Torts – Actions Between Husband And Wife

"Whether a man has laid open his wife's head with a bludgeon, put out her eye, broken her arm, or poisoned her body, he is no longer exempt from liability to her on the ground that he vowed at the alter to 'love, cherish, and protect' her. We have progressed that far in civilization and justice."[1] The purpose of this comment is to examine whether we have in fact "progressed that far."

The inability of husband and wife to sue each other for a tort arose out of the common law doctrine of legal identity. This doctrine made it impossible for one spouse to be civilly liable to the other for an act which would be a tort in the absence of the marital relationship. The basis for the doctrine is obscure, although several sources have been suggested. Among these is the natural law concept of the family as a unit of government with the husband, physically the stronger, as the head; another is the organization of the feudal system; and a third is the position of the *pater-familias* in the Roman law.[2] Whatever its origin, by the eighteenth century courts of equity had established an inroad in the doctrine by giving the wife a separate equitable estate. This development was followed by a wave of legislation in the nineteenth century known as the Married Women's Property Acts, or Emancipation Acts, which were intended, primarily, to secure to a married woman a separate legal estate.[3] The question of the ability of husband and wife to sue each other today depends considerably upon the judicial interpretation of the Married Women's Act in the particular jurisdiction, in respect to its effect upon the common law. In twenty-one jurisdictions individual legislation permits designated actions between husband and wife.[4]

Prior to 1910 the courts of this country had generally sustained the right of a wife to sue her husband for torts against her separate property.[5] The early decisions reflect a considerable distrust for such an innovation in the relation of husband and wife, but since the Married Women's Acts were, in general, expressly designed to give the married woman a separate legal estate, with the rights and duties necessary to its maintenance, the majority of courts have tended to permit such actions. For example, it has been held that the wife can maintain an action against her husband for the conversion of her

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1 Crowell v. Crowell, 180 N. C. 516, 105 S. E. 206 (1921).

2 BRYCE, STUDIES IN HISTORY AND JURISPRUDENCE 819 (2nd ed. 1901).

3 McGurdy, Torts in Domestic Relation in selected essays on family law 396 (1950).

4 VERNIER, AMERICAN FAMILY LAWS § 180 (1938).

5 Note, 26 COL. L. REV. (1926); Comment, 4 FORD. L. REV. 475 (1935).

separate property,[6] for ejectment to recover possession of her separate estate,[7] or for replevin.[8] Actions by the husband have been much rarer but the same result has been reached, as in the case of a suit by the husband against his wife for conversion of his personal property.[9] The courts, however, that had passed upon the right to sue the spouse for a personal tort had denied the existence of such a right.[10] These decisions merely followed the general rule that in the absence of express statutory permission there existed no such right of action.

In 1910 a majority of the United States Supreme Court construed the Married Women's Act of the District of Columbia[11] in the case of *Thompson v. Thompson*,[12] and arrived at a decision in accord with the existing authority by holding that such a right did not exist. Since that time the weight of authority has continued to recognize the common law disability of husband and wife to maintain personal tort actions against each other.[13] Nevertheless, opposition to this position was not long in coming. Scarcely four years from the time of the opinion in the *Thompson* case, the Supreme Court of Connecticut made the doctrine of the dissenting justices the basis of a direct holding in favor of such an action.[14] By 1926 several courts had adopted the minority position, including the Supreme Court of Wisconsin,[15] and

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6 Eshom, c. Eshom, 18 Ariz. 170, 157 P. 974 (1916); Walker v. Walker, 215 Ky. 154, 284 S.W. 1042 (1926); Carpenter v. Carpenter, 154 Mich. 100, 117 N.W. 598 (1908).

7 McDuff v. McDuff, 45 Cal. App. 53, 187 P. 37 (1919); Goodwin v. Goodwin, 172 Misc. 118, 13 N.Y.S. 2d 894 (1939); Humphreys v. Strong, 141 Va. 146, 126 S.E. 194 (1925).

8 Bruner v. Hart, 178 Okla. 222, 62 P. 2d 513 (1936); Notes v. Snyder, 4 F. 2d 426, (D. C. Cir. 1923), 41 A. L. R. 1052.

9 Eddleman v. Eddleman, 183 Ga. 766, 189 S.E. 833 (1937).

10 Bandfield v. Bandfield, 117 Mich. 80, 75 N.W. 287 (1899); Strom v. Strom, 98 Minn. 427, 107 N.W. 1047 (1906).

11 D.C. Code § 43 (1929).

12 218 U. S. 611 (1910), Justices Harlan, Holmes, and Hughes dissented.

