

THE LAW OF DOMESTIC TORTS IN MISSOURI

by Allan H. Zerman and Cary J. Mogerman
100 S. Brentwood Blvd., Suite 325
St. Louis, Missouri 63105

"Domestic torts" are those torts arising specifically within the context of the family relationship between spouses, or children and their parents. They include tort actions between people who were formerly spouses, and non-marital personal relationships. For the purposes of this program, "domestic torts" shall not include subject matter relating to the liability of one family member for the tort of another, or insurance coverage questions; nor will this program address the right of a family member to recover for tortious acts committed against other family members.

I. SPOUSAL AND PARENTAL IMMUNITIES

A. Interspousal immunity - abolished in Missouri by Townsend v. Townsend, 708 S.W. 2d 646 (Mo. banc 1986) (intentional torts) and S.A.V. v. K.G.V., 708 S.W. 2d 651 (Mo. banc 1986) (negligence torts).

At least thirty (30) other states have abolished this doctrine. 708 S.W. 2d at 652. The abrogation of this doctrine nationally has created a substantial increase in domestic tort cases.

B. Parental immunity - Baker v. Baker, 263 S.W. 2d 29 (1953) held this doctrine bars a child's suit against one parent for negligence; Fugate v. Fugate, 582 S.W. 2d 663 (Mo. banc

1979), held the doctrine does not apply where the parents are divorced and the suit is directed against the family member no longer residing in the same household.

II. PROCEDURAL ISSUES

1. Joinderⁱ - Mandatory or Permissive?

a. Rules 55.06(a), 55.10, and 55.32 MRCP;

b. Federal Rules 8(e), 13 and 18 (a) and (b);

c. Sturgis v. Sturgis, 663 S.W. 2d 375 (Mo. App. 1983), allowed joinder of an action at law (breach of contract) with cause for divorce; Builderback v. Builderback, 241 S.W. 2d 377 (Mo. App. 1952), and Coffey v. Coffey, 485 S.W. 2d 167 (Mo. App. 1972) allowed joinder of equitable actions for accounting with the divorce action.

Neither case specifically addressed whether the joinder should be mandatory.

d. For the rule against splitting a cause of action, see Stoops v. Stoops, 256 S.W. 2d 799 (Mo. 1953); Lee v. Guetter, 391 S.W. 2d 311 (Mo. 1965); and Eugene Alper Const. Co. v. Joe Garavelli's, 655 S.W. 2d 132 (Mo. App. 1983).

e. In S.A.V. v. K.G.V., 708 S.W. 2d 651 (Mo. banc 1986) our Supreme Court held that ". . .to the extent that conduct. . .is taken into account in division of marital property pursuant to §452.330.1(4). . .the dissolution decree might be admissible in the subsequent tort action. . .the same may hold

true for the dissolution proceeding if that action follows trial of the tort claim." 708 S.W. 2d at 653.

f. Rule 66.02 MRCP - re separate trials and the possibility of bifurcation.

i. Noble v. Noble, 761 P. 2d 1369 (Utah 1988) suggests the actions should be bifurcated and the tort case tried first.

ii. Some cases have suggested the tort claim is an item of marital property which should be considered by the divorce court.

2. Marital Communications Privilege - What is its present scope?

State v. Euell, 583 S.W. 2d 173 (Mo. banc 1979)

State v. Shafer, 609 S.W. 2d 153 (Mo. banc 1980)

§546.260 RSMo.

§491.020 RSMo.

3. Collateral Estoppel

see S.A.V. v. K.G.V., 708 S.W. 2d 651 (Mo. banc 1986), which held that findings on conduct in a divorce case may preclude further litigation of the issue in a subsequent tort case, and vice versa.

4. Release

In Overberg v. Lusby, 921 F.2d 90 (6th Cir. 1990), the court held a release of claims contained in a separation agreement

bars all subsequent actions for tort claims against the prior spouse, if the plaintiff had notice of the tort prior to the divorce.

III. "HEART BALM" TORTS

Missouri is one of a minority of states that still allow causes of action for these torts; most states have abolished them by statute.

