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# Consortium and Workers' Compensation: The Demolition of Consortium

*Michael Green*\*

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## INTRODUCTION

We frame the matter addressed in this Article with the following hypothetical:

Wanda, while pregnant, suffers an injury immediately after toxic fumes are negligently released while she is at work. Her fetus also suffers injury as a result of the release but is born alive. Jim, Wanda's spouse, was visiting at Wanda's workplace when the release occurred and observed Wanda breathing the toxic fumes

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and her subsequent injury, as well as suffering inhalation injury himself.

Evidently, Jim can recover from the employer in tort for his physical injury, while his spouse, Wanda, cannot, because workers' compensation law displaces tort law for accidental injury occurring due to employment. Whether Jim and Wanda's subsequently born daughter can recover for her injuries suffered *in utero* may depend on whether those injuries were suffered directly from exposure to the fumes or were a consequence of the injury to her mother.<sup>1</sup>

But there are losses other than the physical ones. Wanda's physical injury left her in an emotional funk and uninterested in others, including her husband and daughter. Both of them have suffered harm to the relationship they would have had with Wanda as wife and mother—an interest commonly termed consortium. This interest encompasses affection, comfort, advice, and other attendant benefits of the relationship. Wanda, similarly, may suffer a comparable loss in her relationship with her husband and daughter consequential to their physical injuries.<sup>2</sup>

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1. See *infra* text accompanying notes 67–88. Arguably, the child's claim arose out of the injury to Wanda if the child's claim was consequential to Wanda's injury. See *Peters ex rel. Peters v. Texas Instruments Inc.*, No. CIV.A. 10C-06-043JRJ, 2011 WL 4686518, at \*6 (Del. Super. Ct. Sept. 30, 2011) (Texas law) (relying on consequential nature of fetus's injury to conclude claim was barred by workers' compensation exclusive remedy provision while distinguishing cases in which fetal injury was not consequential to parent's injury); see also *Sena v. Mount Sinai Hosp.*, 1994 WL 411142, at \*1 (Conn. Super. Ct. July 14, 1994) (permitting child injured *in utero* to proceed with a negligence claim against the mother's employer without addressing whether child's injury was direct or consequential); accord *Omori v. Jowa Hawaii Co.*, 981 P.2d 703, 703 (Haw. 1999); *Ledeaux by Ledeaux v. Motorola Inc.*, 101 N.E.3d 116, 131–32, *app. denied sub nom. Ledeaux v. Motorola, Inc.*, 108 N.E.3d 826 (Ill. 2018).

2. To the careful reader, Jim may have suffered a different type of emotional harm from the distress due to his damaged relationship as a result of observing the injury suffered by Wanda. Such a bystander negligent infliction of emotional distress (NIED) claim might be barred by the Workers' Compensation Act, as it "arises from the injury" to his spouse. See *infra* text accompanying notes 67–72; *Snyder v. Michael's Stores, Inc.*, 945 P.2d 781, 785 (Cal. 1997). But see *Collins v. COP Wyoming, LLC*, 366 P.3d 521, 527 (Wyo. 2016) (permitting a parent's bystander NIED claim based on observing his son's death at work on the grounds that the parent's injury "is outside of the 'grand bargain' because worker's compensation provides no remedy for it"); *Sacco v. High Country Indep. Press*, 896 P.2d 411, 417–18 (Mont. 1995). Wanda's consortium claims, in contrast to those asserted by her daughter and husband for their loss of relationship with her, might not be barred because they are not injuries suffered within the scope of

The matter we address in this Article is the availability of Jim's consortium claim based on the injury to Wanda—spousal consortium—that occurs at work, although the same principles are applicable to the parent's child (or to the child's parental) consortium where such are recognized.<sup>3</sup> The physical harm to Wanda is the bailiwick of workers' compensation, a no-fault compensation system adopted early in the 20th century. Spousal consortium claims, on the other hand, are a matter of tort law. Remarkably, almost universally, courts hold that the deprived spouse's<sup>4</sup> consortium claim is barred when the injury to the spouse arose

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employment, as the harm will predominantly be suffered at home or in other non-employment venues. *See Omori*, 981 P.2d at 703 (permitting consortium claims based on *in utero* injury that occurred in a work-related accident); *Ledeaux*, 101 N.E.3d at 131–32 (permitting child consortium claim on similar facts to the hypothetical); *Meyer v. Burger King Corp.*, 26 P.3d 925, 930 (Wash. 2001) (*semble*).

3. We leave for another day the related matter of the effect of exclusive remedy provisions on wrongful death and survival actions, although as we suggest in our analysis of the specific language employed in those provisions, a stronger case can be made for barring wrongful death and survival actions than for consortium suits. *See infra* text accompanying notes 103–106.

4. Throughout, we use the term “deprived spouse” to refer to the spouse who claims that she suffered lost consortium, while employing “injured spouse” to refer to the spouse who suffered physical or emotional harm.

out of the latter's employment.<sup>5</sup> As far as we know, this Article is the first comprehensive effort to address this grossly unfair state of affairs.<sup>6</sup>

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5. Our research failed to identify a single state in which consortium claims are currently permitted against a spouse's employer. In two states, Pennsylvania and Utah, we found no precedent addressing the issue. One of those states, Utah, bars wrongful death claims against employers. The case adopting that bar in its concluding language is broad enough to suggest in dicta that no consortium claim exists. *See Morrill v. J & M Const. Co.*, 635 P.2d 88, 89 (Utah 1981) (“[T]he Act is the exclusive vehicle for recovery of compensation for injury or death, against the employer . . . to the exclusion of ‘any and all other civil liability whatsoever, at common law or otherwise,’ and that it bars all next of kin or dependents, or anyone else, from using any other means of recovery against employers and others named in and covered by the Act, than the Act itself.”). The Larson treatise incorrectly identifies Louisiana as a state permitting such consortium claims. *See* 9 LEX K. LARSON ET AL., *LARSON’S WORKERS’ COMPENSATION LAW* § 101.02 n.6 (Matthew Bender, rev. ed. 2019). The treatise cites *Raney v. Walter O. Moss Reg’l Hosp.*, 629 So. 2d 485 (La. Ct. App. 3d Cir. 1993), *writ denied*, 635 So. 2d 1134 (La. 1994). The case involved family members of an employee who was infected with Hepatitis B. The family members sued for their medical expenses for tests to determine whether they were also infected, for vaccinations, and for their fear of infection. The court there explicitly remarked: “The plaintiffs are not pursuing a loss of consortium claim.” *Id.* at 488. The court went on to distinguish consortium claims from the claims the plaintiffs were pursuing. Another case decided the same year reaffirmed that Louisiana does not permit consortium claims by deprived spouses of injured employees. *See Vallery v. S. Baptist Hosp.*, 630 So. 2d 861, 865 (La. Ct. App. 4th Cir. 1993), *writ denied*, 634 So. 2d 860 (La. 1994). The Larson treatise also incorrectly identifies Oklahoma as a state permitting consortium claims, citing a 1928 case that addressed a parent’s right to recover for loss of a child–employee’s “services” due to an employment injury. The Oklahoma Supreme Court in a 1983 decision made plain that a spouse’s consortium claim was barred by the exclusivity provision in the state’s workers’ compensation act. *See Rios v. Nicor Drilling Co.*, 665 P.2d 1183, 1185 (Okla. 1983). Finally, Larson cites a 1962 federal district court case in Oregon that permitted a wife’s consortium action to proceed but, following a “*But cf.*” signal, refers to an Oregon Supreme Court case holding directly contrary to the federal case. *See* LARSON ET AL., *supra*, § 1001.02D n.1 (referencing *Ellis v. Fallert*, 307 P.2d 283 (Or. 1957)).

6. Two casenotes in 1950 and 1951 discussed the seminal *Hitaffer* case, *see infra* text accompanying notes 35–49, which held that consortium claims are not barred by the exclusive remedy provision of the District of Columbia Workers’ Compensation Act. Both criticized its holding:

The consequences of the *Hitaffer* case, if it remains unimpeached, will undoubtedly be extensive. The effect of this decision on the employer is manifest. The employer will be required to satisfy judgments of varying

We proceed first with a brief and stylized explanation of the adoption of workers' compensation statutes and their scope. We then address the emergence of modern consortium claims from their historical basis that relied on the notion that harm to a wife constituted property damage for which a husband could recover. Wives, of course, had no such claims because, until the Married Women's Acts of the late 19th century, they had no right to sue on their own behalf. The initiation and development of these two different aspects of compensation for accidental injury are important for an understanding of how best to accommodate a compensation scheme with a tort claim.<sup>7</sup>

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amounts without having recourse to the certainty of workmen's compensation insurance.

