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Husband and Wife -- Personal Tort Actions Between Spouses -- Statutory Construction

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HUSBAND AND WIFE—PERSONAL TORT ACTIONS BETWEEN SPOUSES—STATUTORY CONSTRUCTION—Following an interlocutory divorce decree, and while the parties were living apart from one another, defendant allegedly assaulted the plaintiff. The trial court dismissed her complaint on the ground that no action could be brought by one spouse against the other for personal torts committed during coverture. On appeal, *held,* reversed, three judges dissenting and one concurring. The Judicial Code and the Husband and Wife Statutes of Utah,[1] when considered together, entitle a married woman to maintain an action against her husband for injuries intentionally inflicted upon her. *Taylor v. Patten,* 2 Utah (2d) 404, 275 P. (2d) 696 (1954).

It is a familiar principle of the common law that one spouse is not liable to the other in tort. Some of the early cases cited as a basis for this principle the doctrine that husband and wife were one person,[2] but most of the later cases also justify the rule as being necessary to the preservation of domestic tranquility.[3] With the advent of the Married Women's Property Acts, designed

[1] Utah Code Ann. (1953) §§78-11-1, 30-2-1 et seq.

[2] See, e.g., Phillips v. Barnet, Q.B.D. 436 (1876). The origin of the unity doctrine is described in BRYCE, STUDIES IN HISTORY AND JURISPRUDENCE, 2d ed., 819 (1901).

[3] Abbott v. Abbott, 67 Me. 304 (1877); Thompson v. Thompson, 218 U.S. 611, 31 S.Ct. 111 (1910). In Roberts v. Roberts, 185 N.C. 566, 118 S.E. 9 (1923), the court noted a further argument in favor of the immunity: the desirability of avoiding the "unseemly spectacle of transmuting family bickering into court actions." An applicable statute, however, had abrogated the former law. See PROSSER, TORTS 898 (1941).

to emancipate married women from many of the disabilities imposed upon them by the common law, great inroads were made on both the unity concept and the resulting interspousal immunity. Dozens of cases have involved the application of these statutes to the issue presented in the principal case, and dozens more have involved negligence actions between spouses.[4] With only seven states unreported on these issues,[5] the returns show that the common law is still a persistent vote getter; it has lost support in only fifteen states.[6] Here and there it has received the support of express statutory provisions,[7] but its principal strength is to be found in judicial construction of statutes which vary greatly in language from state to state.

In only three states have express statutory provisions settled the question in favor of allowing such suits.[8] Elsewhere the same result has been achieved by one or more of at least four judicial methods. In several states it has been reached by liberal interpretation of certain general provisions giving married women access to the courts, and causes of action, for the enforcement of various personal and property rights.[9] As in the case of statutes under which a contrary result has been reached, these statutes are by no means uniform in language.[10] In the principal case the court employed this method without conspicuous success. The extent to which statutory language[11] was stretched, and the court's disregard of several cardinal rules of construction, is well pointed out by the dissenters. The court rescued itself, however, by calling upon a second judicial method for reversing the common law rule. This method calls for an exami-

[4] Cases of both kinds are collected in 160 A.L.R. 1406 (1946) and earlier annotations there referred to. See also 2 A.L.R. Supp. Dec. 739 (1952) and 1955 A.L.R. Supp. Dec. 351.

[5] Arizona, Florida, Kansas, Nevada, New Mexico, Oregon, and South Dakota. The Wisconsin court has already had occasion to interpret the Arizona statute [Ariz. Code Ann. (1939) §§63-302, 63-303] and has concluded that the immunity is abolished in that state also. Jaeger v. Jaeger, 262 Wis. 14, 53 N.W. (2d) 740 (1952). The Arizona cases cited by the court involved torts against the property, rather than the person, of the spouse.

[6] Alabama, Arkansas, Connecticut, Colorado, Idaho, Kentucky, New Hampshire, North Carolina, North Dakota, New York, Ohio, Oklahoma, South Carolina, Wisconsin, and Utah. Cases and statutes are cited below.

[7] Ill. Rev. Stat. (1952) c. 68, §1, amended shortly after the Illinois Supreme Court adopted the minority view in Brandt v. Keller, 413 Ill. 503, 109 N.E. (2d) 729 (1952). See Mass. Gen. Laws (Ter. ed., 1932) c. 209, §6, for a provision bordering on a prohibition of such actions.

[8] 14 N.Y. Consol. Laws (McKinney, 1941) §57; N.C. Gen. Stat. (Supp. 1953) §52-10.1; Wis. Stat. (1953) §246.075 (confers upon husbands a right of action in tort against their wives, §246.07 having been construed in Wait v. Pierce, 191 Wis. 202, 209 N.W. 475 (1926), to create a similar right in married women).

