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Indiana Law Journal

Volume 10 | Issue 5 Article 3

2-1935

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Recommended Citation
Farage, John J. (1935) "Recovery for Torts Between Spouses," *Indiana Law Journal*: Vol. 10: Iss. 5, Article 3.
Available at: http://www.repository.law.indiana.edu/ilj/vol10/iss5/3

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RECOVERY FOR TORTS BETWEEN SPOUSES

By Donald J. Farage*

Effect of the Marital Status on Contracts and Crimes at Common Law

A brief survey of the legal attributes surrounding the spouses at common law may be helpful in discussing present problems involving the marital status. One very soon learns that many of the difficulties and concepts which have a role in the field of contracts and crimes, where marital status is involved, also appears prominently in the tort field.

The early concept that, "upon marriage, a man and woman merged, in legal contemplation, and became one, that one being the husband" was so

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18 (C. C. A. 7, 1929) 32 F. (2d) 7.

19 (1933) 5 Fed. Supp. 382.

20 (1930) 202 Wis. 470, 232 N. W. 848.

21 Accord, Peters v. Prudential Insurance Co., (1929) 133 Misc. 780, 233 N. Y. S. 500. Contrary results, on this point, were reached in Taylor v. Prudential Insurance Co., (1931) 253 N. Y. S. 55, and Price v. Prudential Insurance Co., (1929) 98 Fla. 1044, 124 So. 817.

22 Leidenger (Bernier) v. Pacific Mutual, (1932) 139 So. 629.

23 Pacific Mutual v. Fishback, (Wash., 1933) 17 Pac. (2d) 841; American Home Foundation v. Canada Life, (1931) 260 N. Y. S. 106 (citing Metropolitan v. Conway, (1930) 252 N. Y. 449, 169 N. E. 642, leading case on the point).

24 Monroe's Admr. v. Federal Union Life, (Ky., 1933) 65 S. W. (2d) 680.

25 North American Acc. Ins. Co. v. Pitts., (1925) 213 Ala. 102, 104 So. 21; Brown v. Pacific Mutual, (C. C. C. 5, 1925) 8 F. (2d) 996.

26 Curtis-Wright Flying Service v. Glose, (C. C. A. 3, 1933) 66 Fed. (2d) 710.

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well established at common law that its authoritative source is difficult of ascertainment. On the basis of this "unity" theory, at any rate, it was firmly established at common law, that a married woman could not contract for herself so as to be able to pursue a legal remedy on the contract, for any breach by the other party.[1] It followed, therefore, that just as a wife couldn't contract with a stranger, she could not contract[2] with her husband or be his valid grantee.[3] Likewise, a husband could not recover on a contract made with his wife.[4]

In the field of crimes, the common law carried the "unity theory" so far that a wife could not be guilty of a crime in respect to property of her husband.[5] As for the husband, upon his marriage all the wife's personal property (except her separate, equitable estate) became his to dispose of at pleasure, as well as all personal property subsequently acquired by the wife.[6] Therefore since, he owned all of the wife's property, he could never be guilty of stealing or embezzling it.

Curiously, however, the common law did not adhere rigidly to the unity theory so far as crimes against the person of the other spouse were concerned. A dictum was uttered by Blackburn in Philips v. Barnet[7] to the effect that from the criminal standpoint, spouses were separate persons. This dictum was very generally followed.[8] However, traces may still be found in a number of cases where a spouse is absolved of guilt for what was otherwise a crime against the person of the other spouse on the strength of the unity theory.[9] The general trend, however, was to abandon the unity theory in cases of crimes against the person.

As for the much talked about "right" of a husband at common law to chastise his wife, it is difficult to ascertain definitely the source of the theory. Coleridge in the case of In re Cochrane,[10] attributes the dicta to Bacon. At any rate, Queen v. Jackson,[11] definitely settled the law that no such right of chastisement, on the part of the husband, exists. That rule has been followed in the United States.[12]

The Effect of the Marital Relation at Common Law upon Tort Actions Brought By and Against Strangers

Just as a wife's right to sue a third party on a contract was recognized only if the husband joined in the suit, so the wife's right to sue a third party for torts was upheld only if her husband joined as plaintiff.[13] But this

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1 Prat v. Taylor, K. B. Croke's Reports, Eliz. 61 (1791). See Blackstone Comm. 442, 443; Coke Litt. 1126.

2 Gay v. Kingsley, 11 Allen 345 (1865).

3 Firebrass on Demise of Jane Symes (widow) v. Pennant, 2 Wilson 254 (1763).

4 See dicta in Gay v. Kingsley (note 2, supra), and Firebrass v. Pennant (note 3, supra).

5 Regina v. Featherstone, 6 Cox. Cr. Cases 376 (1854) (larceny); Rex v. March, 1 Moody Cr. Cases 182 (1828, arson).

6 Jordon v. Jordon, 52 Me. 320 (1864).

7 1 Q. B. D. 436 (1876).