Jack G. Clarke, *Note*, 36 CORNELL L.Q. 148, 154 (1950). We cannot resist responding with the observation that the employer being required to satisfy tort judgments without recourse to the certainty of workers' compensation insurance is exactly what the employer has to do with regard to any torts it commits that harm non-employees. That is why the employer almost certainly would have purchased liability insurance. See KENNETH S. ABRAHAM, *THE LIABILITY CENTURY* (Harvard Univ. Press 2008). The second note was milder in its critique:

Although the consequences may appear harsh, the workmen's compensation acts were intended to benefit the employer as well as the employee, and the consequences therefore are not necessarily absurd or illogical. Other courts construing nearly identical language have held that it clearly and unambiguously bars an action for consortium. Since the ordinary meaning of the language is not inconsistent with the policy of workmen's compensation, it would perhaps be sounder to leave correction of any injustice to legislative action.

*Note*, 35 MINN. L. REV. 423, 427 (1951) (footnotes omitted). We think this author demonstrates a failure to understand the policy of workers' compensation, which addresses injury to employees, not tortious injury inflicted on third parties by the employer.

7. Another area in which this "meshing issue" arises is when an employee is injured at work, and a third party, such as the manufacturer of industrial machinery, is liable in tort to the employee who is also entitled to workers' compensation from her employer. The question of the employee's recovery and the respective liability of employer and third party is a difficult one, complicated by the adoption of comparative responsibility and the modification of joint and several liability. See RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § C20 cmts. b-d (1998); Andrew R. Klein, *Apportionment of Liability in Workplace Injury Cases*, 26 BERKELEY J. EMP. & LAB. L. 65 (2005).

## I. THE DEVELOPMENT OF WORKERS' COMPENSATION AND CONSORTIUM

A. *Workers' Compensation*

Widespread concern about the impact of industrial workplace accidents on injured employees and their families served as the impetus for workers' compensation.<sup>8</sup> Studies conducted early in the 20th century found that over 15,000 workplace injuries in New York occurred in a single year. Employment in the railroad industry was particularly hazardous. One frequently cited statistic from the late 19th century states that a railroad brakeman had an almost 80% chance of dying prematurely.<sup>9</sup> Victims of these injuries were often left with no recourse because tort law at the time was unreceptive to workers' claims, with employers successfully asserting a trilogy of defenses.<sup>10</sup>

States began to investigate ways to help alleviate the plight of injured employees by the early 1900s. The federal government weighed in as well at the instigation of President Theodore Roosevelt, who made the issue of workplace safety a priority.<sup>11</sup> After a brief constitutional hiccup,<sup>12</sup> the

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8. See ABRAHAM, *supra* note 6, at 42–43.

9. See INTERSTATE COMMERCE COMM'N, THIRD ANNUAL REPORT 85 (1889); see also MARK ALDRICH, DEATH RODE THE RAILS: AMERICAN RAILROAD ACCIDENTS AND SAFETY 1828–1965, at 103–07 (2006); WALTER LICHT, WORKING FOR THE RAILROAD: THE ORGANIZATION OF WORK IN THE NINETEENTH CENTURY 190–97 (1983); JOHN FABIAN WITT, THE ACCIDENTAL REPUBLIC: CRIPPLED WORKING MEN, DESTITUTE WIDOWS, AND THE REMAKING OF AMERICAN LAW 3 (2004).

10. These defenses included contributory negligence and assumption of risk, which were applicable to all tort cases of the era, and the fellow-servant rule, which was peculiar to the workplace and exempted an employer from vicarious liability when the plaintiff was an employee. See ORIN KRAMER & RICHARD BRIFFAULT, WORKERS COMPENSATION: STRENGTHENING THE SOCIAL COMPACT 14–15 (1991); Lawrence M. Friedman & Jack Ladinsky, *Social Change and the Law of Industrial Accidents*, 67 COLUM. L. REV. 50, 51–53 (1967) (discussing the fellow-servant rule); Paul C. Weiler, *Workers' Compensation and Product Liability: The Interaction of a Tort and a Non-Tort Regime*, 50 OHIO ST. L.J. 825, 827 (1989).

11. See WITT, *supra* note 9, at 2–4. Roosevelt was not the first U.S. President to do so. Benjamin Harrison had repeatedly urged Congress to enact legislation to address safety for railroad employees. *Johnson v. S. Pac. Co.*, 196 U.S. 1, 19–20 (1904).

12. The Supreme Court struck down the first version of FELA that was enacted in 1906. See *The Employers' Liability Cases*, 207 U.S. 463, 492 (1908) (holding Interstate Commerce Clause did not authorize Congress to protect intrastate railroad workers). This deficiency was corrected two years later by

Federal Employers Liability Act (FELA) was put into place in 1908. To avoid what were thought to be serious constitutional issues, FELA retained a system based on fault but modified or eliminated several aspects of common law torts that foiled most injured workers' claims.<sup>13</sup> New York enacted the first comprehensive workers' compensation system in 1910, but the system was found unconstitutional as a violation of the employer's state and federal due process rights because it imposed civil liability without a showing of negligence.<sup>14</sup> In 1913, the New York state legislature passed a constitutional amendment allowing such a law; workers' compensation was thereafter upheld by the U.S. Supreme Court.<sup>15</sup> Other states introduced workers' compensation systems over the next several decades,<sup>16</sup> which are now in place in all 50 states.<sup>17</sup>

The central feature of workers' compensation is the elimination of fault from the determination of eligibility to recover for injury suffered in the scope of employment. Neither employee contributory negligence nor lack of employer wrongdoing is considered in determining an injured worker's eligibility for compensation.<sup>18</sup> The elimination of fault produced a more streamlined and efficient mechanism for compensating injured workers. With fault eliminated, injured workers would recover compensation far more frequently than they had with common law tort.<sup>19</sup> But the compensation that workers' compensation provided was less

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revising the Act to limit coverage to employees engaged in interstate railroad operations. *See* Act of Apr. 22, 1908, ch. 149, 35 Stat. 65 (codified as amended at 45 U.S.C. § 51).

13. Act of June 11, 1906, ch. 3073, 34 Stat. 232 (1906) (abrogating the fellow-servant rule and providing that slight contributory negligence would reduce, but not bar, the plaintiff's recovery).

14. *Ives v. S. Buffalo Ry.*, 94 N.E. 431 (N.Y. 1911). Price V. Fishback & Shawn Everett Kantor, *The Adoption of Workers' Compensation in the United States, 1900–1930*, 41 J.L. & ECON. 305, 319–20 (1998).

15. *N.Y. Cent. R.R. Co. v. White*, 243 U.S. 188 (1917). Wisconsin adopted the first effective workers' compensation system but employed elective, rather than mandatory, participation. *See* KRAMER & BRIFFAULT, *supra* note 10, at 16.

16. By 1917, 37 states had adopted workers' compensation. *See* KRAMER & BRIFFAULT, *supra* note 10, at 16; Fishback & Kantor, *supra*, note 14, at 307 (“most states enacted the law within a very short period in the 1910s”).

17. DAN B. DOBBS ET AL., *HORNBOOK ON TORTS* § 36.2, at 912 (2d ed. 2017).

18. *See* Michael D. Green & Daniel S. Murdock, *Employers' Liability and Workers' Compensation in the United States*, in *EMPLOYERS' LIABILITY* (Ken Oliphant ed., 2012).

19. One study found that 37% of families recovered nothing when a worker was killed on the job. KRAMER & BRIFFAULT, *supra*, note 10, at 15.

generous than the damages available in a successful tort suit.<sup>20</sup> Making workers' compensation the exclusive remedy for injured workers was critical to these compensation systems.<sup>21</sup> Thus, the employee cannot sue her employer in tort, nor can she sue co-employees for whom the employer would be vicariously liable.<sup>22</sup>

Overall, one can conceptualize workers' compensation as a global scheme that entails an employee's trading off a tort action against the employer—the exclusive remedy provision—in exchange for compensation on a no-fault basis in the event of workplace injury. As two prominent scholars of workers' compensation put it:

In essence, [workers' compensation] legislation established an *ex ante* “contract” between workers and employers, who promised to pay a specified set of benefits for all accidents arising out of or in the course of employment. . . . In return for relatively more certain and more generous average post-accident benefits under workers' compensation, however, workers forfeited their rights to common-law negligence suits.<sup>23</sup>

### B. Consortium

The roots of modern consortium claims date back to at least the 13th century when a writ existed for employers who lost their employee's services because of violence committed by a third party.<sup>24</sup> Within a few centuries, the common law developed a claim by a father for loss of a child's services, although this claim typically involved fraud or enticing the child to leave the family home rather than physical injury.<sup>25</sup> Around the same time, judges began recognizing a husband's claim for loss of his wife's services in the event of her being tortiously injured.<sup>26</sup> Notably, the basis of the claim was that the husband was entitled to the benefits of his

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20. 1 LEX K. LARSON, LARSON'S WORKERS' COMPENSATION LAW § 1.01 (Matthew Bender 2010); DOBBS ET AL., *supra* note 17, at 912–13.

21. DOBBS ET AL., *supra* note 17, at 913.

22. The employee may, however, sue “third parties”—others whose tort also caused the employee's workplace injury. *See* Klein, *supra* note 7, at 66.

