Missouri Law Review

Volume 53
Issue 3 *Summer 1988*

Article 8

Summer 1988

Administration of Tort Claims between Spouses, The

Craig Ritchie

Follow this and additional works at: https://scholarship.law.missouri.edu/mlr

 Part of the Law Commons

Recommended Citation

Craig Ritchie, *Administration of Tort Claims between Spouses, The*, 53 Mo. L. Rev. (1988)
Available at: https://scholarship.law.missouri.edu/mlr/vol53/iss3/8

This Note is brought to you for free and open access by the Law Journals at University of Missouri School of Law Scholarship Repository. It has been accepted for inclusion in Missouri Law Review by an authorized editor of University of Missouri School of Law Scholarship Repository. For more information, please contact bassettcw@missouri.edu.

THE ADMINISTRATION OF TORT CLAIMS BETWEEN SPOUSES

Townsend v. Townsend[1]

S.A.V. v. K.G.V.[2]

In 1986, the Missouri Supreme Court abandoned the doctrine of interspousal tort immunity with its decisions in *Townsend v. Townsend*[3] and *S.A.V. v. K.G.V.*.[4] These cases place Missouri in accord with the majority of states and are philosophically and equitably progressive. Nevertheless, trying to administer disputes arising between spouses or ex-spouses may lead to judicial headaches.

Before *Townsend*, when one spouse sued the other for an intentional tort committed during the marriage, the plaintiff was routinely denied recovery. Likewise, prior to *S.A.V.*, a plaintiff was not able to bring a successful negligence action against his or her spouse. In both cases, the defendant, generally an ex-spouse, hid behind the protective skirt of the common law doctrine of interspousal tort immunity.

Overturning nearly seventy years of precedent,[5] the Supreme Court of Missouri unequivocally rejected the doctrine of interspousal tort immunity in *Townsend v. Townsend* and its sister case, *S.A.V. v. K.G.V.* The *Townsend* court said: "It 'belies reality and fact to say there is no tort when the husband either intentionally or negligently injures his wife', or vice versa."[6] The *Townsend* court held that "a spouse may maintain an action against the other for an intentional tort."[7] In *Townsend*'s sister case, *S.A.V. v. K.C.V.*, the court drove the final nail into the coffin of the interspousal tort immunity doctrine in holding that interspousal immunity was no longer a bar to negligence actions.[8] Taken together, *Townsend* and *S.A.V.* totally abandon what the court in *S.A.V.* called the "archaic doctrine of spousal immunity."[9]

But Justice Donnelly was not prepared for this step forward. In his *Townsend* dissent he urged judicial restraint: "the question of abolishing inter-

---

1. 708 S.W.2d 646 (Mo. 1986) (en banc).
2. 708 S.W.2d 651 (Mo. 1986) (en banc).
3. 708 S.W.2d 646 (Mo. 1986) (en banc).
4. 708 S.W.2d 651 (Mo. 1986) (en banc).
5. For a history of Missouri cases pertaining to interspousal tort immunity, see Comment, *Interspousal Tort Immunity in Missouri*, 47 MO. L. REV. 519 (1982).
6. *Townsend*, 708 S.W.2d at 649 (quoting Justice Hollingsworth's dissent in Brawner v. Brawner, 327 S.W.2d 808, 819-20 (Mo. 1959) (en banc) (Hollingsworth, J., dissenting)).
7. *Townsend*, 708 S.W.2d at 650.
8. *S.A.V.*, 708 S.W.2d at 652.
9. *Id.*

spousal immunity should be decided by the people or by their elected representatives and not by this court."[10]

Now that Missouri has abandoned the doctrine of interspousal immunity, its courts must endure new challenges in the supervision of tort claims between spouses or ex-spouses. This Note examines several potential problem areas.

