Matrimonial Torts: Getting a Jury, Winning a Jury

by Mark H. Sobel and Mark Schepps

What should be the appropriate procedure for litigating a marital tort claim raised in conjunction with a divorce action? This is an issue the New Jersey Supreme Court has grappled with for a number of years.

Initially, the Court, in *Marenoff v. Marenoff*,[1] for the most part abolished the concept of interspousal immunity. The exceptions were acts involving marital or nuptial privileges, consensual acts, and simple common domestic negligence, which were to be defined and developed on a case-by-case basis.[2] The next year, the Court, in *Tevis v. Tevis*,[3] ruled that the circumstances surrounding a marital tort and its potential for money damages are relevant in a matrimonial proceeding under the single controversy doctrine.

While the *Tevis* ruling clearly provided for "matrimonial tort litigation" within the context of a divorce action, it did not, however, address whether a party pursuing such a tort claim is entitled to try that tort claim before a jury. Under past practice and procedure, the family court, as a court of equity, did not handle jury trials. The doctrine of ancillary jurisdiction permits such a court of equity to grant full legal relief, without providing any right to a jury trial, in circumstances where the jury issues are ancillary to the main case.[5]

It was not until this past year that the Court, in *Brennan v. Orban*,[4] decided in large part the issue of when a claimant, as part of a marital litigation, is entitled to have a tort claim tried before a jury. The Court held:

> 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 the victim, be tried by a civil jury.[6]

The Court stated that a major factor in deciding whether a jury trial should be granted for a marital tort action is the divisibility of the tort claim from the other matters in controversy between the parties. Consistent with its decision in the *Tevis* case, the Court held that if the tort claim is germane to and grows out of the subject matter of the divorce action, it should be tried in the Family Part, as contemplated by the doctrine of ancillary jurisdiction. In such a case a jury trial will not be granted. On the other hand, if the Family Part is convinced that society's interests in vindicating a marital tort through the jury process is a dominant interest in the proceedings, it may in fact order that a marital tort be tried by jury.[7]

As a result of *Brennan v. Orban,* matrimonial attorneys will likely have to conduct matrimonial tort trials before a jury. Thus, they must become familiar with the procedural distinctions between non-jury trials and trials by jury, as well as the strategies and pitfalls of trying such cases before a jury.

Demand for a Jury Trial

First make sure the formal pleadings adequately request the jury trial. Rule 4:35-1 contains the mechanism by which a party may demand a trial by jury. In general, any party can demand a jury trial of any issue that is triable of right by a jury by making such a demand within ten days after the service of the last pleading on the issue. Most importantly, even if there is a right to a jury trial, a failure to demand one within the prescribed time waives the right.

Number of Jurors

Once the decision has been made to ask for a jury, the next inquiry is: How many people should sit on the jury?

Normally the request is for six jurors. Rule 1:8-2 states that juries in a civil action shall consist of six persons unless the court, for good cause shown, orders the jury to consist of 12 persons. Thus, in an extremely complicated, potentially long case, with significant damage testimony, the request for a 12-person jury may be appropriate.

The court may, in its discretion, also impanel an appropriate number of alternate jurors. This number may be more than four only in exceptional circumstances. All of the jurors and alternates sit and hear the case. At the conclusion of the case, the excess jurors (if any) are removed by means of a random drawing conducted by the court clerk. The court may order that the alternate jurors not be discharged, in which case they will be sequestered apart from the other jurors and will be subject to the same orders and instructions of the court as the other jurors.

If the alternate jurors are not discharged, and if at any time after the submission of the case to the jury a juror is unable to continue, that juror will be discharged and the court may direct the clerk to draw the name of an alternate juror to take the discharged juror's place. When such a substitution is made, the court will instruct the jury to begin its deliberations anew, and will give the jury appropriate supplemental instructions.

