further development of the law, the committee takes no position as to whether the statute limits recovery of future damages to the life of the parent or the duration of the claimant's dependency.

TAB C.

Letter from Marjorie Gadarian Graham to George Vaka and Jeffrey Liggio.

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PALM BEACH GARDENS, FLORIDA 33410

BOARD CERTIFIED APPELLATE LAWYER

TELEPHONE (561) 775-1204
FACSIMILE (561) 624-4460

July 31, 1998

Mr. Jeff Liggio
531 Middle Road
Union, Maine 04862

Mr. George Vaka
P.O. Box 1438
Tampa, FL 33601

Re: Proposed Jury Instrucions: 1.5—Instruction when first item of documentary or physical evidence is admitted; 1.6—Instruction when evidence is first published to jurors; 1.7—Instruction regarding visual or demonstrative aids; 6.1(e)—Unmarried dependent's claim under Fla. Stat. §768.0415; and 6.2(h)—Unmarried dependent's damages under Fla. Stat. §768.0415.

Gentlemen:

I am enclosing a copy of the proposed standard jury instructions referenced above. These instructions have been published in the Florida Bar News and comments solicited regarding these new instructions.

The Supreme Court Committee on Standard Jury Instructions greatly values the input of the Florida Defense Lawyers Association and the Florida Academy of Trial Lawyers. Accordingly, if you have any comments regarding the proposed instructions, please put them in writing to me, with a copy to Gerry Rose at The Florida Bar, 650 Apalachee Parkway, Tallahassee, FL 32399-2300.

I would appreciate it if your written comments were delivered to Gerry and me no later than August 20, 1998, so that they can be distributed to committee members for review and possible revisions of these instructions prior to our next meeting.

Very truly yours,

Marjorie Gadarian Graham

Marjorie Gadarian Graham

MGG:mmf
cc: Gerry Rose

SEP 25 1998
TAB 9-2

TAB D.

Responses to Publication

1. Letter from George Vaka to Marjorie Gadarian Graham dated August 21, 1998.

2. Letter from Robert Cousins to Marjorie Gadarian Graham dated August 11, 1998.

3. Letter from A. Clark Cone to Marjorie Gadarian Graham dated August 19, 1998.

# FLORIDA DEFENSE LAWYERS ASSOCIATION

*James A. Dixon, Jr., Executive Director*
902 N. Gadsden Street • P.O. Box 13767 • Tallahassee, Florida 32317-3767
(850) 224-1025 • Fax: (850) 222-9166



August 21, 1998

Marjorie Gadarian Graham, Esquire
Oakpark, Suite D 129
11211 Prosperity Farms Road
Palm Beach Gardens, Florida 33410

Dear Marjorie:

Thank you for asking for the FDLA's comments concerning proposed changes to the Florida Standard Jury Instructions. All in all, the comments that I received from the various board members pretty much reflected those comments of Bob Cousin's and rather than repeat them over and over, I am simply sending you the letter that Bob sent to me to be sent along to you. As you can see, that primarily addresses the definition of significant permanent injury and permanent total disability.

With respect to the instructions regarding demonstrative evidence and the like, I heard no unfavorable comments and all of the comments were very favorable and most people thought it was high time that such instructions had been proposed. The only question that our members had was whether the judge would give this instruction at the beginning of the case or give it every single time that some type of demonstrative evidence was used. The thought was that if it was not made clear by the proposed instruction, that it could be made more clear that like in the instance when a deposition is read and the jury is instructed as to the effect of the deposition, the court may want to remind the jury of the effect of the demonstrative evidence but not read the entire instruction every time it is used.

We certainly appreciate your willingness to allow us to participate in providing comments to the proposed instructions. I would also like to let you know that my tenure as President of the Florida Defense Lawyers Association is coming to a close effective the end of September. The incoming President in all likelihood will be Robert Dietz of Orlando and I would ask that you direct future requests for comments to

TAB 9-3

Robert at the above-listed address. Thanks for your cooperation.

Sincerely,

George A. Vaka
President

GAV/men

# FLORIDA DEFENSE LAWYERS ASSOCIATION

*James A. Dixon, Jr., Executive Director*
902 N. Gadsden Street • P.O. Box 13767 • Tallahassee, Florida 32317-3767
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August 11, 1998

Marjorie Gadarian Graham, Esq.
Marjorie Gadarian Graham, P.A.
Oakpark - Suite D 129
11211 Prosperity Farms Road
Palm Beach Gardens, FL 33410

RE: Proposed Jury Instructions 6.1(e) and 6.2(h) under Florida Statute §768.0415

Dear Marjorie:

I am in receipt of your July 31, correspondence to George Vaka, inviting comments on the proposed changes to the Florida Standard Jury Instructions in civil cases. My personal comment is a fundamental one which I believe is self-evident in the proposed Committee Notes. The statute on its face lacks any definitions for "significant permanent injury" and "permanent total disability." Therefore, by attempting to create a jury instruction which is presumed to be an accurate recitation of the law of our state it will become extremely misleading, potentially confusing, and invite error for any trial that deal with this issue. The instruction in its present form provides questionable guidance to any jury. Therefore, I strongly urge that the committee refrain from adopting the instruction in its present format.

I fear that the effect of such a standard instruction in its present form will result in trial judges refusing to deviate from a "standard" instruction and therefore failing to deal with these issues on a case by case basis. As noted above, because of the drafting inadequacies in the statute, the litigants are faced to deal with these issues on a case by case basis. Certainly there are cases where total disability is simply not an issue and similarly, there are cases where "dependency" is evident. However, there are certainly many cases in between which require the parties to try to agree on a definition or rely on the court to interpret the statute and provide guidance to a jury as it applies to a given case. As we know from past experience once an instruction is elevated to the status of a "standard" instruction courts will be

SEP 25 1998

TAB 9-5

extremely reluctant to deviate from the standard, leaving a jury with actually less guidance and instruction than it would probably otherwise receive.

I believe it would be inappropriate for the committee to try to provide definitions and I commend the committee's reluctance to do so. However, until such time as the legislature readdresses the statute, I strongly urge that the committee refrain from potentially making the situation worse than it already is.

Respectfully submitted,

Robert J. Cousins
Immediate Past President of
Florida Defense Lawyers Association

RJC/arg
G:\DATA\COUSINS\FDLA\MGRAHAM.LTR

SEP 25 1998

TAB 9-6

THE CONE LAW FIRM

A. CLARK CONE
ACADEMY OF FLORIDA TRIAL LAWYERS
(BOARD OF DIRECTORS 1988-PRESENT)
ASSOCIATION OF TRIAL LAWYERS OF AMERICA
(FLORIDA DELEGATE 1997-PRESENT)
FLORIDA BAR BOARD CERTIFIED CIVIL TRIAL LAWYER

AL J. CONE
ACADEMY OF FLORIDA TRIAL LAWYERS (PRESIDENT, 1961)
(BOARD OF DIRECTOR EMERITUS)
ASSOCIATION OF TRIAL LAWYERS OF AMERICA (PRESIDENT, 1968)
FLORIDA BAR BOARD CERTIFIED CIVIL TRIAL LAWYER

August 19, 1998

Majorie Gadarian Graham
11211 Prosperity Farms Road
Oakpark - Suite D129
Palm Beach Gardens, Fl. 33410

Re: Proposed Jury Instructions 1.5, 1.6, 1.7, 6.1 & 6.2

Dear Ms. Graham:

Please accept this letter as my comments regarding the proposed new jury instructions published in the Florida Bar News (August 15, 1998, page 4) addressing the admission and publishing of evidence, the use of demonstrative aids, and unmarried dependent's claims.

I have some real concerns about instructions 1.5 and 1.6 on the admission and publishing of evidence. If these instructions are put into use it will certainly increase the jury's focus and reliance upon any physical evidence identified by a witness, and could create the appearance that the Court has placed a stamp of approval on the admitted evidence. The evidentiary basis for the admission of physical evidence simply requires basic identification and authentication by a witness whose testimony could be highly suspect yet sufficient to forms the basic evidentiary requirement for the admission of physical evidence. If an instruction on this issue is for some reason deemed required, which I seriously doubt, then the instruction should indicate that the physical evidence has simply been identified by a particular witness and is now entered into evidence as a result of that witness' testimony and the jury is free to accept or reject the physical evidence based upon the jury's acceptance or rejection of the testimony of the witness. If such an instruction is to be given it has to include some form of an "accept or reject evidence" type of statement to avoid the appearance that the evidence is approved by the Court.

There will certainly be an impact on the jury when the trial judge pauses the proceedings to instruct the jury regarding the admission of physical evidence and there should be no implied stamp of approval. Is there a need for instructions 1.5 and 1.6? Wouldn't these instructions just complicate matters and potentially confuse a jury?

SEP 25 1998

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TAB 9-7

As for instruction 1.7, a lay juror will not understand the nuance between "evidence" and a demonstrative aid. The instruction, to be read when your witness begins to use a demonstrative aid, tells the jury they should question, scrutinize, and practically disregard the demonstrative aid because it is not "evidence". I have a strong objection to this instruction. If the demonstrative aid is not based upon the facts and evidence of the case then the judge will not allow its use, and any weak evidentiary assumptions built into the demonstrative aid will be brought out on cross-examination. I do not see a need for the Court to pause the proceedings in the middle of a witness' testimony to read what is in essence a precautionary instruction to the jury regarding a demonstrative aid which must be based upon properly admitted evidence in the first place.

As for instructions 6.1 & 6.2, these appear to be very basic instructions pending further development of the law.

Sincerely,

THE CONE LAW FIRM

A. Clark Cone, Esq.

ACC/alk

SEP 2 5 1998

TAB 9-8

TAB E.

Materials submitted to the committee

SHEAR, NEWMAN, HAHN & ROSENKRANZ
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DANIEL J. GIBBY
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+BOARD CERTIFIED CIVIL TRIAL LAWYER
*BOARD CERTIFIED IN TAXATION
° CERTIFIED CIRCUIT COURT MEDIATOR
△BOARD CERTIFIED REAL ESTATE LAWYER

September 26, 1996

The Honorable James R. Thompson
The County Court Administrative Office
1700 Monroe Street
Ft. Myers, Florida 33901

The Honorable James D. Whittemore
Circuit Court Judge
Thirteenth Judicial Circuit
419 Pierce Street
Room 314
Tampa, Florida 33602-4025

RE: Draft Jury Instruction on Florida Statute §768.0415

Dear Judge Thompson and Judge Whittemore:

At the last committee meeting we all were appointed to a subcommittee to try and draft a jury instruction for Florida Statutes §768.0415.

I think I mistakenly raised my hand and volunteered to take the initial stab at it. I have done that and you will find the proposed instruction enclosed.

The statute is rather complex even though it is brief. I think the language that I have used in the draft is somewhat awkward but covers the cumbersome language in the statute.



Item 8, page 1

If you would like to discuss this before the next committee meeting, I am sure we can arrange a joint telephone conference.

Very truly yours,

jms/ William E. Hahn

William E. Hahn

WEH\jms
cc: Mrs. Marjorie Gadarian Graham
Enclosure
#274408

OCT 25 1996

Item 8, page 2

DRAFT JURY INSTRUCTION ON FLA. STAT. §768.0415

If you find for the Defendant, you will not consider the matter of damages. But if you find for [claimant], you should next consider the claim of [child]. On this issue, if you find that [claimant] is the natural [or adoptive] parent of [child] an unmarried dependent, then you shall consider the issue of permanency, that is, whether [claimant] sustained a significant permanent injury as a result of the incident complained of, which resulted in [claimants] permanent total disability.

If the greater weight of the evidence does not support the claim of [claimant] on the issue of paternity [or legality of the adoption], or that [child] is [his] [her] unmarried, dependent or that [claimant] is permanently and totally disabled, then you will not consider the matter of damages.

However, if the greater weight of the evidence does support the claim of [claimant] on the issues of paternity, and unmarried dependency, and permanency, then you should consider the following elements:

Any loss to [child] by reason of [his, her] parents permanent total disability of [his] [hers] services, comfort, companionship, society, in the past and in the future.

#271928

OCT 25 1996

Item 8, Page 4

LAW OFFICES
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THEODORE BABBITT
JOSEPH R. JOHNSON
ROBERT L. JOHNSON

PRACTICE LIMITED TO INJURY AND DEATH CLAIMS CAUSED BY NEGLIGENCE

PLEASE REPLY TO:
POST OFFICE BOX 024426
WEST PALM BEACH, FL 33402-4426

TELEPHONE 561-684-2500
FAX 561-684-6308

February 5, 1997

Marjorie Gadarian-Graham, Esq.
Oakpark Suite D-129
11211 Prosperity Farms Road
Palm Beach Gardens, FL 33410

Dear Marjorie:

It has come to my attention that the Florida Standard Jury Instructions do not properly reflect the Florida Supreme Court case of U.S. v. Dempsey, 635 So. 2d 961 (Fla. 1994). What is the proper procedure for getting this matter corrected?

Sincerely,

THEODORE BABBITT

TB/kas

FEB 28 1997
Item 6
Tab 9 -D

## UNMARRIED DEPENDENTS'S LOSS OF CONSORTIUM FOR INJURY TO NATURAL OR ADOPTIVE PARENT (F.S. 768.0415)

6.1(e)(proposed)

If you find for the defendant[s], you will not consider the matter of damages. However, if you find for (claimant), you shall next consider the claim of (claimant)(unmarried dependent). The issues for your determination on this claim are:

(1) Whether Defendant was negligent.
(2) Whether that negligence was a legal cause of significant permanent injury to (claimant's natural or adoptive parent); and
(3) Whether the parent sustained total disability as a result of the incident complained of.

6.2(g)(proposed)

Any loss by (claimant), by reason of their parent's injury, of their parent's services, comfort, companionship, society and attentions in the past and in the future.

6.2(g)(property damages - to be renumbered as 6.2(h))

Comments:

1. See: Section 768.0415, Florida Statutes (1995) for claim by child for injury to natural or adoptive parent and U.S. v. Dempsey, 635 So.2d 961 (Fla. 1994) for claim by parent for injury to child.

2. Section 768.0415 does not define "dependent" or "permanent total disability". This is a matter of substantive case law and statutory analysis.

3. If issues arise as to the child's marital status, parentage or dependency, this instruction will have to be modified.

**NOTE TO COMMITTEE:**

Since Section 768.0415 does not define the terms "dependent" or "permanent total disability," the subcommittee considered a string citation to cases and statutes that do define them.

For example, Comment 2. could read:

> Section 768.0415 does not define "dependent" or "permanent total disability". This is a matter of substantive case law and statutory analysis. See e.g.: Sections 97.021; 121.091(4)(b); 196.012(11); 240.1201; 295.01; 321.19(2); 409.2554; 440.15(1)(b) (and multiple cases under the Workers Compensation Statute on "dependency" and "permanent total disability") for statutory and decisional definitions in unrelated contexts.

**The subcommittee considered but rejected such a comment.**

#293703



Tab 9 -2

# CHAPTER 768

# NEGLIGENCE

## PART I NEGLIGENCE; GENERAL PROVISIONS (ss. 768.041-768.35)

## PART II DAMAGES (ss. 768.71-768.81)

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## PART I

## NEGLIGENCE; GENERAL PROVISIONS



**768.041 Release or covenant not to sue.—**

(1) A release or covenant not to sue as to one tortfeasor for property damage to, personal injury of, or the wrongful death of any person shall not operate to release or discharge the liability of any other tortfeasor who may be liable for the same tort or death.

(2) At trial, if any defendant shows the court that the plaintiff, or any person lawfully on his behalf, has delivered a release or covenant not to sue to any person, firm, or corporation in partial satisfaction of the damages sued for, the court shall set off this amount from the amount of any judgment to which the plaintiff would be otherwise entitled at the time of rendering judgment and enter judgment accordingly.

(3) The fact of such a release or covenant not to sue, or that any defendant has been dismissed by order of the court shall not be made known to the jury.

History.—ss. 1, 2, 3, ch. 57-395; s. 45, ch. 67-254.
Note.—Former s. 54.28.

**768.0415 Liability for injury to parent.**—A person who, through negligence, causes significant permanent injury to the natural or adoptive parent of an unmarried dependent resulting in a permanent total disability shall be liable to the dependent for damages, including damages for permanent loss of services, comfort, companionship, and society. This section shall apply to acts of negligence occurring on or after October 1, 1988.

History.—s. 1, ch. 88-173.

**768.042 Damages.—**

(1) In any action brought in the circuit court to recover damages for personal injury or wrongful death, the amount of general damages shall not be stated in the complaint, but the amount of special damages, if any, may be specifically pleaded and the requisite jurisdictional amount established for filing in any court of competent jurisdiction.

(2) The provisions of this section shall not apply to any complaint filed prior to May 20, 1975.

History.—ss. 8, 9, ch. 75-9.

**768.0425 Damages in actions against contractors for injuries sustained from negligence, malfeasance, or misfeasance.—**



FEB 28 1997

Tal. 9-3

UNITED STATES of America, Appellant/Cross-Appellee,

v.

Loren DEMPSEY, et al., Appellee/Cross-Appellant.

No. 81705.

Supreme Court of Florida.

April 21, 1994.

The United States Court of Appeals for the Eleventh Circuit, 989 F.2d 1134, certified questions to the Supreme Court of Florida for determination of parameters of parents' recovery when their child is severely injured. The Supreme Court, Kogan, J., held that: (1) parents are permitted to recover for loss of child's filial consortium as a result of significant injury resulting in child's permanent total disability, and (2) to recover for services above that recoverable as general component of loss of filial consortium, parent must establish that child had extraordinary income-producing abilities prior to injury.

Questions answered.

Grimes, J., concurred in the result only with an opinion in which Overton, J., concurred.

McDonald, J., dissented in part with an opinion.

1. Parent and Child ⇐7(1)

Parent of injured child has right to recover for permanent loss of filial consortium suffered as a result of significant injury resulting in child's permanent total disability; in this context, loss of "consortium" includes loss of companionship, society, love, affection, and solace of injured child, as well as ordinary day-to-day services that child would have rendered. West's F.S.A. § 768.0415; West's F.S.A. Const. Art. 1, §§ 2, 21.

See publication Words and Phrases for other judicial constructions and definitions.

2. Common Law ⇐14

When common-law rules are in doubt, Supreme Court considers changes in social and economic customs and present day conceptions of right and justice.

3. Action ⇐2

Supreme Court is not precluded from recognizing a right of action simply because legislature has not acted to create such a right.

4. Common Law ⇐14

Common law may be altered when reason for rule of law ceases to exist, or when change is demanded by public necessity or required to vindicate fundamental rights.

5. Husband and Wife ⇐209(3, 4)
Parent and Child ⇐7(1), 7.5
Torts ⇐7

It is policy of Florida that familial relationships be protected and that recovery be had for losses occasioned because of wrongful injuries that adversely affect those relationships. West's F.S.A. § 768.0415.

6. Parent and Child ⇐7(1)

Florida Constitution requires recognition of parent's right to recover for loss of severely injured child's companionship. West's F.S.A. Const. Art. 1, §§ 2, 21.

7. Husband and Wife ⇐209(3, 4)
Parent and Child ⇐7(1)

To recover for loss of services as part of consortium interest, no showing of extraordinary abilities is necessary; loss of services in this context necessarily will be interwoven with more intangible aspects of parent's consortium interest.

8. Parent and Child ⇐7(1)

For parent to recover separate award for loss of permanently disabled child's services above that recoverable as general component of loss of filial consortium, parent must establish that child had extraordinary income-producing abilities prior to injury.

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Frank W. Hunger, Atty. Gen., Gregory R. Miller, U.S. Atty., and Robert S. Greenspan and William G. Cole, Civ. Div., Dept. of Justice, Washington, DC, for appellant/cross-appellee.

James F. McKenzie of McKenzie & Soloway, P.A., Pensacola, for appellee/cross-appellant.

KOGAN, Justice.

The United States Court of Appeals for the Eleventh Circuit certifies the following questions to this Court for resolution, pursuant to article V, section 3(b)(6) of the Florida Constitution:

1. DOES FLORIDA LAW PERMIT PARENTS TO RECOVER FOR THE LOSS OF A CHILD'S COMPANIONSHIP AND SOCIETY WHEN THE CHILD IS SEVERELY INJURED?
2. DOES FLORIDA LAW PERMIT PARENTS TO RECOVER FOR THE LOSS OF THE SERVICES OF A SEVERELY INJURED CHILD ABSENT EVIDENCE OF EXTRAORDINARY INCOME PRODUCING ABILITIES?

*Dempsey v. United States*, 989 F.2d 1134, 1135 (11th Cir.1993). The Eleventh Circuit provides the following statement of the facts and case in its certification:

> On February 27, 1988, Pansey Dempsey, wife of Lonney Dempsey, Sr., an enlistee in the United States Air Force, gave birth to a baby girl at Eglin Air Force Base Hospital. The child, Loren, was born with severe breathing difficulties. An attempt to resuscitate her was unsuccessful because the tube meant to bring oxygen to the child's lungs was put down her esophagus instead. About fifty minutes later, the mistake was discovered and Loren was revived. Nevertheless, as the result of oxygen deprivation, she is now severely retarded. It appears that she will never walk or talk and will require care for the remainder of her life. Loren's parents have suffered the loss of a normal relationship with their child.
>
> The magistrate judge to whom this case was assigned held the Government liable for Loren's injuries and awarded approximately $2.8 million to Loren for medical expenses, loss of earnings, and pain and suffering. The magistrate judge awarded the parents $1.3 million for the "loss of society and affection of their child." The Government appealed the award made to the parents. The parents appealed the magistrate judge's denial of damages for the loss of Loren's services.
>
> On appeal, the dispute centers on the recovery available to the parents. The parties disagree about whether Florida law permits parents to recover for the loss of a child's society and affection when the child is severely injured, but does not die. They also disagree about whether parents may recover for the loss of an injured child's services.

989 F.2d at 1134–35. After reviewing Florida law, the circuit court concluded that the questions were unanswered by controlling precedent from this Court and certification therefore was necessary.

[1] In connection with the first question, the Dempseys take the position that this Court previously has recognized a parent's right to recover for the loss of an injured child's companionship and society. The Government maintains that the Court has not recognized this right. We agree with the Dempseys that they are entitled to recover for the loss of Loren's companionship and society under this Court's decisions in *Wilkie v. Roberts*, 91 Fla. 1064, 109 So. 225 (1926), and *Yordon v. Savage*, 279 So.2d 844 (Fla. 1973).

It is generally accepted that at common law a father was entitled to compensation for the lost services and earnings of his negligently injured child as well as medical expenses incurred as a result of the injury; however, the father's right to compensation did not extend to damages for loss of the child's companionship. *See McGarr v. National & Providence Worsted Mills*, 24 R.I. 447, 53 A. 320, 325–26 (1902) (measure of damages in case brought for loss suffered as result of injury to a child is same as that in case brought by a master for the loss of services of his servant or apprentice; the elements of affection and sentiment are not to be considered); *see also Sizemore v. Smock*, 430 Mich. 283, 422 N.W.2d 666, 668 (1988); Restatement (Second) of Torts § 703, comment h (1977); W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 125, at 934 (5th ed. 1984); John F. Wag-

ner, Jr., Annotation, *Recovery of Damages for Loss of Consortium Resulting from Death of Child*, 77 A.L.R. 4th 411, 416 (1990); Todd R. Smyth, Annotation, *Parent's Right to Recover for Loss of Consortium in Connection with Injury to Child*, 54 A.L.R. 4th 112 (1987 & Supp.1993). The rule that loss of an injured child's companionship is not recoverable has its roots in the common law analogy that was drawn between the parent-child relationship and the master-servant relationship. A child, like a servant, was considered nothing more than an economic asset of the father. *See Ripley v. Ewell*, 61 So.2d 420, 421–22 (Fla.1952); *McGarr*, 53 A. at 325–26; Michael B. Victorson, Note, *Parent's Recovery for Loss of Society and Companionship of Child*, 80 W.Va.L.Rev. 340 (1978); Jean C. Love, *Tortious Interference with the Parent–Child Relationship: Loss of an Injured Person's Society and Companionship*, 51 Ind.L.J. 590, 599 (1975–76); W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 125, at 934 (5th ed. 1984). This outdated perception has met with much criticism. *See e.g. Gallimore v. Children's Hospital Medical Center*, 67 Ohio St.3d 244, 617 N.E.2d 1052, 1056 (1993); *Frank v. Superior Court*, 150 Ariz. 228, 722 P.2d 955, 959 (1986); *Shockley v. Prier*, 66 Wis.2d 394, 225 N.W.2d 495, 500 (1975); Victorson, *supra*; Love, *supra* at 599–601. Several of the courts that have broken free of the master-servant analogy have looked to this Court for guidance. *See e.g. Gallimore*, 617 N.E.2d at 1059 n. 9; *Frank*, 722 P.2d at 956 n. 2.

Beginning with its 1926 decision in *Wilkie*, this Court has recognized a parent's right to a child's companionship as a parental right a wrongful injury to which will support an action for damages:

> The father's right to the custody, companionship, services, and earnings of his minor child are valuable rights, constituting a species of property in the father, a wrongful injury to which by a third person will support an action in favor of the father.

91 Fla. at 1068, 109 So. at 227. Then in 1973, the *Yordon* Court expressly stated that recovery for the loss of a child's companionship and society was available to the parent of a negligently injured child. 279 So.2d at 846. *Yordon* dealt with the issue of whether a mother has a right to recover for losses sustained as a result of a negligent injury to her child. In ruling that a mother has the same right of action as the father, the Court clearly defined that right of action as including recovery for loss of the child's companionship, society and services:

> In *Wilkie v. Roberts*, this Court held that the parent, ... of an unemancipated minor child, injured by the tortious act of another, has a cause of action in his own name for medical, hospital, and related expenditures, indirect economic losses such as income lost by the parent in caring for the child, and for the *loss of the child's companionship, society, and services*, including personal services to the parent and income which the child might earn for the direct and indirect benefit of the parent.

