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Husband's Immunity from Personal Suit for Tort

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Unlike the transaction in the principal case, the preferred stockholders may have no control over the management of the business. In such a situation it would not be wise to disallow the carryover simply because fifty per cent of the carryover benefits went to the new, preferred stockholders. It is clear that any satisfactory solution to such problems requires a thorough re-examination of the purpose and function of loss carryovers in tax law.

HUSBAND'S IMMUNITY FROM PERSONAL SUIT FOR TORT

Plaintiff brought an action to recover damages for injuries which were intentionally inflicted by her former husband subsequent to the initiation of divorce proceedings. The complaint alleged that defendant, with intent to kill plaintiff and in violation of a non-molestation order, repeatedly rammed plaintiff's automobile with his own. Defendant challenged plaintiff's right to sue, claiming immunity from suit by his former wife for personal tort occurring during marriage. The trial court granted judgment for defendant on the pleadings, which was affirmed on appeal. *Held:* A man is immune from suit in tort by his former wife, even though the tort was intentional and was inflicted after divorce proceedings had been initiated. *Fisher v. Toler,* 194 Kan. 701, 401 P.2d 1012 (1965).

At common law a married woman had no legal existence separate from that of her husband, and could bring no cause of action against him.[1] Married Women's Property Acts were enacted in an attempt to alleviate this common law inequity by granting the wife the right to manage her own property and to sue in her own name. For the most part, these acts do not deal explicitly with the question of personal torts between spouses.[2] A majority of courts interpret this silence as limiting the wife's right to sue her husband to property questions.[3] An increasing number of jurisdictions, however, permit recovery for some or all

[1] Under the medieval concept of unity, the husband and wife were "one person in law, so that the very being and existence of the woman is suspended during coverture...." 2 BLACKSTONE, COMMENTARIES 889 (Lewis ed. 1898).

[2] Only New York, North Carolina, and Wisconsin provide specifically for personal tort suits between spouses. N.Y. DOM. REL. LAW § 57; N.C. GEN. STAT. § 52-10.1 (1963); WIS. STAT. § 246.075 (1955). Illinois specifically forbids tort actions between spouses. ILL. REV. STAT. ch. 68, § 1 (1953). See Annot., 43 A.L.R.2d 632 (1955).

[3] McCurdy, *Personal Injury Torts Between Spouses,* 4 VILL. L. REV. 303, 313-14 (1959). The wife's disability to sue her husband for personal tort was considered to be substantive as well as procedural, and the statutes removed only the procedural disability. *Ibid.*

personal torts.[4] By affirming application of the immunity doctrine in the principal case, the Kansas Supreme Court perpetuated a rigid, sterile, and outmoded view of the judicial process.

The court in the principal case considered itself bound by an earlier Kansas decision which had denied damages for injuries negligently inflicted by a husband upon his wife.[5] The court then considered several proffered factual bases for distinguishing the earlier case, but found that the factual situations were not sufficiently different to "require the application of a different principle of law." The court decided that the intentional nature of the tort did not warrant an exception to the general common law rule of immunity. That divorce proceedings were underway was considered immaterial by the court, for the marriage remained technically in effect and thus required application of the immunity doctrine. Finally, the court declared that any change in the doctrine was not within the realm of its authority, but lay only with the legislature. Two judges dissented, finding the earlier case clearly distinguishable. They would have permitted recovery by recognizing that the tort in the principal case fell within the scope of exceptions presently recognized in other jurisdictions.

The court in the principal case was not bound by stare decisis to apply the earlier rule denying recovery. A more recent decision[6] had held that suit could be maintained between spouses for a negligent tort committed *before* marriage, although at common law the marriage would have extinguished *all* existent rights of action. That court had recognized that Kansas had statutorily rejected the rule requiring strict interpretation of statutes in derogation of common law,[7] and gave

