



Marital Torts Can Be a Valuable Tool in a Divorce Case

By Nick Roumel and Lillian K. Saba

“Carla” is a stay-at-home mom with two small children. Escalating domestic violence, contracting a sexually transmitted disease, and calls to the police had her considering divorce. Carla made an appointment to see “Kate,” a family law attorney. Kate has handled everything from uncontested divorces to bitter custody battles. She was all too familiar with clients who could no longer tolerate abusive marriages but had far less income and resources than their husbands. A savvy practitioner, she knew to use marital torts to help level the playing field. But she also had to focus on her client’s immediate goals of personal safety, secure housing, economic stability, and maintaining a home with her children. After hearing Carla’s story, Kate carefully explained her options.

What is a marital tort?

A marital tort is nothing more than a traditional tort claim by one spouse against another. It may be contemporaneous with a crime such as assault and battery, stalking, or rape. It may also encompass negligent or intentional infliction of emotional distress, fraud, harassment, false imprisonment, invasion of privacy, intentional parental alienation, and other

claims such as transmission of venereal disease, conversion, and negligent/intentional spoliation of evidence.¹

Courts used to be dismissive of the concept. In *Bandfield v Bandfield*, the wife sued her husband when she was infected with a venereal disease.² The court denied her claim and expressed that the “plaintiff’s contention would be another step to destroy the sacred relation of man and wife, and to open the door to lawsuits between them for every real and fancied wrong...”³ *Bandfield’s* holding exemplified “interspousal tort immunity,” which was first recognized in the U.S. in the 1860s and was little more than a shield for bad behavior. It prohibited “husbands and wives from successfully pursuing a civil cause of action against each other for personal injuries.”⁴ It stems from the notion that upon marriage, a woman’s legal identity merged with her husband’s.⁵

The doctrine has been slowly abolished,⁶ but not without resistance. In 1978, John Rideout of Salem, Oregon, became the first man in America to be charged with raping his wife when they were still cohabiting. He was acquitted when his attorney successfully argued “[a]woman who’s still in a marriage is presumably consenting to sex...maybe this is the risk of being married, you know?...”⁷

In Michigan, the Supreme Court first opened the door to marital torts in *Mosier v Carney*. The Court spared no quarter in criticizing past cases. They referred to *Bandfield’s* argument that interspousal tort suits may disrupt “marital harmony” and its suggestion that the injured spouse may file for divorce as not only “absurd, but...patently legally faulty...”⁸ Examining more enlightened decisions from other jurisdictions, the Court determined the defense did not have any valid basis⁹ and concluded “the time has come for a reconsideration of this area of the law.”¹⁰

The last vestiges of interspousal immunity were abrogated in *Hosko v Hosko*.¹¹ The wife sustained injuries, including brain damage, as a passenger in a car driven by her husband. Over a quaint dissent, the Court denied the husband’s motion to dismiss, holding that MCL 600.2001 *et seq.*—which stated “[a]ctions may be brought by and against a married woman as if she were unmarried”—had done away with interspousal immunity.¹²

The actual use of marital torts is uncommon

Now practitioners have free rein to fully make use of marital torts, although this tool is vastly underutilized. Judge Patrick J. Conlin notes that “marital torts rarely come up outside of pretrial negotiations to stand the test of time to get to trial.”¹³ When they do, his court informs attorneys the case will be set for evaluation under MCR 2.403. Some domestic practitioners may be outside their comfort zone with their divorce on a general civil scheduling track.

Katherine Sharkey, a family law practitioner who represents abuse survivors, agrees this is an “untapped area of law.” First, she screens all her potential clients for domestic violence. Then she helps create a safety plan with shelter and social services.¹⁴

Sharkey then evaluates her litigation strategy. She takes advantage of the element of surprise. The other spouse will often be unaware the partner is seeing an attorney. Sharkey will want to get the complaint filed, often with a contemporaneous ex parte motion for interim custody, support, and exclusive use of the marital home. She will use the facts of the abuse as necessary to meet her client’s immediate objectives and obtain court orders to protect against potential retaliation. Sharkey said, “I would never keep [allegations of abuse] in my ‘back pocket’ until later. Domestic violence is not something you assert hesitantly. There is still a level of disbelief so if these claims come in the 11th hour, opposing counsel will call it a ploy and the judge may sense you’re being cagey.”¹⁵