279 So.2d at 846 (emphasis added). Relying on these prior decisions, numerous commentators [1] and courts [2] have concluded that recovery for the loss of filial consortium is available within this state.

The Government maintains that the decisions in *Wilkie* and *Yordon* have been misconstrued and that neither decision authorizes recovery for the loss of a child's companionship and society. We agree that *Wilkie* can be read as limiting a parent's recovery to the pecuniary losses suffered as a result of

1. *See e.g.* Mark L. Johnson, *Compensating Parents for the Loss of Their Nonfatally Injured Child's Society: Extending the Notion of Consortium to the Filial Relationship*, 1989 U.Ill.L.Rev. 761, 764 n. 33; Todd R. Smyth, Annotation, *Parent's Right to Recover for Loss of Consortium in Connection with Injury to Child*, 54 A.L.R. 4th 112, 120 n. 20, 128–29 (1987); 25 Fla.Jur.2d, *Family Law*, § 477 (1992).

2. *See, e.g., Pierce v. Casas Adobes Baptist Church*, 162 Ariz. 269, 782 P.2d 1162, 1164 (1989); *Masaki v. General Motors Corp.*, 71 Haw. 1, 780 P.2d 566, 577 n. 9 (1989); *Davis v. Elizabeth General Medical Center*, 228 N.J.Super. 17, 548 A.2d 528, 531 (Law Div.1988); *Gallimore v. Children's Hospital Medical Center*, 67 Ohio St.3d 244, 617 N.E.2d 1052 (1993); *Fields v. Graff*, 784 F.Supp. 224, 227 (E.D.Pa.1992); *Boucher v. Dixie Medical Center*, 850 P.2d 1179, 1183 n. 27 (Utah 1992).

a negligent injury to a child.[3] However, even if the law within this state was not clear at the time of the *Yordon* decision, we read that decision as expanding the common law in this area.

[2] This is a logical conclusion in light of the fact that when our common law rules are in doubt, this Court considers the " 'changes in our social and economic customs and present day conceptions of right and justice.' " *Hoffman v. Jones*, 280 So.2d 431, 435 (Fla. 1973) (quoting *Ripley*, 61 So.2d at 423). Certainly, in 1973, when this Court set forth the elements of damages that a parent of an injured child is entitled to recover, it was apparent that a child's companionship and society were of far more value to the parent than were the services rendered by the child. Thus, there was an obvious need to recognize this element of damages to fully compensate the parent for the loss suffered because of a negligent injury to the child. The recognition of the loss of companionship element of damages clearly reflects our modern concept of family relationships.

[3, 4] Moreover, even if this Court previously had not expanded the common law to allow recovery for the loss of a negligently injured child's companionship, we would do so now. As was explained in *Zorzos v. Rosen*, 467 So.2d 305 (Fla.1985), wherein we declined to recognize a cause of action for loss of parental consortium, we are "not precluded from recognizing [such a right of action] simply because the legislature has not acted to create such a right." 467 So.2d at 307. This Court has repeatedly recognized that our common law "must keep pace with changes in our society." *Gates v. Foley*, 247 So.2d 40, 43 (Fla.1971) (granting wife right of action for loss of husband's consortium); *See also Hoffman v. Jones*, 280 So.2d 431 (Fla. 1973) (replacing rule of contributory negligence with comparative negligence rule); *In re T.A.C.P.*, 609 So.2d 588, 594 (Fla.1992) (adopting the modern definition of death). The common law may be altered when the reason for the rule of law ceases to exist,[4] or when change is demanded by public necessity or required to vindicate fundamental rights.[5] An expansion of the common law is clearly warranted here.

As explained above, the rule that loss of an injured child's companionship is not recoverable is based on the outdated perception that children, like servants, are nothing more than economic assets to their parents. This master-servant analogy no longer holds true. Rather than being valued merely for their services or earning capacity, children are valued for the love, affection, companionship and society they offer their parents. The Government offers no compelling reason to retain a rule that, under today's standards, simply appears unjust. The loss of a child's companionship and society is one of the primary losses that the parent of a severely injured child must endure. As this Court appears to have recognized twenty years ago, recovery for this loss is necessary to ensure the parent adequate compensation for the losses sustained as the result of such injury. This is particularly true considering the limited damages generally recoverable for the loss of ordinary services rendered by a child under present day standards.

[5, 6] Our legislature has recognized that recovery for loss of companionship is necessary to compensate the minor child of a permanently injured parent. § 768.0415, Fla.Stat. (1993). Similarly, this Court has extended the right to recover for the loss of marital consortium to the wife. *Gates*, 247 So.2d 40. These legislative and judicial pronouncements make clear that it is the policy of this state that familial relationships be protected and that recovery be had for losses occasioned because of wrongful injuries that

3. The *Wilkie* Court appears to have limited the recoverable loss in such cases to:

> (1) The loss of the child's services and earnings, present and prospective, to the end of minority; and (2) medical expenses in effecting or attempting to effect a cure.

91 Fla. at 1069, 109 So. at 227.

4. *Gates*, 247 So.2d at 43; *Randolph v. Randolph*, 146 Fla. 491, 1 So.2d 480 (1941) (modifying common law doctrine that gave father superior right to custody of his children).

5. *Waite v. Waite*, 618 So.2d 1360, 1361 (Fla. 1993) (holding that doctrine of interspousal immunity is no longer part of Florida's common law); *In re T.A.C.P.*, 609 So.2d at 594.

adversely affect those relationships. Moreover, in light of the redress available to a husband, a wife, and a minor child for injury to consortium interests, our constitution itself requires recognition of a parent's right to recover for the loss of a severely injured child's companionship. Art. I, §§ 2, 21, Fla. Const.

However, we believe that recovery for loss of filial consortium should be limited in the manner in which recovery for the loss of parental consortium has been limited by the legislature. Section 768.0415 limits a child's recovery for the loss of a parent's services, comfort, companionship, and society to those losses caused by a significant injury "resulting in a permanent total disability." § 768.0415. Because the right of recovery we recognize here provides redress for injury to the parent-child relationship, the same relationship addressed by the legislature in section 768.0415, we see no reason why the same standard for recovery should not apply in this context.

Accordingly, we hold that a parent of a negligently injured child has a right to recover for the permanent loss of filial consortium suffered as a result of a significant injury resulting in the child's permanent total disability. In this context, we define loss of "consortium" to include the loss of companionship, society, love, affection, and solace of the injured child, as well as ordinary day-to-day services that the child would have rendered. As noted above, in *Wilkie* and *Yordon* this Court recognized as recoverable the loss of an injured child's companionship, society, and services; thus, treating the two types of losses as integral components of a parent's consortium interest. This treatment is consistent with the conclusion reached by other courts that in its earliest stage, an action for loss of consortium was in fact an action for loss of services, which gradually was expanded to include the intangible elements of companionship, society, love and comfort. After this evolution, services were treated as only one element of the action, with the intangible elements emerging as the focus of consortium actions. *Frank*, 722 P.2d at [illegible]; *accord Gallimore*, 617 N.E.2d 1052 (Supreme Court recently included a child's services as one aspect of parent's consortium interest). In like fashion, we include loss of ordinary day-to-day services as an element of the damages recoverable for the permanent loss of filial consortium. Such services, although no longer of paramount importance to the parent-child relationship, are still a recognizable component of that relationship.

[7, 8] This leads us to the second certified question, which asks whether a parent can recover for the loss of a severely injured child's services absent evidence of extraordinary income-producing abilities. In light of our defining filial consortium to include ordinary services, the answer to this question is both yes and no. To recover for loss of services as part of the consortium interest, no showing of extraordinary abilities is necessary. Loss of services in this context necessarily will be interwoven with the more intangible aspects of the parent's consortium interest. In contrast, in order for a parent to recover a separate award for the loss of a permanently disabled child's services above that recoverable as a general component of loss of filial consortium, the parent must establish that the child had extraordinary income-producing abilities prior to the injury. *Accord Gresham v. Courson*, 177 So.2d 33 (Fla. 1st DCA 1965) (recovery for loss of services resulting from the wrongful death of a child not recoverable absent a showing that the deceased child had "some extraordinary income-producing attributes"); *Williams v. United States*, 681 F.Supp. 763 (N.D.Fla. 1988) (same).

Accordingly, the cause is returned to the Eleventh Circuit for further proceedings.

It is so ordered.

BARKETT, C.J., and SHAW and HARDING, JJ., concur.

GRIMES, J., concurs in result only with an opinion in which OVERTON, J., concurs.

McDONALD, J., dissents in part with an opinion.

GRIMES, Justice, concurring in result only.

At common law a father was entitled to compensation for the lost services and earn-

ings of his negligently injured child as well as medical expenses incurred as a result of the injury; however, the father's right to compensation did not extend to damages for loss of the child's companionship. *See Restatement (Second) of Torts* § 703, comment h (1977); W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 125, at 934 (5th ed. 1984); John F. Wagner, Jr., Annotation, *Recovery of Damages for Loss of Consortium Resulting from Death of Child*, 77 A.L.R. 4th 411, 416 (1990); Todd R. Smyth, Annotation, *Parent's Right to Recover for Loss of Consortium in Connection with Injury to Child*, 54 A.L.R. 4th 112 (1987 & Supp.1993); *Sizemore v. Smock*, 430 Mich. 283, 422 N.W.2d 666, 668 (1988). In the majority of states, unless the legislature has provided for recovery for the loss of an injured child's companionship and society, the common law rule still stands. *See* 54 A.L.R. 4th 112 and cases cited therein.

Consistent with the common law rule, in *Wilkie v. Roberts*, 91 Fla. 1064, 1068, 109 So. 225, 227 (1926), this Court recognized that the parent of a negligently injured child can recover only the pecuniary loss suffered as a result of the injury. The Court explained that the recoverable loss in such cases is limited to two elements:

> (1) the loss of the child's services and earnings, present and prospective to the end of minority, and (2) medical expenses in effecting or attempting to effect a cure.

91 Fla. at 1069, 109 So. at 227. This principle was specifically reaffirmed in *Youngblood v. Taylor*, 89 So.2d 503 (Fla.1956).

The majority's confusion about a parent's right to recover for the loss of a severely injured child's companionship and society appears to originate from the following statement also found in the *Wilkie* opinion:

> The father's right to the custody, companionship, services and earnings of his minor child are valuable rights constituting a species of property in the father, a wrongful injury to which by a third person will support an action in favor of the father. This is in addition to the right of action the child may have for the personal injury received, with the resulting pain, disfigurement or permanent disability if such results follow. 20 R.C.L. 614.

91 Fla. at 1068–69, 109 So. at 227.

The citation to 20 R.C.L. 615 within the foregoing quotation refers to an out-of-print multi-volume treatise titled *Ruling Case Law* published in 1918. The writers of *Ruling Case Law* were clear that "[i]n fixing the damages *the court ordinarily cannot consider* mental suffering or injury to the father's feelings, or *the loss of the society or companionship of the child.*" 20 R.C.L. 618 (emphasis added). Nonetheless, on page 614, four pages before this statement appears, *Ruling Case Law* refers to "[t]he father's right to the custody and companionship ... of his minor child ..." as a "species of property in the father, a wrongful injury to which by a third person will support an action." This sentence was repeated almost word for word by this Court in *Wilkie*.

On page 614 of *Ruling Case Law*, the authors resolve this apparent contradiction. They state that the "species of property" to which they refer can support three sub-sets of wrongful injury cases: (1) physical injury claims, (2) allegations of enticement or wrongful persuasion of a child to leave its father, or employing a child against its father's wishes, and (3) suits based on the seduction of a daughter. 20 R.C.L. 614. Only in the third sub-set, a claim for a daughter's seduction, or possibly in claims under the second sub-set, may a parent-claimant recover for "injury to [the parent's] feelings and paternal happiness, [which was] more important as an element of damages than the actual loss of her services." *Id.* This injury to parental feelings and happiness was considered to be a loss of companionship, and explains why *Ruling Case Law* included "custody and companionship" as a species of property at common law for some wrongful injury cases. However, it is equally clear that *Ruling Case Law* holds that, in *physical injury* tort cases, a parent may not recover for loss of a child's society or companionship. 20 R.C.L. at 618. By citing *Ruling Case Law* in *Wilkie*, it is evident that the court in referring to a "father's right to ... companionship ... of his minor child" under the common law (109 So. at 227) had in mind that damages for such a loss would only be recoverable in non-physical injury cases

[redacted]ose involving the seduction of a daughter.

In *Yordon v. Savage*, 279 So.2d 844 (Fla. 1973), the Court merely paraphrased the *Ruling Case Law* citation from *Wilkie*, thereby recognizing that recovery for the loss of companionship is possible in those cases discussed in *Ruling Case Law*. Moreover, the sole question in *Yordon* was whether to extend to mothers the fathers' rights under the common law. There was no issue with re[redacted] to what damages could be recovered. S[redacted]quent decisions of four separate district courts of appeal have interpreted *Wilkie* and its progeny to hold that the damages recoverable by the parent of an injured child are limited to medical expenses and loss of services. *Selfe v. Smith*, 397 So.2d 348 (Fla. 1st DCA), *review denied*, 407 So.2d 1105 (Fla. 1981); *Brown v. Caldwell*, 389 So.2d 287 (Fla. 1st DCA 1980); *Hillsborough County Sch. Bd. v. Perez*, 385 So.2d 177 (Fla. 2d DCA 1980); *City Stores Co. v. Langer*, 308 So.2d 621 (Fla. 3d DCA), *dismissed*, 312 So.2d 758 (Fla.1975). Thus, there can be no [redacted]itimate doubt that, consistent with com[redacted]on law, a recovery for the loss of an injured child's companionship is not available to a parent under Florida law as it currently stands. The real issue in this case is whether we should change the rule for the reasons discussed in the majority opinion.

This Court was faced with a similar proposition in *Zorzos v. Rosen*, 467 So.2d 305 (Fla.1985). In that case, minor children were suing for loss of parental companionship resulting from injuries negligently inflicted upon their father by a third party. The [redacted] had not previously recognized this [redacted]. While acknowledging that we had the authority to recognize the claim, we refrained from doing so. Instead, as Justice Shaw wrote:

> We agree ... that if the action is to be created, it is wiser to leave it to the legislative branch with its greater ability to study and circumscribe the cause. In addition, we are influenced by the fact that the legislature has recognized a child's loss of parental consortium in a wrongful death action but has not created a companion action for such loss when the parent is [redacted]injured but not killed. Although this omission may be only an oversight, it strongly suggests that the legislature has deliberately chosen not to create such cause of action.

467 So.2d at 307. Subsequently, the legislature did recognize the claim for loss of parental companionship by the enactment of section 768.0415, Florida Statutes (Supp.1988), but only in cases of permanent total disability.

Normally, I believe that issues of this nature are best left to the legislature. On the other hand, the legislature has already acted to permit children to recover for the loss of companionship of parents who are permanently and totally disabled, and it is difficult to perceive a distinction in the parents' claim for a permanently and totally disabled child. Therefore, because we are doing no more than following the lead of the legislature in recognizing the severity of the loss suffered by a person whose loved one is permanently and totally disabled, I am willing to concur in this decision.

OVERTON, J., concurs.

MCDONALD, Justice, dissenting in part.

Under existing case law I would answer the first certified question in the negative and the second one in the affirmative. For the reasons expressed by Justice Grimes, the majority misconstrues "consortium" under existing case law. At this time, the only intangible damage afforded a parent because of injury to a child is that child's services, which includes, but is not limited to, the child's earnings. It does not extend to the general satisfaction obtained through the companionship and general love of a child. A parent can, of course, recover direct medical or other expenses incurred in the child's healing process.

I recognize that this court extended a father's cause of action to a mother for injury to a child which had not been previously afforded in *Yordon v. Savage*, 279 So.2d 844 (Fla.1973), and we made reciprocal loss of consortium between husband and wife in *Gates v. Foley*, 247 So.2d 40 (Fla.1971). Even so, the creation of a new element of damage is one best left to the legislature. I disagree with the majority that article I,

sections 2 and 21, Florida Constitution demands, authorizes, or justifies the ruling the majority makes. It may be that the legislature agrees that the time has come to add this element of damage when a child is injured. The legislature, rather than this court, should determine whether this element of damage is available.

Because I am satisfied that existing case law does not allow damages to a parent for loss of consortium of a child, and because I do not think this court as a matter of policy should create such a right, I would hold that such an element of damage is not available to a parent.

A parent is entitled to loss of services under the common law. These are best measured by what a parent would have to pay someone to perform the duties the minor would otherwise do but for the injury. Evidence of extraordinary income-producing abilities is not required.


## THE FLORIDA BAR RE AMENDMENTS TO RULES REGULATING THE FLORIDA BAR.

## AMENDMENT TO THE RULES REGULATING THE FLORIDA BAR—RULE 4-1.8(e).

Nos. 81301, 81527.

Supreme Court of Florida.

April 21, 1994.

Supplemental Order Amending Rule July 7, 1994.

Original Proceeding—Rules Regulating The Florida Bar.

Patricia A. Seitz, President of The Florida Bar, Miami, and John F. Harkness, Jr., Executive Director and John A. Boggs, Director of Lawyer Regulation of The Florida Bar, Tallahassee, for petitioner in No. 81,301.

Thomas A. Pobjecky, Gen. Counsel, Florida Bd. of Bar Examiners, Tallahassee, Randolph Braccialarghe, Nova University, Ft. Lauderdale, Holland & Knight, P.A., Martha W. Barnett, Tallahassee, and Anthony V. Pace, Jr., Boca Raton, responding.

Lawrence R. Metsch and Benjamin R. Metsch of Metsch & Metsch, P.A., Miami, for petitioner in No. 81,527.

Timothy P. Chinaris, Ethics Counsel, and Lilijean Quintiliani, Asst. Ethics Counsel, Tallahassee, Comments by The Florida Bar.

PER CURIAM.

The Florida Bar (Bar), as part of its annual review and with the authorization of the board of governors, petitions the Court to amend or adopt Rules Regulating The Florida Bar 11-1.8, 11-1.9, chapters 13 and 17, and to amend the comment to rule 4-3.3. Lawrence R. Metsch (LRM), representing fifty members [1] of the Bar, petitions the Court to amend rule 4-1.8(e). Anthony Pace, a member of the Bar, asks the Court to amend rule 3-7.6(g)(4).[2] The Bar opposed the LRM petition, and various members of the Bar and public opposed the Bar's petition. Therefore, we consolidated these cases for the purpose of oral argument. We have jurisdiction. Art. V, § 2(a), Fla. Const.

The Bar's petition has the following effects. The proposed amendment to the *comment* to rule 4-3.3 relates to the duty of a lawyer to disclose perjury by a criminal defendant. The *rule* directs that a lawyer is not to be a knowing participant in any conduct of a client amounting to a fraud on the court. The comment explains the lawyer's duty and distinguishes an unsworn false statement of a client to a law enforcement officer from any type of false statement of a client made in a court proceeding. We find that this clarifying comment makes it clear that a lawyer has a duty to disclose "any

1. Rule Regulating The Florida Bar 1-12.1 provides:

> (f) Approval of Amendments. Amendments to other than chapters 7 and 9 of these Rules Regulating The Florida Bar shall be by petition to the Supreme Court of Florida. Petitions to amend these Rules Regulating The Florida Bar may be filed by the board of governors or by 50 members in good standing....

2. Mr. Pace did not file a petition.

CHAMBERS OF
CIRCUIT JUDGE
13TH JUDICIAL CIRCUIT OF FLORIDA
HILLSBOROUGH COUNTY

JAMES D. WHITTEMORE

419 PIERCE STREET
ROOM 314
TAMPA, FL 33602
(813) 272-6995

June 13, 1997

Gerry B. Rose
The Florida Bar
650 Apalachee Parkway
Tallahassee, Florida 32399-2300

Dear Gerry:

I. Re: Loss of Parental Consortium Subcommittee

Enclosed are two (alternative) drafts of a proposed instruction on loss of parental consortium (F.S. 768.0415). The first draft ("A") is the instruction the subcommittee proposed at the last meeting with changes as instructed by the committee. This form follows the format of the standards.

The second draft ("B") is the alternative version proposed by Bill Wagner at the last meeting.

Also, enclosed is Model Charge #1 which includes a loss of parental consortium claim, with verdict form.

II. Re: Loss of Filial Consortium (U.S. v. Dempsey, 635 So. 2d 961 (Fla. 1994)). Two alternative drafts addressing loss of filial consortium and a copy of U.S. v. Dempsey, are enclosed.

Sincerely,

James D. Whittemore
Circuit Court Judge

JDW/klc

cc: Bill Hahn, Esq.
Hon. James R. Thompson
Marjorie Gadarian Graham, Chair

Item 6

JUL 11 1997

Tab 9-1

## UNMARRIED DEPENDENT'S LOSS OF CONSORTIUM FOR INJURY TO NATURAL OR ADOPTIVE PARENT (F.S. 768.0415)

6.1(e)(proposed)

If you find for the defendant[s], you will not consider the matter of damages. However, if you find for (claimant), you shall next consider the claim of (claimant)(unmarried dependent). The issues for your determination on this claim are:

(1) Whether Defendant was negligent.
(2) Whether that negligence was a legal cause of significant permanent injury to (claimant's natural or adoptive parent) resulting in a permanent total disability.

If the greater weight of the evidence does not support the claim of (claimant), then your verdict should be for (defendant)(s). However, if the greater weight of the evidence does support the claim of (claimant), then you should award to claimant an amount of money which the greater weight of the evidence shows will fairly and adequately compensate (claimant) for damages caused by the incident in question. You shall consider the following elements of damage:

6.2(g)(proposed)

Any loss by (claimant), by reason of their parent's injury, of their parent's services, comfort, companionship, society and attentions in the past and in the future.

Comments:

1. See: Section 768.0415, Florida Statutes(1995) for claim by child for injury to natural or adoptive parent and U.S. v. Dempsey, 635 So. 2d 961 (Fla. 1994) for claim by parent for injury to child.

2. Section 768.0415 does not define "dependent" or "permanent total disability". This is a matter of substantive case law and statutory analysis.

3. If issues arise as to the child's marital status, parentage or dependency, this instruction will have to be modified.

4. Section 768.0415 refers only to "negligence". The committee takes no position as to whether the statute is limited to negligence cases or the definition of "negligence" in this statutory context. For example, see F.S. 768.81(4)(a), defining "negligence cases".

# UNMARRIED DEPENDENT'S LOSS OF CONSORTIUM FOR INJURY TO NATURAL OR ADOPTIVE PARENT (F.S. 768.0415)

If you find for the defendant[s], you will not consider the matter of damages. However, if you find for [name claimant natural or adoptive parent] and you also find that [name claimant natural or adoptive parent] has suffered a significant permanent injury resulting in a permanent total disability, you shall consider the following elements of damage:

[insert damage elements]

If you find that [name claimant natural or adoptive parent] has not suffered a significant permanent injury resulting in a permanent total disability, then you have found for the defendant on [claimant child's] claim.

Item 6

"B"

JUL 11 1997

T&6 9-3

**MODEL CHARGE**
**(To illustrate charge on F.S.768.0415)**

**(automobile collision; comparative negligence; single claimant and defendant; no counterclaim; no-fault threshold issue; *Fabre* issue; claim for unmarried dependant's loss of consortium for injury to parent (F.S. 768.0415 )**

*Facts of the hypothetical case*

John Doe was injured when the automobile he was driving collided with one driven by Rachel Rowe. Doe sued Rowe. Little John Doe Jr., sued Rowe for loss of consortium. Rowe pleaded comparative negligence. Rowe also claimed that the collision had been caused, at least in part, by a "phantom" vehicle, which suddenly cut in front of her, causing her to collide with the automobile driven by Doe. Questions of negligence, causation, permanency of Doe's injuries, damages, apportionment of fault and loss of parental consortium are to be submitted to the jury.

*The court's charge*

[2.1] Members of the jury, I shall now instruct you on the law that you must follow in reaching your verdict. It is your duty as jurors to decide the issues, and only those issues, that I submit for your determination by your verdict. In reaching your verdict, you should consider and weigh the evidence, decide the disputed issues of fact, and apply the law on which I shall instruct you, to facts as you find them from the evidence.

The evidence in this case consists of the sworn testimony of the witnesses, all exhibits received in evidence and all facts that may be admitted or agreed to by the parties.

In determining the facts, you may draw reasonable inferences from the evidence. You may make deductions and reach conclusions which reason and common sense lead you to draw from the facts shown by the evidence in this case. But you should not speculate on any matters outside the evidence.

[2.2*a*] In determining the believability of any witness and the weight to be given the testimony of any witness, you may properly consider the demeanor of the witness while testifying; the frankness or lack of frankness of the witness; the intelligence of the witness; any interest the witness may have in the outcome of the case; the means and opportunity the witness had to know the facts about which the witness testified; the ability of the witness to remember the matters about which the witness testified; and the reasonableness of the testimony of the witness, considered in the light of all the evidence in the case and in the light of your own experience and common sense.

[2.2*b*] Some of the testimony before you was in the form of opinions about certain technical subjects.

You may accept such opinion testimony, reject it, or give it the weight you think it deserves,



Tab. 6

JUL 2 7 199?

