Wyoming Law Journal

Volume 17 | Number 3 Article 12

December 2019

Interspousal Disability Doctrine

Walter R. Wellman

In the recent case of *Self v. Self*[1] the Supreme Court of California was called upon to decide whether California should continue to follow the rule of interspousal immunity for *intentional* torts first announced in that state in 1909.[2] The court held that a wife could recover if the husband broke her arm in the course of an unlawful assault. *Klein v. Klein*[3] decided the same day, involved an action by a wife against her husband for a broken leg she allegedly suffered as a result of his *negligence*. The court held the wife could recover. In so doing, the common law rule that a married woman cannot maintain an action against her husband for injuries caused by his negligent or intentional act[4] has been completely abandoned.

The weight of authority holds that neither spouse may sue the other for personal tort.[5] California now agrees with the growing number of states which hold that since the enactment of the married women's statutes such an action is permitted.[6] Recently there has developed an intermediate view which recognizes the right to recover for intentional torts while denying the right for negilgent torts.[7]

---

1. Self v. Self, 26 Cal. Rptr. 97, 376 P.2d 65 (1962).
2. Peters v. Peters, 156 Cal. 32, 103 Pac. 219 (1909).
3. Klein v. Klein, 26 Cal. Rptr. 102, 376 P.2d 70 (1962).
4. Phillips v. Barnet, L.R. 1 Q.B. Div. (Eng.) 436 (1876).
5. Ferguson v. Davis, 48 Del. 299, 102 A.2d 707 (1954); Thompson v. Thompson, 218 U.S. 611, 54 L.Ed. 1180 (1910); Wallach v. Wallach, 94 Ga. App. 576, 95 S.E.2d 750 (1956); Bodenhagen v. Farmers Mut. Ins. Co., (Ill.) 5 Wis. 2d 306, 92 N.W.2d 759 (1958); Hary v. Arney, 128 Ind. App. 174, 145 N.E. 2d 575 (1957); Re Dolmage's Estate, 203 Iowa 231, 212 N.W. 553 (dictum) (1927); Sink v. Sink, 172 Kan. 217, 239 P.2d 933 (1952); Gremillion v. Caffey (La.) 43 A.L.R.2d 635, 71 So. 2d 670 (1954); Gray v. Gray (Me.) 87 N.H. 82, 174 Atl. 508 (1934); Ennis v. Donovan, 222 Md. 161 A.2d 698 (1960); Bissonnette v. Bissonnette (Mass.), 20 C.S. 403, 137 A.2d 354 (1957); Kircher v. Kircher, 288 Mich. 669, 286 N.W. 120 (1939); Ensminger v. Campbell, 242 Miss. 519, 134 So. 728 (1961); Hamilton v. Fulkerson, — Mo. —, 285 S.W.2d 642 (1955); Conley v. Conley, 92 Mont. 425, 15 P.2d 922 (1932); Koenigs v. Travis, 246 Minn. 457, 75 N.W.2d 478 (1956); Emerson v. Western Seed & Irrig. Co., 166 Neb. 180, 216 N.W. 297 (1927); Kennedy v. Kennedy, 352 P.2d 833 (1960); Rodgers v. Galindo, 68 N.M. 315, 360 P.2d 400 (1961); Koplik v. C. P. Trucking Corp., 27 N.J. 1, 141 A.2d 34 (1958); Smith v. Smith, 205 Ore. 286, 287 P.2d 572 (1955); Johnson v. Peoples First National Bank & Trust Co., 394 Pa. 116, 145 A.2d 716; Oken v. Oken, 44 R.I. 291, 117 Atl. 357 (1922); Prince v. Prince, 205 Tenn. 451, 326 S.W.2d 908 (1959); Cohen v. Cohen, 66 F. Supp. 312, 22 A.L.R.2d 1255n (1946); Vigilant Ins. Co. v. Bennet, 197 Va. 216, 89 S.S.2d 69 (1955); Levlock v. Spanos, 101 N.H. 22, 131 A.2d 319 (1957); Goode v. Martinis, 58 Wash. 229, 361 P.2d 941 (1961); Campbell v. Campbell, 145 W.V. 245, 114 S.E.2d 406 (1960); McKinney v. McKinney, 59 Wyo. 204, 135 P.2d 940 (1943).
6. Bennett v. Bennett, 224 Ala. 335, 140 So. 378 (1932); Jaeger v. Jaeger, 262 Wis. 14, 53 N.W.2d 740 (1952); Leach v. Laech, 227 Ark. 599, 300 S.W.2d 15 (1957); Klein v. Klein, 26 Cal. Rptr. 102, 376 P.2d 70 (1962); Rains v. Rains, 97 Colo. 19, 46 P.2d 740 (1935); Silverman v. Silverman, 145 Conn. 663, 145 A.2d 826 (1958); Alexander v. Alexander, 140 F. Supp. 925, 229 F.2d 111 (1956); Lorang v. Hays, 69 Idaho 440, 209 P.2d 733 (1949); Brown v. Gosser, 262 S.W.2d 480, 43 A.L.R.2d 626 (1953); Jernigan v. Jernigan, 236 N.C. 430, 72 S.E.2d 812 (1952); Fitzmaurice v. Fitzmaurice, 62 N.D. 191, 242 N.W. 526 (1932); Morin v. Letourneau, 102 N.H. 309, 156 A.2d 131 (1959); Pryor v. Merchants Mut. Cas. Co., 12 Misc. 2d 801, 174 N.Y.S.2d 24 (1958); Damn v. Elyria Lodge No. 465, 158 Ohio St. 107, 107 N.E.2d 337 (1952); Fiedler v. Fiedler, 42 Okla. 124, 140 Pac. 1022 (1914); Prosser v. Prosser, 114 S.C. 45, 102 S.E. 787 (1920); Scotvold v. Scotvold, 68 S.D. 53, 298 N.W. 266 (1941); Taylor v. Patten, 2 Utah 2d 404, 275 P.2d 696 (1954); Wait v. Peirce, 191 Wis. 202, 209 N.W. 475 (1926).
7. Smith v. Smith, 205 Ore. 286, 287 P.2d 576 (1955); Apitz v. Dames, 205 Ore. 242,

