



Final of three parts

The “Rule of thumb” in domestic violence civil suits

Common defenses include statutes of limitations, laches, self-defense, consent, and the implications of res judicata.

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[The author acknowledges much assistance from Leonard and Cheryl Karp, *Domestic Torts: Family Violence, Conflict and Sexual Abuse*, West Group, various editions]

This is the final article in a three-part series of articles addressing the civil actions that can be filed in a domestic violence matters. This article addresses common defenses that batterers will often make to avoid responsibility for their actions.

Statutes of limitations

Plaintiffs are constantly constrained by statutory limits within which to file tort claims in a domestic violence situation. If the time for filing of a cause of action has run, the attorney must examine the jurisdiction's law to determine whether there has been any tolling of the statute of limitations during the marriage.

Jurisdictions are split as to whether the statute of limitations should toll personal injury actions between a husband and wife during coverture¹. This stems from the common law unity or coverture of spouses (now abolished in all states), the inability of the wife to sue her husband, and public policy encouraging domestic peace and tranquility – even in marriages that were anything but.

In California, causes of action against one's spouse are not barred until after the

end of the marriage; but only by the time limit allowed for that particular cause of action's statute of limitation.² This appears to be the minority rule. In most jurisdictions, the statute of limitations does not begin to run (or is tolled) during the marriage in actions against spouses.³

One common reason cited for tolling the statute of limitations on spousal claims during marriage is that public policy favors domestic harmony, which would probably not occur if spouses were forced to sue each other or be barred by the applicable statute of limitations.

However, the law is rapidly changing throughout the country in regards to both inter-spousal tort immunity and the correlative statute of limitation issues. It is imperative that any attorney handling personal injury cases involving spouses be familiar with the current law in the state where the cause of action arose.

Laches

The doctrine of laches generally does not preclude a personal injury action filed by one spouse against the other.⁴ Again, public policy dictates that courts should refrain from discouraging domestic peace and tranquility.

Domestic discord would certainly result if society forced one spouse to race to the courthouse to sue the other spouse, simply to avoid losing their right to sue.

Self-defense

The defense of self-defense is limited to force reasonably necessary to prevent

bodily harm to oneself where there is not enough time to go to court or to have law enforcement intervene.⁵ The Restatement states that “an actor is privileged to use reasonable force, not intended or likely to cause death or serious bodily injury, to defend himself against unprivileged harmful or offensive contact or other bodily harm which he reasonably believes that another is about to inflict intentionally upon him.”

While few domestic violence cases have been published involving self-defense, the arguments would be the same as in criminal cases. The right to act in self-defense arises not only when the danger is real, but also when the danger is apparent and the actor reasonably believed the right to self-defense exists.⁶

Defense of others or property

If the defendant spouse's motive for harming the victim spouse was to prevent immediate battery, abuse or molestation of a child or other relative, then the defendant spouse's conduct may be legally justified by the privilege to defend another. The right to defend others is recognized in every state and occurs when a third party is threatened with any kind of felonious invasion, such as rape, incest or aggravated assault and battery.⁷

However, the privilege of self-defense extends only to acts done to protect another from imminent, threatened aggression. Moreover, the right to defend others does not extend to acts done “as a punishment or in retaliation for a past



aggression or as a warning against the repetition thereof.”⁸

Provocation, in and of itself, is not a defense to an intentional tort, unless it meets the criteria for self-defense. Oftentimes in domestic violence situations, the defendant spouses’ attempts to allege provocation have met with little or no success. In *Johnson v. Johnson*, the Alabama Supreme Court held that a husband who was being sued by his wife for assault and battery could not defend on the basis that the wife was allegedly “mean and fussy.”⁹

Consent

Although not, strictly speaking, an affirmative defense, consent ordinarily bars recovery for intentional torts such as assault, battery, and intentional infliction of emotional distress.

