Washington Law Review

Volume 37
Number 2 *Washington Case Law—1961*

7-1-1962

Torts—Interspousal Actions—Personal Torts

Richard H. Williams

certainties involved in this area, it is hoped that the court will have occasion to review the questions here presented and clarify its position on these issues.

JOHN H. BINNS JR.

Interspousal Actions—Personal Torts. In *Goode v. Martinis*,[1] the Washington Supreme Court held that a wife has a cause of action in tort for an assault committed upon her by her husband while the parties are legally separated and divorce proceedings are pending. While restricting its holdings to the particular facts, the court rejected the rationale advanced in favor of the common law doctrine of spousal disability.[2]

The trial court dismissed the plaintiff's complaint for failure to state a claim upon which relief can be granted. The complaint alleged the following facts. On the evening of January 9, 1958, Paul V. Martinis entered the residence of the plaintiff, Edna V. Goode, his wife, and assaulted her by forcibly having sexual intercourse with her against her will. The assault occurred approximately eight weeks after the parties had separated. However, it was not until almost six weeks after the alleged assault that a divorce action was tried and a final divorce decree awarded.

On appeal the court held that the leading Washington case on interspousal personal torts action, *Schultz v. Christopher*,[3] was not controlling because of the narrow purpose of the statute[4] upon which the holding was based. The court recognized the existence of three statutes[5] which make reference to the right of spouses to maintain actions in their individual capacity. The court did not construe the aggregate effect of these statutes upon abrogation of the common law doctrine of spousal disability. However the tenor of the opinion manifests serious

[1] 158 Wash. Dec. 222, 361 P.2d 941 (1961).
[2] *Id* at 226, 361 P.2d at 944-45.
[3] 65 Wash. 496, 118 P. 629 (1911).
[4] RCW 26.16.160, providing that "All laws which impose or recognize civil disabilities upon a wife, which are not imposed or recognized as existing as to the husband, are hereby abolished, and for any unjust usurpation of her natural or property rights, she shall have the same right to appeal in her own individual name, to the courts of law or equity for redress and protection that the husband has: *Provided always,* That nothing in this chapter shall be construed to confer upon the wife any right to vote or hold office, except as otherwise provided by law."
[5] RCW 26.16.130, providing that "A wife may receive the wages of her personal labor and maintain an action therefor in her own name and hold the same in her own right, and she may prosecute and defend all actions at law for the preservation and protection of her rights and property rights as if unmarried." RCW 26.16.150, providing that "Every married person shall hereafter have the same right and liberty to acquire, hold, enjoy and dispose of every species of property, and to sue and be sued, as if he or she were unmarried." RCW 26.16.160, supra note 4.

doubt as to the continued existence of the doctrine in the light of these statutes and the meritless rationale upon which the doctrine is based.

A right of action in tort between spouses has received recognition in only a few jurisdictions,[6] though favored by writers[7] upon the subject. In *Schultz*[8] the court held that since the husband at common law had no right to sue his wife, correspondingly the wife had no right to sue her husband under the married woman's emancipation statute. The court construed RCW 26.16.160,[9] the married woman's emancipation statute, as only abolishing the tyranny of sex. This result merely places the husband and wife upon an equal footing.[10] The court reasoned that since the husband, at common law or under this statute, did not have a right to sue his wife in tort, it is plain that the wife has been given no such right. The court went on to say that there may be reasons why a spouse should have the right to sue the other for damages in tort but that such a right must be conferred by legislative authority.

The *Schultz* case only concerned the effect of the married woman's emancipation statute. What is the effect of an aggregate construction of RCW 26.16.130[11] and RCW 26.16.150[12] in conjunction with RCW 26.16.160 upon the doctrine of spousal disability? Although the total effect of these statutes has not been determined by the court, it appears that their provisions, if liberally construed,[13] would afford a right of action in tort between spouses. RCW 26.16.150 expressly provides that every married person shall have the right to sue and be sued, as if he or *she* were unmarried. It is obviously the plain import of that provision to give both the husband and wife the right to sue as if unmarried. This provision apparently eliminates the effect of *Schultz v. Christopher*.[14]

It has been argued in other jurisdictions that a statute such as RCW 26.16.150 pertains merely to property and does not expressly provide for a tort remedy. Why should a wife be able to sue her husband for

---

[6] See 43 ALR2d 632 for majority and minority positions.

[7] McCurdy, *Torts Between Persons in Domestic Relations*, 43 HARV. L. REV. 1030 (1930); McCurdy, *Personal Injury Torts Between Spouses*, 4 VILL. L. REV. 303 (1959); PROSSER, TORTS § 674 (2d ed. 1955); Haglund, *Tort Actions Between Husband and Wife*, 27 GEO. L. J. 697 (1939).

