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MARITAL DISABILITY IN PERSONAL TORT ACTIONS

GENERAL STATUS

The effect of the married women's statutes or emancipation acts, which have been passed in all jurisdictions,¹ has been to dissolve the fictional unity of husband and wife which existed at early common law.² As a consequence the courts have generally allowed married women to bring an action against their husbands for torts involving the wife's separate property.³

The majority of jurisdictions in interpreting the emancipation acts still do not allow a *personal tort action* by one spouse against the other.⁴ The

1. These statutes are collected in 3 VERNIER, AMERICAN FAMILY LAWS §§ 167, 179, 180 (1935). For a typical group of statutes see FLA. STAT. ch. 708 (1957).

2. "[I]t is perfectly apparent that the legal unity of husband and wife is now hardly more than an anachronistic fiction." *Koplik v. C. P. Trucking Corp.*, 47 N.J. Super. 196, 201, 135 A.2d 555, 558 (1957).

3. *Conversion*: *Hamilton v. Hamilton*, 255 Ala. 284, 51 So.2d 113 (1950); *Eddleman v. Eddleman*, 183 Ga. 766, 189 S.E. 833 (1937); *Madget v. Madget*, 85 Ohio App. 18, 87 N.E.2d 918 (1949).

Trespass: *Larison v. Larison*, 9 Ill. App. 27 (1881); *Weldon v. DeBathe*, 14 Q.B.D. 339 (1884).

Replevin: *White v. White*, 58 Mich. 546, 25 N.W. 490 (1885); *Howland v. Howland*, 20 Hun 472 (N.Y. 1880); *Cf. Tresher v. McElroy*, 90 Fla. 372, 106 So. 79 (1925).

Waste: *Ferter v. Kear*, 126 Pa. 470, 17 Atl. 668 (1889); *Boston v. Boston*, 190 S.W. 192 (Tex. Civ. App. 1916).

Ejectment: *Cook v. Cook*, 125 Ala. 583, 27 So. 918 (1899); *McDuff v. McDuff*, 45 Cal. App. 53, 187 Pac. 37 (1919); *Crater v. Crater*, 118 Ind. 521, 21 N.E. 290 (1888); *Edmonds v. Edmonds*, 139 Va. 652, 124 S.E. 415 (1924).

4. U.S.: *Thompson v. Thompson*, 218 U.S. 611 (1910); *Cal.*: *Watson v. Watson*, 39 Cal.2d 305, 246 P.2d 19 (1952); *Peters v. Peters*, 156 Cal. 32, 103 Pac. 219 (1909); *Paulus v. Bauder*, 106 Cal. App.2d 589, 235 P.2d 422 (1951); *Cubbison v. Cubbison*, 73 Cal. App.2d 437, 166 P.2d 387 (1946); *Del.*: *Ferguson v. Davis*, 48 Del. 299, 102 A.2d 707 (1954); *Fla.*: *Corren v. Corren*, 47 So.2d 774 (Fla. 1950); *Ga.*: *Eddleman v. Eddleman*, 183 Ga. 766, 189 S.E. 833 (1937); *Ind.*: *Hunter v. Livingston*, 125 Ind. App. 422, 123 N.E.2d 912 (1955); *Iowa*: *In re Dohmagne's Estate*, 203 Iowa 231, 212 N.W. 553 (1927) (dictum); *Kan.*: *Sink v. Sink*, 172 Kan. 217, 239 P.2d 933 (1952); *Me.*: *Anthony v. Anthony*, 135 Me. 54, 188 Atl. 724 (1937) (dictum); *Md.*: *Furstenburg v. Furstenburg*, 152 Md. 247, 136 Atl. 534 (1927); *Mass.*: *Callow v. Thomas*, 322 Mass. 550, 78 N.E.2d 637 (1948); *Mich.*: *Kircher v. Kircher*, 288 Mich. 669, 286 N.W. 120 (1939); *Minn.*: *Karalis v. Karalis*, 213 Minn. 31, 4 N.W.2d 632 (1942); *Miss.*: *Ensminger v. Ensminger*, 222 Miss. 799, 77 So. 2d 308 (1955); *Austin v. Austin*, 136 Miss. 61, 100 So. 591 (1924); *Mo.*: *Willott v. Willott*, 333 Mo. 896, 62 S.W.2d 1084 (1933); *Mont.*: *Conley v. Conley*, 92 Mont. 425, 15 P.2d 922 (1932); *Neb.*: *Emerson v. Western Seed and Irrig. Co.*, 116 Neb. 180, 216 N.W. 297 (1927); *N.J.*: *Von Laszewski v. Von Laszewski*, 99 N.J. Eq. 25, 133 Atl. 179 (1926); *N.M.*: *Romero v. Romero*, 58 N.M. 201, 269 P.2d 748 (1954); *Pa.*: *Koontz v. Messer*, 320 Pa. 487, 181 Atl. 729 (1935) (dictum); *R.I.*: *Oken v. Oken*, 44 R.I. 291, 117 Atl. 357 (1922); *Tenn.*: *Lillienkamp v. Rippetoe*, 113 Tenn. 57, 179 S.W. 628 (1915); *Tex.*: *Worden v. Worden*, 222 S.W.2d 254 (Tex. Civ. App. 1949), *rev'd on other grounds*, 148 Tex. 356, 224 S.W.2d 187 (1949); *Vt.*: *Comstock v. Comstock*, 106 Vt. 50, 169 Atl. 903 (1934); *Va.*: *Furey v. Furey*, 193 Va. 727, 71 S.E.2d 191 (1952); *Wash.*: *Johnson v. Ottomeier*, 45 Wash.2d 419, 275 P.2d 723 (1954); *W. Va.*: *Polinz v. Polinz*, 116 W. Va. 187, 179 S.E. 604 (1935); *Wyo.*: *McKinney v. McKinney*, 59 Wyo. 204, 135 P.2d 940 (1943).