Consent essentially negates the existence of such torts in their inception. As far back as 1887, Oliver Wendell Holmes wrote, in *Ford v. Ford*, that [T]he absence of lawful consent is part of the definition of an assault.¹⁰ “The absence of lawful consent is part of the definition of an assault.” The same is true of false imprisonment and other torts concerning the intentional invasion of a person’s interests.¹¹ The Restatement (Second) of Torts states that “[o]ne who effectively consents to the conduct of another intended to invade his interests cannot recover in an action of tort for the conduct or for harm resulting from it.”¹² The rationale is expressed in the ancient legal maxim that *volenti non fit injuria*, or that one to one who is willing, no wrong is done.

Consent, however, is ineffective if any of the following circumstances exist:

- (1) The plaintiff lacked the capacity to consent (actual or legal, as where he or she lacks the mental or legal capacity to consent);
- (2) The consent was coerced or given under duress;
- (3) The plaintiff was mistaken about the nature and quality of the invasion intended by the defendant’s conduct; or:

(4) The defendant’s conduct was the kind of conduct to which no one can validly consent so as to avoid liability.¹³

Incapacity to consent can exist because of infancy, intoxication, mental incompetence, duress or coercion.

If a plaintiff consents to the defendant’s conduct when the plaintiff is mistaken or misled about the defendant’s intended personal invasion, it does not amount to effective consent. For example, a woman who consents to sexual intercourse may still recover damages if she is infected with a sexually transmitted disease.¹⁴

Acts made criminal to protect certain classes of persons simply cannot be consented to under any circumstance. This is because the members of the protected class are, by reasons of their immaturity, inexperience or judgment, unable to protect themselves against the conduct to which they would likely consent. For example, an underage person cannot legally consent to sexual intercourse, and his or her partner will be liable for statutory rape regardless of whether the victim consented.

A recent controversy in the area of domestic violence litigation is whether one spouse should have the ability to consent to the other spouse’s conduct that the other spouse intended to bring about the first spouse’s own death. This issue has most often arisen in situations involving mercy killings.

Res judicata

The doctrine of *res judicata* embraces merger, bar, and both direct and collateral estoppel. The term *res judicata* incorporates two principles regarding the effect of a valid, final judgment.

First, the judgment, when rendered on the merits in a prior suit, is an absolute bar to a second suit involving the same parties or those in privity with them, based on the same claim or demand.

Second, such a judgment gives rise to an estoppel of a subsequent action between the same parties or those in privity with them, with respect to the issues that

were actually litigated and were necessary in the outcome of the first action.

Under the first principle of *res judicata*, the judgment acts as a bar. This means that the parties are precluded from ever being able to litigate again all grounds, defenses and recoveries that were available to the parties in the initial action and related to the same claim. This applies regardless of whether the issues were actually litigated or were determined by a judge.

For example: A court may hold that a spouse’s tort claims that accrued during the marriage are not barred by the doctrine of *res judicata*, even though the prior divorce decree was granted on the grounds of extreme mental cruelty based on a shooting incident. Assume the prior divorce decree did not bar the husband from filing a later tort action, based on the conclusions that the same type of relief was not available in both actions. The purpose of the divorce proceeding was to dissolve the marriage, regardless of the grounds upon which that decree was sought and predicated. The purpose of the civil tort action, however, was to recover damages for injuries. Since spousal support is not based upon damages to the victim or as a penalty for the abuser, the fact that it may be awarded in a divorce case does not alter the principle.

However, here the court applied the doctrine of *res judicata* against the wife. The court held that the wife’s criminal conviction for the attempted murder of her husband collaterally estopped her from re-litigating the issues of liability and causation in the civil tort action. Applying the doctrine of collateral estoppel, the court held that “a party who, after full litigation has lost on an issue is . . . barred from litigating the issue with new parties.” Even though there was no mutuality of parties in the two actions, the wife had a full and fair opportunity to litigate these issues in the prior criminal case.¹⁵

Equitable estoppel and waiver

Equitable estoppel is a defense predicated on inaction or action by the plain-



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tiff, upon which the defendant relied to his or her detriment. That is, the defendant relied upon the prior acts or omissions by the plaintiff to guide the defendant in acting or not acting in what would otherwise be a tortious manner.

