

MARITAL TORTS IN DIVORCE: THE CASE FOR MANDATORY JOINDER

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Domestic torts are those damage claims arising specifically within the context of the relationship between spouses, or between children and their parents. They include claims between people who were formerly spouses, and claims arising out of non-marital personal relationships. The purpose of this article is to address the narrow topic of what we will call "marital torts," a sub-category of domestic torts. We call them marital torts because they are tort claims between husband and wife, and when a couple divorces, an interesting procedural question arises: must the existing tort claim be joined within the context of the pending divorce? And who says you can sue your spouse in tort, anyway?

INTERSPOUSAL TORT IMMUNITY

In 1986 the Missouri Supreme Court abrogated the doctrine of interspousal tort immunity in cases of intentional torts and

negligence torts. In Townsend v. Townsend, 708 SW2d 646 (Mo. Sup. Ct. 1986) a man shot his wife in the back with a shotgun after their divorce case was tried and submitted, but before a decree was entered. He raised the doctrine of interspousal tort immunity as a defense in the subsequent tort trial initiated by his wife.

The doctrine of interspousal tort immunity arose from the common-law concept of unity or "one-ness" of husband and wife; i.e. that the wife's legal existence was incorporated into that of her husband and that for all intents and purposes, she had no separate legal existence of her own. The concept of one-ness evolved ostensibly to protect the wife. In addressing this doctrine, the Missouri Supreme Court said:

"...it is of little comfort to the victim of an intentional shooting at the hands of her husband that her recovery is barred by a common-law doctrine having as its basis... her protection and benefit..."

The Court went on to abrogate the interspousal immunity doctrine for these intentional torts in a companion case decided the same day, S.A.V. v. K. G. V., 708 SW2d 651 (Mo. banc 1986).

The abolition of interspousal immunity created an entirely new and challenging mix of issues, both substantive and procedural. Chief among these issues is the procedural question which arises

within the context of a divorce case in which a tort claim may exist: is joinder mandatory or permissive?

#### JOINDER--MANDATORY OR PERMISSIVE?

Although there is no Missouri statute or case which expressly addresses joinder in the domestic tort/divorce setting, it appears joinder should be considered mandatory. The all-encompassing scope of the dissolution of marriage statute, coupled with the legal rationales stated in the cases which favor joinder, both procedurally and substantively, appear to require joinder for the following reasons :

1. Collateral Estoppel. The bar of collateral estoppel is one reason to consider mandatory joinder. The Missouri Dissolution of Marriage act allows the court to consider the conduct of the parties during the marriage to be considered in dividing the property. Sec. 452.330 RSMo. Supp. 1991. The Missouri Supreme Court considered this in S.A.V., supra, and hinted about the possible collateral estoppel effect in such circumstances:

"While there are distinct differences between the division of marital property between spouses and awards of damage for an injury, to the extent that conduct of the spouses is taken into account in division of marital property pursuant to Sec. 452.330.1(4), RSMo Supp.

[1991], the dissolution decree might be admissible in the subsequent tort action subject to usual constraints of relevance, competence and with a careful eye to questions of causation and speculativeness of damages. The same may hold true for the dissolution proceeding if that action follows trial of the tort claim. S.A.V. V. K.G.V., 708 S.W. 2d 651, 653 (Mo. banc 1986), emphasis added.

If, as the Court suggests, the dissolution decree was admitted in evidence in a subsequent tort action between the same parties, and if the decree contained a finding as to conduct which was relevant to the tort claim and divided the property based on this finding, would the plaintiff not be barred by collateral estoppel?

And how could the defendant defend himself on the issue of liability if a judicial determination as to the conduct already exists?

2. Release. In Overberg v. Lusby, 921 F.2d 90 (6th Cir. 1990) it was held that a release executed by husband and wife as part of their separation agreement barred the wife's tort action against her husband alleging he transmitted a venereal disease to her during their marriage. The infection resulted in her having to have an otherwise unnecessary hysterectomy. In that case, the wife knew of the disease and had the surgical procedure before executing the settlement agreement.

3. Rules 55.06 and 55.32 MRCP, and the rule against splitting a cause of action. The civil rules on joinder of causes of action apply to divorce cases. Sturgis v. Sturgis, 663 S.W. 2d 375 (Mo. App. 1983). The joinder rules appear by their plain language to be permissive when one reads them. Rule 55.06(a) says "... a party asserting a claim to relief as an original claim...may join, either as independent or as alternate claims, as many claims, legal or equitable, as he has against an opposing party." However, Rule 55.32(a) states a "...pleading shall state as a counterclaim any claim which ... the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties..." The rule mandates that the respondent must plead the tort claim at the time of the divorce, if the claim exists. It makes little sense to require only the respondent to assert the tort claim during the divorce case or risk the bar of collateral estoppel. The same rule should apply to the party who files first.

In fact, the Missouri Supreme Court lends guidance about the "permissive" nature of the joinder rule:

With respect to the joinder of claims, or causes of action,...the civil code of Missouri is permissive...Despite the permissive character of the

statute, however, a cause of action which is in fact single, as distinguished from a several cause of action, may not be split and filed or tried piecemeal, the penalty for which is that an adjudication of the suit first filed is a bar to a second suit. The rule against splitting a single cause of action is one of policy, the prevention of a vexatious multiplicity of suits.

Stoops v. Stoops, 256 S.W. 2d 799, 801 (Mo. Sup. Ct. 1953).

The Stoops court established a rule for determining what constitutes a single cause of action: "...if the parties and subject matter are identical and the evidence necessary to sustain the claims are the same the actions are single and may not be split or separately tried." Stoops at 801. Since the conduct of the parties is in issue in Missouri's dissolution of marriage statute, and the same conduct would be the subject of the tort claim between the parties, it seems the two causes should be tried, or at least considered by the court, at the same time.

Other cases on the rule against splitting a cause of action are Eugene Alper Construction Company v. Joe Garavelli's, 655 S.W. 2d 132 (Mo.App. 1983), and Lee v. Guettler, 391 S.W. 2d 311 (Mo. Sup. Ct. 1965). At least one court of another state has considered the rule against splitting a cause of action in the specific context considered herein, and has determined the tort

action must be brought at the time of the divorce or be barred. See Tevis v. Tevis, 400 A. 2d 1189 (N.J. Sup. Ct. 1979).

#### CONCLUSION

The careful practitioner should always consider joinder of an existing marital tort claim within the context of the divorce case. Failure to do so may result in the client being forever barred from raising the claim at a later time. Courts in other states have addressed this procedural thicket, and the cases which did not bar the filing of a later tort case between the same parties did so primarily on the theory that the conduct underlying the tort claim was not addressed or litigated in the divorce case.

Our present divorce law theoretically places all such issues, including the assets and claims of either party, within the Court's jurisdiction during the divorce. Therefore, the rationale permitting pursuit of the later tort claim may not exist in Missouri.

