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Negligence - Interspousal Tort Immunity - Action by Wife Against Deceased Husband's Estate

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NEGLIGENCE — INTERSPOUSAL TORT IMMUNITY — ACTION BY WIFE AGAINST DECEASED HUSBAND'S ESTATE — When the automobile driven by plaintiff's husband collided with another vehicle, plaintiff's husband was killed and she was seriously injured and rendered mentally incompetent. Plaintiff's guardian brought a negligence action for her injuries against the other driver, who impleaded the administrator of her husband's estate as a third-party defendant. The trial court denied administrator's pre-trial motion for summary judgment,[1] and subsequently entered judgment against the administrator. On certification, *held,* affirmed. The doctrine of tort immunity between spouses is based on a policy of preserving domestic peace and harmony and preventing fraudulent collusion against insurance companies, and does not apply where death dissolves the marital relationship and eliminates the opportunity for collusion. *Long v. Landy,* 171 A.2d 1 (N.J. 1961).

At common law neither husband nor wife could sue the other for tortious conduct.[2] The historical basis for the doctrine lies in a combination of substantive and procedural reasons[3] rooted in the concept of the legal unity of husband and wife.[4] Although this concept is now generally recognized as a fiction,[5] justification for the doctrine is usually found in the public policy against disrupting domestic harmony by litigation between man and wife.[6] The most significant departure from the doctrine of interspousal tort immunity came with the passage of the Married Women's Acts, which were enacted primarily to create or recognize a

1 Long v. Landy, 60 N.J. Super. 362, 158 A.2d 728 (1960).

2 Phillips v. Barnet, 1 Q.B.D. 436 (1876); see PROSSER, TORTS § 101 (2d ed. 1955).

3 See PROSSER, note 2 *supra,* and McCurdy, *Torts Between Persons in Domestic Relation,* 43 HARV. L. REV. 1031 (1930).

4 BLACKSTONE, COMMENTARIES *442, *443; 2 *id.* *433; See generally Williams, *The Legal Unity of Husband and Wife,* 10 MOD. L. REV. 16 (1947).

5 See influential dissent of Pound, J., in Allen v. Allen, 246 N.Y. 571, 159 N.E. 656 (1927).

6 Although the domestic tranquility argument is decisive in most courts today, it does not seem as compelling as it apparently was in 1858 when the Pennsylvania Supreme Court stated, "The flames which litigation would kindle on the domestic hearth would consume in an instant the conjugal bond, and bring on a new era indeed—an era of universal discord, of unchastity, of bastardy, of dissoluteness, of violence, cruelty, and murders." Ritter v. Ritter, 31 Pa. 396, 398 (1858).

substantive right in the wife to her separate property interests; many of these statutes permitted a wife to sue in her own behalf to protect these interests. Most courts today agree that the acts which allowed her the right to sue served to negate both the legal unity concept and the domestic harmony policy, at least in regard to *property* tort actions.[7] Furthermore, many of these acts were written in broad language which appeared to authorize a wife to bring *any* legal action which could be brought by a single woman.[8] Although such statutes might have been construed to allow a wife's personal injury action against her husband, the prevailing view has been that these acts were not intended to give a wife a right which even her husband did not have at common law.[9] Thus in almost two-thirds of our states today one spouse still may not sue the other for a personal tort.[10] A growing minority of jurisdictions have become dissatisfied with the logic and results of the doctrine and reject it entirely.[11] Where the majority rule prevails, however, an action for a personal tort committed during marriage is prohibited even after the marriage relationhip has been disrupted by separation,[12] desertion,[13] divorce,[14] or annulment.[15] Even in the case of the death of one spouse, the courts which subscribe to the interspousal immunity doctrine generally deny a spouse's personal tort action against the estate of the deceased

[7] For an analysis of the provisions of state statutes, see McCurdy, *Personal Injury Torts Between Spouses*, 4 VILL. L. REV. 303, 310-13 (1959). See further 3 VERNIER, AMERICAN FAMILY LAWS § 180 (1935).