married women's acts are ambiguous as to this point and do not expressly confer upon the wife the right to bring a personal tort against her husband.⁵ An exception to this general statutory ambiguity exists in three jurisdictions which have, through statutory enactment, either specifically allowed⁶ or disallowed⁷ an action by one spouse against the other for a personal tort.

The reluctance of the majority to construe the emancipation acts as completely abrogating the common law disabilities of married woman has been further supported by several considerations. The following reasons have been most commonly advanced to substantiate the general view maintaining spousal disability as to personal torts: to promote domestic felicity and conjugal harmony; to prevent fictitious, collusive, fraudulent and trivial claims; to avoid a rise in liability insurance rates;⁸ adequate remedies exist in divorce courts or through the institution of criminal proceedings.⁹

All these arguments have been attacked by numerous writers¹⁰ and it is not the purpose of this comment to engage in any further criticism of the various reasons advanced. It may be said in passing that all of these views have been advanced under the aegis of that all encompassing common denominator - *public policy*.

In what may be termed a growing minority of jurisdictions, personal tort actions between the spouses are now permitted.¹¹ Interestingly enough these jurisdictions have reached this result through an interpretation of emancipation acts quite similar in content and language to those faced

5. *Loranz v. Hays*, 69 Idaho 440, 446, 209 P.2d 733, 737 (1949). "The common law rule has generally been held not to have been changed by what is commonly referred to as the Married Woman's Acts, and the question of whether or not such action can be maintained is one of statutory construction, in which the courts of the country are not in accord."

6. N.Y. DOM. REL. LAW § 57.

7. *Illinois*: ILL. REV. STAT. ch. 68, § 1 (1953). This statute was passed after it had been held that an action for personal tort between spouses could be maintained; *Brandt v. Keller*, 413 Ill. 503, 109 N.E.2d 729 (1952). *Louisiana*: LA. CODE PRAC. ANN. art. 105 (Dart. 1942).

8. N.Y. INS. LAW § 167 (3) provides that no insurance policy should be deemed to insure against any liability of an insured for injuries to his or her spouse, unless the contrary is plainly expressed.

9. See *Hamilton v. Fulkerson*, 285 S.W.2d 642, 647 (Mo. 1955) (For an excellent review of the various arguments, each of which the court found specious).

10. PROSSER, TORTS § 101 (2d ed. 1951); 1 HARPER AND JAMES, LAW OF TORTS § 8.10 (1956); McCurdy, *Torts Between Persons in Domestic Relations* 43 HARV. L. REV. 1030 (1930).

11. *Ala.*: *Penton v. Penton*, 223 Ala. 282, 135 So. 481 (1931); *Harris v. Harris*, 211 Ala. 222, 100 So. 333 (1924); *Johnson v. Johnson*, 201 Ala. 41, 77 So. 335 (1917); *Ark.*: *Katzenberg v. Katzenberg*, 183 Ark. 626, 37 S.W.2d 696 (1931); *Colo.*: *Rains v. Rains*, 97 Colo. 19, 46 P.2d 740 (1935); *Conn.*: *Ginsberg v. Ginsberg*, 126 Conn. 146, 9 A.2d 812 (1939); *Idaho*: *Loranz v. Hays*, 69 Idaho 440, 209 P.2d 733 (1949); *Ky.*: *Brown v. Gosser*, 262 S.W.2d 480 (Ky. 1953); *N.H.*: *Gilman v. Gilman*, 78 N.H. 4, 95 A.H. 657 (1915); *N.D.*: *Fitzmaurice v. Fitzmaurice*, 62 N.D. 191, 242 N.W. 526 (1932); *Ohio*: *Daum v. Elyria Lodge No. 465*, 158 Ohio St. 107, 107 N.E.2d 337 (1952); *Okla.*: *Courtney v. Courtney*, 184 Okla. 395, 87 P.2d 660 (1938); *S.C.*: *Pardue v. Pardue*, 167 S.C. 129, 166 S.E. 101 (1932); *S.D.*: *Scolvold v. Scolvold*, 68 S.D. 53, 298 N.W. 266 (1941); *Utah*: *Taylor v. Patten*, 2 Utah 2d 404, 275 P.2d 696 (1954); *Wis.*: *Forbes v. Forbes*, 226 Wis. 477, 277 N.W. 112 (1938); *Fontaine v. Fontaine*, 205 Wis. 570, 238 N.W. 40 (1931).