23. Fishback & Kantor, *supra* note 14, at 305–06.

24. John H. Wigmore, *Interference with Social Relations*, 21 AM. L. REV. 764, 765 (1887).

25. *Id.* at 768. We focus here on negligent injury to the injured spouse, as that is the modern incarnation of marital consortium, although it also covers other bases of liability for causing physical—or emotional—injury to one spouse.

26. *Id.* at 769; W. PAGE KEETON ET AL., PROSSER AND KEETON ON TORTS § 125, at 931 (5th ed. 1984).

wife's services.<sup>27</sup> The claim was analogous to a master's suit for harm suffered due to injury of a servant.<sup>28</sup> By contrast, a wife could not make a reciprocal claim when her husband was injured, apparently for two reasons: (1) married women at the time could not sue on their own behalf, and any claim had to be prosecuted with the joinder of the husband, who was entitled to the proceeds; and (2) women had no corresponding right to the services of their husbands.<sup>29</sup> The second reason is more compelling. Even the husband's joinder would not be an absolute barrier to such a claim and indeed mirrors current practice that requires joinder of an injured and deprived spouse's claims in a single suit.<sup>30</sup>

A major development that affected the right of consortium, albeit not for decades, occurred in the latter half of the 19th century with a reform designed to attend to the disadvantageous position of married women. The Married Women's Acts provided a variety of rights to those women; the important right in these Acts for the development of consortium is that they entitle women to sue in their own rights and retain as their own property any monetary recovery obtained.<sup>31</sup> Nevertheless, as Professor Evans Holbrook reported in 1923: "The enlarged right of the wife under the Married Women's Acts is therefore pretty clear; she can generally sue for any intentional injury to the consortium, but cannot sue for a loss of consortium due to negligence."<sup>32</sup>

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27. Consortium is a marital property right "and includes the exclusive right to services of the spouse and these contemplate not so much wages or reward earned as assistance and helpfulness in the relations of conjugal life according to their station and the exclusive right to the society, companionship, and conjugal affection of each other." Jacob Lippman, *The Breakdown of Consortium*, 30 COLUM. L. REV. 651, 652–53 (1930) (quoting 8 HISTORY OF ENGLISH LAW 429, 430 (3d ed. 1923)).

28. *Id.* at 662 ("The action was one in trespass for *consortium amisit* and the recovery was as a master's for the loss of his servant's services."); DOBBS ET AL., *supra* note 17, at 718.

29. *See id.* ("Since the wife had no right to the services of her husband at common law, she had no cause of action for an interference with the marriage relationship."); Evans Holbrook, *The Change in the Meaning of Consortium*, 22 MICH. L. REV. 1, 3 (1923).

30. *See* RESTATEMENT (THIRD) OF TORTS: CONCLUDING PROVISIONS § 48A cmt. j (Preliminary Draft No. 1, 2020).

31. Holbrook, *supra* note 29, at 4.

32. *Id.* at 6. After the Married Women's Acts, some courts confronting the asymmetrical treatment of husbands and wives when spousal injury caused harm to the marital relationship corrected the discrimination by holding husbands could no longer assert consortium claims. Lippman, *supra* note 27, at 665–66; KEETON ET AL., *supra* note 26, at 932.

Thus, when the first Restatement of Torts was published in 1938, it recognized only a husband's right to consortium.<sup>33</sup> That Restatement did, however, reflect a development in the content of consortium, moving toward recognition of the relational aspect of marriage, including "society" and "sexual relations," while still retaining the historical protection for a wife's "services."<sup>34</sup>

The break in the deeply gendered history of consortium occurred in 1950 with *Hitaffer v. Argonne Co.*,<sup>35</sup> a case in which a deprived wife sued the employer of her impaired husband who was injured due to the employer's negligence. *Hitaffer* took the same tack as the Torts Restatement, recognizing that "love, affection, companionship, sexual relations, etc." were all included in the interests protected by consortium.<sup>36</sup> Dismissing the flimsy reasons courts had proffered for denying spousal consortium claims to wives, the court took a strong stand on recognizing a wife's spousal consortium claim:

It is therefore the opinion of this court that in light of the existing law of this jurisdiction, in light of the specious and fallacious reasoning of those cases from other jurisdictions which have decided the question, and in light of the demonstratable desirability of the rule under the circumstances, a wife has a cause of action for loss of consortium due to a negligent injury to her husband.<sup>37</sup>

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33. RESTATEMENT OF TORTS § 693 (1938). Section 693 is titled "Action by Husband for Harm Caused by Tort Against Wife." Although the first Restatement recognized the Married Women's Acts but ignored the implications for permitting women a complementary claim, *id.* cmt. c, at least one court had recognized a wife's right to recover for lost consortium for negligent injury to her husband. See *Hipp v. E.I. Dupont De Nemours & Co.*, 108 S.E. 318, 323 (N.C. 1921). Four years later, the North Carolina Supreme Court overruled *Hipp* in *Hinnant v. Tide Water Power Co.*, 126 S.E. 307 (N.C. 1925).

34. RESTATEMENT OF TORTS § 693. Four years before publication of the Restatement, Leon Green made a plea for precision in recognizing legally cognizable interests and specifically sought to distinguish property rights—the husband's property right to his wife's services—from relational interests, such as marriage, that provide to spouses affection, love, comradeship, and sexual relations. Leon Green, *Relational Interests*, 29 ILL. L. REV. 460 (1934).

35. 183 F.2d 811 (D.C. Cir. 1950).

36. *Id.* at 813.

37. *Id.* at 819. The Harper, James, and Gray treatise lauds the *Hitaffer* court's holding affording a consortium claim to married women: "This devastating attack on the older rule achieved wide acceptance as a realistic approach to the problem.

Within a generation, virtually every state extended a consortium claim to wives whose husbands' injuries damaged the marital relationship.<sup>38</sup> This change was reflected in the Second Restatement of Torts, which afforded a consortium claim to both spouses,<sup>39</sup> unlike its predecessor.

### III. MESHING WORKERS' COMPENSATION WITH CONSORTIUM

*Hitaffer* was also the first case that confronted the intersection between a loss of consortium claim and a workplace injury.<sup>40</sup> After resolving the matter of women's consortium claims, the court proceeded to the second issue presented: the effect of the exclusive remedy bar in the D.C. Workers' Compensation statute on Ms. Hitaffer's consortium claim stemming from her husband's injury sustained at work.

The exclusive remedy provision of the D.C. Workers' Compensation statute read:

The liability of an employer prescribed in . . . this title shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death . . . .<sup>41</sup>

Beginning its analysis, the court observed: "We would be less than candid if we did not admit that the plain and literal language of this section of the Act has such broad implications that it could be conceived to vitiate any right of action flowing from the compensable injury."<sup>42</sup> The court reasoned, "such a broad interpretation was not and could not have been

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Seldom has any single opinion been so influential." 2 FOWLER HARPER ET AL., HARPER, JAMES AND GRAY ON TORTS § 8.9, at 661 (3d ed. 2006).

38. See HARPER ET AL., *supra* note 37, 692; see also RESTATEMENT (THIRD) OF TORTS: CONCLUDING PROVISIONS § 48 A, Reporter's Note to cmt. a (AM. LAW INST., Preliminary Draft No. 1, 2020) (reporting that, in all but one state, Virginia, both spouses are afforded a consortium claim).

39. See RESTATEMENT (SECOND) OF TORTS § 69 (AM. LAW INST. 1977).

40. See *Hitaffer*, 183 F.2d 811.

41. 33 U.S.C. § 905 (1927). The District of Columbia Workmen's Compensation Act adopted the federal workers' compensation act for longshoremen. See *Smither & Co. v. Coles*, 242 F.2d 220, 221 (D.C. Cir. 1957) ("[T]he District of Columbia Workmen's Compensation Act . . . adopts as the compensation law for the District of Columbia the Longshoremen's and Harbor Workers' Act.").

42. *Hitaffer*, 183 F.2d at 819.

intended when the result would be such as to lead to the absurd and illogical consequence indicated in this case.”<sup>43</sup> The court’s concern for candor led to a less than probing consideration of the statutory language as we attempt to demonstrate below.<sup>44</sup>

Proceeding to explain why such a broad interpretation was imprudent, the court noted:

There can be no doubt but that this section is designed to make the employer’s liability under this statute exclusive of any other liability either at law or in admiralty to the injured employee or anyone suing in the employee’s right. But where a third person is suing in his or her own right on account of the breach [*sic*] some independent duty owed them by the employer, even though the operative facts out of which this independent right and correlative duty arose are the same as those out of which the injured employee recovers under the Act, the Act does not proscribe the third person’s cause of action.”<sup>45</sup>

The nature of *who* sustains the injury—here, only the non-employee wife—led the court to the conclusion that lost consortium is outside the scope of the exclusivity provision of the Workers’ Compensation Act: “There can be no doubt, therefore, the injury to the consortium is an injury to a right which is independent of any right in the other spouse and to which the defendant owes an independent duty.”<sup>46</sup> Thus, given the deprived wife’s suit for the employer’s negligence in breaching a duty to her that caused her harm, “we cannot say that the Act was designed to deprive her of her action.”<sup>47</sup>

The court based its second rationale on the fact that workers’ compensation systems provide compensation only to the injured worker:

Moreover, it would be contrary to reason to hold that this Act cuts off independent rights of third persons when the whole structure demonstrates that it is designed to compensate injured employees or persons suing in the employee’s right on account of employment connected disability or death. It can hardly be said

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43. *Id.*

44. *See infra* text accompanying notes 73–80.