In 1910 the United States Supreme Court decided the case of *Thompson v. Thompson.*[8] Mr. Justice Harlan, in dissenting, rejected all arguments supporting the majority view as specious and construed the married women's acts[9] to permit an action by one spouse for a personal tort committed by the other, whether it be intentional or negligent in character. The dissenting opinion stated:

> I will not assume that Congress intended to bring about any such result. I cannot believe that it intended to permit the wife to sue the husband separately, in tort, for the recovery, including damages for the detention of her property, and at the same time deny her the right to sue him, separately, for a tort committed against her person.[10]

This opinion, in which Mr. Justice Holmes and Mrs. Justice Hughes joined, stands as a landmark for the growing minority view which is now followed in nineteen states.[11] Prosser has criticized the majority view and is in accord with other legal writers who feel that there is no possible justification for the old rule except that of historical survival.[12]

Various arguments have been advanced by the majority to support the common law view of interspousal disability.

(1). *The nonliability of the husband to the wife for damage for personal tort is founded upon the common law fiction that husband and wife are one.*[13] Colorado has replied, "It would seem to follow that when the fiction is abolished, the nonliability does not survive. Reason is the soul of the law, and when the reason of any particular law ceases so does the law itself."[14] Colorado abrogated the common law rule in 1935, having statutory and constitutional provisions almost identical with those of Wyoming.[15]

(2), *The wife has an adequate remedy in divorce, separate maintenance and criminal proceedings for the wrongs committed by her husband.*[16] This argument is obviously untrue, since neither compensates for

