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Tort Actions Between Husband and Wife

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create obstructions interfering with the natural flow of surface water onto his land, and the lower lands are subject to the servitude of receiving the ordinary and natural flow of surface water. The upper land owner's right is restricted, however, in that he cannot collect surface water and then release it in a huge volume, nor can he make excavations or drains upon his ground by which the flow of surface water is diverted from its natural course and disposition and thereby cast upon the lower estate in an unnatural volume.

In conclusion nothing has been found in the Kentucky cases dealing with percolating or surface water to suggest that our court would hold that riparian rights exist in such water. In fact, the only affirmative judicial statement on the point which the writer has been able to find stated that riparian rights will not arise in surface water unless it flows in a water course or stream, and the Court of Appeals of Kentucky has said that there are no riparian rights in percolating water. Since the question of limiting the use of water in Kentucky seems in the past to have depended on establishing riparian rights in it, the logical conclusion is that one should be able to use all of his percolating water and surface water. At least both kinds of water are non riparian and both should be governed by the same rule as to use of non riparian water for irrigation purposes.

GEORGE B. BAKER, JR.

TORT ACTIONS BETWEEN HUSBAND AND WIFE

In the recent case of Brown v. Gosser the Kentucky Court of Appeals was called upon to decide whether a wife during coverture may continue an action commenced prior to marriage for a negligent injury inflicted by her husband. The jury returned a verdict for the

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22 Dugan v. Long, 234 Ky. 511, 28 S.W. 2d. 765 (1930).
23 Pickerill v. City of Louisville, 125 Ky. 213, 100 S.W. 873 (1907).
26 It should be noted that this statement is found in an intermediate court opinion, and would not bind the court of last resort in this state. In the case of Sith v. L. & N. R.R. Co., 109 Ky. 168, 58 S.W. 600 (1900) the Middlesborough case was cited and overruled, but only to the extent that it held that the so called "common law" rule applied in Kentucky. No mention was made of the further holding that riparian rights will not arise in surface water unless it flows in a water course or stream.
27 Supra note 10.

1 262 S.W. 2d 480 (Ky. 1953).
plaintiff and from the resulting judgment the defendant appealed. The judgment was affirmed.2

The weight of authority holds that neither spouse may sue the other for a personal tort.3 However, a strong and rapidly growing minority, with which Kentucky now has aligned itself, holds that since enactment of the married women's statutes such an action is possible.4

The Kentucky court apparently did not believe that because the tort in the principal case was committed and the action was com-

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2 The Kentucky Court of Appeals' last expression on this question was in Broadus v. Wilkinson, 281 Ky. 601, 136 S.W. 2d 1052 (1940) where the court said, "Neither the husband nor the wife could sue the other in tort at common law and this rule has not been abrogated."


menced prior to marriage the result should be different than if the tort had occurred and the action had been commenced during coverture. This seems correct in legal theory. At common law antenuptial torts were extinguished by marriage and even if the action was commenced prior to marriage it had to be dismissed or stayed.\(^5\) Since the statutes do not make such a distinction, there is no basis for making one. It should also be noted that most courts following the majority rule have not thought the distinction to be important.\(^6\)

Another distinction that might be made is one between negligent and intentional torts. However the cases do not bear this out. A typical reaction is found in the leading case of *Courtney v. Courtney*:

Nor can the difference in the nature of the torts be considered seriously from a legal standpoint. . . . In the case of negligent tort, the wife has suffered a wrong for which the law should provide a remedy, just as in the case of a wilful tort. . . . There is no element to distinguish one wrong from the other in the determination of whether a remedy therefor should be allowed and we find that the courts have made no valid distinction in such determination.\(^7\)

Because at common law one spouse could not bring an action against the other,\(^8\) the courts have necessarily relied upon statutes as a basis for allowing the action. Hence the principal case is based upon an interpretation of the Kentucky statute which reads: "A married woman may sue, and be sued, as a single woman."\(^9\) The following states which have similar statutes have accepted the minority rule:\(^10\) Arkansas,\(^11\) Colorado,\(^12\) New Hampshire,\(^13\) North Carolina,\(^14\) and Wisconsin.\(^15\) With the exception of the statute in New York,\(^16\) which expressly provides for the bringing of tort actions between spouses, the

\(^{13}\) *N. H. Rev. Stat.* c. 340, sec. 2 (1945).
\(^{15}\) *Wis. Stat. Sec.* 246.07 (1951).
\(^{16}\) *N. Y. Dom. Rel. Law,* sec. 97 (1950).
development of the rule has come about as a result of change in judicial attitude rather than by express legislative enactment.

