

INTERSPOUSAL TORT IMMUNITY AND INSURANCE “FAMILY MEMBER EXCLUSIONS”: SHARED ASSUMPTIONS, RELATIONAL AND LIBERAL FEMINIST CHALLENGES

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I. INTRODUCTION

The conference in connection with which this paper is submitted, “Feminist Theories of Relation ‘In the Shadow of the Law,’” is a welcome occasion to reflect upon the relational in law, and on relational feminism as it relates to law.¹ Torts and insurance deal with family and other relationships, sometimes in ways that are straightforward and obvious, and sometimes in ways that are subtle but real. These ways deserve more examination than they have yet received. Although torts and insurance are often considered separately, they can not be understood in isolation from one another.²

A purpose of this paper is to begin such an examination in the context of domestic violence, interspousal tort immunity, and liability insurance in the United States. A further purpose is to examine how two different feminist theories, liberal feminism and relational feminism, would respond to the current situation regarding these issues—the current situation being, as I will argue, the persistence of *de facto* interspousal tort immunity through the mechanism of private insurance.

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1. “Relational feminism” has been described by Mary Becker in *Patriarchy and Inequality: Towards a Substantive Feminism*, 1999 U. CHI. LEGAL F. 21 as contrasted with formal equality and dominance feminism in numerous respects, including that it is based on different values from the other theories and has a different focus from other theories. See *id.* at 46. Becker claims that the values of relational feminism are “community [and] relationships, and traditionally feminine qualities should be valued more and traditionally male qualities should be valued less.” By contrast, formal equality treats as core values the ideas of individual autonomy and choice, and dominance feminism treats “power as defined today” as a dominant value. *Id.* Robin West’s book, *CARING FOR JUSTICE* (1997) can be seen as an extended argument for relational feminism.

2. See generally, MARSHALL S. SHAPO, *TORT AND INJURY LAW* 166 (2d ed. 2000); Kent D. Syverud, *The Duty to Settle*, 76 VA. L. REV. 1113, 1114 (1990); Tom Baker, *Reconsidering Insurance for Punitive Damages*, 1998 WIS. L. REV. 101, 120.

II. THE PERSISTENCE OF DE FACTO INTERSPOUSAL TORT IMMUNITY

Common law interspousal tort immunity was a foundational aspect of tort and family law until quite recently. The justifications for it have changed over time. An early justification for it was the now-discredited doctrine of marital unity, according to which husband and wife were deemed one person and therefore could not sue each other.³ One of the recent justifications for immunity was the assumption that spouses, particularly in the negligence context, would collude to create false claims and obtain undeserved insurance benefits.⁴ Although it is difficult to make definitive empirical claims about historical domestic violence patterns, it seems that interspousal tort immunity largely protected men from women's claims rather than vice versa.⁵ Although some erosion of the doctrine occurred during the early twentieth century, its near-complete demise occurred in the last third of the twentieth century.⁶ During the time period when interspousal tort immunity was in effect, the tort system of course provided neither deterrence of nor compensation for interspousal injury.

However, *de facto* interspousal tort immunity persists in the form of insurance exclusions. Insurance companies for decades have included "family member exclusions" in homeowner and automobile liability policies.⁷ These exclusions provide that family members can not make claims against the policy. If a wife is injured by her husband, and the wife sues the husband for the injury, the liability policy will not cover the husband for the claim.⁸ The injured wife in this example has a choice of bringing a claim against her husband where there is no insurance coverage, and not bringing a claim at all. These provisions are ubiquitous in homeowners liability policies and were widespread in automobile policies until fairly recently.⁹ The reason for the exclusions is the same as the recent justifications for interspousal tort immunity mentioned above; the aim is to protect against collusive suits.¹⁰ Court decisions in both homeowners and automobile contexts have struck some of these exclusions down as against public policy,

3. Carl Tobias, *Interspousal Tort Immunity in America*, 23 GA. L. REV. 359, 363 (1989).

4. *Id.* at nn.457-503 and accompanying text.

5. See generally, Reva B. Siegel, "The Rule of Love": Wife Beating as Prerogative and Privacy, 105 YALE L.J. 2117 (1996).

6. Tobias, *supra* note 3; Carl Tobias, *The Imminent Demise of Interspousal Tort Immunity*, 60 MONT. L. REV. 101 (1999).

