Recent Development Note

The Need for Legislative Action to Abolish Interspousal Immunity: *Varholla v. Varholla*

Varholla v. Varholla[1] presented the Supreme Court of Ohio with the opportunity to reconsider its 1965 holding in *Lyons v. Lyons*[2] that negligence actions between spouses were precluded in Ohio by the doctrine of interspousal immunity. The plaintiff in *Varholla* brought an action seeking damages for personal injuries she allegedly sustained because of her husband's negligent operation of a motor vehicle. The defendant's motion for summary judgment on the ground that he was immune from suit by his spouse was granted by the trial court. The court of appeals affirmed. In a six-to-one decision the Supreme Court of Ohio chose to stand by its decision in *Lyons*.

At common law it had been impossible to maintain actions between spouses because of the legal fiction that husband and wife were one.[3] Not until the passage of the statutes known as Married Women's Acts[4] did a married woman gain a separate legal identity. These statutes, however, were primarily viewed by the courts as only "free[ing] the wife from the husband's control of her property."[5] Many courts, including those in Ohio, refused to interpret the statutes as abolishing the common law prohibition against tort actions between spouses. Instead, these courts retained interspousal immunity in tort actions on policy grounds.[6]

In 1965 when *Lyons* was decided, the majority of jurisdictions adhered to the doctrine of interspousal immunity.[7] Presently twenty-nine

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1. 56 Ohio St. 2d 269, 383 N.E.2d 888 (1978).

2. 2 Ohio St. 2d 243, 208 N.E.2d 533 (1965). In *Lyons* the court retreated from its earlier liberalizing trend in the intrafamily immunity area, and asserted that negligence actions between spouses were barred in Ohio by the common law doctrine of interspousal immunity. For a thorough discussion of these earlier cases and *Lyons, see* Sullivan, *Intra-Family Immunity and the Law of Torts in Ohio*, 18 W. RES. L. REV. 447 (1967).

3. W. PROSSER, HANDBOOK OF THE LAW OF TORTS, § 122, at 859-60 (4th ed. 1971) [hereinafter cited as PROSSER].

4. *See, e.g.*, OHIO REV. CODE ANN. §§ 2307.09 and 2323.09 (Page 1954):

§ 2307.09 MARRIED WOMAN MAY SUE AND BE SUED.

A married woman may sue and be sued as if she were unmarried, and her husband may be joined with her only when the cause of action is in favor of or against both.

§ 2323.09 JUDGMENT AGAINST MARRIED WOMAN.

When a married woman sues or is sued, like proceedings shall be had and judgment rendered and enforced as if she were unmarried. Her property and estate shall be liable for a judgment against her . . . .

5. PROSSER, *supra* note 3, at 861.

6. *Id.* at 862-63; *see also* Lyons v. Lyons, 2 Ohio St. 2d 243, 244, 208 N.E.2d 533, 535 (1965); Lewis v. Lewis, 351 N.E.2d 526 (Mass. 1976).

7. *See* Annot., 43 A.L.R.2d 632, 636 (1955).

states permit a negligence action like the one brought by Mrs. Varholla.[8] Only twenty-one states and the District of Columbia still prohibit motor vehicle negligence actions between spouses.[9]

Thus, for the second time in fourteen years, the court refused to abolish this outdated immunity and Ohio, therefore, remains one of a shrinking number of jurisdictions retaining it. In *Lyons*, the court cited the three traditional reasons for retaining the immunity: (1) that abolishing interspousal immunity is a legislative rather than a judicial task; (2) that interspousal immunity is necessary to promote marital harmony; and (3) that interspousal immunity prevents fraud and collusion against insurance companies.[10] The *Varholla* court simply stated that it thought these considerations were still valid, thus ignoring the persuasive arguments of other state supreme courts that have recently abolished interspousal immunity. Those courts declared that the three considerations upon which the Ohio court relied did not justify the immunity.

