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Casenotes: Torts — Interspousal Immunity — Maryland Abrogates Interspousal Immunity in Cases of Outrageous Intentional Torts. Lusby v. Lusby, 283 Md. 334, 390 A.2d 77 (1978)

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TORTS — INTERSPOUSAL IMMUNITY — MARYLAND ABROGATES INTERSPOUSAL IMMUNITY IN CASES OF OUTRAGEOUS INTENTIONAL TORTS. *LUSBY v. LUSBY,* 283 Md. 334, 390 A.2d 77 (1978).

In *Lusby v. Lusby,*[1] the Court of Appeals of Maryland modified the common law doctrine of interspousal tort immunity by allowing a wife's action against her husband for an outrageous intentional tort. With this decision Maryland joins an increasing number of jurisdictions that have either limited or abolished tort immunity between spouses.[2] Unlike many states that have abolished interspousal immunity in all tort cases,[3] and others that have abrogated it in negligence[4] or intentional tort suits,[5] the Maryland court abrogated the immunity only in those cases involving outrageous intentional torts.

This Note analyzes the *Lusby* decision and its impact on Maryland law and advocates a further abrogation of the immunity in Maryland for all cases involving intentional torts between spouses. Particular emphasis is placed on the court of appeals' abrogation of interspousal tort immunity in light of the recent trend in other jurisdictions.

I. *LUSBY v. LUSBY* — THE FACTUAL BACKGROUND

Diana Lusby brought a civil action against her husband and his two companions on charges of assault, battery, rape, false imprisonment, and intentional infliction of emotional injury.[6] Mrs. Lusby

1. 283 Md. 334, 390 A.2d 77 (1978).
2. A majority of states have modified or completely abrogated the immunity. See Annot., 43 A.L.R.2d 632 (1955).
3. *E.g.,* Brooks v. Robinson, 259 Ind. 16, 284 N.E.2d 794 (1972); Beaudette v. Frana, 285 Minn. 366, 173 N.W.2d 416 (1969).
4. *E.g.,* Rupert v. Stienne, 90 Nev. 397, 528 P.2d 1013 (1974); Richard v. Richard, 131 Vt. 98, 300 A.2d 637 (1973).
5. *E.g.,* Flores v. Flores, 84 N.M. 601, 506 P.2d 345 (1973); Bounds v. Caudle, 560 S.W.2d 925 (Tex. 1977).
6. Mrs. Lusby prayed for compensatory and punitive damages. Brief for Appellant at 1, 2, Lusby v. Lusby, 283 Md. 334, 390 A.2d 77 (1978).
7. The court of appeals did not address the issue of rape. Under Maryland law, a husband is immune from prosecution for rape of his wife. "A person may not be prosecuted [for rape] if the victim is the person's legal spouse at the time of the commission of the alleged rape or sexual offense unless the parties are living separate and apart pursuant to a decree of divorce a mensa et thoro." MD. ANN. CODE art. 27, § 464D (1976). *See generally* Note, *Litigation Between Husband and Wife,* 79 HARV. L. REV. 1650 (1966).

> [A] husband is immune from prosecution for rape of his wife. . . . [I]t is reasonable in many marital situations to assume actual consent to intercourse, but the husband's immunity applies even if it is clear that in fact the wife explicitly refused. Her husband's immunity might in such cases be said to rest on her irrevocable consent at the time of marriage. It is doubtful, however, that such an irrevocable consent is generally anticipated by wives . . . . The absolute privilege therefore appears as an *imposed* term of the marital bargain.

Id. at 1663 (emphasis in original).

alleged that her husband, Gerald Lusby, forced her to engage in sexual intercourse without her consent,[7] and aided two companions in sexually assaulting her. Mrs. Lusby charged that while she was driving her automobile her husband pulled alongside of her in his truck and pointed a high-powered rifle at her. When she attempted to flee, another truck driven by her husband's two companions forced her off the road. Mr. Lusby then took control of his wife's automobile and drove down the road, followed by his two companions. Shortly thereafter, Gerald Lusby forced his wife into his truck where he allegedly struck her, tore her clothes off, and had forced sexual relations with her. Mr. Lusby then assisted his two companions in attempting to rape his wife.

Mr. Lusby demurred to the declaration on the grounds that he was married to Mrs. Lusby at the time of the alleged offense and that the common law prohibited tort suits between spouses. The demurrer was overruled[8] and Mr. Lusby then filed a preliminary motion[9] asserting that a wife lacks standing to sue her husband for a personal tort. The motion was granted and the trial court dismissed the case. An appeal was filed in the court of special appeals and, while the case was pending, certiorari was granted by the court of appeals.[10]

II. THE DOCTRINE OF INTERSPOUSAL IMMUNITY

A. The Common Law

The roots of interspousal immunity are buried in the English common law,[11] formulated in an era when the matrimonial act stripped the wife of certain property rights and suspended her legal existence.[12] Common law disabilities incident to marriage prevented

