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MEMORANDUM

The Common Law Doctrine of Interspousal Tort Immunity as Applied in the States

April 1976

INTERSPOUSAL TORT IMMUNITY

The Doctrine as it Presently Exists in the Fifty States

Explicit Statutory Exceptions to the Common Law Rule of Interspousal Tort Immunity.

New York

In 1937, the New York legislature enacted an amendment to Domestic Relations Law Section 57 which had the effect of abrogating a long line of judicial decisions in New York, which had adhered to the common law rule of interspousal tort immunity. This statute is presently General Obligations Law Section 3-313 and states in pertinent part:

> Right of action by or against married women, and by husband and wife against the other for torts.
>
> A married woman has a right of action against her husband for his wrongful or tortious acts resulting to her in any personal injury as defined in section thirty-seven-a of the general construction law, or resulting in injury to her property, as if they were unmarried, and she is liable to her husband for her wrongful or tortious acts resulting in any such personal injury to her husband or his property, as if they were unmarried.

Although not so explicitly stated, this section seems to be particularly aimed at remedying the problems encountered in the class of intentional torts such as assault and battery. This may perhaps be implied from the fact that the New York legislature, at the same time the above provision was enacted, also enacted Insurance Law Section 167(3) providing that no policy of insurance be deemed to insure against liability of insured because of death or injuries to his or her spouse. This was done to protect insurance carriers against collusive actions between husband and wife in auto accidents - an often stated reason for the common law rule.

As stated by the Supreme Court of New York in Dunbar v. Dunbar, 30 Misc. 2d 744, 364 NYS 2d 699, 701 (1975), an action seeking to have the above mentioned section of the Insurance Law declared unconstitutional, "The Legislature, in enacting the foregoing provisions, clearly intended on the one hand to permit one spouse to be able to maintain an action for damages for personal injuries against the other spouse for the tortious conduct of the latter, and, on the other hand, to protect insurance carriers from the possibility of fraud and collusive actions by husband and wife."

While New York seems to be the only state to have passed an explicit (as opposed to a court's interpretation of the Married Women's Property Act) statute conferring the right of one spouse to sue the other

in tort, Illinois has taken the opposite view.

In Brandt v. Keller, 109 NE 2d 729, the Supreme Court of Illinois took the position that the Married Woman's Act should be construed as abolishing the common law doctrine of interspousal tort immunity. Responding to this judicial construction, the Illinois legislature in 1957 enacted "An act to revise the law in relation to husband and wife". Today, this act is Illinois Annotated Statutes, Chapter 68, Section 1. It reads in pertinent part: "...neither husband nor wife may sue the other for a tort committed during coverture."

Hence, the legislature prohibited suits between spouses for torts! And the constitutionality of the statute was sustained in Heckendorn v. First National Bank of Ottawa, 166 NE 571 (1960).

While the Illinois cases dealt with suits arising from automobile accidents, and not intentional torts, the Illinois statute is all-encompassing.

Louisiana also has a statute which explicitly prohibits the maintenance of a suit between spouses. Louisiana Revised Statutes Section 241 states:

"Wife may not sue husband; exceptions

As long as the marriage continues and the spouses are not separated judicially a married woman may not sue her husband except for:

1) A separation of property;
2) The restitution and enjoyment of her paraphernal property;
3) A separation from bed and board; or
4) A divorce."

However, in Gremillion v. Caffey, 71 So. 2d 670 (1954) it was held that in an action for assault and battery in which Husband beat Wife while they were judicially separated but before a decree of absolute divorce, a cause of action arose and the decree of divorce ended the abatement of the right of action. Hence, the ex-wife was entitled to bring suit.

Pennsylvania also has a statute whereby it is explicitly stated that spouses may not sue one another except in a few stated circumstances similar to the Louisiana Statute (See 48 P.S. Section 111).

The statute has been discussed as recently as December 1973 in DiSirolamo v. Apanavage, 312 A 2d 382.

Hawaii

Hawaii Revised Statutes, Chapter 573 on Married Women Section 573-5 prohibits interspousal suits.

"Section 573-5 Suits by and against. A married woman may sue and

be sued in the same manner as if she were sole; but this section shall not be construed to authorize suits between husband and wife."

These five states seem to be the only ones in which there are explicit statutes dealing with interspousal tort immunity.