45. *Hitaffer*, 183 F.2d at 819–20 (noting “in a case where the employer had secured payment under the Act to the injured employee and the employee thereafter brought an action against the third party, joint tortfeasor, that party was allowed to implead the employer in order to get contribution.”).

46. *Id.* at 820.

47. *Id.*

that it was intended to deprive third persons of independent causes of action where the Act does not even purport to compensate them for any loss. A brief examination of it will reveal that there is no provision therein for compensating a spouse for the loss of consortium. As we have already pointed out, no distinction is made as between the amount of compensation payable to married and unmarried injured male claimants, despite the fact that the latter [*sic*] was under a legal duty to support the wife, and any impairment of the ability to perform that duty is a compensable element of damages, belonging to the wife where the husband has failed to recover therefor.<sup>48</sup>

*Hitaffer* therefore concluded it was erroneous to dismiss the wife's complaint for loss of consortium, permitting her case to proceed, notwithstanding the exclusivity provision of the D.C. Workers' Compensation Act.<sup>49</sup>

Seven years after *Hitaffer*, the Court of Appeals for the District of Columbia revisited the issue. In *Smither & Co. v. Coles*,<sup>50</sup> the court overruled *Hitaffer*.<sup>51</sup> Rather than relying on the text of the statute itself, the *Smither* court dove into the justifications behind the enactment of workers' compensation statutes as a whole:

The history of the development of statutes, such as this, creating a compensable right independent of the employer's negligence and notwithstanding an employee's contributory negligence, recalls that the keystone was the exclusiveness of the remedy. This concept emerged from a balancing of the sacrifices and gains of both employees and employers, in which the former relinquished whatever rights they had at common law in exchange for a sure recovery under the compensation statutes, while the employers on their part, in accepting a definite and exclusive liability, assumed an added cost of operation which in time could be actuarially measured and accurately predicted; incident to this both parties realized a saving in the form of reduced hazards and costs of litigation.<sup>52</sup>

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48. *Id.*

49. *Id.*

50. *Smither & Co. v. Coles*, 242 F.2d 220 (D.C. Cir. 1957).

51. *Id.* at 222.

52. *Id.*

*Smither* relied on the exclusive remedy aspect of the Workers' Compensation statute's scheme to take a shot at the ruling in *Hitaffer*: "Thus, anything that tends to erode the exclusiveness of either the liability or the recovery strikes at the very foundation of statutory schemes of this kind, now universally accepted and acknowledged."<sup>53</sup> Responding to the plaintiff's argument that there could be no legislative intent to bar a wife's consortium claim because no such claim existed when the D.C. Workers' Compensation statute was enacted in 1927, the court, after acknowledging the plausibility of the claim, simply stated, "the objectives of the legislation and the statutory scheme, considered as a whole, strongly if not conclusively support the result we now reach."<sup>54</sup>

The plaintiff's best argument emphasized the *Hitaffer* reasoning that it would be "contrary to reason" for the Workers' Compensation statute to cut off independent rights of third-party non-workers.<sup>55</sup> Recall that the limited liability on which the *Smither* court relied did not extend to third parties tortiously injured by the employer or its agents. Thus, in the hypothetical with which we began, both Jim and his daughter were free to pursue their physical injury claims, notwithstanding the exclusive remedy bar.

*Smither* responded with the antiquated idea that denied a wife the right to sue because all of her rights were "merged" with her husband's, declaring:

Absent a compensable injury to the [employed] spouse there would be no claim to assert against the employer . . . under this statute, as indeed under the statutory scheme of such statutes everywhere, all the rights of "husband or wife" are merged into the exclusive remedy provided by the Act and are barred by a recovery under the Act.<sup>56</sup>

Finally, the court relied on two post-*Hitaffer* U.S. Supreme Court cases holding that a third party could not pursue a contribution claim against an

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53. *Id.*

54. *Id.* at 223 (conceding "[t]he most that can be said for this argument is that Congress did not take into account that one day, whether by judicial or legislative action, a wife might be granted the right to sue for loss of consortium on account of an injury to the husband.").

55. *See id.* at 224; *see also* *Hitaffer v. Argonne Co.*, 183 F.2d 811, 820 (D.C. Cir. 1950).

56. *Smither & Co.*, 242 F.2d at 225. *Smither* also noted that a couple of federal courts had ruled contrary to *Hitaffer* after it had been decided. *Id.*

employer for an occupational injury for which the third party was also liable.<sup>57</sup>

Today, no state permits a spouse<sup>58</sup> to pursue a consortium claim against the injured spouse's employer.<sup>59</sup> Although two courts did sanction such suits, the legislature in each state subsequently overturned that authority.<sup>60</sup> The reasoning and rationale of the courts is a bit diverse but can be summarized in four main groups. First, some courts relied on the exclusive remedy provision in the workers' compensation statute, concluding that its language bars such claims.<sup>61</sup> Second, other courts

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57. *Id.* at 224 n.16. That reasoning, as we explain *infra* text accompanying note 104, ignores a critical distinction between consortium and contribution claims: Consortium claims are for harm to the deprived spouse; contribution claims seek to recover damages already paid for harm to the impaired employee.

58. Or a child or parent of an injured employee. Over the past 40 years, a significant minority of courts have recognized parental and child consortium claims that protect the relational interests between family members. *See* RESTATEMENT (THIRD) OF TORTS, *supra* note 38, at §§ 48B & 48C. We believe that these consortium claims, where recognized, should also be permitted to proceed against employers.

59. *See* RESTATEMENT (THIRD) OF TORTS, *supra* note 38, at § 48A, Reporters Note to cmt. k (“Virtually all states that have ruled on this issue have decided that a spousal consortium claim cannot be made against an employer when the impaired spouse is covered by workers’ compensation.”). Indeed, we would take an even stronger position than the Restatement: We have been unable to find a single state that permits a spousal, parental, or child consortium claim against the employer of a family member injured at work and covered by workers’ compensation.

60. The two states are Massachusetts and New Hampshire. The development in those states is recited in *Powell v. Cole-Hersee Co.*, 529 N.E.2d 1359, 1361 (Mass. App. Ct. 1988), and *Young v. Prevue Prod., Inc.*, 534 A.2d 714, 715–16 (N.H. 1987).

61. *See, e.g.*, *Murdock v. Steel Processing Servs., Inc.*, 581 So. 2d 846, 847 (Ala. 1991) (“It is clear that § 25-5-53 [the exclusive remedy provision] provides that workmen’s compensation benefits are the exclusive remedy for an employee and his or her dependents. This includes his or her spouse. In addition, the section expressly excludes any rights and remedies of a dependent for ‘loss of services.’ Thus, a claim for loss of consortium is barred by this clause.”). With some frequency, the court made no effort to carefully consider the language in the applicable provision and its meaning, simply cursorily concluding that it barred any consortium claims. Surely, the sloppiest example of this is *Vallery v. S. Baptist Hosp.*, 630 So. 2d 861 (La. Ct. App. 4th Cir. 1993), in which the court, addressing language barring claims by dependents and relations from suing “for said injury,” wrote:

relied, in whole or in part, on the notion that the consortium claim is “derivative” and therefore the deprived spouse has no greater rights than the impaired spouse.<sup>62</sup> Frequently, courts invoked other courts’ rulings on the matter,<sup>63</sup> and some cited the comprehensive Larson treatise as

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The word “injury” in the statute’s phrases “an injury” and “for said injury” clearly refers to the injury *to the employee*. Thus, the “defendants” and “relations” of the employee cannot make negligence claims against the employer for injuries to the employee—such as Mrs. Vallery’s present claim for loss of consortium.

*Id.* at 864.