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8. The demurrer was overruled because nothing on the face of the declaration established that Diana and Gerald Lusby were husband and wife. Mr. and Mrs. Lusby were, however, married to each other at the time of the incident. They had been separated for approximately fourteen months and Mrs. Lusby had filed for a suit for a divorce *a vinculo matrimonii*. They were subsequently divorced on April 26, 1976. Brief for Appellant at 3, Lusby v. Lusby, 283 Md. 334, 390 A.2d 77 (1978).
9. Mr. Lusby filed a motion raising preliminary objection pursuant to Maryland Rule 323. 283 Md. at 336, 390 A.2d at 78.
10. Lusby v. Lusby, 283 Md. 334, 337, 390 A.2d 77, 78 (1978). The court of appeals granted certiorari prior to oral arguments in the court of special appeals pursuant to MD. CTS. & JUD. PROC. CODE ANN. § 12-203 (1974).
11. *E.g.*, Abbott v. Abbott, 67 Me. 304, 306-07 (1877). *See generally* 1 W. BLACKSTONE, COMMENTARIES *442; 1 F. HARPER & F. JAMES, THE LAW OF TORTS, Ch. 23 § 8.10 (1956) [hereinafter cited as HARPER & JAMES]; W. PROSSER, HANDBOOK OF THE LAW OF TORTS (4th ed. 1971) [hereinafter cited as PROSSER]; McCurdy, *Torts between Persons in Domestic Relation*, 43 HARV. L. REV. 1030 (1930) [hereinafter cited as McCurdy].
12. *E.g.*, Bounds v. Caudle, 560 S.W.2d 925, 926 (Tex. 1977). *See generally* 1 W. BLACKSTONE, COMMENTARIES *442.

> At common law a woman's capacity to hold or receive title to property was not destroyed by marriage, but marriage had important consequen-

married women from asserting their rights as individuals, rights separate from those shared with their husbands.

Maryland, like most states, has long followed the traditional common law rule that a wife could not bring an action in law against her husband.[13] Historically, this doctrine of interspousal immunity developed from the common law theory that during marriage the legal existence of the wife was merged into that of the husband, thereby creating a single "unity."[14] A married woman could sue and be sued only by joining her husband. Suits between spouses were barred for lack of capacity because such actions would have placed each of the parties in the dual role of both plaintiff and defendant.[15]

Throughout the development of case law on interspousal tort immunity, several theories have been advanced in support of the common law doctrine. Originally, interspousal immunity was based on ancient concepts of public policy favoring preservation of peace and harmony in the home,[16] and that rationale was most frequently applied by the courts to justify the immunity. This concern was the earliest justification for interspousal immunity in Maryland[17] and

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> ces. It gave a man a right to use and enjoy whatever property his wife owned at the time of marriage or acquired during coverture. A husband acquired a right to possess his wife's real estate and to enjoy the rents and profits thereof, but the fee remained in the wife . . . . In view of the perishable nature of chattels, and the common law denial of estates therein, his right to use these involved such complete dominion as to amount to ownership, and consequently marriage was said to give him the legal title by operation of law.

McCurdy, *supra* note 11, at 1031-32 (footnote omitted).

13. The first Maryland case exemplifying this doctrine was Barton v. Barton, 32 Md. 214 (1870). In *Barton*, a wife's suit for the recovery of money loaned by her to her husband prior to the marriage was denied by the court. Later Maryland cases extended the doctrine of interspousal immunity for acts occurring *during* the marriage as well. *E.g.*, Furstenberg v. Furstenberg, 152 Md. 247, 136 A. 534 (1927). Due to the complexity and possible variations of interspousal tort suits regarding acts committed prior to marriage versus those occurring during marriage, and those involving actions by married spouses versus divorced spouses, a comprehensive analysis of these facets of interspousal immunity is beyond the scope of this Note. *See generally* Farage, *Recovery For Torts Between Spouses*, 10 IND. L.J. 290, 292-94 (1934).
14. Thompson v. Thompson, 218 U.S. 611, 614-15 (1910). *See generally* 1 W. BLACKSTONE, COMMENTARIES *442-43; PROSSER, *supra* note 11, at 859 ("Any tort action between husband and wife encountered at the outset the common law doctrine of the legal identity of the two. It has been said . . . that at common law husband and wife were one person, and that person was the husband . . . .").
15. *See, e.g.*, Phillips v. Barnet, 1 Q.B.D. 436 (1876). *See generally* HARPER & JAMES, *supra* note 11, at 643; PROSSER, *supra* note 11, at 860; McCurdy, *supra* note 11, at 1032.
16. *E.g.*, Thompson v. Thompson, 218 U.S. 611, 617 (1910); Patenaude v. Patenaude, 195 Minn. 523, 526, 263 N.W. 546, 547-48 (1935). *See generally* Note, *Litigation Between Husband and Wife*, 79 HARV. L. REV. 1650, 1650-54 (1966).
17. Barton v. Barton, 32 Md. 214, 224 (1870).

courts continued to apply it in denying an injured spouse access to the civil courts. Another theory advanced to uphold interspousal tort immunity was the strong possibility of collusion due to the confidential relationship between husband and wife,[18] which could lead to the filing of spurious claims, particularly when one or both spouses carried liability insurance.[19] Finally, some courts, concluding that criminal and divorce laws provide sufficient redress to an injured spouse,[20] have emphasized that adequate alternative legal remedies are available.