[8] *E.g.*, "Married women shall have power . . . to sue separately . . . for torts committed against them, as fully and freely as if they were unmarried. . . ." D. C. CODE ANN. § 30-208 (1951).

[9] The leading case is Thompson v. Thompson, 218 U.S. 611 (1910), interpreting the forerunner of the District of Columbia statute quoted *supra* note 7. For a collection of cases for other jurisdictions, see McCurdy, *Torts Between Persons in Domestic Relation*, 43 HARV. L. REV. 1031 (1930); Annot., 43 A.L.R.2d 632 (1955).

[10] PROSSER, TORTS § 101 (2d ed. 1955).

[11] Most of the jurisdictions that reject the doctrine have done so by a liberal interpretation of the Married Women's Acts. These courts find no basis for distinguishing property tort from personal tort actions on the basis of the legal unity doctrine or the policy of preserving domestic harmony. *E.g.*, Brown v. Gosser, 262 S.W.2d 480 (Ky. 1953). A few jurisdictions have rejected the doctrine via express statute: N.Y. DOM. REL. LAW § 57; N.C. GEN. STAT. § 52-10.1 (Supp. 1959); WIS. STAT. § 246.07-.075 (1957). *Contra*, ILL. ANN. STAT. ch. 68, § 1 (Smith-Hurd 1959); see N.Y. INS. LAW § 167(3) which exempts the insurer from indemnifying the insured spouse for a tort committed on the other spouse unless a provision expressly covering this liability is inserted into the policy.

[12] Carmichael v. Carmichael, 53 Ga. App. 663, 187 S.E. 116 (1936); Holman v. Holman, 73 Ga. App. 205, 35 S.E.2d 923 (1945).

[13] Clark v. Clark, 11 F.2d 871 (S.D. N.Y. 1925) *(semble), aff'd per curiam*, 11 F.2d 871 (2d Cir. 1926).

[14] Wallach v. Wallach, 94 Ga. App. 576, 95 S.E.2d 750 (1956); Abbott v. Abbott, 67 Me. 304 (1877); Bandfield v. Bandfield, 117 Mich. 80, 75 N.W. 287 (1898); Strom v. Strom, 98 Minn. 427, 107 N.W. 1047 (1906); Nickerson v. Nickerson, 65 Tex. 281 (1886); Schultz v. Christopher, 65 Wash. 496, 118 Pac. 629 (1911). *Contra*, Gremillion v. Caffey, 71 So. 2d 670 (La. App. 1954) *(semble)*.

[15] Callow v. Thomas, 322 Mass. 550, 78 N.E.2d 637 (1948); Lunt v. Lunt, 121 S.W.2d 445 (Tex. Civ. App. 1938). *Contra*, Henneger v. Lomas, 145 Ind. 287, 44 N.E. 462 (1896); *cf.* Watson v. Watson, 39 Cal. 2d 305, 246 P.2d 19 (1952).

spouse.[16] The jurisdiction of the principal case is committed to the majority rule and would deny the action if the husband were still living.[17] If the rule rests solely on the policy of preserving domestic tranquility, the result in the principal case follows logically from the given facts. However, other considerations may be found to support the doctrine and provide a basis for continuing the immunity, at least in modified form, even after the death of one spouse.

One consideration is the danger that the surviving spouse will press false claims upon the deceased spouse's estate. If the decedent's estate is to be liable for torts arising out of the marriage, the surviving spouse might well be tempted by liability insurance[18] or estate assets[19] to file suit for all manner of hurts and annoyances[20] suffered during marriage. The possibility that many claims would be invalid or fraudulent is enhanced by the prevailing rule that the statute of limitations does not run between husband and wife during coverture,[21] thus presenting the problem of fraud associated with stale claims.[22] Furthermore, although the surviving spouse, like any other plaintiff, has the burden of proof, the temptation to offer perjured testimony is greatest when the claim is difficult to disprove.[23]