Tab 9-4

considering the knowledge, skill, experience, training or education of the witness; the reasons given by the witness for the opinion expressed; and all the other evidence in the case.

[Conventional Charge on Claim 3.5*b*] The issues for your determination on the claim of John Doe against Rachel Rowe are whether Rowe was negligent in the operation of the vehicle she was driving; and, if so, [3.6*c*] whether such negligence was a legal cause of loss, injury or damage sustained by Doe.

[3.7] If the greater weight of the evidence does not support the claim of Doe, then your verdict should be for Rowe.

[3.8] If, however, the greater weight of the evidence does support the claim of Doe, then you shall consider the defense raised by Rowe. On the defense, the issues for your determination are [3.8*f*] whether *either Doe or the unidentified driver of the phantom vehicle, or both of them, were* also negligent; and, if so, whether such negligence was a contributing legal cause of the loss, injury or damage complained of.

[3.8 resumed] If the greater weight of the evidence does not support the defense of Rowe, and the greater weight of the evidence does support the claim of Doe, then your verdict should be for Doe in the total amount of his damages. However, if the greater weight of the evidence shows that *Rowe and either Doe or the unidentified driver of the phantom vehicle, or both of them,* were negligent and that the negligence of each contributed as a legal cause of loss, injury or damage sustained by Doe, you should determine and write on the verdict form what percentage of the total negligence is chargeable to each.

[3.9] "Greater weight of the evidence" means the more persuasive and convincing force and effect of the entire evidence in the case.

[4.1] Negligence is the failure to use reasonable care. Reasonable care is that degree of care which a reasonably careful person would use under like circumstances. Negligence may consist either in doing something that a reasonably careful person would not do under like circumstances, or in failing to do something that a reasonably careful person would do under like circumstances.

[5.1*a*] Negligence is a legal cause of loss, injury or damage if it directly and in a natural and continuous sequence produces or contributes substantially to producing such loss, injury or damage, so that it can reasonably be said that, but for the negligence, the loss, injury or damage would not have occurred.

[5.1*b*] In order to be regarded as a legal cause of loss, injury or damage, negligence need not be the only cause. Negligence may be a legal cause of loss, injury or damage even though it operates in combination with the act of another, if such other cause occurs at the same time as the negligence, and if the negligence contributes substantially to producing such loss, injury or damage.

[6.1*d*] If you find for Rowe, you will not consider the matter of damages. However, if you



Item 6

JUL 11 1997

Tab 9-5

find for Doe, you shall next determine the issue of permanency, that is, whether Doe sustained an injury as a result of the incident complained of which consists in whole or in part of *a permanent injury within a reasonable degree of medical probability*.

You should award to *Doe* an amount of money which the greater weight of the evidence shows will fairly and adequately compensate Doe for damages caused by the incident in question, including any such damage as Doe is reasonably certain to experience or incur in the future. If the greater weight of the evidence does not support the claim of Doe on the issue of permanency, you shall consider only the following elements of damage:

[6.2*c*] *The reasonable expense of hospitalization and medical care and treatment necessarily or reasonably obtained by Doe in the past, or to be so obtained in the future..*

[6/2*d*] *Any earnings lost in the past, and any loss of ability to earn money in the future..*

[6.1*d* resumed] And which have not been paid and are not payable by personal injury protection benefits.

However, if the greater weight of the evidence does support the claim of Doe on the issue of permanency, then you should also consider the following elements:

[6.2*a*] Any bodily injury sustained by Doe and any resulting pain and suffering, disability or physical impairment, disfigurement, mental anguish, inconvenience or loss of capacity for the enjoyment of life experienced in the past, or to be experienced in the future. There is no exact standard for measuring such damage. The amount should be fair and just, in the light of the evidence.

[6.2*c*] *The reasonable expense of hospitalization and medical care and treatment necessarily or reasonably to be obtained in the future.*

[6.2*d*] *Any loss of ability to earn money in the future.*

[??] If you find for Rowe, you will not, as I have stated, consider the matter of damages. However, if you find for Doe and you also find that Doe has suffered a significant permanent injury resulting in a permanent total disability, you shall consider the following elements of damage:

Any loss by Little John Doe Jr., by reason of his parent,s, Doe's, injury of his parent's services, comfort, companionship, society and attentions in the past and in the future.

If you find that Doe has not suffered a significant permanent injury resulting in a permanent total disability, then you have found for Rowe on Little John Doe Jr.'s claim.

[6.9*a*] If the greater weight of the evidence shows that Doe has been permanently injured, you may consider his life expectancy. The mortality tables received in evidence may be considered in determining how long Doe may be expected to live. Such tables are not binding on you, but may be considered together with other evidence in the case bearing on Doe's health, age and physical



Item 6

JUL 11 199?

Tab 9-6

condition, before and after the injury, in determining the probable length of his life.

[6.10] Any amount of damages which you allow for future medical expenses or loss of ability to earn money in the future should be reduced to its present money value, and only the present money value of these future economic damages should be included in your verdict. The present money value of future economic damages is the sum of money needed now which, together with what that sum will earn in the future, will compensate Doe for these losses as they are actually experienced in future years.

[6.1c] In determining the total amount of damages, you should not make any reduction because of the negligence, if any, of Doe. The court will enter a judgment based on your verdict and, if you find that Doe was negligent in any degree, the court, in entering judgment, will reduce the total amount of damages by the percentage of negligence which you find is chargeable to Doe.

[7.1] Your verdict must be based on the evidence that has been received, and the law on which I have instructed you. In reaching your verdict, you are not to be swayed from the performance of your duty by prejudice, sympathy or any other sentiment for or against any party.

[7.2] When you retire to the jury room, you should select one of your number to act as foreman or forewoman, to preside over your deliberations and sign your verdict. Your verdict must be unanimous, that is, your verdict must be agreed to by each of you. You will be given a verdict form, which I shall now read and explain to you.

*(Court reads and explains verdict form)*

When you have agreed on your verdict, the foreman or forewoman, acting for the jury, should date and sign it. You may now retire to consider your verdict.

*Special Verdict Form*

**VERDICT**
**(To illustrate presentation of F.S.768.0415 issue)**

We, the jury, return the following verdict:

1. Was there negligence on the part of defendant, Rachel Rowe, which was a legal cause of damage to plaintiff, John Doe?

YES_____ NO_____

If your answer to question 1 is NO, your verdict is for the defendant, and you should not proceed further, except to date and sign this verdict form and return it to the courtroom. If your answer to question 1 is YES, please answer question 2.



Item 6

JUL 11 1997

Tab 9-7

2. Did plaintiff, John Doe, sustain a permanent injury within a reasonable degree of medical probability as a result of the incident complained of?

YES_____ NO_____

Please answer question 3.

3. Was there negligence on the part of plaintiff, John Doe, which was a legal cause of his damage?

YES_____ NO_____

Please answer question 4.

4. Was there negligence on the part of the unidentified driver of the phantom vehicle which was a legal cause of damage to plaintiff, John Doe?

YES_____ NO_____

If your answer to either question 3 or question 4 is YES, please answer question 5. If your answer to both questions 3 and 4 is NO, skip question 5 and answer question 6.

5. State the percentage of any negligence which was a legal cause of damage to plaintiff, John Doe, that you charge to:

Defendant, Rachel Rowe _____%

Unidentified Driver of Phantom Vehicle _____%

Plaintiff, John Doe _____%

Total must be 100%

Please answer question 6.



Defense

JUL 11 1997

Feb 98

6. What is the total amount (100%) of any damages sustained by plaintiff, John Doe, and caused by the incident in question?

Total damages of plaintiff, John Doe $_____

Please answer question 7.

7. Did plaintiff, John Doe, sustain a significant permanent injury resulting in a permanent total disability as a result of the incident complained of?

YES_____ NO_____

If your answer to question 7 is NO, your verdict is for the defendant on the claim of Little John Doe, Jr., and you should not proceed further, except to date and sign this verdict form and return it to the courtroom. If your answer to question 7 is YES, please answer question 8.

8. What is the total amount (100%) of any damages sustained by Little John Doe Jr., by reason of his parent,s, Doe's, injury of his parent's services, comfort, companionship, society and attentions in the past and in the future and and caused by the incident in question?

Total damages of Little John Doe Jr. $_____



Item 6

JUL 11 1997

Tab 9-9

In determining the total amount of damages, do not make any reduction because of the negligence, if any, of plaintiff, John Doe. If you find plaintiff, John Doe, negligent in any degree, the court, in entering judgment, will reduce Doe's total amount of damages (100%) by the percentage of negligence which you find is chargeable to Doe.

SO SAY WE ALL, this _____ day of _____, 19_____.

_____
FOREMAN OR FOREWOMAN

NOTE ON USE

For a model itemized verdict form, as contemplated by section 768.77, Florida Statutes, refer to Model Verdict Form 8.1.



Item 1

JUL 11 19

T.L. 9-10

**PARENTAL LOSS OF FILIAL CONSORTIUM**
**FOR INJURY TO CHILD (U.S. v. Dempsey, 635 So. 2d 961 (Fla. 1994))**

If you find for the defendant[s], you will not consider the matter of damages. However, if you find for (claimant), you shall next consider the claim of (claimant's parent). The issues for your determination on this claim are:

(1) Whether Defendant was negligent.
(2) Whether that negligence was a legal cause of significant permanent injury to (claimant's child) resulting in a permanent total disability.

If the greater weight of the evidence does not support the claim of (claimant), then your verdict should be for (defendant)(s). However, if the greater weight of the evidence does support the claim of (claimant), then you should award to claimant an amount of money which the greater weight of the evidence shows will fairly and adequately compensate (claimant) for damages caused by the incident in question. You shall consider the following elements of damage:

Any loss by (claimant), by reason of their child's injury, of their child's services, comfort, companionship, society and attentions in the past and in the future.

Comments:

1. See: Section 768.0415, Florida Statutes(1995) for claim by child for injury to natural or adoptive parent and U.S. v. Dempsey, 635 So. 2d 961 (Fla. 1994) for claim by parent for injury to child.

2. Section 768.0415 does not define "dependent" or "permanent total disability". This is a matter of substantive case law and statutory analysis.

3. If issues arise as to the child's marital status, parentage or dependency, this instruction will have to be modified.

4. Section 768.0415 refers only to "negligence". The committee takes no position as to whether the statute is limited to negligence cases or the definition of "negligence" in this statutory context. For example, see F.S. 768.81(4)(a), defining "negligence cases".

5. In order for a parent to recover a separate award for the loss of a permanently disabled child's services above that recoverable as a general component of loss of filial consortium, the parent must establish that the child had extraordinary income producing abilities prior to the injury. U.S. v. Dempsey, 635 So. 2d at p.965

Item 6

"A"

JUL 11 1997

Tab 9-11

PARENTAL LOSS OF FILIAL
CONSORTIUM FOR INJURY TO CHILD
U.S. v. Dempsey, 635 So. 2d 961 (Fla. 1994)

If you find for the defendant[s], you will not consider the matter of damages. However, if you find for [name claimant] and you also find that [claimant's child] has suffered a significant permanent injury resulting in a permanent total disability, you shall consider the following elements of damage:

[insert damage elements]

If you find that [name child] has not suffered a significant permanent injury resulting in a permanent total disability, then you have found for the defendant on [claimant's parents] claim.

Frank

JUL 2 3 1997

"B"

Tab 9-17

UNITED STATES of America, Appellant/Cross-Appellee,

v.

Loren DEMPSEY, et al., Appellee/Cross-Appellant.

No. 81705.

Supreme Court of Florida.

April 21, 1994.

The United States Court of Appeals for the Eleventh Circuit, 989 F.2d 1134, certified questions to the Supreme Court of Florida for determination of parameters of parents' recovery when their child is severely injured. The Supreme Court, Kogan, J., held that: (1) parents are permitted to recover for loss of child's filial consortium as a result of significant injury resulting in child's permanent total disability, and (2) to recover for services above that recoverable as general component of loss of filial consortium, parent must establish that child had extraordinary income-producing abilities prior to injury.

Questions answered.

Grimes, J., concurred in the result only with an opinion in which Overton, J., concurred.

McDonald, J., dissented in part with an opinion.

1. Parent and Child ⇐7(1)

Parent of injured child has right to recover for permanent loss of filial consortium suffered as a result of significant injury resulting in child's permanent total disability; in this context, loss of "consortium" includes loss of companionship, society, love, affection, and solace of injured child, as well as ordinary day-to-day services that child would have rendered. West's F.S.A. § 768.0415; West's F.S.A. Const. Art. 1, §§ 2, 21.

See publication Words and Phrases for other judicial constructions and definitions.

2. Common Law ⇐14

When common-law rules are in doubt, Supreme Court considers changes in social and economic customs and present day conceptions of right and justice.

3. Action ⇐2

Supreme Court is not precluded from recognizing a right of action simply because legislature has not acted to create such a right.

4. Common Law ⇐14

Common law may be altered when reason for rule of law ceases to exist, or when change is demanded by public necessity or required to vindicate fundamental rights.

5. Husband and Wife ⇐209(3, 4)
Parent and Child ⇐7(1), 7.5
Torts ⇐7

It is policy of Florida that familial relationships be protected and that recovery be had for losses occasioned because of wrongful injuries that adversely affect those relationships. West's F.S.A. § 768.0415.

6. Parent and Child ⇐7(1)

Florida Constitution requires recognition of parent's right to recover for loss of severely injured child's companionship. West's F.S.A. Const. Art. 1, §§ 2, 21.

7. Husband and Wife ⇐209(3, 4)
Parent and Child ⇐7(1)

To recover for loss of services as part of consortium interest, no showing of extraordinary abilities is necessary; loss of services in this context necessarily will be interwoven with more intangible aspects of parent's consortium interest.

8. Parent and Child ⇐7(1)

For parent to recover separate award for loss of permanently disabled child's services above that recoverable as general component of loss of filial consortium, parent must establish that child had extraordinary income-producing abilities prior to injury.

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Frank W. Hunger, Atty. Gen., Gregory R. Miller, U.S. Atty., and Robert S. Greenspan and William G. Cole, Civ. Div., Dept. of Justice, Washington, DC, for appellant/cross-appellee.

James F. McKenzie of McKenzie & Soloway, P.A., Pensacola, for appellee/cross-appellant.

KOGAN, Justice.

The United States Court of Appeals for the Eleventh Circuit certifies the following questions to this Court for resolution, pursuant to article V, section 3(b)(6) of the Florida Constitution:

1. DOES FLORIDA LAW PERMIT PARENTS TO RECOVER FOR THE LOSS OF A CHILD'S COMPANIONSHIP AND SOCIETY WHEN THE CHILD IS SEVERELY INJURED?
2. DOES FLORIDA LAW PERMIT PARENTS TO RECOVER FOR THE LOSS OF THE SERVICES OF A SEVERELY INJURED CHILD ABSENT EVIDENCE OF EXTRAORDINARY INCOME PRODUCING ABILITIES?

*Dempsey v. United States*, 989 F.2d 1134, 1135 (11th Cir.1993). The Eleventh Circuit provides the following statement of the facts and case in its certification:

> On February 27, 1988, Pansey Dempsey, wife of Lonney Dempsey, Sr., an enlistee in the United States Air Force, gave birth to a baby girl at Eglin Air Force Base Hospital. The child, Loren, was born with severe breathing difficulties. An attempt to resuscitate her was unsuccessful because the tube meant to bring oxygen to the child's lungs was put down her esophagus instead. About fifty minutes later, the mistake was discovered and Loren was revived. Nevertheless, as the result of oxygen deprivation, she is now severely retarded. It appears that she will never walk or talk and will require care for the remainder of her life. Loren's parents have suffered the loss of a normal relationship with their child.
>
> The magistrate judge to whom this case was assigned held the Government liable for Loren's injuries and awarded approximately $2.8 million to Loren for medical expenses, loss of earnings, and pain and suffering. The magistrate judge awarded the parents $1.3 million for the "loss of society and affection of their child." The Government appealed the award made to the parents. The parents appealed the magistrate judge's denial of damages for the loss of Loren's services.
>
> On appeal, the dispute centers on the recovery available to the parents. The parties disagree about whether Florida law permits parents to recover for the loss of a child's society and affection when the child is severely injured, but does not die. They also disagree about whether parents may recover for the loss of an injured child's services.

989 F.2d at 1134–35. After reviewing Florida law, the circuit court concluded that the questions were unanswered by controlling precedent from this Court and certification therefore was necessary.

[1] In connection with the first question, the Dempseys take the position that this Court previously has recognized a parent's right to recover for the loss of an injured child's companionship and society. The Government maintains that the Court has not recognized this right. We agree with the Dempseys that they are entitled to recover for the loss of Loren's companionship and society under this Court's decisions in *Wilkie v. Roberts*, 91 Fla. 1064, 109 So. 225 (1926), and *Yordon v. Savage*, 279 So.2d 844 (Fla. 1973).

It is generally accepted that at common law a father was entitled to compensation for the lost services and earnings of his negligently injured child as well as medical expenses incurred as a result of the injury; however, the father's right to compensation did not extend to damages for loss of the child's companionship. *See McGarr v. National & Providence Worsted Mills*, 24 R.I. 447, 53 A. 320, 325–26 (1902) (measure of damages in case brought for loss suffered as result of injury to a child is same as that in case brought by a master for the loss of services of his servant or apprentice; the elements of affection and sentiment are not to be considered); *see also Sizemore v. Smock*, 430 Mich. 283, 422 N.W.2d 666, 668 (1988); Restatement (Second) of Torts § 703, comment h (1977); W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 125, at 934 (5th ed. 1984); John F. Wag-

ner, Jr., Annotation, *Recovery of Damages for Loss of Consortium Resulting from Death of Child*, 77 A.L.R. 4th 411, 416 (1990); Todd R. Smyth, Annotation, *Parent's Right to Recover for Loss of Consortium in Connection with Injury to Child*, 54 A.L.R. 4th 112 (1987 & Supp.1993). The rule that loss of an injured child's companionship is not recoverable has its roots in the common law analogy that was drawn between the parent-child relationship and the master-servant relationship. A child, like a servant, was considered nothing more than an economic asset of the father. *See Ripley v. Ewell*, 61 So.2d 420, 421–22 (Fla.1952); *McGarr*, 53 A. at 325–26; Michael B. Victorson, Note, *Parent's Recovery for Loss of Society and Companionship of Child*, 80 W.Va.L.Rev. 340 (1978); Jean C. Love, *Tortious Interference with the Parent-Child Relationship: Loss of an Injured Person's Society and Companionship*, 51 Ind.L.J. 590, 599 (1975–76); W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 125, at 934 (5th ed. 1984). This tiquated perception has met with much .iticism. *See e.g. Gallimore v. Children's Hospital Medical Center*, 67 Ohio St.3d 244, 617 N.E.2d 1052, 1056 (1993); *Frank v. Superior Court*, 150 Ariz. 228, 722 P.2d 955, 959 (1986); *Shockley v. Prier*, 66 Wis.2d 394, 225 N.W.2d 495, 500 (1975); Victorson, *supra*; Love, *supra* at 599–601. Several of the courts that have broken free of the master-servant analogy have looked to this Court for guidance. *See e.g. Gallimore*, 617 N.E.2d at 1059 n. 9; *Frank*, 722 P.2d at 956 n. 2.

Beginning with its 1926 decision in *Wilkie*, this Court has recognized a parent's right to a child's companionship as a parental right a wrongful injury to which will support an action for damages:

> The father's right to the custody, companionship, services, and earnings of his minor child are valuable rights, constituting a species of property in the father, a wrongful injury to which by a third person will support an action in favor of the father.

91 Fla. at 1068, 109 So. at 227. Then in 1973, the *Yordon* Court expressly stated that recovery for the loss of a child's companionship and society was available to the parent of a negligently injured child. 279 So.2d at 846. *Yordon* dealt with the issue of whether a mother has a right to recover for losses sustained as a result of a negligent injury to her child. In ruling that a mother has the same right of action as the father, the Court clearly defined that right of action as including recovery for loss of the child's companionship, society and services:

> In *Wilkie v. Roberts*, this Court held that the parent, ... of an unemancipated minor child, injured by the tortious act of another, has a cause of action in his own name for medical, hospital, and related expenditures, indirect economic losses such as income lost by the parent in caring for the child, and for the *loss of the child's companionship, society, and services*, including personal services to the parent and income which the child might earn for the direct and indirect benefit of the parent.

279 So.2d at 846 (emphasis added). Relying on these prior decisions, numerous commentators [1] and courts [2] have concluded that recovery for the loss of filial consortium is available within this state.

The Government maintains that the decisions in *Wilkie* and *Yordon* have been misconstrued and that neither decision authorizes recovery for the loss of a child's companionship and society. We agree that *Wilkie* can be read as limiting a parent's recovery to the pecuniary losses suffered as a result of

1. *See e.g.* Mark L. Johnson, *Compensating Parents for the Loss of Their Nonfatally Injured Child's Society: Extending the Notion of Consortium to the Filial Relationship*, 1989 U.Ill.L.Rev. 761, 764 n. 33; Todd R. Smyth, Annotation, *Parent's Right to Recover for Loss of Consortium in Connection with Injury to Child*, 54 A.L.R. 4th 112, 120 n. 20, 128–29 (1987); 25 Fla.Jur.2d, *Family Law*, § 477 (1992).

2. *See, e.g., Pierce v. Casas Adobes Baptist Church*, 162 Ariz. 269, 782 P.2d 1162, 1164 (1989); *Masaki v. General Motors Corp.*, 71 Haw. 1, 780 P.2d 566, 577 n. 9 (1989); *Davis v. Elizabeth General Medical Center*, 228 N.J.Super. 17, 548 A.2d 528, 531 (Law Div.1988); *Gallimore v. Children's Hospital Medical Center*, 67 Ohio St.3d 244, 617 N.E.2d 1052 (1993); *Fields v. Graff*, 784 F.Supp. 224, 227 (E.D.Pa.1992); *Boucher v. Dixie Medical Center*, 850 P.2d 1179, 1183 n. 27 (Utah 1992).

a negligent injury to a child.[3] However, even if the law within this state was not clear at the time of the *Yordon* decision, we read that decision as expanding the common law in this area.

[2] This is a logical conclusion in light of the fact that when our common law rules are in doubt, this Court considers the " 'changes in our social and economic customs and present day conceptions of right and justice.' " *Hoffman v. Jones*, 280 So.2d 431, 435 (Fla. 1973) (quoting *Ripley*, 61 So.2d at 423). Certainly, in 1973, when this Court set forth the elements of damages that a parent of an injured child is entitled to recover, it was apparent that a child's companionship and society were of far more value to the parent than were the services rendered by the child. Thus, there was an obvious need to recognize this element of damages to fully compensate the parent for the loss suffered because of a negligent injury to the child. The recognition of the loss of companionship element of damages clearly reflects our modern concept of family relationships.

[3, 4] Moreover, even if this Court previously had not expanded the common law to allow recovery for the loss of a negligently injured child's companionship, we would do so now. As was explained in *Zorzos v. Rosen*, 467 So.2d 305 (Fla.1985), wherein we declined to recognize a cause of action for loss of parental consortium, we are "not precluded from recognizing [such a right of action] simply because the legislature has not acted to create such a right." 467 So.2d at 307. This Court has repeatedly recognized that our common law "must keep pace with changes in our society." *Gates v. Foley*, 247 So.2d 40, 43 (Fla.1971) (granting wife right of action for loss of husband's consortium); *See also Hoffman v. Jones*, 280 So.2d 431 (Fla. 1973) (replacing rule of contributory negligence with comparative negligence rule); *In re T.A.C.P.*, 609 So.2d 588, 594 (Fla.1992) (adopting the modern definition of death). The common law may be altered when the reason for the rule of law ceases to exist,[4] or when change is demanded by public necessity or required to vindicate fundamental rights.[5] An expansion of the common law is clearly warranted here.

As explained above, the rule that loss of an injured child's companionship is not recoverable is based on the outdated perception that children, like servants, are nothing more than economic assets to their parents. This master-servant analogy no longer holds true. Rather than being valued merely for their services or earning capacity, children are valued for the love, affection, companionship and society they offer their parents. The Government offers no compelling reason to retain a rule that, under today's standards, simply appears unjust. The loss of a child's companionship and society is one of the primary losses that the parent of a severely injured child must endure. As this Court appears to have recognized twenty years ago, recovery for this loss is necessary to ensure the parent adequate compensation for the losses sustained as the result of such injury. This is particularly true considering the limited damages generally recoverable for the loss of ordinary services rendered by a child under present day standards.

[5, 6] Our legislature has recognized that recovery for loss of companionship is necessary to compensate the minor child of a permanently injured parent. § 768.0415, Fla.Stat. (1993). Similarly, this Court has extended the right to recover for the loss of marital consortium to the wife. *Gates*, 247 So.2d 40. These legislative and judicial pronouncements make clear that it is the policy of this state that familial relationships be protected and that recovery be had for losses occasioned because of wrongful injuries that

3. The *Wilkie* Court appears to have limited the recoverable loss in such cases to:

> (1) The loss of the child's services and earnings, present and prospective, to the end of minority; and (2) medical expenses in effecting or attempting to effect a cure.

91 Fla. at 1069, 109 So. at 227.

4. *Gates*, 247 So.2d at 43; *Randolph v. Randolph*, 146 Fla. 491, 1 So.2d 480 (1941) (modifying common law doctrine that gave father superior right to custody of his children).

5. *Waite v. Waite*, 618 So.2d 1360, 1361 (Fla. 1993) (holding that doctrine of interspousal immunity is no longer part of Florida's common law); *In re T.A.C.P.*, 609 So.2d at 594.