by the majority. Implicit in the result reached by the minority has been a rejection of the so-called public policy argument.¹²

In two jurisdictions a rather anomalous result has been reached, whereby the wife is permitted to sue the husband for a tort to her person, but such a right is not conferred upon the husband.¹³ As in the other minority jurisdictions the emancipation statutes were held to have taken away the disability of the wife to sue the husband, but in the absence of similar statutory authority the common law rule with respect to the husband remained in force.¹⁴

INCONSISTENT MIDDLEGROUND

Several jurisdictions, when confronted with certain factually unique situations, have created exceptions to the common law rule of spousal disability. It should be noted that the jurisdictions which have broken with the majority, under these factual exceptions, still adhere to the general rule of spousal disability. Discussion in this article is limited to those jurisdictions which have modified the disability rule and those which follow the rule en toto.

Pre-nuptial Torts

There is no conflict over the proposition that a party injured by a future spouse has both a cause of action and a right of action against the tortfeasor at the time the tort occurs. However, when the injured party and the tortfeasor marry, the question arises as to whether suit may be brought or continued (if instituted prior to marriage) after this inter-marriage.¹⁵

In *Koplick v. C. P. Trucking Co.* the plaintiff, an automobile passenger, was negligently injured by the defendant operator. After suit was brought and while the action was pending, plaintiff and defendant were married. The court, in allowing the action, squarely held that the public policy argument of marital harmony was inapplicable.¹⁶ In an almost identical factual situation the Missouri Supreme Court held the action maintainable.¹⁷ The court gave approval to a novel contention when it considered

12. See *Brown v. Gosser*, 262 S.W.2d 480 (Ky. 1953).

13. *Scholtens v. Scholtens*, 230 N.C. 149, 52 S.E.2d 350 (1949); *Fehr v. General Acc. Fire and Life Assur. Corp.*, 246 Wis. 228, 16 N.W.2d 787 (1944).

14. *Ibid.*

15. 47 N.J. Super. 196, 135 A.2d 555 (1957).

16. "If the pendency of such an action was no obstacle to the deliberate entry of the parties into the marital relationship itself in the first instance, we see no rational basis for the entertainment of a presumption that the continued prosecution of the action, patently contemplated when the parties married, will be substantially deleterious to that relationship Where the underlying policy of 'domestic peace and felicity' is not factually implicated, the rule of immunity will not be mechanically applied by the courts." *Id.* at 201, 135 A.2d at 558.

17. *Hamiton v. Fulkerson*, 285 S.W.2d 642 (Mo. 1955).

a cause of action owned by a woman prior to marriage as being part of her separate property which was not extinguished by marriage.¹⁸

Despite the compelling language supporting complete abrogation of the disability rule,¹⁹ the decisions in both *Koplick* and *Hamilton* were careful to limit their holdings to the factual situations at hand; a prime example of an adherence to stare decisis in the face of an admitted modern social trend.

It must be observed that most courts still apply the spousal disability even when an antenuptial tort is involved.²⁰ The position of these courts was well stated in *Carmichael v. Carmichael*:²¹ "Under the common law all rights of action by a wife for antenuptial wrongs committed by her husband are extinguished by their subsequent marriage. . . ."

Divorce and Annulment

Where the marital status has been terminated by legal decree, some jurisdictions have permitted a spouse to maintain an action in tort which accrued before, during or after coverture.²²

In *Steele v. Steele*²³ the wife's action against her former husband for an assault committed after she received a final divorce decree, but before the decree became effective,²⁴ was held maintainable. Commenting upon the domestic felicity argument the court stated: "This argument savors more of a rationalization of a preconceived notion than of bona fide reasoning leading to a logical conclusion."²⁵

18. *Id.* at 644. The same property analysis was adopted in *Carver v. Ferguson*, 254 P.2d 44 (Cal. App. 1953). However, that decision is only of academic value since the Supreme Court of California granted a hearing. A personal tort action between spouses, based on a premarital tort, was permitted in *Shirley v. Ayers*, 201 N.C. 51, 158 S.E. 840 (1931) ("semble").

