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# Antenuptial Torts After Divorce

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# CASES NOTED

## ANTENUPTIAL TORTS AFTER DIVORCE

Plaintiff was the mother of a minor child whose death was proximately caused by the negligence of the defendant. Thereafter, the plaintiff and the defendant were married. Subsequent to their divorce, the plaintiff brought an action against the defendant alleging negligence under the Florida wrongful death statute.[1] The defendant moved for summary judgment on the ground that the plaintiff's right of action was extinguished by the marriage. The District Court for the Northern District of Florida *held,* motion granted: under Florida law, a former spouse cannot be sued for an antenuptial tort, because the marriage relation extinguishes all rights of action between spouses and such rights of action are not re-created or revived by divorce. *Gaston v. Pittman,* 285 F. Supp. 645 (N.D. Fla. 1968).

The common law has long recognized the immunity from suit between spouses, which is historically based on the *unity doctrine.*[2] Acceptance of this long standing doctrine has eroded with time as it has been applied to property[3] and contract[4] rights, but the overwhelming majority of jurisdictions still hold that spouses may not sue each other for personal torts.[5] Many jurisdictions now emphasize other justifications for this position, such as the public interest in the protection of family

1. FLA. STAT. § 768.03 (1967).

2. This doctrine holds that during marriage the husband and wife are one person in the eyes of the law, and that all personal legal rights and duties depend upon their unity. Phillips v. Barnet, 1 Q.B.D. 436 (1876); W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 442 (Lewis's ed.). Put another way, "Under the common law the woman and the man became one person upon marriage, and that person was the husband." Taylor v. Dorsey, 155 Fla. 305, 313, 19 So.2d 876, 880 (1944). Since the husband and wife had a singular legal identity and since a person could not sue himself, no cause of action could arise in favor of one spouse against the other. Thompson v. Thompson, 218 U.S. 611 (1910); Tresher v. McElroy, 90 Fla. 372, 106 So. 79 (1925); Wallach v. Wallach, 94 Ga. App. 576, 95 S.E.2d 750 (1956); Brown v. Gosser, 262 S.W.2d 480 (Ky. 1953) (rejecting the unity doctrine); Harvey v. Harvey, 239 Mich. 142, 214 N.W. 305 (1927). The effect of the doctrine has been that "marriage acts as a perpetually operating discharge of all wrongs between man and wife, committed by one upon the other." Abbott v. Abbott, 67 Me. 304, 307, 24 Am. R. 27, 29 (1877).

3. Based on the construction of the married women's emancipation acts, a wife may sue her husband where her separate property is involved. White v. White, 58 Mich. 546, 25 N.W. 490 (1885); Carney v. Gleissner, 62 Wis. 493, 22 N.W. 735 (1885).

4. Based on the construction of the married women's emancipation acts, a wife may sue her husband where contract rights between them are involved. Mathewson v. Mathewson, 79 Conn. 23, 63 A. 285 (1906); Smith v. Hughes, 292 Ky. 723, 167 S.W.2d 847 (1943); Trayer v. Setzer, 72 Neb. 845, 101 N.W. 989 (1904).

5. A well developed discussion of the majority position may be found in Smith v. Smith, 205 Ore. 286, 287 P.2d 572 (1955). For a collection of cases *see* 41 AM. JUR. 2d *Husband and Wife* § 522 (1968); 41 C.J.S. *Husband and Wife* § 396 (1944); Annot., 43 A.L.R. 2d 632, 636-41 (1955).

harmony,[6] the dangers of fraudulent claims against insurance companies,[7] the availability of appropriate alternative remedies,[8] and the interest in final settlement between parties in divorce proceedings.[9]

Attack upon this rule most often revolves around the construction of the married women's emancipation acts of the several states.[10] Most states have strictly construed these statutes so as to deny a right of action against a spouse,[11] while the minority of states which allow interspousal

6. Thompson v. Thompson, 218 U.S. 611 (1910); Corren v. Corren, 47 So.2d 774 (Fla. 1950); Bandfield v. Bandfield, 117 Mich. 80, 75 N.W. 287 (1898); Patenaude v. Patenaude, 195 Minn. 523, 263 N.W. 546 (1935); Romero v. Romero, 58 N.M. 201, 269 P.2d 748 (1954); Tanno v. Eby, 78 Ohio App. 21, 68 N.E.2d 813 (1946); Smith v. Smith, 205 Ore. 286, 287 P.2d 572 (1955). In a dramatic overstatement of the policy behind the rule one court has stated:

> [If suits between spouses were allowed] [t]he flames which [such] litigation would kindle on the domestic hearth would consume in an instant the conjugal bond and bring on a new era indeed—an era of universal discord, of unchastity, of bastardy, of dissoluteness, of violence, cruelty and murders. But will the courts expose this fundamental relation to the consequences of unbridled litigation? Never. Smith v. Smith, 14 Pa. D. & C. 466, 468 (1930).

