Toward The Abolition Of Interspousal Tort Immunity

Michael N. Gambrill
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by Michael N. Gambrill

The idea that one cannot sue his or her spouse for a tort is deeply entrenched in Anglo-American common law. The concept is known as the doctrine of interspousal immunity. Since the development of the doctrine during the fuedalistic period of England, it has shown a great deal of resistance to change. Only recently has the doctrine come under attack and been eroded in the American courts. A number of courts have partially abrogated the doctrine by limiting its use as a defense to particular torts. Others have completely abolished the doctrine. See, e.g., Klein v. Klein, Cal.2d 692, 26 Cal. Repr. 102, 376 P.2d 70 (1962); Brooks v. Robinson, 259 Ind. 16, 284 N.E.2d 794 (1973); Beaudette v. Frana, 285 Minn. 366, 173 N.W.2d 416 (1969); Maestas v. Overton, 87 N.M. 213, 531 P.2d 947 (1975); and Freche v. Freche, 81 Wash. 2d 183, 500 P.2d 771 (1972).

At common law, husband and wife were presumed for legal purposes to be identical. Because of this presumption, all of the property which a wife owned at marriage became solely the property of the husband. Women could not enter into contracts. A wife could not sue or be sued. If the wife was injured in her person or property, she could only bring an action with her husband’s name and with his concurrence. Neither could she be sued without her husband as a defendant. In 1 W. Blackstone, Commentaries, this explanation is found:

By marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband: under whose wing, protection, cover, she performs everything... and her condition upon marriage is called her coverture. Id at 442.

Until the Married Women’s Act of 1898, the English common law treatment of women was followed in Maryland. The common law was somewhat limited by the Married Women’s Act of 1898, which is found in Md. Ann. Code Art. 45, sec. 5. That section provides that:

Married women shall have the power to engage in any business, and to contract, whether engaged in business or not and to sue upon their contracts, and also to sue for the recovery, security or protection of their property, and for the torts committed against them, as fully as if they were unmarried; contracts may also be made with them, and they may also be sued separately upon their contracts, whether made before or during marriage, as fully as if they were unmarried; nor shall any husband be liable upon any contract made by his wife in her own name and upon her own responsibility, nor for any tort committed separately by her out of his presence, without his participation or sanction.

Clearly, the statute permits women to enter contracts on their own behalf. It is also clear that a woman may sue on her own behalf without obtaining the concurrence of her husband or using his name as was required by common law. The necessity of naming a husband as a defendant in order to sue a woman is also abolished by the statute.

Logically, if a woman can sue for torts committed against her as fully as if she was unmarried, then she should be able to sue her husband. Maryland courts were first faced with this problem in Furstenburg v. Furstenburg, 152 Md. 247, 136 A.534 (1927). Confronted with a suit by a wife against her husband for injuries sustained in an automobile accident, the court was very conservative in its construction of Art. 45, sec. 5. In Furstenburg, the court relied upon Thompson v. Thompson, 218 U.S.611 (1910) in which the Supreme Court construed a District of Columbia statute similar to Art. 45, sec. 5. The majority in Thompson wrote, “The statute was not intended to give a right of action as against the husband but to allow the wife, in her own name, to maintain an action of tort which at common law must be brought in the joint names of herself and her husband.” Id. at 617.

Rationalizing this construction of the District of Columbia statute, the court pointed out that such a long established doctrine as interspousal immunity could only be abrogated “by language so clear and plain as to be unmistakeable evidence of the legislative intention.” Judge Urner found for the Maryland court, in Furstenburg, that sec. 5 was not meant to be as broad and unqualified as it appeared. There was no express evidence of an intent to abrogate interspousal immunity and therefore, the doctrine barred the wife’s suit in Furstenburg.

After years of suggesting that abrogation of the doctrine of interspousal immunity was a legislative function, the Maryland Court of Appeals took it upon itself to abolish the doctrine partially. In Lusby v. Lusby, 283 Md. 334, 390 A.2d 77, 77 (1978), the Court held, “that under the facts and circumstances of this case, amounting to an outrageous, intentional tort, a wife may sue her husband for damages.”