Courts resisting the minority rule have used a multitude of reasons for denying the action. Those most often advanced are:

1. If tort actions between spouses were allowed, the peace and tranquility of the home would be destroyed. In the principal case Judge Combs ably answers this:

   The argument would have a truer ring except for the fact a wife may now, in this state, sue her husband for tort affecting her property interest. For instance, she may now sue him for conversion, or detention of chattels, for fraud, for trespass to land, for waste, or in an action of ejectment or unlawful detainer. [citations omitted] It is difficult to perceive how a tort action for personal injuries would disrupt the domestic peace and tranquility to any greater extent than a tort action for damage to property.

Furthermore, if the tort consists of assault and battery little peace and tranquility would seem to remain. And if one spouse has been negligently injured by the other, it is not a necessary conclusion that conjugal bliss will be broken by allowing the tort action in cases where an insurance company will ultimately bear the loss. If there is any danger here, it lies more in collusion between the spouses than in disruption of the home.

2. The husband and wife have long been regarded as a legal entity. Although the statutes have apparently destroyed this conception, the historical influence continues. In modern civilization where women are managers of corporations, elected to Congress, appointed ambassadors, and own a major portion of the nation's wealth, this conception is not only obsolete, but impractical.

3. Some courts have met a stumbling block in statutory interpretation. Since at common law neither spouse was permitted a cause of action against the other and the statutes are silent as to the husband's rights, it is said the legislature could not have intended to give a cause of action to the wife while leaving the husband in status quo. But the courts allowing the action state that the statutes have the

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262 S.W. 2d 480 (Ky. 1953); Posser, Torts 901, 903 (1941).
Posser, Torts 908 (1941).
McCurdy, supra note 3, at 1035.
Schultz v. Christopher, 65 Wash. 496, 118 Pac. 629, 630 (1911).
effect of destroying the legal unity of the husband and wife. The wife is then in a position of a feme sole or an unmarried person including the right to sue or be sued for an injury to her person.\textsuperscript{23} Contrariwise, other courts argue that since at common law each spouse lacked both a substantive and procedural right to sue the other, the removal of the procedural incapacity by statute does not necessarily create a new substantive cause of action.\textsuperscript{24} Thus it is argued that the statute must expressly create such a cause of action. Although only one statute expressly creating the action has been found,\textsuperscript{25} fourteen states along with the District of Columbia nevertheless allow such a cause of action. One writer said:

\begin{quote}
It is not necessary to create a cause of action in terms, for the removal of disability leaves the parties possessed of all rights and subject to all duties that pertain to an ordinary person. In this sense the statute 'creates' a cause of action.\textsuperscript{26}
\end{quote}

And one court spoke thusly:

\begin{quote}
It was necessary [naming a section of the statute] only to free the married woman of her procedural disability in order that she might exercise the natural rights of an ordinary person which she had gradually gained through a change in the conception of marriage.\ldots \textsuperscript{27}
\end{quote}

And another court said:

\begin{quote}
As the nonliability of the husband to the wife for damages for a personal tort was founded upon the common-law fiction that the husband and wife were one, it would seem to follow that where that fiction is abolished, the nonliability does not survive.\textsuperscript{28}
\end{quote}

Hence it may be argued plausibly that if the wife is a person independent of the husband she has the same rights as all independent natural persons, including the right to sue any person for an injury to her person.