The proponents of the interspousal tort immunity doctrine often cite the possibility of fraudulent claims as a reason for upholding the immunity.[11] Most courts' concern in this regard is that spouses might act collusively in "trumping up claims" against one another. This is even more troublesome where the real defendant is one spouse's liability insurer. For example, in *Lyons v. Lyons*,[12] an Ohio court noted:

> There is a real danger of fraud or collusion between the spouses in such suits against each other, where insurance is involved. . . . In truly adversary cases, fraud is likely to be uncovered because of the desire of the defendant to avoid the loss. Where insurance is involved, the risk of loss is removed, and both spouses stand to gain from a decision adverse to the defendant. This creates a strong inducement to trump up claims and conceal possible defenses.[13]

In *Hamilton v. Fulkerson*,[14] the Missouri Supreme Court addressed the possibility of fraudulent claims in interspousal tort actions. It said "the danger of fraudulent and trivial claims is no more real than that danger in litigation between other parties, and the courts and juries are as able to deal with trivial, fraudulent, and fictitious claims between spouses as well as with such claims between other litigants."[15]

This presupposes, however, that the parties settle the claim by adjudication. What if, on the contrary, the parties settle the claim prior to going to trial? One answer lies in legislation directing the courts how to treat the settlement. For instance, the legislature may want to legislate to prevent insurance companies from having to indemnify the insured where there has been no adjudication.[16]

Another alternative is to simply do nothing and allow the insurance carrier to decide, as it presently does, whether to settle the claim or go to court. If the insurance company suspects fraud, it can choose not to settle. In addition, it can choose not to defend or indemnify its insured. If the company decides not to indemnify, the insured may sue the insurance company based on the

---

10. *Townsend*, 708 S.W.2d at 651 (Donnelly, J., dissenting).
11. Annotation, *Modern Status of Interspousal Tort Immunity in Personal Injury and Wrongful Death Actions*, 92 A.L.R.3D 901, 921 (1979).
12. 2 Ohio St. 2d 243, 208 N.E.2d 533 (1965).
13. *Id.* at 245, 208 N.E.2d at 535-36.
14. 285 S.W.2d 642 (Mo. 1955).
15. *Id.* at 647.
16. This author suggests that such a statute could read: "No liability insurance company shall be forced to indemnify the spouse (or ex-spouse) of the insured for damages allegedly caused by its insured without an adjudication of the facts by a civil court."

insurance contract. This result would enable courts to decide on a case-by-case basis whether the plaintiff and the defendant joined together to defraud the insurance company. Under this approach, only in cases in which the insurance company suspects fraud will an adjudication be necessary. In the absence of fraud, the insurance company may either settle the claim or adjudicate it based on the merits. Regardless of whether the insurance company eventually indemnifies the insured, the injured spouse will probably join the insurance company in the lawsuit.

This problem could become moot (or more complicated) if the injured spouse sues for an intentional tort. Most insurance agreements provide that the insurer will not defend nor indemnify the insured for intentional acts.[17] Caselaw interprets such contractual language to mean that the insurance company does not have to "defend or indemnify the insured" if the act was "a dangerous act from which harm was almost certain to result and was such as to raise an inference of an intention to harm."[18] A finding that the insured was under the influence of alcohol or marijuana (as may be the case in many interspousal tort cases) does not preclude the finding of intent.[19]

By now insurance carriers know of their obligation to defend their insured against tort actions brought by his or her spouse (at least in negligent tort actions). As a result, the insurance companies may either raise their premiums or attempt to contract around this liability by expressly excluding such coverage from the insurance contract.

The abandonment of interspousal tort immunity also raises the issue of whether a party can join a tort claim in a dissolution of marriage proceeding.[20] Missouri caselaw has suggested that a plaintiff may join additional claims, such as for breach of contract[21] and an accounting[22] in a divorce proceeding. In *Coffey v. Coffey*,[23] for example, the court permitted a husband to join with his claim for divorce a claim for an accounting of certain personal property. The *Coffey* court held that "[t]he joinder in plaintiff's petition was proper and salutary in keeping with the modern spirit of liberality in pleadings."[24]

---

17. For example, California Insurance Code § 533 provides: "An insurer is not liable for a loss caused by the willful act of the insured; but he is not exonerated by the negligence of the insured, or of the insured's agents or others." CAL. INS. CODE § 533 (West 1972).