19. "It is not apparent to us that the maintenance of an action by one spouse against the other for an antenuptial personal tort would disrupt domestic tranquility any more than do permitted actions between spouses based on wrongful acts affecting their separate property." *Hamilton v. Fulkerson*, 285 S.W.2d 642, 647 (Mo. 1955).

20. Where the action was brought before marriage: *Spator v. Weisman*, 59 App. D.C. 280, 40 F.2d 792 (1930); *Lubowitz v. Tarnes*, 293 Mass. 39, 198 N.E. 320 (1936); *Tanno v. Eby*, 78 Ohio App. 21, 68 N.E.2d 813 (1946); *Raines v. Mercer*, 165 Tenn. 415, 55 S.W.2d 263 (1932); *Staats v. Co-operative Transit Co.*, 125 W.Va. 473, 24 S.E.2d 916 (1943). Where the action was brought after marriage: *Carmichael v. Carmichael*, 53 Ga. App. 663, 187 S.E. 116 (1936); *Patenaude v. Patenaude*, 195 Minn. 523, 263 N.W. 546 (1935); *Scales v. Scales*, 168 Miss. 439, 151 So. 551 (1934); *Furey v. Furey*, 193 Va. 727, 71 S.E.2d 191 (1952).

21. *Supra* note 20, at 116.

22. *Steele v. Steele*, 65 F. Supp. 329 (D.D.C. 1946) (after marriage); *Lorang v. Flays*, 69 Idaho 440, 209 P.2d 733 (1949) (during marriage); *Henneger v. Lomas*, 145 Ind. 287, 44 N.E. 462 (1896) (before marriage); *Gremillion v. Caffey*, 71 So.2d 670 (La. App. 1954) (during marriage); see also cases collected in 43 A.L.R.2d 632, 644.

23. 65 F. Supp. 329 (D.D.C. 1946).

24. *Id.* at 332. "In the District of Columbia a decree of absolute divorce does not take effect until the expiration of six months after its entry (D.C. Code, tit. 16, § 421)." The fact that the tort occurred after the decree of absolute divorce was entered permitted the court to distinguish *Thompson v. Thompson*, 218 U.S. 611 (1910) which adhered to the common law after strictly interpreting the Married Women's Act. (D.C. Code 30-208, 1940).

25. *Steele v. Steele*, 65 F. Supp. 329, 330 (D.D.C. 1946). The court further recognized that since "a wife is at liberty to apply to the police and prosecuting authorities as well as to the criminal courts for redress, surely, this recourse is as apt to be disturbing to family tranquility as a resort to civil actions for damages."

The same result obtained in a recent Louisiana case²⁶ for a tort committed during coverture, action being brought after a divorce. The court construed the wife's disability as a relative incapacity to prosecute her cause of action which is removed by an absolute divorce.²⁷

In denying the wife's action against her husband for a tort committed during the marriage, the Supreme Court of Massachusetts²⁸ considered a voidable marriage as being valid until annulled.²⁹

The theory that no cause of action arises for a personal tort committed by one spouse upon the other would no longer seem valid with the demise of fictional unity. Furthermore the termination of the marriage by divorce or annulment would appear to make the public policy argument of marital harmony inapplicable. Most jurisdictions now recognize that there has been a wrong, but that the injured spouse is under a personal disability to sue.³⁰ Therefore when the marital status has been legally concluded, reason would seem to dictate that since there are no longer any reasons remaining to support a disability, the right of action should be permitted.

Wrongful Death and Survival Actions

Where the tortfeasor spouse, the wronged spouse or both, are deceased and an action has been brought under a wrongful death or survival statute, the general rule of spousal disability has met with declining applicability.³¹ The usual wrongful death statute contains the expressed or implied condition that there can only be recovery if the injured party could have maintained an action if death had not ensued.³² The condition, literally taken, makes the action a derivative one.

Using this argument, some courts have reasoned that since the wronged spouse would not be permitted to sue if he or she had lived, any person suing for the wrongful death of the spouse should similarly be barred.³³ One court buttressed its literal interpretation of the statute by revitalizing

26. *Gremillion v. Caffey*, 71 So.2d 670 (La. App. 1954).

27. *Id.* at 674. "Article 159, LSA — C.C., provides: 'Effects of a divorce. — The effects of a divorce shall . . . dissolve, forever the bonds of matrimony between the parties, and place them in the same situation with respect to each other as if no marriage had ever been contracted between them.'" (Emphasis added.)

28. *Callow v. Thomas*, 322 Mass. 550, 78 N.E.2d 637 (1948).

29. *Id.* at 640. The court followed the reasoning of one English case, *Dodworth v. Dale*, 2 K.B. 503, 519 (1936) holding "that which has been done during the continuance of the *de facto* marriage cannot be undone — cannot be overturned by the operation of law."

