

Towards the Establishment of Spouse Tort Liability within Marriage

Ruitong Wang

Hebei Provincial People's Procuratorate Case Management Department, Hebei, Shijiazhuang
050000, China

Abstract. In the evolution of law, there is a growing awakening of individual consciousness. The number of intra-marital tort claims not predicated on divorce has increased in judicial practice. However, China currently only has a compensation system for damages arising from divorce, which is not conducive to the protection of the legitimate rights and interests of the parties involved. With the development of the economy, the liberalization of ideas, the collision of Chinese and Western legal thoughts, and the independent status of marital economics, the establishment of an intra-marital tort system has become possible. Intra-marital tort litigation is not predicated on the termination of marriage, but is established to protect the victim, punish the at-fault party, and prevent the occurrence of tortious acts. The elements of such litigation should have stricter requirements than general torts.

Keywords: Intra-marital tort; Marriage and Family; Marital Stability.

1. Introduction

Marital tort is a special existence of tort scene, is by two independent civil subject, in the process of living together, due to unavoidable friction of all kinds. Accompanied by the social and economic development, the liberation of ideological concepts, not to divorce as the premise of the marital tort request is more and more common, but also gradually accepted by the public. However, in China's current law, only the damages system based on the divorce^①, The lack of a marital tort liability system that presupposes the existence of a marriage. In particular, with the introduction of the Interpretation (I) of the Supreme People's Court on the Application of the Marriage and Family Section of the Civil Code of the People's Republic of China at the end of 2020 ^②.Indirectly affirmed that marital tort damages are subject to divorce as a prerequisite, which is undoubtedly bad news for those who don't want to get out of the marital relationship and want to safeguard their legitimate rights and interests within the marriage.

2. Realistic dispute

In real life, there are many controversies on how to construct the marital tort liability, including but not limited to judicial practice as well as legal theory controversy.

2.1. Confusion of legal basis in judicial practice

In judicial practice, there are many litigation cases involving marital infringement, but the basis of judgment is very different because of the lack of clear legal guidance.

Case 1: Wu Changlin, Yang Yeqin and other disputes over the right to life, body and health ^③

Brief introduction of the case: Defendant Zhang Changying and Wu Gaofei is a husband and wife relationship, in 2019, the two people had a physical conflict due to life trifles, in the course of the conflict Zhang Changying stabbed Wu Gaofei with a fruit knife, resulting in his death.

Judgment result and reasons: the presiding judge of the case held that, first, Zhang Changying and Wu Gaofei had conflicts due to trivia in their lives, and they were both at fault, so the right to claim damages for non-fault parties was not applicable ^④; Second, it is found that the property of the two persons is jointly owned, and there is no basis and necessity for compensation for infringement within

marriage; Third, on the premise of Wu Gaofei's death, the plaintiff in this case (the parents and children of the deceased) requested the defendant to bear tort liability, which is not conducive to the growth and education of minor children, and is not in line with socialist core values. Reject his claim for damages for marital infringement.

Case 2: Fang Lirong and Zhang Jicheng infringement liability dispute case ⑤

Brief introduction of the case: the original defendant is a husband-and-wife relationship, during the survival of the marriage relationship, the plaintiff was physically injured by the car driven by the defendant, and the defendant was identified as the main responsibility for the accident.

Judgment result and reasons: The presiding judge of the case held that, first, although the original defendant is a husband and wife, he is also an independent civil subject; Second, the General Principles of the Civil Law of the People's Republic of China and the Tort Liability Law of the People's Republic of China do not exclude the tort between husband and wife. Support the plaintiff's claim for disability compensation.

Case 3: Chen and Zheng divorce dispute case ⑥

Brief description of the case: the original defendant's husband and wife do not feel good, the conflict occurred during the survival of the marriage relationship, the plaintiff requested the defendant to compensate its medical expenses, lost work expenses, nursing expenses and other related expenses.