62. *See, e.g.*, *Alexander v. Morrison-Knudsen Co.*, 124, 444 P.2d 397, 400 (Colo. 1968) (relying on the ground that the consortium plaintiff’s rights “are strictly derivative,” as well as upon the statutory language); *Mergenthaler v. Asbestos Corp. of Am.*, 534 A.2d 272, 280–81 (Del. Super. Ct. 1987) (“A claim for loss of consortium is derivative to that of the injured spouse and is dependent upon the existence of a valid claim by the injured spouse for physical injury. . . . To the extent that availability of workmen’s compensation to the injured spouse bars the injured spouse from preserving a tort action for physical injuries, the spouse is also barred from recovering damages for loss of consortium resulting from those injuries.”); *Bourassa v. ATO Corp.*, 317 N.W.2d 669, 671 (Mich. Ct. App. 1982) (“Plaintiff Karen Bourassa’s claim is for loss of consortium. Because her husband’s claim is barred by the exclusive remedy provision of the Act, her claim is derivative and is also barred.”); *Sama v. Cardi Corp.*, 569 A.2d 432, 433 (R.I. 1990) (holding that because consortium plaintiff’s claim is derivative of her husband’s tort claim and because that claim is barred by exclusive remedy provision, consortium plaintiff’s claim was also barred); *Reed Tool Co. v. Copelin*, 610 S.W.2d 736, 738–39 (Tex. 1980) (holding that the spouse’s consortium claim “is derivative and that a defense that tends to constrict or exclude the tortfeasor’s liability to the injured husband will have the same effect on the wife’s consortium action.”); *Derosia v. Book Press, Inc.*, 531 A.2d 905, 907 (Vt. 1987). Unsurprisingly, the *Bourassa* court did not rely on the exclusive remedy provision in Michigan’s Workers’ Compensation statute, which provides: “The right to the recovery of benefits as provided in this act shall be the employee’s exclusive remedy against the employer for a personal injury or occupational disease.” MICH. COMP. LAWS § 418.131. Similarly, both the *Sama* court and the *Copelin* court had to rely on their derivative reasoning, as the plain terms of the Rhode Island and Texas statutes did not bar consortium claims. *See infra* text accompanying note 89.

63. *See, e.g.*, *Derosia*, 531 A.2d at 907 (referring to “decisions from other jurisdictions interpreting similar statutory provisions,” along with the derivative nature of the consortium claim and statutory language, to bar a consortium claim); *Provost v. Puget Sound Power & Light Co.*, 696 P.2d 1238, 1239–40 (1985). One state that used this reasoning to support denial of a consortium claim noted the biggest flaw with this approach: “The persuasive force of the precedent from other states, however, is diminished by the diverse statutory formulations of immunity

support.<sup>64</sup> And then, a few courts, including *Smither*, relied on the analogy to contribution and indemnity claims asserted against employers by third-party tortfeasors who were sued by an employee in tort for the same injury covered by workers' compensation.<sup>65</sup>

A fifth way—and certainly the most bizarre method—came from Kentucky, where the Supreme Court reasoned that a person's decision to take a job is protected by the federal constitutional right to privacy and thus the person's spouse must consent to waiver of any consortium claim because otherwise the spouse would have an effective veto over the party's ability to accept a job. Yes, that's actually what the court said—it based its conclusion on the hypothesis that without such a consortium waiver, employers would not hire married applicants.<sup>66</sup>

In light of the role that the statutory exclusive remedy provisions play in barring consortium claims, consideration of the precise language employed is, at this point, helpful. Recall that the workers' compensation tradeoff provides compensation to employees for accidental injury suffered within the scope of employment. Thus, there are two critical matters in most states' workers' compensation statutes barring tort claims.<sup>67</sup> The first is those persons who are barred from bringing an action.

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and exclusivity among the various states.” *McKellar v. Clark Equip. Co.*, 472 A.2d 411, 413 (Me. 1984).

64. See *Fregeau v. Gillespie*, 451 N.E.2d 870, 873 (Ill. 1983) (citing the Larson treatise for the proposition that “[w]ith near unanimity courts interpreting exclusivity provisions with this or comparable language have held that the provisions preclude actions by a spouse of the employee for loss of consortium”); *West v. Plastifax, Inc.*, 505 So. 2d 1026, 1028 (Miss. 1987) (citing 2A LARSON, WORKMEN'S COMPENSATION LAW, §§ 66.10, 66.20 (1983) for the propositions that exclusive remedy provisions such as Mississippi's bar consortium claims and that numerous other states have reached the same outcome); *Wesson v. City of Milford*, 498 A.2d 505, 507 (Conn. App. Ct. 1985) (relying on and quoting 2A LARSON, THE LAW OF WORKMEN'S COMPENSATION § 66.00); *Hartman v. Cold Spring Granite Co.*, 77 N.W.2d 651, 653, 653 n.5 (1956) (citing the Larson treatise for proposition that text writers agree that consortium claims should be barred).

65. See *Smither & Co. v. Coles*, 242 F.2d 220, 224 (D.C. Cir. 1957).

66. *Brooks v. Burkeen*, 549 S.W.2d 91, 93 (Ky. 1977).

67. The canonical Larson treatise on workers' compensation attempts a similar taxonomy of workers' compensation exclusive remedy provisions but employs only one of the dimensions we identify above, relying exclusively on the persons named whose claims are barred. See 9 LARSON ET AL., *supra* note 5, § 101.01. The first edition of the Larson treatise, published in 1952 and on which a number of courts relied in addressing whether consortium claims were barred, employed a three-part categorization of exclusive remedy provisions, but we find

Obviously, the employee should be barred from bringing an action, but third parties—such as those who would bring survival actions—should also be barred because they are surrogates for the employee’s own tort claims. Nevertheless, the more expansive the category of those barred, the broader the potential scope of claims that are excluded. If the only person barred from a tort action is the employee herself, then consortium claims, as well as wrongful death and survival actions, would not be barred. On the other hand, a provision barring “all persons” from bringing such a suit would have a far more expansive scope.<sup>68</sup> The intermediate specification of “employee”—legal representative and dependents—would best be understood as barring wrongful death or survival actions but not consortium claims.<sup>69</sup>

The second matter is the specification of what claims are barred. Workers’ compensation statutes do not bar contract claims by employees

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this categorization similarly unhelpful for a careful analysis of the statutory language. That version of Larson provided:

There are three general types of “exclusive liability” clause which, for present purposes, must be carefully identified with the cases that depend upon them; from the narrowest to the broadest, they are as follows: The Massachusetts type, which only says that the employee, by coming within the Act, waives his common-law rights; the California and Michigan type, which say that the employer’s liability shall be “exclusive,” or that he shall have “no other liability whatsoever”; and the New York type, which carries this kind of statute one step further by specifying that the excluded actions include those by such “employee, his personal representatives, husband, parents, dependents, or next of kin, or anyone otherwise entitled to recover damages, at common law or otherwise, on account of such injury or death.”

2 ARTHUR LARSON, *LARSON’S WORKMEN’S COMPENSATION LAW* § 66.10 (Matthew Bender 1952).

68. Recall that the applicable provision in the District of Columbia Workers’ Compensation Act barred claims by “employee’s spouse, widow, children, parents, dependents, next of kin, heirs, personal representatives, guardian, or any other person whomsoever.” *See supra* text accompanying note 41.

69. The Connecticut Workers’ Compensation Act so provides. *See* Conn. Gen. Stat. 31-284(a). Yet that is not how the Connecticut Court of Appeals interpreted the language. The court, upon determining the plaintiff-consortium claimant was a dependent of her spouse, concluded that the exclusive remedy provision “unambiguously” barred her claim. *Wesson*, 498 A.2d at 509 (“As noted earlier in this opinion, the immunity section is unambiguous.”). The court nowhere noted or apparently appreciated the adventitiousness of its ruling, which would presumably permit consortium claims by non-dependent spouses. The Maryland exclusivity provision bars suit by only the employee and dependents of the employee. MD. CODE ANN., LAB. & EMPL. § 9-509.

or other enumerated individuals—the workers' compensation compromise was about accidental injury to an employee. Thus, the narrowest such provision would bar all claims against the employer *for injury to the employee*. Consortium claims are not for injury to the employee, but rather for injury suffered by the spouse.<sup>70</sup> On the other hand, barring claims *for and on account of injury*<sup>71</sup> to the employee must bar claims other than simply those that concern the employee's injury, if the additional language "on account of" is to be interpreted to have meaning, as standard statutory interpretation principles provide. Finally, we note that for the vast majority of courts addressing this issue, if doubt arises as to the meaning of the exclusive remedy provision, ties go to retaining the common law claim because statutes in derogation of common law rights must be clearly expressed.<sup>72</sup>

#### IV. INTERPRETING EXCLUSIVE REMEDY LANGUAGE

Let us proceed by carefully examining the exclusive remedy language applicable in *Hitaffer* and *Smither*—something neither court did. We think the language is reasonably amenable to an interpretation that it does not bar consortium claims, but instead bars only claims by other denominated individuals who seek recovery for the employee's injury or death. If the employee dies, both a survival action and a wrongful death action would be available, absent the bar by the exclusive remedy provision. And, unlike consortium claims, wrongful death and survival actions preceded workers' compensation, having been enacted in the latter half of the 19th century.<sup>73</sup> The decedent's estate is the beneficiary of any recovery in a survival action, and the executor, administrator, or legal representative would be

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70. Notwithstanding our analysis, the Montana Supreme Court held that an employer had no liability for consortium based on an exclusive remedy provision that provided "an employer is not subject to any liability whatever *for the death of or personal injury* to an employee." See *Maney v. Louisiana Pac. Corp.*, 15 P.3d 962, 967 (Mont. 2000) (emphasis added). Moreover, in the context of § 39-71-411 (MONT. CODE ANN.), no liability "for" the injury or death means "[a]s a result of; because of" or "[a]s regards; concerning." The court did this by taking the word "for" out of context and concluding that it meant "concerning" based on a dictionary definition, thereby barring all of the claims brought by decedent-employee's legal representative. See *id.*

71. Or, alternatively, "arising out of injury" to the employee.

72. See *Danek v. Hommer*, 87 A.2d 5, 8 (1952) (Vanderbilt, C.J., dissenting) ("If a change in the common law is to be effectuated, the legislative intent to do so must be clearly and plainly expressed.")

