


1960

# Tort Actions between Husband and Wife

Catherine H. Hotes

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AT COMMON LAW, the legal existence of the wife was merged in that of her husband. They were regarded as one person in law, and the husband was that person. He had almost complete control over his wife, who was in a condition of dependence and was bound to obey her husband. As a result of this unity, she alone, in most cases, could not sue a third person in tort to enforce her rights; such action had to be prosecuted by husband and wife jointly. Of course, it would be absurd for a husband to join his wife in an action against himself. Nor could the husband sue the wife. By doing so, he would be suing himself because husband and wife were regarded as one.

This state of affairs continued until about 1844, when statutes known as Married Women's Acts, or Emancipation Acts, were passed in all American jurisdictions. These statutes, differing widely in language, were designed primarily to secure to a married woman a separate legal identity and a separate legal estate in her own property. Generally speaking, they confer upon married women the separate ownership and control of their own property, and the capacity to sue or be sued without joinder of the husband. The wife is made separately responsible for her own torts.

In the majority of states, the statutes have no express provision with respect to personal tort actions between spouses. Instead, they provide in general language that married women may sue separately for torts committed against them and that they may sue and be sued as though they were unmarried.[1] In most of these states, however, the courts have held that such statutes do not abrogate the common law rule of spousal immunity.[2]

* B.A., in Economics, West. Res. Univ.; and a Third-year student at Cleveland-Marshall Law School.

[1] 43 A. L. R. 2d 632, 651 (1955).

[2] Baker v. Gaffney, 141 F. Supp. 602 (D. C. D. C., 1956); Spellens v. Spellens, 49 Cal. 2d 210, 317 P. 2d 613 (1957); Owens v. Owens, 149 A. 2d 320 (Del., 1959); Wallach v. Wallach, 94 Ga. App. 576, 95 S. E. 2d 750 (1956); Hary v. Arney, 145 N. E. 2d 575 (Ind., 1957); Scholle v. Home Mut. Casualty Co., 273 Wis. 387, 78 N. W. 2d 902 (1956); (applying Kansas law); Libby v. Berry, 74 Me. 286, 43 Am. Rep. 589 (1883); Furstenburg v. Furstenburg, 152 Md. 247, 136 A. 534 (1927); Ronan v. Ronan, 159 N. E. 2d 653 (Mass., 1959); Harvey v. Harvey, 239 Mich. 142, 214 N. W. 305 (1927); Koenigs v. Travis, 246 Minn. 254, 75 N. W. 2d 478 (1956); Tobias v. Tobias, 225 Miss.

(Continued on next page)

However, the contrary result has been reached in a substantial minority of jurisdictions.[3]

The New York statute expressly allows one spouse to sue the other for personal injuries.[4] A Louisiana statute, which bars married women from suing their husband, except for certain divorce and property actions, has been construed as barring a suit for personal injuries during coverture.[5] On the other hand, the Illinois statute expressly provides that neither spouse may sue the other for a personal tort committed during coverture.[6]

In adhering to or rejecting the common law rule, the courts have stated various reasons for their holdings, but the difference in result can almost always be traced to a different interpretation of the applicable Married Women's Acts. As Sanford points out:

> The immediate problem is thus primarily a matter of statutory construction. While in a few cases the decisions have turned upon some specific language in the particular statute, on the whole the decisions have been based upon general