Judgment result and reasons: The presiding judge of the case held that the tort relationship between husband and wife is a special tort relationship, and compensation should be limited to intentional tort, negligence tort belongs to the category of ethical relationship, no matter it is gross negligence or general negligence, it should not be compensated.

2.2. The dispute about the object of marital tort in the theoretical circle

Experts and scholars mainly focus on the scope of marital tort, which mainly includes the following two viewpoints: The first viewpoint believes that marital tort refers to the infringement of personal, property or spiritual rights based on the identity rights of the marital relationship, and the scope of protection is smaller than the second viewpoint [1]; The second view holds that in addition to the rights based on status rights, marital torts should also include the rights enjoyed by both spouses during the duration of the conjugal relationship based on the rights enjoyed by general civil subjects [2].

The author agrees with the second point of view, as mentioned in case 2 above, the specific personal relationship between husband and wife resulting from marriage does not exclude its general civil subject qualification, and the basic premise of natural persons entering into marriage is that they are a legal person, if they do not recognize their basic civil rights because of entering into marriage relationship, it will only fuel the flame of marriage fear in society.

3. Possibility and necessity of setting tort liability within marriage

The disputes in judicial practice and theoretical circles just show the reality of marital torts. If there is a right, there should be relief, otherwise the rights that are not guaranteed will become water without a source; If there are disputes, it is necessary to continue in-depth research and make clear legal guidance on marital infringement as soon as possible.

3.1. Setting possibilities

3.1.1. The development of ideas

In our country, the traditional family concept emphasizes that harmony is the most valuable. When there is a conflict in the family, most people choose to adjust by ethical and moral means rather than resorting to legal means. However, with the continuous development of society, the continuous

opening of ideas, and the continuous collision of Chinese and western ideas, more and more people choose to submit the problem of marital infringement to the law to solve. The author believes that whether through ethics or legal norms to adjust the issue of marital infringement, its ultimate goal is to maintain the harmony and stability of marriage, there is no superior question. The construction of the marital tort liability system is not to replace moral means with legal means, but to give the infringed one more choice path and a more powerful means of civil rights protection.

3.1.2. The clarity of marital property

Under current society, most families in China are still practicing the marital community property system, and even if it is determined that marital torts do exist, there is no basis for material compensation. And it is foreseeable that in a long period of time the joint property system of husband and wife is still the mainstream, is the concept of marriage generally held by the Chinese people. [3].

The author believes that the construction of the legal system should have a certain degree of predictability, and can not be ignored, such as the husband and wife agreed property system, "non-mainstream" groups, the current legal system, there is the possibility of constructing a marital infringement-related system. On the one hand, the modern society, the husband and wife economic independent state. Both husband and wife are not only confined to the family, the family's economic resources are not only dependent on one of the parties, both spouses to their own hard work earned personal property is also attached great importance. Moreover, according to Article 1088 of the Civil Code ⑦, even if one of the spouses lacks socio-economic resources due to his/her family responsibilities, he/she has the possibility to own separate property within the marriage. On the other hand, there is a legal basis for the independence of marital property. The common property of husband and wife is essentially a special kind of common common, according to Article 303 of the Civil Code ⑧ common common property has a divisible basis. and pursuant to articles 1063 and 1064 of the Civil Code ⑨. The former affirms the existence of the possibility for spouses to own personal property, which creates a material basis for material compensation for marital torts; the latter narrows the scope of the joint debt of spouses and safeguards the independent status of property between spouses. The various legal norms mentioned above provide a legal basis for the clarification of the individual share of the couple's joint property.

