CHEN: THE SECOND DEPARTMENT DEALS A BLOW TO SPOUSAL TORT ACTIONS[1]

Elliott Scheinberg

In "Chen: Personal Injury Claims as Part of Matrimonial Actions,"[2] Myrna Felder, Esq, offers an informative review of a necessary coexistence between independent civil actions arising from spousal torts and matrimonial actions. Ms. Felder addresses the painful and inextricably intertwined real world options confronting domestic violence victims (DVV): (1) pursuit of criminal proceedings against the violent spouse encumbered by a knowing forfeiture of civil relief because of District Attorneys reluctant to prosecute once the victim has declared an intent to seek civil redress, (2) forbearance of the criminal relief, (3) a significant deferral of the divorce action, or (4) the abuser's leveraging of a discontinuance of the tort claims.

In a ground breaking decision, seemingly of first impression, the Second Department, in *Chen v. Fischer,*[3] held that "interspousal tort actions seeking to recover damages for personal injuries commenced subsequent to, and separate from, an action for divorce are barred by claim preclusion." Citing CPLR §601(a) (permitting permissive joinder of issues whereby one court may resolve legal and equitable claims), and *Boronow v. Boronow*[4] (which is predicated on *res judicata*), the court reasoned that since egregious conduct is a factor in property distribution, tort claims should be asserted within the divorce action, where the same tortious activity would constitute grounds for divorce," or forever waive the claim.

In essence, the Appellate Division opted to protect one public policy over another: "societal need" for finality of litigation trumped shielding the rights of DVV's. It can hardly be gainsaid that these newly competing issues occupy different ranks on the public policy hierarchy. Litigation neatness must yield to security and justice. Rather, *Chen* imposes an additional layer of duress on DVV's by compelling them to make unenviable choices from amongst coexisting means of redress which irretrievably foreclose access to the others.[5]

---

[1]

[2] NYLJ, Dec. 13, 2004.

[3] 783 N.Y.S.2d 394 (2nd Dept., 2004).

[4] 71 N.Y.2d 284, 525 N.Y.S.2d 179 (1988).

[5] *Chen*, also, emphasizes the importance of the general release provision in settlement agreements.

Chen adopted the procedural approach in *Maharam v. Maharm*[6] which outlines the sequence of trials once an interspousal tort action has been severed from the divorce action. Specifically, the court must consider the award in the tort action prior to any property distribution because "a substantial award thereunder would have a significant impact upon 'the probable future financial circumstances of each party.'" Furthermore, success in the tort action, could result in the abuser's "paying damages with funds that later may be determined to have been, in part, marital property...as a joint trial...the court will have the opportunity to take this factor into account when rendering an equitable distribution award." This, however, is not a viable solution because District attorneys may, nevertheless, remain adamant about not prosecuting when a complaint in the divorce action sets forth allegations in tort.

Clouding Title To Property

Puzzlingly, *Chen* twice analogized the tort therein to concerns about clouding title to property: (1) *Boronow*:

> ... in Boronow ... the Court of Appeals held that "a party to a concluded matrimonial action, who had a full and fair opportunity to contest title to the former marital home, is barred by res judicata principles from subsequently and separately reopening that issue"... which tempers the rule that joinder of claims is permissive by recognizing that all claims arising out of a transaction or occurrence are barred once any of them is actually litigated.
>
> In a matrimonial action, where the essential objective is to dissolve the marriage relationship, questions pertaining to important ancillary issues like title to marital property are certainly intertwined and...can be fairly and efficiently resolved with the core issue. The courts and the parties should ordinarily be able to plan for the resolution of all issues relating to the marriage relationship in the single action ... Fragmentation in this area would be particularly inappropriate and counterproductive ... [A] continuation...of the conflict among parties ...would be particularly perverse and the inevitable cloud on titles should also not be allowed to hang over the alienability of the property.

and (2) in *Partlow v. Kolupa*,[7] also grounded in *res judicata*, where the tort in question was conversion of property. The clash between these distinct categories of torts, spousal abuse and clouded property title, is severe.