1. Alienation of Affections

a. Alienation of Affections between spouses - Muchisky v. Kornegay, 741 S.W. 2d 43 (Mo. App. 1987) held that alienation of affections and criminal conversation are separate torts, and upon sufficient proof a plaintiff may be compensated for both. See also Bogart v. Jack, 727 S.W. 2d 447 (Mo. App. 1987); Comte v. Blessing, 381 S.W. 2d 780 (Mo. 1964); Sandler v. Schmidt, 263 S.W. 2d 35 (Mo. 1953); Reynolds v. Jobes, 565 S.W. 2d 690 (Mo. App. 1978); and Gibson v. Frowein, 400 S.W. 2d 418 (Mo. banc 1964).

b. Alienation of Parents from Children - Hale v. Buckner, 615 S.W. 2d 97 (Mo. App. 1981) held a child may not recover for alienation of a parent's affections.

c. Alienation of Children from Parents - no cause of action for the wronged parent per Hester v. Barnett, 723 S.W. 2d 544 (Mo. App. W.D. 1987).

The rationale for denial of causes of action in parts (b) and

(c) above is the concern that such actions would render the child a hostage in family disputes. 723 S.W. 2d at 555. However, at least one court has held that the deliberate destruction by a custodial parent of the non-custodial parent's relationship with the child could be so outrageous as to form the basis for a claim of intentional infliction of emotional distress; this is an alternative cause of action to consider in such cases. Bhama v. Bhama, 425 N.W. 2d 733 (Mich. App. 1988).

2. Criminal Conversation - Muchisky v. Kornegay, 741 S.W. 2d 43 (Mo. App. 1987); Bogart v. Jack, 727 S.W. 2d 447 (Mo. App. 1987); The term "criminal conversation" arises from the rule that the act of intercourse with the spouse of another was an ecclesiastical crime; "conversation" refers to the act of intercourse. W. Prosser, Law of Torts, §124 (4th Ed. 1971).

3. Breach of Marriage Promise/Seduction

a. Breach of Promise - damages are recoverable for humiliation and loss of reputation as well as for actual pecuniary loss. Rehg v. Giancola, 391 S.W. 2d 934 (Mo. App. 1985); Catanzaro v. Duzer, 329 S.W. 2d 257 (Mo. App. 1959).

b. Seduction - See Parker v. Bruner, 686 S.W. 2d 483 (Mo. App. 1984); Breece v. Jett, 556 S.W. 2d 696 (Mo. App. 1977); and Boedges v. Dinges, 428 S.W. 2d 930 (Mo. App. 1968).

IV. INTENTIONAL DOMESTIC TORTS

A. Battery and Domestic Violence

1. Battery - Townsend v. Townsend, 708 S.W. 2d 646 (Mo. banc 1986) allowed an action by wife against husband who shot her with a shotgun, and abrogated the doctrine of interspousal immunity for intentional torts in Missouri.

Trammell v. Vaughan, 59 S.W. 79 (Mo. 1900) supports the proposition that transmittal of a venereal disease constitutes an assault and vitiates the innocent's consent to the act. See also B.N. v. K.K., 538 A. 2d 1175 (Md. 1988).

2. Rape

a. §566.085 RSMo. 1991

b. Consent a defense; marriage is not

B. Abduction of children

1. Interference with custody - gives rise to tort cause of action for abduction. Kramer v. Lieneweber, 642 S.W. 2d 364 (Mo. App. 1982); *See also* 46 Mo. L. Rev. 829 (1981).

2. Interference with visitation - Marriage of Segel, 224 Cal. Reprtr. 591, 179 Cal. App. 3d 604 (Cal. App. 1986) says go to the divorce court, not the civil trial court, for redress.

3. Child may have cause of action.

4. Damages - Kramer v. Lieneweber says:

- loss of services
- loss of care, custody, and companionship
- emotional distress, mental anguish, wounded feelings
- expenses incurred in prosecuting (but not

attorney's fees)

- punitives in an appropriate case

C. Conversion - Nesbitt v. Nesbitt, 589 S.W. 2d 297 (Mo. banc 1979); Shewalter v. Wood, 183 S.W. 2d 1127 (Mo. App. 1916); and Ray v. Ray, 336 S.W. 2d 731 (Mo. App. 1960).

D. False Imprisonment - Rogers v. Rogers, 177 S.W. 382 (Mo. 1915) denied this cause of action on the basis of interspousal immunity. Now that the doctrine has been abolished, there seems to be no reason to deny the prosecution of such a claim.

E. Eavesdropping - Kempf v. Kempf; Bess v. Bess; and Stamme v. Stamme.

F. Fraud within Domestic Relationships

1. Fraud relating to pregnancy - A California case holds that when a woman becomes pregnant after having consented to sexual intercourse on false representation of the male's sterility, she has a cause of action against him. Barbara A. v. John G., supra.