8 State v. Lankford, 6 Boyce (Del.) 594 (1917, infecting spouse with venereal disease); Gross v. State, 135 Miss. 624 (1924, assault); People v. Meli, 193 N. Y. S. 365 (husband abetting in rape on wife); State v. Fulton, 149 N. C. 485 (slander); State v. Oliver, 70 N. C. 60 (whipping wife).

9 Rex v. Masters, Sayer's Cases 122 (1754, libel); Regina v. Clarence, 16 Cox Cr. Cases 511 (1888, husband infecting wife with gonorrhea).

10 8 Dowling's Practice Reports 630.

11 1 Q. B. D. 671 (1891).

12 State v. Oliver, 70 N. C. 60.

13 Anderson v. Anderson, 11 Ky. 327 (1875). See Rogers v. Smith, 17 Ind. 323 1861).

procedural difficulty, in the way of the wife's suit, was not present in cases where the wife sued for torts committed against her separate equitable property.[14] In such cases, she could sue without joining her husband with her. Of course, the husband could assume control of any chose in action accruing to the wife (except those pertaining to her separate estate) and reduce them into possession by suit or dispose of such choses in action by assignment or release,[15] even without the wife's consent. As for damages indirectly suffered by the husband for injuries to the wife by strangers, resulting in the loss of the wife's services, the husband could and had to sue alone; the wife could not be joined.[16]

So much for cases where the spouses were plaintiffs. In the reverse situation where the spouses are made defendants, the cases fall into two groups, first, those where the wife committed a tort against the plaintiff before marriage; secondly, where the wife committed the tort after marriage.

Bearing in mind that, upon marriage, all of the wife's property became the husband's,[17] the common law rule, as to torts committed by the wife before marriage, seems reasonable. It was well settled in those cases that though the duty was substantively the wife's, the suit had to be brought against the husband and wife jointly and judgment could be enforced against the property of either spouse.[18] However, if the husband died, the action could be brought against the wife alone.[19] This indicates that coverture afforded only a temporary, procedural disability or immunity from suit.

As for torts committed by the wife after marriage, in general, the husband was not liable where the wife's acts were not done in his presence nor under his advice or direction.[20] However, though the husband could not be sued alone for torts of the wife committed in his absence, he could be joined with the wife as defendant.[21] In fact, in suits against the wife for such torts, the husband had to be joined.[22]

Where the wife's acts were done in the presence of the husband, the earlier common law rule raised a presumption of coercion on the part of the husband, rendering the wife a mere innocent agent.[23] Even before married women's statutes, this presumption began to find disfavor and to break down.[24] The advent of the Married Woman's Statutes, which will be dealt with at greater length hereafter, had a further destructive effect on this presumption of coercion, so that all that remains of it is that the wife is permitted to show that she was in fact coerced; but the prima facie presumption has well disappeared.[25] Of course, where the husband directs or instigates

14 Willis v. White & Co., 150 N. C. 199 (1909); Adams v. Sater, 19 Ind. 418 (1862).

15 Ballard v. Russel, 33 Me. 196 (1851).

16 Rogers v. Smith, 17 Ind. 323 (1861); Berger v. Jacobs, 21 Mich. 215; Matteson v. N. Y. Central R. R., 35 N. Y. 487.

17 Jordon v. Jordon, (note 6 supra).

18 Hawk v. Harmon, 5 Riney (Pa.) 43 (1812) where the court upheld the writ even though it charged *both* spouses with a trespass in fact committed by the wife alone before marriage. Also Hubble v. Fogartie, 3 Rich. (S. C.) 413 (1831).

19 Woodman v. Chapman, 1 Camp. 189 (1808).

20 Hinds v. Jones, 48 Me. 348 (1861) (tort of wife as executrix de son tort, committed without husband's knowledge).

21 Fowler v. Chichester, 26 Ohio St. 9 (1874); Bell v. Bennett, 21 Ind. 427 (1863).

22 Whitmore v. Delano, 6 N. H. 543 (1834); Heckle v. Lurvey et ux 101 Mass. 344 (1869); Bell v. Bennett, supra note 21, at page 428.

23 Lee Commonwealth v. Burk, 11 Gray (Mass.) 437 (1858).

24 Lee State v. Shee, 13 R. I. 535; also Wagener et ux v. Bill et ux, 19 Barb. 321 (N. Y. 1855) where the court held that the presumption of coercion was only prima facie and might be repelled, so that the case had to be submitted to the jury.

25 Blakeslee v. Tyler, 55 Conn. 397 (1887). But see Dressler v. State, 194 Ind. 8 (1923).

the commission of a tort by the wife, he is liable even though the act is done in his absence.[26]

Just as in the cases of torts committed by the wife before marriage, she could be sued alone after the husband died, so she could be sued alone after his death for torts committed by her after marriage (unless she was a mere innocent agent); and likewise suit might be continued against the wife alone where the husband died pending the prosecution of the suit against the husband and wife jointly.[27] Divorce after a tort committed by the wife during marriage had a siimlar effect; the husband could not thereafter be joined in a suit against the ex-wife.[28]

As for the liability of a wife after coverture for the torts of her servant committed during the wife's coverture, it would seem that, the marriage relation no longer subsisting, the ex-wife should enjoy no greater immunity than for her own direct torts. One Rhode Island case[29] seems to go contra in holding that the ex-wife is not liable for the torts of her servants committed during her marriage. At first blush this decision would seem to indicate that the court considered marriage as a substantive rather than a mere procedural incapacity. However, the court rests its decision on the argument that there was no valid contract of agency between her and the servant during the marriage and, therefore, no liability from any agency relationship can arise. While the court undoubtedly is wrong in assuming that there can be no liability as master without a valid contract subsisting between master and servant, the emphasis which the court placed on this ground dispels the notion that the court looked upon marriage as a permanent disability. It seems a more proper explanation of the case to say that the court was really stressing contractual disability during coverture, rather than pressing the question as to the extent of the permanency of the wife's immunity from tort liability because of the marital relationship.