7. ROBERT E. KEETON & ALAN I. WIDISS, INSURANCE LAW 393 § 4.9(c)(1) (1988).

8. Of course the same is true if a wife injures a husband.

9. The exclusion applies to claims against "family members," so it in effect insulates parents from children's claims and vice versa. Parent-child immunity is beyond the scope of this paper. See, e.g., Rousey v. Rousey, 528 A.2d 416 (D.C. 1987); Frye v. Frye, 505 A.2d 826 (Md. 1986); Mitchell v. Davis, 598 So. 2d 801 (Ala. 1992); Squeglia v. Squeglia, 661 A.2d 1007 (Conn. 1995); RESTATEMENT (2D) OF TORTS § 895G (1977).

10. KEETON & WIDISS, *supra* note 7, at 393 § 4.9(c)(1) (family member automobile exclusions "designed with a view to protecting insurers from collusive suits").

particularly in the automobile context.¹¹ An additional common insurance provision, the "intentional acts exclusion," also bars claims for some intentional torts between spouses.¹²

These insurance exclusions have a similar effect to common law interspousal tort immunity. They inhibit and discourage litigation seeking redress for tortious injury. If a person is injured by a spouse's tort and consults a lawyer, the lawyer will analyze not just liability issues but also the practical issues of what damages actually can be recovered.¹³ The potential defendant's liability insurance generally is the most important potential source of recovery.¹⁴ Family member exclusions and intentional act exclusions in individual liability policies guarantee that lawsuits will only rarely be filed for interspousal injury.¹⁵ For various reasons including these exclusions, there is very little tort litigation seeking redress for these injuries.¹⁶ Despite tort compensation for myriad other harms, both physical and psychic, compensation is simply lacking in the area of injury from domestic violence.¹⁷ As in the era of interspousal tort immunity, the tort system thus is still providing virtually no deterrence or compensation.

11. See, e.g., *Meyer v. State Farm Mut. Auto Ins. Co.*, 689 P.2d 585 (Colo. 1985) (recognizing possibility of fraud and collusion between family members but holding that public policy in favor of insurance and compensation for those injured in automobile accidents rendered family member exclusion invalid), *result overturned by legislation*, *Allstate Ins. Co. v. Feghali*, 814 P.2d 863 (Colo. 1991) (acknowledging legislative change); *Farmers Ins. Exchange v. Call*, 712 P.2d 231 (Utah 1985) (despite possibility of household collusion, policy of protecting victims of automobile accidents outweighs importance of protecting insurers from possible collusion). See also *Shannon v. Shannon*, 442 N.W.2d 25, 35 (Wis. 1989) (upholding family member exclusion in homeowners policy in view of likely bias of family members). See generally, Joseph W. McKnight, *Family Law: Husband and Wife*, 48 SMU L. REV. 1225 (May-June 1995) (noting that while intrafamily immunity was the law of torts, family member exclusions in insurance policies were consistent with the law of torts but that when immunity was abolished, policy exclusion contradicted tort policy); Martin J. McMahon, *Annotation: Validity, Under Insurance Statutes, of Coverage Exclusion for Injury to or Death of Insured's Family or Household Members*, 52 A.L.R. 4th 18 (1987).

12. Detailed discussion of the intentional acts exclusion is found in Jennifer Wriggins, *Domestic Violence Torts*, 75 S. CAL. L. REV. 121, 135-36, 161-65 (2001).

13. See Michael J. Saks, *Do We Really Know Anything About the Behavior of the Tort Litigation System-And Why Not?*, 140 U. PA. L. REV. 1147, 1190 (1992) ("[L]awyers usually do not accept a case unless they see an acceptable probability of economic success for themselves in doing so").

14. See Tom Baker, *Blood Money, New Money, and the Moral Economy of Tort Law in Action*, 35 LAW & SOC'Y REV. 275 (2002).

15. Douglas D. Scherer, *Tort Remedies for Victims of Domestic Violence*, 43 S.C. L. REV. 543, 565 (1992). Scherer found a minuscule number of court decisions dealt with domestic violence injuries. It appears that more recent studies of the number of lawsuits filed or decided specifically for domestic violence injuries have not been published. See generally Wriggins, *supra* note 12, at 133-36.

16. For further discussion, see Wriggins, *supra* note 12, at 135-44.

17. "First party" insurance such as health insurance or disability insurance (which is uncommon) may cover medical bills or some lost wages, but this is very different from tort compensation. Tort compensation can include pain and suffering, lost wages, mental distress damages and punitive damages in appropriate cases.

Interspousal immunity has reappeared in a new guise – the guise of private insurance. The archaic mechanism for protecting actors who cause harm within families has been replaced by a new, more subtle mechanism. That mechanism is private liability insurance contracts which exclude coverage for intentional torts between family members.