73. DOBBS ET AL., *supra* note 17, § 28.1, at 685.

the appropriate person to pursue a survival action.<sup>74</sup> But any recovery in a survival action would consist of medical expenses, lost wages, and pain and suffering occurring before the decedent's death. Those are precisely the losses that workers' compensation covers and that the exclusive remedy bar was intended to preclude. The inclusion of a variety of family members and dependents who are barred from recovery from the employer might best, in our view, be understood to address wrongful death actions<sup>75</sup> that, depending on the precise parameters of a given state's act,<sup>76</sup> would provide recovery to dependents for support lost as a result of the death or amounts that the deceased's estate would have accumulated if she had not died prematurely.<sup>77</sup>

Once again, those are all damages provided under tort law, but those damages are superseded by the payment of workers' compensation benefits. In some states, these wrongful death claims are properly brought by the beneficiaries, which could include all family members, other dependents, and heirs. In others, the personal or legal representative brings an action, in effect, on behalf of those beneficiaries.<sup>78</sup> Today, some wrongful death actions permit recovery for non-pecuniary losses.<sup>79</sup> Unlike the pecuniary losses identified above, these losses are not derived from the deceased's earnings and are akin to the loss recognized by consortium. In

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74. *Id.* § 295, at 804.

75. The Montana exclusive remedy provision makes this point explicitly, providing that in the case of death, claims by "the employee's personal representative and all persons having any right or claim to compensation for the employee's injury or death" are barred. MONT. CODE ANN. § 39-71-411 (2019).

76. The exclusive remedy language applicable in the District of Columbia was adopted from the federal Longshore and Harbor Workers' Compensation Act, which, because it applies to all such injured employees engaged in the specified vocations, could be applicable to injuries in numerous states whose survival and wrongful death statutes would provide any right that might otherwise exist due to the death of the decedent. Hence, there is a potentially long list of family members who might be entitled to recover damages under a given state's wrongful death statutes.

77. *See* *Greene v. Westinghouse Elec. Corp.*, 573 N.E.2d 452, 453 (Ind. Ct. App. 1991) (explaining the consortium plaintiff's interpretation of the exclusive remedy provision to cover "tort suits brought by an injured employee or, if the employee dies as a result of the workplace injury, to wrongful death actions brought by the decedent employee's personal representative, dependents, or next of kin.").

78. DOBBS ET AL., *supra* note 17, § 298, at 813.

79. These non-pecuniary losses include lost society—the equivalent of consortium—and grief or anguish at the loss of one's spouse. *See id.* § 297, at 811–13.

our view, this aspect of wrongful death claims should not be swept within the exclusive remedy immunity—damages for lost consortium do not compensate for any harms that the employee could have asserted against her employer.

We hasten to add that the statutory language in the District of Columbia's Workers' Compensation Act is broader than those states that employ “for injuries or death” language.<sup>80</sup> The applicable statute in *Hitafter* barred a claim seeking damages from the employer “on account of such injury or death.” That language is ambiguous and could be understood to mean that no claims can be made that depend on injury to an employee. It might also be understood as barring claims against the employer “for such injury or death.” That statutory language, we suggest, is best interpreted as not barring a claim for a harm different from the harm the employee suffered, albeit a harm conditioned on injury or death of the employee.

Even more clearly, other workers' compensation statutes do not, by their terms, bar consortium claims. For example, the North Carolina exclusive remedy provision bars claims by only “the employee, his dependents, next of kin,<sup>81</sup> or representative,”<sup>82</sup> thereby covering claims by family members who might recover in a survival or wrongful death claim. That the statute does not bar claims by non-dependent spouses reveals that the language is best understood as limited to survival or wrongful death claims whose damages overlap with workers' compensation benefits. By contrast, common law spousal consortium claims do not overlap in any way with workers' compensation benefits. The North Carolina courts held otherwise, reasoning that this result would circumvent the purpose of the provision to limit “employers' total liability for the injury suffered by the

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80. See, e.g., ARIZ. REV. STAT. § 23-1022(A) (2019) (“The right to recover compensation pursuant to this chapter for injuries sustained by an employee or for the death of an employee is the exclusive remedy against the employer . . . .”); MONT. CODE ANN. § 39-71-411 (“an employer is not subject to any liability whatever for the death of or personal injury to an employee”); W. VA. CODE § 23-2-6 (1991) (employer “shall not be liable . . . for the injury or death of any employee, however occurring.”) Notwithstanding the language in the Arizona statute, the court of appeals found it to evince “a clear legislative intent to bar any common law right-of-action which might possibly flow from a work-related injury.” *Mardian Const. Co. v. Superior Court In & For Maricopa Cty.*, 754 P.2d 1378, 1380-81 (Ariz. Ct. App. 1988).

81. “Next of kin” is defined as the individual's closest living blood relative and thus excludes spouses.

82. N.C. GEN. STAT. § 97-10.1 (2019).

employee.”<sup>83</sup> That reasoning ignores that the employer’s liability for injury *suffered by the employee* is limited to the workers’ compensation payment, while the employer’s liability for injury *suffered by the spouse* is not so limited.<sup>84</sup>

Pennsylvania’s exclusive remedy provision bars claims against the employer “on account of any injury or death as defined in the [Workers’ Compensation Act] . . . .”<sup>85</sup> Of course, the definition of injury requires that it be suffered by an employee, and nowhere mentions loss of consortium. Texas contains the narrowest exclusive remedy provision, declaring: “Recovery of workers’ compensation benefits is the exclusive remedy of an employee covered by workers’ compensation insurance coverage or a legal beneficiary against the employer or an agent or employee of the employer for the death of or a work-related injury sustained by the employee.”<sup>86</sup> The Texas statute includes only the employee and the employee’s legal representative—the person who would pursue a survival action in the event of death of the employee—and is limited to claims “for the death . . . or work-related injury” of the employee.<sup>87</sup> Other states have similarly limited exclusive remedy provisions.<sup>88</sup>

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83. *Sneed v. Carolina Power & Light Co.*, 300 S.E.2d 563, 564 (N.C. Ct. App. 1983).

84. In addition to North Carolina, Georgia, Idaho, Indiana, South Carolina, Tennessee, and Vermont bar suits by only those who might pursue a wrongful death or survival action. GA. CODE ANN. § 34-9-11 (West 2019); IDAHO CODE § 72-203 (2019); IND. CODE § 22-3-2-6 (2019); S.C. CODE ANN. § 42-1-540 (West 2019); TENN. CODE ANN. § 50-6-108 (West 2019); 21 VT. STAT. ANN. § 622 (West 2019). Five of these states, unlike North Carolina and South Carolina, employ “on account of such injury,” rather than the North Carolina “for such injury.” *See supra* text accompanying note 80.

85. 77 PA. STAT. 411 (2019).

86. TEX. LAB. CODE ANN. § 408.001 (West 2018).

87. Texas is among the states that barred consortium claims based on the characterization of a consortium claim as derivative—an explanation that provides not much more than a conclusion. *See KEETON ET AL.*, *supra* note 26, at 938–39 (“Courts have commonly said that the consortium action is derivative and must fall with the main claim, but as they could as well have said that it was independent, this sounds more like a conclusion than a reason . . . .”); *HARPER ET AL.*, *supra* note 37, §8.9, at 657 (noting with regard to whether the negligence of the impaired spouse should be imputed to the deprived spouse, “[t]o assign, as a reason, the derivative character of [the deprived spouse’s] action is really begging the questions since it does little more than to state the result in different language”) (footnote omitted).

88. *See* R.I. GEN. LAWS § 9-1-41 (2019) (explaining workers’ compensation benefits “shall be in lieu of all rights and remedies as to such injury now existing,

## V. THE FIX AND WHY WE NEED ONE

We think the universal barring of consortium claims against negligent employers is untenable, unfair, and not mandated by the exclusive remedy provision of numerous workers' compensation statutes.<sup>89</sup> Moreover, to the extent that legislatures explicitly nullify all consortium claims, as occurred in Massachusetts and New Hampshire, they overreach the compromise reflected in workers' compensation systems.

Our fundamental objection takes us back to the core of the workers' compensation arrangement: Employees gave up their right to a tort claim and its more expansive measure of tort damages in exchange for a

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either at common law or otherwise against an employer, or its directors, officers, agents or employees; and such rights and remedies shall not accrue to employees entitled to compensation . . ."); WASH. REV. CODE ANN. § 51.32.010 (West 2019) ("Each worker injured in the course of his or her employment, or his or her family or dependents in case of death of the worker, shall receive compensation in accordance with this chapter, and, except as in this title otherwise provided, such payment shall be in lieu of any and all rights of action whatsoever against any person whomsoever."). The Rhode Island statute, which includes common law claims within its sweep, might be understood to include common law contribution claims, as well as the older loss of services claims by husbands and fathers.