With this general background of the legal incidents and attributes attaching to the spouses in respect to third persons, let us now pursue our principal inquiry,—the question of suits between the spouses themselves.

In theory, suits between husband and wife may be variously classified. In point of time, four situations might be enumerated, viz.: (a) Suits where the cause of action, if any, arose prior to marriage and suit was brought during marriage; (b) Suits where the cause of action, if any, arose before marriage and suit was brought after termination; (c) Suits where the cause of action, if any, arose during marriage and suit was brought during marriage; finally (d) Suits where the cause of action, if any, arose during marriage and suit was brought after termination.

Another obvious classification of tort cases between spouses may be based on the interest affected. Some torts affect property primarily, others the person and still others affect both property and the person.

Further, suits may be in equity or at law, either for specific relief or for substituted relief by way of damages.

The possible combinations are many. But while these classifications should and would be helpful, there is a lamentable paucity of cases upon many of the variations; especially are the cases few which deal with the subject before the Married Women's Acts. Those few cases that are to be found, moreover, usually fail to articulate any legal bearing which the particular variation of the problem may have in deciding the particular case. Finally, the individual importance of these elements (i. e. time of bringing the action, place of suit, whether in equity or at law, etc.) varies greatly.

[26] Handy v. Foley, 121 Mass. 259 (1876).
[27] Baker v. Braslin, 16 R. I. 635 (1889).
[28] Capel v. Powell, 17 Common Bench Reports 743 (New Series), (1870).
[29] Ferguson v. Neilson, 17 R. I. 81 (1890).

Therefore, whatever the merits of any classifications in determining what should be the law, they will not be very useful in determining how the cases actually have been decided. A rather convenient mode of approach will perhaps be afforded by first seeing what the cases have held and then observing the arguments relied on by the courts and the factors which consciously or subconsciously influence the decisions of the courts.

Suits Between Spouses at Common Law, Before Married Women's Statutes

As we have seen in the discussion of suits between the wife and third parties, there was always a procedural difficulty that attached to such suits in that the husband had to be joined with the wife in order for her to sue or be sued.[30] This same procedural difficulty, operating as an incident of the unity theory, obviously was present (before the Married Women's Acts) where suits were between the spouses. This difficulty disposed of the great bulk of tort cases between spouses at common law, and served no doubt to keep many cases from the courts. As Blackburn said[31] in 1876:

"It is not difficult to see why such an action has not been brought before. There could be no question of bringing it except where the marriage was dissolved by divorce for . . . before dissolution of the marriage, the objection on account of parties would of itself prevent the action."

However, even before the Married Women's Statutes, a more basic and substantive ground was announced than this procedural difficulty, upon which a denial of relief in suits between spouses might be rested. The first case to announce the substantive grounds was Philips v. Barnet.[32]

A woman after divorce sued her former husband for alleged assaults and batteries which occurred during coverture. No Married Women's Act was yet in operation. The court held that the action would not lie. Blackburn said:

"I was at first inclined to think, having regard to the old procedure and form of pleas in abatement, that the reason why the wife could not sue her husband was a difficulty as to parties; but I think that when one looks at the matter more closely, the objection to the action is not merely with regard to the parties, but a requirement of law founded upon the principle that husband and wife are one person."

Field, who concurred with Blackburn, said:

"I think it clear that the real substantial ground why the wife can not sue the husband, is not merely a difficulty in the procedure but the general principle of the common law that husband and wife are one person."

Again in Abbott v. Abbott[33] a wife after a divorce sued her husband for assaults and false imprisonment in an insane asylum, the acts having been done during coverture. Here too there was no operative Married Woman's Act. Peters, J., cited and followed Philips v. Barnet in denying recovery. The court said:

"We are not convinced that it is desirable to have the law as plaintiff contends it to be. There is no necessity for it. . . . The criminal courts are open to her. She has the privilege of the writ of habeas corpus, if unlawfully restrained. As a last resort, if need be, she can prosecute at her husband's expense, a suit for divorce.

"If the wife can sue husband, he can sue her. If an assault was actionable, then would slander and libel and other torts be. Instead of settling, a divorce

[30] Anderson v. Anderson, supra note 13; Hawk v. Harmon and Hubble v. Fogartie, supra note 18.

[31] Philips v. Barnet, 1 Q. B. D. 436 (1876).

[32] Id. See also Barnett v. Harshbarger, 105 Md. 411, 412.