13 Thompson v. Thompson, note 12 *supra;* Ewald v. Lane, 104 F. 2d 222 (D.C. Cir. 1939); Cubbison v. Cubbison, 73 Cal. App. 2d 437, 166 P. 2d 387 (1946); Carmichael v. Carmichael, 53 Ga. App. 663, 187 S.E. 116 (1936); Broaddus v. Wilkenson, 281 Ky. 601, 136 S.W. 2d 1052 (1940); Harvey v. New Amsterdam Casualty Co., 6 So. 2d 744 (La. Ct. of App. 1942); Anthony v. Anthony, 135 Me. 54, 188 A. 724 (1937); Callow v. Thomas, 322 Mass. 550, 78 N.E. 2d 637 (1948); Kircher v. Kircher, 288 Mich. 669, 286 N.W. 120 (1939); Keralis v. Keralis, 213 Minn. 31, 4 N.W. 2d 632 (1942); Scales v. Scales, 168 Miss. 439, 151 So. 551 (1934); Lang v. Lang, 24 N.J. Misc. 26, 45 A. 2d 822 (1946); Tanno v. Elby, 78 Ohio App. 21, 68 N.E. 2d 813 (1946); Fisher v. Diehl, 156 Pa. Super Ct. 476, 40 A. 2d 912 (1945); Lunt v. Lunt, 121 S.W. 2d 445 (Tex. Civ. App. 1938); Comstock v. Comstock, 106 Vt. 50, 169 A. 903 (1934); Staets v. Co-Operative Transit Co., 125 W. Va. 473, 24 S.E. 2d 916 (1943); McKinney v. McKinney, 59 Wy. 204, 135 P. 2d 940 (1943).

14 Brown v. Brown, 88 Conn. 42, 89 A. 889 (1914); reaffirmed in Bushnell v. Bushnell, 103 Conn. 583, 131 A. 432, 44 A.L.R. 794 (1925).

15 Wait v. Wait, 191 Wis. 202, 209 N.W. 475, 48 A.L.R. 276 (1926).

this tendency has continued to grow. In 1937 New York amended its laws to provide for such an action,[16] and North Carolina,[17] Oklahoma,[18] and South Dakota[19] now also permit such action. In fairness it must be said that in North Carolina and South Dakota, as in New York, such actions are permitted as a result of legislative action.

When we examine the opinions of several jurisdictions that are cited as comprising the weight of authority, it becomes evident that several of them can be given very little weight. For example in Louisiana, New Jersey, Texas, and Vermont the statutes dealing with the rights of married women either expressly forbid such actions or expressly allow only actions between spouses concerning property rights.[20] In Kentucky, Maine, Massachusetts, and West Virginia the legal status of husband and wife still retains many of its common law disabilities including the right to contract with each other.[21] In Missouri the purposes for which a woman is considered a *femme sole* are expressly limited by statute.[22] California recognizes the common law disability of the wife in the matter of litigation against the husband with an exception in the case of actions affecting property when she is separated from her husband.[23] The weight to be given to the decisions comprising the majority position is further weakened by strong dissenting opinions and the doubts which others openly express as to the soundness of their decisions.[24]

In the case of *Phillips et. al. v. Graves et. al.*,[25] decided in 1870, the Ohio Supreme Court enunciated the common law doctrine of the legal identity of husband and wife. This doctrine was modified by legislative action on March 19, 1887, by the enactment of the Ohio Married Women's Act.[26] This Act provides that neither the husband nor the wife has any interest in the property of the other, that either may contract as though unmarried, and that either may take, hold or dispose of property as though unmarried. Since that time the Ohio courts have aligned themselves with the majority of jurisdictions by refusing to permit the husband or wife to bring an action for a

16 N.Y. DOM. REL. LAW § 57 (1939); Stouborough v. Preferred Accident Ins. Co., 180 Misc. 339, 40 N.Y.S. 2d 480 (1943), *aff'd*, 292 N.Y. 154, 54 N.E. 2d 342 (1944).

