

Tort Actions Between Spouses

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CURRENT LEGISLATION

TORT ACTIONS BETWEEN SPOUSES.—At common law no tort action whatsoever was allowed between husband and wife. There were two theories as to the basis of this rule: (1) the merger of the personality of the wife in that of the husband; (2) the public policy theory.¹ Although the rule was sometimes put on one ground and sometimes on the other, it is probable that both were equally important.

In 1848² and 1849³ the New York Legislature passed two acts preserving to married women their real and personal property. The years 1860⁴ and 1862⁵ saw the passage of additional acts giving to them the right to bring an action for injuries to person or character. The passage of these acts put married women on a par with their husbands insofar as the right to sue third parties for torts was concerned. As between the spouses it might seem that the language of the acts would permit the same latitude as was allowed towards third parties, but the New York courts have not gone so far as to adopt this view. They have allowed actions between spouses for torts to property⁶ although refusing to allow them to sue each other for personal torts.⁷ The reason that the courts have given for refusing to allow such actions is that they are contrary to the public policy of the state.⁸

¹ BURDICK, *THE LAW OF TORTS* (4th ed. 1926) 151, citing the following cases: *Phillips v. Quarnet*, 1 Q. B. D. 435, 45 L. J. Q. B. 277 (1876); *Abbott v. Abbott*, 67 Me. 304, 24 Am. R. 27 (1877); *Bandfield v. Bandfield*, 117 Mich. 80, 75 N. W. 287, 40 L. R. A. 757 (1898); *Strom v. Strom*, 98 Minn. 427, 107 N. W. 1047, 6 L. R. A. (N. S.) 191 (1906). It will be noted that none of these are New York cases and that all were decided after the passage of the Married Women's Acts in New York. They are, however, declaratory of the common-law rule in New York prior to the passage of the Married Women's Acts.

² Laws of 1848, c. 200.

³ Laws of 1849, c. 375.

⁴ Laws of 1860, c. 90, § 7.

⁵ Laws of 1862, c. 272. The Acts of 1860 and 1862 were repealed in 1880 (Laws of 1880, c. 245, §§ 36, 38) but the right of a married woman to sue for torts to person, property or character was preserved to her under the Code of Civil Procedure, § 450. This right was reinserted in the Domestic Relations Law of 1896 and was continued in the present law (passed in 1909) in almost identical language.

⁶ *Whitney v. Whitney*, 49 Barb. 319 (N. Y. 1867); *Minier v. Minier*, 4 Lans. 421 (N. Y. 1871); *Berdell v. Parkhurst*, 19 Hun 358 (N. Y. 1879); *Fitch v. Rathbun*, 61 N. Y. 579 (1875); *Wood v. Wood*, 83 N. Y. 575 (1881); *Ryerson v. Ryerson*, 8 N. Y. Supp. 738 (1890); *Mason v. Mason*, 66 Hun 386 (1892).

⁷ *Longendyke v. Longendyke*, 44 Barb. 366 (N. Y. 1863); *Freethy v. Freethy*, 42 Barb. 641 (N. Y. 1865); *Schultz v. Schultz*, 89 N. Y. 644 (1882); *Abbe v. Abbe*, 22 App. Div. 483, 48 N. Y. Supp. 25 (1897).

⁸ In *Longendyke v. Longendyke*, 44 Barb. 366 (N. Y. 1863), the court said: "The right to sue her husband in an action of assault and battery may perhaps be covered under the literal language of this section; but I think such was not the meaning and intent of the legislature and such should

The refusal to allow these actions has led to some very interesting decisions in recent years. In *Schubert v. Schubert Wagon Co.*,⁹ the Court of Appeals allowed a married woman to recover for personal injuries from the defendant corporation. The corporation was held liable for the negligence of its servant, the plaintiff's husband, although the husband himself was not liable. Not long after this decision the Appellate Division, Third Department, in the case of *Wadsworth v. Webster*¹⁰ refused to allow a wife to recover from a partnership of which her husband, whose negligence had caused her injuries, was a member. It was not, however, until the case of *Caplan v. Caplan*¹¹ came up that the Court of Appeals was asked to review the situation with regard to partnerships. In this case the husband was clearly acting in the partnership business and the question was squarely presented as to whether the partnership was liable although the negligent partner was not. The court decided that it was not, thus definitely settling the question of such liability.

Although the New York courts had thus limited the right of married women to sue for torts, there were a number of other jurisdictions¹² which allowed such actions between spouses, either by a liberal interpretation of a general statutory provision or by expressly providing for such actions. Finally, in 1937, the New York State Legislature, taking cognizance, perhaps, of the great increase in the number of injuries suffered by women through the negligence of their husbands, since the advent and widespread use of automobiles, took the step necessary to alleviate the hardships so often caused by the application of this now obsolete rule of public policy.¹³ It amended

not be the construction given to the act, for the following among other reasons: * * * 2. It is contrary to the policy of the law, and destructive of that conjugal union and tranquillity, which it has always been the object of the law to guard and protect. * * * 3. The effect of giving so broad a construction to the Act of 1860 might be to involve the husband and wife in perpetual controversy and litigation—to sow the seeds of perpetual domestic discord and broil—to produce the most discordant and conflicting interests of property between them, and to offer a bounty or temptation to the wife to seek encroachment upon her husband's property, which would not only be at war with domestic peace, but deprive her probably of those testamentary dispositions by the husband, in her favor, which he would otherwise be likely to make."

⁹ 249 N. Y. 253, 164 N. E. 42 (1928).

¹⁰ 143 Misc. 806, 257 N. Y. Supp. 386 (1932). The plaintiff in this action did not have a very strong case since she had failed to show that at the time of the accident her husband was acting in the partnership business. For this reason, the case was never taken to the Court of Appeals.

