

MARITAL TORTS

10 THINGS EVERY PRACTITIONER SHOULD KNOW

PRESENTED TO

TARRANT COUNTY BAR ASSOCIATION
FAMILY LAW SECTION

BY

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1. Just what is a marital tort?

A marital tort comes from incidents or behaviors that occurred between spouses, and sometimes third parties, during the marriage, even during the pendency of a divorce suit and possibly afterward in certain circumstances.

Some examples of a suit that could be brought as a marital tort action are:

- assault, including sexual assault,
- infliction of emotional distress,
- transmission of a venereal disease,
- invasion of privacy, wiretap, and
- false imprisonment

An option that may exist for some plaintiffs involves the federal Violence Against Women Act of 2000 (VAWA) where the plaintiff can ask for compensatory and punitive damages and attorneys fees. The elements to a VAWA action are: The defendant committed a crime of violence that rose to the level of a felony and the conduct was gender-motivated. The defendant doesn't have to be charged with a crime and the defendant's behavior doesn't have to be classified as a felony in the state where the act occurred.

An interesting area of law is developing in the area of wiretapping and the illegal interception of communications. There are federal and state laws about wiretapping and what

may be legal in Texas, isn't in another state, or isn't in federal court. Some examples of communication interception that may be the basis for a suit are: telephone wiretaps, eavesdropping on cellular communications, eavesdropping on cordless phone conversations, downloading your spouse's e-mail files, getting records of your spouse's conversations on Internet chat rooms, or intercepting beeper messages.

2. What are the advantages and disadvantages of a marital tort?

There are some benefits from joining a marital tort with the divorce. The total expenses for legal fees and costs of litigation can be reduced, and the tort portion may be handled on a contingency. The evidence in the divorce case can be used in the tort case. There are also some disadvantages to joining a divorce and a tort action. If the divorce action is tried by a judge instead of a jury, and the divorce judge also makes the decision in the tort action, the potential award from the tort may be much less than what a jury would award. In addition, a judge may not award the victim as much as he or she could get in a divorce action because of the award in the tort action.

The problem with many marital tort actions is that there isn't anyone to sue who has enough money to make pursuit of the action worthwhile—it's the "deep pocket" problem. Many potential suits aren't filed simply because the defendant doesn't have sufficient assets or income to permit the plaintiff to collect on any award.

Sometimes the deep pocket problem can be addressed by bringing third party defendants into the cause of action. For example, a homeowner's insurance company may pay on a claim for a negligence suit, accountants for failing to disclose certain financial records, or a family member for helping to hide a child or commit an intentional tort.

Many divorces are completed by a settlement or separation agreement. It is standard for many lawyers to have a boilerplate provision called the waiver. The purpose of the provision is that each spouse agrees that the settlement reached in the divorce acts as a complete settlement of any legal claims or issues that may arise from their marriage. This waiver provision can be very damaging, potentially extinguishing the marital tort.

3. What will I need to prove?

Here are the elements of the most common torts that arise in the marital context:

Assault:

Texas law recognizes two types—assault by threat and assault by contact. The latter is called “battery” in most jurisdictions and in older Texas cases. The elements of assault are the same in both civil and criminal cases. *See Morgan v. City of Alvin*, 175 S.W.3d 408, 418 (Tex. App.—Houston [1st Dist.] 2004, no pet.) (citing *Forbes v. Lanzl*, 9 S.W.3d 895, 899 (Tex. App.—Austin 2000, pet. denied)). A person commits an assault by (1) intentionally, knowingly, or recklessly causing bodily injury to another; (2) intentionally or knowingly threatening another with imminent bodily injury; or (3) intentionally or knowingly causing physical contact with

another when the person knows or should reasonably believe that the other will regard the contact as offensive or provocative. *See id.* (citing TEX. PEN. CODE ANN. § 22.01 (Vernon 2004); *Forbes*, 9 S.W.3d at 900; *Wal-Mart Stores, Inc. v. Odem*, 929 S.W.2d 513, 522 (Tex. App.—San Antonio 1996, pet. denied)). “Bodily injury” means “physical pain, illness, or any impairment of physical condition;” it is a broad term encompassing even relatively minor physical contacts so long as they constitute more than mere offensive touching. *Forbes*, 9 S.W.3d at 900 (quoting TEX. PEN. CODE ANN. § 1.07(a)(8)).