17 Alberts v. Alberts, 217 N.C. 443, 8 S.E. 2d 523 (1940).

18 Courtney v. Courtney, 184 Okla. 395, 87 P. 2d 660 (1939).

19 Scotvold v. Scotvold, 68 S.D. 53, 298 N.W. 266 (1941).

20 Comment, 4 FORD. L. REV. 475 (1935).

21 See note 3 *supra*.

22 Mo. STAT. *Ann.* § 2998; Rogers v. Rogers, 265 Mo. 200, 177 S.W. 382 (1917).

23 Dunbar v. San Francisco - Oakland Terminal Rys., 54 Cal. App. 15, 201 Pac. 330 (1921).

24 Sykes v. Speer, 112 S.W. 422 (Tex. Civ. App. 1908); Thompson v. Thompson, note 12 *supra*.

25 20 Ohio St. 371 (1870); see also Glidden, Murphin and Co. v. Taylor, 16 Ohio St. 517 (1866); Levi v. Earl, 30 Ohio St. 163 (1876).

26 OHIO GEN. CODE §§ 8002-1 to 8002-8, inclusive.

personal tort against each other. On the other hand, Ohio's position on their ability to sue each other for a property tort is rather vague.

In 1912 the Ohio Supreme Court decided the case of *State of Ohio v. Phillips*[27] which, although a criminal action based on a property tort, has been cited in later decisions to support the position that question was presented as to whether a wife could be convicted of larceny for the conversion of personal property belonging to her husband. The state contended that by virtue of Sections 7995 to 8004, inclusive, of the Ohio General Code,[28] the common law identity of husband and wife had been abrogated, and that the wife was therefore liable to prosecution. The court applied the canon that statutes in derrogation of the common law must be strictly construed, saying, "An intention of the legislature to abolish an established rule of the common law . . . must clearly and unmistakably appear," and held that such an action could not be maintained. On its facts, this case seems to have little bearing on the problem of tort liability, and, indeed, the case has been distinguished by two later cases which have held it not controlling where the husband and wife have separated.[29] The case, however, is important in this discussion because of dictum in the decision to the effect that the peace and sanctity of the home and family are the ultimate reason for the common law rule, and that if such an action (criminal) were permitted it would also authorize a husband or wife to maintain a civil action against the other for personal torts. This language has been quoted with approval by the Ohio courts. In *Finn v. Finn*[30] a wife brought an action against her husband to recover damages for personal injuries sustained by his alleged negligence in the operation of the family car. The Court quoted with approval the language in the *Phillips* case and stated that while the common law unity of husband and wife no longer exists there remains a unity of interest in the establishment of the home. The court added that "It would seem that any policy that may add to the causes for dissention between husband and wife would be of doubtful benefit." A similar fact situation was present in the case of *Leonardi v. Leonardi*.[31] The court reached the same conclusion as in the *Finn* case, but without mentioning that decision. The wife, plaintiff in the action, called attention to Section 11245 of the Ohio General Code providing that "A married woman shall sue and be sued as if she were unmarried, and her husband be joined with her only when the cause of action is in favor of or against both." The court considered this Section and

27 85 Ohio St. 317, 97 N.E. 976 (1912).

28 See note 26 *supra* for present statutory references.

29 Frazier v. The State of Ohio, 16 Ohio App. 9 (1922); Milwaukee Mechanics' Ins. Co. v. Hefferman, 121 Ohio St. 499, 169 N.E. 573 (1929).

30 19 Ohio App. 302 (1924).

31 21 Ohio App. 110, 153 N.E. 93 (1925).

Sections 7995 to 8004, inclusive, of the Ohio General Code[32] and concluded that these Sections did not enlarge the right of action of either the husband or the wife against the other for personal wrongs. This court also quoted with approval the language of the *Phillips* case. In addition the court, stated "To give either the husband or wife the right to sue the other for injury sustained by reason of a negligent act would strike at the very heart of the peaceable domestic relation of the husband and wife and, further, at the happiness of the family." *Metropolitan Life Ins. v. Huff*[33] cited both the preceding cases as authority for the proposition that a wife cannot maintain a personal tort action against her husband.

On the question of the wife's right of action against her former husband for a tort committed prior to the marriage, Ohio has again refused to permit such an action.[34] In the later case of *Lanno v. Elby*[35] the court held that even when the injury was received and the action commenced prior to the marriage and an antenuptial agreement was entered into purporting to give to the wife the right to maintain the action after marriage, that the marriage destroyed the wife's right of action.