18. Travelers Ins. Co. v. Cole, 631 S.W.2d 661 (Mo. Ct. App. 1982).

19. *Id.* at 664; Hanover Ins. Co. v. Newcomer, 585 S.W.2d 285, 289 (Mo. Ct. App. 1979).

20. *See generally* Baron, *Joinder of Interspousal Claims in Dissolution Proceedings*, 43 MO. B.J. 19 (1987).

21. Sturgis v. Sturgis, 663 S.W.2d 375, 385 (Mo. Ct. App. 1983).

22. Coffey v. Coffey, 485 S.W.2d 167, 172 (Mo. Ct. App. 1972); Builderback v. Builderback, 241 Mo. App. 508, 511-12, 244 S.W.2d 377, 379 (1951).

23. 485 S.W.2d 167 (Mo. Ct. App. 1972).

24. *Id.* at 172; *see also* State *ex rel.* Stone v. Ferriss, 369 S.W.2d 244 (Mo. 1963) (en banc). In *Ferriss*, the court also looked to Rule 88.08 for guidance. It said: "In accordance with [Rule 88.08], it is now permissible to join other justiciably equita-

The *Coffey* court noted that section 509.060 of the Missouri Revised Statutes states: "The plaintiff in his petition . . . may join either as independent or alternative claims as many claims either legal or equitable or both as he may have against an opposing party."[25] The court considered the supreme court's adoption of Rule of Civil Procedure 88.08[26] to deal expressly with the joinder of claims in dissolution actions.[27] In 1973, however, a supreme court order repealed Rule 88.08 and Missouri Revised Statutes Chapter 452 replaced the rules concerning divorce and dissolution.[28] No statute directly corresponds to Supreme Court Rule 88.08. Whether this was an intentional omission or merely an oversight by the legislature is unknown.

In *Sturgis v. Sturgis*[29] the court relied on Missouri Supreme Court Rule 55.06(a) which provides "[a] party asserting a claim to relief as an original claim . . . may join, either as independent or as alternate claims, as many claims, legal or equitable, as he has against an opposing party."[30] The court, stating the rule "applies to dissolution actions,"[31] held that under the rule a plaintiff may join a contract action in a divorce proceeding.[32] Even though Rule 88.08 no longer exists, it appears as though Missouri courts still allow a plaintiff to join at least a breach of contract action with his or her claim for a divorce. Further, because the *Sturgis* court cited *Coffey* with approval,[33] it also appears that Missouri courts will allow a plaintiff to join an action for an accounting to the divorce proceeding.

The question remains, however, whether Missouri courts will read *Sturgis* and *Coffey* to allow joinder of any cause of action, including a tort action, with a divorce proceeding.[34] Some states, such as Texas, do allow such joinder. In *Mogford v. Mogford*,[35] the Texas court of appeals allowed a wife to join a tort action against her husband with her divorce action. The Texas court relied on the Texas Rules of Civil Procedure,[36] which are modeled after Federal Rules

---

ble issues between the parties plaintiff and defendant with an action for divorce." *Id.* at 250.

25. Mo. Rev. Stat. § 509.060 (1969). Matters of procedure are now covered by Supreme Court Rules (also referred to as Missouri Rules of Civil Procedure).

26. Rule 88.08 provided: "In a petition for divorce or separate maintenance, the provisions of these rules with respect to joinder of separate claims and causes of action shall be permitted." Mo. R. Civ. P. 88.08 (repealed 1973).

27. 485 S.W.2d at 171.

28. Mo. Rev. Stat. ch. 452 (1987).

29. 663 S.W.2d 375 (Mo. Ct. App. 1983).

30. *Id.* at 385.