Item 6
JUL 11 1997
Tab 9-16

adversely affect those relationships. Moreover, in light of the redress available to a husband, a wife, and a minor child for injury to consortium interests, our constitution itself requires recognition of a parent's right to recover for the loss of a severely injured child's companionship. Art. I, §§ 2, 21, Fla. Const.

However, we believe that recovery for loss of filial consortium should be limited in the same manner in which recovery for the loss of parental consortium has been limited by the legislature. Section 768.0415 limits a child's recovery for the loss of a parent's services, comfort, companionship, and society to those losses caused by a significant injury "resulting in a permanent total disability." § 768.0415. Because the right of recovery we recognize here provides redress for injury to the parent-child relationship, the same relationship addressed by the legislature in section 768.0415, we see no reason why the same standard for recovery should not apply in this context.

Accordingly, we hold that a parent of a negligently injured child has a right to recover for the permanent loss of filial consortium suffered as a result of a significant injury resulting in the child's permanent total disability. In this context, we define loss of "consortium" to include the loss of companionship, society, love, affection, and solace of the injured child, as well as ordinary day-to-day services that the child would have rendered. As noted above, in *Wilkie* and *Yordon* this Court recognized as recoverable the loss of an injured child's companionship, society and services; thus, treating the two types of losses as integral components of a parent's consortium interest. This treatment is consistent with the conclusion reached by other courts that in its earliest stage, an action for loss of consortium was in fact an action for loss of services, which gradually was expanded to include the intangible elements of companionship, society, love and comfort. After this evolution, services were treated as only one element of the action, with the intangible elements emerging as the focus of consortium actions. *Frank*, 722 P.2d at [illegible]; *accord Gallimore*, 617 N.E.2d 1052 (Ohio Supreme Court recently included a child's services as one aspect of parent's consortium interest). In like fashion, we include loss of ordinary day-to-day services as an element of the damages recoverable for the permanent loss of filial consortium. Such services, although no longer of paramount importance to the parent-child relationship, are still a recognizable component of that relationship.

[7, 8] This leads us to the second certified question, which asks whether a parent can recover for the loss of a severely injured child's services absent evidence of extraordinary income-producing abilities. In light of our defining filial consortium to include ordinary services, the answer to this question is both yes and no. To recover for loss of services as part of the consortium interest, no showing of extraordinary abilities is necessary. Loss of services in this context necessarily will be interwoven with the more intangible aspects of the parent's consortium interest. In contrast, in order for a parent to recover a separate award for the loss of a permanently disabled child's services above that recoverable as a general component of loss of filial consortium, the parent must establish that the child had extraordinary income-producing abilities prior to the injury. *Accord Gresham v. Courson*, 177 So.2d 33 (Fla. 1st DCA 1965) (recovery for loss of services resulting from the wrongful death of a child not recoverable absent a showing that the deceased child had "some extraordinary income-producing attributes"); *Williams v. United States*, 681 F.Supp. 763 (N.D.Fla. 1988) (same).

Accordingly, the cause is returned to the Eleventh Circuit for further proceedings.

It is so ordered.

BARKETT, C.J., and SHAW and HARDING, JJ., concur.

GRIMES, J., concurs in result only with an opinion in which OVERTON, J., concurs.

McDONALD, J., dissents in part with an opinion.

GRIMES, Justice, concurring in result only.

At common law a father was entitled to compensation for the lost services and earn-

Item 6
JUL 11 1997
Tab 9-17

ings of his negligently injured child as well as medical expenses incurred as a result of the injury; however, the father's right to compensation did not extend to damages for loss of the child's companionship. *See Restatement (Second) of Torts* § 703, comment h (1977); W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 125, at 934 (5th ed. 1984); John F. Wagner, Jr., Annotation, *Recovery of Damages for Loss of Consortium Resulting from Death of Child*, 77 A.L.R. 4th 411, 416 (1990); Todd R. Smyth, Annotation, *Parent's Right to Recover for Loss of Consortium in Connection with Injury to Child*, 54 A.L.R. 4th 112 (1987 & Supp.1993); *Sizemore v. Smock*, 430 Mich. 283, 422 N.W.2d 666, 668 (1988). In the majority of states, unless the legislature has provided for recovery for the loss of an injured child's companionship and society, the common law rule still stands. *See* 54 A.L.R. 4th 112 and cases cited therein.

Consistent with the common law rule, in *Wilkie v. Roberts*, 91 Fla. 1064, 1068, 109 So. 225, 227 (1926), this Court recognized that the parent of a negligently injured child can recover only the pecuniary loss suffered as a result of the injury. The Court explained that the recoverable loss in such cases is limited to two elements:

> (1) the loss of the child's services and earnings, present and prospective to the end of minority, and (2) medical expenses in effecting or attempting to effect a cure.

91 Fla. at 1069, 109 So. at 227. This principle was specifically reaffirmed in *Youngblood v. Taylor*, 89 So.2d 503 (Fla.1956).

The majority's confusion about a parent's right to recover for the loss of a severely injured child's companionship and society appears to originate from the following statement also found in the *Wilkie* opinion:

> The father's right to the custody, companionship, services and earnings of his minor child are valuable rights constituting a species of property in the father, a wrongful injury to which by a third person will support an action in favor of the father. This is in addition to the right of action the child may have for the personal injury received, with the resulting pain, disfigurement or permanent disability if such results follow. 20 R.C.L. 614.

91 Fla. at 1068–69, 109 So. at 227.

The citation to 20 R.C.L. 615 within the foregoing quotation refers to an out-of-print multi-volume treatise titled *Ruling Case Law* published in 1918. The writers of *Ruling Case Law* were clear that "[i]n fixing the damages *the court ordinarily cannot consider* mental suffering or injury to the father's feelings, or *the loss of the society or companionship of the child.*" 20 R.C.L. 618 (emphasis added). Nonetheless, on page 614, four pages before this statement appears, *Ruling Case Law* refers to "[t]he father's right to the custody and companionship ... of his minor child ..." as a "species of property in the father, a wrongful injury to which by a third person will support an action." This sentence was repeated almost word for word by this Court in *Wilkie*.

On page 614 of *Ruling Case Law*, the authors resolve this apparent contradiction. They state that the "species of property" to which they refer can support three sub-sets of wrongful injury cases: (1) physical injury claims, (2) allegations of enticement or wrongful persuasion of a child to leave its father, or employing a child against its father's wishes, and (3) suits based on the seduction of a daughter. 20 R.C.L. 614. Only in the third sub-set, a claim for a daughter's seduction, or possibly in claims under the second sub-set, may a parent-claimant recover for "injury to [the parent's] feelings and paternal happiness, [which was] more important as an element of damages than the actual loss of her services." *Id.* This injury to parental feelings and happiness was considered to be a loss of companionship, and explains why *Ruling Case Law* included "custody and companionship" as a species of property at common law for some wrongful injury cases. However, it is equally clear that *Ruling Case Law* holds that, in *physical injury* tort cases, a parent may not recover for loss of a child's society or companionship. 20 R.C.L. at 618. By citing *Ruling Case Law* in *Wilkie*, it is evident that the court in referring to a "father's right to ... companionship ... of his minor child" under the common law (109 So. at 227) had in mind that damages for such a loss would only be recoverable in non-physical injury cases

like those involving the seduction of a daughter.

In *Yordon v. Savage*, 279 So.2d 844 (Fla. 1973), the Court merely paraphrased the *Ruling Case Law* citation from *Wilkie*, thereby recognizing that recovery for the loss of companionship is possible in those cases discussed in *Ruling Case Law*. Moreover, the sole question in *Yordon* was whether to extend to mothers the fathers' rights under the common law. There was no issue with respect to what damages could be recovered. Subsequent decisions of four separate district courts of appeal have interpreted *Wilkie* and its progeny to hold that the damages recoverable by the parent of an injured child are limited to medical expenses and loss of services. *Selfe v. Smith*, 397 So.2d 348 (Fla. 1st DCA), *review denied*, 407 So.2d 1105 (Fla. 1981); *Brown v. Caldwell*, 389 So.2d 287 (Fla. 1st DCA 1980); *Hillsborough County Sch. Bd. v. Perez*, 385 So.2d 177 (Fla. 2d DCA 1980); *City Stores Co. v. Langer*, 308 So.2d 621 (Fla. 3d DCA), *dismissed*, 312 So.2d 758 (Fla.1975). Thus, there can be no ritimate doubt that, consistent with common law, a recovery for the loss of an injured child's companionship is not available to a parent under Florida law as it currently stands. The real issue in this case is whether we should change the rule for the reasons discussed in the majority opinion.

This Court was faced with a similar proposition in *Zorzos v. Rosen*, 467 So.2d 305 (Fla.1985). In that case, minor children were suing for loss of parental companionship resulting from injuries negligently inflicted upon their father by a third party. The Court had not previously recognized this claim. While acknowledging that we had the authority to recognize the claim, we refrained from doing so. Instead, as Justice Shaw wrote:

> We agree ... that if the action is to be created, it is wiser to leave it to the legislative branch with its greater ability to study and circumscribe the cause. In addition, we are influenced by the fact that the legislature has recognized a child's loss of parental consortium in a wrongful death action but has not created a companion action for such loss when the parent is injured but not killed. Although this omission may be only an oversight, it strongly suggests that the legislature has deliberately chosen not to create such cause of action.

467 So.2d at 307. Subsequently, the legislature did recognize the claim for loss of parental companionship by the enactment of section 768.0415, Florida Statutes (Supp.1988), but only in cases of permanent total disability.

Normally, I believe that issues of this nature are best left to the legislature. On the other hand, the legislature has already acted to permit children to recover for the loss of companionship of parents who are permanently and totally disabled, and it is difficult to perceive a distinction in the parents' claim for a permanently and totally disabled child. Therefore, because we are doing no more than following the lead of the legislature in recognizing the severity of the loss suffered by a person whose loved one is permanently and totally disabled, I am willing to concur in this decision.

OVERTON, J., concurs.

MCDONALD, Justice, dissenting in part.

Under existing case law I would answer the first certified question in the negative and the second one in the affirmative. For the reasons expressed by Justice Grimes, the majority misconstrues "consortium" under existing case law. At this time, the only intangible damage afforded a parent because of injury to a child is that child's services, which includes, but is not limited to, the child's earnings. It does not extend to the general satisfaction obtained through the companionship and general love of a child. A parent can, of course, recover direct medical or other expenses incurred in the child's healing process.

I recognize that this court extended a father's cause of action to a mother for injury to a child which had not been previously afforded in *Yordon v. Savage*, 279 So.2d 844 (Fla.1973), and we made reciprocal loss of consortium between husband and wife in *Gates v. Foley*, 247 So.2d 40 (Fla.1971). Even so, the creation of a new element of damage is one best left to the legislature. I disagree with the majority that article I,

sections 2 and 21, Florida Constitution demands, authorizes, or justifies the ruling the majority makes. It may be that the legislature agrees that the time has come to add this element of damage when a child is injured. The legislature, rather than this court, should determine whether this element of damage is available.

Because I am satisfied that existing case law does not allow damages to a parent for loss of consortium of a child, and because I do not think this court as a matter of policy should create such a right, I would hold that such an element of damage is not available to a parent.

A parent is entitled to loss of services under the common law. These are best measured by what a parent would have to pay someone to perform the duties the minor would otherwise do but for the injury. Evidence of extraordinary income-producing abilities is not required.


## THE FLORIDA BAR RE AMENDMENTS TO RULES REGULATING THE FLORIDA BAR.

## AMENDMENT TO THE RULES REGULATING THE FLORIDA BAR—RULE 4-1.8(e).

Nos. 81301, 81527.

Supreme Court of Florida.

April 21, 1994.

Supplemental Order Amending Rule July 7, 1994.

Original Proceeding—Rules Regulating The Florida Bar.

Patricia A. Seitz, President of The Florida Bar, Miami, and John F. Harkness, Jr., Executive Director and John A. Boggs, Director of Lawyer Regulation of The Florida Bar, Tallahassee, for petitioner in No. 81,301.

Thomas A. Pobjecky, Gen. Counsel, Florida Bd. of Bar Examiners, Tallahassee, Randolph Braccialarghe, Nova University, Ft. Lauderdale, Holland & Knight, P.A., Martha W. Barnett, Tallahassee, and Anthony V. Pace, Jr., Boca Raton, responding.

Lawrence R. Metsch and Benjamin R. Metsch of Metsch & Metsch, P.A., Miami, for petitioner in No. 81,527.

Timothy P. Chinaris, Ethics Counsel, and Lilijean Quintiliani, Asst. Ethics Counsel, Tallahassee, Comments by The Florida Bar.

PER CURIAM.

The Florida Bar (Bar), as part of its annual review and with the authorization of the board of governors, petitions the Court to amend or adopt Rules Regulating The Florida Bar 11-1.8, 11-1.9, chapters 13 and 17, and to amend the comment to rule 4-3.3. Lawrence R. Metsch (LRM), representing fifty members [1] of the Bar, petitions the Court to amend rule 4-1.8(e). Anthony Pace, a member of the Bar, asks the Court to amend rule 3-7.6(g)(4).[2] The Bar opposed the LRM petition, and various members of the Bar and public opposed the Bar's petition. Therefore, we consolidated these cases for the purpose of oral argument. We have jurisdiction. Art. V, § 2(a), Fla. Const.

The Bar's petition has the following effects. The proposed amendment to the *comment* to rule 4-3.3 relates to the duty of a lawyer to disclose perjury by a criminal defendant. The *rule* directs that a lawyer is not to be a knowing participant in any conduct of a client amounting to a fraud on the court. The comment explains the lawyer's duty and distinguishes an unsworn false statement of a client to a law enforcement officer from any type of false statement of a client made in a court proceeding. We find that this clarifying comment makes it clear that a lawyer has a duty to disclose "any

1. Rule Regulating The Florida Bar 1-12.1 provides:

(f) Approval of Amendments. Amendments to other than chapters 7 and 9 of these Rules Regulating The Florida Bar shall be by petition to the Supreme Court of Florida. Petitions to amend these Rules Regulating The Florida Bar may be filed by the board of governors or by 50 members in good standing....

2. Mr. Pace did not file a petition.

Item: 6
JUL 11 1997
Tab 9-20

CHAMBERS OF
CIRCUIT JUDGE
13TH JUDICIAL CIRCUIT OF FLORIDA
HILLSBOROUGH COUNTY

JAMES D. WHITTEMORE

419 PIERCE STREET
ROOM 314
TAMPA, FL 33602
(813) 272-6995

January 30, 1998

Gerry B. Rose
The Florida Bar
650 Apalachee Parkway
Tallahassee, Florida 32399-2300

Re: Loss of Parental Consortium Subcommittee

Dear Gerry:

Enclosed please find the subcommittee's drafts of proposed instructions on Loss of Parental Consortium (F.S. 768.0415) and on Parental Loss of Filial Consortium for Injury to Child (*U.S. v. Dempsey*, 635 So. 2d 961 (Fla.1994)).

Also, enclosed is a Model Charge which includes a loss of parental consortium claim, with a verdict form.

Sincerely,

Jim Whittemore

James D. Whittemore
Circuit Court Judge

JDW/kle

cc: Bill Hahn, Esq.
Hon. James R. Thompson
Marjorie Gadarian Graham, Chair

Feb 9-1

FEB 27 1998

*(proposed)*

*e. Unmarried dependent's loss of consortium for injury to natural or adoptive parent (F.S. 768.0415)*:

**If you find for the** (defendant)**[s], you will not consider the matter of damages. However, if you find for** (claimant)**, you shall next consider the claim of [unmarried dependent]. The issue for your determination on this claim is:**

**Whether Defendant's negligence was a legal cause of significant permanent injury to (~~claimant's natural or adoptive parent~~) resulting in a permanent total disability.**

**If the greater weight of the evidence does not support the claim of [unmarried dependent], then your verdict should be for** (defendant)**[s]. However, if the greater weight of the evidence does support the claim of [unmarried dependent], then you should award to [unmarried dependent] an amount of money which the greater weight of the evidence shows will fairly and adequately compensate [unmarried dependent] ~~for damages caused by the incident in question~~. You shall consider the following elements of damage:**



*(proposed)*

**Any loss by [unmarried dependent], by reason of [his, her] parent's injury, of [his, her] parent's services, comfort, companionship, society and attentions in the past and in the future.**

NOTE ON USE

If issues arise as to the child's marital status, parentage or dependency, this instruction will have to be modified.

*Comments*

1. See Section 768.0415, Florida Statutes (1995) for claim by child for injury to natural or adoptive parent and *U.S. v. Dempsey*, 635 So. 2d 961 (Fla. 1994) for claim by parent for injury to child.

2. Section 768.0415 does not define "significant permanent injury", "dependent" or "permanent total disability". This is a matter of substantive case law and statutory analysis.

3. Section 768.0415 refers only to "negligence". The committee takes no position as to whether the statute is limited to negligence cases or the definition of "negligence" in this statutory context. For example, see F.S. 768.81(4)(a), defining "negligence cases".

4. The duration of future damages for which claimant may recover is unclear. Pending further development of the law, the committee takes no position on whether the statute limits recovery of future damages to the life of the parent or the duration of the claimant's dependency.

**MODEL CHARGE**
**(To illustrate charge on F.S.768.0415)**

**(automobile collision; comparative negligence; single claimant and defendant; no counterclaim; no-fault threshold issue; *Fabre* issue; claim for unmarried dependant's loss of consortium for injury to parent (F.S. 768.0415 )**

*Facts of the hypothetical case*

John Doe was injured when the automobile he was driving collided with one driven by Rachel Rowe. Doe sued Rowe. John Doe's five (5) old son, Little John Doe Jr., sued Rowe for loss of consortium. Rowe pleaded comparative negligence. Rowe also claimed that the collision had been caused, at least in part, by a "phantom" vehicle, which suddenly cut in front of her, causing her to collide with the automobile driven by Doe. Questions of negligence, causation, permanency of Doe's injuries, damages, apportionment of fault and loss of parental consortium are to be submitted to the jury.

*The court's charge*

[2.1] Members of the jury, I shall now instruct you on the law that you must follow in reaching your verdict. It is your duty as jurors to decide the issues, and only those issues, that I submit for your determination by your verdict. In reaching your verdict, you should consider and weigh the evidence, decide the disputed issues of fact, and apply the law on which I shall instruct you, to facts as you find them from the evidence.

The evidence in this case consists of the sworn testimony of the witnesses, all exhibits received in evidence and all facts that may be admitted or agreed to by the parties.

In determining the facts, you may draw reasonable inferences from the evidence. You may make deductions and reach conclusions which reason and common sense lead you to draw from the facts shown by the evidence in this case. But you should not speculate on any matters outside the evidence.

[2.2*a*] In determining the believability of any witness and the weight to be given the testimony of any witness, you may properly consider the demeanor of the witness while testifying; the frankness or lack of frankness of the witness; the intelligence of the witness; any interest the witness may have in the outcome of the case; the means and opportunity the witness had to know the facts about which the witness testified; the ability of the witness to remember the matters about which the witness testified; and the reasonableness of the testimony of the witness, considered in the light of all the evidence in the case and in the light of your own experience and common sense.

[2.2*b*] Some of the testimony before you was in the form of opinions about certain technical subjects.

You may accept such opinion testimony, reject it, or give it the weight you think it deserves, considering the knowledge, skill, experience, training or education of the witness; the reasons given by the witness for the opinion expressed; and all the other evidence in the case.



Feb 9-3

[Conventional Charge on Claim 3.5*b*] The issues for your determination on the claim of John Doe against Rachel Rowe are whether Rowe was negligent in the operation of the vehicle she was driving; and, if so, [3.6*c*] whether such negligence was a legal cause of loss, injury or damage sustained by Doe.

[3.7] If the greater weight of the evidence does not support the claim of Doe, then your verdict should be for Rowe.

[3.8] If, however, the greater weight of the evidence does support the claim of Doe, then you shall consider the defense raised by Rowe. On the defense, the issues for your determination are [3.8*f*] whether *either Doe or the unidentified driver of the phantom vehicle, or both of them, were* also negligent; and, if so, whether such negligence was a contributing legal cause of the loss, injury or damage complained of.

[3.8 resumed] If the greater weight of the evidence does not support the defense of Rowe, and the greater weight of the evidence does support the claim of Doe, then your verdict should be for Doe in the total amount of his damages. However, if the greater weight of the evidence shows that *Rowe and either Doe or the unidentified driver of the phantom vehicle, or both of them,* were negligent and that the negligence of each contributed as a legal cause of loss, injury or damage sustained by Doe, you should determine and write on the verdict form what percentage of the total negligence is chargeable to each.

[3.9] "Greater weight of the evidence" means the more persuasive and convincing force and effect of the entire evidence in the case.

[4.1] Negligence is the failure to use reasonable care. Reasonable care is that degree of care which a reasonably careful person would use under like circumstances. Negligence may consist either in doing something that a reasonably careful person would not do under like circumstances, or in failing to do something that a reasonably careful person would do under like circumstances.

[5.1*a*] Negligence is a legal cause of loss, injury or damage if it directly and in a natural and continuous sequence produces or contributes substantially to producing such loss, injury or damage, so that it can reasonably be said that, but for the negligence, the loss, injury or damage would not have occurred.

[5.1*b*] In order to be regarded as a legal cause of loss, injury or damage, negligence need not be the only cause. Negligence may be a legal cause of loss, injury or damage even though it operates in combination with the act of another, if such other cause occurs at the same time as the negligence, and if the negligence contributes substantially to producing such loss, injury or damage.



Tab 9-4

[6.1*d*] If you find for Rowe, you will not consider the matter of damages. However, if you find for Doe, you shall next determine the issue of permanency, that is, whether Doe sustained an injury as a result of the incident complained of which consists in whole or in part of *a permanent injury within a reasonable degree of medical probability.*

You should award to *Doe* an amount of money which the greater weight of the evidence shows will fairly and adequately compensate Doe for damages caused by the incident in question, including any such damage as Doe is reasonably certain to experience or incur in the future. If the greater weight of the evidence does not support the claim of Doe on the issue of permanency, you shall consider only the following elements of damage:

[6.2*c*] *The reasonable expense of hospitalization and medical care and treatment necessarily or reasonably obtained by Doe in the past, or to be so obtained in the future..*

[6/2*d*] *Any earnings lost in the past, and any loss of ability to earn money in the future..*

[6.1*d* resumed] And which have not been paid and are not payable by personal injury protection benefits.

However, if the greater weight of the evidence does support the claim of Doe on the issue of permanency, then you should also consider the following elements:

[6.2*a*] Any bodily injury sustained by Doe and any resulting pain and suffering, disability or physical impairment, disfigurement, mental anguish, inconvenience or loss of capacity for the enjoyment of life experienced in the past, or to be experienced in the future. There is no exact standard for measuring such damage. The amount should be fair and just, in the light of the evidence.

[6.2*c*] *The reasonable expense of hospitalization and medical care and treatment necessarily or reasonably to be obtained in the future.*

[6.2*d*] *Any loss of ability to earn money in the future.*

[6.1*e*] If you find for Rowe, you will not consider the matter of damages. However, if you find for ~~Little John~~ Doe (Jr.), you shall next consider the claim of Little John Doe, Jr. The issue for your determination on this claim is:

> Whether Defendant's negligence was a legal cause of significant permanent injury to John Doe resulting in a permanent total disability.

3.6(?)

If the greater weight of the evidence does not support the claim of Little John Doe, Jr., then your verdict should be for Rachel Rowe. However, if the greater weight of the evidence does support the claim of Little John Doe, Jr., then you should award to him an amount of money which the greater weight of the evidence shows will fairly and adequately compensate him for damages caused by the incident in question. You shall consider the following elements of damage:

Any loss by Little John Doe Jr., by reason of his parent's injury, of his parent's services, comfort, companionship, society and attentions in the past and in the future.

Jg 6 9-5

FEB 27 1998

[6.9*a*] If the greater weight of the evidence shows that Doe has been permanently injured, you may consider his life expectancy. The mortality tables received in evidence may be considered in determining how long Doe may be expected to live. Such tables are not binding on you, but may be considered together with other evidence in the case bearing on Doe's health, age and physical condition, before and after the injury, in determining the probable length of his life.

[6.10] Any amount of damages which you allow for future medical expenses or loss of ability to earn money in the future should be reduced to its present money value, and only the present money value of these future economic damages should be included in your verdict. The present money value of future economic damages is the sum of money needed now which, together with what that sum will earn in the future, will compensate Doe for these losses as they are actually experienced in future years.

[6.1*c*] In determining the total amount of damages, you should not make any reduction because of the negligence, if any, of Doe. The court will enter a judgment based on your verdict and, if you find that Doe was negligent in any degree, the court, in entering judgment, will reduce the total amount of damages by the percentage of negligence which you find is chargeable to Doe.

[7.1] Your verdict must be based on the evidence that has been received, and the law on which I have instructed you. In reaching your verdict, you are not to be swayed from the performance of your duty by prejudice, sympathy or any other sentiment for or against any party.

[7.2] When you retire to the jury room, you should select one of your number to act as foreman or forewoman, to preside over your deliberations and sign your verdict. Your verdict must be unanimous, that is, your verdict must be agreed to by each of you. You will be given a verdict form, which I shall now read and explain to you.

*(Court reads and explains verdict form)*

When you have agreed on your verdict, the foreman or forewoman, acting for the jury, should date and sign it. You may now retire to consider your verdict.