A. States in which there has been a relatively recent change in position.

In Missouri, the court has changed the common law rule so as to allow suits between spouses for intentional torts. In Ennis v. Truhitte, 306 S. W. 2d 549 (1957), injured Wife sued Husband's administrator for injuries incurred in an auto accident where Husband's extreme recklessness constituted willfulness. In allowing the maintenance of suit, the court stated at p. 551: "...it belies reality and fact to say there is no tort when the husband either intentionally or negligently injures his wife."

Oregon has also allowed suit in a case where there has been an intentional tort. In Apitz v. Dames, 287 P 2d 585 (1955), Husband shot and killed Wife and then killed himself. By way of allowing Wife's executor to sue Husband's estate under a wrongful death statute, the court noted that to sue under the statute, there must have been an act which constituted a tort. The court then stated that Wife would have had a cause of action for damages had she survived. As mores change, so must the common law provisions on interspousal tort immunity.

The Court reaffirmed this "intentional tort" doctrine in an auto accident case. See Kowaleski v. Kowaleski, 361 P 2d 64 (1960).

In Self v. Self, 26 Cal. Rptr. 97, 376 P 2d 65, (1962), the Supreme Court of California had an opportunity to re-examine the old common law rule of interspousal immunity even for intentional torts first enunciated in Peters v. Peters, 156 Cal. 32, 103 P. 219 (1909). The court in Self determined that Peters was no longer good law and that interspousal tort immunity would no longer exist in California, at least for intentional torts.

In Self, Husband beat his Wife to the point where she suffered a broken arm. In permitting the maintenance of a suit against Husband the court noted that the doctrine of immunity was originally based on the legal identity of Husband and Wife which no longer existed after passage of the married women's acts. Nevertheless, the immunity was continued on the theory that to allow suits would destroy the peace and harmony of the home.

By way of defeating this argument, the court quotes from Prosser on Torts (2d ed. 1955 p. 674) where it is stated: " 'This is on the bald theory that after a Husband has beaten his wife, there is a peace and harmony left to be disturbed; and that if she is sufficiently injured or angry to sue him for it, she will be soothed and deterred from reprisals by denying her the legal remedy - and this even though she has left him or divorced him for that very ground, and though the same courts refuse to find any disruption of domestic tranquility if she sues him for a tort to her property, or brings a criminal prosecution against him.' " (at p. 66

of 376 P 2d).

The court also notes that "Practically every legal writer in this field agrees that the old rule is archaic and outmoded, and that the minority rule is the better rule," (at 66 citing several law reviews and tort texts).

Morover, while Self dealt with only intentional torts, on the same day, in Klein v. Klein, 376 P 2d 70, the Supreme Court of California extended the new rule to negligent torts as well. While noting that the conjugal harmony argument had been discussed and rejected in Self, the court stated at p. 72 that " t he argument about inundating the courts with trifling suits is palpably unsound. We have not been informed that such result has followed in any of the 18 states that have repudiated the old rule. "

Furthermore, the court states that Justice Schauer's argument in Spellens v. Spellens, 317 P 2d 613, that "'the court should not decline to entertain a meritorious action against a spouse... because of the dubious apprehension that in some future case trifling domestic difficulties may become the subject of litigation,' " is a sound one.

In Brooks v. Robinson, 284 NE 2d 794 (1972), the Supreme Court of Indiana rejected the old common law rule of immunity and adopted the new rule for all torts. To meet the conjugal harmony argument, the court quoted Prosser's argument which the Self court had quoted. As for the collusive litigation argument, the court stated that the mere possibility of collusive litigation does not justify the closing of the court's doors to legitimate claims.

In Beaudette v. Frana, 173 NW 2d 416 (1969) the Supreme Court of Minnesota held "that the absolute defense of interspousal immunity in actions for torts is abrogated... " (at p. 420). However, the court noted that "the risks of intentional contact in marriage are such that one spouse should not recover damages from the other without substantial evidence that the injurious contact was plainly excessive or a gross abuse of normal privilege. " (at 420).

In Hosko v. Hosko, 187 NW 2d 236 (1971) the Supreme Court of Michigan ruled that when the legislature amended a statute which formerly read "Whenever a cause of action shall accrue to, or arise against any married woman, she may sue or be sued in the same manner as if she were sole" to "Action may be brought by and against a married woman as if she were unmarried," this evidenced a legislative intent to change the old common law rule to the modern rule where there is no interspousal immunity.