[4] Courts in seventeen jurisdictions permit actions between spouses for any nature of personal tort. Bennett v. Bennett, 224 Ala. 335, 140 So. 378 (1932); Cramer v. Cramer, 379 P.2d 95 (Alaska 1963); Katzenberg v. Katzenberg, 183 Ark. 626, 37 S.W.2d 696 (1931); Klein v. Klein, 58 Cal. 2d 692, 26 Cal. Rptr. 102, 376 P.2d 70 (1962); Rains v. Rains, 97 Colo. 19, 46 P.2d 740 (1935); Bushnell v. Bushnell, 103 Conn. 583, 131 Atl. 432 (1925); Brown v. Gosser, 262 S.W.2d 480 (Ky. 1953); Lumbermen's Mut. Cas. Co. v. Blake, 94 N.H. 141, 47 A.2d 874 (1946); Coster v. Coster, 289 N.Y. 438, 46 N.E.2d 509 (1943); Roberts v. Roberts, 185 N.C. 566, 118 S.E. 9 (1923); Fitzmaurice v. Fitzmaurice, 62 N.D. 191, 242 N.W.526 (1932); Damm v. Elyria Lodge No. 465, 158 Ohio St. 107, 107 N.E.2d 337 (1952) (dictum); Courtney v. Courtney, 184 Okla. 395, 87 P.2d 660 (1938); Pardue v. Pardue, 167 S.C. 129, 166 S.E. 101 (1932); Scotvold v. Scotvold, 68 S.D. 53, 298 N.W. 266 (1941); Taylor v. Patten, 2 Utah 2d 404, 275 P.2d 696 (1954) (intentional injury, but immunity abolished as to all torts); Wait v. Pierce, 191 Wis. 202, 209 N.W. 475, 210 N.W. 822 (1932). Wisconsin has also held that Arizona permits recovery, although there are no Arizona cases in point. Jaeger, v. Jaeger, 262 Wis. 14, 53 N.W.2d 740 (1952). See PROSSER, TORTS 883-85 (3d ed. 1964); McCurdy, *supra* note 3.

[5] Sink v. Sink, 172 Kan. 217, 239 P.2d 933 (1952).

[6] O'Grady v. Potts, 193 Kan. 644, 396 P.2d 285 (1964), 14 KAN. L. REV. 124 (1965).

[7] The common law as modified by constitutional and statutory law, judicial decisions, and the conditions and wants of the people, shall remain in force in aid of

liberal effect to the statute which granted married women the right to sue.[8] Thus, the court in the principal case had before it recent authority for the proposition that the statute allowing suit should be liberally construed. In the absence of any indication that the legislature had intended otherwise, the court in the principal case could have effected a liberal interpretation of the statute and granted to the wife a right to sue.

Although the court's unwillingness to accept an argument based solely on statutory construction might be justifiable for policy reasons,[9] its express refusal to consider recently-recognized judicial exceptions to the judicially-created immunity doctrine constitutes abdication of its responsibility. As pointed out in dissent, the alleged tort in the principal case was intentional, which would serve adequately to distinguish the negligent tort of the earlier case.[10] When the marriage relationship has disintegrated even before the tort occurred, as in the principal case, there is even less reason to perpetuate the immunity doctrine. The unity of person concept, the traditional argument advanced in support of the immunity doctrine, is no longer extant in Kansas.[11] Nor was there domestic harmony to maintain in the principal case, for divorce proceedings were pending when the tort was executed.[12] Although it is true

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the General Statutes of this state; but the rule of the common law that statutes in derogation thereof shall be strictly construed, shall not be applicable to any general statute in this state, but all such statutes shall be liberally construed to promote their object. KAN. GEN. STAT. § 77-109 (1949).

[8] "A married woman may, while married, sue and be sued in the same manner as if she were unmarried." KAN. GEN. STAT. § 23-203 (1949). As stated by the court, "It is clear when a Kansas statute has been enacted which reasonably covers a common law subject matter, such statute will prevail, it being entitled to a liberal construction." O'Grady v. Potts, 193 Kan. 644, 396 P.2d 285, 288 (1964). The court also took note of a "guideline for interpretation" laid down in a previous case involving married women's rights: "The one-person idea of the marriage relation as expounded by the common-law authorities can no longer be made the touchstone of a married woman's right or capacities in this state. Her powers and responsibilities do not depend upon the principle of unity, but upon the principle of diversity." Harrington v. Lowe, 73 Kan. 1, 20, 84 Pac. 570, 578 (1906).