3.1.3. The mature private law system abroad can be referred to

The global legal system is in the process of continuous integration and development, and it is one of the ways to improve the development of the law to make reference to the relevant foreign legal systems and extract the advanced systems that are adapted to China's national conditions. The common law system to the United States, for example, experienced from not recognize the marital tort to the 1860s for the first time to recognize the principle of marital tort immunity, and clear marital tort covers all the infringement of personality rights and property rights of the general situation. [4] civil law countries to Japan, for example, after World War II, the judiciary has the ability to intervene in the marriage relationship during the tort of the case, and in 1908 pitted the injured spouse has the right to claim damages, and now in Japan in the marriage relationship between the man and the master of the two sides are independent of the civil individual, marital relationship is not a statutory cause of impediment to the tort of the relationship. [5]

3.2. Necessity of setting

3.2.1. Protective effect

Each of the spouses is a person in the legal sense of the word, and as long as he or she is a person, he or she is entitled to the rights he or she enjoys as a human being, i.e., human rights. When rights such as the right to identity, the right to property or the right to personal integrity are violated, they need to be defended by legitimate means, and the law is the last line of defense. According to the current "civil code" article 1091 couples divorce, can be based on "other significant fault" to request compensation for the damage caused by marital infringement, by strengthening the judge's discretion,

alleviate the problem of excessive restrictions on divorce damages [6], but the reality is that, since the marriage law to increase the system of divorce damages since , the injured party sued to the court in accordance with this claim and fully supported the proportion has always been low, [7] which is obviously very unfavorable to the protection of the injured party. Correspondingly, the victim's rights during the marriage relationship was seriously damaged, there are other laws to regulate (such as domestic violence to serious injury can be referred to the criminal law to regulate), but there is no relevant remedies within the civil law, at this time on the right of personality, property rights and even the right to health and how to call it a civil right?

3.2.2. Punishing effect

One of the purposes of civil law is to regulate civil relations between equal civil subjects, and to achieve this purpose, the civil liability of the infringer cannot be replaced by other means of punishment. The purpose of administrative punishment and criminal liability are different from the purpose of civil liability, the law is a strict logical system, can not be replaced by other means of punishment civil punishment. For example, behind the back of the wife of the husband secretly will be married to the common property into their own private money, the wife without the husband secretly will be married to the common property provided to the family use, and even one of the husband and wife for the divorce of the use of cold violence, and so on and so forth, the tortfeasor should be given the corresponding civil penalties in order to make up for the victim's losses. To put it in another way, if the marital tortfeasor can not get the corresponding civil punishment, there may be a mistake can also escape punishment of the mentality of fluke, leading to infringement of the more frequent infringement of the degree of infringement of the more serious, and ultimately not only is not conducive to the long term stability of the marriage, but also may lead to a major disaster.

3.2.3. Deterrent effect

The deterrent effect here can be understood in two ways. On the one hand, it is a deterrent for the spouses who are still in the marital relationship. Under the current legal system, whether through administrative or criminal liability, may affect the victims themselves or their children, so when the infringement does not reach a certain level of severity, the victims may easily choose not to pursue the responsibility of the tortfeasor, in order to avoid damage to their own interests or reputation. At this point, if there is a clear mechanism for civil penalties for marital infringement, it can effectively alleviate such problems. On the other hand, the deterrence of third parties outside the marriage relationship. It is often said that when you fall in love with two people's business, marriage is the business of two families, in reality it is true, and may even be outside the family of the "third party" or "fourth, fifth person" business. Clearly marital tort liability system may not be able to completely solve the mother-in-law and daughter-in-law conflict, the third party crisis, but can be in the form of material damages within the marriage, to reduce the "third party" benefit, try to make up for the loss of the injured party.

4. Construction of tort liability within marriage

After discussing the current problems and the rationality of the construction of marital tort liability, it is important to clarify what is a marital tort, how it differs from ordinary torts, what kind of rights are infringed upon and how to remedy the infringed rights.

4.1. Elements of marital tort liability

Marital tort as a special form of tort its constitutive elements first to meet the general tort framework, namely, behavior, fault, the fact of damage and causal relationship. The author believes that the establishment of the marriage relationship itself contains a moderate concession of their own rights, a completely self-interested marriage relationship only exists with the ideal state, "the abolition of the principle of immunity for marital tort, does not mean that in determining the liability for tort to ignore the existence of marriage,"[8] the establishment of marital torts to be given to a more stringent standard.