[9] Rains v. Rains, 97 Colo. 19, 46 P. (2d) 740 (1935); Brown v. Gosser, note 8 supra, Gilman v. Gilman, 78 N.H. 4, 95 A. 657 (1915); Fitzmaurice v. Fitzmaurice, 62 N.D. 191, 242 N.W. 526 (1932); Prosser v. Prosser, 114 S.C. 45, 102 S.E. 787 (1920); Wait v. Pierce, note 8 supra.

[10] Compare the statutory provisions relied upon in the cases cited in note 9 supra. These statutes are currently Colo. Rev. Stat. (1953) c. 90, art. 2-2; Ky. Rev. Stat. (1953) §404.060; N.H. Rev. Laws (1942) c. 340, §1; N.D. Rev. Code (1943) §14-0705; S.C. Code (1952) §10-216; Wis. Stat. (1953) §246.07.

[11] The specific language relied upon by the court appears in Utah Code Ann. (1953) §§30-2-2 and 30-2-4.

nation of the statute as a whole; if the substance of the unity doctrine has been undercut by conferring upon married women full rights to hold property in their own names, free from their husbands' control and not subject to his debts and liabilities, and if at the same time access to the courts has been given for the preservation of these rights, then the unity doctrine itself has ceased to exist.[12] The court simply concludes that the immunity role, as the offspring of the unity doctrine, has perished with its parent.

The concurring opinion invokes a third approach to the issue. It embodies the view that the common law rule had more than one parent; in addition to the unity doctrine, concededly abolished by the statute, there is also the matter of domestic tranquility to contend with. The statute having been silent on this matter, it is felt that the court is free to decide whether any vitality remains in the public policy basis of the immunity rule. Moreover, the danger of collusive suits designed to defraud insurance companies is deemed significant. The concurring judge sees danger of both marital disharmony and collusion, and would therefore limit the remedial effect of the statutes to cases in which the parties have obtained at least an interlocutory divorce decree.[13] The weaknesses of the argument that family harmony is jeopardized by the liberal rule have often been pointed out[14] and need not be repeated here. There is also rebuttal to the argument that collusive suits will result: (1) the insurance companies may exempt themselves from such liability by contract; (2) if necessary, a statute might be enacted to provide a similar exemption, at least where the policy does not expressly provide for such coverage;[15] and (3) experience in states which have long allowed these suits has not demonstrated the validity of the collusion argument.[16]

The fourth approach is illustrated in the dissenting opinion, where it is implied that policy considerations are inseparable from the unity doctrine in the process of determining whether the immunity rule continues in effect. Thus, a statute does not abrogate the common law unless it serves the dual

[12] Some of the cases in which this reasoning has been invoked, and current statutes which have been so construed, are Johnson v. Johnson, 201 Ala. 41, 77 S. 335 (1917) [Ala. Code (1940) tit. 34, §65 et seq.]; Brown v. Brown, 88 Conn. 43, 89 A. 889 (1914) [Conn. Gen. Stat. (1949) §7307]; Lorang v. Hays, 69 Idaho 440, 209 P. (2d) 733 (1949) [Idaho Code (1948) §32-901 et seq.]; Damm v. Elyria Lodge No. 465, 158 Ohio St. 107, 107 N.E. (2d) 337 (1952) [Ohio Rev. Code (Baldwin, 1953) §§3103.03 to 3103.08].

[13] See 48 COL. L. REV. 961 (1948), where it is argued that such actions between former spouses should no longer be denied.

[14] See, e.g., Courtney v. Courtney, 184 Okla. 395, 87 P. (2d) 660 (1938); PROSSER, TORTS 898 et seq. (1941); Morris, "What Price Marriage," 1946 INS. L.J. 911 at 942.

[15] A statute of this type has been enacted in New York. 27 N.Y. Consol. Laws (McKinney, 1949) §167(3).

[16] Interspousal tort actions have been permitted in some states for more than forty years, yet Illinois is the only state in which legislation has resulted in a return to the common law rule. It may also be doubted that experience led to the reversal in Illinois, since the statute was amended very shortly after the minority view had been adopted by the courts of that state. See note 7 supra.

purpose of abolishing the unity doctrine and adopting a new public policy.[17] The opinion of the court anticipates this approach and rebuts it by concluding that the very abolition of the unity doctrine reflects the adoption of a new policy by the legislature. This anticipatory rebuttal is not a worthy effort, however, as the dissenters generously point out.

The principal case offers little that will be of additional aid to courts and practitioners who will deal with the issue in the future. Yet the combination of divergent approaches to the subject, and the consequent variations in result, make the case not only a starting point for analysis but an ideal pedagogical tool for the teacher of legislation or domestic relations.

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[17] Compare Wait v. Pierce, note 8 supra. On the application of public policy to statutory construction, see generally SUTHERLAND, STATUTORY CONSTRUCTION, 3d ed., §§5901 to 5905 (1943).