[33] 67 Me. 304 (1877).

would unsettle all matters between married parties. The private matters of the whole period of married existence might be exposed by suits. . . . With divorces as common as they are now-a-days, there would be new harvests of litigation. If such a precedent was permitted, we do not see why any wife surviving the husband, could not maintain a suit against his executors or administrators . . . and this would add a new method by which estates could be plundered."

Despite the fact that these cases were decided before Married Women's Statutes, they have apparently acquired the position of leading cases and their position is often referred to and is followed by the weight of authority under the Married Women's Acts in cases (which we will discuss presently) involving injuries to personality.

Married Women's Statutes As Affecting Property

"Enabling Acts," or "Married Women's Acts" or "Emancipation Acts" of the nineteenth century were designed primarily to secure to married women, a right to a separate estate, and to make this a legal estate. The estates created by these statutes were modelled after the equitable separate estate. However, most statutes have gone further and declare all property acquired after marriage by married women to be their own, free from the control of the husband, and free from liability for his debts. Many statutes give married women a more or less unlimited power to convey or contract.[34]

[34] The following extracts are typical examples of married women's statutes:

(a) Ind. Ann. Stat. (Burns, 1929) § 8751:

"A married woman may bring and maintain an action in her own name against any person or body corporate for damages for any injury to her person or character the same as if she were sole; and the money recovered shall be her separate property, and her husband, in such case, shall not be liable for costs."

(b) Kansas Comp. Laws of 1879 Ch. 62:

"The property, real and personal, which any woman in this state may own at the time of her marriage and rents and profits thereof and any property coming to her by descent, devise or bequest or gift of any person but her husband, shall remain her sole and separate property notwithstanding her marriage, and not be subject to disposal of her husband or liable for his debts.

"A married woman may bargain, sell and convey realty and personalty and enter any contract with reference to same as any married man can do.

"Any married woman may carry on any trade or business and perform any labor or services on her sole and separate account; and earnings shall be her sole and separate property.

"A married woman may sue and be sued in the same manner as if she were unmarried."

(c) Iowa Code—Section 2202:

"A married woman may own in her own right, realty and personalty acquired by descent, gift, or purchase, and manage, sell, convey and devise same by will to same extent and in like manner that her husband can property belonging to him."

Section 2211:

"A wife may receive wages of her personal labor and maintain an action therefor in her own name and hold same in her own right; and she may prosecute and defend all actions at law and in equity for the preservation and protection of her rights and property as if unmarried. Neither husband nor wife is liable for debts or liabilities of the other incurred before marriage and except as herein otherwise declared, they are not liable for the separate debts of the other; nor are wages, earnings or property of either liable for separate debts of the other."

Section 2562:

"A married woman may in all cases sue and be sued without joining her husband with her, to the same extent as if she were unmarried, and an attachment or judgment in such action shall be enforced by or against her as if she were a single woman."

(d) Maine R. S. 1857 c 61 Para. 3:

"A married woman is authorized to prosecute and defend suits at law or in equity for the preservation and protection of her property, as if unmarried, or may do it jointly with her husband."

In general, most of the statutes of the various states have much in common. Essentially, they all give married women a separate estate which is legal. Beyond that there are differences which might be briefly summarized as follows: (1) Some statutes allow married women to sue or be sued only in respect to her separate estate; (2) Some statutes expressly preclude the right to sue a spouse; (3) Some statutes don't allow married women to sue or be sued by a third person alone in her own name for personal torts; (4) Some statutes expressly give married women the same right to sue or be sued as though they were sole; (5) Some statutes, in express terms say that spouses may sue each other.

At any rate, to repeat, courts are almost entirely in accord under the statutes in giving the wife enforceable property rights against the husband. There is very little difficulty today in the way of laying down as a fairly unanimous rule, the proposition that spouses may sue each other in respect to property rights. If any difficulty at all is raised in these property cases, it is only as to the question of whether such suit shall be brought at law[35] or whether the remedy shall be sought in equity.[36] Cases can be found upholding, in suits by the wife against the husband, almost every kind of property interest including suits to quiet title,[37] suits to impose constructive trusts,[38] actions of replevin,[40] waste,[41] and ejectment.[42]

(e) Mississippi Code of 1906 Section 2517:

"Married women are fully emancipated from all disability on account of converture; and the common law as to the disabilities of married women and its effect on the property rights of the wife is totally abrogated, and marriage shall not impose any disability or incapacity on wife as to ownership, acquisition or disposition of property which she could lawfully do if she were not married; but every woman now married or hereafter to be married, shall have the same capacity to acquire, hold, manage, control, use, and dispose of all property and to make any contract in reference thereto and to bind herself personally and to sue and be sued, with all the rights and liabilities incident thereto as if she were not married."

Section 2518:

"Husband and wife may sue each other."

(f) Mass. G. L. c. 209 Paragraphs 2, 4, 6:

"The common law disabilities of married women as to making of contracts are removed so that they can contract, sue and be sued in the same manner as if single, subject however to the limitation that contracts and suits between husband and wife are not permissible, but stand on the same footing as heretofore."