[16] *In re* Estate of Dolmage, 203 Iowa 231, 212 N.W. 553 (1927); Wilson v. Brown, 154 S.W. 322 (Tex. Civ. App. 1912); Keister's Adm'r v. Keister's Ex'rs, 123 Va. 157, 96 S.E. 315 (1918); Wright v. Davis, 132 W. Va. 722, 53 S.E.2d 335 (1949). *Contra,* Johnson v. Peoples First Nat'l Bank & Trust Co., 394 Pa. 116, 145 A.2d 716 (1958); Brower v. Webb, 5 D. & C.2d 193 (C.P. Phila. 1955); Bodnar v. Herley, 47 Berks. 31 (C.P. Pa. 1954); *cf.* Apitz v. Dames, 205 Ore. 242, 287 P.2d 585 (1955) (intentional tort); Ennis v. Truhitte, 306 S.W.2d 549 (Mo. 1957) (willful and wanton negligence): Brennecke v. Kilpatrick, 336 S.W.2d 68 (Mo. 1960) (child against parent); Kaczorowski v. Kalkosinski, 321 Pa. 438, 184 Atl. 663 (1936) (wrongful death action by parent of wife against deceased husband's estate).

[17] Koplik v. C. P. Trucking Corp., 27 N.J. 1, 141 A.2d 34 (1958).

[18] "[A] raid upon an insurance company" would be the only reason a wife would want to sue her husband for a negligent tort. Newton v. Weber, 119 Misc. 240, 241, 196 N.Y.S. 113, 114 (Sup. Ct. 1922); see Boisvert v. Boisvert, 94 N.H. 357, 53 A.2d 515 (1947); Fuchs v. London & Lancashire Indem. Co. of America, 171 Misc. 908, 14 N.Y.S.2d 387 (Sup. Ct. 1939), *aff'd,* 258 App. Div. 603, 17 N.Y.S.2d 338 (1940); Villaret v. Villaret, 169 F.2d 677 (D.C. Cir. 1948). However, "automobile liability policies often exclude from coverage . . . liability to members of the household. . . ." VANCE, INSURANCE § 196 (3d ed. 1951).

[19] Abbott v. Abbott, 67 Me. 304, 308 (1877); *cf.* Lasecki v. Kabara, 235 Wis. 645, 294 N.W. 33 (1940).

[20] See Drake v. Drake, 145 Minn. 388, 177 N.W. 624 (1920) (injunction against nagging denied); Wait v. Pierce, 191 Wis. 202, 209 N.W. 475 (1926) (dissent) (discussing the problem of an excessively kissed wife).

[21] *E.g.,* Morris v. Pennsgrove Nat'l Bank & Trust Co., 115 N.J. Eq. 219, 170 Atl. 16 (1934).

[22] "They [statutes of limitations] were enacted to prevent frauds; to prevent parties from asserting rights after the lapse of time had destroyed or impaired the evidence which would show that such rights never existed. . . ." Bailey v. Glover, 88 U.S. (21 Wall.) 342, 349 (1874).

[23] See In the Matter of the Estate of Crawford, 155 Kan. 388, 392, 125 P.2d 354, 357 (1942): "What about the jeopardy to the interests of other heirs . . . if a widow were permitted to set up old claims against her husband, supported only by her own averments and which the other heirs would frequently have no means of disproving?"