B. Married Women's Acts

Beginning in the mid-nineteenth century, economic and social progress led to the enactment of Married Women's Property Acts.[21] The primary purpose of those statutes was to secure to a married woman a separate legal identity as well as a separate legal estate.[22] Ultimately, Married Women's Acts were passed in every jurisdiction.[23]

Courts have been confronted with the question of whether the Acts gave a married woman standing to bring an interspousal tort suit. More specifically, the issue has been whether the married woman's separate legal identity, established by the statute, had the effect of modifying the common law immunity, or merely allowed a wife to sue third parties in her own name without joining her husband.[24] Only a few statutes specifically addressed the issue of the married woman's right to bring a tort action against her husband.[25]

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18. *E.g.*, Smith v. Smith, 205 Ore. 286, 310, 287 P.2d 572, 583 (1955). In *Smith*, the court stated that the confidential relationship between husband and wife increases the probability of fraud and collusion. *See generally* PROSSER, *supra* note 11, at 863.
19. *E.g.*, Beaudette v. Frana, 285 Minn. 366, 372, 173 N.W.2d 416, 419 (1969) (allowing interspousal tort claims when family member is insured creates strong temptation to file spurious claims).
20. *E.g.*, Thompson v. Thompson, 218 U.S. 611, 617 (1910) (divorce adequate remedy); Abbott v. Abbott, 67 Me. 304, 307 (1877) (interspousal tort actions are unnecessary where criminal and divorce laws exist). *Contra*, Freehe v. Freehe, 81 Wash. 2d 183, 187-88, 500 P.2d 771, 774-75 (1972) (criminal and divorce laws do not adequately compensate for negligence).
21. A thorough classification of the Acts can be found in McCurdy, *Personal Injury Torts Between Spouses*, 4 VILL. L. REV. 303, 308-13 (1959).
22. 1 W. BLACKSTONE, COMMENTARIES *442.
23. McCurdy, *Personal Injury Torts Between Spouses*, 4 VILL. L. REV. 303, 310 (1959).
24. *E.g.*, Brown v. Brown, 88 Conn. 42, 46, 89 A. 889, 891 (1914).
25. An example of a statute employing specific prohibitory language can be found in ILL. REV. STAT. ch. 68, § 1 (1973), which provides that "[a] married woman may, in all cases, sue and be sued without joining her husband with her, to the same extent as if she were unmarried; provided that neither husband nor wife may sue the other for a tort to the person committed during coverture." Other statutes that deal specifically with interspousal tort suits are considered in McCurdy, *supra* note 21, at 312-13.

In most jurisdictions the legislative intent was difficult to ascertain because the statutes did not refer to the immunity doctrine in precise terms.[26] Therefore, the impact of the Acts varied from state to state.

In 1910, the Supreme Court in *Thompson v. Thompson* interpreted the District of Columbia's Married Women's Acts, and held that a wife could not sue her husband in tort for assault and battery.[27] The Court based its decision on statutory construction as well as policy considerations of public welfare and domestic harmony.[28] In refusing to construe the statute to allow a wife a cause of action against her husband, the Court determined that if the legislative intent had been to effect such "radical and far-reaching changes"[29] in the policy of the common law, clear and specific language in the Act would have been employed to indicate such a purpose.[30] Justice Day concluded that "[t]he statute was not intended to give a right of action as against the husband, but to allow the wife, in her own name, to maintain actions of tort which at common law must be brought in the joint names of herself and husband."[31]

In a dissenting opinion, Justice Harlan, joined by Justices Hughes and Holmes, criticized the ruling on the ground that the statute on its face empowered married women "to sue separately . . . for torts committed against them, *as fully and freely as if they were unmarried.*"[32] The dissenters concluded, therefore, that the legislative intent of the statute was to give a wife the right to sue her husband in tort and thus the majority's holding was in opposition to the plain meaning of the language of the statute.