(g) N. Y. Act of 1860 (Amended by Act of 1862): Section 7

"And any married woman may bring and maintain an action in her own name for damages against any person or body corporate for any injury to her person or character, the same as if she were sole."

(h) Pa. Act of June 8, 1893 P. L. 344 (Para. 3) as amended by Act of March 27, 1913, Pd. 14:

"Hereafter a married woman may sue and be sued civilly in all respects and in any form of action and with the same effect and results as an unmarried person, but she may not sue her husband except in a proceeding for divorce or in a proceeding to protect and recover her separate property; nor may she be arrested or imprisoned for her torts."

35 Howe v. Blander, 21 Vt. 315 (1849); Smith v. Gorman, 41 Me. 405 (1856); Plotkin v. Plotkin, 125 Atl. (Del.) 455 (1924).

36 Minier v. Minier, 4 Lans. 421 (N. Y. 1871).

37 Porter v. Goble, 88 Iowa 565 (1893).

38 Heintz v. Heintz, 56 Tex. Civ. Appeals 403.

39 Healey v. Healey, 1 K. B. 938 (1915).

40 Howland v. Howland, 20 Hun 472 (N. Y. 1880).

41 Feiler v. Kear, 126 Pa. 470 (1889).

42 Smith v. Smith, 133 Atl. 860 (N. J. Eq. 1926).

Similarly many states allow the husband to enforce property rights as against the wife.[43]

The tort cases which afford the most difficulty and confusion since the Married Women's Acts are those where the wrongful act affects the person rather than property. To those cases we shall now turn our attention.

Tort Actions Between Spouses Since the Married Women's Acts to Vindicate Rights of Personality

Since in most jurisdictions, it became settled at an early date that the Married Women's Statutes gave the wife a right to sue in respect to her separate property, an attempt was made to recover for injuries to personality by classifying an action for damages for personal injuries as an action dealing with the wife's separate property.

In Peters v. Peters[44] a wife sued her husband for assaults and batteries committed by the husband during marriage. The section of the code relied on for recovery by the wife read:

"Should either husband or wife obtain possession or control of property belonging to the other, either before or after marriage, the owner of the property may maintain an action therefor, or for any right growing out of same in the same manner and extent as if they were unmarried."

The wife claimed that a right to sue for an injury is property and that where this right of action exists in favor of the wife, it is her property for which she may sue.

The court quickly disposed of the wife's argument and held there could be no recovery, saying that plaintiff assumed the very thing to be established, i. e. that the right to sue is a property right. The court proceeded to interpret the statute as inapplicable in cases of personal injuries.

The leading case on the question is perhaps Thompson v. Thompson.[45] There the question of whether the wife might recover from the husband for personal intentional injuries was flatly raised. The wife sued her husband for assaults during marriage. The court of the District of Columbia overruled the wife's demurrer to the husband's plea of coverture of the wife. On appeal to the Supreme Court of the United States the judgment below was affirmed. Justice Day said:

"The statute[46] was not intended to give a right of action against the husband, but to allow the wife to maintain actions of tort which at common law must be brought in the joint names of herself and husband."

In the course of the opinion, the court referred to Philips and Barnet with approval.

As was intimated in the discussion of that case, earlier in this paper, the rule laid down in that case seems to be the great weight of authority after the Statutes in personal injuries cases. Thompson v. Thompson no doubt did much to lend it further strength, judging from the number of cases and jurisdictions which cite and follow Thompson and Thompson, invariably mentioning Philips v. Barnet and Abbott v. Abbott. Numerous cases where

[43] Lombard v. Morse, 155 Mass. 136 (1891—to enforce a trust); Niles v. Niles, 143 Ky. 94 (1911—partition); Mason v. Mason, 66 Hun 386 (1892—conversion); Notes v. Synder, 4 F. (2nd) 426 (1925—replevin).

[44] 42 Iowa 182 (1875); Miller v. Miller, 44 Pa. 170 in accord. See also Cardamone v. Cardamone, 9 D. & C. 723.

[45] 218 U. S. 611 (1910).

[46] A typical one (see supra, note 34).

the wife sued the husband for assaults and batteries are in accord[47] with the Thompson case. In addition, the same rule has been followed in actions for false imprisonment,[48] slander,[49] libel[50] and negligence.[51] New York[52] and Pennsylvania[53] are among the leading states following the view.

Minority View As To Torts Affecting the Person

Despite the overwhelming weight of authority, in point of number and importance of jurisdictions, which denies recovery between spouses for personal wrongs, there is a definite minority of jurisdictions which go the whole way of allowing recovery in cases of torts affecting the person as well as for torts in respect to property. Connecticut is the principal state which gives relief for personal wrongs not only when intentional[54] but also when the defendant husband injured the wife through negligence.[55]

Taking the same stand as this state are Alabama,[56] Arkansas,[57] North Carolina,[58] Oklahoma,[59] South Carolina[60] and Wisconsin.[61]

We shall presently attempt to indicate the reasoning of the minority as well as the majority jurisdictions, in an effort to explain the divergency of views. At this point, the writer desires to indicate merely that there is a decided minority which does allow recovery in cases of torts affecting the person, be they intentional or negligent.

