

## Divorce and marital torts:

# *Severed trials OK'd*

By Dana Coleman

Matrimonial lawyers now might have to double as personal injury attorneys for divorce clients who are granted separate jury trials for injuries claimed by one of the spouses.

It's either that or farming out the tort claim — provided they can find personal injury lawyers willing to take a case that doesn't have a deep-pocket defendant or insurance company backstop.

In a 4-2 precedent-setting ruling that ultimately could have an important impact on domestic violence situations, the New Jersey Supreme Court held in *Brennan v. Orban* that family

court judges have the discretion to split a personal injury claim from a divorce and send the alleged tort to a jury trial.

"I think it's a positive step for victims of abuse," said Patricia M. Barbarito, chairwoman of the State Bar Association's Family Law Section. "It's finally the word on the issue of tort that we've been waiting for."

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A full text of *Brennan*, Order No. 2204, is available from the NJL Facts-on-Call Service, 800-340-4725. See digest, Page 17.

The decision, some experts say, ranks as one of the most important affecting family law in recent years.

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# Severed trials OK'd for divorce and marital torts

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"Now domestic violence victims have the same rights as any other tort victims in our legal system," said Robert J. Durst II of Princeton, who along with Beth G. Baldinger represented plaintiff Mary Brennan. "The court really has taken a tremendous step to reaffirm New Jersey's commitment to combating and dealing with domestic violence."

In the past decade, instances of domestic violence in New Jersey — generally with women as the victims — have increased more than 300 percent.

In the opinion written by Justice Daniel J. O'Hern, the court said most marital tort or spousal abuse claims would be ancillary to the divorce and should be handled by the family judge in the same proceeding.

But, noting the seriousness of domestic violence, the court created a door-opener, saying certain cases warrant jury trials.

"We hold that when vindication of the public policy against domestic violence outweighs in its significance to the family the other matters awaiting disposition, the tort claim should, at the request of a victim, be tried by a civil jury," the court held.

And the high court said that decision by trial judges should not be based on the seriousness of the alleged abuses because "there is no such thing as an act of domestic violence that is not serious."

The ruling once and for all decides the issue of whether jury trials should be allowed, but leaves broad discretion to family court judges to make that determination. At the same time, it gives divorce litigants in certain situations the option of a new strategy that could carry with it increased leverage for achieving favorable results.

## Positive impact

"I think it may give at least some matrimonial litigants an incentive to bring marital tort claims in connection with divorce actions in light of at least the possibility of a jury trial," said Steven K. Warner, the Summit lawyer representing Joseph S. Orban Jr. And that, he added, "could have a positive impact" for the litigant with the tort claim, "at least on settlements."

In the past, courts have been split on whether to allow jury trials for personal

injury claims in such circumstances. Last August, a split appellate court in *Giovine v. Giovine* allowed jury trials, but said a trial court must first determine whether the issues of a case are complex enough and whether the injuries are serious enough to warrant a jury trial.

Other rulings, *Davis v. Davis* and *Tweedley v. Tweedley* previously were followed. In *Davis*, the court held spouses with marital tort claims are not entitled to jury trials because the claims are closely related to equitable distribution and should be decided along with those issues. In *Tweedley*, the court held a spouse has a right to a jury trial.

"From where we were 10 years ago, the court's ruling opens the door to jury trials in some cases. But from where we were in *Giovine* and *Tweedley*, it closes the door to those who suggested there is an absolute right to a jury trial," said John P. Paone Jr., immediate past chairman of the State Bar Association's Family Law Section. "This is probably the most important opinion affecting the practice."

## Trial skills refresher

Attorneys said the ruling could force family lawyers to hone their jury trial skills because personal injury attorneys likely would not take a marital tort case on a contingent-fee basis.

"Personal injury lawyers will not readily take the case if there's no insurance companies to pay the claim unless the defendant has substantial net worth," said David M. Wildstein, a Woodbridge family lawyer. "Family lawyers who want to handle these cases will have to brush up on their jury trial skills."

While some lawyers do not anticipate a rise in marital tort claims filed with divorces, attorneys who receive those cases might have to use two separate retainer agreements, Wildstein added. One would have to spell out the hourly arrangement for the divorce proceeding and the other would spell out a contingent arrangement for the tort action. Barbario said the ruling will make family lawyers think twice before taking a case, but she does not believe it will force them to wear two hats.

"The ruling will make us assess cases and be conscious of case management," Barbario said. "For lawyers, it's

not going to significantly change the way we've been practicing."

The court left to the discretion of family judges whether to grant a separate jury trial, but said a factor that can be used to determine whether one is warranted "should be the divisibility of the tort claim from the other matters in the controversy."

The court said it would be difficult to have a jury in family court and said judges can order the marital tort case be severed from the divorce claim and transferred to the Law Division for a trial.

The court did not say whether the marital tort or divorce case should be handled first, holding it would have to be decided on a case-by-case basis. However, the court noted a recommendation by the Supreme Court Family Practice Committee's Jury Trial Subcommittee that the personal injury claim should come first.

In the case before the court, Brennan, a Trenton attorney, filed for divorce in Monmouth County Family Court from Orban, a New Brunswick lawyer. Two weeks later, she filed a personal injury suit in the Law Division, seeking a jury trial for her claim of injuries caused by Orban's alleged mental and physical abuse during their marriage.

The trial court denied a separate jury trial. The appeals court reversed, citing the appellate ruling in *Giovine* and holding Brennan could have her marital tort heard by a jury if she could prove serious injuries.

The Supreme Court upheld Brennan's right to a jury trial, but said there should be no distinction between serious and

non-serious injuries. O'Hern noted "we believe that there is no such thing as an act of domestic violence that is not serious."

Warner, Orban's lawyer, said he plans to file a motion with the Supreme Court for reconsideration of its ruling allowing a jury trial. He said Brennan never cross-appealed the appellate court's ruling that she must overcome the *Giovine* threshold of proving significant injuries.

Justices Gary S. Stein and James H. Coleman Jr., while concurring with the majority to allow a jury trial, dissented from the broader holding granting extensive discretion to family court judges. Former Chief Justice Robert N. Wilentz did not participate.

Stein said the court should allow jury trials in almost all marital tort cases and charged the majority with being "regressive" in its ruling.

Meanwhile, in a related ruling, the court said judges should hold separate trials on charges stemming from violations of domestic violence restraining orders and the underlying criminal offenses when the two charges stem from the same criminal act.

In *State v. Chenique-Puey*, Justice Stewart G. Pollock said "As with most issues that confront the judiciary, however, the trial of a domestic violence case is multidimensional. Courts must balance the vigilant protection of a victim of domestic violence with the right of a defendant to a fair trial." (A full text of *Chenique-Puey*, Order No. 2210, is available from the NJL Facts-on-Call Service, 800-340-4725.)