31. *Id.*

32. *Id.*

33. *Id.*

34. *See generally* Baron, *Joinder of Interspousal Claims in Dissolution Proceedings*, 43 Mo. B.J. 19 (1987).

35. 616 S.W.2d 936 (Tex. Ct. App. 1981).

36. According to the *Mogford* court, Texas Rule of Civil Procedure 5(a) provides: "A plaintiff in his or her petition may join as independent claims any or as many claims either legal or equitable or both as he may have against the opposing party."

8(e) and 18 on joinder of claims. The rules allow the plaintiff to join as many claims as he or she has against the defendant.[37]

Will Missouri follow the *Mogford* approach? Missouri has adopted Missouri Rules of Civil Procedure 55.06(a) and 55.10,[38] which, like the Texas Rules of Civil Procedure, coincide with the Federal Rules. Based on the courts' reasoning in *Sturgis* and *Coffey*, coupled with Missouri's "modern spirit of liberality in pleadings,"[39] Missouri courts may very well permit plaintiffs to join tort claims against their spouse in divorce proceedings.

If a plaintiff is *entitled* to join a tort claim in a dissolution proceeding, is that joinder *required*? Although unresolved in Missouri, the Wisconsin courts have addressed this issue. In *Stuart v. Stuart*[40] the court held that a tort action subsequent to a divorce proceeding was not barred by res judicata, equitable estoppel, or waiver.[41] The Wisconsin court based this determination in part on the distinction between the right to a jury trial in a tort action and the lack of that right in a divorce proceeding:[42]

> In light of a party's right to maintain a tort action against a spouse and the inadequacies of the divorce forum to fully address such a claim, we conclude that it would be contrary to public policy to require a party to join a tort claim in a divorce action. Indeed, public policy mandates that a party be permitted to commence a tort action subsequent to a divorce judgment. If a legal claim, such as tort, is required to be joined with an equitable claim, such as divorce, a party has a right to a jury trial on the legal claim. If, however, a party voluntarily joins such claims, the right to a jury trial on the legal claim is lost. Wisconsin does not require mandatory joinder of claims or compulsory counterclaims. Thus, if an abused spouse chooses not to commence a tort action against his or her marital partner prior to divorce, the spouse must be permitted to maintain a tort action subsequent to divorce to preserve the right to a jury trial.[43]

If joinder is required an injured spouse cannot bring a tort action after

---

Mogford, 616 S.W.2d at 940. Texas Rule of Civil Procedure 48 provides: "A party may state as many separate claims as he or she has regardless of consistency and whether they are based on legal or equitable grounds or both." TEXAS R. CIV. P.

37. *Id.*

38. Missouri Supreme Court Rule 55.06(a) provides: "A party asserting a claim to relief as an original claim, counterclaim, cross-claim, or third-party claim, may join, either as independent or as alternate claims, as many claims, legal or equitable, as he has against an opposing party." MO. R. CIV. P. 55.06.

Rule 55.10 provides that "[a] party may also state as many separate claims or defenses as he has regardless of consistency and whether based on legal or equitable grounds." MO. R. CIV. P. 55.10.

39. Coffey v. Coffey, 485 S.W.2d 167, 172 (Mo. Ct. App. 1972).

40. 140 Wis. 2d 455, 410 N.W.2d 632 (Ct. App. 1987).

41. *Id.* at 467, 410 N.W.2d at 638.

42. *Id.*

43. *Id.* at 465-66, 410 N.W.2d at 637 (citations omitted).

the divorce.[44] He or she must then choose between "three equally unacceptable alternatives":[45]

> (1) Commence a tort action during the marriage and possibly endure additional abuse; (2) join a tort claim in a divorce action and waive the right to a jury trial on the tort claim, or (3) commence an action to terminate the marriage, forego the tort claim, and surrender the right to recover damages arising from spousal abuse.[46]

The *Stuart* court, in addressing the joinder of tort and divorce actions, said that "[a]lthough joinder is permissible, the administration of justice is better served by keeping tort and divorce actions separate."[47]