Until recently, a majority of state courts followed the *Thompson* decision and continued to apply common law justifications to uphold interspousal immunity.[33] In most states, the courts concluded that the creation of a woman's separate legal identity without more was not enough to abrogate the immunity.[34] Statutes which destroyed the marital unity but did not express a clear legislative mandate addressing the married woman's right to bring tort actions against their husbands were generally strictly construed. Such statutes, like

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26. *E.g.*, Self v. Self, 58 Cal. 2d 683, 376 P.2d 65, 26 Cal. Rptr. 97 (1962), *overruling* Peters v. Peters, 156 Cal. 32, 103 P. 219 (1909); Beaudette v. Frana, 285 Minn. 366, 173 N.W.2d 416 (1969), *overruling* Strom v. Strom, 98 Minn. 427, 107 N.W. 1047 (1906).
27. 218 U.S. 611 (1910).
28. *Id.* at 616–18.
29. *Id.* at 618.
30. *Id.*
31. *Id.* at 617.
32. *Id.* at 620 (emphasis in original) (citing D.C. CODE § 1155 (1901)).
33. *E.g.*, Patenaude v. Patenaude, 195 Minn. 253, 263 N.W. 546 (1935); Austin v. Austin, 136 Miss. 61, 100 So. 591 (1924).
34. *E.g.*, Strom v. Strom, 98 Minn. 427, 428, 107 N.W. 1047, 1048 (1906); Austin v. Austin, 136 Miss. 61, 71, 100 So. 591, 592 (1924).

the District of Columbia Acts considered in *Thompson,* merely provided that married women could sue for torts committed against them as if they were unmarried. The courts reasoned that a change in the established common law rule could be effected only through clear and precise statutory language.[35] Consequently, state courts concluded that while the statutes generally gave women the right to bring tort actions for wrongs committed against them, interspousal tort suits remained barred.

The dissent in *Thompson*[36] and the critical views of legal commentators,[37] however, have provided an impetus for a change in the common law. The recent trend in an increasing number of jurisdictions has been to rely on the Married Women's Acts to abrogate interspousal immunity.[38] Employing a liberal construction of the statutes, some courts have determined that giving the wife a separate legal identity had the effect of allowing tort actions between spouses.[39] Other courts have concluded that where the statute did not specifically address the issue of interspousal immunity, the legislature had intended that the court retain the power to modify the common law rule.[40] Legislatures in a few jurisdictions have provided specific statutory authorization for interspousal tort suits.[41]

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35. *E.g.,* Poling v. Poling, 116 W. Va. 187, 179 S.E. 604 (1935). The court strictly construed W. VA. CODE § 48-3-19 (1931) and upheld interspousal tort immunity. The pertinent part of the statute states: "A married woman may sue or be sued alone in any court in this State that may have jurisdiction of the subject matter, the same in all cases as if she were a single woman . . . ." *Id.* at 190, 179 S.E. at 605-06. See note 38 *infra* for the case overruling *Poling v. Poling.*
36. 218 U.S. 611, 620-24.
37. *See generally* Greenstone, *Abolition of Intrafamilial Immunity,* 7 FORUM 82 (1972); Sanford, *Personal Torts within the Family,* 9 VAND. L. REV. 823 (1956).
> In view of the paucity of authority, the unsatisfactory and inconsistent character of the reasons advanced, the different and inconsistent treatment of husband and wife and parent and child, in several instances by the same court, and the changed economic conditions of the present day, the problem of a cause of action for personal injury should be considered an open question, meriting a more careful and exhaustive analysis, a more critical appreciation of the factors involved, and a more rational treatment than it has received in the past.

McCurdy, *supra* note 11, at 1082.
38. *E.g.,* Coffindaffer v. Coffindaffer, 244 S.E.2d 338 (W. Va. 1978). The court overruled Poling v. Poling, 116 W. Va. 187, 179 S.E. 604 (1935), and reinterpreted W. VA. CODE § 48-3-19 to permit tort actions between spouses. The *Coffindaffer* court attributed its reinterpretation of the statute to "the fact that the conditions of society [had] changed." *Id.* at 342.
39. *Id.*
40. *E.g.,* Beaudette v. Frana, 285 Minn. 366, 173 N.W.2d 416 (1969). "The failure of the legislature more completely to respond to the . . . invitation . . . does not so much indicate the legislature's indifference to the issue as it does its preference that this court should itself resolve the issue." *Id.* at 370, 173 N.W.2d at 418-19.
41. *See* N.Y. GEN. OBLIG. LAW § 3-313 (McKinney 1964).

Maryland's Married Women's Acts, enacted in 1898, completely revised the rights of women but did not state whether the General Assembly intended to give women the right to sue their husbands in tort.[42] The 1898 enactment gave married women the right to hold and convey property, to engage in business, to contract, to sue and be sued upon their contracts, and "to sue . . . for torts committed against them, as fully as if they were unmarried."[43]

The statute did not mention the husband until two years later when the General Assembly added another provision to the Act, which, unlike the 1898 law, contained clear and precise language abrogating the doctrine of interspousal immunity in contract suits. That provision specifically authorized a married woman to "contract with her husband, and . . . form a copartnership with her husband, or with any other person . . . in the same manner as if she were a *femme sole,* and upon all such contracts . . . sue and be sued as fully as if she were a *femme sole.*"[44] In the area of interspousal tort immunity, however, the intent of the legislature has not been further defined by statute. Until *Lusby,* strict judicial interpretation of the Married Women's Acts in Maryland precluded women from recovering in tort for personal injuries caused by their husbands.