The age and capacity of the victim is significant, as the assaults become aggravated for children (generally under age (14), seniors (generally over 65), disabled (generally, persons unable to care for themselves). Torts in these categories are exempt from the Texas punitive damages caps. Without this exemption, punitive are capped at the greater of \$200,000 or two times the economic damages plus up to \$750,000 of non-economic damages.

Sexual Assault:

For this tort, start with the basic elements of assault and add, in general, one or more of the following:

- actual penetration; or
- contact between the sex organs or mouth of one person with a sex organ of another.

As with injuries to children and the elderly, sexual torts are often outside the Texas punitive damages caps.

Infliction of Mental Anguish:

The elements of intentional infliction of emotional distress are that (1) the defendant acted intentionally or recklessly, (2) the conduct was extreme and outrageous, (3) the actions of the defendant caused the plaintiff emotional distress, and (4) the emotional distress was severe. *See Twyman v. Twyman*, 855 S.W.2d 619, 621 (Tex. 1993).

Various Texas cases have provided clarification on the meaning of the specific terms used in *Twyman*, and we tend to plead these cases as follows:

Defendant engaged in a course of conduct that was so outrageous in character or extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. Defendant knew or had reason to know of facts that created a high degree of risk that his conduct would cause emotional distress to the Plaintiff yet proceeded in conscious disregard of, or indifference to, that risk. The conduct proximately caused the Plaintiff to suffer emotional distress and that emotional distress was severe. Defendant inflicted emotional distress upon the Plaintiff in a manner so unusual that the Plaintiff has no other recognized means of redress.

This last sentence is important, because the tort of infliction of mental anguish may not be used when the same conduct gives rise to a more-traditional tort for which mental anguish damages are recoverable. Consider assault. With that tort, mental anguish is one of the elements of damages so the same

conduct will not also support a claim for intentional infliction of mental anguish.

Invasion of privacy:

The elements of a claim for invasion of privacy are (1) the defendant intentionally intruded on the plaintiff's solitude, seclusion, or private affairs; and (2) the intrusion would be highly offensive to a reasonable person. *See Valenzuela v. Aquino*, 853 S.W.2d 512, 513 (Tex. 1993) (*citing* RESTATEMENT (SECOND) OF TORTS § 652B (1977)); *Russell v. Am. Real Estate Corp.*, 89 S.W.3d 204, 212 (Tex. App.—Corpus Christi 2002, no pet.); *see also Clayton v. Wisener*, 190 S.W.3d 685, 696 (Tex. App.—Tyler 2005, pet. denied).

Again, we plead this as follows:

Defendant gave publicity to matters concerning the private life of Plaintiff, this publicity was of the type that would be highly offensive to a reasonable person of ordinary sensibilities, the matter publicized was not of legitimate public concern, and its disclosure injured Plaintiff.

4. Intentional does not mean intentional.

We have mentioned that these torts may, at times, be covered by insurance. While we all traditionally think of assault and “Intentional” Infliction of Mental Anguish as intentional torts—generally outside the scope of insurance coverage—pay close attention to the elements shown above. Both of the torts

may be committed with conduct that is merely reckless. A reckless assault, by definition, is not an intentional tort. *See Karnes City v. Kendall*, 172 S.W.3d 624, 629 (Tex. App.—San Antonio 2005, pet. denied); *Monk v. Phillips*, 983 S.W.2d 323, 325 (Tex. App.—Fort Worth 1998, pet. denied); *see also Twyman*, 855 S.W.2d at 621 (noting a cause of action when mental anguish is inflicted recklessly).