[9] The court may have felt that acceptance of plaintiff's argument for a liberal construction would have necessitated the overruling of Sink v. Sink, 172 Kan. 217, 239 P.2d 933 (1952), which it was unwilling to do.

[10] *Cf.* Lorang v. Hays, 69 Idaho 440, 209 P.2d 733 (1949), in which it was held that an action would lie under the Idaho Married Women's Act under circumstances similar to those in the principal case. Oregon has distinguished between negligent and intentional torts between spouses, permitting recovery only for the latter. *Compare* Apitz v. Dames, 205 Ore. 242, 287 P.2d 585 (1955), *with* Smith v. Smith, 205 Ore. 286, 287 P.2d 572 (1955).

[11] See note 8 *supra.*

[12] It has been argued that the injured party has sufficient redress through criminal prosecution and divorce, and that immunity is necessary in order to preserve domestic peace and tranquility and prevent frivolous or collusive claims. In Goode v. Martinez, 58 Wn. 2d 229, 361 P.2d 941 (1961), 37 WASH. L. REV. 233 (1962), in which divorce was pending at the time an alleged assault by the husband took place, the court considered each of these reasons and rejected them. With regard to criminal prosecution

that the legal aspect of the relationship survived, a bare legal relationship cannot sustain the harmonious character of a functioning marriage.[13]

The most disturbing factor in the principal case is the court's decision that it could not deal with the problem, and that the duty of change lay solely with the legislature. This position is not in accord with sound judicial thinking, ignores the realities of the situation, and conflicts with a previous Kansas decision.[14] Immunity doctrines are the product of common law courts;[15] without regard to statutory authority the court in the principal case had power to modify this judicially-created doctrine.[16] The Kansas Bill of Rights guarantees a remedy for every injury "by due course of law." The decision in the principal case denies that remedy to the plaintiff. Even if the legislature were moved by the decision in the principal case to abrogate inter-spousal immunity, the plaintiff would still be denied her remedy; legislative acts, as opposed to judicial decisions, can seldom be applied retroactively.

In reality, there is little prospect of reform legislation.[17] The victims of the immunity rule form no identifiable lobby group to push for enactment. Further, legislatures are reluctant to initiate change when the court appears satisfied with a doctrine of its own making. An assumption by the legislature that the court will overrule an unjust but judicially-created doctrine is just as reasonable as the court's assumption that the legislature, by its inactivity, has condoned it. In the circumstances of the principal case a creative judicial role would not have conflicted with the legislature, and might even have stirred legislative activity.

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it noted: "A criminal action may be adequate to prevent future wrongs, but it certainly affords no compensation for past injuries." *Id.* at 234, 361 P.2d at 944. *Cf.* Lorang v. Hays, 69 Idaho 440, 209 P.2d 733 (1949). See also 38 WASH. L. REV. 371 (1963).

[13] *Cf.* Goode v. Martinez, 58 Wn. 2d at 235, 361 P.2d at 945 (1961):

> Where only "the shell of the marriage contract" remains, we find no justification, at least in the present context, for determining the legal rights of the parties as if nothing had ever happened to interrupt their marital relations. To do otherwise is to ignore the realities of the situation and indulge in a fanciful assumption . . . .

[14] Noel v. Menninger Foundation, 175 Kan. 751, 267 P.2d 934 (1954).

[15] "It is a general principal that for negligent or tortious conduct, liability is the rule. Immunity is the exception to the rule, created by the courts which have applied it." Noel v. Menninger Foundation, *supra* note 14, 267 P.2d at 942.

[16] In *Noel,* the court rejected any assertion that it must wait for legislative action, and—quoting the Washington Supreme Court—said, "We closed our courtroom doors without legislative help, and we can likewise open them." *Ibid.*

[17] This is the conclusion reached by Prof. Peck, following a survey of legislation in the field of tort law. Peck, *The Role of the Court and Legislatures in the Reform of Tort Law,* 48 MINN. L. REV. 265 (1963).