III. HOLDING AND ANALYSIS OF *LUSBY*

In reviewing the common law doctrine of interspousal immunity, the court of appeals in *Lusby* did not consider statutory construction of the Married Women's Acts or prior cases in Maryland as dispositive of its holding. Instead, the court approached *Lusby* as a case of first impression. The opinion traced the historical development of interspousal immunity through Maryland case law, and Judge Smith factually distinguished *Lusby* from prior decisions based on the type of tortious conduct involved. Cases previously decided in Maryland involved interspousal suits brought by women for personal injuries resulting from their husband's negligence,[45] or suits against the husband's employer[46] or some third party allegedly responsible for the husband's negligent acts.[47] Other cases dealt

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42. Law of April 9, 1898, ch. 457, § 5 (now codified and amended as MD. ANN. CODE art. 45, § 5 (1971 & Supp. 1978)).
43. *Id.*
44. Law of April 10, 1900, ch. 633, § 1 (now codified as MD. ANN. CODE art. 45, § 20 (1971)).
45. *E.g.,* Hudson v. Hudson, 226 Md. 521, 174 A.2d 339 (1961) (husband's negligent operation of automobile prior to marriage resulted in wife's injuries); Furstenberg v. Furstenberg, 152 Md. 247, 136 A. 534 (1927) (husband's negligent operation of automobile during marriage resulted in wife's injuries).
46. *E.g.,* Riegger v. Bruton Brewing Co., 178 Md. 518, 16 A.2d 99 (1940) (husband's negligence while acting in the scope of employment resulted in wife's injuries).
47. *E.g.,* David v. David, 161 Md. 532, 157 A. 755 (1932) (wife sued owners of a business in which husband was a partner).

strictly with property interests.[48] None of the earlier Maryland cases, however, involved allegations of outrageous intentional torts, as in *Lusby*.

A. The Cases in Maryland Prior to Lusby

A line of Maryland cases beginning with *Furstenberg v. Furstenberg*[49] consistently followed the Supreme Court's decision in *Thompson*[50] and strictly construed the Married Women's Acts to deny a wife the right to bring an action in tort against her husband,[51] or his employer[52] for personal injuries allegedly resulting from the husband's negligence. Relief was denied in negligence actions even where the cause of action arose prior to marriage.[53] The courts, quoting generously from *Thompson,* concluded that an intent to create personal causes of action between husband and wife was not expressed by the terms of the statute.[54] The legislature, the court reasoned, could have provided specific language in the 1898 Act giving women an express power to sue their husbands in tort. In contrast, the courts noted that the provision enacted in 1900 clearly and unequivocally expressed the legislative intent to give the wife a right to bring a contract suit against her husband or any other third party.[55] The consensus of opinion in cases prior to *Lusby* was that a change in the common law rule of interspousal immunity in tort actions, as in contract actions, should originate in the legislature.

B. The Court's Rationale

The court of appeals quoted Blackstone as authority on the rights of married persons at common law: "[T]he husband . . . by the old law, might give his wife moderate correction . . . [b]ut this power of correction was confined within reasonable bounds, and the husband was prohibited from using any violence to his wife . . . ."[56] Under the common law, therefore, a husband did not have a right to commit a violent assault and battery on his wife.

In an effort to achieve a just result without violating principles of stare decisis, the *Lusby* court did not ascribe its reasoning to a necessary modification of the common law nor did the court disturb

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48. *E.g.,* Fernandez v. Fernandez, 214 Md. 519, 135 A.2d 886 (1957) (wife sued husband in replevin for recovery of chattels).
49. 152 Md. 247, 136 A. 534 (1927).
50. See text accompanying notes 27-32 *supra.*
51. See note 45 *supra.*
52. See note 46 *supra.*
53. Hudson v. Hudson, 226 Md. 521, 174 A.2d 339 (1961).
54. *E.g.,* Furstenberg v. Furstenberg, 152 Md. 247, 249-51, 136 A. 534, 534-36 (1927).
55. *Id.* at 252, 136 A. at 535-36.
56. 1 W. BLACKSTONE, COMMENTARIES *444, *cited in* Lusby v. Lusby, 283 Md. 334, 338-39, 390 A.2d 77, 79 (1978).

prior cases strictly construing the Married Women's Acts. Instead, the court determined that the common law did not bar an action by a wife against her husband for an outrageous intentional tort.[57]

Noting Blackstone and acknowledging that all prior cases were distinguishable inasmuch as they did not deal with intentional torts, the court concluded that "nothing in our prior cases or elsewhere . . . indicate[s] that under the common law of Maryland a wife was not permitted to recover from her husband in tort when she alleged and proved the type of outrageous intentional conduct here alleged."[58] The court held, therefore, that "[t]he type of action in the case at bar . . . [was] not . . . forbidden by the common law of this State."[59]