4. Occasionally the reason has been said to lie in the convenient phrase, public policy. Although there was a time when this type of action was opposed to public policy, the evolution of the status of women has reached a point where this line of reasoning is questionable. One of the fundamental aims of the law should be to settle differences with practical remedies appropriate to the social system of the times. When the reasons for a rule have been exploded and the rule itself has outworn its usefulness, courts should not allow the compulsion of judicial inertia to cause them to dispense antique justice.

\begin{footnotes}
\item[23] Fitzpatrick v. Owens, 124 Ark. 167, 186 S.W. 832, 835 (1916).
\item[25] See note 16 supra.
\item[26] McCurdy, supra note 3, at 1051.
\item[27] Courtney v. Courtney, 184 Okla. 395, 87 P. 2d 660, 665 (1938).
\item[28] Rains v. Rains, 97 Colo. 19, 46 P. 2d 740, 742 (1935).
\end{footnotes}
5. It sometimes is said that a spouse has ample protection by bringing a bill for divorce or by seeking criminal indictment. It is not difficult to imagine the situation where a wife has been injured as a result of her husband's negligent operation of an automobile and is in dire need of compensation, yet she may have no desire to part company with him by divorce or through his imprisonment. Furthermore where a wife is physically injured and her earning capacity is impaired, her financial situation will not be bettered by having her husband placed behind bars. Should a husband or wife therefore be forced to criminal proceedings with their attendant stigma or should persons who will not seek a divorce or those who are unable to obtain a divorce be denied an adequate remedy?

Where tort actions between husband and wife are permitted, a large percentage of the litigation has been in the field of negligent rather than intentional torts. Where the negligence resulted from the use of an automobile, public attention has been focused upon a practical consideration underlying the legal problems. There is almost universal use of automobile liability insurance today. Even though the insurance company may not be allowed to be a party to the action, it is the real party who stands to lose. Conceding that this fact should not in legal theory affect the question of tort suits between spouses, one cannot overlook the consternation which developed in the background as a result of allowing such an action. Insurance companies were quick to point out that allowing such suits would inevitably raise premium rates. Thus realistically viewed, there seem to be two chief factors which should be weighed in considering the allowance of tort actions between spouses: (1) the seriousness of the burden which will fall upon liability insurance companies which insure the husband or wife; and (2) the desirability of such suits. Since insurance companies have the facilities to change their rates or rephrase their contracts in order to prevent any ruinous loss from payments to injured spouses, the burden upon insurance companies should not be overwhelming. In *Courtney v. Courtney*, it is stated:

A man pays for insurance to indemnify any person whom he injures by his careless driving, and if it is intended to except his wife from such indemnification, such intent can very easily be expressed in the contract. . . .

The opportunity for collusion between spouses is a factor which cannot be overlooked, but courts have accepted the responsibility of ferreting out fabrications in other situations; as for example, in suits for divorce or alienation of affections. Nor is the danger of fraud any

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20 184 Okla. 395, 87 P. 2d 660, 668 (1938).
greater than in actions brought by an automobile passenger against his host for injuries caused by his host's negligence. These cases should not be "saddled with a presumption of fraud."\textsuperscript{30}

As to the desirability factor, it is submitted that an injury resulting from the tortious act of a spouse should be no less compensable than an act of a stranger. One cannot reasonably assume that a husband is more willing to recompense the general public than his wife, nor is an injured spouse any less injured because she is married. Where an action is denied, she may be without an adequate remedy. It is difficult for courts to continue to argue that denying such an action will contribute to the preservation of domestic happiness in the intentional tort cases where the greatest damage has already occurred and in the automobile negligence cases where the insurance company will indemnify the losing spouse. For those who fear that once the door is opened a volume of trivial suits will arise, it is suggested that the defenses of consent and assumption of risk are applicable to this situation.

The reasons most often advanced for denying a husband or wife such an action are no longer compelling. In addition, denying the right of action may place a heavy burden on the injured spouse. Therefore the decision of the Kentucky court seems a step in the right direction.

\textit{William J. Briggs}

**WORKMEN'S COMPENSATION—EFFECT OF TRANSFER OF BUSINESS WITHOUT NOTICE**

Transfer of business without notice to the employee as affecting the employee's right to recover against the original employer and his insurer for injuries sustained after the transfer was the subject of an unusual legal determination which was given judicial reaffirmance recently by the Court of Appeals of Kentucky in two similar workmen's compensation cases, \textit{Hamlin v. Sammons},\textsuperscript{1} and \textit{Bituminous Gas Corp. v. Johnson}.	extsuperscript{2} In each case the plaintiff was hired as a mine worker of employer-one who carried workmen's compensation insurance. Employer-one then transferred the mining operations to em-

\textsuperscript{30} \textit{Ibid.}
\textsuperscript{1} 261 S.W. 2d 440 (Ky. 1953).
\textsuperscript{2} 259 S.W. 2d 448 (Ky. 1953).