Legal considerations

Some of the legal issues to consider include whether to file a tort claim contemporaneously with a divorce or separately, joinder, collateral estoppel, res judicata, the trier of fact, statute of limitations, and collectability. A multi-count complaint is an option that includes filing a divorce complaint along with tort claims as additional counts. If a client wishes to pursue torts after the divorce, do not include a general release, because that means the divorce judgment satisfies all the claims.¹⁶

One important consideration is MCR 2.203, which requires mandatory joinder of claims that arise “out of the transaction or occurrence that is the subject matter of the action.” Later marital tort claims are usually exempt from this rule. For example, battery and intentional infliction of emotional distress claims were considered separate and distinct actions from a divorce, even though battery could be a factor relative to the issue of fault¹⁷ as well as fraudulent conduct during the divorce proceeding regarding the valuation of property.¹⁸ However, it has been held that a fraud in the inducement to marry claim, which is “intimately intertwined” with the breakdown of a marriage, was barred by res judicata because it should have been brought in the prior divorce action.¹⁹ The type of tort you are filing and when it happened affects whether it is out of the same transaction or occurrence and when it needs to be filed.

AT A GLANCE

A marital tort claim will transform your divorce case. It can increase your bargaining power and provide significant compensation for abuse or fraud. Learn whether you have a claim, and how and when to raise it. It is an underutilized tool that can be beneficial in the right circumstances.

If your divorce judge has made findings of fact concerning abuse, your client may further benefit in a later proceeding.²⁰ In *McCoy v Cooke*, right after the opinion was issued in their divorce, the wife filed a suit seeking damages for intentional infliction of emotional distress and for assault.²¹ The defendant husband incorrectly relied on collateral estoppel to prevent relitigation of the case, claiming the divorce case considered the abuse in the division of marital property. However, the court held that collateral estoppel worked against the husband and prevented him from denying the issue of abuse in the subsequent tort action.²²

The statute of limitations, though reasonably generous, must be considered as well. For assault or battery by a spouse or former spouse, or parties with a child in common or who have resided or still reside together, the statute is five years. It is the same if the abuse occurred in a dating relationship, and 10 years if there is criminal sexual conduct.²³

As the use of marital torts evolves, practitioners should expect joinder, collateral estoppel, and res judicata defenses to be raised more frequently. Out of an abundance of caution, we recommend either the tort claims be joined with the divorce or the clients be thoroughly counseled with the risk of reserving such claims. Regardless of the joinder issues, “[t]he decision to forgo the fault argument [in a divorce] must be weighed carefully against the likelihood that the client will actually recover in tort, the client’s ability to fund two separate lawsuits, and counsel’s ability to sever the issues of domestic violence from the rest of the divorce litigation.”²⁴ A jury trial is usually waived in all civil cases unless demanded;²⁵ therefore, if the case is merged with the divorce, typically the judge will be the trier of fact on the claims unless there is a jury demand, in which case the jury will decide the tort claims.

Practical considerations

If safety is paramount, the importance of first filing a personal protection order cannot be overemphasized.²⁶ Beyond that, just because a tort may be brought doesn’t mean it always should be. Raising new damage claims within the divorce may inflame the batterer.²⁷ On the other hand, filing separately may “revictimize the survivor” in multiple courts. If a marital tort is not formally raised, the offending conduct may instead serve

among the factors considered for favorable spousal support, custody, parenting time, or other relief.

When children are involved, the realities of lifetime co-parenting must also be considered. If the situation does not compel the raising of a marital tort and the power dynamics permit, some parties may be better served by a creative problem-solving approach to facilitate a peaceful post-divorce relationship. However, the authors would never advocate abandoning meritorious claims simply to appease an abusive spouse.

Collectability and documented damages are other issues. Are damages compelling or speculative? Is it worth more pain and financial burden to pursue a spouse without assets?²⁸

Sometimes, attorneys do not pursue a marital tort in assault and battery because they rely on the criminal justice system. However, victim restitution is limited by statute, and the survivor may have little say in the amount awarded.²⁹

As in traditional personal injury litigation, you may require additional discovery and documentation, including medical bills, journals, police reports, etc.³⁰ You may need to hire an investigator and conduct multiple depositions. It may help to seek the advice of or formally partner with a personal injury attorney.