In Immer v. Risko, 267 A 2d 481 (1970) the Supreme Court of New Jersey abandoned the common law rule of interspousal tort immunity. As stated in many similar opinoins the court said: "A person would not sue his spouse if there were perfect harmony, and it is unlikely that adjudication of the rights involved will worsen the relationship. " (at 484). This case dealt with automobile accidents.

In Flores v. Flores, 506 P 2d 345 (1973) the Court of Appeals of New Mexico held that "one spouse may sue the other for intentional torts," (at 348). In this case, Husband stabbed Wife with a knife inflicting personal injuries. Damages sought included loss of wages and medical expenses. As to the argument that Wife has an adequate remedy through the criminal and divorce laws the court stated: "We fail to understand how... The criminal action enforced society's prohibition against defendant's conduct (Husband had entered a plea of guilty to aggravated battery); it did not purport to remedy the wrong done to the victim of the crime. Divorce actions, which are statutory, do not purport to provide a remedy for personal injuries," (at 347).

As for the predicted flood of trivial suits, the court stated, "The states which permit such suits do not appear to have been inundated," (at 347).

In Richard v. Richard, 300 A 2d 637 (1973), the Supreme Court of Vermont rejected an earlier line of cases and adopted the new rule. While this case dealt with an auto accident the court stated at page 641, "Despite the doleful prediction by many courts that the permitting of tort actions between Husband and Wife would result in a flood of litigation, there has been nothing to show that in the states which have permitted such action that peace and harmony of the home is disrupted to any greater extent, or that the courts are deluged with a greater volume of litigation than in the states which deny such action."

In Surratt v. Thompson, 183 SE 2d 200 (1971), the Supreme Court of Virginia stated that the common law as it exists today does not bar interspousal suits arising from a motor vehicle accident. However, the court stated at p. 202, "We of course do not decide whether a wife can maintain an action against her husband for personal injuries that do not result from a motor vehicle accident."

In Freehe v. Freehe, 500 P 2d 771, (1972), the Supreme Court of Washington overruled earlier cases which had adhered to the common law rule and adopted the new rule which abandons immunity. The court rejected the standard arguments that domestic tranquility will be adversely affected, that there is legal unity between Husband and Wife, that there is an adequate remedy in the criminal and divorce laws, that there will be a flood of trivial litigation, and that the doors will be open to collusive and fraudulent suits. The case dealt with negligence - Wife's negligent maintenance of a tractor and failure to warn Husband of it's unsafe condition.

States in Which the Policy Against Interspousal Tort Immunity has Existed for Some Time (Discussing only those states which have dealt with assault and battery.)

In Fiedeer v. Fiedeer, 140 P. 1022 (1914), the Supreme Court of Oklahoma stated that the doctrine of interspousal tort immunity does not exist in Oklahoma. In this case, Husband shot Wife in the head with a

shotgun loaded with powder and buckshot. So much physical damage was inflicted, that Wife was disabled from working for the rest of her life. The court stated at pages 1023-24: "We fail to comprehend wherein public policy sustains a greater injury by allowing a wife compensation for being disabled for life by the brutal assault of a man with whom she has been unfortunately linked for life than it would be to allow her to go into a criminal court and prosecute him and send him to the penitentiary for such assault."

In Johnson v. Johnson, 77 So. 335 (1917), the Supreme Court of Alabama held that the Married Women's acts abrogated the common law so that Wife could maintain an action against Husband for the tort of assault.

In Brown v. Brown, 89 A. 889 (1914), the Supreme Court of Connecticut held that the Married Women's Acts abolished the common law rule and allow a Wife to maintain suits in tort against her Husband. While the facts are not elaborated upon, the action in Brown was for assault and battery and false imprisonment.

In Garrett v. Garrett, 49 SE 2d 643 (1948), Husband's accomplice dragged Wife from her home to a point outside where Husband was lying in wait. Both defendants then beat her to the extent that she suffered lacerations, abrasions, bruises, and other wounds. The trial court awarded Wife $20,000 in actual damages and $5,000 in punitive damages. The Supreme Court of North Carolina affirmed the trial court although the award had been attacked as excessive. No argument was made on the issue of interspousal immunity. The law in North Carolina was clear that there was no immunity.