Relying on the outrageous nature of the tort in *Lusby* as the basis for its holding, the court of appeals circumvented a long recognized common law disability incident to marriage, which forbids tort suits between spouses. Although under the common law a husband had no right to commit a violent assault and battery upon his wife,[60] an injured wife could not recover in tort and was limited either to bringing a criminal action or obtaining a divorce in equity.[61] Concededly, none of the prior Maryland cases that applied the immunity doctrine involved intentional tort actions, and therefore are distinguishable. Earlier Maryland decisions, however, defined the scope of the immunity rule as including *all* torts between spouses. The rule consistently applied in many of those cases was not limited to negligence actions, but was stated as a general principle of common law that "a wife could not maintain an action against her husband for a personal tort."[62] In *Tobin v. Hoffman,* Chief Judge Sobeloff succinctly expressed the consensus of judicial opinion in this state prior to *Lusby* when he said for the court: "It is clear that Maryland will not entertain a suit by one spouse against the other for his or her tort, committed during the marital status."[63]

IV. SCOPE OF FUTURE ABROGATION

Although the *Lusby* court joined the emerging majority of states that have either modified or abolished the immunity between spouses in tort actions, its abrogation of the interspousal immunity was narrowly drawn. For instance, many courts that have departed from the common law rule have allowed negligence actions between

57. Lusby v. Lusby, 283 Md. 334, 358, 390 A.2d 77, 89 (1978).
58. *Id.*
59. *Id.*
60. *See generally* 1 W. BLACKSTONE, COMMENTARIES *444-45.
61. *E.g.,* Abbott v. Abbott, 67 Me. 304, 307 (1877). *See generally* PROSSER, *supra* note 11, at 862-63.
62. Riegger v. Bruton Brewing Co., 178 Md. 518, 521, 16 A.2d 99, 100 (1940).
63. 202 Md. 382, 391, 96 A.2d 597, 601 (1953).

spouses as well as suits for intentional injuries.[64] Other states have abrogated the interspousal immunity in actions arising out of motor vehicle accidents[65] or suits involving intentional torts.[66] In some jurisdictions where a departure from the immunity rule originated as a limited exception in an assault and battery action,[67] the modification has been broadened in subsequent cases of negligence.[68] In one state where the court had previously abolished interspousal immunity in cases of motor vehicle negligence torts,[69] as well as cases of intentional torts,[70] a recent case has extended the abrogation to claims arising from domestic or household negligence.[71]

The court of appeals in *Lusby* carved out a narrow exception to the doctrine of interspousal immunity in cases of outrageous intentional torts. This decision, albeit a step forward in the abrogation of the immunity, indicates the court's intention to continue to limit access to the courts in civil actions between spouses. In light of the erosion of the traditional public policy justifications favoring tort immunity between spouses, Maryland's limited exception should be extended to permit broader access to the courts. The traditional justifications for interspousal immunity —

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64. *E.g.*, Beaudette v. Frana, 285 Minn. 366, 173 N.W.2d 416 (1969).
65. *E.g.*, Rupert v. Stienne, 90 Nev. 397, 528 P.2d 1013 (1974); Richard v. Richard, 131 Vt. 98, 300 A.2d 637 (1973). *See generally* Note, 11 SUFFOLK U.L. REV. 1214 (1976).
66. *E.g.*, Flores v. Flores, 84 N.M. 601, 506 P.2d 345 (1973) (husband intentionally wounded wife with knife); Bounds v. Caudle, 560 S.W.2d 925 (Tex. 1977) (husband shot and killed wife). After discussing the origins of interspousal immunity and prior Texas decisions following the old rule, the Texas court concluded:
> Although most authorities recognize a distinction between a claim based on a negligent act and one based on an intentional tort, all agree that there is no sound basis for barring a suit for an intentional tort. We concur and accordingly we abolish the rule . . . to the extent that it would bar all claims for willful or intentional torts.

Id. at 927.
67. Self v. Self, 58 Cal. 2d 683, 376 P.2d 65, 26 Cal. Rptr. 97 (1962) (wife entitled to recover damages from husband for broken arm resulting from husband's intentional tort of assault and battery).
68. Klein v. Klein, 58 Cal. 2d 692, 376 P.2d 70, 26 Cal. Rptr. 102 (1962) (wife entitled to recover damages for slip and fall on husband's boat if slippery condition was caused by husband's negligence).
69. Immer v. Risko, 56 N.J. 482, 267 A.2d 481 (1970) (wife entitled to recover damages from husband for injuries sustained while riding as a passenger in auto driven negligently by husband).
70. Small v. Rockfeld, 66 N.J. 231, 330 A.2d 335 (1974) (wrongful death action on behalf of wife against husband who allegedly murdered wife was sustained by court).
71. Merenoff v. Merenoff, 76 N.J. 535, 388 A.2d 951 (1978) (wife's index finger severed as result of husband's negligent operation of hedge trimmer). In the companion case, Mercado v. Mercado, 76 N.J. 535, 388 A.2d 951 (1978), the doctrine of interspousal tort immunity was abrogated when the wife was severely burned as a result of husband's negligence in using a flammable cement compound near a gas stove.

preservation of domestic harmony, the danger of collusive suits, and the availability of alternative remedies — are no longer viable reasons for upholding interspousal immunity or abrogating it only in such limited circumstances.