Because interspousal immunity is a judicially created doctrine it is subject to amendment, modification, or abrogation by the courts,[11] and the *Varholla* court was incorrect in claiming that the immunity must be

8. Bennett v. Bennett, 224 Ala. 335, 140 So. 378 (1932); Cramer v. Cramer, 379 P.2d 95 (Alas. 1963); Leach v. Leach, 227 Ark. 599, 300 S.W.2d 15 (1957); Klein v. Klein, 58 Cal. 2d 692, 376 P.2d 70, 26 Cal. Rptr. 102 (1962); Rains v. Rains, 97 Colo. 19, 46 P.2d 740 (1935); Brown v. Brown, 88 Conn. 42, 89 A. 889 (1914) (by implication); Rogers v. Yellowstone Park Co., 97 Idaho 14, 539 P.2d 566 (1974); Brooks v. Layne, 433 S.W.2d 116 (Ky. 1968); Soirez v. Great American Ins. Co., 168 So. 2d 418 (La. App. 1964) (construing LA. REV. STAT. ANN. § 22:655 (West 1978), to permit suit by one spouse against the other's insurer, but not directly against spouse); Lewis v. Lewis, 351 N.E.2d 526 (Mass. 1976); Hosko v. Hosko, 385 Mich. 39, 187 N.W.2d 236 (1971); Beaudette v. Frana, 385 Minn. 366, 173 N.W.2d 416 (1969); Rupert v. Stienne, 90 Nev. 397, 528 P.2d 1013 (1974); Lundberg v. Hagen, 114 N.H. 110, 316 A.2d 177 (1974); Immer v. Risko, 56 N.J. 482, 267 A.2d 481 (1970); Maestas v. Overton, 87 N.M. 213, 531 P.2d 947 (1975); Henry v. Henry, 291 N.C. 156, 229 S.E.2d 158 (1976); Fitzmaurice v. Fitzmaurice, 62 N.D. 191, 242 N.W. 526 (1932); Courtney v. Courtney, 184 Okla. 395, 87 P.2d 660 (1938); Digby v. Digby, 388 A.2d 1 (R.I. 1978); Prosser v. Prosser, 114 S.C. 45, 102 S.E. 787 (1920); Scotvold v. Scotvold, 68 S.D. 53, 298 N.W. 266 (1941); Richard v. Richard, 131 Vt. 98, 300 A.2d 637 (1973); Surratt v. Thompson, 212 Va. 191, 183 S.E.2d 200 (1971); Freehe v. Freehe, 81 Wash. 2d 183, 500 P.2d 771 (1972); Coffindaffer v. Coffindaffer, 244 S.E.2d 338 (W. Va. 1978); Zelinger v. State Sand & Gravel Co., 38 Wis. 2d 98, 156 N.W.2d 466 (1968); N.Y. GEN. OBL. LAW § 3-313 (McKinney 1978).

9. Burns v. Burns, 111 Ariz. 178, 526 P.2d 717 (1974) (interspousal immunity, however, does not bar a former spouse from suing for an intentional tort inflicted during marriage); Short Line, Inc. v. Perez, 238 A.2d 341 (Del. 1968); Mountjoy v. Mountjoy, 121 U.S. App. D.C. 27, 206 A.2d 733, *appeal denied*, 347 F.2d 811 (1965); Eddleman v. Eddleman, 183 Ga. 766, 189 S.E. 833 (1937) (dictum); Flogel v. Flogel, 257 Iowa 547, 133 N.W.2d 907 (1965); Miles v. West, 224 Kan. 284, 580 P.2d 876 (1978); Moulton v. Moulton, 309 A.2d 224 (Me. 1973) (tortious conduct occurring during marriage by one spouse against other creates no cause of action, but wife may sue husband during marriage for tortious injury occurring prior to marriage); Lusby v. Lusby, 283 Md. 334, 390 A.2d 77 (1978) (but wife can maintain action when outrageous, intentional tort is alleged); McNeal v. McNeal's Estate, 254 So. 2d 521 (Miss. 1971); Ebel v. Ferguson, 478 S.W.2d 334 (Mo. 1972); State Farm Mut. Auto Ins. Co. v. Leary, 168 Mont. 482, 544 P.2d 444 (1975); Emerson v. Western Seed & Irrigation Co., 116 Neb. 180, 216 N.W. 297 (1927); Varholla v. Varholla, 56 Ohio St. 2d 269, 383 N.E.2d 888 (1978); Apitz v. Dames, 205 Or. 242, 287 P.2d 585 (1955) (interspousal immunity is not a bar in actions based on intentional torts); Digirolamo v. Apanavage, 454 Pa. 557, 312 A.2d 382 (1973); Childress v. Childress, 569 S.W.2d 816 (Tenn. 1978) (prenuptial injury claims can be brought during marriage); Bounds v. Caudle, 560 S.W.2d 925 (Tex. 1977) (interspousal immunity abolished in willful and intentional tort cases); Rubalcava v. Gisseman, 14 Utah 2d 344, 384 P.2d 389 (1963); McKinney v. McKinney, 59 Wyo. 204, 135 P.2d 940 (1943); HAWAII REV. STAT. § 573-5 (1968); ILL. ANN. STAT. ch. 68, § 1 (Smith-Hurd 1959).