30. "[T]he disability of the wife to sue is one personal to her, and does not inhere in the tort itself. The assault upon her is wrongful even though she is under a personal disability to sue." *Deposit Guaranty Bank and Trust Co. v. Nelson*, 212 Miss. 33, 54 So.2d 476 (1951).

31. See cases cited in notes 35 and 42 *infra*.

32. For a typical wrongful death statute see FLA. STAT. §§ 768.01, 768.02 (1957).

33. *Apitz v. Dames*, 205 Ore. 242, 287 P.2d 585 (1955); *Wilson v. Brown*, 154 S.W. 322 (Tex. App. 1912); *Wright v. Davis*, 132 W.Va. 722, 53 S.E.2d 335 (1949).

the unity ghost and used language to the effect that a spouse was not merely disabled to sue the other for tort but that there simply was no tort!³⁴

The hurdle of a more liberal construction of the wrongful death statute is minimized when the factual circumstances under which the action is brought are viewed in a more realistic light. Several courts have held that with the termination of the marital relationship by the death of one or both spouses reasons no longer exist for the application of the general disability rule.³⁵ In *Rodney v. Stamon*,³⁶ the court said: "The public policy which prevents a wife from suing her husband in tort has no relevancy to facts such as are here present. The oneness of spouses has been abolished and with the death intervening, there is no longer family harmony to be conserved."

The argument that no action could be brought under the wrongful death statute, because of its derivative nature, was adequately dispensed with in a well reasoned Pennsylvania case.³⁷ Recognizing that the action was derivative, the court nevertheless observed: "Its derivation is from the tortious act, and not from the person of the deceased, so that it comes to the parties named in the statute free from personal disabilities arising from the relationship of the injured party and tortfeasor. . . ."³⁸

Under the survival statutes, enacted in all jurisdictions,³⁹ an action for personal injuries survives the death of the injured party or the tortfeasor and can be maintained by or against the respective personal representative.⁴⁰ Where the persons involved were husband and wife at the time of the tort, the question arises as to whether there is a cause of action to survive.⁴¹ The underlying problem is not a great deal different from that involved in actions under the wrongful death statute. That is, will the disability continue to ensue even after the death of one or both spouse?

Two recent cases with identical factual situations held that a personal injury action by the wife against her deceased husband's estate could be maintained.⁴² Answering the question of whether there was a cause of action which survived, the Missouri court stated: "In one sense, of course,

34. *Apitz v. Dames*, *supra* note 33.

35. *Shiver v. Sessions*, 80 So.2d 905 (Fla. 1955); *Welch v. Davis*, 410 Ill. 130, 101 N.E.2d 547 (1951); *Deposit Guaranty Bank and Trust Co. v. Nelson*, 212 Miss. 33, 54 So.2d 476 (1951); *Rodney v. Stamon*, 371 Pa. 1, 89 A.2d 313 (1952) (applying Ohio law); *Kaczorowski v. Kalkosinski*, 32 Pa. 438, 184 Atl. 663 (1936); *Johnson v. Ottomeier*, 45 Wash.2d 419, 275 P.2d 723 (1954).

36. *Rodney v. Stamon*, *supra* note 35, at 5, 89 A.2d at 315.

37. *Kaczorowski v. Kalkosinski*, 32 Pa. at 440, 184 Atl. at 664.

38. This reasoning was accepted in *Welch v. Davis*, 410 Ill. 130, 101 N.E.2d 547 (1951); *Rodney v. Stamon*, 371 Pa. 1, 89 A.2d 313 (1952); *Johnson v. Ottomeier*, 45 Wash.2d 419, 275 P.2d 723 (1954).

39. See PROSSER, *TORTS* 708 (2d ed. 1955).

40. E.g., FLA. STAT. § 45.11 (1957).

41. See *Johnson v. Peoples First Nat'l Bank and Trust Co.*, 394 Pa. 110, 114, 145 A.2d 716, 718 (1958).

42. *Ennis v. Trulutte*, 306 S.W.2d 549 (Mo. 1957); *Johnson v. Peoples First Nat'l Bank and Trust Co.*, 394 Pa. 110, 145 A.2d 716 (1958).

if one spouse may not sue the other there is no enforceable cause of action, but it belies reality and fact to say that there is no tort when the husband either intentionally or negligently injures his wife."⁴³ In commenting upon the absence of any public policy in such a situation, the Pennsylvania court observed: "Death having terminated the marriage, domestic harmony and felicity suffer no damage from the allowance of the enforcement of the cause of action."⁴⁴

The courts that continue to apply the disability rule where death of a spouse has intervened are blindly following a proposition in situations where it has no reasonable basis. They certainly have failed to take cognizance of the age old maxim: "When the policy behind a rule no longer exists, the rule should disappear."⁴⁵

Intentional torts

Since the public policy argument most often applied by the courts in maintaining spousal disability is the preservation of marital harmony, it might logically be assumed that a distinction would often be made between willful or intentional torts and those torts classified as unintentional. There would not seem to be very much marital harmony to preserve when one spouse commits a battery upon the other.