5. Can you bring a separate suit for fraud?

Unfortunately, the general answer is “no.” Wrongdoing that touches on the value of the community estate must be handled as part of the divorce. The Texas Supreme Court has recognized waste of community assets as a factor to be taken into consideration in the division of the community estate and not in a separate tort action. *See Schlueter v. Schlueter*, 975 S.W.2d 584, 589 (Tex. 1998); *see also Harper v. Harper*, 8 S.W.3d 782, 783-84 (Tex. App.-Fort Worth 1999, pet. denied). While one spouse's fraud on the community estate could justify an unequal division of the estate, “there is no independent tort cause of action for wrongful disposition by a spouse of community assets.” *Schlueter*, 975 S.W.2d at 589.

Interestingly, the Fort Worth Court of Appeals has stated that, “We note that the *Schlueter* holding is limited to claims based on waste of community assets, fraud on the community estate, and related punitive damages.” *Loaiza v. Loaiza*, 130 S.W.3d 894, 901 n.1 (Tex. App.—Fort Worth 2004, no pet.) (Livingston, J.) (*citing Schlueter*, 975 S.W.2d at 589). *But see Chu v. Hong*, 185 S.W.3d 507 (Tex. App.—Fort Worth 2005, pet. filed) (allowing a statutory fraudulent transfer claim outside the divorce action).

6. Can I bring the tort claim after the divorce?

This is essentially a question on the application of res judicata to a divorce action and whether that possibility compels joinder. The issue of when an interspousal tort may or must be joined in a divorce action has been the subject of much controversy among family law experts since the abolition of interspousal immunity. In *Twyman v. Twyman*, 855 S.W.2d 619 (Tex. 1993), the Texas Supreme Court adopted a moderate approach, whereby the joinder of tort causes of action with divorce proceedings is permitted but not required. *See id.* at 624. However, the court cautioned that while joinder of the two actions is permissive, the principles of res judicata remain applicable. *See id.* at 625. Accordingly, the joinder of tort claims with the divorce, when feasible, is encouraged. *See id.* In fact, the *Twyman* Court noted that it anticipated interspousal tort claims and divorce proceedings should remain separate only where the facts supporting the tort action are different from those supporting a petition for divorce. *See id.* at 625 n. 17.

“Res judicata, or claims preclusion, prevents the relitigation of a claim or cause of action that has been finally adjudicated, as well as related matters that, with the use of diligence, should have been litigated in the prior suit.” *Barr v. Resolution Trust Corp.*, 837 S.W.2d 627, 628 (Tex.1992). Therefore, a “final judgment on an action extinguishes the right to bring suit on the transaction, or series of connected transactions, out of which the action arose.” *Barr*, 837 S.W.2d at 631 (citing RESTATEMENT (SECOND) OF JUDGMENTS § 24(1) (1982)).

In *Brinkman v. Brinkman*, Ms. Brinkman countersued Mr. Brinkman for divorce, alleging that the marriage was insupportable because of, among other things, cruel treatment toward Ms. Brinkman by Mr. Brinkman. 966 S.W.2d 780 (Tex. App.—San Antonio 1998, pet denied.) Ms. Brinkman requested a disproportionate share of the community property because of Mr. Brinkman's fault in the breakup of the marriage. Further, during the pendency of the divorce, at a hearing on Ms. Brinkman's motion for temporary orders, Ms. Brinkman disclosed that Mr. Brinkman had physically assaulted her, causing permanent neck injuries. Ms. Brinkman was cross-examined regarding the incident, her subsequent actions, her injuries, and various treatment she has received from doctors and therapists.

Applying the principles of res judicata to the facts, the San Antonio court found that the case presented a situation in which “the facts supporting [the] tort action [are] different from those supporting [the] petition for divorce” as anticipated by the *Twyman* court. *See Twyman*, 855 S.W.2d at 625. Even so, the Court noted that the tort could have been brought within the divorce and held that res judicata barred Ms. Brinkman’s post-divorce suit, noting,

Because Ms. Brinkman knew about her personal injury claim against Mr. Brinkman and used it to her advantage in the divorce proceeding, the claim should have been joined with the divorce action. If such joinder would have caused undue complication of the divorce proceeding, the proper remedy would have been severance, not the filing of a second suit after the first had been resolved.