10. 56 Ohio St. 2d at 270, 383 N.E.2d at 889 (1978).

11. *See e.g.*, Lewis v. Lewis, 351 N.E.2d 526 (Mass. 1976); Rupert v. Stienne, 90 Nev. 397, 528

abolished only by the legislature and not by the judiciary. Nevertheless, because the court has consistently refused to abolish the immunity, it is incumbent upon the legislature to take action to abolish this anachronistic and unfair doctrine. Indeed, "there is something wanting in a system of justice which permits strangers, friends, relatives, and emancipated children to recover injuries suffered as a result of their driver's negligence but denies the right to the driver's spouse. . . . "[12] The invidiousness of an immunity preventing interspousal suits is made even clearer by the fact that the remaining reasons put forth by the court for retaining interspousal immunity do not support its retention.

The majority in *Varholla* also noted that interspousal immunity was necessary to promote marital harmony. A flaw in this argument was shown by the Supreme Court of Washington in *Freehe v. Freehe*:[13]

> If a state of peace and tranquility exists between the spouses, then the situation is such that either no action will be commenced or that the spouses—who are, after all, the best guardians of their own peace and tranquility—will allow the action to continue only so long as their personal harmony is not jeopardized. If peace and tranquility is nonexistent or tenuous to begin with, then the law's imposition of a technical disability seems more likely to be a bone of contention than a harmonizing factor.[14]

A second problem with this argument is that by statute[15] spouses may sue one another in contract and property actions. These actions are just as likely to disrupt marital harmony as a tort action, but they are permitted. To permit suit to remedy all wrongs except personal torts "runs against our fundamental concept of tort law. . . . The state of matrimony alone is not a sufficient justification for preventing suit on an actionable wrong."[16]

The final argument for retaining interspousal immunity in *Varholla* was that interspousal immunity prevents fraud and collusion against

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P.2d 1013 (1974); Freehe v. Freehe, 81 Wash. 2d 183, 500 P.2d 771 (1972). The Supreme Judicial Court of Massachusetts stated:

> [I]t is within the power and authority of the court to abrogate this judicially created rule; and the mere longevity of the rule does not by itself provide cause for us to stay our hand if to perpetuate the rule would be to perpetuate inequity. When the rationales which gave meaning and coherence to a judicially created rule are no longer vital, and the rule itself is not consonant with the needs of contemporary society, a court not only has the authority but also the duty to reëxamine its precedents rather than to apply by rote an antiquated formula.

Lewis v. Lewis, 351 N.E.2d 526, 531 (Mass. 1976).

The Ohio Supreme Court, moreover, found no need to defer to the legislature when it abolished charitable hospital immunity in Avellone v. St. John's Hospital, 165 Ohio St. 467, 135 N.E.2d 410 (1956), or governmental immunity for municipally owned hospitals in Sears v. Cincinnati, 31 Ohio St. 2d 157, 285 N.E.2d 732 (1972).

12. Immer v. Risko, 56 N.J. 482, 495, 267 A.2d 481, 488 (1970).

13. 81 Wash. 2d 183, 500 P.2d 771 (1972).

14. *Id.* at 187, 500 P.2d at 774.

15. *See* note 4 *supra*.