Availability of Petit Jury List

In order to investigate the potential jury pool and its susceptibility to a challenge, counsel has the opportunity to examine, in advance, the list of the potential jury pool. This list is available upon request by counsel from the clerk of the court at least 10 days before the date fixed for trial, pursuant to Rule 1:8-5.

Examination of Jurors

Selecting jurors to hear the case is perhaps the most critical aspect of the proceeding. The rules and procedures for such *voir dire* are both specific and comprehensive. You should structure the *voir dire* in order to provide the best jury for your particular matter. The preparation and submission of a detailed list of *voir dire* examination questions will increase the chances that objectionable potential jurors will be eliminated from the jury pool, thus reducing the need to resort to peremptory challenges later.

The first step is to determine if the panel is fairly drawn. Rule 1:8-3 provides the framework for the examination and challenge of prospective jurors. Any party may challenge the array in writing on the grounds that the jurors were not selected, drawn, or summoned according to law. This challenge is decided by the court *before* any individual juror is examined.

The next step is the examination of individual potential jurors. To determine whether a challenge for cause is appropriate, the court, not counsel, interrogates the prospective jurors.

A challenge for cause must be made before the juror is sworn. The court may, for good cause, permit it to be made after the juror is sworn but before any evidence is presented. Jurors can be challenged for cause based on, among other things, their potential bias, improper and adverse pretrial publicity, and their own doubt as to their ability to sit fairly and impartially. A juror who has served within the past 12 months is ineligible pursuant to N.J.S.A. 2A:69-4, and thus excusable for cause. Failure to make a timely challenge to such a juror pursuant to N.J.S.A. 2A:78-6 will, however, protect the integrity of the verdict.

The ability to understand the foreign language in which a witness will testify is not grounds for a valid challenge for cause if the juror expressly agrees to abide by the interpreter's translation of the testimony rather than his or her own knowledge. Potential jurors can still be systematically excluded based upon concerns regarding foreign-speaking jurors' interpretations of evidence given in that foreign language. However, these potential jurors must be excluded through the use of peremptory challenges. This appears to be the only way that minorities can be systematically excluded from a jury.

Each party separately represented by counsel is entitled to six peremptory challenges. Parties represented by the same attorney are deemed to be one party for peremptory challenge purposes. However, where multiple parties represented by different counsel have a substantial identity of interest in one or more issues, the trial court may give additional peremptory challenges to the adverse party. This will be done upon application of counsel prior to the selection of the jury, in such number as to avoid unfairness to the adverse party.

When each side is entitled to an equal number of peremptory challenges, the challenges will alternate one by one, with the plaintiff going first. When the number of challenges is not equal, the court will establish the order in which they will be exercised. This order will be set forth on the record prior to the beginning of jury selection.

Opening and Closing Statements

Once the jury is selected, the focus should be on the opening and closing statements of counsel. The

opening "sets the stage," and provides the "road map" for the jury to rule in your client's favor. While this article is not about developing key strategies for opening and closing statements, it is important to note that such submissions before a jury are quite different from those before a court.

Rule 1:7-1 provides for the plaintiff to make an opening statement before any evidence is offered at trial, unless otherwise provided for in the pre-trial order. The defendant *must* open immediately after the plaintiff opens, and may not wait until the plaintiff rests. A complaint is subject to dismissal following an opening statement that makes clear that no cause of action exists. It is extremely important, therefore, to set forth all elements of the offense to prevent such a motion.

Closing statements are made in the reverse order from opening statements. Any party may suggest to the trier of fact that unliquidated damages in cases that may involve, for instance, pain and suffering, be calculated on a time-unit basis without reference to a specific sum. If such comments are made to the jury, the judge must instruct the jury that they are only arguments, and do not constitute evidence.

Objections During Trial

Objections made in front of a jury bear dual risks. The first risk is that the objection is overruled, and the second is that the jury gets the impression that counsel is attempting to hide facts from the jury. Even if entirely proper, counsel must weigh the strategic risks in making objections in front of the jury. Objections often do nothing more than alert the jury to the importance of adverse testimony and highlight its importance. In addition, objections may unwittingly alert opposing counsel to a strategic weakness in the case. Finally, the objection may warn the testifying witness of potential pitfalls in his or her testimony. Where these concerns become paramount, an objection should certainly be made at side-bar, out of the presence of both the jury and the witness.