[8] Schultz v. Christopher, 65 Wash. 496, 118 Pac. 629 (1911).

[9] Quoted at note 4 *supra*.

[10] Rosencrantz v. Territory, 2 Wash. Terr. 267, 5 Pac. 305 (1884).

[11] Quoted at note 5 *supra*.

[12] Quoted at note 5 *supra*.

[13] RCW 1.12.010 provides: "The provisions of this code shall be liberally construed and shall not be limited by any rule of strict construction."

[14] 65 Wash. 496, 118 Pac. 629 (1911).

breach of contract[15] or for conversion of her personal property[16] and at the same time not be able to sue him for a malicious and wilful tort?[17] Some courts have recognized this apparent inconsistency in the application of such statutes and have stretched their analytical approach to allow recovery for a personal tort. This result has been accomplished by reason that the wife has an inchoate chose in action arising from the injury inflicted by her husband's act. This tort action then comes within the scope of alleged property statute.[18] The better reasoned cases[19] hold that statutes such as RCW 26.16.130, 150, and 160 should be construed liberally.

The effect of these statutes has been to emancipate the wife from her common law inability to own, control, and manage her separate property. In additon, they have emancipated her from her inability to sue and be sued for the protection of her property and personal rights. Since the reason for the wife's disability and lack of rights has been completely eliminated, it is logical that the better reasoned cases hold her disability and loss of rights to have completely disappeared with the common law fiction that the husband and wife are one.[20] Thus there is now no need for an express statutory provision declaring that marriage does not disable spouses from suing one another in tort.[21] The legislature has intended to establish the separate identity of the husband and wife in all property and personal rights as if they were

---

[15] In Mattinson v. Mattinson, 128 Wash. 328, 222 Pac. 620 (1924), the court held that there is no reason why the wife should not be permitted to bring an action to recover the amount loaned from her separate funds to her husband and to secure judgment against her husband personally. The court, citing RCW 26.16.150, recognizes that she may sue and be sued, as if unmarried. See Kimble v. Kimble, 17 Wash. 75, 49 Pac. 216 (1897), which held that a wife may sue her husband for fraud.

[16] Walker v. Walker, 215 Ky. 154, 284 S.W. 1042 (1926) (statute similar to RCW 26.16.150.)

[17] See Brown v. Brown, 88 Conn. 42, 89 Atl. 889 (1914); Scotvold v. Scotvold, 68 S.D. 53, 298 N.W. 266 (1941).

[18] See Curtis v. Wilcox [1948] 2 K.B. 474 (antenuptial tort); Koplik v. C. P. Trucking Corp., 47 N.J. Super. 196, 135 A.2d 555 (1957) (antenuptial tort).

[19] Damm v. Elyria Lodge No. 465, 158 Ohio St. 107, 107 N.E.2d 337 (1952); Scotvold v. Scotvold, 68 S.D. 53, 298 N.W. 266 (1941); Courtney v. Courtney, 184 Okla. 395, 87 P.2d 660 (1938); Johnson v. Johnson, 201 Ala. 41, 77 So. 335 (1917); Gilman v. Gilman, 78 N.H. 4, 95 Atl. 657 (1916); Brown v. Brown, 88 Conn. 42, 89 Atl. 889 (1914).

[20] See Johnson v. Ottomeier, 45 Wn.2d 419, 424, 275 P.2d 723, 725 (1954). The court states that the basis of the spousal disability doctrine is based upon the *"supposed"* unity of the husband and wife. This language indicates that the Washington court is not sure of the continued existence of this unity in the light of RCW 26.16.130, 150, and 160.

[21] Damm v. Elyria Lodge No. 465, 158 Ohio St. 107, 107 N.E.2d 337 (1952). See also, Beach v. Brown, 20 Wash. 266, 55 Pac. 46 (1898), holding that an investigation of the statutes in relation to the rights of married women shows that in all cases where exceptions are intended they are provided expressly by statute.

unmarried. These statutes are remedial in nature and should be construed liberally to give a remedy where there is a wrong.[22]

It may be questioned if such a suit could be maintained in the State of Washington. There is no procedural impediment to the maintenance of a suit between spouses.[23] RCW 5.60.060 (1) provides that a spouse may be examined as a witness against her husband in either a civil or criminal proceeding.[24] The court does not appear to be concerned about whether the damages recovered would be community or separate property. It has held that such a consideration has no bearing upon the ability of the spouse to sue for such damages.[25]

Therefore, it appears that there is no longer any procedual or substantive impediment to give full effect to RCW 26.16.130, 150, and 160. If such statutes are taken at face value there is no reason why they cannot be construed to give a wife cause of action in tort against her husband.