Tab 9-6

**VERDICT**
**(To illustrate presentation of F.S.768.0415 issue)**

We, the jury, return the following verdict:

1. Was there negligence on the part of defendant, Rachel Rowe, which was a legal cause of damage to plaintiff, John Doe?

YES_____ NO_____

If your answer to question 1 is NO, your verdict is for the defendant, and you should not proceed further, except to date and sign this verdict form and return it to the courtroom. If your answer to question 1 is YES, please answer question 2.

2. Did plaintiff, John Doe, sustain a permanent injury within a reasonable degree of medical probability as a result of the incident complained of?

YES_____ NO_____

Please answer question 3.

3. Was there negligence on the part of plaintiff, John Doe, which was a legal cause of his damage?

YES_____ NO_____

Please answer question 4.

4. Was there negligence on the part of the unidentified driver of the phantom vehicle which was a legal cause of damage to plaintiff, John Doe?

YES_____ NO_____

If your answer to either question 3 or question 4 is YES, please answer question 5. If your answer to both questions 3 and 4 is NO, skip question 5 and answer question 6.



Feb 9-7

5. State the percentage of any negligence which was a legal cause of damage to plaintiff, John Doe, that you charge to:

| | |
|---|---|
| Defendant, Rachel Rowe | _____% |
| Unidentified Driver of Phantom Vehicle | _____% |
| Plaintiff, John Doe | _____% |

Total must be 100%

Please answer question 6.

6. What is the total amount (100%) of any damages sustained by plaintiff, John Doe, and caused by the incident in question?

Total damages of plaintiff, John Doe $_____

Please answer question 7.

7. Did plaintiff, John Doe, sustain a significant permanent injury resulting in a permanent total disability as a result of the incident complained of?

YES_____ NO_____

If your answer to question 7 is NO, your verdict is for the defendant on the claim of Little John Doe, Jr., and you should not proceed further, except to date and sign this verdict form and return it to the courtroom. If your answer to question 7 is YES, please answer question 8.



Feb 9-8

8. What is the total amount (100%) of any damages sustained by Little John Doe Jr., by reason of his parent, Doe's injury, of his parent's services, comfort, companionship, society and attentions in the past and in the future and caused by the incident in question?

Total damages of Little John Doe Jr. $_____

In determining the total amount of damages, do not make any reduction because of the negligence, if any, of plaintiff, John Doe. If you find plaintiff, John Doe, negligent in any degree, the court, in entering judgment, will reduce Doe's total amount of damages (100%) by the percentage of negligence which you find is chargeable to Doe.

SO SAY WE ALL, this _____ day of _____, 19_____.

_____
FOREMAN OR FOREWOMAN

NOTE ON USE

For a model itemized verdict form, as contemplated by section 768.77, Florida Statutes, refer to Model Verdict Form 8.1.



Feb 9-9

FEB 27 1998

*(?.) Parental loss of filial consortium for injury to child:*

**If you find for the** (defendant)[s], **you will not consider the matter of damages. However, if you find for** (claimant), **you shall next consider the claim of** (claimant's parent). **The issue for your determination on this claim is:**

> **Whether** (Defendant's) **negligence was a legal cause of significant injury to** (claimant) **resulting in a permanent total disability.**

**If the greater weight of the evidence does not support the claim of** (claimant's parent), **then your verdict should be for** (defendant)[s]. **However, if the greater weight of the evidence does support the claim of** (claimant's parent), **then you should award to** (claimant's parent) **an amount of money which the greater weight of the evidence shows will fairly and adequately compensate** (claimant's parent) **for damages caused by the incident in question. You shall consider the following elements of damage:**

**The permanent loss by** (claimant's parent), **by reason of their child's injury, of their child's services, comfort, companionship, society and attentions in the past and in the future.**

*Comments*

1. See *U.S. v. Dempsey*, 635 So. 2d 961 (Fla. 1994).

2. In order for a parent to recover a separate award for the loss of a permanently disabled child's services above that recoverable as a general component of loss of filial consortium, the parent must establish that the child had extraordinary income producing abilities prior to the injury. *U.S. v. Dempsey*, 635 So. 2d at p.965

TGB 9-10

JAMES R. THOMPSON
CIRCUIT JUDGE
TWENTIETH JUDICIAL CIRCUIT OF FLORIDA

LEE COUNTY JUSTICE CENTER COMPLEX
1700 MONROE STREET
FORT MYERS, FLORIDA 33901
813-335-2419

# PRELIMINARY MEMORANDUM

To: Marjorie Gadarian Graham, Esq., Chair, and the Committee on Standard Jury Instructions-Civil

From: Jim Thompson, Circuit Judge

Date: February 10, 1998

Re: Elements of damages for parent's loss by reason of injury to a child after U.S. v. Dempsey, 635 So.2d 961 (Fla. 1994)

The purpose of this memorandum is to advise the reader of the present state of the law on the damages available to a parent whose child sustains an injury, specifically those damages defined in SJI 6.2f, Parent's loss of child's services, earnings and earning capacity, and to suggest proposals for any necessary modifications of the instructions.

This is almost exclusively an analysis of U.S v. Dempsey. Dempsey should be read, particularly page 965, very closely and then read again. As of February 10, 1998 there are no cases modifying or explaining Dempsey. A copy of Dempsey is in our notebooks, however, it is so crucial to this subject I am attaching a copy for the reader's convenience.

After significant effort I cannot advise the Committee on this issue with sufficient authority, clarity or certainty to warrant it acting on my opinions. Indeed, the more I have studied the issue the more confused and befuddled I have become, as may become apparent. Therefore, I am calling this a preliminary memorandum to begin our discussions and I will supplement it as necessary after I have the benefit of others' views.

**Introduction:** Dempsey recognized the loss of filial consortium as an element of damages available to a parent whose child sustained "a significant permanent injury resulting in the



Tab 9-11

FEB 27 1998

child's permanent total disability." On occasion I will refer to that injury as a "qualifying injury." A subcommittee is drafting a threshold instruction for that claim along with one for the related or similar claim for loss by a child of parental consortium as established by F.S. 768.0415.

Prior to Dempsey most of us would have considered the elements of damages that a parent of an injured child was entitled to recover to have been as set forth in SJI 6.2c, Medical Expenses: care and treatment of claimants' minor child and SJI 6.2f , Parent's loss of child's services, earnings, earning capacity. These were the elements and instructions regardless of the severity of the injuries. 6.2c is still a correct statement of the law. It was not affected by Dempsey and does not need discussion, except, perhaps, as to how it will be related to any necessarily created new instructions. However 6.2f is not now a correct or complete statement of the law and will have to be modified. If you accept the position of the four member majority in Dempsey, SJI 6.2f has not been correct since 1973 because it did not include as an element loss of filial consortium.[1]

As it presently exists 6.2f provides as follows:

**6.2f**

*Parent's loss of child's services, earnings, earning capacity:*

Any loss by (claimant) by reason of [his] [her] child's injury, of the [services] [earnings] [or] [earning ability] of [his] [her] child in the past [and in the future until the child reaches the age of (legal age)].

As you read Dempsey and particularly page 965, I would ask that you please consider the following questions:

1. Is there any recovery for services and/or filial consortium by a parent as a result of injuries to a child that has suffered less than "a significant permanent injury resulting in the child's permanent total disability?"

2. Is there any recovery by a parent of a child with extraordinary income producing ability for the loss of the child's earnings or earning ability as a result of injuries to

---

1. The Committee recognized the uncertainty in the law and the relevant cases in the Committee Comment on 6.2f.



Tab 9-12

FEB 27 1998

the child if that child has suffered less than "a significant permanent injury resulting in the child's permanent total disability?

3. The Court appears to have used the term "services" to include earnings and earnings ability. Is there any recovery for loss of what I would term "ordinary earnings or earning ability" as opposed to loss of "extraordinary income-producing ability" as a result of a qualifying injury to the child?

4. Has the period of any future recovery been changed from the present "until the child reaches legal age" to something else by the court's use of the phrase, "permanent loss of filial consortium?"

My answers to those questions are, 1. No, 2. I can't believe there isn't, 3. I think so but I hope not because it will compound the difficulty in drafting an instruction, 4. Probably not but I don't believe we can say for certain.

**Discussion:**

1. The reasons I believe there are no longer any recovery for services and/or filial consortium by a parent as a result of lesser injuries to a child are as follows.

First and most importantly the four member majority said there wasn't and two additional justices concurred in the decision. The four member majority believed the law had allowed a recovery for loss of filial consortium for all magnitudes of injury prior to Dempsey and that in Dempsey they were just limiting it to cases of significant injury. If they had not intended to limit the availability of the recovery they would only have had to say we recognize loss of filial consortium as an element of damages available to parents of an injured child and refrained from discussing limiting the recovery to cases with a qualifying injury. Additionally, they defined loss of consortium to include ordinary services when they limited the recovery for loss of consortium. The significant wording found on page 965 with my underlining for emphasis is as follows:

> **, we believe that recovery for loss of filial consortium should be limited in the same manner ****[ to those losses caused by a significant injury resulting in a permanent total disability]



Tab 9-13

FEB 27 1998

> we hold that a parent of a negligently injured child has a right to recover for the permanent loss of filial consortium suffered as a result of a significant injury resulting in the child's permanent total disability. In this context, we define loss of "consortium" to include the loss of companionship, society, love, affection and solace as well as ordinary day-to-day services that the child would have rendered.
>
> **********
>
> **, we include loss of ordinary day-to-day services as an element of damages recoverable for the permanent loss of filial consortium.
>
> **********

2. The reasons I can't answer the question of whether there is any recovery by a parent of a child with extraordinary income producing ability for the loss of the child's earnings or earing ability as a result of lesser injuries to the child are as follows.

This is a claim for tangible damages that can potentially be very significant if you consider the consequences of an injury to a young Tiger Woods or to some teenage rock star. I believe our law is still that the earnings of the minor are the property of the parent. Therefore, there would be no recovery for significant and previously allowed damages. I just can't believe the court intended such a potentially significant limitation on damages without saying so more clearly and directly. The significant wording or lack thereof appears at page 965 with my underlining for emphasis and is as follows:

> **** the second certified question which asks whether a parent can recover for the loss of a severely injured child's services absent evidence of extraordinary income-producing abilities.
>
> **********
>
> **** in order for a parent to recover a separate award for the loss of a permanently disabled child's services above that recoverable as a general component of loss of filial consortium, the parent must establish the child had extraordinary income-producing



Tab 9-1

FEB 27 1998

abilities prior to the injury. Accord Gresham v. Courson, 177 So.2d 33 (Fla. 1st DCA 1965).

As you can see the author is focusing on the severely injured child and is not at all addressing the less severely injured child. The opinion is just not directly saying there is no longer any recovery if there is proof of extraordinary income-producing ability but only proof of a less serious injury. Also as the author limits the loss of consortium claim to a case of the severe injury he then defines "consortium" so it does not include extraordinary income-producing ability, only "ordinary day-to-day services."

Finally please note that the author is using "services" to include earnings or income producing ability. Those elements "services" and "earnings have been treated separately for some time, see Wilkie v. Roberts 109 So. 225 (1926) as cited in Dempsey at page 966, and failure to maintain that distinction leads me into my next quandary.

3. When a child sustains a qualifying injury, is there any recovery for loss of what I would term "ordinary earnings or earning ability" as opposed to loss of "extraordinary income-producing ability?"

As mentioned the author in Dempsey failed to maintain a distinction between the "services" element of damage and the "earnings or earning ability" element and instead treated the services as including earnings and earnings ability. Therefore when he includes the term "ordinary day to day services" in the definition of loss of consortium it may carry with it a claim for loss of ordinary day to day income for "the" or "a" child. Since it is unlikely a jury will consider income as services unless we define services in the instruction to include it or separately define the type of income recoverable without proof of extraordinary income producing ability, drafting an instruction will be more difficult if the parent can recover for the ordinary earnings.

The reason I said "may" in the preceding paragraph is because the author may have been influenced by language in some wrongful death cases indicating that the cost of maintaining a child to maturity will normally exceed the value to the parent of the child's services or earnings and, therefore, no recovery should be had unless the child had some extraordinary income-producing attribute. See Gresham v. Courson, 177 So.2d 33 (Fla. 1st DCA 1965) cited in Dempsey at page 965. The problem with



Tab 9-15

applying this proposition to a situation with an injured but living child is that the parent of the living child not only loses the value of the services and earnings but also still has the unrecoverable normal cost of maintaining the child to maturity.

All of this is much-a-do about what will probably in most(?) cases be an insignificant loss and my recommendation is to pretend the problem doesn't exist. Indeed, it may not. The effect of this approach is little more than that the child's lawn mowing or bag boy type earnings may not be recovered and possibly this can even be recovered as extraordinary income if the attorney presents the necessary evidence.

4. I can't say whether or not the period of any future recovery has been changed from the present "until the child reaches legal age" to something else by the court's use of the phrase, "permanent loss of filial consortium."

I believe the best way to present this problem is by attempting to identify the arguments that might support a limitation of the recovery to the period of minority and the arguments that might support a different limitation or a committee position of "no position." I would invite the reader to supplement the list. Arguments for limitation:

(a) Historically a parent's recovery for injuries to a child has been limited to minority. Present 6.2c and 6.2f are in accord.

(b) If the recovery is for "permanent" loss, the parents of a 17 year-old may recover for probably the shorter of the child's or their life, or possibly only their life, but the parents of a 19 year old can recover nothing for equal injuries during a mostly similar period. It just don't seem right!

(c) The wrongful death statute limits a parent's recovery for loss of services as a result of the death of a child to the child's minority, defined as age 25. F.S. 768.21(1).

(d) Loss of the son's or daughter's services and their earnings and earning ability are elements of the parent's recovery. How can you extend this beyond minority when the earnings at least will be the adult child's?

(e) Others to be suggested.

Arguments against limitation:

(a) The court held at page 965 "that a parent of a negligently injured <u>child</u> has a right to recover for the <u>permanent</u> loss of filial consortium." The definition of "filial" only refers to son or daughter without any age limitation and



Tab 9-16

FEB 27 1999

they said permanent, dag gum it! How can we say it's not? "Permanent for the period of childhood" seems a weak interpretation of the language.

(b) Although it does not appear the legislature in adopting F.S.768.0415 or the Court in incorporating that statute's limitations in Dempsey considered this problem, they limited the recovery to the most catastrophic injuries. The parent's losses will certainly extend beyond minority. Is it clear enough for us to say it, that they didn't intend to compensate for the full loss?

(c) The wrongful death statute does not limit a parent's recovery for mental pain and suffering as a result of the death of a child to the child's minority but rather to the parent's life. SJI 6.6h.

(d) Others to be suggested.

**Recommendations:** My very tentative recommendations are as follows:

1. Modify 6.2f by splitting it into 6.2f(1) and 6.2f(2). 6.2f(1) would include loss of filial consortium using the court's definition of filial consortium including "ordinary day-to-day services." Say nothing about "ordinary income" and make no attempt to further define services in a manner to include ordinary income.

If the Committee will not agree to ignore the potential problem with ordinary income we will need to define it separately or define "ordinary day-to-day services" to include it. I just don't believe a jury will award income under an instruction that advises them to make an award for loss of "ordinary day-to-day services" unless they are further instructed.

I don't have a definition or phrase that I am comfortable with, but to begin the discussion I will mention the following:

> "ordinary day-to-day income and earning ability for a typical child"
> "income and earning ability typical of childhood"
> "income of a type and amount customarily earned by children" [or during childhood or minority"]

6.2f(2) would be limited to loss of earnings or earning ability for a child with extraordinary earning ability. Additionally, a definition of extraordinary based on common



Feb 9-17

FEB 27 1998

understanding could be included[2]; however, this may impair the ability to recover for lawn mowing or bag boy type earnings under the extraordinary earnings instruction. Perhaps it should! I don't know. A Note on Use should be included advising the user either that the instruction is applied to all case regardless of the severity of the injury or that the Committee could take no position on this issue.

2. As to the length of the recovery in 6.2f(1), give optional instructions on the period of the recovery based on the existing wording in 6.2f limiting it to minority and on the wording in 6.6h advising the jury they may consider the life expectancies of the parents. Should an option also be one that considers the joint life expectancies of the parent and the child, see 6.6f and 6.6g?

3. As to the length of the recovery in 6.2f(2), limit it to legal age because after legal age the income is the adult child's.

Finally, I have attached some very rough drafts of possible changes in the instructions for your consideration. I have exhausted my thinking on this subject and would appreciate the Committee's assistance in reviewing Dempsey, this memorandum and putting me on the right track as may be necessary.

---

A definition from Webster is, 1. Going beyond what is usual, regular or customary.



Tab 9-18

FEB 27 1998

## POSSIBLE INSTRUCTIONS

### 6.2f(1)

*Parent's loss of child's consortium:*

Any loss by (claimant) by reason of [his] [her] child's injury, of the ordinary day to day services, companionship, society, love, affection, and solace[3] of [his] [her] child in the past and in the future. (Delete period "." if using first alternative. Also, see Note On Use 2)

[until the child reaches the age of (legal age)].

or

[In determining the duration of any future loss you may consider the life (expectancy) (expectancies) of the parent(s) together with the other evidence in the case]

### 6.2f(2)

(See note on Use 3)

*Parent's loss of child's extraordinary earnings, extraordinary earning capacity:*

Any loss by (claimant) by reason of [his] [her] child's injury, of the child's extraordinary [earnings] [or] [earning ability] of [his] [her] child in the past [and in the future until the child reaches the age of (legal age)].

Extraordinary [earnings] [or] [earning ability] are such [earnings] [or] [earning ability] as are exceptional and not customary, common or usual for a child [of this age].

### Notes on Use 6.2f

1. SJI 6.2f(1) is to be used in instructing on the law as set forth in U.S. v. Dempsey, 635 So.2d 961 (Fla. 1994). It is only to be given in conjunction with SJI (being drafted) and if

---

[3] Webster's Dictionary defines the noun solace as: 1. alleviation of grief or anxiety; 2. a source of relief or consolation. It is a word that may be more confusing to a some jurors than those used in its definition but the Committee has preferred to use the exact words chosen in an opinion or statute. I believe we should use the court's words in this case and leave any further explanations for the attorneys in final argument.



Feb 9-19

there is evidence sufficient to present an issue for the jury as to whether the child sustained "a significant permanent injury resulting in the child's permanent total disability."

2. SJI 6.2f(1) presents the court with two options for instructing on the duration of future losses. Prior to Dempsey, supra, a parent's loss for injuries to a child was limited to the period until the child reached the legal age. However, in stating the holding in Dempsey the Court referred to the right to recover for the "permanent loss of filial consortium." Pending further development in the law, the Committee takes no position on the duration of future losses.

3. SJI 6.2f(2) is to be used in instructing on the law as set forth in U.S. v. Dempsey, 635 So.2d 961 (Fla. 1994) when there is evidence that the injured child had extraordinary income-producing ability and a separate award for that loss is sought. The duration of the award is limited to the minority of the child as it is only during the minority that a child's earnings are legally the property of the parent.

[Pending further development in the law the Committee takes no position as to whether these damages are recoverable in cases where the child sustains an injury less severe than "a significant permanent injury resulting in the child's permanent total disability."]

**OR**

[The Committee takes the position that Dempsey does not restrict the right of a parent of a child sustaining injuries that are less severe than "a significant permanent injury resulting in the child's permanent total disability" from recovering for loss of the child's extraordinary income or extraordinary income-producing abilities. Therefore, SJI 6.2f should be given in all cases in which an issue is presented for the jury on this element of damages.



Feb 9-20

UNITED STATES of America, Appellant/Cross-Appellee,

v.

Loren DEMPSEY, et al., Appellee/Cross-Appellant.

No. 81705.

Supreme Court of Florida.

April 21, 1994.

The United States Court of Appeals for the Eleventh Circuit, 989 F.2d 1134, certified questions to the Supreme Court of Florida for determination of parameters of parents' recovery when their child is severely injured. The Supreme Court, Kogan, J., held that: (1) parents are permitted to recover for loss of child's filial consortium as a result of significant injury resulting in child's permanent total disability, and (2) to recover for services above that recoverable as general component of loss of filial consortium, parent must establish that child had extraordinary income-producing abilities prior to injury.

Questions answered.

Grimes, J., concurred in the result only with an opinion in which Overton, J., concurred.

McDonald, J., dissented in part with an opinion.

1. Parent and Child ⇐7(1)

Parent of injured child has right to recover for permanent loss of filial consortium suffered as a result of significant injury resulting in child's permanent total disability; in this context, loss of "consortium" includes loss of companionship, society, love, affection, and solace of injured child, as well as ordinary day-to-day services that child would have rendered. West's F.S.A. § 768.0415; West's F.S.A. Const. Art. 1, §§ 2, 21.

See publication Words and Phrases for other judicial constructions and definitions.

2. Common Law ⇐14

When common-law rules are in doubt, Supreme Court considers changes in social and economic customs and present day conceptions of right and justice.

3. Action ⇐2

Supreme Court is not precluded from recognizing a right of action simply because legislature has not acted to create such a right.

4. Common Law ⇐14

Common law may be altered when reason for rule of law ceases to exist, or when change is demanded by public necessity or required to vindicate fundamental rights.

5. Husband and Wife ⇐209(3, 4)
Parent and Child ⇐7(1), 7.5
Torts ⇐7

It is policy of Florida that familial relationships be protected and that recovery be had for losses occasioned because of wrongful injuries that adversely affect those relationships. West's F.S.A. § 768.0415.

6. Parent and Child ⇐7(1)

Florida Constitution requires recognition of parent's right to recover for loss of severely injured child's companionship. West's F.S.A. Const. Art. 1, §§ 2, 21.

7. Husband and Wife ⇐209(3, 4)
Parent and Child ⇐7(1)

To recover for loss of services as part of consortium interest, no showing of extraordinary abilities is necessary; loss of services in this context necessarily will be interwoven with more intangible aspects of parent's consortium interest.

8. Parent and Child ⇐7(1)

For parent to recover separate award for loss of permanently disabled child's services above that recoverable as general component of loss of filial consortium, parent must establish that child had extraordinary income-producing abilities prior to injury.

---

Frank W. Hunger, Atty. Gen., Gregory R. Miller, U.S. Atty., and Robert S. Greenspan and William G. Cole, Civ. Div., Dept. of Justice, Washington, DC, for appellant/cross-appellee.

Tab 9-21

FEB 27 1995

James F. McKenzie of McKenzie & Soloway, P.A., Pensacola, for appellee/cross-appellant.

KOGAN, Justice.

The United States Court of Appeals for the Eleventh Circuit certifies the following questions to this Court for resolution, pursuant to article V, section 3(b)(6) of the Florida Constitution:

1. DOES FLORIDA LAW PERMIT PARENTS TO RECOVER FOR THE LOSS OF A CHILD'S COMPANIONSHIP AND SOCIETY WHEN THE CHILD IS SEVERELY INJURED?
2. DOES FLORIDA LAW PERMIT PARENTS TO RECOVER FOR THE LOSS OF THE SERVICES OF A SEVERELY INJURED CHILD ABSENT EVIDENCE OF EXTRAORDINARY INCOME PRODUCING ABILITIES?

*Dempsey v. United States*, 989 F.2d 1134, 1135 (11th Cir.1993). The Eleventh Circuit provides the following statement of the facts and case in its certification:

> On February 27, 1988, Pansey Dempsey, wife of Lonney Dempsey, Sr., an enlistee in the United States Air Force, gave birth to a baby girl at Eglin Air Force Base Hospital. The child, Loren, was born with severe breathing difficulties. An attempt to resuscitate her was unsuccessful because the tube meant to bring oxygen to the child's lungs was put down her esophagus instead. About fifty minutes later, the mistake was discovered and Loren was revived. Nevertheless, as the result of oxygen deprivation, she is now severely retarded. It appears that she will never walk or talk and will require care for the remainder of her life. Loren's parents have suffered the loss of a normal relationship with their child.
>
> The magistrate judge to whom this case was assigned held the Government liable for Loren's injuries and awarded approximately $2.8 million to Loren for medical expenses, loss of earnings, and pain and suffering. The magistrate judge awarded the parents $1.3 million for the "loss of society and affection of their child." The Government appealed the award made to the parents. The parents appealed the magistrate judge's denial of damages for the loss of Loren's services.
>
> On appeal, the dispute centers on the recovery available to the parents. The parties disagree about whether Florida law permits parents to recover for the loss of a child's society and affection when the child is severely injured, but does not die. They also disagree about whether parents may recover for the loss of an injured child's services.

989 F.2d at 1134–35. After reviewing Florida law, the circuit court concluded that the questions were unanswered by controlling precedent from this Court and certification therefore was necessary.

[1] In connection with the first question, the Dempseys take the position that this Court previously has recognized a parent's right to recover for the loss of an injured child's companionship and society. The Government maintains that the Court has not recognized this right. We agree with the Dempseys that they are entitled to recover for the loss of Loren's companionship and society under this Court's decisions in *Wilkie v. Roberts*, 91 Fla. 1064, 109 So. 225 (192[illegible] and *Yordon v. Savage*, 279 So.2d 844 (Fla. 1973).