Two more situations remain to be alluded to in outlining the trend of the law in tort cases involving the marital status. First, how far is an employer of a spouse liable to the other spouse for an injury inflicted by the employee spouse on the other during the course of employment? Second, how far is one spouse vicariously liable to the other for torts committed by agents of the defendant spouse?

Liability of Employer of One Spouse for Torts Inflicted on Other by the Employee Spouse

With the exception of New York,[62] no states which refuse to allow recovery for personal injuries as between the spouses directly, permit a spouse to recover from the employer of the spouse who inflicted the injury. The three principal cases which thus deny recovery against the employer

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47 Peters v. Peters, 156 Cal. 32; Dishon v. Dishon, 187 Ky. 497; Libby v. Berry, 74 Me. 286; Strom v. Strom, 98 Minn. 427; Brandfield v. Brandfield, 117 Mich. 80; Smith v. Smith, 14 D. & C. 466 (Pa. 1926); Speer v. Sykes, 102 Tex. 451.

48 Rogers v. Rogers, 265 Mo. 200.

49 Clark v. Clark, 11 Fed. (2nd.) 871.

50 Faris v. Hope, 298 Fed. 727.

51 Blickenstaff v. Blickenstaff, 167 N. E. 146, (Ind. App. 1929); Furstenburg v. Furstenburg, 152 Md. 247; Austin v. Austin, 136 Miss. 61; Woltman v. Woltman, 153 Minn. 217.

52 Schultz v. Schultz, 89 N. Y. 644 (1882) reversing 27 Hun 26 where the wife recovered.

53 Smith v. Smith, supra note 47.

54 Brown v. Brown, 88 Conn. 42 (1914—assault and battery).

55 Bushnell v. Bushnell, 103 Conn. 583 (1925).

56 Johnson v. Johnson, 201 Ala. 41 (1917 assault).

57 Fitzpatrick v. Owens, 124 Ark. 167 (1916 where the court went so far as to allow the wife's administrator to recover from the husband for killing the wife.)

58 Roberts v. Roberts, 185 N. C. 566 (negligence).

59 42 Okla. 124 (assault and battery 1914).

60 Prosser v. Prosser, 114 S. C. 45 (assault 1922).

61 Moore v. Moore, 191 Wis. 232 (negligence).

62 Schubert v. Schubert Wagon Co., 164 N. E. 42.

are Maine v. Maine and Sons;[63] Riser v. Riser;[64] and Emerson v. Western Seed and I. Co.[65]

In all three cases a wife sued the husband's employer for injuries inflicted by the husband while driving a car for the employer. The theory of each case was negligence. Recovery was denied in each case, each court resting its decision on two propositions. First, that the employer is liable only if the employee is liable. This assumption, that a principal is never liable unless the agent is, is not always true. For example, the case of an innocent agent who acts upon the direction of the principal is overlooked. The second argument relied on by the courts in these cases, is perhaps more significant; that is that a recovery against the employer would give the latter a right over against the employee; and thus ultimately the burden is on the husband, so that the wife would be accomplishing indirectly what she couldn't do directly.

As pointed out above,[66] New York state is in accord with the majority in allowing recovery in suits between spouses in cases affecting property. Likewise, New York is with the majority in denying recovery in direct suits between spouses for personal injuries.[67] Yet curiously enough, New York has refused to follow the majority in the cases of suits against the employer, and instead has permitted recovery.

In Schubert v. Schubert Wagon Co., a wife sued the husband's employer for injuries sustained through the husband's negligent operation of a car while in the defendant's employment. The trial court refused recovery. On appeal to the Court of Appeals, the judgment was reversed. Cardozo in deciding in favor of the wife said:

"The disability of wife or husband to maintain an action against the other for injuries to the person is not a disability to maintain a like action against the other's principal or master. . . . A trespass, negligent or willful upon the person of a wife does not cease to be an unlawful act though the law exempts the husband from liability for damage. Others may not hide behind the skirts of his immunity. . . .

"We are told that in the long run the consequences of upholding an action against the master may be to cast the burden on the husband, since the master, if not personally at fault, has a remedy over. The consequence may be admitted without admitting its significance as a determining factor in the solution of the problem. . . . Domestic Relations Law . . . is explicit that 'A married woman has a right of action for an injury to her person or property or character as if unmarried.' By authority and tradition an exception has been engrafted upon this rule where the husband is defendant. We are not at liberty to extend it by dubious construction."

As for suits by one spouse against the employer of the other in the minority of jurisdictions which allow direct suits for personal injuries between the spouses, the writer was unable to find a single case raising this question of recovery against the employer. However, there being recovery between spouses in direct suits, for personal injuries, it would seem an a fortiori conclusion that suits by a spouse against the employer of the other would be permitted in the minority jurisdictions.

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[63] 198 Iowa 1278 (1924).
[64] 240 Mich. 402 (1927).
[65] 116 Neb. 180 (1927).
[66] Minier v. Minier, supra note 36.
[67] Schultz v. Schultz, supra note 52.