The new mechanism, liability insurance, is significant. Liability insurance operates through contracts purchased by individuals and couples from private insurance companies. Some might argue that unlike blanket common-law immunity, these liability insurance exclusions reflect market demand and, as such, are not subject to the same criticisms as the common law rule.¹⁸ If the exclusions simply reflect individual choice, there is no valid basis to critique them, according to some. However, it is debatable whether insurance markets simply reflect consumer demand; moreover, problems such as imperfect information plague such markets.¹⁹ People are not very good risk estimators, as much research has shown, and may tend to make suboptimal insurance decisions. Thus, arguments that markets reflect consumer demand and consumer demand reflects rational decision-making are weak in the insurance context. Moreover, insurance is not accurately referred to as "private." Insurance is heavily regulated by the states, although state regulators are often very influenced by the insurance industry.²⁰ Insurance contracts are far from individually bargained-for contracts. Automobile insurance is mandatory in almost every state, and homeowners insurance is required as a condition for getting a mortgage.²¹

18. Arguments along these lines are commonly made in support of existing insurance arrangements. See, e.g., George L. Priest, *The Current Insurance Crisis and Modern Tort Law*, 96 YALE L.J. 1521, 1547 (1987) (arguing that insurance markets reflect consumer demand and tort law does not).

19. For an example of how imperfect information would affect insurance markets, consider research showing that one hundred percent of individuals getting married believe their marriages will endure. Lynn A. Baker & Robert E. Emery, *When Every Relationship is Above Average: Perceptions and Expectations of Divorce at the Time of Marriage*, 17 LAW & HUM. BEHAV. 439, 443 (1993). Rational insurance purchase decisions can not be expected in every context. See, e.g., Christine Jolls, Cass Sunstein, Richard Thaler, *A Behavioral Approach to Law and Economics*, 10 STAN. L. REV. 1471 (1998) (people inaccurately estimate environmental risks); Steven D. Croley & Jon D. Hanson, *The Nonpecuniary Costs of Accidents: Pain and Suffering Damages in Tort Law*, 108 HARV. L. REV. 1785, 1835-1865 (individuals do not possess sufficient information to enter into specific contracts for pain-and-suffering damages) (1995); Ellen S. Pryor, *The Tort Law Debate, Efficiency, and the Kingdom of the Ill: A Critique of the Insurance Theory of Compensation*, 79 VA. L. REV. 91, 114, 143 (1993) (individuals may inaccurately estimate risk of becoming disabled); Wriggins, *supra* note 12.

20. See generally KENNETH ABRAHAM, *DISTRIBUTING RISK*, 36-41 (1986).

21. Tom Baker & Karen McElrath, *Whose Safety Not? Home Insurance and Inequality*, 21 LAW & SOC. INQUIRY 229, 242-43 (1990) (noting that insurance must be purchased in order for a buyer to obtain financing for a home); Deborah A. Stone, *Beyond Moral Hazard: Insurance as Moral Opportunity*, 6 Conn. Ins. L.S. 11, 28 (1999-2000) (noting that most states require car owners to carry liability insurance).

State legislation mandates specific provisions of insurance contracts and specific insurance markets. Thus, the state, through insurance regulation, maintains an active role in the *de facto* persistence of interspousal immunity.

III. FEMINIST APPROACHES

The prevalence of injury from domestic violence and the lack of compensation for injuries from domestic violence would probably be recognized by feminists across a wide spectrum as an example of law's failure. Domestic violence injuries are to some extent a "gender-specific harm."²² After all, in the United States, "domestic violence is the most common cause of nonfatal injury to women."²³ Interspousal immunity was, and insurance family member exclusions are, ways that law "legitimizes gender-specific harms."²⁴ The striking contrast between widespread injury and lack of recognition or compensation seems to present a powerful example of law devaluing injuries to women.²⁵ This section explores ways of analyzing family member exclusions from a liberal feminist point of view and from a relational feminist point of view.²⁶ Liberal feminism provides a coherent way to critique these exclusions. A relational feminist approach also presents a way to criticize the exclusions, but it may risk justifying what it aims to attack. However, it provides a more far-reaching way of approaching the problem than does the liberal feminist approach.