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392, 83 So. 2d 638 (1955); Smith v. Smith, 300 S. W. 2d 275 (Mo. App., 1957); Brawner v. Brawner, 327 S. W. 2d 808 (Mo., 1959); Conley v. Conley, 92 Mont. 425, 15 P. 2d 922 (1932); Emerson v. Western Seed and Irrig. Co., 116 Neb. 180, 216 N. W. 297 (1927); Koplik v. C. P. Trucking Corp., 27 N. J. 1, 141 A. 2d 34 (1958); Romero v. Romero, 58 N. M. 201, 269 P. 2d 748 (1954); Smith v. Smith, 205 Or. 286, 287 P. 2d 572 (1955); Johnson v. Johnson, 394 Pa. 116, 145 A. 2d 716 (1958); Oken v. Oken, 44 R. I. 291, 117 A. 903 (1934); Lillienkamp v. Rippetoe, 133 Tenn. 57, 179 S. W. 628 (1915); Crawford v. DeLong, 324 S. W. 2d 25 (Tex., 1959); Levlock v. Spanos, 101 N. H. 22, 131 A. 2d 319 (1957) (applying Vermont law); Vigilant Ins. Co. v. Bennett, 197 Va. 216, 89 S. E. 2d 69 (1955); Schultz v. Christopher, 65 Wash. 496, 118 P. 629 (1911); Poling v. Poling, 116 W. Va. 187, 179 S. E. 604 (1935); McKinney v. McKinney, 59 Wyo. 204, 135 P. 2d 940 (1943).

[3] Hamilton v. Hamilton, 255 Ala. 284, 51 So. 2d 13 (1950); Jaeger v. Jaeger, 262 Wis. 14, 53 N. W. 2d 740 (1952) (stating Arizona rule); Leach v. Leach, 227 Ark. 599, 300 S. W. 2d 15 (1957); Rains v. Rains, 97 Colo. 19, 42 P. 2d 740 (1935); Silverman v. Silverman, 145 Conn. 663, 145 A. 2d 826 (1958); Alexander v. Alexander, 140 F. Supp. 925 (D. C. S. C., 1956) (applying Florida law); Lorang v. Hays, 69 Idaho 440, 209 P. 2d 733 (1949); Brown v. Gosser, 262 S. W. 2d 480 (Ky., 1953); Priddle v. Farm Bureau Mutual Ins. Co., 100 N. H. 73, 119 A. 2d 97 (1955); Maryland Casualty Co. v. Jacek, 156 F. Supp. 43 (D. C. N. J., 1957) (applying New York law); Lamb v. Liberty Mut. Ins. Co., 5 Misc. 2d 236, 161 N. Y. S. 2d 703 (1941); Fitzmaurice v. Fitzmaurice, 62 N. D. 191, 242 N. W. 526 (1932); Lowman v. Lowman, 166 Ohio St. 1, 139 N. E. 2d 1 (1956); Courtney v. Courtney, 184 Okla. 395, 87 P. 2d 660 (1938); Pardue v. Pardue, 167 S. C. 129, 166 S. E. 101 (1932); Scotvold v. Scotvold, 68 S. D. 53, 298 N. W. 266 (1941); Taylor v. Patten, 2 Utah 2d 404, 275 P. 2d 696 (1954); Wait v. Pierce, 191 Wis. 202, 209 N. W. 475 (1926).

[4] N. Y. Dom. Rel. Law, § 57.

[5] Edwards v. Royal Indemnity co., 182 La. 171, 161 So. 191 (1935); Palmer v. Edwards, 155 So. 483 (La. App., 1934).

[6] Ill. Rev. Stat., C. 68, § 1 (1953). Boker v. Boker, 17 Ill. App. 2d 260, 149 N. E. 2d 774 (1958).

principles of statutory construction considered in the light of the social theories and interests involved.[7]

**Reasons Supporting Majority and Minority Views**

*A. Preservation of Domestic Peace*

The major argument used by the courts for supporting adherence to the common law rule of spousal immunity is that continued application of the rule is necessary to safeguard marital harmony and domestic accord.[8] Prosser criticizes this argument, doubting that denial of legal remedies will sooth an angry and aggrieved wife.[9]

Courts which have rejected the common law rule of spousal immunity have also rejected this argument as lacking in substance.[10]

*B. Province of the Legislature*

In supporting the common law rule, the courts have also frequently said that statutes in derogation of common law must be strictly construed. Actions between spouses for personal torts are not expressly provided for in the Married Women's Acts nor, say these courts, is their authorization necessarily implied.[11] If the abrogation of the common law rule is desirable, it is a problem calling for legislative action and it lies outside the sphere of proper judicial action.[12] In *Ensminger v. Ensminger*,[13] the Mis-

[7] Sanford, Personal Torts Within the Family, 9 Vand. L. Rev. 823, 826 (1956).