Suit Against a Spouse for Vicarious Liability for Personal Injuries Inflicted by Servants of the Defendant Spouse

Here again there is a lamentable paucity of cases. Only one case could be found by the writer dealing with this situation. In Waite v. Pierce,[68] a wife sued her husband for injuries inflicted by one of the husband's servants through the negligent operation of a car, while in the course of his employment. The trial court denied recovery, but was reversed. It must be noted, however, that Wisconsin is one of the minority jurisdictions which allow direct recovery against a spouse for direct personal injuries.[69] Therefore, the effect of this decision on future cases in the majority jurisdictions is dubious, perhaps even in New York, where despite the result in Schubert v. Schubert Wagon Co.,[70] Cardozo simultaneously recognized the husband's immunity from liability when he said:

"By authority and tradition, an exception has been engrafted upon this rule (i. e., that the wife can sue as if unmarried) where the husband is defendant."

Reasoning Of, and Factors Influencing the Courts

We have seen that, broadly speaking, the majority of states refuse recovery for personal injuries in suits between spouses. Also we have seen that a decided minority view does allow recovery. Why the divergency?

Naturally enough, since all the jurisdictions have statutes on the subject, the courts invariably use as one haven of refuge the explanation that "statutory interpretation and construction" require the particular result reached in the given jurisdiction. It is submitted, however, that this explanation, if it explains anything, merely describes the result and not the reason for the result reached.

As indicated earlier in this paper, the statutes in the various states are very much the same. Yet, despite similar statutes, they are "construed" and "interpreted" differently. For example, New York, which denies[71] recovery, and North Carolina[72] and Wisconsin,[73] which allow recovery, have statutes with almost identical wording.

The usual argument on the one hand is that unless a statute expressly gives the wife a remedy against the husband, the common law disability must continue. On the other hand, the minority asserts that the statutes have completely altered the civil basis of marriage, that the unity conception of the common law has been abrogated and that the question is purely one of removing a disability.

Again in Mississippi, the statute[74] says expressly: "Husband and wife may sue each other." Yet Mississippi courts in accord with the majority have refused to allow recovery. In Austin v. Austin[75] the court "interpreted" the statute as removing only procedural difficulties; that the statute did not create substantive rights and that the inexistence of a substantive right of action continued.

To repeat, therefore, it would seem that "statutory interpretation and construction" does not do more than describe the result which the courts desire to reach.

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68 191 Wis. 202.
69 Moore v. Moore, supra note 61.
70 Supra note 62.
71 Schultz v. Schultz, supra note 52.
72 Roberts v. Roberts, supra note 58.
73 Moore v. Moore, supra note 61.
74 Supra note 34 (e) Section 2518.
75 136 Miss. 61.

One factor which may be important in determining the view of a particular jurisdiction may be found in the type of relief sought in the earlier marital cases in that jurisdiction. For example, Drake v. Drake was one of the early cases in Minnesota where a wife was sued by her husband under a statute. There the husband went to equity and prayed the court to enjoin the wife's nagging. In addition to the influence of Thompson and Thompson,[76] the Minnesota court obviously faced other considerations. The difficulties in the way of enforcing an injunction if granted and the possible ridicule which might be involved in restraining the wife's nagging may well have influenced the court in denying relief. To repeat, therefore, wherever the cases of first impression in any particular jurisdiction have sought equitable relief as here, it is easy to see why such jurisdictions have followed Thompson v. Thompson.

The particular variation of the problem (i. e., when the cause of action arose, when suit was brought, etc.) is occasionally a determinative factor, as in a recent Pennsylvania case.[77] There a single woman sued a man for personal injuries. Before trial the parties married. The husband then moved for a nonsuit. The court refused the nonsuit and said that the plaintiff's disability, having arisen after the cause of action, was not permanent; that it merely put the plaintiff under a procedural disability. The result was, said the court, that the proceedings were merely suspended indefinitely until the procedural obstacle was removed by the husband's death or divorce. Meanwhile, the court chose to keep the cause of action hanging in the air, so to speak, like Mohamet's coffin, rather than to grant a nonsuit. Nor could laches run, under the court's holding, because until the disability terminated the plaintiff was legally unable to sue.

This case illustrates one of the rare instances of a court placing full reliance on the factual variation of the problem (here that the disability supervened after the cause of action had already accrued). On the whole, however, as indicated earlier in this paper, the courts do not stress the variation as a deciding factor of the cases.

A fear of fraud[78] is often relied upon by the courts in denying recovery. The argument is advanced that if the wife is allowed to recover, it would provide an easy way for women to plunder the estates of deceased husbands.

Still another common argument is that there is no necessity for giving married women a right to sue for damages.[79] It is pointed out that the criminal courts are open to the wife for relief, as well as writs of habeas corpus in cases of unlawful restraints; and in addition, there is, as a last resort, the right to sue for divorce. The soundness of this reasoning is perhaps to be questioned in view of the many cases of negligence where none of these remedies may be available. Besides many property rights are protected by criminal courts. Yet the majority of jurisdictions permit tort suits between spouses in such cases despite possible relief from the criminal courts.