The Doctrine of Egregious Conduct

Under the amorphous doctrine of egregious conduct, progressive at its inception a generation

---

[6] 177 A.D.2d 262, 575 N.Y.S.2d 846 (1st Dept., 1991). Maharam v. Maharam, 123 A.D.2d 165, 510 N.Y.S.2d 104 (1st Dept., 1986), upheld spousal tort actions.

[7] 69 N.Y.2d 927, 516 N.Y.S.2d 632 (1987).

ago, the Second Department, in *Blickstein v. Blickstein*,[8] granted DVV's eligibility for some measure of added compensation via a disproportionate distribution of assets. The Court of Appeals affirmed *Blickstein* in *O'Brien v. O'Brien*:[9]

> Except in egregious cases which shock the conscience of the court, however, it is not a "just and proper" factor for consideration in the equitable distribution of marital property ... That is so because marital fault is inconsistent with the underlying assumption that a marriage is in part an economic partnership and upon its dissolution the parties are entitled to a fair share of the marital estate, because fault will usually be difficult to assign and because introduction of the issue may involve the courts in time-consuming procedural maneuvers relating to collateral issues...

However, with rare exception the egregious conduct doctrine has received stepchild status, generally being inhospitable to the victim spouse, as evidenced by unsatisfying and woefully lacking awards. A sampling of some of the leading cases is illustrative:[10]

> *Brancoveanu v. Brancoveanu*:[11] defendant, inter alia, attempted to engage an admitted former Romanian terrorist to murder his wife and dispose of the body; he continually made death threats over the years and struck her causing emergency medical treatment; and caused her to be falsely incarcerated for almost five hours. Ruling: "the premises were purchased with the wife's funds along with her contributions as mother, homemaker and primary income producer." The wife was awarded 60% of the proceeds following the sale of the home. A dismal award in view of the additional equity that the seed money for the home originated with the wife.
>
> *Wenzel v. Wenzel*:[12] defendant repeatedly stabbed his wife and left her for dead. She required extensive hospitalization, surgery and therapy. He was convicted of attempted murder, serving a 8 1/3 to 25 year sentence. That notwithstanding, the court made a disturbing comment: "Though there is no question but that the assault on plaintiff's life by the defendant-husband was a heinous act, it is not the repugnance

---

[8] 99 A.D.2d 287, 472 N.Y.S.2d 110 (2nd Dept., 1984).

[9] 66 N.Y.2d 576, 498 N.Y.S.2d 743 (1985).

[10] Lesser offenses than those cited herein are typically not considered. See, for example, Orofino v. Orofino, 215 A.D.2d 997, 627 N.Y.S.2d 460 (3rd Dept., 1995): extraordinary drinking, physical abuse, throwing an ashtray which cut plaintiff's scalp; threats of arson; and placement of a rifle muzzle to plaintiff's head threatening to kill her. Ruling: "... defendant's actions ... did not rise to the level of that rare occasion where marital fault should be considered" even though the wife suffered from nervousness requiring medical care.

[11] 145 A.D.2d 395, 535 N.Y.S.2d 86 (2nd Dept., 1988).

[12] 122 Misc.2d 1001, 472 N.Y.S.2d 830 (Sup.Ct. Suffolk Co.,1984).

or violence of the act itself that is the basis for fault to be considered as a factor, rather there must be a finding of such adverse detrimental effect upon the innocent spouse. Thus, there must be a two-step finding: (1) fault, and (2) such adverse physical and/or psychological effect upon the innocent spouse so as to interfere with her ability to be, or to become self-supporting." Ruling: The court awarded spousal maintenance and child support but since the husband was in prison refusing to cooperate with the distribution of his vested pension plan, the support payments would be charged against the plan. The court, however, gave him the right, upon release, to apply for a modification. Astounding. Mercifully this theory was rejected in *Havel v. Islam*.[13]