In Gilman v. Gilman, 95 A 657 (1915) the Supreme Court of New Hampshire held that the Married Women's Act permits a Wife to sue her husband for an assault. The court stated: "If a married woman is either injured or damaged by another's illegal act, the statute gives her a remedy even though that other is the husband; and it is, and was at the time the statute was enacted, illegal for a husband to assault his wife."

In Prosser v. Prosser, 102 SE 787 (1920), the Supreme Court of South Carolina held that a Wife may maintain suit against her husband in tort. The court stated at p. 788, "...the Code of Procedure was enacted to give a wife every remedy against her husband for any wrong she may suffer at his hands."

Aberrant States

In Windauer v. O'Conner, 485 P 2d 1157 (1971), Husband shot Wife in the head during an argument which had begun over the fact of Husband's heavy drinking. Two days later, Wife instituted divorce proceedings. The divorce was granted a few months later. Moreover, Husband was convicted of assault with intent to murder and sentenced to prison. Two months after the decree of divorce, Wife sued in tort.

The Supreme Court of Arizona stated that the subject case was not an appropriate vehicle in which to overturn the doctrine of interspousal tort immunity. The court also noted that since under Arizona law tort recoveries are community property, the problem "is a matter much better handled by legislative action on a broad front covering all affected areas of substantive law." Nevertheless, the court held "that a spouse may, after a divorce from the offending spouse, sue to recover damages for an intentional tort," (at 1158).

In Rubalcava v. Sissena, 384 P 2d 389 (1963), the Supreme Court of Utah overruled Taylor v. Patten, 275 P 2d 696 (1954) which had held that a Wife may sue her Husband for assault and battery. While Rubalcava involved an auto accident and the court was clearly concerned with collusive claims against insurance companies which possibly cause the "raising (of) insurance rates on thousands of honest persons for the benefit of the fraudulent few," nevertheless the court stated that "no basis can be found...for any distinction between intentional or unintentional torts." (at 392).

The following additional states adhere to the new rule in which there is no interspousal tort immunity. All of these cases involved auto accidents:

Alaska	Armstrong v. Armstrong, 441 O 2d 699
Arkansas	Leach v. Leach, 30 SW 2d 15
Colorado	Rains v. Rains, 46 P 2d 740
Kentucky	Layne v. Layne, 433 SW 2d 116
South Dakota	Scotvold v. Scotvold, 298 NW 266
Wisconsin	Haumschild v. Continental Casualty Co, 95 NW 2d 814
North Dakota	Fitzmaurice v. Fitzmaurice, 242 NW 526
Ohio	Lyons v. Lyons, 208 NE 2d 533
Idaho (for false arrest and false imprisonment)	Lorang v. Harp, 209 P 2d 733

Hence, there are now 27 states which have adopted the new rule.

The following states still follow the old common law rule of interspousal tort immunity:

Arizona	See above
Delaware	Short Line, Inc. v. Perez, 238 A 2d 341
District of Columbia	Jones v. Pledger, 238 F. Supp. 638 Steele v. Steele, 65 F. Supp. 329 (Assault and Battery, recognizing but criticizing rule)
Florida	Orefire v. Albert, 237 So. 2d 142
Georgia	Taylor v. Vezzani, 135 SE 2d 134
Illinois	See above
Iowa	Wright v. Daniels, 164 NW 2d 180
Kansas	Fisher v. Toler, 401 P 2d 1012
Louisiana	See above
Maine	Bedell v. Reagen, 192 A 2d 24 Libby v. Berry, 74 Me. 286 (Assault) (1883)

Maryland	Ennis v. Donovan, 161 A 2d 24
Massachusetts	Lubowitz v. Taines, 198 NE 320
Mississippi	Cases available
Montana	" "
Nebraska	" "
Pennsylvania	See above
Rhode Island	Cases available
Tennessee	" "
Texas	Cohen v. Cohen, 66 F. Supp. 312 (Assault)
Utah	See above
West Virginia	Cases available
Nevada	" "
Hawaii	HRS Section 573-5; Tugaeff v. Tugaeff, 42 Haw. 455

Hence, 23 states still retain the old common law rule.

The current tally, then, is OLD: 23
NEW: 27.

(See also: 43 ALR 2d 632 - "Right of one spouse to maintain action against the other for personal injury", and 43 Harv. L. Rev. 1030 (1930))

END