7. It is suggested that the potential gain by a defendant husband from a judgment for his wife to be paid by an insurance company would offer an incentive for fraudulent claims that would be difficult to disprove because of the intimate relationship between parties. *See* Smith v. Smith, 205 Ore. 286, 287 P.2d 572 (1955). *But see* Brown v. Gosser, 262 S.W.2d 480 (Ky. 1953); Courtney v. Courtney, 184 Okla. 395, 87 P.2d 660 (1939).

8. *See* Main v. Main, 46 Ill. App. 106 (1892); Abbott v. Abbott, 67 Me. 304, 24 Am. R. 27 (1877); Bandfield v. Bandfield, 117 Mich. 80, 75 N.W. 287 (1898); Austin v. Austin, 136 Miss. 61, 100 So. 591 (1924).

9. *See* Main v. Main, 46 Ill. App. 106 (1892); Abbott v. Abbott, 67 Me. 304, 24 Am. R. 27 (1877); Patenaude v. Patenaude, 195 Minn. 523, 263 N.W. 546 (1935). One court has held that there is a presumption that all claims between parties were settled in the divorce proceeding. Schultz v. Christopher, 65 Wash. 476, 118 P. 629 (1911).

10. While the differences between these statutes are substantive in some cases, Florida's statute may be considered typical. FLA. STAT. § 708.08 (1967) provides:

> Every married woman is hereby empowered to take charge of, and manage and control her separate property, to contract and to be contracted with, to sue and be sued, and to sell, convey, transfer, mortgage, use and pledge her property, real and personal, and to make, execute and deliver instruments and documents of every character, without restraint, without the joinder or consent of her husband, in all respects as fully as if she were unmarried. Every married woman, without the joinder or consent of her husband, shall have and may exercise all rights and powers with respect to her separate property, income and earnings, and may enter into, obligate herself to perform, and enforce contracts or undertakings to the same extent and in like manner as if she were unmarried; provided, however, that no deed, mortgage or other instrument conveying or encumbering real property owned by a married woman shall be valid without the joinder of her husband; provided, further, that any claim or judgment against any married woman shall not be a claim or lien against such married woman's inchoate right of dower in her husband's separate property.

Another line of attack has been based on constitutional rights to redress all legal wrongs. Courtney v. Courtney, 184 Okla. 395, 87 P.2d 660 (1939). One United States District Court has held that the Florida Constitution confers such a right on married women. Alexander v. Alexander, 140 F. Supp. 925 (W.D.S.C. 1956). But this decision has been expressly rejected by the Florida Supreme Court as an incorrect statement of Florida law. Bencomo v. Bencomo, 200 So.2d 171 (Fla. 1967).

11. The basis of these decisions is that the statutes did not abrogate the common law rule of unity or its attendant immunity to create a new right of action in the wife that was not recognized by the common law. Instead, the legislatures merely intended to free the wife of the procedural barrier of joinder of the husband so that she could sue and be sued on her own behalf as well as manage her own property. Thompson v. Thompson, 218 U.S. 611

claims for torts have paved the way for this development by liberal construction of the statutes.[12]

Most courts have decided that the right of action for antenuptial torts is extinguished upon the marriage of the parties, and thus allow no suit during marriage for an antenuptial tort.[13] The majority of jurisdictions have likewise held that since no right of action arose for torts committed during marriage,[14] there is therefore no basis for suit after termination of the marriage because divorce cannot re-create that which never existed.[15]

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(1910); Corren v. Corren, 47 So.2d 774 (Fla. 1950); Hudson v. Hudson, 226 Md. 521, 174 A.2d 339 (1961); Koenigs v. Travis, 246 Minn. 466, 75 N.W.2d 478 (1956); Scales v. Scales, 168 Miss. 439, 151 So. 551 (1934); Romero v. Romero, 58 N.M. 201, 269 P.2d 748 (1954); Raines v. Mercer, 165 Tenn. 415, 55 S.W.2d 263 (1932); Furey v. Furey, 193 Va. 727, 71 S.E.2d 191 (1952); Schultz v. Christopher, 65 Wash. 476, 118 P. 629 (1911); Staats v. Co-Operative Transit Co. 125 W. Va. 473, 24 S.E.2d 916 (1943). Some courts have emphasized the anomaly which would be produced by giving the wife a right of action. Since at common law neither spouse could sue the other, construction of the married women's emancipation act to allow suit by the wife would confer no equal right in the husband:

> At common law there was no right of action either by husband or wife against the other for a personal tort. There was absolute equality in that respect. Therefore there was no occasion to emancipate the wife with reference to such torts, because the husband was under the same sort of disability as the wife. [If the statute gave the wife a right of action,] we would have the novel situation of the wife having a cause of action against her husband for a personal tort, while the husband would have no such right against his wife; for there is nothing either in our Constitution or statutes which gives any such right to the husband. Austin v. Austin, 136 Miss. 61, 72, 100 So. 591, 592 (1924).

At least one state has statutorily forbidden suits between spouses during coverture. ILL. ANN. STAT. ch. 68, § 1 (1959).

12. These jurisdictions generally hold that the married women's emancipation acts or the state constitutions have abrogated the unity doctrine. Bennett v. Bennett, 224 Ala. 335, 140 So. 378 (1932); Katzenberg v. Katzenberg, 183 Ark. 626, 37 S.W.2d 696 (1931); Rains v. Rains 97 Colo. 19, 46 P.2d 740 (1935); Brown v. Brown, 88 Conn. 42, 89 A. 889 (1914); Brown v. Gosser, 262 S.W.2d 480 (Ky. 1953); Lorang v. Hays, 69 Idaho 440, 209 P.2d 733 (1949); Gilman v. Gilman, 78 N.H. 4, 95 A. 657 (1915); Crowell v. Crowell, 180 N.C. 516, 105 S.E. 206 (1920); Fitzmaurice v. Fitzmaurice, 62 N.D. 191, 242 N.W. 526 (1932); Courtney v. Courtney, 184 Okla. 395, 87 P.2d 660 (1939); 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. Pierce, 191 Wis. 202, 209 N.W. 475 (1926). One statute expressly provides for interspousal suits during coverture. N.Y. GEN. OBLIG. LAW § 3-313(2) (McKinney 1964).

13. Carmichael v. Carmichael, 53 Ga. App. 663, 187 S.E. 116 (1936); Hunter v. Livingston, 125 Ind. App. 422, 123 N.E.2d 912 (1955) (sympathizing with the minority position); Hudson v. Hudson, 226 Md. 521, 174 A.2d 339 (1961); Lubowitz v. Taines, 293 Mass. 39, 198 N.E. 320 (1936); Scales v. Scales, 168 Miss. 439, 151 So. 551 (1934); Patenaude v. Patenaude, 195 Minn. 523, 263 N.W. 546 (1935); Orr v. Orr, 36 N.J. 236, 176 A.2d 241 (1961); Raines v. Mercer, 165 Tenn. 415, 55 S.W.2d 263 (1932); Furey v. Furey, 193 Va. 727, 71 S.E.2d 191 (1952); Staats v. Co-operative Transit Co., 125 W. Va. 473, 24 S.E.2d 916 (1943); Buckeye v. Buckeye, 203 Wis. 248, 234 N.W. 342 (1931) (applying Illinois law). One state has held that antenuptial agreements providing for the survival of antenuptial rights of action after marriage are void as a matter of public policy. Tanno v. Eby, 78 Ohio App. 21, 68 N.E.2d 813 (1946). The two Florida decisions on this point have used the language that the right of action "abates" during marriage, instead of saying it is extinguished by the marriage. Webster v. Snyder, 103 Fla. 1131, 1132, 138 So. 755 (1932); Amendola v. Amendola, 121 So.2d 805, 806 (Fla. 2d Dist. 1960).

14. *See* note 5 *supra*.

15. Bencomo v. Bencomo, 200 So.2d 171 (Fla. 1967); Wallach v. Wallach, 94 Ga. App.

The combination of legal relations necessary to involve both of these principles has heretofore arisen only once, in the case of *Henneger v. Lomas*.[16] There the court applied both principles which, when read together, preclude liability for antenuptial torts between spouses after divorce; stating:

> For the reason that the marriage extinguished antenuptial rights of action for tort or upon contract between husband and wife, the wife could not, after divorce from her husband or his death, maintain an action against him or his estate for any injury to her person or character by him before their marriage . . . .[17]

The instant case adopts the view taken in *Henneger* as a correct statement of the law in Florida.[18]