However, there appears to be only one decision in which a clear cut distinction between intentional and unintentional torts has been made.⁴⁶ In this case the Oregon Supreme Court had before it a wrongful death action brought by the wife's executor against the administrator of the husband's estate. The husband had murdered his wife and committed suicide. Initially, the court failed to follow the lead of several decisions which interpreted the wrongful death statute as giving rise to a new and independent action when it held that "the Oregon Death Statute means exactly what it says."⁴⁷ This interpretation required the court to answer the basic question: *Could the wife have maintained the action if she were alive?* The affirmative answer given to this question is somewhat startling in view of the position taken in the first part of the opinion. The court observed that where a husband inflicts intentional harm upon his wife, "the peace and harmony of the home has been so damaged that there is no danger that it will be further impaired by the maintenance of an action for damages and she may therefore maintain an action."⁴⁸

The significance of this holding becomes clear when one considers the total effect of the in-road upon the general rule of spousal disability in tort actions. The court has, taking the decision out of its wrongful

43. *Ennis v. Trulutte*, *supra* note 42, at 551.

44. *Johnson v. Peoples First Nat'l Bank and Trust Co.*, 394 Pa. at 116, 145 A.2d at 719.

45. *Kaczorowski v. Kalkosinski*, 32 Pa. at 444, 184 Atl. at 665.

46. *Apitz v. Dames*, 205 Ore. 242, 287 P.2d 585 (1955).

47. *Id.* at 252, 287 P.2d at 590.

48. *Id.* at 271, 287 P.2d at 598.

death context, apparently established a new exception by permitting an action for intentional tort even though both spouses are still alive and married to each other.

Vicarious liability

Following the rule, as set forth by Justice Cardozo in *Schubert v. August Schubert Wagon Co.*,⁴⁹ most subsequent cases have held that spousal disability did not operate to prevent one spouse from suing the master of the other for a tort committed by the servant spouse.⁵⁰ The fact, that to allow the action is to permit the wife or husband to do indirectly what she or he may not do directly, has not disturbed the courts.

It is recognized, in this situation, that the rule forbidding personal tort actions between spouses is now based only on a personal immunity of the spouse not to be sued and is inapplicable where the action is brought against a stranger to the marriage:

A trespass, negligent or willful, upon the person of a wife, does not cease to be an *unlawful act*, though the law exempts the husband from liability for the damage. Others may not hide behind the skirts of his *immunity*.⁵¹ (Emphasis added.)

FLORIDA TRENDS

Florida follows the majority of jurisdictions in denying a right of action against one's spouse for a personal tort.⁵² The leading case on this issue, *Corren v. Corren*,⁵³ held that a wife could not maintain an action against her husband for personal injuries resulting from the negligent operation of an automobile by their daughter, to whom the husband had entrusted the car. The court, in its reluctance to modify or abrogate the common law, took refuge in the fictional unity of husband and wife.⁵⁴ In finding

49. 249 N.Y. 253, 164 N.E. 42 (1928).

50. *Broaddus v. Kilkenson*, 281 Ky. 601, 136 S.W.2d 1052 (1940); *Pittsley v. David*, 298 Mass. 510, 11 N.E.2d 461 (1937); *Mullally v. Langenberg Bros. Grain Co.*, 339 Mo. 582, 98 S.W.2d 645 (1936); *Hudson v. Gas Consumer's Ass'n.*, 123 N.J.L. 252, 8 A.2d 337 (1939); *Koontz v. Messer*, 320 Pa. 487, 181 Atl. 792 (1935); *LaSage v. LaSage*, 224 Wis. 57, 271 N.W. 369 (1937).

51. *Shubert v. August Schubert Wagon Co.*, 249 N.Y. 253, 164 N.E. 42, 43 (1928).

52. *Shiver v. Sessions*, 80 So.2d 905 (Fla. 1955); *Sullivan v. Sessions*, 80 So.2d 706 (Fla. 1955); *Corren v. Corren*, 47 So.2d 774 (Fla. 1950).

53. *Corren v. Corren*, *supra* note 52.

