



“MARITAL IMMUNITY”

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IS THERE SUCH A THING AS IMMUNITY IN A MARRIAGE?



There has been much debate as to whether a husband can be guilty of raping his wife.

There are various schools of thought which seem to suggest *yea* and *nay*! What say you?

It has been a long common law principle that “a husband cannot be guilty of rape upon his lawful wife because of the marriage contract”.

It is also said that upon marriage the wife consents to her husband's exercise of his marital rights. As such a wife's consent can only be withdrawn in certain circumstances such as her death, or if the marriage was voided by an Act of Parliament, a Separation Order, a Decree Nisi, an undertaking, a deed of separation or a family protection order.

There is also a school of thought that in marriage the law presumes that a wife consents to sexual intercourse with her husband. Can this presumption be rebutted by evidence that the wife did not consent, by simply saying, “NO”.

In 1991, the House of Lords in the United Kingdom was faced with deciding the fate of a husband who was brought on charges of rape and attempted rape against his wife. In the controversial case, it was held that there was no longer a rule of law that a wife was deemed to have consented irrevocably to sexual intercourse with her husband; and that, a husband could be convicted of rape or attempted rape of his wife where she had withdrawn her consent to sexual intercourse.

So why is it that our Courts or Parliament appear reluctant to apply the decisions held by the House of Lords? Could it be that our legislators are fantasizing on the idea or notion that “**in marriage, the wife, hath given up her body to her husband, thus the husband has a right to the person of his wife**”.



In examining the law that governs sexual offences in The Bahamas i.e. The Sexual Offences and The Domestic Violence Act, it is clear that Parliament did not intend that a spouse could be raped by another spouse. According to the Act, rape is the act of any person not under fourteen years of age **having sexual intercourse with another person**

who is not his spouse. Not to exclude sexual offences against spouses all together, Parliament created an offence of Sexual Assault against a spouse.

Having analyzed the thought process of Parliament, the Act was enacted to curv the notion that a husband could be guilty of sexual assault rather than rape.

Section 15 (1) of the Act provides:

“Any person who has sexual intercourse with his spouse without the consent of the spouse-

- (a) **where there is in existence in relation to them-**
 - i. **a decree nisi of divorce**
 - ii. **a decree of judicial separation**
 - iii. **a separation agreement; or**
 - iv. **an order of a court for the person not to molest or cohabit with his spouse, or any other order made under Part II; or**
- (b) **where the person has notice that a petition for judicial separation, divorce or nullity of marriage has been presented to a court,**

is guilty of the offence of sexual assault by the spouse and liable to imprisonment for a term of fifteen (15) years.

The present legislation which seems to address the issue whereby a husband can be brought before the Court for unwanted sexual acts against his wife, does not sufficiently speak to situations whereby both parties to the marriage co-habit together and the wife removes herself from the marital bed. What the Act does is to provide some relief to a wife, once a petition has been made or a Decree Nisi has been granted, effectively terminating the marriage; or the granting of a decree of judicial separation or separation agreement between the parties, legally withdrawing the wife's consent. Consequently, should a husband force unwanted sexual intercourse upon his wife, without her consent, the husband would then be guilty of the offence and liable to imprisonment for a term of fifteen (15) years.

Although the Act provides protection to a wife who has petitioned the Court, and withdrew her consent to engage in sexual intercourse with her husband,

the Act, fails to address situations whereby a wife who does not have the means to petition the Court or afford an attorney to prepare a separation agreement; or has removed herself from the matrimonial home: - Does this not mean that her consent for sexual intercourse with her husband has been withdrawn?

It is suggested that the mere fact that the wife withdraws from cohabitation with her husband, is sufficiently strong enough to make it clear to the husband that as far as she is concerned the marriage is at an end. Arguably, the husband's immunity may be lost.



It would appear that marital immunity may be lost **only** by the process of law or by an express agreement between the parties. The notion that a husband can be guilty of raping his wife should be explored further when considering situations whereby the wife attempts to defend herself from engaging in sexual intercourse with her husband due to the husband's belief that he has a legal right to the person of his wife. Such acts may result in either party to the marriage causing harm to either spouse. In this regard, the legislators ought to weigh the pros and cons as to the effect this may pose on persons who are involved in an abusive marriage and find it difficult to get out of the marriage due to financial constraints or intimidation. Nonetheless, there are remedies which are available should a spouse (*wife*) find herself in a situation whereby her implied consent to have sexual intercourse with her husband has been withdrawn. The Matrimonial Causes Act provides grounds to which the marriage may be dissolved; and thus marital immunity can be lost.

Written by Nerissa A. Greene
Partner
ngreene@halsburylawchambers.com