Ohio's position on the question of the right of the husband or wife to sue each other for a tort affecting their separate property is not clearly established, since there is a dearth of cases upon this subject. In *Shafer v. Shafer*[36] the court held that Sections 7998, 7999, and 8001 of the Ohio General Code[37] effected a complete emancipation of the wife except as limited by such statutes, and that the wife could maintain as action for partition of real estate against her husband. In 1949, in the case of *Madget v. Madget*,[38] the court was faced with the question as to whether the incapacity of the husband to sue his wife at common law has survived the Ohio Married Women's Act and prevents him from maintaining an action against his wife upon a cause of action involving property rights. The court concluded that there was no case in Ohio denying the right of the husband to maintain an action to recover his property or to seek damages for its conversion. Ohio Jurisprudence states that there is no statutory right for either spouse to sue the other for an injury to property and cites *Finn v. Finn* as authority.[39] While it is true that a statement to that effect appears in the case, it is mere dictum. The court turned to an examination of the holdings in other jurisdictions and concluded that, while some con-

32 See note 26 *supra* for present statutory references.
33 48 Ohio App. 412, 194 N.E. 429 (1933).
34 Wirrig V. Harter, 29 Ohio L. Abs. 587 (1939).
35 78 Ohio App. 21, 68 N.E. 2d 813 (1946).
36 30 Ohio App. 298, 163 N.E. 507 (1928).
37 Present statutory references are OHIO GEN. CODE §§ 8002-4, 8002-5, and 8002-7.
38 85 Ohio App. 18, 87 N.E. 2d 918 (1949).
39 21 Ohio Jur. 502.

flict exists, the weight of authority is in support of the allowance of such actions. The court chose to follow the weight of authority and held that, since the Ohio Married Women's Act permits the spouses to hold property free from the common-law disabilities, the husband could maintain the tort action of conversion against his wife. If the Ohio courts choose to follow the reasoning of this case, the way is open to permit any of the various tort actions affecting property between spouses.

Ohio and the majority of jurisdictions have promulgated four chief reasons for refusing an action between spouses arising out of a tort. The first of these is statutory interpretation, the maxim generally applied being that statutes in derrogation of the common law should be strictly construed. The second reason advanced is that the wife, or husband, has other adequate remedies available to her, namely divorce or criminal proceedings. The third reason is that the allowance of such suits would open new avenues for fraud and collusion. The fourth and the most frequently quoted reason is that such actions are against public policy because they tend to bring about the dissolution of the marriage relationship. Very few, if any, decisions are based upon any single one of the above reasons but rely on several or all of them in justifying their position. An example of this can be seen in the case of *Thompson v. Thompson*[40] in which can be found the first, second, and fourth of the above reasons.

Let us examine the relative merit of these reasons. The maxim that statutes in derrogation of the common law should be strictly construed merits little consideration. The courts tend to fall back upon this maxim not because of any intrinsic value which it has, but as a justification for reaching a result influenced by the courts underlying conception of the marriage relationship. The argument that the wife has sufficient remedy in divorce actions and criminal proceedings merits as little consideration. These actions may be adequate to prevent future wrongs, but they afford no compensation for past injuries and in many instances, such as negligence, afford no remedy at all. With regard to the danger of fraud and collusion, it has been asserted that such a policy would subject insurance companies to numerous fraudulent claims.[41] A person pays for insurance to indemnify any person whom he injures by his negligent conduct, and it is sufficiently easy, if desired, to except the husband or wife from the contract of insurance.[42] The fourth justification that tort actions between husband and wife are against public policy appears more often than any of the other three. It is said that such actions would disturb the domestic tranquility of the marriage relationship, but it is difficult to see why

40 Note 12 *supra.*

41 Harvey v. Harvey, 239 Mich. 142, 214 N.W. 305 (1927).

42 Note, 4 WIS. L. REV. 37 (1926).

the allowance of tort action would disturb domestic tranquility to any greater extent than the divorce actions or criminal proceedings which are suggested as alternative remedies.[43] If such a reason is accepted, however, it is difficult to understand why such actions are refused even after a divorce. Another apparently unanswered question, which might be asked, is why the allowance of actions for personal injuries will result in any greater domestic disturbance than do actions for injuries to property, which are generally allowed.

What then is a possible solution? The best would seem to be that of permitting tort actions between husband and wife both in respect to property and personal injuries, but with limitations due to the relationship of the parties.[44] Husband and wife do not act toward each other as total strangers and to treat them as such is to take a position as unreasonable as the common law doctrine of indentity of husband and wife. For this reason the marriage status should create a presumption of consent to many acts which would be torts if committed against a third person. The extent of this distinction can only be determined by the common denominator of so many legal concepts, time and experience.

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43 Note, 26 COL. L. REV. 895 (1926); Comment, 26 ILL. L. REV. 89 (1931).
44 See note 3 *supra.*