54. *Id.* at 775. Authority which strongly tended to deny the validity of the unity theory was distinguished on rather weak grounds. The affect of FLA. STAT. §§ 708.08, 708.09 (1957), were restricted to actions involving the wife's "separate property and dealings with persons other than her husband." Similarly *State v. Hendron*, 158 Fla. 115, 27 So.2d 833 (1946) (husband chargeable with larceny of wife's separate property) was held to have no modifying affect, since "after all that was a controversy between the state and the husband to punish him for the theft of property belonging to the wife." Conversely the dictum in *Webster v. Snyder*, 103 Fla. 1131, 138 So. 755 (1932) was elevated to the status of holding to permit the conclusion that the FLA. CONST. art. 11, § 1 and FLA. STAT. ch. 708 (1941) had not altered the common law. A final criticism is the court's failure to comment upon *Tresher v. McElroy*, 90 Fla. 372, 106 So. 79 (1925) which held that the common law rule of unity of husband and wife was no bar to an action of replevin by the wife against her husband's vendee to recover her automobile.

that "this unity or more accurately merger, has been called the foundation for the rights, duties, and disabilities of marriage,"⁵⁵ the court also expressed a concern for marital harmony and similar considerations of public policy.

The unity argument of the *Corren* case⁵⁶ was quietly disposed of by the Florida Supreme Court in *Shiver v. Sessions*.⁵⁷ As a result of this shift, "public policy" has acquired the dubious distinction of being the only rationale now used by Florida to support the common law disability.⁵⁸ "Thus, it is settled law in this jurisdiction that the wife's disability to sue her husband for his tort is personal to her, and does not inhere in the tort itself."⁵⁹

In *Shiver v. Sessions*⁶⁰ a husband killed his wife and then committed suicide. The court held that the spousal disability rule did not bar an action by the minor children as beneficiaries under the Wrongful Death Act.⁶¹ In the companion case of *Sullivan v. Sessions*⁶² spousal disability was held to bar an action against the husband's estate brought under the Survival Statute⁶³ by the wife's personal representative. The personal representative under the Survival Statute⁶⁴ was considered as one who simply "stands in her shoes"⁶⁵ and can have no greater right than the wife would have had during her lifetime.

The administrator, in the absence of other entitled persons, would have been able to successfully bring suit under the Wrongful Death Act.⁶⁶ It would therefore appear that the defense of spousal disability is only valid when the action is brought in the name of "survival." The anomaly

55. *Corren v. Corren*, 47 So.2d at 775, quoting with approval *Taylor v. Dorsey*, 155 Fla. 305, 312, 19 So.2d 876, 880 (1944).

56. *Corren v. Corren*, *supra* note 55.

57. 80 So.2d 905 (Fla. 1955).

58. *Id.* at 906. "[I]t is generally held that the rule should still be adhered to, either on the ground that the Emancipation Act in question did not completely destroy the common law fiction of the unity of husband and wife, or on the ground that domestic tranquility is fostered by the prohibition of actions by a wife against her husband for his torts against her. It was apparently the latter ground which was the basis for our decision in the *Corren* case. . . ."

59. *Id.* at 907. This statement sounded the death knell for the "unity" of husband and wife in Florida. Under a strict interpretation of the unity theory the husband and wife are fictionally merged into one, the husband being that one. It therefore follows that aside from there being no right of action, the merged identity of the husband more significantly precludes the existence of a cause of action, since in effect he would be suing himself.

60. 80 So.2d 905 (Fla. 1955).

61. FLA. STAT. § 768.02 (1957); see also *Florida East Coast Ry. v. McRoberts*, 111 Fla. 278, 149 So. 631, 633 (1933). The "[c]onclusion is irrefutable, that the statutes grant a new right of action for death by wrongful act, and not merely a continuation of the old one by way of a substituted form of action in favor of the deceased's representatives" (Emphasis added.)

62. 80 So.2d 706 (Fla. 1955).

63. FLA. STAT. § 45.01 (1957).

64. *Ibid.*

65. *Sullivan v. Sessions*, 80 So.2d at 707.

66. FLA. STAT. 768.02 (1957). *Love v. Hannah*, 72 So.2d 39 (Fla. 1954) held that the administrator of decedent's estate may not maintain a suit for wrongful death in the absence of an affirmative showing of the nonexistence of any other person having a precedent right of action under FLA. STAT. § 768.02.

created by the two *Sessions* cases is not too unusual when one considers the statutes involved and the similar anomalies created by the types of recoveries permitted thereunder.⁶⁷

May v. Palm Beach Chemical Co.,⁶⁸ held that a wife's disability to sue her husband for personal injuries did not relieve the owner of the automobile from liability for injuries sustained as a result of her husband's gross negligence.⁶⁹ A forerunner of this case, *Webster v. Snyder*,⁷⁰ held that plaintiff's marriage to defendant's servant did not abate the plaintiff's right of action against the master for the negligence of the servant. Dicta in the opinion did indicate that plaintiff's marriage to defendant did abate any right of action she might have against him.⁷¹ Restricting the above two decisions to their affect on spousal disability,⁷² it must be concluded that the disability is at its weakest where third party liability is involved.