The *Stuart* court went on to note that in tort claims many interests are at stake, including those of the insurance company. Due to this, tort actions are often drawn out over long periods of time. Allowing or requiring parties to join tort claims in a divorce action might "unduly lengthen the period of time before a spouse could obtain a divorce and result in such adverse consequences as delayed child custody and support determinations."[48]

Missouri courts will have to balance the benefits of allowing joinder against the disadvantages expressed in *Stuart*. Despite the many advantages of joining multiple claims, Missouri, like Wisconsin, may disallow such joinder due to these difficult public policy considerations.[49]

If joinder of tort claims and a dissolution action is not required, or if an injured spouse decides to pursue his or her tort claim before the divorce, Missouri courts must decide how damages to an injured spouse should be awarded in that pre-divorce proceeding. Naturally, the award should be such that it will not benefit the tortfeasor. In Missouri, proceeds of a personal injury settlement, and their increase in value, are considered marital property.[50] Nevertheless, the law is unclear as to how an award from an interspousal suit is to be classified.

In *Freehe v. Freehe*,[51] the Supreme Court of Washington fashioned a scheme for awarding damages that minimizes the extent by which a tortfeasor in a community property state can be enriched.[52] The court said that damages

---

44. *Id.*
45. *Id.* at 638, 410 N.W.2d at 637.
46. *Id.*
47. *Id.*
48. *Id.*
49. "Whether or not Missouri . . . will [allow] divorce litigants to also pursue tort claims presents a more challenging and complex proposition than the addition of claims based on a contract or for an accounting and is certain to be the subject of future appellate discussion." Baron, *Joinder of Interspousal Claims in Dissolution Proceedings*, 43 Mo. B.J. 19, 19-21 (1987).
50. Trapani v. Trapani, 684 S.W.2d 500 (Mo. Ct. App. 1984). *Contra* Gloria B.S. v. Richard G.S., 458 A.2d 707 (Del. Fam. Ct. 1982) (personal injury awards are not marital property).
51. 81 Wash. 2d 183, 500 P.2d 771 (1972).
52. *Id.* at 192, 500 P.2d at 777.

should be awarded to the injured spouse in three parts: (1) special damages to reimburse the "community" for out-of-pocket expenses related to the injury; (2) general damages for one-half the loss of future earnings, which would have been community property, as separate property; and (3) general damages in full for pain and suffering, emotional distress, and the like as separate property.[53] By classifying the award in this manner, the tortfeaser spouse will be precluded from benefitting from his or her tortious acts, except for recovering one-half of the special damages. As to these special damages, the court said:

> The fact that the tort-feasor spouse is thereby spared his or her community share of these expenses is . . . outweighed by the facts that these damages are strictly compensatory in nature, inure directly to the benefit of the injured spouse, and that any reduction in the damages recoverable would most directly harmfully affect the injured spouse.[54]

Could Missouri, a non-community property state, follow this approach? Section 452.330 of Missouri Revised Statutes provides how a court is to classify property as either marital or non-marital.[55] This statute establishes a presumption that any property acquired during marriage is marital property. The statute also, however, provides five specific categories of non-marital property.[56]

Nixon v. Nixon,[57] held that since money received in a personal injury case did not fit specifically into one of the five non-marital property categories,[58] it was a marital asset subject to equitable distribution in a dissolution proceeding.[59] In *Nixon*, however, the tortfeaser was a third party and therefore, it is unclear whether Missouri courts will interpret awards based on interspousal suits to be marital property. To characterize the award as marital property would clearly be an unfair result, as the tortfeasor could potentially receive a windfall from his or her own wrongful acts.[60] To avoid this result, the legislature should create another category of non-marital property for awards in interspousal suits.