However, a majority of courts follow the common law doctrine of spousal disability for the following reasons. (1) The common law doctrine rests upon the premise that the husband and wife are one, hence, they could not maintain an action against one another. However, the common law allowed one spouse to criminally prosecute another.

(2) Another argument advanced is that the wife is legally incapacitated to sue her husband as a matter of public policy. To permit such an action would be to disrupt the marital harmony. However, it seems that a criminal prosecution would disrupt the marital harmony just as

---

[22] Courtney v. Courtney, 184 Okl. 395, 87 P.2d 660 (1938). See also, State *ex rel.* Attorney General v. Seattle Gas & Elect. Co., 28 Wash. 488, 68 Pac. 946 (1902), which states that the rule in construing statutes, though they may be in derogation of the common law, is that everything is to be done in advancement of the remedy that can be done consistently with any fair construction that can be put upon it.

[23] RCW 4.08.030 provides: "When a married woman is a party her husband must be joined with her, *except:* ... (2) when the action is between herself and her husband, she may sue or be sued alone." (Emphasis added.)

[24] RCW 5.60.060 provides: "The following persons shall not be examined as witnesses: (1) A husband shall not be examined for or against the wife, without consent of the wife or a wife shall not be examined for or against the husband, without consent of the husband; nor can either during marriage or afterward, be without the consent of the other, examined as to any communication made by one to the other during marriage. But this exception shall not apply to a civil action or proceeding by one against the other, nor to a criminal action or proceeding for a crime committed by one against the other."

[25] In Stevens v. Depue, 151 Wash. 641, 276 Pac. 882 (1929), the court held that the wife had the right to sue alone for damages for alienation of affections, regardless of whether such damages, when recovered, would become community or separate property. The court stated, "Whether, when recovered, the damages will belong to her or the community is immaterial to us. Since she had the right to sue for damages alone, she has the concomitant sole right to satisfy and discharge any judgment in her favor." The court recognized that RCW 26.16.150 and 160 gave her such a right.

much as a civil action.[26] Also, it is difficult to see how an action for personal injuries would disrupt marital harmony any more than an action for damage to property, which is permissible under the Married Women's Statutes.[27]

(3) A spouse can get adequate relief for past misconduct by institution of criminal or divorce proceedings. But these proceedings do not afford compensation for the wrong incurred. They merely prevent future wrongs.[28] It is questionable whether they accomplish that result.

(4) Another factor advanced in support of the common law doctrine is, if the wife could recover in tort from her husband it would lead to collusion and fraud against insurance companies. However, there is no more opportunity for fraud in a tort action than in actions permitted between husband and wife. This line of argument pre-supposes that the court are so ineffectual and the jury system so imperfect that fraudulent claims would not be recognized. Such an argument is an insult to the integrity and competence of our court system.[29]

(5) It has also been advanced that permitting litigation between husband and wife would flood the courts with trivial lawsuits. This objection has turned out to be merely another theoretical possibility which in practicality has not materialized.[30]

In the past decade the Washington court has shown an increasing willingness to overturn court-made tort law.[31] In *Borst v. Borst*,[32] a child was allowed to recover from his parent in tort, despite the common law provision for parental immunity from suit by the child. The court in *Borst* answered the argument that the court should wait for legislative sanction for such an action, stating that the true role of the legislature is to restrict liability if it chooses to do so,[33] but, "where the proposal is to open the doors of the court, rather than to close them, the courts

[26] See, Steele v. Steele, 65 F.Supp. 329 (D.D.C. 1946); Fieldeer v. Fieldeer, 42 Okl. 124, 140 Pac. 1022 (1914).

[27] Brown v. Goser, 262 S.W.2d 480 (Ky. 1953). See cases cited at notes 18 & 19 *supra*.

[28] Courtney v. Courtney, 184 Okl. 395, 87 P.2d 660 (1938); Crowell v. Crowell, 180 N.C. 516, 105 S.E. 206 (1920); Johnson v. Johnson, 201 Ala. 41, 77 So. 335 (1917).

[29] Brown v. Goser, 262 S.W.2d 480 (Ky. 1953).

[30] Goode v. Martinis, 158 Wash. Dec. 222, 361 P.2d 941 (1961).

[31] See cases cited at 43 ALR2d 632.

[32] 41 Wn. 2d 642, 251 P.2d 149 (1952). See also, Woods v. Lancet, 303 N.Y. 349, 102 N.E.2d 691 (1951), which held that a court would abdicate its own function, in a field peculiarly nonstatutory, if it refused to reconsider an old and unsatisfactory court-made rule.