¹¹ 268 N. Y. 445, 198 N. E. 23 (1935).

¹² *Johnson v. Johnson*, 201 Ala. 41, 77 So. 335 (1917); *Fitzpatrick v. Owens*, 124 Ark. 167, 186 S. W. 832 (1916); *Brown v. Brown*, 88 Conn. 42, 89 Atl. 89 (1914); *Gilman v. Gilman*, 78 N. H. 4, 95 Atl. 657 (1915); *Roberts v. Roberts*, 185 N. C. 566, 118 S. E. 9 (1923); *Fiedler v. Fiedler*, 42 Okla. 124, 140 Pac. 1022 (1914).

¹³ The author does not mean to infer by this statement that human nature has changed so greatly as to preclude the possibility of family quarrels with their attendant unpleasantnesses.

Section 57 of the Domestic Relations Law¹⁴ by expressly providing that married women may sue, or be sued by, their husbands for any wrongful or tortious act resulting in injury to person, property or character.¹⁵

The far-reaching results of this legislative enactment will readily be seen. Practically all of the New York cases previously cited in this article are no longer law.¹⁶ Not only are husbands and wives no longer immune from suits by their spouses for personal torts, but also any partnership of which one spouse may be a member is now liable for all injuries inflicted in the course of the partnership business. We may confidently expect quite a number of actions in a short time, under the provisions of this law.

Since husbands and wives may now sue each other for personal injuries, the new law is capable of greatly increasing the burden of insurance carriers. Having issued policies before it was possible for one spouse to bring an action against the other, the insurance companies would have thrust upon them a liability which was not contemplated when they entered into these contracts unless they were otherwise protected. To prevent this injustice and maintain the *status quo* (as far as the underwriters' liability is concerned), the legislature inserted in the new law three sections¹⁷ which provide that unless the policy makes express provision for it, such liability shall not be deemed to be included within the terms of the policy. The effect of these sections is to neutralize the additional burden imposed upon the underwriters by the change in the Domestic Relations Law.

However, in their effort to protect the insurance companies, the legislators seem to have gone a little too far. The second paragraph of Section 2 of the Act reads as follows:

¹⁴ N. Y. Consolidated Laws, c. 14.

¹⁵ Laws of 1937, c. 669, § 1, in effect Sept. 1, 1937. The section as amended, reads as follows:

"A married woman has a right of action for an injury to her person, property or character or for an injury arising out of the marital relation, as if unmarried. She is liable for her wrongful or tortious acts; her husband is not liable for such acts unless they were done by his actual coercion or instigation; and such coercion or instigation shall not be presumed, but must be proved. A married woman has a right of action against her husband for his wrongful or tortious acts resulting to her in any personal injury as defined in section thirty-seven-a of the general construction law, or resulting in injury to her property, as if they were unmarried, and she is liable to her husband for her wrongful or tortious acts resulting in any such personal injury to her husband or to his property, as if they were unmarried.

Section 5 of the Act provides that:

"The amendment made by this act to section fifty-seven of the domestic relations law shall not affect any right, cause of action or defense existing prior to the taking effect of this act."

¹⁶ This amendment, however, will have no effect on the law as stated in the Schubert case, cited *supra*, note 9.

¹⁷ Laws of 1937, c. 669, §§ 2, 3, 4.

"No such policy, however, heretofore or hereafter issued shall be deemed to insure against any liability of an insured for injuries to his or her spouse or for injury to *property* of his or her spouse *unless express provision* for such insurance is included in the policy." (Italics ours.)

It is submitted that this section, in part, contravenes Article I, Section 10 of the Constitution.¹⁸ Since, even prior to this enactment, husbands and wives could sue each other for injuries to *property*,¹⁹ an underwriter who has issued a policy insuring against liability for injury to property must be held to have contemplated liability for such injuries between spouses. Therefore a statute which declares that no policy heretofore issued shall be deemed to insure against such liability is clearly impairing the obligation of contracts and to that extent is unconstitutional.²⁰

Although the new amendment to the Domestic Relations Law may have the undesirable effect of bringing family disputes into the courts for settlement,²¹ it would seem that the benefits which will be derived from it will more than offset this defect and make the change, on the whole, a highly desirable one.

EDWARD J. CARRY.

AN AMENDMENT TO THE MULTIPLE DWELLING LAW IN REFERENCE TO ALTERATIONS OF SLUM DWELLINGS.—Many persons in the lower-income groups of our population¹ have been compelled, for many years, to live in buildings that have long been outmoded by both law and time. Faced by this problem, the New York Housing Authority was created in an attempt to eradicate these eyesores of the city.² Investigations were conducted by this body and the testi-

¹⁸ U. S. CONST. Art. I, § 10 (1) reads as follows:

"No State shall * * * pass any law impairing the obligation of contracts."

¹⁹ See cases cited *supra*, note 6.

²⁰ We are of the opinion that it was unnecessary for the legislature to refer at all to contracts *heretofore* made. Section 5 of the Act, *supra*, note 15, would render futile any attempt on the part of an insured's injured spouse to force liability on the insurer for personal injuries under Section 1.

²¹ See quotation from *Longendyke v. Longendyke*, 44 Barb. 366 (N. Y. 1863), cited *supra*, note 8.

¹ *New York City Housing Authority v. Muller*, 270 N. Y. 333, 1 N. E. (2d) 151 (1936).

² Karlin, *New York Slum Clearance and the Law* (1937) 52 POL. SCI. Q. 245 ("the purpose of the Municipal Housing Authorities Law [enacted by the Laws of 1934, c. 4, as an amendment to the Housing Law of 1926] is to enable cities in New York State to take necessary steps to clear slums and to provide housing accommodations for persons of low income * * *").