2. Fraud relating to sexually transmitted diseases - DeVall v. Strunk, 96 S.W. 2d 245 (Tex. Civ. App. 1936); Kathleen K. v. Robert B., 150 Cal. App. 3rd 992, 198 Cal. Repr. 273 (Cal. App. 1984); Maharam v. Maharam, 510 N.Y.S. 2d 104 (N.Y. App. 1986); and Barbara A. v. John G., 193 Ca. Repr. 422, 145 Cal. App. 3d 369 (Cal. App. 1983).

G. Damages for Infliction of Emotional Distress - Bass v. Nooney Co., 646 S.W. 2d 765 (Mo. banc 1983) is the leading

Missouri case on this item on damages for negligence. Some states have allowed this item of recovery for both intentional and negligent domestic torts.

H. Other Intentional Torts

V. TORTS INVOLVING NEGLIGENCE

1. S.A.V. v. K.G.V., 708 S.W. 2d 651 (Mo. banc 1986) appears to allow a cause of action by wife against husband for husband's negligence in transmitting herpes to her during their marriage. Other states have allowed such a cause of action pleaded in terms of fraud or misrepresentation, i.e., that the tortfeasor misrepresented to the plaintiff that he or she was free from venereal disease, when he was not. Kathleen K. v. Robert B., 150 Cal. App. 3rd 992, 198 Cal. Repr. 273 (Cal. App. 1984). See also B.N. v. K.K., 538 A. 2d 1175 (Md. 1988), and R.A.P. v. B.J.P., 428 N.W. 2d 103 (Minn. App. 1988).

a. Consent is not a defense to such a cause of action in many states; the innocent party's consent to the act of intercourse is deemed vitiated by the tortfeasor's concealment of the existence of the disease. Kathleen K. v. Robert B., supra, citing DeVall v. Strunk, 96 S.W. 2d 245 (Tex. Civ. App. 1936); Crowell v. Crowell, 105 S.E. 206 (N.C. 1920); and State v. Lankford, 102 A. 63 (Del. 1917).

2. With the abrogation of interspousal immunity in negligence cases, other actions for negligence may arise.

VI. DEFENSES

A. Interspousal immunity - abolished in Missouri in both intentional tort and negligence cases. Townsend v. Townsend, 708 S.W. 2d 646 (Mo. banc 1986) and S.A.V. v. K.G.V., 708 S.W. 2d 651 (Mo. banc 1986).

B. Parental immunity - this rule has become less viable in Missouri; case by case analysis seems more appropriate than a hard and fast rule.

C. Right to Privacy - this constitutional right has been asserted as a defense to various torts in two (2) California cases, to no avail. Kathleen K. v. Robert B., supra; Barbara A. v. John G., supra.

D. Consent - a claimed consent may be vitiated by fraudulent concealment of a serious venereal disease.

E. Marriage - no longer a defense in criminal rape cases - may ultimately have civil ramifications. §566.085 RSMo. 1991.

F. Statute of Limitations - generally five (5) years for injuries to the person or to property, or for claims for the recovery of specific personal property. §516. RSMo.

G. Res Judicata/Collateral Estoppel - See S.A.V. v. K.G.V., supra.

H. "Parental love and concern" for the welfare of offspring has been successfully interposed as a defense in an alienation of

affection case in which a father-in-law was accused of interfering in his daughter's marital relationship to the point of alienation. Beckler v. Yates, 89 S.W. 2d 650 (Mo. 1935).

VIII. RESOURCES FOR FURTHER STUDY REGARDING DOMESTIC TORTS

a. Marital & Parental Torts: A Guide to Causes of Action, Arguments, and Damages, American Bar Association, 1990.

b. Mo Bar Family Law Chapter 7, "Tort Liability and the Family Relationship," by Milton Garber.

c. American Bar Association Section of Family Law - 1990 Annual Meeting Compendium - published by Professional Education Systems, Inc., P. O. Box 1028, Eau Claire, Wisconsin 54702.

Phone 1-800-826-7155.

torts
8-29-91(6)
NOTES

i. See also R. Baron, "Joinder of Interspousal Claims in Dissolution Proceedings," Journal of the Missouri Bar, January-February 1987, at 20; M. Garber, "Tort Liability and the Family Relationship," in 1 Mo Bar CLE Family Law §7.3.