As the court points out, the facts are extraordinary and do dictate the results of the case. Diana R. Lusby alleged that her husband, Gerald Lee Lusby, and two of his companions used their vehicles to force her vehicle off the road. Once she stopped, her husband approached her automobile with a rifle pointed at her, forced his way into the automobile and began to drive. Mr. Lusby proceeded to take her to another location...
with his friends following in one of the other vehicles. Then, it was "alleged that her husband struck her, tore [her] clothes off and did forcefully and violently, despite [her] desperate attempts to protect herself, carnally know [her] against her will and without her consent."' Id. at 77. Mr. Lusby proceeded to help his two companions in their attempt to rape his wife. Before releasing Mrs. Lusby, he threatened to kill her if she went to the police. After that day, he continued to harrass and threaten her.

When Mrs. Lusby filed suit against her husband for the injuries sustained by her from this act, Mr. Lusby raised a preliminary objection asserting a lack of legal capacity on the part of his wife to sue. His objection was based on the fact that he and the plaintiff were legally married on the date of the alleged incident. Thus, he believed that this fact entitled him to raise as an absolute defense, the doctrine of interspousal immunity. The trial judge granted the motion and a judgment for costs was entered against the wife in favor of the husband. An appeal was filed with the Court of Special Appeals and prior to consideration by the Court of Special Appeals, the Court of Appeals granted certiorari.

The Court of Appeals, in Lusby draws considerable support for partially abrogating the interspousal immunity doctrine from the dissent in Thompson. Justices Harlan, Holmes and Hughes, who are characterized by the Maryland Court as "three of the great minds of the Supreme Court of the United States in 1910," join in dissent. Justice Harlan writing for the dissent observes that:

[The statute] proceeds to authorize married women 'also to sue separately for the recovery, security or protection of their property; still more, they may sue separately, 'for torts committed against them, as fully and freely as if they were unmarried.' No discrimination is made, in either case, between the persons charged with committing the tort. No exception is made in reference to the husband, if he happens to be the party charged with transgressing the rights conferred upon the wife by statute. In other words, Congress, by these statutory provisions, destroys the unity of the marriage association as it previously existed.

But my brethren. . . are moved to add, by construction, to the provision that married women may 'sue separately. . . for torts committed against them as fully and freely as if they were unmarried' these words: 'Provided, however, that the wife shall not be entitled, in any case, to sue her husband separately for a tort committed against her person.' Thompson, supra at 622-3.

Judge Smith points out that much of what Justice Harlan said would be applicable to an analysis of the Maryland act.

The Lusby court points to a lack of policy reasons for preventing one spouse from recovering from another for the outrageous conduct alleged. Perhaps, the most widely propounded reason for continuing to allow the defense of interspousal immunity is the preservation of family harmony. In Lusby where an intentional tort was involved, the Court declared, "[i]t is difficult to see how any law barring access to the courts for personal injuries will promote harmony. If this were a valid sociological consideration, the Legislature could orchestrate even greater harmony by abolishing the statute giving the right to divorce." Id. at 342.

Clearly, the cases which have upheld the doctrine of interspousal immunity such as Furstenburg, supra, were left standing although their rationale was shaken by Lusby.

At the same time Lusby was decided, the Supreme Court of Appeals of West Virginia decided Coffindaffer v. Coffindaffer, ___ W. Va. ___, 244 S.E. 2d 338 (1978). That case involved both an intentional tort and a negligent tort. In completely abolishing interspousal immunity, the Court, relying upon Thompson, supra for many of the same reasons the Maryland Court of Appeals found in the dissenting opinion by Justice Harlan, overruled an earlier West Virginia case to the contrary. The Court, in Coffindaffer, also examined the family harmony rationale, saying, "[i]t is difficult to see how any law barring access to the courts for personal injuries will promote harmony. If this were a valid sociological consideration, the Legislature could orchestrate even greater harmony by abolishing the statute giving the right to divorce." Id. at 342.