In summary, the reality of practice often leaves tort claims abandoned. On top of the weighty divorce proceedings, a client may have little incentive to include marital torts or begin a new lawsuit.

Final thoughts

When Kate met with Carla, she made sure her client's safety was paramount. She disclosed her experience of abuse early in the case. With Carla's consent, if the facts were egregious and Carla's husband is collectible, Kate may then advise combining tort claims with the divorce rather than referred (and likely abandoned) after the divorce is final.

Including marital torts is economically efficient, permits all issues to be considered by one trier of fact, prevents Carla's revictimization in another forum, and may provide additional economic security as she begins her life's next chapter. It is the authors' hope that this article gives family law practitioners a new tool to be used in appropriate cases as they strive to help their vulnerable clients survive the emotional toll of a divorce and thrive in their new lives afterwards. ■



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ENDNOTES

1. MCL 750.4 (preserving civil remedies) and *People v Veenstra*, 337 Mich 427, 430 (1953) (stating that the same act could be both a crime and a tort).
2. *Bandfield v Bandfield*, 117 Mich 80, 80; 75 NW 287 (1898).
3. *Id.* at 82.
4. Tobias, *Interspousal Tort Immunity in America*, 23 Ga L Rev 359 (1989) available at <<https://scholarship.richmond.edu/cgi/viewcontent.cgi?article=1765&context=law-faculty-publications>> [<https://perma.cc/QM5H-HSPY>] (accessed May 31, 2019).
5. *Id.* at 370.
6. *Id.* at 359.
7. Barry, *Spousal Rape—The Uncommon Law*, 66 ABA J 1088, 1090 (1980).
8. *Mosier v Carney*, 376 Mich 532, 546; 138 NW2d 343 (1965).
9. *Id.* at 543.
10. *Id.* at 542, 600. This modest holding garnered a bare four-justice majority, a concurrence, and two strenuous dissents—including one from Justice Black, who warned of the “deluge of intra-family litigation that is sure to follow,” including, for example, by a child suing his father for running over his new scooter.
11. *Hosko v Hosko*, 385 Mich 39; 187 NW2d 236 (1971).
12. The dissent noted, “Married tempers often fly. So do pots, pans, fists and worse. Apologies and caresses will no longer be the only available balm. In Michigan at least, we can well envision the family donnybrook ending with the husband calling his insurance agent, the wife calling her lawyer and both entertaining visions of better days ahead.” *Hosko*, 385 Mich at 44, 48. Curiously, the *Mosier* court did not discuss MCL 600.2001.
13. Interview with Washtenaw County Trial Court Judge Patrick J. Conlin (January 14, 2019).
14. Interview with family law practitioner Katherine A. Sharkey, Esq. (January 10, 2019).
15. *Id.*
16. Kelly, Curtis & Roane, eds, *Michigan Family Law—Seventh Ed*, ICLE (2019), Chapter 19.
17. *McCoy v Cooke*, 165 Mich App 662; 419 NW2d 44 (1988) and *Goldman v Wexler*, 122 Mich App 744; 333 NW2d 121 (1983).
18. *Courtney v Feldstein*, 147 Mich App 70; 382 NW2d 734 (1985).
19. *Gubin v Lodisev*, 197 Mich App 84; 494 NW2d 782 (1992).
20. *People v Gates*, 434 Mich 146, 150–151, 165; 452 NW2d 627 (1990) (jury verdict of no jurisdiction in a child protective proceeding based on the father's alleged sexual misconduct did not collaterally estop subsequent prosecution for criminal sexual misconduct).
21. *McCoy v Cooke*, 165 Mich App 662, 664; 419 NW2d 44 (1988).
22. *Id.* at 667.
23. MCL 600.5805(4) through MCL 600.5805(6).
24. *Michigan Family Law*.
25. Const 1963, art 1, § 14.
26. Interview with family law attorney Kimberly A. Grover, Esq. (January 8, 2019).
27. Interview with Lakeshore Legal Aid Chief Operating Officer Katherine Strickfaden, Esq. (November 13, 2018).
28. *Id.*, referencing MCL 600.5805(4) through MCL 600.5805(6).
29. Criminal restitution is typically restricted to out-of-pocket loss and “is not a substitute for civil damages,” especially compensatory damages like emotional distress. *People v Tyler*, 188 Mich App 83, 89; 468 NW2d 537 (1991) and MCL 780.767(1).
30. Strickfaden interview.