A liberal feminist critique of family member exclusions in insurance might go as follows. First, a liberal feminist perspective might consider the problem of the persistence of *de facto* interspousal tort immunity as important because family member and other exclusions operate to "underdeter and undercompensate" harms particularly suffered by women.²⁷ Although liberal feminism takes the principle of

22. See, e.g., ROBIN WEST, *CARING FOR JUSTICE* 98 (1997). See generally, ELIZABETH M. SCHNEIDER, *BATTERED WOMEN AND FEMINIST LAWMAKING* (2000).

23. Demetrios N. Kyriacous et al., *Risk Factors of Injury to Women from Domestic Violence*, 23 NEW ENG. J. MED. No. 25, Dec. 16, 1999, at 1892.

24. WEST, *supra* note 22, at 98.

25. *Id.* at 165. West notes "gender-specific harms are underdeterred, and . . . women are undercompensated for their sufferance." *Id.* at 98.

26. It should be noted that the contours of liberal and relational feminism are not always evident. For example, there is debate about the extent to which Robin West's ideas are actually liberal. See, e.g., Linda C. McClain, *The Liberal Future of Relational Feminism: Robin West's Caring for Justice*, 24 LAW & SOC. INQUIRY 477 (Spring 1999). Moreover, the degree to which liberalism is actually based on the model of an atomistic individual is disputed. See Linda C. McClain, "Atomistic Man Revisited": *Liberalism, Connection, and Feminist Jurisprudence*, 65 S. CAL. L. REV. 1171 (1992). In this paper, I will not fully join the debate but will accept for present purposes the common characterization of liberalism as valuing individualism and autonomy over community and relationship. At the same time, the characterization of liberal feminism by West does at times seem unduly narrow, as noted at *infra* note 27.

27. See WEST, *supra* note 22, at 98. I am assuming that under a liberal feminist analysis, the fact that these provisions do not explicitly discriminate against women

individual autonomy as foundational, when harms are focused on particular groups, those harms become of particular concern.

Further, such a critique would take the position that people actually are individuals and it should be assumed that they will act as such. To assume that they would collude and defraud insurance companies with other family members, much more than they would with non-family members, is a stereotype and thus mistaken. Therefore, the same insurance rules should be applied to claims made by one family member against another as to claims made by a stranger against a family member.²⁸ This is indeed what some courts have claimed in striking down family member exclusions in the automobile context. As the Texas Supreme Court wrote in doing so, "[w]e refuse to indulge in the assumption that close relatives will prevaricate so as to promote a spurious lawsuit. . . Dishonest individuals will always attempt to circumvent the intent of the statute by lying, while honest citizens are penalized when the truth brings them within the statutory scope. . . ."²⁹ The assumption that relatives will prevaricate, one might claim, is simply based on stereotyping about collusion within families. Stereotyping is one of the enemies of liberal feminism. The exclusions, since simply based on stereotypes, should be abolished. If that happens, there are likely to be many consequences. Among them are more litigation, more compensation, and more deterrence.

A relational feminist perspective, articulated by Mary Becker³⁰ and Robin West,³¹ takes a different approach. Relational feminism rejects the "liberal" notion of rational, atomistic, self-interest-maximiz-

does not mean that they are unproblematic. See generally, McClain, *supra* note 26. Under even a liberal feminist analysis, the fact that these provisions in operation work to women's disadvantage is problematic. West seems to claim that liberal feminism sees gender problems only as straightforward discrimination, which as she correctly points out is an unduly narrow way to view women's situation. WEST, *supra* note 22, at 153. However, the concept of discrimination adopted by liberal feminism could be broad enough to include 'indirect' discrimination such as that effected by provisions like the family member exclusion. See generally McClain, *supra* note 26.

28. A related point is that insurance family member exclusions provide a private, yet state-endorsed, way of defining family. For example, State Farm's standard homeowner's policy defines the "insured" as "you, and if residents of your household, (a) your relatives and (b) any other person under 21 who is in the care of any person described above." State Farm Homeowners Policy, FP7955 (8196), 1. It excludes coverage for "bodily injury to you or any insured within the meaning of part (a) or (b) of the definition of the insured." *Id.* at 17. The policy contains no definition of 'relatives.' Presumably a member of an unmarried heterosexual couple could claim not to be a relative and the family member exclusion would not apply. It is interesting that although the definition of 'family' is very much in flux in U.S. society, insurance policies seem to assume that the concept is so clear that it need not even be defined.

29. *Whitworth v. Bynum*, 699 S.W.2d 194, 197 (Tex. 1985); *Shearer v. Shearer*, 480 N.E.2d 388, 393 (Ohio 1985) (spouses are no more likely to defraud auto insurance companies than are unrelated parties in car accident situations where a driver wants to provide compensation to an injured passenger).