Although the dead man statutes would probably preclude the injured spouse from testifying herself,[24] a person who would be willing to commit perjury in the first place would also be tempted to suborn a third person to swear falsely.[25] Nevertheless, "there is opportunity for fraud and collusion in many legal proceedings, but our system of courts and juries is very well designed to seek them out and its presence clearly furnishes no just or moral basis for precluding honest and meritorious actions."[26]

A more fundamental reason for denying liability for torts which occur in the ordinary course of marital activity is presented by the special nature of interspousal conduct. Since such conduct rests on a basis entirely different from that of the typical tort situation, conduct which might be tortious between persons not husband and wife should be distinguished from similar conduct between spouses.[27] At least two differentiating characteristics are ascertainable: the attitudes of precaution existing between husband and wife, and the sharing of risk among members of a family unit. Although marriage is generally thought to increase the responsibilities between a man and woman, the familiarity which develops between husband and wife might result in a less cautious attitude toward each other than would be taken toward a stranger. For example, a person may expose his spouse to the same hazards he takes himself, regardless of whether this is more or less caution than would be taken if third parties were involved. Rather than indicating a lack of respect for the safety of one's spouse, this attitude can be said to flow from the close identity of personalities and interests implicit in the marital relationship. Closely related to this unique concept of care between spouses is the element of risk-sharing in the conduct of the marital enterprise.[28] Since the affairs of the modern family are typically conducted on a joint basis, the wife is no longer restricted to the role of a junior partner. The common interests of husband and wife should require that each bear the ordinary risks as well as the benefits of activities undertaken for marital purposes. These two distinguishing characteristics of interspousal conduct provide a basis for limiting the application of the interspousal tort immunity doctrine to situations in which the negligence does not consist of an extreme departure from ordinary standards of care, and the activity arises out of and in the

[24] 2 WIGMORE, EVIDENCE § 578 (3d ed. 1940).

[25] MCCORMICK, EVIDENCE § 65 (1954).

[26] Koplik v. C. P. Trucking Co., 27 N.J. 1, 15, 141 A.2d 34, 42 (1958) (dissent); see Brown v. Gosser, 262 S.W.2d 480, 484 (Ky. 1953); Courtney v. Courtney, 184 Okla. 395, 403, 87 P.2d 660, 668 (1938).

[27] See McCurdy, *Personal Injury Torts Between Spouses*, 4 VILL. L. REV. 303, 338 (1959). *But see* Smith v. Smith, 205 Ore. 286, 314, 287 P.2d 572, 584 (1955): "We are not disposed to carve out the area within which actions for negligence should be allowed, or that other area in which the intimacy of the family relationship forbids recovery by the spouses."

[28] See McCurdy, *Torts Between Persons in Domestic Relation*, 43 HARV. L. REV. 1031, 1055 (1930); Sanford, *Personal Torts Within the Family*, 9 VAND. L. REV. 823 (1956); Comment, 51 NW. U. L. REV. 610 (1956).

course of the marital relation. Thus, if a wife negligently prepares the family dinner so that her husband becomes seriously ill, or if a husband injures his wife by negligently driving his automobile in his haste to get his wife to the grocery store before closing hours, there should be no liability even if the tortfeasor spouse has died. Although each of the suggested qualifications to the immunity doctrine presents difficulties in application, the courts have considerable experience with similar problems in other contexts. For example, in delimiting what activity arises out of and in the course of the marital relationship, the courts can look to their experience with an analogous provision in the workmen's compensation statutes[29] or the "family purpose" doctrine of vicarious liability for automobile accidents.[30] Similarly, to determine what conduct constitutes an extreme departure from ordinary care[31] the courts could develop concepts similar to those employed to interpret automobile guest statutes which limit liability to guest passengers for gross negligence, or willful, wanton and reckless conduct.[32] In spite of the difficulties which would be encountered in applying these standards, a doctrine of qualified interspousal tort immunity presents a reasonable alternative to the complete acceptance or rejection of the common law doctrine.

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[29] 1 LARSON, WORKMEN'S COMPENSATION §§ 6.00-29.20 (1952).

[30] See generally Lattin, *Vicarious Liability and the Family Automobile,* 26 MICH. L. REV. 846 (1928).

[31] See classic definition of gross negligence by Rugg, C.J., in Altman v. Aronson, 231 Mass. 588, 121 N.E. 505 (1919).

[32] See generally Weber, *Guest Statutes,* 11 U. CINC. L. REV. 24 (1937).