Two other reasons commonly put forth for continuing to grant interspousal immunity, were also discussed by the Court in Coffindaffer. The first, fraud and collusion between the spouses is directly linked to the second, the possibility of increased liability of insurance companies.
In answer to the fraud and collusion argument, the Court expressed its belief that the integrity of the adversary system could not be so easily beguiled. In addition the Court said,

"In suits for personal injuries the issue is not only liability, as such cases assume real proportions only if there are valid personal injuries of some magnitude. There may be those desperate couples who would conclude that the prospect of a substantial monetary recovery is worth the pain of self-inflicted injuries. One can hardly imagine that the legal system will break down with cases brought by spouses who have flung themselves down cellar steps or permitted the other spouse to strike them with the family car in order to achieve the type of substantial injury that makes jury litigation worthwhile."

As for the insurance companies, the Court expressed the feeling that adequate use of discovery methods would alert them to the falsity of the claim.

In *Freehe*, supra, the Court discussed another answer frequently found in the cases that refuse to allow suits in tort between spouses:

A third reason advanced in support of maintaining the common-law rule of disability is the suggestion that the injured spouse has an adequate remedy through the criminal and divorce laws. It has been observed that neither of these alternatives actually compensates for the damage done, or provides any remedy for unintentional (negligent) torts. Id. at 774.

We are cognizant of the long standing nature of the common law rule of interspousal tort immunity. But we find more impelling the fundamental precept that, absent express statutory provision or compelling public policy, the law should not immunize tort-feasors or deny remedy to their victims. Id. at 777.

In the future, the Court of Appeals in Maryland may eliminate the doctrine of interspousal immunity without reservation. The dicta in *Lusby*, supra, should aid greatly in overcoming the doctrine when raised as a defense in a negligence or less severe intentional tort injury case. That dicta combined with the precedent of cases from other jurisdictions, which have abolished the doctrine, may aid the many battered wives of today's society. A spouse should not have to wait for the occurrence of an outrageous intentional tort or have to rely on a divorce to be compensated for losses or injuries.

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POETIC LICENSE

by Jeffrey Kluger

"The Supreme Court will never entertain the notion of tampering with the sanctity of the application and interpretation of the nation's abundant crop of social idioms, fables and popular cliches."

—Warren Earl Burger

So spoke the Chief Justice at last year's American Bar Association convention in Kansas City. Yet less than ten months later, the Court "tampered" indeed, and in so doing, elected to overturn one of American culture's hoarier, more entrenched cliches.

*Pippin v. Rufo*, 98 S.Ct. 653 (1979), the Court's response to long gathering judicial storm clouds, emerged as the linchpin of a rapidly accelerating movement designed, as one activist noted, "to overthrow the vise-like tyranny of ancient platitudes." The case posed the question of whether, when the going gets tough, the tough must indeed get going.

"Not necessarily," responded the court.

The *Pippin* plaintiff alleged due process violations when his tenure as a member of a semi-professional football team was abruptly rescinded for failure to comply with the basic tenets of the motto. The Court, finding in favor of the plaintiff, held that "athletic exhortations are not of such a sacred, inviolable character that they may be exempted out-of-hand from the guarantees of the 14th amendment. Constitutional imperatives must bind uniformly both the profound and the banal." Having thus established the justiciability of the case, the Court ordered the reinstatement of the aggrieved athlete based upon the team's "wholesale failure to provide its players with notice as to the precise moment at which the going got tough and the requisite subsequent behavior sufficient to constitute the ideal of getting going."

The ruling stunned most judicial insiders. With unaccustomed suddenness, the Court discarded one of its most venerable policies, spurning in a single holding two hundred years of *laissez-faire* deference. "The floodgates are open," remarked one senior Washington advocate, "now all that remains is to brave the people's cries of 'foul.'"

Despite such dire forecasts, public response to the *Pippin* initiative has been generally supportive. The Veterans of Foreign Wars, electing uncharacteristically to comply voluntarily with the spirit of the decision, announced last week that it has designated January 1, 1981 as the formal expiration date of the public's responsibility for collective recollection of the historic Alamo conflict and promised a study to examine the feasibility of similar action regarding *The Maine*, *Lusitania* and Pearl