It is generally accepted that at common law a father was entitled to compensation for the lost services and earnings of his negligently injured child as well as medical expenses incurred as a result of the injury; however, the father's right to compensation did not extend to damages for loss of the child's companionship. *See McGarr v. National & Providence Worsted Mills*, 24 R.I. 447, 53 A. 320, 325–26 (1902) (measure of damages in case brought for loss suffered as result of injury to a child is same as that in case brought by a master for the loss of services of his servant or apprentice; the elements of affection and sentiment are not to be considered); *see also Sizemore v. Smock*, 430 Mich. 283, 422 N.W.2d 666, 668 (1988); Restatement (Second) of Torts § 703, comment h (1977); W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 125, at 934 (5th ed. 1984); John F. Wag-

Tab 5-22

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the Court has not
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entitled to recover
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109 So. 225 (1926),
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*the Law of Torts*
4); John F. Wag-

ner, Jr., Annotation, *Recovery of Damages for Loss of Consortium Resulting from Death of Child*, 77 A.L.R. 4th 411, 416 (1990); Todd R. Smyth, Annotation, *Parent's Right to Recover for Loss of Consortium in Connection with Injury to Child*, 54 A.L.R. 4th 112 (1987 & Supp.1993). The rule that loss of an injured child's companionship is not recoverable has its roots in the common law analogy that was drawn between the parent-child relationship and the master-servant relationship. A child, like a servant, was considered nothing more than an economic asset of the father. *See Ripley v. Ewell*, 61 So.2d 420, 421–22 (Fla.1952); *McGarr*, 53 A. at 325–26; Michael B. Victorson, Note, *Parent's Recovery for Loss of Society and Companionship of Child*, 80 W.Va.L.Rev. 340 (1978); Jean C. Love, *Tortious Interference with the Parent–Child Relationship: Loss of an Injured Person's Society and Companionship*, 51 Ind.L.J. 590, 599 (1975–76); W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 125, at 934 (5th ed. 1984). This antiquated perception has met with much criticism. *See e.g. Gallimore v. Children's Hospital Medical Center*, 67 Ohio St.3d 244, 617 N.E.2d 1052, 1056 (1993); *Frank v. Superior Court*, 150 Ariz. 228, 722 P.2d 955, 959 (1986); *Shockley v. Prier*, 66 Wis.2d 394, 225 N.W.2d 495, 500 (1975); Victorson, *supra*; Love, *supra* at 599–601. Several of the courts that have broken free of the master-servant analogy have looked to this Court for guidance. *See e.g. Gallimore*, 617 N.E.2d at 1059 n. 9; *Frank*, 722 P.2d at 956 n. 2.

Beginning with its 1926 decision in *Wilkie*, this Court has recognized a parent's right to a child's companionship as a parental right a wrongful injury to which will support an action for damages:

> The father's right to the custody, companionship, services, and earnings of his minor child are valuable rights, constituting a species of property in the father, a wrongful injury to which by a third person will support an action in favor of the father.

91 Fla. at 1068, 109 So. at 227. Then in 1973, the *Yordon* Court expressly stated that recovery for the loss of a child's companionship and society was available to the parent of a negligently injured child. 279 So.2d at 846. *Yordon* dealt with the issue of whether a mother has a right to recover for losses sustained as a result of a negligent injury to her child. In ruling that a mother has the same right of action as the father, the Court clearly defined that right of action as including recovery for loss of the child's companionship, society and services:

> In *Wilkie v. Roberts*, this Court held that the parent, . . . of an unemancipated minor child, injured by the tortious act of another, has a cause of action in his own name for medical, hospital, and related expenditures, indirect economic losses such as income lost by the parent in caring for the child, and for the *loss of the child's companionship, society, and services*, including personal services to the parent and income which the child might earn for the direct and indirect benefit of the parent.

279 So.2d at 846 (emphasis added). Relying on these prior decisions, numerous commentators [1] and courts [2] have concluded that recovery for the loss of filial consortium is available within this state.

The Government maintains that the decisions in *Wilkie* and *Yordon* have been misconstrued and that neither decision authorizes recovery for the loss of a child's companionship and society. We agree that *Wilkie* can be read as limiting a parent's recovery to the pecuniary losses suffered as a result of

1. *See e.g.* Mark L. Johnson, *Compensating Parents for the Loss of Their Nonfatally Injured Child's Society: Extending the Notion of Consortium to the Filial Relationship*, 1989 U.Ill.L.Rev. 761, 764 n. 33; Todd R. Smyth, Annotation, *Parent's Right to Recover for Loss of Consortium in Connection with Injury to Child*, 54 A.L.R. 4th 112, 120 n. 20, 128–29 (1987); 25 Fla.Jur.2d, *Family Law*, § 477 (1992).

2. *See, e.g., Pierce v. Casas Adobes Baptist Church*, 162 Ariz. 269, 782 P.2d 1162, 1164 (1989); *Masaki v. General Motors Corp.*, 71 Haw. 1, 780 P.2d 566, 577 n. 9 (1989); *Davis v. Elizabeth General Medical Center*, 228 N.J.Super. 17, 548 A.2d 528, 531 (Law Div.1988); *Gallimore v. Children's Hospital Medical Center*, 67 Ohio St.3d 244, 617 N.E.2d 1052 (1993); *Fields v. Graff*, 784 F.Supp. 224, 227 (E.D.Pa.1992); *Boucher v. Dixie Medical Center*, 850 P.2d 1179, 1183 n. 27 (Utah 1992).

Tab 9-23

FEB 27 1998

a negligent injury to a child.[3] However, even if the law within this state was not clear at the time of the *Yordon* decision, we read that decision as expanding the common law in this area.

[2] This is a logical conclusion in light of the fact that when our common law rules are in doubt, this Court considers the " 'changes in our social and economic customs and present day conceptions of right and justice.' " *Hoffman v. Jones*, 280 So.2d 431, 435 (Fla. 1973) (quoting *Ripley*, 61 So.2d at 423). Certainly, in 1973, when this Court set forth the elements of damages that a parent of an injured child is entitled to recover, it was apparent that a child's companionship and society were of far more value to the parent than were the services rendered by the child. Thus, there was an obvious need to recognize this element of damages to fully compensate the parent for the loss suffered because of a negligent injury to the child. The recognition of the loss of companionship element of damages clearly reflects our modern concept of family relationships.

[3, 4] Moreover, even if this Court previously had not expanded the common law to allow recovery for the loss of a negligently injured child's companionship, we would do so now. As was explained in *Zorzos v. Rosen*, 467 So.2d 305 (Fla.1985), wherein we declined to recognize a cause of action for loss of parental consortium, we are "not precluded from recognizing [such a right of action] simply because the legislature has not acted to create such a right." 467 So.2d at 307. This Court has repeatedly recognized that our common law "must keep pace with changes in our society." *Gates v. Foley*, 247 So.2d 40, 43 (Fla.1971) (granting wife right of action for loss of husband's consortium); *See also Hoffman v. Jones*, 280 So.2d 431 (Fla. 1973) (replacing rule of contributory negligence with comparative negligence rule); *In re T.A.C.P.*, 609 So.2d 588, 594 (Fla. 1992) (adopting the modern definition of death). The common law may be altered when the reason for the rule of law ceases to exist,[4] or when change is demanded by public necessity or required to vindicate fundamental rights.[5] An expansion of the common law is clearly warranted here.

As explained above, the rule that loss of a injured child's companionship is not recoverable is based on the outdated perception that children, like servants, are nothing more than economic assets to their parents. This master-servant analogy no longer holds true. Rather than being valued merely for their services or earning capacity, children are valued for the love, affection, companionship and society they offer their parents. The Government offers no compelling reason to retain a rule that, under today's standards, simply appears unjust. The loss of a child's companionship and society is one of the primary losses that the parent of a severely injured child must endure. As this Court appears to have recognized twenty years ago, recovery for this loss is necessary to ensure the parent adequate compensation for losses sustained as the result of such injury. This is particularly true considering the limited damages generally recoverable for the loss of ordinary services rendered by a child under present day standards.

[5, 6] Our legislature has recognized that recovery for loss of companionship is necessary to compensate the minor child of a permanently injured parent. § 768.0415, Fla.Stat. (1993). Similarly, this Court has extended the right to recover for the loss of marital consortium to the wife. *Gates*, 247 So.2d 40. These legislative and judicial pronouncements make clear that it is the policy of this state that familial relationships be protected and that recovery be had for losses occasioned because of wrongful injuries that

3. The *Wilkie* Court appears to have limited the recoverable loss in such cases to:

> (1) The loss of the child's services and earnings, present and prospective, to the end of minority; and (2) medical expenses in effecting or attempting to effect a cure.

91 Fla. at 1069, 109 So. at 227.

4. *Gates*, 247 So.2d at 43; *Randolph v. Randolph*, 146 Fla. 491, 1 So.2d 480 (1941) (modifying common law doctrine that gave father superior right to custody of his children).

5. *Waite v. Waite*, 618 So.2d 1360, 1361 (Fla. 1993) (holding that doctrine of interspousal immunity is no longer part of Florida's common law); *In re T.A.C.P.*, 609 So.2d at 594.

Tab 9-24

FEB 27 1998

adversely affect those relationships. Moreover, in light of the redress available to a husband, a wife, and a minor child for injury to consortium interests, our constitution itself requires recognition of a parent's right to recover for the loss of a severely injured child's companionship. Art. I, §§ 2, 21, Fla. Const.

However, we believe that recovery for loss of filial consortium should be limited in the same manner in which recovery for the loss of parental consortium has been limited by the legislature. Section 768.0415 limits a child's recovery for the loss of a parent's services, comfort, companionship, and society to those losses caused by a significant injury "resulting in a permanent total disability." § 768.0415. Because the right of recovery we recognize here provides redress for injury to the parent-child relationship, the same relationship addressed by the legislature in section 768.0415, we see no reason why the same standard for recovery should not apply in this context.

Accordingly, we hold that a parent of a negligently injured child has a right to recover for the permanent loss of filial consortium suffered as a result of a significant injury resulting in the child's permanent total disability. In this context, we define loss of "consortium" to include the loss of companionship, society, love, affection, and solace of the injured child, as well as ordinary day-to-day services that the child would have rendered. As noted above, in *Wilkie* and *Yordon* this Court recognized as recoverable the loss of an injured child's companionship, society and services; thus, treating the two types of losses as integral components of a parent's consortium interest. This treatment is consistent with the conclusion reached by other courts that in its earliest stage, an action for loss of consortium was in fact an action for loss of services, which gradually was expanded to include the intangible elements of companionship, society, love and comfort. After this evolution, services were treated as only one element of the action, with the intangible elements emerging as the focus of consortium actions. *Frank*, 722 P.2d at 959; *accord Gallimore*, 617 N.E.2d 1052 (Ohio Supreme Court recently included a child's services as one aspect of parent's consortium interest). In like fashion, we include loss of ordinary day-to-day services as an element of the damages recoverable for the permanent loss of filial consortium. Such services, although no longer of paramount importance to the parent-child relationship, are still a recognizable component of that relationship.

[7, 8] This leads us to the second certified question, which asks whether a parent can recover for the loss of a severely injured child's services absent evidence of extraordinary income-producing abilities. In light of our defining filial consortium to include ordinary services, the answer to this question is both yes and no. To recover for loss of services as part of the consortium interest, no showing of extraordinary abilities is necessary. Loss of services in this context necessarily will be interwoven with the more intangible aspects of the parent's consortium interest. In contrast, in order for a parent to recover a separate award for the loss of a permanently disabled child's services above that recoverable as a general component of loss of filial consortium, the parent must establish that the child had extraordinary income-producing abilities prior to the injury. *Accord Gresham v. Courson*, 177 So.2d 33 (Fla. 1st DCA 1965) (recovery for loss of services resulting from the wrongful death of a child not recoverable absent a showing that the deceased child had "some extraordinary income-producing attributes"); *Williams v. United States*, 681 F.Supp. 763 (N.D.Fla. 1988) (same).

Accordingly, the cause is returned to the Eleventh Circuit for further proceedings.

It is so ordered.

BARKETT, C.J., and SHAW and HARDING, JJ., concur.

GRIMES, J., concurs in result only with an opinion in which OVERTON, J., concurs.

McDONALD, J., dissents in part with an opinion.

GRIMES, Justice, concurring in result only.

At common law a father was entitled to compensation for the lost services and earn-

FEB 27 1998

ings of his negligently injured child as well as medical expenses incurred as a result of the injury; however, the father's right to compensation did not extend to damages for loss of the child's companionship. *See Restatement (Second) of Torts* § 703, comment h (1977); W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 125, at 934 (5th ed. 1984); John F. Wagner, Jr., Annotation, *Recovery of Damages for Loss of Consortium Resulting from Death of Child*, 77 A.L.R. 4th 411, 416 (1990); Todd R. Smyth, Annotation, *Parent's Right to Recover for Loss of Consortium in Connection with Injury to Child*, 54 A.L.R. 4th 112 (1987 & Supp.1993); *Sizemore v. Smock*, 430 Mich. 283, 422 N.W.2d 666, 668 (1988). In the majority of states, unless the legislature has provided for recovery for the loss of an injured child's companionship and society, the common law rule still stands. *See* 54 A.L.R. 4th 112 and cases cited therein.

Consistent with the common law rule, in *Wilkie v. Roberts*, 91 Fla. 1064, 1068, 109 So. 225, 227 (1926), this Court recognized that the parent of a negligently injured child can recover only the pecuniary loss suffered as a result of the injury. The Court explained that the recoverable loss in such cases is limited to two elements:

> (1) the loss of the child's services and earnings, present and prospective to the end of minority, and (2) medical expenses in effecting or attempting to effect a cure.

91 Fla. at 1069, 109 So. at 227. This principle was specifically reaffirmed in *Youngblood v. Taylor*, 89 So.2d 503 (Fla.1956).

The majority's confusion about a parent's right to recover for the loss of a severely injured child's companionship and society appears to originate from the following statement also found in the *Wilkie* opinion:

> The father's right to the custody, companionship, services and earnings of his minor child are valuable rights constituting a species of property in the father, a wrongful injury to which by a third person will support an action in favor of the father. This is in addition to the right of action the child may have for the personal injury received, with the resulting pain, disfigurement or permanent disability if such results follow. 20 R.C.L. 614.

91 Fla. at 1068–69, 109 So. at 227.

The citation to 20 R.C.L. 615 within the foregoing quotation refers to an out-of-print multi-volume treatise titled *Ruling Case Law* published in 1918. The writers of *Ruling Case Law* were clear that "[i]n fixing the damages *the court ordinarily cannot consider* mental suffering or injury to the father's feelings, or *the loss of the society or companionship of the child.*" 20 R.C.L. 618 (emphasis added). Nonetheless, on page 614, four pages before this statement appears, *Ruling Case Law* refers to "[t]he father's right to the custody and companionship ... of his minor child ..." as a "species of property in the father, a wrongful injury to which by a third person will support an action." This sentence was repeated almost word for word by this Court in *Wilkie*.

On page 614 of *Ruling Case Law*, the authors resolve this apparent contradiction. They state that the "species of property" to which they refer can support three sub-sets of wrongful injury cases: (1) physical injury claims, (2) allegations of enticement or wrongful persuasion of a child to leave its father, or employing a child against its father's wishes, and (3) suits based on seduction of a daughter. 20 R.C.L. 614. Only in the third sub-set, a claim for a daughter's seduction, or possibly in claims under the second sub-set, may a parent-claimant recover for "injury to [the parent's] feelings and paternal happiness, [which was] more important as an element of damages than the actual loss of her services." *Id.* This injury to parental feelings and happiness was considered to be a loss of companionship, and explains why *Ruling Case Law* included "custody and companionship" as a species of property at common law for some wrongful injury cases. However, it is equally clear that *Ruling Case Law* holds that, in *physical injury* tort cases, a parent may not recover for loss of a child's society or companionship. 20 R.C.L. at 618. By citing *Ruling Case Law* in *Wilkie*, it is evident that the court in referring to a "father's right to ... companionship ... of his minor child" under the common law (109 So. at 227) had in mind that damages for such a loss would only be recoverable in non-physical injury cases

Tab 9-26

FEB 27 1998

[redacted]

like those involving the seduction of a daughter.

In *Yordon v. Savage*, 279 So.2d 844 (Fla. 1973), the Court merely paraphrased the *Ruling Case Law* citation from *Wilkie*, thereby recognizing that recovery for the loss of companionship is possible in those cases discussed in *Ruling Case Law*. Moreover, the sole question in *Yordon* was whether to extend to mothers the fathers' rights under the common law. There was no issue with respect to what damages could be recovered. Subsequent decisions of four separate district courts of appeal have interpreted *Wilkie* and its progeny to hold that the damages recoverable by the parent of an injured child are limited to medical expenses and loss of services. *Selfe v. Smith*, 397 So.2d 348 (Fla. 1st DCA), *review denied*, 407 So.2d 1105 (Fla. 1981); *Brown v. Caldwell*, 389 So.2d 287 (Fla. 1st DCA 1980); *Hillsborough County Sch. Bd. v. Perez*, 385 So.2d 177 (Fla. 2d DCA 1980); *City Stores Co. v. Langer*, 308 So.2d 621 (Fla. 3d DCA), *dismissed*, 312 So.2d 758 (Fla.1975). Thus, there can be no legitimate doubt that, consistent with common law, a recovery for the loss of an injured child's companionship is not available to a parent under Florida law as it currently stands. The real issue in this case is whether we should change the rule for the reasons discussed in the majority opinion.

This Court was faced with a similar proposition in *Zorzos v. Rosen*, 467 So.2d 305 (Fla.1985). In that case, minor children were suing for loss of parental companionship resulting from injuries negligently inflicted upon their father by a third party. The Court had not previously recognized this claim. While acknowledging that we had the authority to recognize the claim, we refrained from doing so. Instead, as Justice Shaw wrote:

> We agree ... that if the action is to be created, it is wiser to leave it to the legislative branch with its greater ability to study and circumscribe the cause. In addition, we are influenced by the fact that the legislature has recognized a child's loss of parental consortium in a wrongful death action but has not created a companion action for such loss when the parent is injured but not killed. Although this omission may be only an oversight, it strongly suggests that the legislature has deliberately chosen not to create such cause of action.

467 So.2d at 307. Subsequently, the legislature did recognize the claim for loss of parental companionship by the enactment of section 768.0415, Florida Statutes (Supp.1988), but only in cases of permanent total disability.

Normally, I believe that issues of this nature are best left to the legislature. On the other hand, the legislature has already acted to permit children to recover for the loss of companionship of parents who are permanently and totally disabled, and it is difficult to perceive a distinction in the parents' claim for a permanently and totally disabled child. Therefore, because we are doing no more than following the lead of the legislature in recognizing the severity of the loss suffered by a person whose loved one is permanently and totally disabled, I am willing to concur in this decision.

OVERTON, J., concurs.

MCDONALD, Justice, dissenting in part.

Under existing case law I would answer the first certified question in the negative and the second one in the affirmative. For the reasons expressed by Justice Grimes, the majority misconstrues "consortium" under existing case law. At this time, the only intangible damage afforded a parent because of injury to a child is that child's services, which includes, but is not limited to, the child's earnings. It does not extend to the general satisfaction obtained through the companionship and general love of a child. A parent can, of course, recover direct medical or other expenses incurred in the child's healing process.

I recognize that this court extended a father's cause of action to a mother for injury to a child which had not been previously afforded in *Yordon v. Savage*, 279 So.2d 844 (Fla.1973), and we made reciprocal loss of consortium between husband and wife in *Gates v. Foley*, 247 So.2d 40 (Fla.1971). Even so, the creation of a new element of damage is one best left to the legislature. I disagree with the majority that article I,

Tab 9-27

FEB 27 1998

sections 2 and 21, Florida Constitution demands, authorizes, or justifies the ruling the majority makes. It may be that the legislature agrees that the time has come to add this element of damage when a child is injured. The legislature, rather than this court, should determine whether this element of damage is available.

Because I am satisfied that existing case law does not allow damages to a parent for loss of consortium of a child, and because I do not think this court as a matter of policy should create such a right, I would hold that such an element of damage is not available to a parent.

A parent is entitled to loss of services under the common law. These are best measured by what a parent would have to pay someone to perform the duties the minor would otherwise do but for the injury. Evidence of extraordinary income-producing abilities is not required.


## THE FLORIDA BAR RE AMENDMENTS TO RULES REGULATING THE FLORIDA BAR.

## AMENDMENT TO THE RULES REGULATING THE FLORIDA BAR—RULE 4–1.8(e).

Nos. 81301, 81527.

Supreme Court of Florida.

April 21, 1994.

Supplemental Order Amending Rule July 7, 1994.

Original Proceeding—Rules Regulating The Florida Bar.

Patricia A. Seitz, President of The Florida Bar, Miami, and John F. Harkness, Jr., Executive Director and John A. Boggs, Director of Lawyer Regulation of The Florida Bar, Tallahassee, for petitioner in No. 81,301.

Thomas A. Pobjecky, Gen. Counsel, Florida Bd. of Bar Examiners, Tallahassee, Randolph Braccialarghe, Nova University, Ft. Lauderdale, Holland & Knight, P.A., Martha W. Barnett, Tallahassee, and Anthony V. Pace, Jr., Boca Raton, responding.

Lawrence R. Metsch and Benjamin R. Metsch of Metsch & Metsch, P.A., Miami, for petitioner in No. 81,527.

Timothy P. Chinaris, Ethics Counsel, and Lilijean Quintiliani, Asst. Ethics Counsel Tallahassee, Comments by The Florida Bar.

PER CURIAM.

The Florida Bar (Bar), as part of its annual review and with the authorization of the board of governors, petitions the Court to amend or adopt Rules Regulating The Florida Bar 11–1.8, 11–1.9, chapters 13 and 17, and to amend the comment to rule 4–3.3. Lawrence R. Metsch (LRM), representing fifty members[1] of the Bar, petitions the Court to amend rule 4–1.8(e). Anthony Pace, a member of the Bar, asks the Court to amend rule 3–7.6(g)(4).[2] The Bar opposes the LRM petition, and various members of the Bar and public opposed the Bar's petition. Therefore, we consolidated these cases for the purpose of oral argument. We have jurisdiction. Art. V, § 2(a), Fla. Const.

The Bar's petition has the following effects. The proposed amendment to the *comment* to rule 4–3.3 relates to the duty of a lawyer to disclose perjury by a criminal defendant. The *rule* directs that a lawyer is not to be a knowing participant in any conduct of a client amounting to a fraud on the court. The comment explains the lawyer's duty and distinguishes an unsworn false statement of a client to a law enforcement officer from any type of false statement of a client made in a court proceeding. We find that this clarifying comment makes it clear that a lawyer has a duty to disclose "any

1. Rule Regulating The Florida Bar 1–12.1 provides:

> (f) Approval of Amendments. Amendments to other than chapters 7 and 9 of these Rules Regulating The Florida Bar shall be by petition to the Supreme Court of Florida. Petitions to amend these Rules Regulating The Florida Bar may be filed by the board of governors or by 50 members in good standing....

2. Mr. Pace did not file a petition.

Tab 9-28

FEB 27 1998

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June 8, 1998

Ms. Marjorie Gadarian Graham
11211 Prosperity Farms Rd., #D-129
Palm Beach Gardens, FL 33410-3449

RE: Standard Jury Instruction Committee

Dear Marjorie:

Our subcommittee on the Instruction for Unmarried Dependents Loss of Consortium met last week, and please consider this our report and recommendations to the committee.

We reviewed in detail the minutes of the last meeting and recommend the following:

The subcommittee recommends changing the first sentence of 6.1e as follows: "If you find for the Defendant[s], you will not consider the claim of [unmarried dependant]."

The committee at the last meeting changed the numbering of Instruction 6.2g to 6.2h. The subcommittee recommends that words 6.2h read: "Any loss by [unmarried dependant] by reason of [his, her] parents' injury, of [his, her] parents' services, comfort, companionship and society in the past and in the future."

The minutes of the last meeting suggested that some language be inserted in the comments under paragraph 2 concerning the committee's lack of knowledge of the actual definitions of the terms that appear in the Instruction. The subcommittee has

discussed this in great detail and we believe that the proposed sentence under comment 2 should stand. We recommend deleting the second sentence.

There was some discussion in the minutes about the need for use of Instruction 2.4 (Multiple Claims) as a way of introducing the statutory cause of action. There was also discussion about whether the statute should be utilized with 3.5 issues or whether it should be in 6.1. The subcommittee reviewed 2.4 and the Note on Use. The subcommittee feels strongly that 2.4 **should not** be used in conjunction with this new instruction. In addition, the subcommittee recommends that the following be added to the second sentence of the Note on Use of as follows: "The committee recommends that this charge not be given to distinguish between a primary claim and a derivative claim (e.g., that of the injured party and that of his or her spouse) or between a claim against a party primarily liable in a claim against the party liable only vicariously (e.g., claims against a party actively negligent and against his employer) or claims under Fla. Stat. § 768.0145."

The minutes of the last meeting reflect an extensive discussion on the question of whether the child's award would be reduced by the parents' comparative negligence. While it is the unanimous belief of the subcommittee that the child's award would be reduced by the parents' negligence, we also believe unanimously that no comment concerning this matter should be made by the committee.

With respect to the Instruction itself and the Proposed Model Instruction and Verdict Form to accompany the Instruction, the subcommittee considered the question of whether or not the actual structure needs to include language concerning the causation issue. After much debate, the subcommittee recommends the following language be adopted by the committee:

> "6.1e. Whether the injury sustained by (claimant's natural or adoptive parent) was a significant permanent injury resulting in a permanent total disability."
>
> Model Verdict option question 7: "Was the injury sustained by John Doe a significant permanent injury resulting in a permanent total disability?"

This instruction would not of course be appropriate in the rare case that is brought by an unmarried dependent without a simultaneous case being brought by the parent. Whether a comment about this is necessary, needs to be discussed.

The subcommittee also considered several options if the consensus of the committee is that the question of legal cause needs to be included in the Instruction. If so, the committee recommends the language that was considered at the last meeting as follows:

**OPTION 1**

"Whether defendant's negligence was a legal cause of significant permanent injury to (claimant's natural or adoptive parent) resulting in a permanent total disability."