A. Intentional Torts

There is ample justification for extending the holding in *Lusby* to abrogate interspousal immunity in all intentional tort actions. The Maryland court did not take full cognizance of the strong policy reasons for modifying the immunity rule. Recent decisions in other jurisdictions, however, have effectively negated the public policy considerations previously advanced in support of the doctrine and have emphasized that the needs of modern society dictate a more radical change in the long-established common law rule.

In cases involving intentional torts, the preservation of the marital relationship is not a sufficient justification to immunize a spouse. Because of the brutal nature of the tort in *Lusby,* Judge Smith noted that there was no domestic harmony left to be preserved and, therefore, the risk of marital discord did not justify denying a cause of action,[72] for "[a]fter discord, suspicion and distrust have entered the home, it is idle to say that one of the parties shall not be allowed to sue the other because of fear of bringing in what is already there."[73] In *all* intentional tort cases involving personal injuries to a spouse, however, both the tortious act and the filing of suit reflect the unstable state of the marriage relationship.[74] In a recent Texas case involving an interspousal suit for an intentional tort, the court concluded that "we do not believe that suits for willful or intentional torts would disrupt domestic tranquility. The peace and harmony of a home which has already been strained to the point where an intentional physical attack could take place will not be further impaired by allowing a suit to be brought to recover damages for the attack."[75]

The danger of collusion in intentional tort suits between spouses is remote. Because of the close relationship between husband and wife, the possibility of collusion exists, but "courts have at their command ample means to cope with the real or asserted spectre of fraud in the context of marital tort claims."[76] Moreover, insurers are protected by well-established investigative practices[77] and criminal sanctions for fraud.[77a] It is extremely unlikely that a person would

72. Lusby v. Lusby, 283 Md. 334, 357, 390 A.2d 77, 88 (1978).
73. Gregg v. Gregg, 199 Md. 662, 667, 87 A.2d 581, 583 (1952) (quoted in Lusby v. Lusby, 283 Md. 334, 357, 390 A.2d 77, 78 (1978)).
74. *E.g.,* Bounds v. Caudle, 560 S.W.2d 925, 927 (Tex. 1977).
75. *Id.*.
76. Merenoff v. Merenoff, 76 N.J. 535, 554, 388 A.2d 951, 961 (1978).
77. Note, 11 SUFFOLK U.L. REV. 1214, 1223 n.62 (1976).
77a. MD. ANN. CODE art. 48A, § 233 (1979).

submit voluntarily to serious bodily injury for the purpose of collecting a money judgment. Furthermore, there is generally no insurance coverage for intentional injuries,[78] and thus any monetary recovery by either spouse would come from the couple's own assets. Consequently, there is little incentive to bring fraudulent claims in suits for intentional torts between spouses.

Previously, the immunity doctrine was upheld on the grounds that other judicial remedies were available to an injured spouse.[79] More recent cases, however, have abolished the common law rule partly on the basis of the inadequate relief afforded women under the existing criminal and divorce laws.[80] Divorce and criminal remedies, unlike tort remedies, do not provide compensatory damages.[81] Alimony in divorce actions may be awarded, but the nature of this type of recovery does not provide redress for physical injuries. Therefore, in cases of intentional torts between husband and wife, interspousal suits provide the most effective means of judicial redress.

Several jurisdictions that have recently modified the doctrine of interspousal immunity have looked to earlier cases abrogating the analagous parental immunity doctrine to justify their departure from common law precedent.[82] Many of the same policy considerations advanced in support of interspousal tort immunity were relied on to deny a cause of action between parent and child.[83] Abrogation of parental immunity has evolved more slowly than the abrogation of interspousal immunity.[84] In some states, however, cases allowing tort suits between parent and child came first, and their rationale has been applied to permit subsequent interspousal tort actions.[85]

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78. Klein v. Klein, 58 Cal. 2d 692, 699-700, 376 P.2d 70, 75, 26 Cal. Rptr. 102, 107 (1962).
79. See text accompanying note 22 *supra*.
80. *Id.*
81. The issue was addressed by the court in Flores v. Flores, 84 N.M. 601, 506 P.2d 345 (1973), in the context of an interspousal suit resulting from an intentional tort. After stating the common justification that the injured spouse has an adequate remedy through the criminal and divorce laws, the court concluded that,

> Defendant has been convicted of a crime; the parties are now divorced. The criminal action enforced society's prohibition against defendant's conduct; it did not purport to remedy the wrong done to the victim of the crime. Divorce actions, which are statutory, do not purport to provide a remedy for personal injuries. Neither the criminal law nor the divorce action provide a remedy to plaintiff for the results of the knifing; a knifing which violated the wife's right to personal security.