287 P.2d 585 (1955); Kowaleski v. Kowaleski, 227 Ore. 45, 361 P.2d 64 (1961); Ennis v. Truhitte, 306 S.W.2d 549 (1957).

8. Thompson v. Thompson, 218 U.S. 611, 31 Sup. Ct. 111, 54 L. Ed. 1180, 30 L.R.A. (n.s.) 1153; 21 Ann. Cas. 921 with Justice Holmes and Justice Hughes joining in the dissent.
9. Wyo. Stat. §§ 20-22 to 20-28 (1957).
10. Thompson v. Thompson, 218 U.S. 611 at 623.
11. Cases cited note 6 supra.
12. Prosser on Torts, 2d Ed. at 674, 675 (1955).
13. 13 R. C. L. 1394, 1396.
14. Rains v. Rains, 97 Colo. 19, 46 P.2d 740 (1935). See also, Naab v. Smith, 55 Wyo. 181, 97 P.2d 677 (1940).
15. *Wyo.*: Wyo. Const., art. 1, § 8; art. 6, § 1, art. 19, § 9. Wyo. Stat., §§ 20-22 to 20-28 (1957). Rule 17, Rules of Civil Procedure. More particularly Wyo. Stat. § 20-24, Power to sue and be sued. Any woman may, while married, sue and be sued in all matters having relation to her property, person or reputation, in the same manner as if she were sole.
Colo.: Colo. Const. art. 11, § 6; art. 7, § 2; art. 18, § 1, C.R.S. §§ 90-2-1 to 90-2-10 (1953). Rule 17b Rules of Civil Procedure. More particularly C.R.S. § 90-2-2. Married women may sue and be sued. Any woman, while married, may sue and be sued, in all matters having relation to her property, person or reputation, in the same manner as if she were sole.
16. Austin v. Austin, 136 Miss. 61, 100 So. 591 (1924).

the damage done nor covers all the torts that may be committed.[17] In Oklahoma the court stated:

> We are unable to perceive wherein either public policy or society, or the sanctity of the home, or the sacred relations of marriage is better protected by denying her a reasonable compensation for injuries maliciously and feloniously inflicted upon her by the husband with a shotgun loaded with buckshot . . . than to allow her to go into the criminal courts and send him to the penitentary or into a divorce court and publish their entire married life to the world.[18]

(3). *Actions between husband and wife are against public policy because they tend to bring about a dissolution of the marriage.*[19] This contention has been held particularly weak by one court in which they stated:

> We can perceive of nothing in the nature of tort action which would make them the more acrimonious and disturbing to domestic tranquility than property actions, criminal proceedings and divorce suits. In the rare instances where the wife will sue the husband despite his objections there is probably not much tranquility to preserve.[20]

(4). *The allowance of such suits would open new avenues for fraud and collusion.*[21] Discussing fraud upon insurance corporations by collusion between spouses, the case of *Courtney v. Courtney* states, "A man pays for insurance to indemnify any person whom he injuries 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."[22] Negligence actions by wives against husbands without any notable exception have involved automobile accidents and have arisen since it has become a common practice for owners of such vehicles to carry insurance that serves the double purpose of protecting them and compenasting those whom they or their agents may injure. It is natural and commendable that an owner who is the head of a family should want this protection to extend to the members of his family.[23] With respect to the question of fraud it has been very logically submitted that no case should be saddled with the presumption of fraud ab initio.[24] 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.[25]

17. Prosser on Torts, Ed Ed. at 674 (1955). Example: Ordinary negligent injury is nowhere a crime, or a ground for divorce.
18. Fiedeer v. Fiedeer, 42 Okla. 124, 140 Pac. 1022, 1025 (1914).
19. Johnson v. Peoples First National Bank and Trust Co., 394 Pa. 116, 145 A.2d 719 (1958).
20. Courtney v. Courtney, 184 Okla. 395, 87 P.2d 660 (1939).
21. Thompson v. Thompson, supra note 8.
23. See Justice Kimball dissenting in McKinney v. McKinney, 59 Wyo. 204, at 253, 135 P.2d 940 (1943).
24. Garcia v. Fantauzzi, 20 F.2d 524, 529, C.C.A. 1st (1927).
25. See Justice Jacobs dissenting in Koplik v. C. P. Trucking Corp., 27 N.J. 1, 141 A.2d 34 at 40.

(5). *If the statutory construction is considered narrow and its consequences socially undesirable the remedy lies in the hands of the legislature.*[26] In this regard Mr. Justice Harlan[27] felt the married women's acts enacted by Congress for the District of Columbia were so explicit that no room remained for mere construction. He further stated that, "If the words used by Congress lead to such a result, and if, as suggested, that result be undesirable on grounds of public policy, it is not within the function of the court to ward off the dangers feared or the evils threatened *simply by judicial construction that will defeat the plainly expressed will of the legislative department.* With mere policy, expediency or justice of legislation the courts, in our system of government, have no rightful concern. Their duty is only to declare what the law is, not what in their judgment, it ought to be."