16. Rupert v. Stienne, 90 Nev. 397, 402, 528 P.2d 1013, 1016 (1974). *Cf.* OHIO CONST. art. I, § 16 (Page 1955), which states: "All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay." *See also* Justice W. Brown's dissent in *Varholla* in which he argues that interspousal immunity is unconstitutional. 56 Ohio St. 2d at 273-275, 383 N.E.2d at 891-92.

tactically disadvantaged insurance companies. This rationale can be attacked in two ways. First, the courts always have the task of weeding out fraudulent claims from true ones. It is the function of the finder of fact to ascertain the truth; "the testimony of both parties will be extremely vulnerable to impeachment at a trial on the grounds of bias, interest and prejudice."[17] Indeed, in *Primes v. Tyler*,[18] the Ohio Supreme Court held the Ohio guest statute to be unconstitutional despite the state's argument that it prevented fraudulent claims. In so holding, the court quoted from a North Dakota Supreme Court decision:

> In all other cases, we rely upon the standard remedies of perjury, the efficacy of cross-examination, the availability of pretrial discovery, and the good sense of juries to detect false testimony if it should occur. We do not withdraw the remedy from all injured persons in order to avoid a rare recovery based upon false testimony.[19]

This reasoning is just as valid in interspousal suits as it was in guest-driver suits.[20] Another problem with the court's third rationale is that interspousal immunity is not necessary to protect insurance companies. Insurance companies can either exempt spouses from coverage[21] or raise the premiums for such coverage.

Since the Supreme Court of Ohio has continually refused to abolish interspousal immunity in negligence actions, the onus is upon the legislature to take action. There are two approaches open to the legislature. One approach would be to abolish the immunity only when the defendant is insured.[22] The advantage of this approach is that the presence of insurance would minimize any adverse effect of the litigation on marital harmony. Furthermore, since most drivers are insured, many of the interspousal suits arising out of motor vehicle accidents could still be maintained under this approach.

A second approach is to abolish the immunity in all instances, regardless of insurance status. This approach is preferable. If one spouse wishes to bring suit against the other spouse in the absence of insurance, it is unlikely that marital harmony exists. Prohibiting suit on the basis of

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17. Brooks v. Robinson, 259 Ind. 16, 22, 284 N.E.2d 794, 797 (1972).

18. 43 Ohio St. 2d 195, 331 N.E.2d 723 (1975).

19. *Id.* at 201, 331 N.E.2d at 727, *quoting* Johnson v. Hasett, 217 N.W.2d 771, 778 (N.D. 1974).

20. As pointed out by the Supreme Court of New Jersey,

> it is ironic that the presence of insurance has spawned the second rationale . . . of protecting the insurance carriers against fraud and collusion. That rationale belies the possibility that domestic harmony will be disturbed since its very premise is that the interspousal relationship is so harmonious that fraud and collusion will result.

Immer v. Risko, 56 N.J. 482, 489, 267 A.2d 481, 485 (1970).

21. *See generally* Casey, *The Trend of Interspousal and Parental Immunity—Cakewalk Liability*, 45 INS. COUNSEL J. 321 (1978). The author argues that such exclusions be enlarged to cover *all* relatives of the insured.

22. This approach is followed in Louisiana. Louisiana's direct action statute permits a suit by one spouse against the other's insurer. LA. REV. STAT. ANN. § 22:655 (West 1978). If the other spouse is uninsured, however, interspousal immunity prohibits suit. Soirez v. Great American Ins. Co., 168 So.2d 418 (La. App. 1964).

interspousal immunity will only exacerbate marital disharmony. The only alternative presently open to the one spouse is to suffer damages with no hope of recovery.[23] Under existing law in Ohio a spouse can bring suit seeking damages from the other spouse in contract and property law. There is no justification for interspousal immunity prohibiting such action in negligent torts. Nor is there any justification for abolishing the immunity only when the defendant is insured.

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23. In Ohio interspousal immunity attaches both at the time of the tort and at the time of the suit. In *Varholla* the court held that the immunity attaches when the married parties are living together as husband and wife at the time of the alleged injury. 56 Ohio St.2d at 269, 383 N.E.2d at 889. In Thomas v. Herron, 20 Ohio St. 2d 62, 253 N.E.2d 772 (1969), the court held that a negligent tort suit could not be maintained between spouses presently living together for injuries sustained prior to marriage even though the action was filed 17 days before they were married.