With respect to the Model Verdict Form question 7, the subcommittee offers two options, with the

Option 1 "A"- "Was the negligence on the part of the defendant, Rachael Row, a legal cause of significant permanent injury to John Doe resulting in a permanent total disability?"; or

Option 1 "B" - "Did the plaintiff John Doe sustain a significant permanent injury resulting in a permanent total disability as a result of the incident complained of?"

Option "A" is more in the style of Question 1 of the Model Verdict Form and Option "B" is the proposal as last offered by the subcommittee.

The subcommittee also to some extent dealt with the U.S. vs. Dempsey decision on loss of filial consortium. It is the subcommittee's suggestion that the proposed instructions referred to above be finalized before the committee gives any consideration to the loss of filial consortium issues. The two are similar but different enough to be confusing and we think they ought to be considered separately. It is our intention to make a presentation concerning the loss of filial consortium and the U.S. vs. Dempsey case at the committee meeting that is scheduled in October.

Sincerely Yours,

/s/ William E. Hahn

William E. Hahn

WEH/jlb

6.1

*(proposed)*

*e. Unmarried dependent's loss of consortium for injury to natural or adoptive parent (F.S. 768.0415)*:

**If you find for the** (defendant)[s], **you will not consider the claim of [unmarried dependent]. However, if you find for** (claimant), **you shall next consider the claim of [unmarried dependent]. The issue for your determination on this claim is:**

**Whether the injury sustained by (claimant's natural or adoptive parent) was a significant permanent injury resulting in a permanent total disability.**

**If the greater weight of the evidence does not support the claim of [unmarried dependent], then your verdict should be for** (defendant)[s]. **However, if the greater weight of the evidence does support the claim of [unmarried dependent], then you should award to [unmarried dependent] an amount of money which the greater weight of the evidence shows will fairly and adequately compensate [unmarried dependent] for damages caused by the incident in question. You shall consider the following elements of damage:**

6.2

*(proposed)*

*h.* **Any loss by [unmarried dependent], by reason of [his, her] parent's injury, of [his, her] parent's services, comfort, companionship and society in the past and in the future.**

NOTE ON USE

If issues arise as to the child's marital status, parentage or dependency, this instruction will have to be modified.

*Comments*

1. See Section 768.0415, Florida Statutes (1995) for claim by child for injury to natural or adoptive parent and *U.S. v. Dempsey*, 635 So. 2d 961 (Fla. 1994) for claim by parent for injury to child.

2. Section 768.0415 does not define "significant permanent injury", "dependent" or "permanent total disability".

3. Section 768.0415 refers only to "negligence". The committee takes no position as to whether the statute is limited to negligence cases or the definition of "negligence" in this statutory context. For example, see F.S. 768.81(4)(a), defining "negligence cases".

4. The duration of future damages for which claimant may recover is unclear. Pending further development of the law, the committee takes no position on whether the statute limits recovery of future damages to the life of the parent or the duration of the claimant's dependency.

**MODEL CHARGE**
**(To illustrate charge on F.S.768.0415)**

**(automobile collision; comparative negligence; single claimant and defendant; no counterclaim; no-fault threshold issue; *Fabre* issue; claim for unmarried dependant's loss of consortium for injury to parent (F.S. 768.0415 )**

*Facts of the hypothetical case*

John Doe was injured when the automobile he was driving collided with one driven by Rachel Rowe. Doe sued Rowe. John Doe's five (5) old son, Little John Doe Jr., sued Rowe for loss of consortium. Rowe pleaded comparative negligence. Rowe also claimed that the collision had been caused, at least in part, by a "phantom" vehicle, which suddenly cut in front of her, causing her to collide with the automobile driven by Doe. Questions of negligence, causation, permanency of Doe's injuries, damages, apportionment of fault and loss of parental consortium are to be submitted to the jury.

*The court's charge*

[2.1] Members of the jury, I shall now instruct you on the law that you must follow in reaching your verdict. It is your duty as jurors to decide the issues, and only those issues, that I submit for your determination by your verdict. In reaching your verdict, you should consider and weigh the evidence, decide the disputed issues of fact, and apply the law on which I shall instruct you, to facts as you find them from the evidence.

The evidence in this case consists of the sworn testimony of the witnesses, all exhibits received in evidence and all facts that may be admitted or agreed to by the parties.

In determining the facts, you may draw reasonable inferences from the evidence. You may make deductions and reach conclusions which reason and common sense lead you to draw from the facts shown by the evidence in this case. But you should not speculate on any matters outside the evidence.

[2.2*a*] In determining the believability of any witness and the weight to be given the testimony of any witness, you may properly consider the demeanor of the witness while testifying; the frankness or lack of frankness of the witness; the intelligence of the witness; any interest the witness may have in the outcome of the case; the means and opportunity the witness had to know the facts about which the witness testified; the ability of the witness to remember the matters about which the witness testified; and the reasonableness of the testimony of the witness, considered in the light of all the evidence in the case and in the light of your own experience and common sense.

[2.2*b*] Some of the testimony before you was in the form of opinions about certain technical subjects.

You may accept such opinion testimony, reject it, or give it the weight you think it deserves, considering the knowledge, skill, experience, training or education of the witness; the reasons given by the witness for the opinion expressed; and all the other evidence in the case.

[Conventional Charge on Claim 3.5*b*] The issues for your determination on the claim of John Doe against Rachel Rowe are whether Rowe was negligent in the operation of the vehicle she was driving; and, if so, [3.6*c*] whether such negligence was a legal cause of loss, injury or damage sustained by Doe.

[3.7] If the greater weight of the evidence does not support the claim of Doe, then your verdict should be for Rowe.

[3.8] If, however, the greater weight of the evidence does support the claim of Doe, then you shall consider the defense raised by Rowe. On the defense, the issues for your determination are [3.8*f*] whether *either Doe or the unidentified driver of the phantom vehicle, or both of them, were* also negligent; and, if so, whether such negligence was a contributing legal cause of the loss, injury or damage complained of.

[3.8 resumed] If the greater weight of the evidence does not support the defense of Rowe, and the greater weight of the evidence does support the claim of Doe, then your verdict should be for Doe in the total amount of his damages. However, if the greater weight of the evidence shows that *Rowe and either Doe or the unidentified driver of the phantom vehicle, or both of them,* were negligent and that the negligence of each contributed as a legal cause of loss, injury or damage sustained by Doe, you should determine and write on the verdict form what percentage of the total negligence is chargeable to each.

[3.9] "Greater weight of the evidence" means the more persuasive and convincing force and effect of the entire evidence in the case.

[4.1] Negligence is the failure to use reasonable care. Reasonable care is that degree of care which a reasonably careful person would use under like circumstances. Negligence may consist either in doing something that a reasonably careful person would not do under like circumstances, or in failing to do something that a reasonably careful person would do under like circumstances.

[5.1*a*] Negligence is a legal cause of loss, injury or damage if it directly and in a natural and continuous sequence produces or contributes substantially to producing such loss, injury or damage, so that it can reasonably be said that, but for the negligence, the loss, injury or damage would not have occurred.

[5.1*b*] In order to be regarded as a legal cause of loss, injury or damage, negligence need not be the only cause. Negligence may be a legal cause of loss, injury or damage even though it operates in combination with the act of another, if such other cause occurs at the same time as the negligence, and if the negligence contributes substantially to producing such loss, injury or damage.

[6.1*d*] If you find for Rowe, you will not consider the matter of damages. However, if you find for Doe, you shall next determine the issue of permanency, that is, whether Doe sustained an injury as a result of the incident complained of which consists in whole or in part of *a permanent injury within a reasonable degree of medical probability.*

You should award to *Doe* an amount of money which the greater weight of the evidence shows will fairly and adequately compensate Doe for damages caused by the incident in question, including any such damage as Doe is reasonably certain to experience or incur in the future. If the greater weight of the evidence does not support the claim of Doe on the issue of permanency, you shall consider only the following elements of damage:

[6.2*c*] *The reasonable expense of hospitalization and medical care and treatment necessarily or reasonably obtained by Doe in the past, or to be so obtained in the future..*

[6/2*d*] *Any earnings lost in the past, and any loss of ability to earn money in the future.*

[6.1*d* resumed] And which have not been paid and are not payable by personal injury protection benefits.

However, if the greater weight of the evidence does support the claim of Doe on the issue of permanency, then you should also consider the following elements:

[6.2*a*] Any bodily injury sustained by Doe and any resulting pain and suffering, disability or physical impairment, disfigurement, mental anguish, inconvenience or loss of capacity for the enjoyment of life experienced in the past, or to be experienced in the future. There is no exact standard for measuring such damage. The amount should be fair and just, in the light of the evidence.

[6.2*c*] *The reasonable expense of hospitalization and medical care and treatment necessarily or reasonably to be obtained in the future.*

[6.2*d*] *Any loss of ability to earn money in the future.*

[6.1*e*] If you find for Rowe, you will not consider the matter of damages. However, if you find for Little John Doe, Jr., you shall next consider the claim of Little John Doe, Jr. The issue for your determination on this claim is:

> Whether the injury sustained by John Doe was a significant permanent injury resulting in a permanent total disability.

If the greater weight of the evidence does not support the claim of Little John Doe, Jr., then your verdict should be for Rachel Rowe. However, if the greater weight of the evidence does support the claim of Little John Doe, Jr., then you should award to him an amount of money which the greater weight of the evidence shows will fairly and adequately compensate him for damages caused by the incident in question. You shall consider the following elements of damage:

Any loss by Little John Doe Jr., by reason of his parent's injury, of his parent's services, comfort, companionship and society in the past and in the future.

[6.9*a*] If the greater weight of the evidence shows that Doe has been permanently injured, you may consider his life expectancy. The mortality tables received in evidence may be considered in determining how long Doe may be expected to live. Such tables are not binding on you, but may be considered together with other evidence in the case bearing on Doe's health, age and physical condition, before and after the injury, in determining the probable length of his life.

[6.10] Any amount of damages which you allow for future medical expenses or loss of ability to earn money in the future should be reduced to its present money value, and only the present money value of these future economic damages should be included in your verdict. The present money value of future economic damages is the sum of money needed now which, together with what that sum will earn in the future, will compensate Doe for these losses as they are actually experienced in future years.

[6.1*c*] In determining the total amount of damages, you should not make any reduction because of the negligence, if any, of Doe. The court will enter a judgment based on your verdict and, if you find that Doe was negligent in any degree, the court, in entering judgment, will reduce the total amount of damages by the percentage of negligence which you find is chargeable to Doe.

[7.1] Your verdict must be based on the evidence that has been received, and the law on which I have instructed you. In reaching your verdict, you are not to be swayed from the performance of your duty by prejudice, sympathy or any other sentiment for or against any party.

[7.2] When you retire to the jury room, you should select one of your number to act as foreman or forewoman, to preside over your deliberations and sign your verdict. Your verdict must be unanimous, that is, your verdict must be agreed to by each of you. You will be given a verdict form, which I shall now read and explain to you.

*(Court reads and explains verdict form)*

When you have agreed on your verdict, the foreman or forewoman, acting for the jury, should date and sign it. You may now retire to consider your verdict.

**VERDICT**
**(To illustrate presentation of F.S.768.0415 issue)**

We, the jury, return the following verdict:

1. Was there negligence on the part of defendant, Rachel Rowe, which was a legal cause of damage to plaintiff, John Doe?

YES_____ NO_____

If your answer to question 1 is NO, your verdict is for the defendant, and you should not proceed further, except to date and sign this verdict form and return it to the courtroom. If your answer to question 1 is YES, please answer question 2.

2. Did plaintiff, John Doe, sustain a permanent injury within a reasonable degree of medical probability as a result of the incident complained of?

YES_____ NO_____

Please answer question 3.

3. Was there negligence on the part of plaintiff, John Doe, which was a legal cause of his damage?

YES_____ NO_____

Please answer question 4.

4. Was there negligence on the part of the unidentified driver of the phantom vehicle which was a legal cause of damage to plaintiff, John Doe?

YES_____ NO_____

If your answer to either question 3 or question 4 is YES, please answer question 5. If your answer to both questions 3 and 4 is NO, skip question 5 and answer question 6.

5. State the percentage of any negligence which was a legal cause of damage to plaintiff, John Doe, that you charge to:

| | |
|---|---|
| Defendant, Rachel Rowe | _____% |
| Unidentified Driver of Phantom Vehicle | _____% |
| Plaintiff, John Doe | _____% |

Total must be 100%

Please answer question 6.

6. What is the total amount (100%) of any damages sustained by plaintiff, John Doe, and caused by the incident in question?

Total damages of plaintiff, John Doe $_____

Please answer question 7.

7. Was the injury sustained by John Doe a significant permanent injury resulting in a permanent total disability?

YES_____ NO_____

JUL 10 1998

If your answer to question 7 is NO, your verdict is for the defendant on the claim of Little John Doe, Jr., and you should not proceed further, except to date and sign this verdict form and return it to the courtroom. If your answer to question 7 is YES, please answer question 8.

8. What is the total amount (100%) of any damages sustained by Little John Doe Jr., by reason of his parent, Doe's injury, of his parent's services, comfort, companionship and society in the past and in the future and caused by the incident in question?

Total damages of Little John Doe Jr. $_____

In determining the total amount of damages, do not make any reduction because of the negligence, if any, of plaintiff, John Doe. If you find plaintiff, John Doe, negligent in any degree, the court, in entering judgment, will reduce Doe's total amount of damages (100%) by the percentage of negligence which you find is chargeable to Doe.

SO SAY WE ALL, this _____ day of _____, 19_____.

_____
FOREMAN OR FOREWOMAN

NOTE ON USE

For a model itemized verdict form, as contemplated by section 768.77, Florida Statutes, refer to Model Verdict Form 8.1.

# Notice

## Amendments proposed to Standard Jury Instructions in Civil Cases

The Supreme Court Committee on Standard Jury Instructions in Civil Cases proposes the following amendments to the standard jury instructions. After reviewing the comments received in response to this publication, the committee will make its final proposal to the Florida Supreme Court. Please submit all comments to Marjorie Gadarian Graham, Chair, Oakpark-Suite D129, 11211 Prosperity Farms Road, Palm Beach Gardens 33410. Your comments must be received by August 24.

**1.5**
INSTRUCTION WHEN FIRST ITEM OF DOCUMENTARY, PHOTOGRAPHIC OR PHYSICAL EVIDENCE IS ADMITTED

**The** (describe item of evidence) **has now been received in evidence. Witnesses may testify about or refer to this or any other item of evidence during the remainder of the trial. This and all other items received in evidence will be available to you for examination during your deliberations at the end of the trial.**

NOTE ON USE

This instruction should be given when the first item of evidence is received in evidence. It may be appropriate to repeat this instruction when items received in evidence are not published to the jury. It may be combined with 1.6 in appropriate circumstances. It may also be given in conjunction with 1.7 if a witness has used exhibits which have been admitted in evidence and demonstrative aids which have not.

**1.6**
INSTRUCTION WHEN EVIDENCE IS FIRST PUBLISHED TO JURORS

**The** (describe item of evidence) **has been received in evidence. It is being shown to you now to help you understand the testimony of this witness and other witnesses in the case, as well as the evidence as a whole. You may examine** (describe item of evidence) **briefly now. It will also be available to you for examination during your deliberations at the end of the trial.**

NOTE ON USE

This instruction may be given when an item received in evidence is handed to the jurors. It may be combined with 1.5 in appropriate circumstances.

**1.7**
INSTRUCTION REGARDING VISUAL OR DEMONSTRATIVE AIDS

*a. Generally*

**This witness will be using** (identify demonstrative or visual aid(s)) **to assist in explaining or illustrating [his][her] testimony. The testimony of the witness is evidence; however, [this] [these]** (identify demonstrative or visual aid(s)) **[is] [are] not to be considered as evidence in the case unless received in evidence, and should not be used as a substitute for evidence. Only items received in evidence will be available to you for consideration during your deliberations.**

b. Specially Created Visual or Demonstrative Aids Based On Disputed Assumptions

**This witness will be using** (identify demonstrative aid(s)) **to assist in explaining or illustrating [his] [her] testimony. [This] [These] item[s] [has] [have] been prepared to assist this witness in explaining [his][her] testimony. [It] [They] may be based on assumptions which you are free to accept or reject. The testimony of the witness is evidence; however, [this] [these]** (identify demonstrative or visual aid(s)) **[is] [are] not to be considered as evidence in the case unless received in evidence, and should not be used as a substitute for evidence. Only items received in evidence will be available to you for consideration during your deliberations.**

NOTE ON USE

1. Instruction 1.7*a* should be given at the time a witness first uses a demonstrative or visual aid which has not been specially created for use in the case, such as a skeletal model.

2. Instruction 1.7*b* is designed for use when a witness intends to use demonstrative or visual aids which are based on disputed assumptions, such as a computer-generated model. This instruction should be given at the time the witness first uses these demonstrative or visual aids. This instruction should be used in conjunction with 1.5 or 1.6 if a witness uses exhibits during testimony, some of which are received in evidence, and some of which are not.

**6.1**
*e. Unmarried dependent's claim under Fla. Stat. § 768.0415:*

**If you find for the** (defendant)(s), **you will not consider the claim of** (unmarried dependent). **However, if you find for** (claimant parent), **you shall next consider the claim of** (unmarried dependent). **The issue for your determination on this claim is whether the injury sustained by** (claimant parent) **was a significant permanent injury resulting in a permanent total disability.**

**If the greater weight of the evidence does not support the claim of** (unmarried dependent), **then your verdict should be for** (defendant)(s) **on that claim. However, if the greater weight of the evidence does support the claim of** (unmarried dependent), **then you should award to** (unmarried dependent) **an amount of money which the greater weight of the evidence shows will fairly and adequately compensate** (unmarried dependent) **for damages caused to [him] [her] by the incident in question. You shall consider the following elements of damage:**

NOTE ON USE ON 6.1e

If issues arise as to the child's marital status, parentage or dependency, this instruction should be modified.

*Comments on 6.1e*

3. Fla. Stat. § 768.0415 does not define "significant permanent injury," "dependent" or "permanent total disability." Therefore, the instructions do not attempt to define the terms.

4. Fla. Stat. § 768.0415 refers only to "negligence." The committee takes no position as to whether the statute is limited to negligence cases or the definition of "negligence" in this statutory context. For example, see Fla. Stat. § 768.81(4)(a), defining "negligence cases."

**6.2**
h. Unmarried dependent's damages under Fla. Stat. § 768.0415:

**Any loss by reason of** (claimant parent's) **injury of** (claimant parent's) **services, comfort, companionship and society in the past and in the future.**

*Comment on 6.2h*

1. Pending further development of the law, the committee takes no position as to whether there may be elements of damage not specifically enumerated in the statute.

2. The duration of future damages for which the child may recover is unclear. Pending further development of the law, the committee takes no position as to whether the statute limits recovery of future damages to the life of the parent or the duration of the claimant's dependency.

LAW OFFICES
MARJORIE GADARIAN GRAHAM, P.A.
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PALM BEACH GARDENS, FLORIDA 33410

BOARD CERTIFIED APPELLATE LAWYER

TELEPHONE (561) 775-1204
FACSIMILE (561) 624-4460

July 31, 1998

Mr. Jeff Liggio
531 Middle Road
Union, Maine 04862

Mr. George Vaka
P.O. Box 1438
Tampa, FL 33601

Re: Proposed Jury Instrucions: 1.5—Instruction when first item of documentary or physical evidence is admitted; 1.6—Instruction when evidence is first published to jurors; 1.7—Instruction regarding visual or demonstrative aids; 6.1(e)—Unmarried dependent's claim under Fla. Stat. §768.0415; and 6.2(h)—Unmarried dependent's damages under Fla. Stat. §768.0415.

Gentlemen:

I am enclosing a copy of the proposed standard jury instructions referenced above. These instructions have been published in the Florida Bar News and comments solicited regarding these new instructions.

The Supreme Court Committee on Standard Jury Instructions greatly values the input of the Florida Defense Lawyers Association and the Florida Academy of Trial Lawyers. Accordingly, if you have any comments regarding the proposed instructions, please put them in writing to me, with a copy to Gerry Rose at The Florida Bar, 650 Apalachee Parkway, Tallahassee, FL 32399-2300.

I would appreciate it if your written comments were delivered to Gerry and me no later than August 20, 1998, so that they can be distributed to committee members for review and possible revisions of these instructions prior to our next meeting.

Very truly yours,

Marjorie Gadarian Graham

Marjorie Gadarian Graham

MGG:mmf
cc: Gerry Rose

SEP 25 1998
TAB 9-2

# FLORIDA DEFENSE LAWYERS ASSOCIATION

*James A. Dixon, Jr., Executive Director*
902 N. Gadsden Street • P.O. Box 13767 • Tallahassee, Florida 32317-3767
(850) 224-1025 • Fax: (850) 222-9166



August 21, 1998

Marjorie Gadarian Graham, Esquire
Oakpark, Suite D 129
11211 Prosperity Farms Road
Palm Beach Gardens, Florida 33410

Dear Marjorie:

Thank you for asking for the FDLA's comments concerning proposed changes to the Florida Standard Jury Instructions. All in all, the comments that I received from the various board members pretty much reflected those comments of Bob Cousin's and rather than repeat them over and over, I am simply sending you the letter that Bob sent to me to be sent along to you. As you can see, that primarily addresses the definition of significant permanent injury and permanent total disability.

With respect to the instructions regarding demonstrative evidence and the like, I heard no unfavorable comments and all of the comments were very favorable and most people thought it was high time that such instructions had been proposed. The only question that our members had was whether the judge would give this instruction at the beginning of the case or give it every single time that some type of demonstrative evidence was used. The thought was that if it was not made clear by the proposed instruction, that it could be made more clear that like in the instance when a deposition is read and the jury is instructed as to the effect of the deposition, the court may want to remind the jury of the effect of the demonstrative evidence but not read the entire instruction every time it is used.

We certainly appreciate your willingness to allow us to participate in providing comments to the proposed instructions. I would also like to let you know that my tenure as President of the Florida Defense Lawyers Association is coming to a close effective the end of September. The incoming President in all likelihood will be Robert Dietz of Orlando and I would ask that you direct future requests for comments to

TAB 9-3

SEP 25 1998

Robert at the above-listed address. Thanks for your cooperation.

Sincerely,

George A. Vaka
President

GAV/men

SEP 25 1998
TAB 9-4

# FLORIDA DEFENSE LAWYERS ASSOCIATION

*James A. Dixon, Jr., Executive Director*
902 N. Gadsden Street • P.O. Box 13767 • Tallahassee, Florida 32317-3767
(850) 224-1025 • Fax: (850) 222-9166



August 11, 1998

Marjorie Gadarian Graham, Esq.
Marjorie Gadarian Graham, P.A.
Oakpark - Suite D 129
11211 Prosperity Farms Road
Palm Beach Gardens, FL 33410

RE: Proposed Jury Instructions 6.1(e) and 6.2(h) under Florida Statute §768.0415

Dear Marjorie:

I am in receipt of your July 31, correspondence to George Vaka, inviting comments on the proposed changes to the Florida Standard Jury Instructions in civil cases. My personal comment is a fundamental one which I believe is self-evident in the proposed Committee Notes. The statute on its face lacks any definitions for "significant permanent injury" and "permanent total disability." Therefore, by attempting to create a jury instruction which is presumed to be an accurate recitation of the law of our state it will become extremely misleading, potentially confusing, and invite error for any trial that deal with this issue. The instruction in its present form provides questionable guidance to any jury. Therefore, I strongly urge that the committee refrain from adopting the instruction in its present format.

I fear that the effect of such a standard instruction in its present form will result in trial judges refusing to deviate from a "standard" instruction and therefore failing to deal with these issues on a case by case basis. As noted above, because of the drafting inadequacies in the statute, the litigants are faced to deal with these issues on a case by case basis. Certainly there are cases where total disability is simply not an issue and similarly, there are cases where "dependency" is evident. However, there are certainly many cases in between which require the parties to try to agree on a definition or rely on the court to interpret the statute and provide guidance to a jury as it applies to a given case. As we know from past experience once an instruction is elevated to the status of a "standard" instruction courts will be

SEP 25 1998
TAB 9-5

extremely reluctant to deviate from the standard, leaving a jury with actually less guidance and instruction than it would probably otherwise receive.

I believe it would be inappropriate for the committee to try to provide definitions and I commend the committee's reluctance to do so. However, until such time as the legislature readdresses the statute, I strongly urge that the committee refrain from potentially making the situation worse than it already is.

Respectfully submitted,

Robert J. Cousins
Immediate Past President of
Florida Defense Lawyers Association

RJC/arg
G:\DATA\COUSINS\FDLA\MGRAHAM.LTR

THE CONE LAW FIRM

A. CLARK CONE
ACADEMY OF FLORIDA TRIAL LAWYERS
(BOARD OF DIRECTORS 1988-PRESENT)
ASSOCIATION OF TRIAL LAWYERS OF AMERICA
(FLORIDA DELEGATE 1997-PRESENT)
FLORIDA BAR BOARD CERTIFIED CIVIL TRIAL LAWYER

AL J. CONE
ACADEMY OF FLORIDA TRIAL LAWYERS (PRESIDENT, 1961)
(BOARD OF DIRECTOR EMERITUS)
ASSOCIATION OF TRIAL LAWYERS OF AMERICA (PRESIDENT, 1968)
FLORIDA BAR BOARD CERTIFIED CIVIL TRIAL LAWYER

August 19, 1998

Majorie Gadarian Graham
11211 Prosperity Farms Road
Oakpark - Suite D129
Palm Beach Gardens, Fl. 33410

Re: Proposed Jury Instructions 1.5, 1.6, 1.7, 6.1 & 6.2

Dear Ms. Graham:

Please accept this letter as my comments regarding the proposed new jury instructions published in the Florida Bar News (August 15, 1998, page 4) addressing the admission and publishing of evidence, the use of demonstrative aids, and unmarried dependent's claims.