Wyoming considered this question in 1943 in the case of *McKinney v. McKinney*[28] in which the majority of the three-judge Supreme Court denied the right of a wife to sue her husband for damages for personal injuries sustained by reason of his gross negligence in the operation of an automobile in which she was riding. Justice Riner, speaking for the majority approved the rule that the married women's statutes[29] had not abrogated the common law rule of spousal disability ,but instead conferred upon a married woman only the right to sue and be sued by third persons as if she were unmarried and without joining her husband. Mr. Justice Blume, concurring, approved the common law rule but added that an exception to the rule should be drawn where it is apparent that the husband was protected by liability insurance. *Chief Justice Kimball* dissented on the ground that the language of the Wyoming statutes[30] was to be construed as entirely overcoming and evincing a legislative intent to abrogate the common law rule disabling a wife from suing her husband for tort.

Justice Riner, in the majority opinion recalled that it is well settled that in construing statutes the rules of the common law are not to be changed by doubtful implication nor overturned except by clear and unambiguous language, citing 25 R.C.L. 1054, Section 280. This section further provides: "In order to hold that a statute has abrogated common law rights existing at the date of its enactment it must clearly appear that they are so repugnant to the act, or the part thereof invoked, *that their survival would in effect deprive it of its effacy and render its provisions nugatory.*[31]

In 1956 the United States District Court for South Carolina rendered a very significant decision.[32] The case involved an action for malicious

26. Koenigs v. Travis, 246 Minn. 457, 75 N.W.2d 478 (1956).
27. Thompson v. Thompson, supra note 8.
28. McKinney v. McKinney, 59 Wyo. 204, 135 P.2d 940 (1943).
29. See statutes cited note 15 supra.
30. Ibid.
31. McKinney v. McKinney, 59 Wyo. 204 at 213, 135 P.2d 940 (1943).
32. Alexander v. Alexander, 140 F. Supp. 925, 229 F.2d 111 (1956).

prosecution and the laws of Florida controlled the substantive rights of the parties. The court held: First, that as used in the Constitutional provision that no state shall deprive any "person" of life, liberty or property, without due process of law, or deny to any person the equal protection of the law, . . . is broad enough to include any human being who is a citizen of the United States. Second, the Constitution and laws of the United States recognize that a married woman is a person and an individual entitled to the same protection of the laws as other individuals *regardless of ancient provisions of the common law.* Third, the Constitution of Florida is the basic law of the state and supersedes *any* provision of the common law which conflicts with it, *notwithstanding* a state statute adopting the common laws of England which were of general and not *local in nature.*

Thus the common law of Florida which prohibited suits between husband and wife for tort has been abrogated by the Fourteenth Amendment to the Federal Constitution and by the Constitution of Florida.

Unquestionably the general purpose of the modern statutes is to emancipate women and eliminate disabilities which existed under common law, including the fiction that the husband and wife are legally one. This writer feels that to continue the common law rule of interspousal disability defeats the plainly expressed will of the legislative department and in effect deprives the Constitution of the United States, the Constitution of the State of Wyoming, and the married women's statutes of their effacy and renders such provisions nugatory. As Justice Crowhart said:

> Every step taken to emancipate women from the rigorous restraints of the common law has been met with dark forebodings on the part of the judiciary. But now that women have been put on a parity with men as to their personal and property rights, society survives, with none of the dark portents of the judicial prophets realized.[33]

The reasoning advanced for denying the husband or wife this right, is not compelling in light of the modern and more enlightened conception of marriage. Twenty years have elapsed since the decision of *McKinney v. McKinney* with no less than eight additional states abandoning the old common law rule in favor of the better reasoned minority view.[34] This trend indicates that Wyoming will undoubtedly re-examine its position on this question.

WALTER R. WELLMAN

33. See Justice Crowhart dissenting in Wick v. Wick, 192 Wis. 266, 212 N.W. 787 (1927).
34. Cases cited note 6 supra.