4.1.1. Illegality of conduct

Tort liability requires the existence of a tortious act, including both acts and omissions. Placed in the context of marital torts, it requires that such infringement violates the prohibitive or commanding provisions of the law on the rights and obligations of husband and wife, including, but not limited to: mutual fidelity, mutual respect, mutual love and care ⑩. The right to life, body, health, name, name, portrait, reputation, honor, privacy and other rights ⑪. The infringement must occur during the marriage, and the infringement of non-marital cohabitation and "false divorce" must be explicitly excluded from the marital infringement.

4.1.2. Subjective fault

The general principle of attribution of responsibility for torts is fault-based and no-fault-based, which means that, depending on the circumstances, subjective intent, negligence or gross negligence may result in the establishment of a tort. In the marriage relationship, there are many kinds of conflicts, there are contradictions may lead to conflict, whether based on reality or based on moral requirements should not be too harsh on the spouse. The author believes that the subjective determination of the marital relationship is limited to intent is more appropriate, if the negligence is also included in the establishment of the scope of the marital tort may result in excessive interference in the life of the law, but also may result in the judiciary to handle the case of too much pressure.

4.1.3. Damage result

The Tort Liability Section (Fault Liability) of the Civil Code requires that a person be liable for tort only if he/she has caused damages ⑫. Meanwhile, according to Article 1167 of the Civil Code, the object of protection of marital tort is the right to person and property, which includes both damages that have already been suffered and possible dangers. In the author's opinion, the requirements for this element of marital tort liability are basically the same as those for general tort liability, but in judicial practice, the judge may exercise reasonable discretion according to the ethics, facts of the case, evidence and other factors, and give marital tort a stricter standard of damage.

4.1.4. Causality

Causation is established when one spouse, by act or omission, causes physical, material or moral damage to the other spouse, which is no different from the determination of causation in general torts.

4.2. The main types of tort liability within marriage

Tort liability protects a wide range of civil rights and interests, and the Civil Code reserves space for the protection of new types of civil rights [9], but can still be divided into two major rights and interests of the person and property, and the same is true for marital torts.

4.2.1. Violation of personal rights

Personal rights have a worldwide effect, and all persons other than the right holder have the obligation not to hinder the exercise of the right. In the case of marital infringement, the rights enjoyed by one of the spouses include personality rights based on his or her status as a civil subject, such as the right to life, the right to health, etc., and identity rights based on his or her special status relationship, such as the right to cohabitation and the right to act as an agent in daily family affairs.

The right to personality is a natural right that a natural person should enjoy, and it is not affected by the establishment or loss of marriage, and Article 110 of the Civil Code has listed such rights in detail ⑬. Domestic violence in marriage and family life may involve violation of the right to health or even the right to life, the right to privacy may be violated by making remarks about the couple's private life, and the right to reputation may be violated by fabricating and spreading false information about the spouse. As society continues to develop, new and more insidious forms of infringement will emerge, all of which will require civil law to regulate when the degree of infringement does not reach the level of a crime.

The right to identity is based on the existence of the marital relationship. In judicial practice, the violation of the right of identity based on the marriage relationship mainly includes: the right of cohabitation, the duty of fidelity, the duty of mutual assistance, the right of procreation, the right to act in daily family affairs and other personal rights, of which "obligation" although the name of the obligation, but one spouse to fulfill the obligation, it is based on the other's rights. The duty of fidelity, for example, refers to the duty of exclusive conjugal sexual life [10]. Articles 1042 and 1043 of the Civil Code clearly state that "a spouse is prohibited from cohabiting with another person" and "spouses shall be faithful to each other", both reflecting that the duty of fidelity is an inevitable requirement of the modern marriage system. However, in reality, there are cases where a spouse has sexual relations with a third person, and the party who fulfills the duty of fidelity can only request compensation for damages in the event of divorce, and has to endure psychological suffering and even material losses during the marriage, which is obviously not conducive to the stability and harmony of the marriage.