Rule 1:7-2 provides a framework for making objections during the course of the trial in order to reserve questions for review on appeal. A party, at the time the ruling or order objected to is made or sought, shall make known to the court specifically the action the party desires the court to take, or the objection to the action taken, as well as the grounds for the action. The court can then take remedial action, or else the issue is reserved for later appeal.

Requests to Charge the Jury

Rule 1:8-7 governs requests to charge the jury. Written requests to charge must be submitted before the beginning of the trial. This is a procedure that is usually honored in the breach. It does, however, provide the prepared counsel with both an opportunity and a potential problem. Obtaining favorable jury instructions and having the court fully understand the legal analysis of your client's position is clearly essential. Providing that information unilaterally, however, must be avoided at all costs. It is therefore essential that such written requests to charge the jury be presented to the court at a time when the other side is also compelled to present these requests. Once the requests are presented to the court, only supplemental charges regarding unanticipated issues may be submitted to the court.

Sequestration of the Jury

Under Rule 1:8-6, there is a right to request sequestration of a jury, although the request is granted only in the most unusual of circumstances. The option should not be lightly regarded, since it imposes severe and significant hardships upon the jurors. The jury will not know which litigant requested the sequestration. Nevertheless, if strategically you believe hardships inflicted on the jury would adversely affect your client, avoid sequestration if at all possible.

The jury will not be sequestered prior to its instruction by the court, except in exceptional circumstances in which sequestration is required to protect the jurors or further the interests of justice. After it is instructed, the jury will generally be sequestered, but may be dispersed by the court for meals, for the night, and during any other authorized intermissions in the deliberations.

Jury Verdict

Rule 1:8-9 provides that a civil verdict must be reached by five-sixths of the jurors. Unless at the time the jury is drawn any party refuses on the record to do so, each party is deemed to have stipulated that, in the event one juror out of six, or one or two jurors out of 12, is (are) excused, the trial shall proceed. In the event jurors are excused, the verdict must be reached by five-sixths of the original number of jurors, which is five jurors in the case of an original six-person jury, and 10 jurors in the case of an original 12-person jury. The same five or 10 jurors need not agree on each issue, as long as the required number of jurors agrees on each issue.

Rule 4:39-1 covers special verdicts, which are written findings upon each issue of fact. This rule must be carefully reviewed, since it imposes significant requirements and liabilities for failure to adhere to the specific dictates set forth.

If, in instructing the jury, the court omits any issue of fact raised by the pleadings or by the evidence, a party must demand submission of that issue to the jury before the jury retires. If any party fails to do this, the right to a jury trial on that issue is waived, and the court is free to make a finding on that issue without a separate demand for such a finding.

General jury verdicts accompanied by answers to interrogatories are covered by Rule 4:39-2.

In addition to the forms used for a general verdict, the court may submit to the jury written interrogatories dealing with some or all of the issues of fact, the jury's decisions on which its verdict is based. Where the general verdict and the answers to the interrogatories are consistent with each other, the entry of the judgment upon the verdict and answers will be directed by the court. On the other hand, if the answers are consistent with other answers but are inconsistent with the general verdict, the court has three options:

1) to enter judgment consistent with the specific answers;

2) to return the jury for further consideration of its answers and verdict; or

3) to order a new trial.

If the answers are inconsistent with each other, and one or more of them is inconsistent with the general verdict, the court is not permitted to enter judgment and must either return the jury for further consideration or order a new trial.