Observing that Florida had not previously decided the question presented,[19] and that the Florida married women's emancipation act[20] had been interpreted so as not to give a wife a substantive right of action against her husband,[21] the court turned its attention to the unity doctrine.[22] The court reasoned that any right of action possessed by the plaintiff was merged with the rights of the defendant upon her marriage to him, and that the effect of such a merger was to abate the right of action against him.[23] The court determined that since the right of action was extinguished by the marriage, divorce could not re-create it, for nothing remained of it which could be revived.[24]

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576, 95 S.E.2d 750 (1956); Main v. Main, 46 Ill. App. 106 (1892); Abbott v. Abbott, 67 Me. 304, 24 Am. R. 27 (1877); Bandfield v. Bandfield, 117 Mich. 80, 75 N.W. 287 (1898); Strom v. Strom, 98 Minn. 427, 107 N.W. 1047 (1906); Smith v. Smith, 14 Pa. D. & C. 466 (1930); Schultz v. Christopher, 65 Wash. 476, 118 P. 629 (1911); Phillips v. Barnet, 1 Q.B.D. 436 (1876).

16. 145 Ind. 287, 44 N.E. 462 (1896). Other cases have stated the same rule in dicta. *See, e.g.*, Spector v. Weisman, 40 F.2d (D.C. Cir. 1930); Wallach v. Wallach, 94 Ga. App. 576, 95 S.E.2d 750 (1956).

17. Henneger v. Lomas, 145 Ind. 287, 291, 44 N.E. 462, 463 (1896).

18. Gaston v. Pittman, 285 F. Supp. 645, 646, 650 (N.D. Fla. 1968).

19. *Id.* at 646.

20. FLA. STAT. § 708.08 (1967). *See* note 10 *supra*.

21. Gaston v. Pittman, 285 F. Supp. 645, 646 (N.D. Fla. 1968). *Accord*, Corren v. Corren, 47 So.2d 774 (Fla. 1950).

22. Gaston v. Pittman, 285 F. Supp. 645, 647 (N.D. Fla. 1968). At this point the court thoroughly discussed the common law roots of the unity doctrine. *Id.* at 647-48. Other Florida cases on similar questions have based their holdings on the unity doctrine. *See* Bencomo v. Bencomo, 200 So.2d 171 (Fla. 1967); Shiver v. Sessions, 80 So.2d 905 (Fla. 1955); Corren v. Corren, 47 So.2d 774 (Fla. 1950); Taylor v. Dorsey, 155 Fla. 305, 19 So.2d 876 (1944); Webster v. Snyder, 103 Fla. 1131, 138 So. 755 (1932); Amendola v. Amendola, 121 So.2d 805 (Fla. 2d Dist. 1960).

23. Gaston v. Pittman, 285 F. Supp. 645, 648 (N.D. Fla. 1968). Attention was directed to the meaning of the word "abates." *Id.* at 648-49. Other jurisdictions had unanimously held that marriage extinguishes all antenuptial rights of action, *see* note 13 *supra*, and the court for present purposes held that the words "abate" and "extinguish" have the same meaning. Gaston v. Pittman, 285 F. Supp. 645, 648-49 (N.D. Fla. 1968). The distinction would become important in a case where the marriage was invalid. In such circumstances the word "abate" would mean suspend, and the right of action would survive the invalid marriage. *Id.* at 649-50 (dictum).

24. Gaston v. Pittman, 285 F. Supp. 645, 649 (N.D. Fla. 1968).

If the *Gaston* case is followed, the effect would be to increase the commitment of the Florida courts to the fiction of the unity doctrine.[25] The decision has foreclosed the opportunity to limit the unity doctrine by using a different interpretation of the word "abate" than was used in earlier cases.[26] The result is an extension of the doctrine to provide immunity where neither the cause of action nor the suit upon it arose during marriage.

The total emancipation of women in the last century makes the unity doctrine a hollow justification upon which to hang the cloak of immunity. Other rationales[27] offered to grant immunity in suits during coverture for antenuptial torts, or after divorce for torts committed during coverture, have no application to suits for antenuptial torts after divorce. The interest in the preservation of domestic harmony is vitiated by divorce.[28] Collusive fraudulent claims against insurance companies are no greater danger between former spouses for premarital torts than between strangers, because the incentive for fraud, which is the potential gain by the defendant by a finding of liability,[29] does not exist after divorce.[30]

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25. It is fictitious to the extent that in all other respects FLA. STAT. § 708.08 (1967) makes a married woman a free individual with virtually the same rights toward others as an unmarried woman. *See* Courtney v. Courtney, 184 Okla. 395, 87 P.2d 660 (1939).