4.2.2. Infringement of property rights

Property is an indispensable material basis for life in modern society, it can be said that the amount of property directly affects the quality of life. The violation of the right to property in daily life is mainly in the form of as manifested, such as one of the spouses secretly hidden private money, such as not informing the spouse of the high amount of bounty on the anchor; not as a form of the more typical, concealment of the amount of wages, and so on and so forth is the infringement of the right of common property between husband and wife.

4.3. The way of bearing tort liability within marriage

Article 179 of the Civil Code provides for 11 ways of assuming civil liability, and article 1167 (Tort Liability) lists three ways of assuming tort liability, citing, in the author's opinion, the following ways of assuming liability that can be applied to assuming liability for marital torts.

Cessation of infringement: This form of undertaking can be used to avoid continuous infringement, such as domestic violence, and the injured party can apply to the court for a protection order to protect his or her civil rights if necessary.

Eliminate the danger: this way of assumption is mainly used in the infringement of property rights, such as the spouse will be the joint property loaned to others, the other party has the money to require the spouse to inform the borrower of the details, in order to avoid the damage to the property rights.

Compensation for damages: this is the most important way to assume responsibility for tort [11], almost can be applied to the damage caused by tort. However, it is worth noting that the damages are not the same as the damages in the divorce, does not require the injured party is not at fault, the injured party is at fault can only be used to reduce the liability.

Elimination of the effects of restoration of reputation: this can be used in cases where one spouse violates the other spouse's right to reputation.

Reparation and apology: This form of liability is not only required by law, but also based on basic courtesy. Apologies are inevitable between spouses because of quarrels over trivial matters of life. In the case of intentional violation of civil rights within marriage, an apology, whether paper or verbal, can be said to be the first step in solving the problem.

5. Conclusion

Undeniably, the current mainstream system of joint ownership of marital property, is indeed not conducive to the implementation of marital tort damages, but the author believes that the joint ownership of marital property and the exercise of marital damages is not contradictory to the exercise of the right to claim damages, the injured party can be the court's judgment or the relevant legal instruments (including the husband and wife agreed to) as similar to "passbook" property rights. "The

injured party may treat the court's judgment or related legal documents (including the agreement of the spouses) as a "passbook" of property rights, which will be kept in a safe place during the marriage, and will be cashed out after the division of the spouses' common property in the event of termination of the marriage.

Family is the modern busy society in the soul of the support, marriage is the core of the family composition of a link, film and television works often describe home as a haven, is because of its in the busy life of people to bring relaxation and sense of belonging. No sea is always calm, there will always be a wave of time, the reasonable and effective construction of marital tort liability, is the marriage of this ship traveling in the sea encountered when the wind and waves of the best shelter.