Id. at 603, 506 P.2d 347.
82. *E.g.*, Beaudette v. Frana, 285 Minn. 366, 371, 173 N.W.2d 416, 419 (1969); Apitz v. Dames, 205 Or. 242, 270, 287 P.2d 585, 598 (1955).
83. *See generally* PROSSER, *supra* note 11, at 865-66.
84. *Id.* at 866.
85. See cases cited at note 82 *supra*.

In *Lusby,* Judge Smith cited the leading Maryland case of *Mahnke v. Moore,*[86] which allowed a tort suit by a child against her father for "malicious and wanton wrongs."[87] The *Mahnke* court stated that the parental immunity doctrine did not apply in cases where the parent's "acts . . . show complete abandonment of the parental relation . . . ."[88] The facts in *Mahnke,* like those in *Lusby,* involved conduct of an extremely outrageous nature.[89] *Mahnke's* rationale, however, is easily applied to most intentional tort suits between parent and child or husband and wife. The immunity which arises by virtue of the relationship of the parties should not provide protection from liability where the tortious conduct of either party exhibits a renouncement of the family alliance.

B. Beyond Intentional Torts

Future abrogation of interspousal immunity in tort suits for negligence will pose difficult problems for the Maryland courts. Unlike the area of intentional torts, the immunity between spouses for negligence has been firmly established by prior cases.[90] The strict statutory construction of the Married Women's Acts in previous interspousal suits involving negligence was not disturbed by the *Lusby* holding.

Although in prior cases, the Maryland court consistently applied strict statutory construction to the Married Women's Acts to uphold interspousal immunity, the court in *Lusby* did not rely on the statute as a basis for Maryland's partial abrogation of the common law doctrine. In this respect Maryland differs from the majority of jurisdictions that have relied, at least in part, on the Married Women's Acts for their initial abrogation of the immunity. Curiously, the *Lusby* court discussed at great length prior Maryland decisions strictly interpreting the statute and emphasizing the necessity of an express legislative mandate to broaden the Acts to include suits between spouses. Moreover, Judge Smith recognized the alternative of reinterpreting the Married Women's Acts to permit tort actions between spouses[91] and acknowledged the possible applicabil-

86. 197 Md. 61, 77 A.2d 923 (1951).
87. *Id.* at 68, 77 A.2d at 926.
88. *Id.*
89. In the child's presence, the father killed the mother with a shotgun. He kept the child with the dead body for six days and subsequently committed suicide in the child's presence.
90. See text accompanying notes 45-47 *supra.*
91. Lusby v. Lusby, 283 Md. 334, 390 A.2d 77 (1978). Judge Smith stated:
> Insofar as the interpretation to be given to the present statute is concerned, we have said many times that the cardinal rule of statutory construction is to ascertain and carry out the real legislative intent, and in ascertaining that intent the court considers the language of an enactment in its natural and ordinary signification.

Id. at 357, 390 A.2d at 88.

ity of the dissenting opinion in *Thompson*.[92] The court, however, refused to incorporate statutory interpretation into its decision.[93]

By refusing to base its decision on statutory interpretation of the Married Women's Acts, the court of appeals in *Lusby* made further abrogation of the doctrine of interspousal immunity more difficult. The abrogation of the common law immunity in *Lusby* cannot be extended beyond the area of intentional torts without overruling prior cases. Therefore, the Maryland courts will probably await a legislative mandate before allowing interspousal tort suits for negligence.

V. CONCLUSION

With the court of appeals' decision in *Lusby v. Lusby*, Maryland joins the modern trend toward a departure from the common law doctrine of interspousal immunity. In most jurisdictions, the lack of any sound public policy for retaining the interspousal immunity doctrine has led the state courts to significantly modify or abolish the common law rule. The narrow holding in *Lusby*, however, limits the scope of tort liability between spouses to cases of outrageous intentional torts. Moreover, the court's distinction based upon the nature of the tort and Judge Smith's refusal to rely on statutory construction of the Married Women's Acts create problems for further judicial abrogation of interspousal immunity. No prior Maryland cases, however, have dealt with suits between spouses for intentional torts that are not "outrageous," and therefore courts in the future can allow actions for intentional torts that are less than "outrageous" without disturbing precedent.[94]

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92. *Id.* at 357, 390 A.2d at 88.
93. The court did not explain why it was unnecessary to apply statutory construction in this case. *Id.* at 357-58, 390 A.2d at 89.
94. In fact, House Bill No. 653, which was introduced in the Maryland House of Delegates during the 1979 legislative session, attempted to abrogate further the interspousal immunity doctrine. This bill would have added to MD. ANN. CODE art. 45, § 6 the following:

> A married person may sue his or her spouse for an intentional tort committed against such person as fully as if the parties were unmarried.

The bill received an unfavorable committee report, however, and was not enacted.