26. Interpretation of the word "abate" to mean suspend during marriage would have allowed recovery in the instant case without overruling the unity doctrine's application to other circumstances. It would be consistent with this conclusion to continue to rule that: (1) marital suits for premarital torts are not maintainable, for the right of action is suspended during marriage; (2) marital suits for marital torts are not maintainable for the double reason that no right of action arises for torts committed during marriage, and even if such right did arise it would be suspended during the marriage; (3) post marital suits for marital torts are not maintainable, for no right of action arises for torts committed during marriage.

27. It is interesting to note that the court justified its conclusion solely upon the unity doctrine, while more recent Florida cases have given some attention to the public interest in the preservation of domestic harmony. *See* Corren v. Corren, 47 So.2d 774 (Fla. 1950); Shiver v. Sessions, 80 So.2d 905 (Fla. 1955).

28. Critics have vehemently argued that the act giving rise to the cause of action upon which relief is sought and the readiness to seek judicial relief show that even before divorce, marital harmony and tranquility are already destroyed and cannot be preserved by immunity from suit. *See* 1 F. HARPER & F. JAMES, THE LAW OF TORTS 645-47 (1956); W. PROSSER, HANDBOOK OF THE LAW OF TORTS 883 (3d ed. 1964); McCurdy, *Torts Between Persons in Domestic Relation*, 43 HARV. L. REV. 1030, 1052-53 (1930); Comment, 51 NW. U.L. REV. 610, 613-14 (1956). While this criticism may be accurate in cases involving intentional torts, acts creating liability for negligence and the readiness to press suit against an insurance company need not destroy domestic harmony and tranquility. In Smith v. Smith, 205 Ore. 286, 287 P.2d 572 (1955) the court stated:

> [T]he peace and domestic tranquility of the home is [not] ended every time that a wife is shaken up by the inattentive conduct of her husband in operating the family automobile, or vice versa. Nor can it be said that domestic felicity has been forever lost if a husband slips on a carelessly oiled kitchen floor. *Id.* at 307, 287 P.2d at 581.

29. *See* Smith v. Smith, 205 Ore. 286, 287 P.2d 572 (1955).

30. Even if this were not the case, a similar risk of fraud exists in suits between friends and persons enjoying guest status; *see* Courtney v. Courtney, 184 Okla. 395, 87 P.2d 660 (1939), and no authority suggests that such suits should be barred. Where divorce has not destroyed the incentive for fraud, faith in judicial competence has overcome the fear of fraud. Brown v. Gosser, 262 S.W.2d 480 (Ky. 1953).

Justification for immunity in this case is likewise not found in the assertion that other remedies are available to the injured spouse. Some courts have suggested that divorce or criminal sanctions brought against the defendant are sufficient.[31] Aside from the limited application of these remedies,[32] they are in all cases inadequate because they do not compensate the plaintiff for his injuries.[33]

Finally, post divorce suits for personal torts have been barred based upon the admonition that divorce should not open the door to litigation and should act as a final settlement of tort claims between parties.[34] Where the right of action arose before marriage, the marriage was an obstacle to its enforcement; removal of the obstacle by divorce should no more affect the right of action for a tort than it would affect a similar right of action for property or in contract.

As the result of the instant case, a strongly criticised legal anomaly has been extended to circumstances which by their unique character defy all rational justifications which can be offered for similar situations.[35] It appears, however, that if the slightest deviation from the blanket immunity of the common law is to be made, the cry for help must first be heeded by the legislature.[36] From all indications, the courts are either unwilling or unable to abolish a rule of law which has been obsolete for more than half a century.

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## CONSTITUTIONAL LAW—CAPITAL PUNISHMENT AND THE CHALLENGE FOR CAUSE

At the *voir dire* examination in the petitioner's trial for murder in a state court of Illinois, the prosecution successfully challenged for cause forty-seven of the ninety-six prospective jurors under the authority of the following statute:

> In trials for murder it shall be a cause for challenge of any juror who shall, on being examined, state that he has conscientious scruples against capital punishment, or that he is opposed to the same.[1]

31. *See* note 8 *supra*.

32. These remedies would not even apply to the instant case, for the parties are already divorced and no criminal action could be brought against the defendant for ordinary negligence.

33. *See* Courtney v. Courtney, 184 Okla. 395, 87 P.2d 660 (1939).

34. *See* note 9 *supra*.

35. *See* note 28 *supra*.

36. Judicial restraint seems to be the watchword for leaving changes of such magnitude to the legislature. *See* Thompson v. Thompson, 218 U.S. 611 (1910); Corren v. Corren, 47 So.2d 774 (Fla. 1950).

1. Ill. Rev. Stat., chs. 38, 743 (1959).