Further, all money judgments, except those for alimony, support, or main-

---

53. *Id.*
54. *Id.*
55. MO. REV. STAT. § 452.330 (1986).
56. Those categories include: (1) acquired by gift, bequest, devise, or decent; (2) acquired in exchange for property acquired by gift, bequest, devise or descent; (3) acquired by a spouse after a decree of legal separation; (4) excluded by valid agreement of the parties, or (5) the increase in value of property acquired prior to the marriage. *Id.* § 452.330(2).
57. 525 S.W.2d 835 (Mo. Ct. App. 1975).
58. *Id.* at 839.
59. *Id.*
60. A Missouri court "possesses broad discretion in the determination of the identity of marital property and its division." Trapani v. Trapani, 684 S.W.2d 500, 503 (Mo. Ct. App. 1984). Nevertheless, this problem of identification can be avoided simply by characterizing the award as separate property. The easiest way to achieve this is to carve out another exception under MO. REV. STAT. § 452.330(2) (1986).

tenance are usually dischargeable in bankruptcy.[61] Some courts, however, have held that judgments for intentional acts are not dischargeable in bankruptcy.[62] If the party joins the tort claim in the divorce proceeding, he or she might wish to request the court order that the tortfeasor provide the tort award by way of a lump sum maintenance award. If the court does so, it avoids the possibility that the tortfeasor can discharge the debt in bankruptcy.

Finally where both parties are domiciled in Missouri, the tortious acts occur in Missouri, and all of the marital property is located in Missouri, no problems should arise as to whose law controls. However, complications may arise when one of the parties is domiciled in a state that still recognizes the interspousal tort immunity doctrine or the tortious act occurs in such a state. Because some states still recognize the immunity, whether a spouse will recover may depend on whose law controls. This choice of law issue, while of great importance, is beyond the scope of this Note. The Restatement (Second) of the Conflicts of Laws provides some guidance.[63]

These are merely some of the considerations facing the Missouri courts with the abandonment of the interspousal tort immunity doctrine. As is often the case, the court faces a difficult task in administering its new law. As one author has noted, "[t]o be certain whatever the future holds, it promises to be an exciting one."[64]

CRAIG RITCHIE

---

61. In Henson v. Henson, 366 S.W.2d 1 (Mo. Ct. App. 1984), the court held that where a property settlement agreement is substantially for alimony, maintenance or support, the husband's obligation thereunder is not dischargeable in bankruptcy. *Id.* at 5. *See* Bankruptcy Act § 17, 11 U.S.C. § 35 (1898), *amended by* 11 U.S.C. § 523(a)(5) (1978).

62. *E.g.*, Koch v. Segler, 331 S.W.2d 126 (Mo. Ct. App. 1960) (a judgment for malicious prosecution could not be discharged in bankruptcy, pursuant to Bankruptcy Act § 17(a), 11 U.S.C. § 35(a) (1898), *amended by* 11 U.S.C. § 523(a)(6) (1978)).

63. The Second Restatement states that in tort cases the law to be applied is "the local law of the state which . . . has the most significant relationship to the occurrence and the parties." RESTATEMENT (SECOND) OF CONFLICTS OF LAWS § 145 (1971). Missouri has adopted the "most significant contacts test" for tort actions. Kennedy v. Dixon, 439 S.W.2d 173 (Mo. 1969) (en banc).

In Pennington v. Dye, 456 So. 2d 507 (Fla. Dist. Ct. App. 1984), a Florida appellate court said "[s]ince Florida now follows the significant relationships test as set forth in the Restatement (Second) of Conflicts of Laws (1971), it is appropriate to look to that authority in making a choice of law decision involving the issue of interspousal immunity." *Id.* at 509. The *Dye* court, applying the principles set forth in the Restatement, held that Ohio clearly had the most significant relationship to the accident. As reasons for its finding, the court noted that the parties both resided in Ohio, the insurance policies were issued in Ohio, and the marital relationship (which the immunity doctrine sought to protect) continued to exist in Ohio. *Id.* at 510.

64. Baron, *Joinder of Interspousal Claims in Dissolution Proceedings*, 43 Mo. B.J. 19, 21 (1987).