89. Two exceptions are the Massachusetts and New Hampshire exclusive remedy provisions. In *Ferriter v. Daniel O'Connell's Sons*, 413 N.E.2d 690 (Mass. 1980), the Massachusetts Supreme Court held that family members were permitted to make consortium claims against their family member's employer. The statute in place at the time provided that employees waived the right to sue their employers in tort unless they notified their employers when hired that they declined to waive such right. This was a holdover from the early days of workers' compensation adoption when legislatures attempted to circumvent constitutional limitations by making the system elective and providing nudges and carrots to have both employers and employees choose workers' compensation coverage. After *Ferriter*, the Massachusetts Legislature overruled the decision with an amendment to the Workers' Compensation Act:

If an employee has not given notice to his employer that he preserves his right of action at common law as provided by this section, the employee's spouse, children, parents and any other member of the employee's family or next of kin who is wholly or partly dependent upon the earnings of such employee at the time of injury or death, shall also be held to have waived any right of action at common law against such employer for damage due to loss of consortium, parental guidance, companionship or the like, when such loss is a result of any injury to the employee that is compensable under this chapter.

MASS. GEN. LAWS ch. 152, § 24 (2019).

guaranteed but more modest compensation.<sup>90</sup> Both employers and employees gained and gave up in this global arrangement of the rights of employers and employees, which was mandated by law, to be sure, but not without support from both labor and industry when these systems were adopted.<sup>91</sup> Critically, family members were not part of this compromise and neither received compensation for their harms nor should be required to give up their tort claims against the employer of another family member.<sup>92</sup>

What the workers' compensation system does not compensate are harms to third parties.<sup>93</sup> Jim's claim, in our opening hypothetical, is not barred by workers' compensation because he is a non-employee who suffered harm, albeit proximately to his spouse's employment and her injury. Jim and Wanda's daughter, injured *in utero* at Wanda's place of employment, can recover in a tort suit against the employer. Similarly, a family member injured by asbestos brought home by a family member who works in a factory manufacturing products containing asbestos is not

90. See *supra* text accompanying notes 8–23.

91. See RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § B19 cmt. 1 (1998) (explaining that “the plaintiff–employee’s workers’ compensation benefits can be conceptualized as a settlement of tort liability between the plaintiff–employee and the employer . . . .”); Klein, *supra* note 7 (analogizing workers’ compensation tradeoff to a mandated settlement of the employee’s tort claim against the employer).

92. Remarkably, the Indiana Court of Appeals both recognized and sympathized with this argument, yet still denied a consortium claim because it felt bound by the exclusive remedy provision of the state’s workers’ compensation statute:

We agree with [consortium plaintiff] that the Act’s policy of compensating injured workers for lost wages, without distinguishing between married and unmarried employees, fails to recognize a separate loss incurred by the spouses of married workers. The Act turns away from recognizing the distinct nature of harm occasioned by injury to a married employee. In so doing, the Act fails to compensate for all harms flowing from workplace injuries. The spouse of the injured employee receives no quid pro quo.

However, we are constrained to affirm the trial court’s dismissal of Greene’s case. To create a remedy for the inadequacy of the Act is properly a function of the General Assembly.

Greene v. Westinghouse Elec. Corp., 573 N.E.2d 452, 453 (Ind. Ct. App. 1991).

93. This statement puts aside truly derivative claims, such as a survival action.

barred by the exclusivity of workers' compensation.<sup>94</sup> In all of these instances, employers pay more than workers' compensation provides to family members of employees for harms they have suffered. Yet consortium spouses receive nothing for their loss of consortium. Thus, an employer who negligently causes identical injuries to two employees, one married and the other single, will pay exactly the same amount in workers' compensation benefits to each employee. The spouse of the injured employee who suffers harm in the form of a loss of consortium receives nothing from the workers' compensation system.

To us, this is fundamentally at odds with the grand conception. Thus, we find the reasoning of the Court of Appeals for the District of Columbia in barring these consortium claims to be so short-sighted that blind-sighted might be a better characterization:

The history of the development of statutes, such as this creating a compensable right independent of the employer's negligence and notwithstanding an employee's contributory negligence, recalls that the keystone was the exclusiveness of the remedy. This concept emerged from a balancing of the sacrifices and gains of both employees and employers, in which the former relinquished whatever rights they had at common law in exchange for a sure recovery under the compensation statutes, while the employers on their part, in accepting a definite and exclusive liability, assumed an added cost of operation which in time could be actuarially measured and accurately predicted; incident to this both parties realized a saving in the form of reduced hazards and costs of litigation.<sup>95</sup>

A consortium spouse suffers sacrifice in the relationship with her spouse, but that is not balanced against any gain provided by the workers' compensation system.

Moreover, the *Smither* court's merger reasoning, set out above,<sup>96</sup> reflected antiquated rules and was downright lazy. The idea that any rights

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94. See *Quisenberry v. Huntington Ingalls Inc.*, 818 S.E.2d 805, 813 (Va. 2018) (permitting daughter of employee–father who contracted mesothelioma from take-home asbestos exposure to pursue a claim against her father's employer without any mention of workers' compensation); accord *Kesner v. Superior Court*, 384 P.3d 283 (Cal. 2016). But see *Quisenberry*, 818 S.E. 2d at 817 (Lemons, C.J., dissenting) (arguing that the plaintiff–daughter's claim should be barred because permitting suit against the father's employer “upsets the careful balance struck by the legislature in the Workers' Compensation Act”).

95. *Smither & Co. v. Coles*, 242 F.2d 220, 222 (D.C. Cir 1957).

96. See *supra* text accompanying note 56.

of a wife are merged into her husband's for purposes of a consortium lawsuit conflicts with virtually every state's Married Women's Act, which were enacted in the prior century and provided women the right to sue in their own names, freeing them from needing their spouses to pursue claims.<sup>97</sup> Relying on the idea that employees and their non-employee spouses had their interests "merged" under the Workers' Compensation Act conveniently created grounds to dismiss the claims and sidestep *Hitafter*. Although modern reasons exist for encouraging or even mandating joinder—including judicial efficiency and avoiding duplicated damages—those were far from the *Smither* court's mind.

Notably, it is true that consortium claims are conditioned on a tortious injury to one's spouse, but it is not true of the other family tort claims identified above. The tortious-injury requirement has led some courts to describe consortium claims as "derivative" and to further reason that the consortium claim cannot proceed if the exclusive remedy provision bars the injured employee's tort claim, as it plainly does. Two difficulties arise with this reasoning. First, truly derivative claims are asserted by a surrogate for the actual party who suffered injury. For example, in the insurance subrogation context, the insurer's claim is identical to the insured's claim and is brought on the insured's behalf; it is hence "derivative" and subject to any defenses that could have been raised in a suit by the insured. Or, in shareholder-derivative actions, the plaintiff-shareholders bring suit asserting a "derivative" claim belonging to the corporation and also subject to any defenses that would bar the company's claim. Consortium claims are different. The deprived spouse is not suing on the impaired spouse's behalf. The deprived spouse has suffered harm and asserts her own claim for that distinct and cognizable injury.

Second, characterizing a claim as "derivative," or alternatively as "independent" as courts often do with consortium claims, or characterizing them as both derivative and independent as they also do, or characterizing them inconsistently in different cases, or even inconsistently in the same case does not get to the core issue at stake or consider what policies are applicable.<sup>98</sup> There are good reasons to mandate that the impaired spouse

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97. Only one other jurisdiction in the country, Maryland, treats consortium claims as a right of the marital unit, instead of the right of a husband or wife individually. *See Deems v. W. Maryland Ry. Co.*, 231 A.2d 514 (Md. Ct. Spec. App. 1967). Thus, in Maryland, a claim for loss of consortium "can only be asserted in a joint action for injury to the marital relationship." *Id.* at 525.

98. An early draft of the Restatement (Third) of Torts: Concluding Provisions is critical of the use of characterizations of "derivative" or, contrarily, "independent" to resolve any of the numerous issues that arise in consortium claims:

and the deprived spouse join their claims wherever feasible, but characterizing the consortium claim as derivative or independent elides those good reasons. Whether consortium claims against employers of the impaired spouse should be permitted should be based on the applicable statute and reasons applicable to this particular issue.

Moreover, we think the statutory provisions exempting employers from tort suits when an employee is injured are, for the most part, ambiguous at best, as recited above.<sup>99</sup> And that is true of some of the more expansive exclusive remedy provisions found in workers' compensation statutes.<sup>100</sup> By contrast, consider the Kansas Workers' Compensation Act, whose narrow exclusive remedy bar specifies: "Save as herein provided, no . . . employer . . . shall be liable for any injury for which compensation is recoverable under this act . . ." <sup>101</sup> The obvious interpretation of this language is that it covers claims "for any injury for which compensation is recoverable"—namely the employee's injury—because those are the only injuries compensated by workers' compensation. That interpretation would not include an injury suffered by the spouse who is not entitled to compensation under the Act. Nonetheless, without any effort to parse the statutory language, the Kansas Supreme Court, relying on precedent that barred a wrongful death action, ruled, "the exclusive remedy provision of the Workmen's Compensation Act (K.S.A. 44-501) bars an employee or

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This terminology is quite confusing, and the various labels rarely provide a transparent and coherent explanation for resolution of the issue to which this description is applied because the characterization is a conclusion rather than an explanation.