Another influence in the decisions can be traced to the old, pre-married-women's-statutes cases like Philips v. Barnet and Abbott v. Abbott. Invariably the courts allude to the "sound doctrine laid down in Philips v. Barnet" with approval, despite the fact that those cases ought no longer be determinative of the wife's rights in view of the fact that no married women's statutes were involved there.

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[76] Supra note 45.

[77] Lipschutz v. Kohl, 16 D. & C. 386 (Pa.). But see Hennenger v. Lomas, 145 Ind. 287, 294 (1896).

[78] Supra note 33, Abbott v. Abbott.

[79] Id.

The most frequently stressed argument, and the one most earnestly urged, in denying recovery, is that recovery in tort actions between spouses for personal injuries would disrupt and destroy the peace and harmony of the home.[80]

The minority, which does allow relief in personal injury cases, find their greatest strength (beyond the argument of "statutory interpetation and construction") in attacking this last named argument about "disruption of domestic tranquility." It is first pointed out that suits to protect property interests may be and often are more acrimonious and disturbing to domestic peace than cases for personal injuries. Yet, as pointed out above, there is substantial unanimity in allowing property suits. If the objection be sound at all, it is argued, it should serve to close the door to all suits between spouses, including those to protect property.[81]

Secondly, the minority argues, if the infliction of personal injuries by one spouse upon the other, provokes in the other a desire to sue, there can be little domestic tranquility left, to be preserved.[82] And it has further been pointed out that even if there be validity to the view that such suits do disrupt domestic peace, the objection is no longer present where the suit is brought after coverture is terminated, or where the real party is an employer, or insurer of the tortious spouse. In such cases, presumably, both spouses, far from being at odds, are in full accord. In fact, a stronger argument against recovery in such case, is not "disruption of domestic peace," but rather the danger of "domestic collusion."[83]

No doubt there is much to be said in favor of the objections to the majority's argument of "disruption of domestic peace." On the other hand, the writer submits that it would be undesirable to permit spouses to sue each other for every trivial touching, or for every casual negligent injury where the consequences are not particularly serious. In other words, the marriage relationship should be deemed to confer certain limited privileges and immunities in respect to acts, that as between strangers would be actionable. "Consent," "common purpose," "voluntary assumption of risk" and like doctrines ought to be applied fairly liberally in favor of the defendant spouse. While the cases don't openly assert as a basis for their decision, a fear of too many suits by spouses for trivialities, it is submitted that this is perhaps the basis for the majority's refusal of relief. As suggested above, a firm adherence to and consistent application of the doctrines of "consent," "common purpose," etc., will serve to minimize fear of suits for trivialities.

Beyond that, however, in view of the definite emancipation of women in respect to property rights, and in view of the weakness of the majority's mainstay—"disruption of domestic harmony"—it is submitted that modern courts should cease to pay lip-service to the common law doctrines announced by Philips v. Barnet. And doubts in "interpretation and construction" of statutes should be resolved in favor of emancipation, with a caution, to repeat, on the part of the courts to pay due regard to the considerations of

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80 Logendyke v. Longendyke, 44 Barb. 367 (N. Y. 1863).

81 Brown v. Brown, 88 Conn. 42.

82 Schultz v. Schultz, 27 Hun 6, overruled later in 89 N. Y. 644 by memorandum opinion.

83 See Marks v. Carne, 2 K. B. 516-1909, also see Fidelity & Cas. Co. v. Marchand, 4 Dominion Law Reports 157 (1924). In the latter case, a father negligently ran over and injured his son. The father then appointed a tutor to sue him (the father) on behalf of the son. Upon recovery by the tutor, the father sued the Insurance Company to be indemnified. On appeal, a judgment for recovery was reversed. This case serves to show the great possibilities of domestic collusion.

"consent," "common purpose," etc., as carrying a peculiarly significant importance wherever marital status is involved.

It is true that the determination of individual cases may raise difficulties in determining whether a particular offense alleged to have been committed by a defendant spouse has exceeded the limits up to which he is privileged. However, this is a factual difficulty merely which offers no greater hazards than many other factual problems in all fields of law. It is to be hoped that the view of the minority will gain added favor.

INDIANA LAW JOURNAL

Published Monthly, October to June, inclusive, by The Indiana State Bar Association
EXECUTIVE OFFICE, 817 UNION TITLE BUILDING
INDIANAPOLIS, INDIANA
EDITORIAL OFFICE, BLOOMINGTON, INDIANA

SUBSCRIPTION PRICE, $3.00 A YEAR **SINGLE COPIES, 50 CENTS**
Canadian Subscription Price is $3.50; Foreign, $4.00.

Subscription price to individuals, not members of the Indiana State Bar Association, $3.00 a year; to those who are members of the association the price is $1.50, and is included in their annual dues, $7.00.

The complete management of the Indiana Law Journal is exercised by The Indiana State Bar Association through its officers. The Editor, Editorial Boards and other officers of The Journal are appointed by the President of The Indiana State Bar Association with the advice and approval of the Board of Managers. The Indiana State Bar Association founded the Indiana Law Journal and retains full responsibility and control of its publication. The participation of Indiana University School of Law is editorial.

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