[8] 47 So. 2d 774, 776 (Fla., 1950). See also: Yellow Cab Co. v. Dreslin, 86 App. D. C. 327, 181 F. 2d 626 (1950); Holman v. Holman, 73 Ga. App. 205, 35 S. E. 2d 923 (1945); Sink v. Sink, 172 Kan. 217, 239 P. 2d 933 (1952); David v. David, 161 Md. 532, 157 A. 755 (1932); Bandfield v. Bandfield, 117 Mich. 80, 75 N. W. 287 (1898); Patenaude v. Patenaude, 195 Minn. 523, 263 N. W. 546 (1935); Austin v. Austin, 136 Miss. 61, 100 So. 591 (1924); Rogers v. Rogers, 265 Mo. 200, 177 S. W. 382 (1915); Emerson v. Western Seed and Irrig. Co., supra, n. 2; Kennedy v. Camp, 14 N. J. 390, 102 A. 2d 595 (1954); Lillienkamp v. Rippetoe, supra, n. 2; Morgan v. Leuck, 137 W. Va. 546, 72 S. E. 2d 825 (1952).

[9] Prosser, Torts, 674 (2d ed., 1955).

[10] Brown v. Brown, 88 Conn. 42, 89 A. 889 (1914). Lorang v. Hays, supra, n. 3. Brandt v. Keller, 413 Ill. 503, 109 N. E. 2d 729 (1952). Brown v. Gosser, supra, n. 3. Courtney v. Courtney, supra, n. 3. Scotvold v. Scotvold, supra, n. 3. Wait v. Pierce, supra n. 3.

[11] Lillienkamp v. Rippetoe supra, n. 2. Keister v. Keister, 123 Va. 157, 96 S. E. 315 (1918). Poling v. Poling, supra, n. 2.

[12] Paulus v. Bauder, 106 Cal. App. 2d 589, 235 P. 2d 422 (1951); Wright v. Wright, 85 Ga. App. 721, 70 S. E. 2d 152 (1952); Henneger v. Lomas, 145 Ind. 287, 44 N. E. 462 (1896); Karalis v. Karalis, 213 Minn. 31, 4 N. W. 2d 632 (1942); Willott v. Willott, 333 Mo. 896, 62 S. W. 2d 1084 (1933); Emerson v. Western Seed and Irrig. Co., supra, n. 2; Oken v. Oken, supra, n. 2; Comstock v. Comstock, 106 Vt. 50, 169 A. 903 (1934).

[13] 222 Miss. 799, 77 So. 2d 308 (1955).

sissippi Supreme Court said that granting a wife the right to sue her husband is fraught with such far-reaching results that it should not be made by judicial fiat, but should be granted only through legislative processes.

*C. Encouragement of Litigation*

In support of the no-torts-between-spouses view, the courts have said that to allow such actions would be to encourage baseless and trivial actions brought out of spite rather than merit. In *Thompson v. Thompson,*[14] the Supreme Court held that, under the law of the District of Columbia, a wife could not bring an action against her husband for assault and battery. To permit such an action would open the doors of the courts to accusations of all sorts by one spouse against the other, and bring into public notice claims for assault, slander, and libel, and alleged injuries to the property of the one or the other, by husband against wife, or wife against husband.