6. Annotation:

- ①: Article 1091 of the Civil Code: If one of the following circumstances leads to divorce, the party not at fault shall have the right to claim damages: (a) bigamy; (b) cohabitation with another person; (c) domestic violence; (d) abuse or abandonment of a family member; and (e) other major faults.
- ②: Article 87, paragraph 2, of the Interpretation of the Supreme People's Court on the Application of the Marriage and Family Section of the Civil Code of the People's Republic of China (I): In cases in which the People's Courts have ruled that a divorce is not permissible, the People's Courts shall not accept a request for damages filed by the parties concerned on the basis of article 1091 of the Civil Code.
- ③: Chinese Judicial Instruments Website Case No. (2021) Zhejiang 0482 Minchu No. 3064
- ④: Article 46 of the Marriage Law of the People's Republic of China: If one of the following circumstances leads to divorce, the party not at fault shall have the right to request compensation for damages: (a) bigamy; (b) cohabitation of a spouse with another person; (c) perpetration of domestic violence; and (d) maltreatment or abandonment of family members.
- ⑤: China Referee Network Case No. (2019) Beijing 0116 Minchu No. 4160
- ⑥: China Judicial Instruments Website Case No. (2018) Yue 0512 Minchu 82
- ⑦: Article 1088 of the Civil Code states that a spouse who has been burdened with more duties in raising children, caring for the elderly, assisting the other spouse in his or her work, etc., shall have the right to request compensation from the other spouse at the time of divorce, and the other spouse shall compensate him or her. The specific method shall be agreed upon by both parties; if the agreement fails, it shall be decided by the People's Court.
- ⑧: Article 303 of the Civil Code If a co-owner agrees not to divide the real or movable property in common in order to maintain the relationship of common ownership, he shall do so in accordance with the agreement, but the co-owner may request for division if he has a serious reason for needing such division; in the absence of an agreement or if the agreement is unclear, the co-owner of a share may request for division at any time, and the co-owner of a joint tenancy may request for division in the event that the basis of the joint tenancy has been lost or when there is a serious reason for needing such division. If damage is caused to other co-owners as a result of the division, compensation shall be paid.
- ⑨: Article 1063 of the Civil Code states that the following property is the personal property of one of the spouses: (a) the pre-marital property of one of the spouses; (b) compensation or indemnification received by one of the spouses for personal injury; (c) property determined in a will or gift contract to belong to one of the spouses only; (d) articles of daily life intended for the exclusive use of one of the spouses; and (e) any other property that should be attributed to one of the spouses. Article 1064 Debts incurred with the joint signature of both spouses or the subsequent acknowledgement of one of

the spouses, as well as debts incurred by one of the spouses in his or her own name for the daily needs of the family during the marriage, are joint debts of the spouses.

⑩: Article 1043, paragraph 2, of the Civil Code states that spouses shall be faithful to each other, respect each other and care for each other; family members shall respect the elderly, love the young and help each other, and maintain equal, harmonious and civilized marital and family relations.

⑪: Article 990 of the Civil Code, the right to personality is the right to life, body, health, name, name, portrait, reputation, honor, privacy, etc., enjoyed by civil subjects.

⑫: Article 1165 of the Civil Code stipulates that the perpetrator shall be liable for infringement of rights and interests of others if he has infringed upon such rights and interests through fault and has caused damage.

⑬: Article 110 of the Civil Code Natural persons have the right to life, the right to body, the right to health, the right to name, the right to portrait, the right to reputation, the right to honor, the right to privacy, the right to marital autonomy, etc.

References

- [1] Jiang Hong. Tort Liability of Husband and Wife[J]. Politics and Law Forum, 2003(01): 74-79.
- [2] Xia Yinlan, Luo Manjing. Comparison of Chinese and American laws on marital torts between husband and wife[J]. Comparative Law Research, 2012(03): 54-62.
- [3] Xia Yinlan. Development and Reflection on the Principle of Equality between Men and Women in the Marriage and Family Section of the Civil Code[J]. Journal of China Women's College, 2020(04): 31-36.
- [4] Jiang Hong. Tort Liability of Husband and Wife[J]. Politics and Law Forum, 2003(01): 74-79.
- [5] Chen Yuxi. Research on marital tort liability [D]. Chongqing: Chongqing University, 2022.
- [6] Huang Wei. Interpretation of the Marriage and Family Section of the Civil Code of the People's Republic of China [M]. Beijing: Law Press, 2020:183.
- [7] Ma Yinan, Jia Xue. Empirical analysis of article 46 of the marriage law--influencing factors and trial ideas of divorce damages[J]. Journal of China Women's College, 2016(01): 5-13.
- [8] Jiang Hong. Tort Liability of Husband and Wife[J]. Politics and Law Forum, 2003(01):74-79.
- [9] Zhang Jianwen. The Civil Code and the new type of civil rights protection[J]. Journal of Gansu University of Political Science and Law,2021(01):11-20.
- [10] Jia Jing. On the Legal Responsibility of Third Party Infringing on Spousal Rights[J]. Politics and Law, 2013(05): 104-105.
- [11] Chen Wei. Discussion on the legal application of divorce damages [J]. Law and Business Research (Zhongnan Journal of Politics and Law), 2002(02): 80-86.