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Marital Tort Actions; Family Law

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Family law attorneys report an increasing interest in the area of marital tort actions. Sometimes referred to as domestic torts, these are actions brought against third parties or by one spouse against the other. Actions in which one spouse seeks to recover damages in tort against the other spouse for acts committed during the marriage are usually raised at the time of a divorce, although they may be viable after the dissolution as well. In this column we will address some of the substantive and procedural issues related to these claims.

Common law recognized actions against third parties

Historically, the common law prohibited suits between spouses but recognized actions against third parties for interference with the marital relationship.

The two most common torts were alienation of affection and criminal conversation. An alienation of affection action, designed to compensate the plaintiff for the loss of love, society, companionship and comfort of the other spouse, could be brought against a third party. There was no requirement that the relationship between the plaintiff's spouse and the defendant be sexual in nature.

Therefore, these types of actions have been brought against in-laws or other family members as well as counselors or clergy members. The tort of criminal conversation was based on the theory that spouses had exclusive rights to sexual intercourse with each other. A third party who engaged in such a relationship with the plaintiff's spouse could therefore be held liable for a violation of the plaintiff's "exclusive right."

The action for criminal conversation did not have to involve any alienation of affection. When the plaintiff's spouse engaged in an extramarital affair and then left the spouse for the defendant, both causes of action were often brought. These actions, premised on the theory that the marital partners had a property interest in the affection and sexual services of each other, gradually grew out of favor in the modern age and have been abandoned by virtually every state.

Tort actions brought by one spouse against the other spouse eventually came to be recognized. The recognition of these types of claims can be traced to several trends. First, interspousal immunity was abolished. This common law doctrine was originally grounded in the "unity" theory of marriage pursuant to which the husband and wife were considered to be one legal entity after marriage.

Under the common law, a husband could not sue his wife in tort because they were one legal person. In addition, a husband was liable for his wife's actions in tort and, furthermore, a wife could only sue by joining her husband as a plaintiff.

After the advent of the Married Women's Property Acts, these justifications no longer existed, but courts continued to disallow suits between married individuals because of a concern for undermining marital harmony, exposing private family matters to public scrutiny and fear of frivolous or collusive lawsuits. By the 1970s, courts began to abolish the immunity beginning in most states with actions for intentional torts and eventually permitting all actions between spouses. Today, the doctrine of interspousal immunity has been abolished in all jurisdictions.

The second trend was an increase in "no-fault" jurisdictions. When many states moved to no-fault grounds for the securing of a divorce, a spouse who felt morally aggrieved was denied an opportunity to challenge the granting of the divorce based on the principle that the petitioning spouse was not "injured and innocent," as was required under the previous law.

At the same time, many states removed fault as a factor that could be considered in property and alimony awards. As a result, some aggrieved spouses turned to tort actions to seek economic remedies for the wrongs committed against them during the marriage. Finally, an increased awareness of intentional torts, primarily those suffered by victims of domestic violence, led to a consideration of using the tort system to compensate for injuries that would clearly be compensable outside of the marital setting.

Common marital torts in which one spouse brings an action against the other spouse include assault and battery, the intentional infliction of emotional distress and fraud. A significant problem with tort actions between spouses is the law's reluctance to embrace the notion that actions that might be tortious between nonfamily members should be treated as such when the victim and the alleged tortfeasor are spouses. The underlying principle appears to be that there are some mutual concessions inherent in the marital relationship, and that individuals who share a life together may have different expectations concerning their behavior toward each other.

Battery is probably the easiest cause of action to establish. Physical abuse is generally easy to prove, damages are fairly easy to ascertain and consent cannot be implied merely because of the marital relationship. Courts have little difficulty allowing these claims.

More problematic are those cases alleging the intentional infliction of emotional distress. The difficulty lies in establishing that the behavior engaged in by the defendant was "outrageous," a necessary element of the cause of action.

Unfortunately, the case law in this area is extremely inconsistent. Emotional damage that is a result of physical abuse is most often recognized. At the other end of the spectrum, emotional distress claimed to have been caused by adultery is generally not found to be compensable. Courts seem hesitant to recognize this tort based on the subjective nature of what constitutes "outrageous." There is the additional concern that recognition of emotional distress, present to some degree in virtually every divorce, will bring fault back into the dissolution setting.

Another common tort action between spouses is one based on fraud. Here the courts seem to make a distinction based on the nature of the fraud.

Fraudulent misrepresentations concerning personal matters are generally less actionable than those that involve economic damages. For instance, a misrepresentation concerning affection is generally not actionable. There is also a reluctance to compensate a husband who relied on his wife's misrepresentation concerning the paternity of a child.

Sometimes the action is brought along with a claim for intentional infliction of emotional distress. While there have been a few cases in which the father was allowed to proceed, in the majority of cases the courts have held that developing a relationship with a child is simply not a compensable injury.

Fraud related to economic interests such as those involved in securing a marital settlement agreement can constitute a separate cause of action. While the usual remedy is to ask to have the property agreement set aside, some courts have held that the remedy may be inadequate and have allowed a claim to proceed including a request for punitive damages that would clearly not be available to the family court in the dissolution proceeding.

Other claims brought against a spouse include false imprisonment, interference with custody, and negligent infliction of emotional distress as the result of the transmission of sexually transmitted diseases. Also, there are remedies for illegal wiretapping, usually pursuant to statute.

Several procedural issues must be addressed first

Several procedural issues must be addressed when considering whether to pursue a tort action. The first is the question of joinder. Should the tort action be joined with the divorce action? States have adopted three approaches to this issue. The first is to require joinder either through state rule or by application of res judicata principles, the second is to prohibit joinder and, finally, some states allow, but do not require joinder. There are also variations in each category. The attorney contemplating bringing such an action must first determine the state law on this subject. If the state permits but does not require joinder, additional issues must be considered, such as the advantage of waiting to pursue the claim.

In those states where fault is a consideration in the distribution of property or the awarding of alimony, the defendant in a later suit based on tort may raise the affirmative defense that the plaintiff had already been compensated in the divorce action. An additional area of concern relates to common language in divorce settlement agreements in which the parties agree to release each other from "any and all other claims." Attorneys must be cautious of inserting such a clause as they have been held to bar future tort actions.

Statutes of limitations can also present problems. Typically, intentional torts have fairly short limitation periods. Some plaintiffs have successfully argued that physical abuse during a marriage constituted a "continuing" tort, and therefore the statute of limitations did not begin to run until the separation.

There are several other considerations that must be addressed by the attorney whose client discloses information that could form the basis of a tort claim. The first is area of expertise. The family law attorney must consider whether he or she is competent to handle a tort claim or if the client must be referred to another attorney. Second, is there a potential source of funds to pay a judgment? Most homeowner's policies now exclude intentional torts, but the attorney contemplating such an action should not assume this to be the case without a careful review of the policy.

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