Brinkman, 966 S.W.2d at 783.

7. Are there special limitations issues?

The general limitations rules and tolling provisions that apply to “regular” torts apply to torts brought in the family law arena. But one of these tolling provisions is very useful in marital torts but is rarely seen outside of these cases. With intentional or reckless infliction of mental anguish, the cause of action does not accrue until the last incident in a course of conduct that caused the anguish. *See Newton v. Newton*, 895 S.W.2d 503, 506 (Tex. App.—Fort Worth 1995, no pet.) This is called the “continuing course of conduct doctrine” and is also applicable to allegations that conduct induced Battered Woman’s Syndrome.

8. What about severance?

The same rules apply to torts as are applicable to other considerations of severance and joinder. The rules imposes a duty on the trial court to sever and order a separate trial where the facts and circumstances unquestionably require a separate trial to prevent “manifest injustice,” where no facts or circumstances support a contrary conclusion, and where there will be no prejudice suffered. *Womack v. Berry*, 291 S.W.2d 677, 683 (Tex. 1956); Under these circumstances, the refusal to order a separate trial is a violation of a plain legal duty, even though it is often termed a clear abuse of discretion. *See Womack*, 291 S.W.2d at 683.

Rule 41 provides the circumstances where severance is appropriate. It states:

Misjoinder of parties is not ground for dismissal of an action. Parties may be dropped or added, or suits filed separately may be consolidated, or actions which have been improperly joined may be severed and each ground of recovery improperly joined may be docketed as a separate suit between the same parties, by order of the court on motion of any party or on its own initiative at any stage of the action, before the time of submission to the jury or to the court if trial is without a jury, on such terms as are just. Any claim against a party may be severed and proceeded with separately.

TEX. R. CIV. P. 41.

A claim may be properly severed only if the controversy involves more than one cause of action, the severed claim is one that would be the proper subject of a lawsuit if independently asserted, and the severed claim is not so interwoven with the remaining action that they involve the same facts and issues. *State Dep't of Highways and Public Transp. v. Cotner*, 845 S.W.2d 818, 819 (Tex.1993). With a tort claim, these elements are usually met, so if a party requests severance, it will typically be granted.

9. Can I double-dip?

No, but we respect you for asking! The same general rule that allows only one recovery for each injury is applicable here. So, if one factor supports a disproportionate allocation of the community estate, that same factor will not support a separate tort recovery.

However, be on the lookout for multiple factors. For example, consider a hypothetical where the evidence showed that Husband enjoyed higher earnings than Wife, a higher earning capacity, and had more business opportunities available to him. The evidence also shows that Husband assaulted Wife. The judge hearing this case does not have to rely on Wife's allegation of assault as a basis for a disproportionate property division. *See Murff v. Murff*, 615 S.W.2d 696, 698 (Tex. 1981)(while evidence of fault may be presented, court is not obligated to consider it in dividing marital estate); *Young v. Young*, 609 S.W.2d 758, 762 (Tex.1980) (same). If the trial court makes an express finding that a disproportionate division is just and right based on the economic factors—and does not refer to the tort—separate recover for the assault is authorized and appropriate.

10. Can I charge a contingency fee?

The Texas Supreme Court answered this in *Twyman*:

By holding that these actions may be brought in a single lawsuit we are not authorizing the use of contingent fee arrangements in family law matters. See TEX. DISCIPLINARY R. PROF. CONDUCT 1.04 & cmt. 9 (1989), reprinted in TEX.GOV'T CODE ANN., tit. 2, subtit. G app. (Vernon Supp.1993) (State Bar Rules

art. 10, § 9). Rather, attorneys should enter two separate fee arrangements, one for the divorce and the other for the tort claim. *See* Andrew Schepard, *Divorce, Interspousal Torts, and Res Judicata*, 24 Fam.L.Q. 127, 151-52 (1990).

855 S.W.2d at 625.