Papers, Exhibits, Instructions, Etc. in the Jury Room

Rule 1:8-8 addresses the issue of what the jurors are allowed to bring with them into their deliberations. The jury may take into the jury room any exhibits received into evidence, and, if the court allows, a list of claims and defenses made by the parties, a list of the items of damage upon which proof was submitted at trial, and a list of possible verdicts. These lists may be prepared by either an attorney or the court. In addition, the court may submit a copy of all or part of its instructions to the jury for its consideration in the jury room.

Polling the Jury

Before a returned verdict is recorded, the jury shall be polled at the request of the court or any party, according to the terms of Rule 1:8-10. In addition, the jury shall be polled in every civil action if the verdict is not unanimous. If the poll discloses that there is not a five-sixths concurrence in the verdict, the jury may either be directed to retire for further deliberations or be discharged.

Interviewing Jurors Subsequent to Trial

While it may be a fervent desire to discuss the case with jurors after their determination of the matter, such actions by counsel are specifically prohibited. Rule 1:16-1 specifically sets forth that only with leave of the court may such interviewing of jurors take place. Such a request should be made on the record, so that there is no confusion regarding the court's granting of such a request.

Jury Verdict Review

Finally, once a jury verdict is rendered, it is important to remember that should the ruling be adverse and an appeal be contemplated, the first step normally is to make a motion for a new trial based on the grounds that the jury verdict was against the weight of the evidence. The failure to make such an application before the trial court will waive the right to make such an argument on appeal under Rule 2:10-1. Since this is one of the fundamental areas of appeal, it is imperative that such a motion be made if an appeal is contemplated.

Key Jury Strategy Issues

Counsel should also keep the following strategies in mind when practicing before a jury. By far the most important point is to make initial contact with the jury from the beginning of *voir dire* right through to closing statements. Nothing is more essential to success in front of a jury than gaining and holding its interest throughout the trial. Being personable, making good eye contact, and breaking down complex legal principles into simple terms without being condescending are all necessary elements in making early and successful contact with a jury. You don't want to lose a jury verdict in a winning case because a jury finds it impossible either to understand your case or to identify with you and your client.

A powerful opening statement is the springboard to achieve a favorable outcome in front of a jury. This is especially true for plaintiff's counsel, since the burden of proving a case rests with him or her. A clear, simple, and interesting blueprint to the case, one that does not promise more than counsel can deliver, is the most dependable way to give an opening statement.

During direct examination, the best way to proceed is to let the witnesses tell their stories in their own words, without leading them. It is important during cross-examination to be thorough but brief. Avoid the temptation to repeat issues covered during the direct examination. Brevity and lack of repetition are the key to keeping the jury's attention. Remember, one bad question could wipe out the positive effects of 10 good questions. Finally, have one powerful last question prepared for each cross-examination, after which you promptly sit down and end the examination.

It is also important to make judicious use of experts in front of the jury in order to establish the severity of injuries (or lack thereof), as well as to establish the extent of damages. The use of visual aids such as slides, photographs, and videotape is extremely helpful in order to involve the jury in your case and bring the case to life.

The summation is trial counsel's final opportunity to connect with the jury. It is important to speak to each juror individually, and to do so without talking down to them. Again, simple language is most effective, and nothing is more important than avoiding the use of legal jargon. It is equally important to avoid appearing overly solicitous, and thus condescending. The successful trial attorney will be well-practiced at striking the perfect balance between talking over the heads of jurors and talking down to them. If done effectively, the potential for success will be greatly enhanced.

These are only a few of the key procedural and strategic issues involved in a jury trial. Knowledge of these items will greatly increase your potential for success before a jury, and enhance your client's probability of a favorable outcome. ⚖

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Endnotes

1. 76 N.J. 535 (1978).
2. *Id.* at 557-559.
3. 79 N.J. 422 (1979).
4. 145 N.J. 282 (1996).
5. Legal issues are ancillary if they are "germane to, or grow out of, the subject matter of the equitable jurisdiction." *Fleisher v. James Drug Stores,* 1 N.J. 138 (1948).
6. *Id.* at 287.
7. *Id.* at 302.