In some cases, the courts indicated their belief that, where the defendant was protected by insurance, the allowance of such actions would encourage collusion and fraud.[15] In New York, special statutory protection has been afforded insurers. It provides that no insurance policy issued shall be deemed to insure against any liability of an insured for injuries to the person or property of the insured's spouse, unless an express provision is included in the policy.[16]

However, courts adopting the rule that such actions can be maintained have said that there is no more danger of collusion in such cases than in many others and that such a contention is no basis for denying liability.[17] In *Brown v. Brown,*[18] the Kentucky court commented that it was not willing to admit that courts are so ineffectual, or the jury system so imperfect, that fraudulent claims cannot be detected and disposed of accordingly.

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[14] Thompson v. Thompson, 218 U. S. 611 (1910).

[15] Lubowitz v. Taines, 293 Mass. 39, 198 N. E. 320 (1935); Harvey v. Harvey, Mich., supra, n. 2; Smith v. Smith, Oregon, supra, n. 2.

[16] N. Y. Ins. Law, § 167 (3).

[17] Brandt v. Keller, supra, n. 10. Brown v. Gosser, supra, n. 3. Courtney v. Courtney, supra, n. 3.

[18] Supra n. 10.

*D. Availability of Other Remedies*

In those jurisdictions where spouses cannot sue each other for personal injuries, the courts have said that criminal and divorce laws afford married persons adequate remedies, and are sufficient to protect society's interest in their prevention.[19] In a Minnesota case,[20] a husband was denied the right to enjoin his wife from committing tortious acts toward him. The court said that neither husband nor wife is without an appropriate remedy, since the divorce courts are open to both parties and, where the misconduct complained of is of a criminal nature, the criminal laws will furnish adequate protection.

On the other hand, proponents of the abrogation of the common law rule have pointed out that if the right of a spouse to bring a personal injury action against the other is denied, the injured spouse has no other adequate remedy.[21] An Alabama court stated that the remedies of divorce or criminal prosecution available to a wife injured in her person by her husband were entirely illusory and inadequate.[22]

**Type of Tort**

In applying the rule of spousal disability, most of the courts have drawn no distinction between intentional and unintentional torts.[23] For example, in a Georgia case, the court ruled that since the common law was not changed by statute in Georgia, neither spouse could sue the other in tort, regardless of whether the civil action was based upon simple negligence, wilful misconduct, or wanton and malicious conduct.[24]

Oregon, however, apparently distinguishes between negligent torts and wilful torts. In the latter case, the harmony of the home has been so damaged that there is no danger that it will be further impaired by maintenance of action.[25] Missouri now permits the wife to maintain an action against the administrator of her hus-

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[19] Peters v. Peters, 156 Cal. 32, 103 P. 219 (1909); Abbott v. Abbott, 67 Me. 304, 24 Am. Rep. 27 (1877); Austin v. Austin, supra, n. 8.

[20] Drake v. Drake, 145 Minn. 388, 177 N. W. 624 (1920).

[21] Crowell v. Crowell, 180 N. C. 516, 105 S. E. 206 (1920); Courtney v. Courtney, supra, n. 3.

[22] Johnson v. Johnson, 201 Ala. 41, 77 So. 335 (1917).

[23] See Annot., 43 A. L. R. 2d 632, 636 (1955).

[24] Wright v. Wright, supra, n. 12.

[25] Smith v. Smith, Oregon, supra, n. 2 (involving action for injuries sustained in automobile accident); Apitz v. Dames, 205 Or. 242, 287 P. 2d 585 (1955) (involving action for intentional tort).

band's estate for wilful, wanton, and intentional wrongdoing in the operation of an automobile in which the wife was a passenger and the husband the driver. The court held that since these circumstances do not infringe on any reasons of policy, the Married Women's Acts and the survivors' statutes do not preclude the action.[26]

## Premarital Torts

In states where a spouse cannot sue the other spouse for personal injuries, it is generally held that the rule is applicable to premarital torts.[27] Thus, for example, in *Patenaude v. Patenaude*,[28] it was held that the fact that the tort was committed prior to marriage did not affect spousal immunity. The court said that this was the only logical conclusion. The common law immunity also applied to premarital torts. If the statute modified the common law as to suits between spouses, it changed that law as to all such suits, whether the wrong was committed before or after the marriage. But since it had previously been held that the statute did not change the common law as to torts committed during coverture, it could not be said that it did change the common law in the case at bar.