I have some real concerns about instructions 1.5 and 1.6 on the admission and publishing of evidence. If these instructions are put into use it will certainly increase the jury's focus and reliance upon any physical evidence identified by a witness, and could create the appearance that the Court has placed a stamp of approval on the admitted evidence. The evidentiary basis for the admission of physical evidence simply requires basic identification and authentication by a witness whose testimony could be highly suspect yet sufficient to forms the basic evidentiary requirement for the admission of physical evidence. If an instruction on this issue is for some reason deemed required, which I seriously doubt, then the instruction should indicate that the physical evidence has simply been identified by a particular witness and is now entered into evidence as a result of that witness' testimony and the jury is free to accept or reject the physical evidence based upon the jury's acceptance or rejection of the testimony of the witness. If such an instruction is to be given it has to include some form of an "accept or reject evidence" type of statement to avoid the appearance that the evidence is approved by the Court.

There will certainly be an impact on the jury when the trial judge pauses the proceedings to instruct the jury regarding the admission of physical evidence and there should be no implied stamp of approval. Is there a need for instructions 1.5 and 1.6? Wouldn't these instructions just complicate matters and potentially confuse a jury?

SEP 25 1998

NORTHBRIDGE CENTRE • 515 NORTH FLAGLER DRIVE • SUITE 703 • WEST PALM BEACH, FLORIDA 33401
PHONE: (561) 835-8100 • FAX: (561) 655-1005 • 1-800-352-4938

TAB 9-7

As for instruction 1.7, a lay juror will not understand the nuance between "evidence" and a demonstrative aid. The instruction, to be read when your witness begins to use a demonstrative aid, tells the jury they should question, scrutinize, and practically disregard the demonstrative aid because it is not "evidence". I have a strong objection to this instruction. If the demonstrative aid is not based upon the facts and evidence of the case then the judge will not allow its use, and any weak evidentiary assumptions built into the demonstrative aid will be brought out on cross-examination. I do not see a need for the Court to pause the proceedings in the middle of a witness' testimony to read what is in essence a precautionary instruction to the jury regarding a demonstrative aid which must be based upon properly admitted evidence in the first place.

As for instructions 6.1 & 6.2, these appear to be very basic instructions pending further development of the law.

Sincerely,

THE CONE LAW FIRM

A. Clark Cone, Esq.

ACC/alk

SEP 2 5 1998

TAB 9-8

# WAGNER, VAUGHAN & McLAUGHLIN

A PROFESSIONAL ASSOCIATION OF ATTORNEYS AT LAW

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ROGER VAUGHAN
JOHN McLAUGHLIN
DENISE E. VAUGHAN
BOB VAUGHAN
KEVIN McLAUGHLIN


July 27, 1998

Mrs. Marjorie Gadarian Graham
11211 Prosperity Farms Road
Oakpark Suite D 129
Palm Beach Gardens, FL 33410

Dear Marjorie:

Please consider this my submission for a proposed amendment to Instruction Section 6.2e

"*e. Spouse's loss of consortium and services:*

On the separate claim brought by (spouse) you should award (spouse) an amount of money, which the greater weight of the evidence shows, will fairly and adequately compensate (spouse) for damages caused by the incident in question. You shall consider the following elements of damage:

Any loss by reason of [his wife's] [her husband's] injury, or [his] [her] services, comfort, society and attentions in the past [and in the future]."

Respectfully submitted,

Bill Wagner

BW/mal

SEP 25 1998
TAB 9-9

TAB F.

Excerpts from minutes of committee meetings.

## SUPREME COURT COMMITTEE ON STANDARD JURY INSTRUCTIONS (CIVIL)

July 11-12, 1996
The Breakers
Palm Beach, Florida

(7) Thompson's Letter of 2-24-96:

Thompson raised three possible new issues:

a) Loss of parental consortium
Thompson noted that Florida Statutes section 768.0415 states that where a parent has been totally disabled, a child can make a claim for loss of consortium. Webster noted that there is currently a standard instruction for loss of a child's consortium, however, the Committee that loss of parental consortium is different because there is a permanency threshold involved.

**The subcommittee, consisting of Thompson, Hahn, and Whittemore, will address this issue.**

## THE SUPREME COURT COMMITTEE ON STANDARD JURY INSTRUCTIONS (CIVIL)

February 28-March 1, 1997
The Omni Hotel
Jacksonville, Florida

VIII. LOSS OF PARENTAL CONSORTIUM

Whittemore addressed this instruction in Hahn's absence.
This is agenda item 6. The materials for this meeting do not reflect a Tab number, but they consist of 11 pages. This item was assigned Tab 9.

The Committee began its discussion of this issue by reviewing Florida Statutes section 768.0415 (page 2 of the materials).

Whittemore also briefly discussed United States v. Dempsey, 635 So. 2d 961 (Fla. 1994). At page 964 of this decision, the court cites section 768.0415. However, Whittemore reported that this case deals with parental recovery for loss of a child's services, not a child's recovery for loss of parental services.

The Committee also reviewed a letter from Theodore Babbitt which was distributed on

Friday.

Bald noted that this element of damages cannot be awarded unless a threshold is met, and suggested that the instruction should tell the jury about this limitation. Bald also questioned whether the instruction should be more specific about the process of deciding whether there is a significant permanent injury and total disability. Several Committee members suggested that this instruction could parallel the no-fault act instruction.

Whittemore reported that the primary issues in these claims are whether the child is dependent, whether the parent has suffered a significant permanent injury and whether the parent is totally disabled. Whittemore noted that other statutes define these terms and these statutes can be referenced in the instruction. However, the subcommittee considered and rejected a note on use listing these statutory definitions. Thompson and Dalton noted that the definitions may be different in a different statute.

Bald suggested that the instruction should do more than set out the issues, and that it should tell the jury what to do with their determination. Specifically, the jury needs to be told that if they find, for example, that the greater weight of the evidence does not support the claim of the child their verdict is for the defendant and they should not consider the matter of damages. The Committee agreed to add such language.

Boyer suggested that the term "a total disability," which is the specific statutory term, may be different than the term "total disability." The Committee agreed to add "a" to the instruction. The Committee also agreed to follow the statutory language "permanent total disability."

Whittemore reminded the Committee that this issue is reached after the initial liability determination.

Thompson noted that the statute only permits the cause of action in negligence cases, not in intentional tort cases.

Bald questioned whether the Committee should draft a special verdict form taking the jury through the process. Thompson noted that the note on use to the no-fault instruction states that this issue will usually require a special interrogatory verdict form.

The Committee next discussed the relationship between the terms "permanent total disability" and "significant permanent injury." Wagner questioned why these are treated as separate issues, and suggested that there could never be a permanent total disability that is not also a significant permanent injury. Wagner also suggested that the term "as a result" in subpart (3) is the same as "legal cause" in subpart (2).

Whittemore reminded the Committee that the statute states that both a significant

permanent injury and a permanent total disability are required. Bald suggested that the Committee should include both terms since both appear in the statute.

Stroker questioned whether the term "significant injury" means that there has to be a significant trauma. Dalton gave an example of a psychological conversion reaction causing paraplegia. Stroker noted that for a claim of emotional distress causing disability, there does not have to be a significant injury under impact rule. Webster suggested that a claimant could meet the impact requirement without a significant injury event and still have a total disability.

Whittemore noted that the basis for statute is to provide financial support, and suggested that it is therefore reasonable to assume that physical injury is required.

Altenbernd noted that the Committee may want to review the spousal consortium instructions in light of any decision on this issue, to make the instructions parallel. The current instruction on spousal consortium is a "tack-on" to the primary claim. Altenbernd suggested that the Committee may want to adopt a comparable introductory sentence for such claims.

Graham reminded the Committee that the Committee needs to avoid renumbering the standard instructions because a renumbering causes problems with shepardizing and research.

Bald notes that the current draft states "you shall award," and questioned whether the jury is required to award these damages. The Committee decided to change the language to the currently used "You shall consider the following elements of damage . . . "

Thompson noted that the statute allows the claim in negligence cases only need, and questioned whether the requirement of negligence needs to be in the instruction. Wagner suggested that this is a legal issue and that the judge will handle it. Webster suggested to put this limitation in a comment. Dauksch questioned what would happen in a case where there is a strict liability count, a negligence court and an intentional tort count. Wagner suggested that this situation can be handled on the verdict form by instructing the jury not to answer the question on this claim unless they find negligence.

Altenbernd noted that the definition of "negligence" in the Tort Reform Act includes strict liability and other types of claims. Altenbernd suggested that the Committee insert a comment stating that the statute refers to a "negligence case" and that the Committee takes no position as to the definition of this term in this context.

**The subcommittee will review these issues for discussion at the next meeting. The subcommittee will:**
**(1) draft a model charge showing where this instruction will fit in; (2) address Dempsey; and (3) research the statute defining "negligence." Thompson will prepare a short memo outlining Dempsey issues.**

Altenbernd suggested that the Committee needs to add a comment to 6.2(f) that this instruction is undergoing revision in light of Dempsey, because 6.2(f) is almost never accurate in light of Dempsey. The Committee agreed to insert a warning using an appropriate procedure such as a sticker.

**SUPREME COURT COMMITTEE ON STANDARD JURY INSTRUCTIONS (CIVIL)**
Doubletree Inn
Ft. Lauderdale, Florida
October 24-25, 1997

**6. LOSS OF PARENTAL CONSORTIUM: section 768.0415** Tab 9

Hahn reported to the Committee on this issue.
This issue arises out of section 768.0415 and Dempsey v. U.S..

This topic was last addressed at the February 1997 meeting. The Committee reviewed the minutes from that meeting.

Hahn reported that the subcommittee has incorporated the Committee's earlier decisions. The version at page 9-2A represents the subcommittee's current recommendation.

The subcommittee was directed to add the word "a" before "permanent total disability."

The subcommittee also has, pursuant to earlier Committee decision, added language to the effect that if the jury finds that the greater weight of the evidence does not support the claim of the child, the verdict is for the defendant.

Wagner questioned whether a child, like a spouse, can be forced to bring the derivative claim at the same time as the main claim. If so, Wagner suggested that there will never be a finding on the child's claim alone. The injured parent/Plaintiff would have to recover before the issue of the child's claim would ever be reached. Therefore, there is no case in which this language would be used. According to Wagner, the issue at this point is not whether the defendant was negligent but whether there was a permanent injury and whether the child was dependent.

Altenbernd suggested that there may need to be two versions of this instruction, one for use where there is only the child's claim and one for use where both claims are brought.

Wagner also questioned whether the question of dependency of the child is a jury issue. Hahn recalled that dependency was placed before the jury in a prior version of the instruction and had been rejected by the subcommittee.

Warner questioned whether this is really a derivative claim, and noted that under the statute, the

cause of action appears to be direct.

Thompson recalled that the statute relates only to negligence which is why the "if you find Defendant negligent" language was included.

Graham stated that 6.1e refers to damages only. At this point, the jury has already decided that there was negligence.

Graham also noted that Dempsey does not address how long the damages accrue. This question will be flagged in a comment.

The Committee decided to: eliminate question 1; bracket language regarding the dependency issue; change the comment regarding when to use the dependency question to a note on use; and add a new comment stating that how long these damages accrue is unclear. **The subcommittee will revise accordingly and this instruction will be reviewed at the next meeting. The subcommittee will also present a verdict form at the February 1998 meeting.**

Barfield suggested that the subcommittee review whether some of the undefined terms from this statute have been defined by the legislature in other contexts, such as the workers' compensation context. Barfield also suggested that the subcommittee review the staff analysis of the statute. Barfield noted that terms used in statutes do not necessarily have the same meaning in all contexts.

SUPREME COURT COMMITTEE
ON STANDARD JURY INSTRUCTIONS (CIVIL)

Sheraton Grand Hotel
Tampa, Florida
February 27-28, 1998

VII. LOSS OF PARENTAL CONSORTIUM Tab 9

Whittemore presented the subcommittee's current draft instructions on this issue, which arises under Florida Statutes section 768.0415. The current draft reflects the concerns raised at the discussion of the entire Committee at prior meetings.

Whittemore reported that he reviewed all the legislative history on this statute. It provided no insight regarding what the legislature intended with respect to the terms "permanent total disability" and "significant permanent injury," except that when the statute was originally proposed the required injury was the loss of a bodily function. The senate amended the statute to its present language. There is no explanation for this change in the records reviewed by

Whittemore.

Whittemore reported that despite the lack of legislative guidance, the statute is fairly straightforward. The instruction tracks it literally, and some of the subcommittee's concerns appear in the comments so that people will be advised of possible issues.

The Committee reviewed proposed 6.1e. Altenbernd noted that there is already a 6.2g on property damage and that we cannot renumber existing instructions. Thus, the proposed 6.2g will actually be 6.2h.

Webster noted that we have no guidance regarding the meaning of the terms "permanent total disability" and "significant permanent injury." The Committee agreed to insert a comment stating that we do not know what these terms mean.

The Committee reviewed the statute.

The Committee first discussed whether this instruction adequately introduced the issue of the child's claim to the jury and where such an introduction should appear in the instructions. Bald suggested that there should be some instruction in the issues section stating that there is a claim by the minor for _____ and the issues are_____.

Warner suggested that this be treated the same as a permanency instruction because the same issue is presented—whether there is a qualified injury. The jury has already decided negligence. The question should be whether the injury caused by the defendant's negligence is a significant permanent injury resulting in permanent total disability.

Walbolt questioned whether the jury needs to decide causation.

Warner stated that the jury would already have decided negligence and causation in favor of the parent plaintiff. On the child's claim, the only additional question is how big is the injury.

Whittemore referred the Committee to the proposed model instructions at Tab 9-5 of the materials.

6.1(e) needs to be corrected to state: "If you find for D you will not consider the claim of (unmarried dependant) (instead of "the matter of damages"). Also, the instruction should read "However, if you find for (parent) . . . " i.e., if you find for John Doe instead of Little John Doe Jr.

Webster stated that it is necessary to list the child's claim as a claim in a 3.5b instruction on the issues for the jury's determination.

The Committee noted that in spousal consortium cases, the spouse's name is simply added to

3.5b and the consortium claim is considered as an element of damages. However, the spousal consortium claim is derivative. There was substantial discussion regarding whether the child's claim under the statute is also derivative or at least similar in nature to a spousal consortium claim. The Committee noted that unlike a spousal consortium claim, the child's claim requires an additional element and is a separate claim. Several Committee members noted that presumably the child's claim could be brought in a separate action and the child could well be represented by a different attorney than the parent. It was also noted that in the case of divorced parents where the noncustodial parent is injured, the interests of the parent and child may not be completely aligned.

Bald questioned whether there would be a special verdict on the issue. If so, we can lead them through the steps to answer the verdict questions and thereby make it clear that before they can even consider the claim of the child, they need to find that a qualifying injury was suffered by the parent.

The Committee discussed in detail whether to list the issues on the child's claim together with the parent's issues or separately and, if separately, whether the child's issues should be listed after the instructions on the parent's claim are completed. Altenbernd suggested that the child's claim be inserted at 6.1.

Webster noted that there is no 2.4 (on multiple issues) in the subcommittee proposal. Warner observed that the note on use recommends that 2.4 not be given.

Webster stated that the level of injury to the parent is a liability issue to the child's claim. It is not technically a damages question to the child. Therefore, this should be a 3.5 issue.

Substantial discussion was had regarding when the jury would be told that it would be considering two claims. A number of committee members thought it was less confusing to put the issue in 6.1 so that the jury would hear all the parent's liability issues first, regardless of whether the issue is a liability issue as a technical matter.

Whittemore stated that the subcommittee drafted its proposal from the practical standpoint of where the issue made the most logical sense to the jury hearing the instructions. The child's claim may not technically be derivative but it is not viable unless the parent get a liability verdict. Legally it may be more proper to put this issue at 3.5b but the subcommittee believed that it flowed better at 6.1.

Warner stated that the negligence issue applies to both claims, and the 3.5(b) instruction should so state.

Several members suggested using 2.4 to inform the jury that there are two claims, telling them the issues on the 1st (parent's) claim, that they will not consider the child's claim unless they find for the parent, and that if they find for the parent they next will consider whether the

parent's injury was severe enough to support the child's claim.

The Committee next reviewed 6.2 which relates to the damages of the child. Webster suggested "Any loss of [unmarried dependent's] parent's services, comfort, companionship, and society in the past and in the future by reason of a significant permanent injury resulting in permanent total disability to the parent."

Bald expressed concern that this suggests that there is such an injury and noted that the jury needs to first find a qualified injury.

After substantial discussion on these issues, the Committee determined that the subcommittee version was more faithful to the statute than the proposals considered on the floor. The Committee therefore worked with subcommittee draft format in terms of organization.

There was substantial discussion regarding causation of the child's damages. Wagner stated that if there is a significant injury to the parent, the child gets all his damages regardless of whether they flow from the parent's permanent total disability or from a lesser injury of the parent.

Several Committee members noted that the statute grants a right to all damages, "including" consortium damages, and that the claim is apparently not limited to the type of damages listed. Other members noted that the statute does not refer to "attentions" - apparently, this came from the spousal consortium instruction.

The Committee also questioned whether the child's damages have to be permanent, and whether the child's claim ends upon majority or independence.

The Committee considered the following two alternative schemes:
(1) Insert 2.4; identify child's claim in 3.5 and state that the negligence of the defendant is a common issue; and list the elements of the child's claim in a manner similar to 6.1(d); OR
(2) (Webster and Dalton version) do not use 2.4; insert name of child only in 3.5; list damages in 6.2(h).

The Committee discussed whether to treat this as a derivative claim or a separate cause of action. Bald questioned why the jury would need to know this distinction.

The Committee noted that we do not know whether the child's damages are reduced by the parent's comparative negligence. Wagner stated that a wife's consortium claim is reduced by the husband's negligence under the common law, but a wrongful death claim is not. Altenbernd noted that if the child's claim is not reduced by the parent's comparative negligence, the parent may be a Fabre third party. The Committee does not know the answer to these questions.

the spouse's claim, and that the subcommittee could not envision any valid economic damages claim by the child.

Wagner suggested that the Committee should at least note that other damages appear to be available under the statute, but that the Committee takes no position on what other damages could be awarded. The Committee decided to add a comment to 6.2h stating that the Committee takes no position regarding what other types of damages are available.

Warner reported that she has reviewed the tapes of the legislative debate surrounding the enactment of this statute. Warner reported that the incentive for this statute was a Miami case in which a single woman was in a coma and her minor children recovered nothing because all the damages went to attorneys fees and medical bills. The legislature decided to create a separate claim for the children so that a medical lien could not reach the children's recovery. Warner reported that there was no recorded debate about what kind of damages would be available. She also noted that the statute originally defined the children able to recover as those under 21. It was changed to dependent children as defined "by the statutes," but there was no reference to which statutory definition of "dependent" would be used.

The Committee next reviewed the language of 6.1e. Several format changes were made. The Committee determined that the injured parent would be referred to as "(claimant parent)," and that the instruction will need to be modified where the injured parent is not a party to the case.

Thompson suggested that the instruction must be limited to damages caused to "the unmarried dependent," not all damages caused by the incident in question.

Hahn reminded the Committee that once the jury gets to this point, they would already have determined legal cause. This has previously been discussed in detail.

Wagner questioned how the statute would apply if child is at fault in the accident, i.e., if the child was driving. Whittemore suggested that the child would be a Fabre party on the original claim. Whittemore reminded the Committee that it had previously agreed that comparative negligence would probably apply but not to comment on it.

The Committee made title changes to eliminate the reference to "consortium" and to refer to the statute.

Because the entire verdict may not be for the defendant even if the child does not prove his claim, the Committee changed this language to refer to the claim of the "unmarried dependent."

The Committee discussed whether the damages instructions should be parallel to the spousal consortium instructions.

There was discussion regarding whether "in the future" should be in brackets. It is unclear whether there may be cases where there are no future losses, such as where the child has become independent or married, or died, prior to trial. Wagner suggested that dependency at the time of the incident is all that is required and later independence does not terminate damages. He suggested that the jury could find that there are no future damages, but the instruction still needs to list this element. The Committee does not know whether attaining independence or marriage terminates the right to damages under this statute. See subcommittee comment 4. The Committee decided not to put the "future damages" in brackets.

Altenbernd noted that in non-auto cases, the spouse can get consortium damages even if there is no permanent injury.

The Committee determined that the comment stating that there is no statutory definition of "significant permanent injury," "dependent," or "permanent total disability" should state that the instructions do not attempt to define these terms. There was discussion regarding whether the Committee should state that expert witnesses and argument can address this issue, and debate regarding whether the definitions of these terms are legal questions or fact questions. It was decided to leave out a reference to who may testify to this, despite the fact that such format is used in other instructions.

Other form and style changes were made. The notes on use and comments were reviewed and relocated to place them with the instructions to which they apply.

The versions of these instructions approved by the Committee are attached hereto as Exhibit "C." These will be published for comment.

The subcommittee also recommends adding a reference to this statute to an existing note on use to instruction 2.4, regarding multiple claims. The note on use states that certain types of claims are not multiple claims. The Committee determined that this need not be published. It will be included with the submission to the court on 6.1 and 6.2.

The Committee agreed that Dempsey will be handled separately.

The Committee noted that if these instructions are approved, the Committee will need to change the model charges and verdict form to make them consistent.

**At the next meeting, Wagner will present a written proposal for changes to 6.2e.**

*e. Unmarried dependent's claim under Fla. Stat. § 768.0415:*

**If you find for the (defendant)(s), you will not consider the claim of (unmarried dependent). However, if you find for (claimant parent), you shall next consider the claim of (unmarried dependent). The issue for your determination on this claim is whether the injury sustained by (claimant parent) was a significant permanent injury resulting in a permanent total disability.**

**If the greater weight of the evidence does not support the claim of (unmarried dependent), then your verdict should be for (defendant)(s) on that claim. However, if the greater weight of the evidence does support the claim of (unmarried dependent), then you should award to (unmarried dependent) an amount of money which the greater weight of the evidence shows will fairly and adequately compensate (unmarried dependent) for damages caused to [him] [her] by the incident in question. You shall consider the following elements of damage:**

NOTE ON USE ON 6.1e

If issues arise as to the child's marital status, parentage or dependency, this instruction should be modified.

*Comments on 6.1e*

1. Fla. Stat. § 768.0415 does not define "significant permanent injury," "dependent" or "permanent total disability." Therefore, the instructions do not attempt to define the terms.

2. Fla. Stat. § 768.0415 refers only to "negligence." The committee takes no position as to whether the statute is limited to negligence cases or the definition of "negligence" in this statutory context. For example, see Fla. Stat. § 768.81(4)(a), defining "negligence cases."



*h. Unmarried dependent's damages under Fla. Stat. § 768.0415:*

**Any loss by reason of (claimant parent's) injury of (claimant parent's) services, comfort, companionship and society in the past and in the future.**

*Comment on 6.2h*

1. Pending further development of the law, the committee takes no position as to whether there may be elements of damage not specifically enumerated in the statute.

2. The duration of future damages for which the child may recover is unclear. Pending further development of the law, the committee takes no position as to whether the statute limits recovery of future damages to the life of the parent or the duration of the claimant's dependency.

## 2.4

## MULTIPLE CLAIMS, NUMEROUS PARTIES, CONSOLIDATED CASES

**In your deliberations, you are to consider [several] [**(state the number)**] distinct claims.** (Identify claims to be considered.) **Although these claims have been tried together, each is separate from the other[s], and each party is entitled to have you separately consider each claim as it affects that party. Therefore, in your deliberations, you should consider the evidence as it relates to each claim separately, as you would had each claim been tried before you separately.**

NOTE ON USE

This instruction is applicable to two or more consolidated actions as well as to two or more claims in the same action by or against different persons or by or against the same person in different capacities. The committee recommends that this charge not be given to distinguish between a primary claim and a derivative claim (*e.g.*, that of the injured party and that of his or her spouse) or between a claim against a party primarily liable and a claim against a party liable only vicariously (*e.g.*, claims against a party actively negligent and against his employer) or claims under Fla. Stat. § 768.0415.

SUPREME COURT COMMITTEE ON STANDARD JURY INSTRUCTIONS (CIVIL)
Florida Bar Offices
Tampa, Florida
October 30, 1998

III. LOSS OF PARENTAL CONSORTIUM - Tab 9

The Committee reviewed feedback received from FDLA and the Cone Law Firm regarding these instructions (6.1 and 6.2). The subcommittee has reviewed these comments and has determined that the comments do not require the current proposal to be changed.

The Committee noted that FDLA's criticism of the instruction was based on the fact that the statute fails to define certain terms. On this question, the Committee reviewed the opinion in the case of Deruis v. Allstate Indemnity Company, 23 Fla. L. Weekly D1383 (Fla. 4th DCA 1998), which held it was proper to instruct the jury on a PIP claim without defining the term "necessary." The Committee noted that the language in this instruction is parallel.

Instructions 6.1 and 6.2 will be submitted to the Supreme Court as previously drafted.

**The subcommittee will present a proposal on parental loss of consortium (the Demsey issue) at the February meeting.**

Wagner submitted a letter raising a new issue in the area of spousal consortium. This issue will be considered when Wagner is present.