Adding to the confusion is that the use of the term "derivative" to describe claims typically means something quite different: A derivative claim is generally a claim in which a secondary plaintiff asserts a claim on behalf of the primary plaintiff who suffered the loss in question. Thus, for example, in the insurance subrogation context, the insurer's claim is identical to the insured's claim and brought on the insured's behalf; it is hence "derivative." Or, in shareholder actions, the plaintiff shareholders assert a "derivative" claim belonging to the corporation. Consortium claims are different. The deprived spouse is not suing on the impaired spouse's behalf. The deprived spouse has suffered a distinct harm and asserts his or her own claim for that distinct and cognizable injury.

For the reasons above, labeling consortium claims as "independent" or "derivative" is unhelpful in explicating what is at stake.

RESTATEMENT (THIRD) OF TORTS: CONCLUDING PROVISIONS § 48A cmt. i (Preliminary Draft No. 1, 2020).

99. See *supra* text accompanying notes 67–88.

100. See *supra* text accompanying notes 68–72.

101. KAN. STAT. ANN. § 44-501 (West 2019).

his dependents from bringing a common-law action against the employer to recover damages resulting from injuries sustained by the employee [including consortium claims].”<sup>102</sup> We are hard-pressed to understand how language providing employer immunity covering “any injury for which compensation is recoverable” could extend to a spousal consortium claim for which compensation is not recoverable under the Workers’ Compensation Act.

As acknowledged above, wrongful death and survival actions against an employer should be barred. The recovery in those actions reflects sums that the employee would have recovered in a tort suit against her employer that, because of the employee’s death, are being recovered in a different proceeding. The employer has provided compensation for the pecuniary harm suffered by those family members in its payment of workers’ compensation benefits, which include lost wages. Moreover, the right of a father and husband to recover for “lost services” when a spouse or child was injured at work reflected the father and husband’s property right to any earnings by the family member.<sup>103</sup> As with wrongful death and survival actions, those lost services reflected loss of earnings of the employee that were compensated by the workers’ compensation deal. Not until consortium’s evolution to recognizing harm to relationships did consortium relate the independent loss of a family member to the lost society, comfort, affection, and, in the cases of spouses, sexual relations resulting from physical harm to a family member. That evolution occurred slowly, often through courts taking an expansive view of what constituted lost services, but had not solidly emerged at the time in the early 20th century when workers’ compensation was being adopted throughout the United States.

To us, common law contribution claims are similar to wrongful death and survival actions in how they should be treated by exclusive remedy provisions and do not provide an analogy for consortium. The *Smither* court, which overruled *Hitafter*, noted that “the employer is not liable for contribution to a third party.”<sup>104</sup> But contribution claims by third-party tortfeasors who were held liable in tort to an employee injured at work are seeking to recover for the damages that were traded off in the workers’ compensation compromise and, if recognized, would constitute an end run around the exclusivity bar. Employers should not be liable, in whole or in part, for the difference between workers’ compensation and tort damages. That was part of the workers’ compensation deal.

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102. *Fritzson v. City of Manhattan*, 528 P.2d 1193, 1195 (Kan. 1974).

103. *See supra* text accompanying notes 23–24.

104. *Smither & Co. v. Coles*, 242 F.2d 220, 224 (D.C. Cir. 1957).

One objection, previously noted, to the use of exclusive remedy provisions to bar consortium claims is that, in many cases, the right to recover for consortium was not established until after the workers' compensation statute was enacted. The objection seems persuasive: How, absent language explicitly adverting to unknown future claims that might develop, could the legislature be understood to bar a claim that didn't exist at the time and that thus was not known by the legislators enacting such provisions? A few exclusive remedy provisions might be understood to do so, but the vast majority do not support such a legislative intent. Yet courts confronted with this argument have sidestepped it and nevertheless concluded that such legislation does bar consortium claims.<sup>105</sup>

The *Smither* court's emphasis on the policy of limiting the employer's liability is unpersuasive. Workers' compensation limits liability of the employer for the injury to the injured worker, but the employer's liability should not be limited if it causes harm to persons other than the employee. Thus, if on a "bring your child to work day," a mother brings her daughter to work and both are injured by a negligently installed light fixture that falls, the employer's liability *to the employee* is limited to workers' compensation benefits. The employer's liability, however, is *not* limited in the sense that it must pay for the harm to the daughter.<sup>106</sup> Similarly, the employer's liability should not be limited for harm the daughter suffers because the mother's injury prevents her from providing her usual parental care to her daughter.

One can understand barring a consortium claim when it consisted of a loss of services, as it did historically before the modern development expanding consortium to cover relational harm. The property right to the injured wife's "services" when she was employed outside the home would consist of her wages to which the husband was legally entitled. In such situations, the husband was, in essence, standing in the shoes of his wife seeking recovery for what we now recognize as her harm—from which the

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105. See, e.g., *Wright v. Action Vending Co.*, 544 P.2d 82, 84 (Alaska 1975) ("Without deciding the jurisprudential question of whether the *Schreiner* case [which provided a consortium claim] created or merely recognized the existence of a right to sue for loss of consortium, we conclude that the legislature intended to cover this action under the [exclusive remedy] language of [the workers' compensation act.]").

106. See *Cushing ex rel. Brewer v. Time Saver Stores, Inc.*, 552 So. 2d 730, 732 (La. Ct. App. 1st Cir. 1989) (holding "the Louisiana *Worker's* Compensation Act was neither intended nor purports to affect the rights of an employee's child who is injured on the employee's job site" when equipment fell on the pregnant mother's abdomen).

employer should be properly shielded because, as noted above, workers' compensation includes compensation for lost wages.<sup>107</sup>

#### CONCLUSION

We think that courts across the land have erred<sup>108</sup> in holding that consortium claims cannot be made against employers whose tortious injury to an employee causes harm suffered by the employee's spouse. Those courts failed to appreciate the workers' compensation "grand bargain." That bargain addressed a deal between employers and employees on how to handle occupational injury suffered by the latter. Spouses were not part of that deal. Just as Jim, in our opening hypothetical, can recover for his physical injury, he should be permitted to recover for the form of emotional distress—loss of consortium with Wanda—he also suffered. Neither of those harms are covered by the workers' compensation bargain, and neither should be barred by the immunity provided to employers for injuries to their employees.

To a significant extent, the failure to appreciate the difference between consortium and other forms of third-party recovery from the employer conditioned on injury to an employee has led courts astray, both in their interpretation of workers' compensation statutes and in their non-statutory reasoning. Some of those claims seek to recover compensation for what the employee would be entitled to in the tort system. Thus, a third party's contribution claim against the employer seeks to recover money paid to the employee based on the employee's tort recovery against the third party. Those contribution claims should not be permitted against employers.<sup>109</sup> Their liability should be limited to the workers' compensation measure of benefits. Similarly, survival actions reflect claims for injuries suffered based on the tort system that are properly barred by the exclusive remedy provision of workers' compensation.

The same is true of claims by fathers and husbands for loss of services of their wives and children in the days before loss of services morphed into consortium claims that addressed relational wrongs. Those loss-of-

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107. See KRAMER & BRIFFAULT, *supra* note 10, at 23 ("Workers compensation provides . . . benefits that compensate for lost wages . . .").

108. The exception to this error is the two states in which legislatures overturned decisions by the courts that permitted consortium claims. See *supra* text accompanying note 60.

109. Rather, in fairness, the injured employee should bear any difference between the employer's comparative share of tort liability and the employer's workers' compensation payment to the employee. See RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § C20 cmts. b–d (1998); Klein, *supra* note 7.

services claims represented lost earnings of the wife or child—earnings that fell squarely within the workers' compensation bargain and were compensated by that system. Wrongful death claims are a bit more complicated in that they contain a hybrid of tort compensation—the earnings the deceased worker would have devoted to dependents—and harms to third parties—the equivalent of lost consortium when a spouse dies. The former is a component of damages that is properly within the employer's immunity; the latter, like consortium, is not. In interpreting statutory exclusive remedy provisions across the land, courts, including the *Hitaffer* court that permitted consortium claims, have failed to appreciate these principles.

What is surprising in this tale is how courts have universally failed to understand the matters raised in this Article. Also surprising is the lack of academic attention to this state of affairs. We have grasped for explanations of how the current law came to be and confess that the straws for which we grasped all seemed to be chimeras. Much like families who see their consortium claims dismissed because of courts' misreading or misunderstanding, we are left without sound explanation. We conclude, borrowing from Buffalo Springfield:

There's something happening here  
What it is ain't exactly clear.<sup>110</sup>

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110. BUFFALO SPRINGFIELD, *For What It's Worth* (Atco Records 1966).