In North Carolina, however, the rule of disability has been held inapplicable to a premarital tort on the theory that a woman's liability for torts was not affected by marriage under the language of the applicable statute.[29] In a 1955 Missouri case, it was also held that a wife could maintain an action against her husband for personal injuries arising out of an automobile accident which occurred prior to the marriage, even though the action was brought after marriage.[30] In 1957, a New Jersey court held that a personal injury action by an injured passenger against the operator of the automobile did not abate when the female passenger married the male operator while the action was pending.

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[26] Ennis v. Truhitte, 306 S. W. 2d 549 (Mo., 1957).

[27] Baker v. Gaffney, supra, n. 2; Hunter v. Livingston, 125 Ind. App. 422, 123 N. E. 2d 912 (1955); Coster v. Coster, 289 N. Y. 438, 46 N. E. 2d 509 (1943) (stating Massachusetts rule); Scales v. Scales, 168 Miss. 439, 151 So. 551 (1934); Raines v. Mercer, 165 Tenn. 415, 55 S. W. 2d 263 (1932); Furey v. Furey, 193 Va. 727, 71 S. E. 2d 191 (1952); Morgan v. Leuck, supra, n. 8; Bohenek v. Niedzwiecki, 142 Conn. 278, 113 A. 2d 509 (1955) (applying Pennsylvania law).

[28] Patenaude v. Patenaude, supra, n. 8.

[29] Shirley v. Ayers, 201 N. C. 51, 158 S. E. 840 (1931).

[30] Hamilton v. Fulkerson, 285 S. W. 2d 642 (Mo., 1955). See also Berry v. Harmon, 329 S. W. 2d 784 (Mo., 1959).

> Where the underlying policy of 'domestic peace and felicity' is not factually implicated, the rule will not be mechanically applied by the courts. . . Where the reason for the immunity does not obtain, the case calls for appropriate modification of the rule.[31]

Similar decisions were reached in California and in New Hampshire in 1959.[32]

**Effect of Invalid Marriage or Annulment**

In an Indiana case involving an action for premarital seduction, the court held that, where the marriage of the parties was shown to be invalid, the rule of spousal disability was inapplicable so that the wife could bring such an action against her husband. The court added that the rule of spousal disability would be similarly inapplicable if the marriage of the parties was annulled because of the under-age of one of them, and the annulment preceded the institution of the seduction suit.[33]

However, the spousal disability rule was applied in a Massachusetts case to bar an action by a wife against her husband for negligence. It was held that the common law rule prevailed even though the marriage was annulled prior to the commencement of the wife's action. The court said that, although an annulment generally makes the marriage void for almost every purpose, there is a well-recognized exception in the case of occurrences during the period of the supposed marriage. It should be noted that the court indicated that its holding of spousal disability was tied to the fact that the marriage was annulled on the ground of fraud. Implicit in the court's opinion is the idea that, had the marriage been one prohibited by law there would not have been spousal disability.[34]

The spousal disability rule was also applied in a Texas case to bar a tort action by a wife against her husband for malicious prosecution and false imprisonment, notwithstanding that at the time she brought the action, the marriage had been annulled. The court took the view that whatever cause of action the wife

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[31] Koplik v. C. P. Trucking Corp., supra, n. 2.

[32] Foote v. Foote, 339 P. 2d 188 (Calif., 1959); Morin v. Letourneau, 156 A. 2d 131 (New Hampshire, 1959).

[33] Henneger v. Lomas, supra, n. 12.