Waiver, by contrast, is a voluntary relinquishment of a known right. Waiver may be implied by a plaintiff's actions, words or deeds even where the specific words "I waive my right" are not communicated to the defendant.

There are many rights that a person cannot waive. While these rights vary from state to state, there are some areas of common agreement. For example, people cannot waive their rights to relinquish the rights of third parties. One spouse cannot defend an action on the ground of waiver if the other spouse never made a claim for personal injury damages in the divorce action, but makes them in a later action independent of or subsequent to the dissolution final judgment.

However, the opposite is also true. If a spouse demands spousal support based upon a disability caused by the other spouse's tortious conduct, any claim for

those same damages may be precluded in a subsequent civil action under both waiver and *res judicata* theories.

Conclusion

As plaintiff's lawyers, we must probe every possible theory of recover and evaluate every defense to determine whether we should file a lawsuit on behalf of our client. This is especially the case for personal injury actions arising in a domestic violence situation. While there may be opportunities for recovery in these types of cases, it is critical for the plaintiff's lawyer to know the recent changes in the law that may have a significant impact on the value of the case.

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Endnotes:

¹ Coverture was a legal doctrine whereby, upon marriage, a woman's legal rights were subsumed by those of her husband. Coverture was enshrined in the common law of England and the United States throughout most of the 19th century. Under traditional English common law, an adult unmarried woman was considered to have the legal status of feme sole, while a married woman had the status of feme covert. These are English spellings of medieval Anglo-Norman phrases (the modern standard French spellings would be femme seule "sin-

gle woman" and femme couverte, literally "covered woman"). A feme sole had the right to own property and make contracts in her own name. A feme covert was not recognized as having legal rights and obligations distinct from those of her husband in most respects. Instead, through marriage a woman's existence was incorporated into that of her husband, so that she had very few recognized individual rights of her own. See <http://en.wikipedia.org/wiki/Coverture>

² *Wilson v. Wilson* (1868) 36 Cal 447.

³ *Cary v. Cary* (1938) 159 Or 578, [80 P2d 886].

⁴ See generally: 41 CJS *Husband and Wife - Laches*, at 914 (1944)

⁵ W. Prosser & P. Keeton, *Handbook on the Law of Torts* §19, at 125-26 (5th Ed. 1984).

⁶ Restatement (Second) of Torts §63 comment e, at 100 (1965)

⁷ See: W. Prosser & P. Keeton, *Handbook on the Law of Torts* §20, at 130 (5th ed 1984).

⁸ Restatement (Second) of Torts §63, comment g, at 101.

⁹ 201 Ala 41, 77 So 335 (1917), cited in Karp, Leonard and Karp, Cheryl, *Domesic Torts: Family Violence, Conflict and Sexual Abuse*, Clark, Boardman & Callaghan 1989 at pp. 58.

¹⁰ 143 Mass 577, 578, 10 NE 474, 475 (1887).

¹¹ See: Restatement (Second) of Torts §892A (1965) cited in Karp, Leonard and Karp, Cheryl, *Domesic Torts: Family Violence, Conflict and Sexual Abuse*, Clark, Boardman & Callaghan 1989 at pp. 60.

¹² Id. §892A(1).

¹³ W. Prosser & P. Keeton, *Handbook on the Law of Torts* §18, at 114 (5th Ed. 1984).

¹⁴ *Crowell v. Crowell*, 180 NC 516, 105 SE 206(1920), *re-hearing denied* 181 NC 66, 106 SE 149 (1921), cited at Karp, Leonard and Karp, Cheryl, *Domesic Torts: Family Violence, Conflict and Sexual Abuse*, Clark, Boardman & Callaghan 1989 at pp. 61.

¹⁵ *Aubert v. Aubert* 129 NH 422, 529 A2d 909 (1987)