30. Becker, *supra* note 1.

31. WEST, *supra* note 22.

ing individuals for many reasons, including that women so often do not act that way and are harmed in the process.³² According to Mary Becker's chart of values of different kinds of feminism, the values and goals of relational feminism are that "community, relationships, and traditionally feminine qualities should be valued more and traditionally male qualities should be valued less."³³ It is difficult to apply these values with specificity to the world of torts and insurance. If interspousal intentional torts have been committed, relationships by definition (at a minimum) have destructive aspects³⁴ and the community of the family³⁵ necessarily has been undermined. The questions of *what* "relationships" and "community" we should value in such contexts, and *how* we should value these things, are challenging.

A relational feminist perspective presents a broad critique, which arguably may conflict with the idea of private insurance itself. If we had a system which valued community and relationship more, we might conclude that private insurance itself, which by definition extends coverage to only some members of a community, is anathema. Similarly, we might conclude that the tort-insurance system is not the best way to compensate for or deter interspousal injuries.

But we currently live in a world where private liability insurance has much to do with what claims get brought and who gets compensated for their injuries. Liability insurance is based on probabilistic behavior predictions that people are less likely to collude with those outside the private realm of their families than with those inside the family realm.³⁶ This prediction and assumption of insurance is somewhat similar to the notion of atomistic self-interested individuals that is said to be at the heart of liberalism.³⁷ If we simultaneously continue to rely on private insurance to deal with compensation and deterrence of torts, yet truly reject the model of self-interested individuals,³⁸ we put in place a model that may justify the family member exclusion. The reason this is so is that if we assume that individuals value relationships and community above other values, we may also assume that individuals will be more likely to collude with family members (people with whom they have relationships, people with whom they form a community) than with others. Thus, we may have created a justification for the assumption made by insurers that this is so.

32. WEST, *supra* note 22, at 4-7, 124.

33. Becker, *supra* note 1, at 47.

34. See generally, CLARE DALTON & ELIZABETH M. SCHNEIDER, *BATTERED WOMEN AND THE LAW* (2001).

35. See McClain, *supra* note 26.

36. Of course, this assumption reproduces the family-market dichotomy frequently questioned by feminist scholars. See, e.g., Frances Olsen, *The Family and the Market: A Study in Ideology and Legal Reform*, 96 HARV. L. REV. 1497 (1983).

37. WEST, *supra* note 22, at 4-7.

38. If we are relying on private insurance to encourage tort litigation, compensation, and deterrence.

Relational feminists probably would have responses to this, as follows: even if it is true, as indeed it may be, that family members are more likely to collude with one another than with others,³⁹ that does not justify the wholesale exclusion. The wholesale exclusion is unacceptable given the harm that the exclusion does to women. Claims investigation and rate-setting should be able to deal with the collusion concern. The increased valuation of community and relationship is precisely what makes the family member exclusion unacceptable. Valuing relationships means that we recognize the potential for both harm and good in relationships,⁴⁰ and that when there is harm, we find ways to heal it and compensate for it. Once intentional torts take place in relationships and family communities, liability insurance should be there to help with compensation and deterrence.⁴¹ Moreover, valuing community and relationship means that more loss-sharing should take place through the mechanism of insurance than currently takes place. All policyholders should, as part of valuing community and relationship, help compensate (through insurance premiums) those injured by intentional torts of family members. In this way, the state would take injuries to women more seriously and begin to counter, rather than legitimate, these injuries.⁴²

IV. CONCLUSION

A broad focus on "the relational" in torts and insurance law leads us to focus on hitherto unexamined assumptions and their consequences, such as the assumption underlying interspousal tort immunity and insurance exclusions that family members will collude to create false claims (and that nonfamily members will not do so). If it turns out that these assumptions are empirically verifiable, liberal feminism's critique of them is seriously weakened.⁴³ Relational feminism, on the other hand, with its focus on values and human flourishing, preserves a critique of inequality even in the face of empirical differences. As Becker notes, however, it has a "weakness" of being "not judicially manageable."⁴⁴ This is a significant weakness for a legal theory. However, relational feminism is making significant contributions in widening the lens of feminist legal theory.

39. Relational feminism would seem to have an easier time than liberal feminism acknowledging that this might be true.

40. WEST, *supra* note 22, at 7.

41. See Saks, *supra* note 13.

42. See WEST, *supra* note 22, at 136, 142, 165.

43. As many have noted, liberal feminism requires that likes be treated alike but does not go further.

44. Becker, *supra* note 1, at 47.