[34] Callow v. Thomas, 322 Mass. 550, 78 N. E. 2d 637 (1948); but cf. Langley v. Schumacker, 46 Cal. 2d 601, 297 P. 2d 977 (1956), where wife could maintain action against former husband for his fraud in marrying her with secret intention not to consummate marriage, even though she secured annulment on the ground of such fraud.

had, accrued when the tortious acts were committed, but the marital relationship barred the cause of action from accruing.[35]

**Effect of Divorce**

It is well settled that the common law rule of spousal disability presupposes the marital relationship and has no applicability to torts committed after divorce against a former spouse. Where an interlocutory decree of divorce had been entered, but before the entry of the final decree, a California court held that the entry of the interlocutory decree did not sever the marital bonds. So spousal disability still applied.[36] On the other hand, although recognizing the District of Columbia rule of spousal disability, a federal District Court in *Steele v. Steele*[37] held that a wife might sue her husband for assault he committed upon her after a decree of absolute divorce had been entered, but before the expiration of the six-month period prior to the effective date of the decree. The court said that, although the marriage was not entirely dissolved, the status of husband and wife lacked its original character. In fact, the court added, the marriage relationship which gives rise to the principle of spousal disability did not continue until the expiration of the six-month period but was held in suspended animation.

In the case of a spouse's post-divorce suit for personal injuries caused by the other spouse during coverture, the courts agree that the spousal disability rule bars the suit,[38] based on the theory that no cause of action arose during coverture and a subsequent divorce cannot create a cause of action where none existed at the time the events occurred. The courts also rely on the contention that all of the rights of the parties were determined in the divorce proceeding and settled by the divorce decree. However, a Louisiana court took a different view in *Gremillion v. Caffey*[39] and held that, since a divorce dissolves the bonds of matrimony, it terminates a wife's incapacity to sue her husband for a tort committed during coverture.

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35 Lunt v. Lunt, 121 S. W. 2d 445 (Tex. Civ. App., 1938).

36 Paulus v. Bauder, supra, n. 12.

37 65 F. Supp. 329 (D. C. D. C., 1946).

38 Abbott v. Abbott, supra, n. 19; Koenigs v. Travis, supra, n. 2; Callow v. Thomas, supra, n. 34; Bandfield v. Bandfield, supra, n. 8; Nickerson v. Nickerson, 65 Tex. 281 (1886); Lunt v. Lunt, supra, n. 35; Schultz v. Christopher, supra, n. 2; Wallach v. Wallach, supra, n. 2.

39 71 So. 2d 670 (La. App., 1954).

## Summary

About one-third of the states have abrogated the common law rule of spousal disability. Only in New York has a statute been enacted which expressly provides that one spouse may bring a personal injury action against the other.[40] Florida[41] and Kentucky[42] have only recently abandoned the common law rule.

> . . . We may view with no more than historical interest Lord Bacon's statement in his Abridgement, Title Baron and Femme B., that: "The husband hath by law, power and dominion over his wife, and may keep her by force within the bounds of duty, and may beat her, but not in a violent or cruel manner." And only the more hardy among legal writers have the temerity to quote the statement even for that purpose.[43]

And, in 1957, a California court recognized the existence of the common law rule in California but suggested that it may be abandoned:

> The rule was originally formulated by this court in reliance upon a now outmoded common law rule, and if this court becomes convinced that the rule is unwise it should see fit to change it.[44]

The courts in some of the recent cases have attempted to formulate a rule which would secure all the social interests involved rather than adhere to either the inflexible rule of disability or the equally inflexible rule of no disability.

It is the virtue of the common law that as mores changes, the law will also change.[45]

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40 Supra, n. 4.

41 Alexander v. Alexander, supra, n. 3.

42 Brown v. Gosser, supra, n. 3.

43 Ibid., at 484.

44 Spellens v. Spellens, supra, n. 2, 633.

45 Apitz v. Dames, supra, n. 25. See also Taylor v. Patten, supra, n. 3.