[33] See, Brandt v. Keller, 413 Ill. 503, 109 N.E.2d 729 (1952). Notice the effect of its holding that a wife may recover from her husband in an action for tort upon the law in Illinois as subsequently enacted and applied in Hindman v. Holmes, 4 Ill. App. 2d 279, 124 N.E.2d 344 (1955).

are quite competent to act for themselves."[34] *In Pierce v. Yakima Valley Memorial Hospital Assocaition,*[35] the court reversed the common law proposition that charitable hospitals are immune from tort actions. The court stated: "The factors upon which any public policy is based —the relevant factual situation and the thinking of the times—are not static. They change as conditions change and as ways of looking at things change."[36]

The day of the spousal immunity doctrine is waning. Justice Cordozo said, "The inn that shelters for the night is not the journey's end. The law, like the traveler must be ready for the morrow."[37] There is, and never has been any statute in England or in Washington declaring the "oneness" of husband and wife. It was an inference drawn by courts in a barbarous age, based on the wife's being treated as a chattel without any right to property or person. It has always been disregarded by courts of equity. Public opinion as expressed by all subsequent laws and constitutional[38] provisions has been against it. The anomalous instances of oneness which still survive are due to the courts having restricted or construed away changes made through corrective legislation.

> 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 altar to "love, cherish and protect" her. We have progressed that far in civilization and justice. Never again will "the sun go back ten degrees on the dial of Ahaz."[39]

The status of women in today's society has completely changed since the common law doctrine was formulated. They are no longer thought of as chattels, subservient to every wish and command of their husband. It is recognized that when the woman takes her wedding vows certain confidential relationships[40] and ordinary frictions of wedlock must be

---

[34] 41 Wn.2d at 657, 251 P.2d at 157.
[35] 43 Wn.2d 162, 260 P.2d 765 (1953).
[36] *Id.* at 166, 260 P.2d at 767, 768.
[37] Steele v. Steele, 65 F.Supp. 329 (D.D.C. 1946), quoting CARDOZO, THE GROWTH OF THE LAW, 20.
[38] WASH. CONST. art. I, § 3 provides: "No person shall be deprived of life, liberty, or property, without due process of law." WASH. CONST. art. I, § 12 provides: "No law shall be passed granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which upon the same terms shall not equally belong to all citizens or corporations." See also, Courtney v. Courtney, 184 Okl. 395, 87 P.2d 660, 667 (1938).
[39] Crowell v. Crowell, 180 N.C. 516, 105 S.E. 206, 210 (1920).
[40] See, Hamlin v. Merlino, 44 Wn.2d 851, 272 P.2d 125 (1954). See also, note, TORT ACTIONS BETWEEN HUSBAND AND WIFE, 9 CLEV.-MAR. L. REV. 265 (1960).

accepted, but the fact of marriage should not mean wholesale destruction of individual liberty and rights. There is no compelling reason why a wife should not be afforded the right to sue her husband for a malicious and wilful tort. The day has come when Cardozo's traveler must again arise and continue on his journey.

RICHARD H. WILLIAMS

Landowner's Liability to Servants of Independent Contractor. In *Murk v. Aronsen*[1] the Washington Supreme Court had occasion to consider a landowner's tort liability where work is placed under the control of an independent contractor. In a 5-to-4 decision the court held that an owner is not liable to a contractor's servant injured by the negligence of a contractor who has control of the premises. By its decision the court has reaffirmed its earlier position,[2] despite a trend toward expanding the exceptions to the rule of non-liability for torts of independent contractors.[3]

The Congregation Bikur Cholim had employed the Aronsens as caterers to prepare and serve a banquet at the synagogue. The Aronsens, during the course of the preparation, serving and clean-up were given complete control of the kitchen and were not supervised by the synagogue. The Aronsens also provided their own employees, one of whom was the plaintiff, Ebba Murk.

While dinner was being prepared Louis Aronsen spilled cooking grease on the floor. Although the slippery condition of the floor was called to his attention nothing was done about it. Later in the evening Murk walked past the stove, slipped on the grease and was injured. She brought suit against both the Congregation and the Aronsens. A judgment was directed against the Aronsens but the suit against the synagogue was dismissed.

In affirming the dismissal of the suit against the synagogue, the majority based its decision upon the factors of control and duty. It recognized that the principal employer owes a duty to the servants of his independent contractor not to injure them by his own negligence.[4] However, when the servant is injured solely through the negligence of

[1] 57 Wn.2d 785, 359 P.2d 816 (1961).
[2] Campbell v. Jones, 60 Wash. 265, 110 Pac. 1083 (1910).
[3] Morris, *The Torts of an Independent Contractor*, 29 ILL. L. REV. 339, 345 (1934). "It is believed that the apparently expanding exceptions to the traditional rule of insulation indicate that the law is headed that direction."
[4] Construction company held liable to the employees of an independent contractor for injuries resulting from the company's negligence in providing a defective scaffold to be used by the employees. Bowen v. Smyth, 68 Wash. 513, 123 Pac. 1016 (1912).