The most recent decision to concern itself with the Florida disability rule was rendered by a federal district court sitting in South Carolina.⁷³ The wife brought an action against her husband based on a tort committed in Florida. In holding the action maintainable the court's purported application of Florida law was clearly erroneous. In reaching this result the court observed: "that the common law of Florida has been abrogated by the Constitution of the United States and by the Constitution of the State of Florida, and that one spouse can now sue another in the State of Florida for tortious acts committed by one spouse upon the other spouse. . . ."⁷⁴

The weak reasoning of the *Correns* case,⁷⁵ the inroads by the *May*⁷⁶ and *Webster*⁷⁷ decisions and the limited applicability of the disability where the injured spouse is deceased⁷⁸ have cracked the foundation of the

67. See *English v. United States*, 204 F.2d 808 (5th Cir. 1953).

68. 77 So.2d 468 (Fla. 1955).

69. Florida has reached a result, through judicial decision, whereby the owner of an automobile is vicariously liable for the negligence of anyone driving the vehicle with his consent. *Fleming v. Alter*, 69 So.2d 185 (Fla. 1953); *Lynch v. Walker*, 159 Fla. 188, 31 So.2d 268 (1947). The basis for this result is well expressed in *May v. Palm Beach Chemical Co.*, *supra* note 68, at 472. "A study of the origin and application of the doctrine of vicarious liability on the part of an automobile owner shows clearly that whatever may be the limitations of its scope of application, liability is bottomed squarely upon the doctrine of respondeat superior arising from a principal and agent relationship implied in law."

70. *Webster v. Snyder*, 103 Fla. 1131, 138 So. 755 (1932).

71. *Id.* See comment on case, note 54 *supra*.

72. The issue of agency indicated in note 69 *supra* has been omitted from this discussion.

73. *Alexander v. Alexander*, 140 F. Supp. 925 (W.D. S.C. 1956).

74. *Id.* at 929.

75. *Corren v. Corren*, 47 So.2d 774 (Fla. 1950).

76. *May v. Palm Beach Chemical Co.*, 77 So.2d 468 (Fla. 1955).

77. *Webster v. Snyder*, 103 Fla. 1131, 138 So. 755 (1932).

78. *Shiver v. Sessions*, 80 So.2d 905 (Fla. 1955) permitting action under FLA. STAT. § 768.02 (1957). It is interesting to note that since a spouse precedes all other named beneficiaries, a double death situation would have to result before a suit could successfully be maintained.

continued adherence to the majority view by Florida. The switch in emphasis from unity to the more tenable approach of public policy has laid the groundwork for further modifications and possibly complete abrogation of the common law rule. *Shiver v. Sessions*⁷⁹ brought public policy to the forefront, but the court did little to fortify it there or in the *Sullivan* case⁸⁰ where factual circumstances presented an excellent opportunity for further elucidation. "It is commendable in either spouse to reconcile differences in order to harmonize the marital status, but neither is required to live in a buzzards nest to do so."⁸¹

Recent decisions indicate that the Supreme Court of Florida is dissatisfied with an unrestricted application of spousal disability. Because of this dissatisfaction, it is believed that the court may now be ready to construe more liberally the Florida Constitution⁸² and Emancipation Act.⁸³ Sufficient pronouncements of judicial sentiment exists to permit the court to re-evaluate its position, so as to extend "emancipation" to include a wife's person as well as her property. Obviously the effect of this statutory extension would be to abrogate completely the common law spousal disability. "We think it has not only been abrogated by law, it has been abrogated by custom, the very thing out of which the common law was derived."⁸⁴

CONCLUSION

The disability applied to personal tort actions by the majority is not the same disability that existed at common law. By denying validity to legalistic unity concept of husband and wife, the courts have destroyed the foundation for the rule. Left without any legal basis and with a desire to continue the disability rule there has been developed, as an afterthought, a public policy argument which can be characterized as both unrealistic and questionable.

As a result of a reshaping of the rule upon the framework of public policy, the courts no longer need concern themselves with the specter of abrogating the common law in any subsequent alteration of the disability. All that they would be doing is rejecting the concept of public policy, which they themselves have created and are gradually finding outdated. With these thoughts in mind it is not difficult to predict the eventual disappearance of the marital disability concept in personal tort actions.

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79. 80 So.2d 906 (Fla. 1955).

80. *Sullivan v. Sessions*, 80 So.2d 706 (Fla. 1955).

81. *Klimis v. Klimis*, 158 Fla. 159, 162, 28 So.2d 112, 114 (1946).

82. FLA. CONST. Declaration of Rights, § 4; FLA. CONST. art. 11, §§ 1, 2.

83. FLA. STAT. ch. 708 (1957).

84. *State v. Hendron*, 158 Fla. 115, 118, 27 So.2d 833, 835 (1946). The words of Justice Terrell concerning a married woman's separate property are just as applicable today to the spousal disability to sue for personal tort.