Havel v.Islam: on his daughter's birthday, Aftab Islam broke into his wife's bedroom, and beat her viciously on the head, face, neck and hands with a barbell. She remained conscious during the incident, and saw her blood, teeth and bone spattering everywhere. Her three daughters, 15, 12 and 10, came into the room where defendant told them that he killed their mother. As one child tried to call 911, he twice renewed his attacks. The daughters held him off her until his arrest. She sustained, inter alia, neurological damage. Her medical treatment was extensive and painful across a long time. Ruling: The wife was awarded 95% of the near $13 million marital estate. *Havel* added: "Obviously defendant's conduct herein was far more shocking and despicable [than in Brancoveanu]." A new concept: "comparative egregiousness." Sad commentary. Imagine if the Romanian terrorist had, indeed, been successful.

Havel, citing *McCann v. McCann*,[14] underscored:
..."egregious" and "conscience-shocking" have no meaning outside of a specific context, and that conduct is "conscience-shocking, evil, or outrageous" only when "the act in question grievously injures some highly valued social principle." Therefore, the court concluded, conduct no matter how violent or repugnant is "egregious" only where it substantially implicates an important social value. The court further noted that the cases that have taken marital fault into consideration involved the paramount social values: preservation of human life and "the integrity of the human body.

McCann saw an award grounded in egregious conduct as punitive:
The difference between ordinary marital fault and egregious marital fault, however, concerns the relative importance of the particular social value involved. The more highly the preservation of an interest is valued by society, the more likely it is that the offensive conduct in question will be deemed egregious.

---

[13] 301 A.D.2d 339, 751 N.Y.S.2d 449 (1st Dept., 2002).

[14] McCann v. McCann, 156 Misc.2d 540, 593 N.Y.S.2d 917 (Sup.Ct. NY Co., 1993).

> A judge, therefore, in determining whether particular conduct amounts to egregious marital fault, must decide whether the social interest compromised by the offending spouse's conduct is so fundamental that the court is compelled to punish the offending spouse by affecting the equitable distribution of the marital assets.

However, although civil actions may contemplate punitive awards, they are anchored primarily in compensating the victim, trying to make the victim as whole as possible. A strict application of *Chen* may, therefore, compel a DVV to seek punitive damages under the egregious conduct doctrine (as explained in *McCann*) without having been properly compensated for the underlying injuries themselves.

The fact pattern in *Chen* has not been confronted in any other department – in *Maharam*1 the cause of action in tort was included in the underlying divorce action. Although adding a perfunctory personal injury claim to divorce actions just to cover one's bases may be one option. An alternative with an intermittent chance of luck may be available under CPLR §509 which permits plaintiffs to designate the county of venue – anywhere – thereafter shifting the onus unto the defendants to challenge the designation. The First Department, for instance, has demonstrated a sensitivity to the underdog-spouse's inability to commence an action within the normal statutory period during the course of a viable marriage, and has, therefore, tolled the statute of limitations during the marriage to permit challenges to a prenup once the marriage is clearly over.[15]

Conclusion

The Legislature's elimination of fault from DRL §236B has seemingly desensitized judicial intolerance to otherwise disturbing spousal behavior. DVV's need unabridged access to all available relief rather than the imposition of an "election of remedies" theory. Limiting DVV's to the egregious conduct theory is their certain trip to nowhere. That this issue lends itself to legislative intervention is readily apparent from the Legislature's earlier haste to carve out ameliorative procedural and substantive legislation limited to matrimonial actions.[16] Finally, District Attorneys should be statutorily precluded from holding pending tort actions against DVV's.

---

[15] Bloomfield v. Bloomfield, 281 A.D.2d 301, 723 N.Y.S.2d 143 (1st Dept., 2001). The Second Department assumes a contrary view, Rubin v. Rubin, 275 A.D.2d 404, 712 N.Y.S.2d 626 (2nd Dept., 2000). This is not to say that the Second Department is incorrect, the reasons for which are beyond the subject and spatial considerations of this article.

[16] (i) CPLR §3212(e): prohibition against reverse partial summary judgment in matrimonial actions only; (ii) CPLR §211(e), and (iii) CPLR §§5241 and §5242.