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Tort Liability Between Husband and Wife: The Interspousal Immunity Doctrine

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COMMENTS

TORT LIABILITY BETWEEN HUSBAND AND WIFE: THE INTERSPOUSAL IMMUNITY DOCTRINE

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I. INTRODUCTION

While it is generally recognized that domestic relations law differs significantly between the various states,[1] no area of the law is in a greater state of flux than the anachronistic "interspousal immunity" doctrine. This concept sets forth the proposition that a tort committed by one spouse against the person or character of the other, does not give rise to a cause of action in favor of the injured spouse.[2] The rule originated at common law and was adopted by early American courts.

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1. See generally, GOLDSTEIN, THE FAMILY & THE LAW (1965).

2. This concept has been reasoned two different ways with the same result. In Maine v. James Maine & Sons Co., 198 Iowa 1278, 201 N.W. 20 (1924), the court held that the common law freedom of the husband from liability to the wife for a tortious or negligent injury to her person arises out of the very relationship itself and does not rest merely upon a lack of remedy. However, in Broaddus v. Wilkenson, 281 Ky. 601, 136 S.W.2d 1052 (1940), the court reasoned that the immunity of a spouse from action by the other spouse does not mean that there is no right of action, but merely denies the remedy as against the spouse. *Accord*, Thompson v. Thompson, 218 U.S. 611 (1910); Aldrich v. Tracy, 222 Iowa 84, 269 N.W. 30 (1936).

The injustice of the basic concept precipitated its early erosion. In the eighteenth century Equity recognized that a married woman could sue her husband over matters relating to her separate property. By the nineteenth century, comprehensive legislation was enacted to advance the general emancipation of married women. However, despite twentieth-century legislative, economic, social and judicial innovations, the majority of states while allowing property and contract actions, have still refused to shed this cloak of antiquity. Few topics reflect greater judicial inconsistency, pure unsound reasoning, and such a significant divergence in judicial treatment. This disparity can be attributed to the "battle between conflicting conceptions of the family between individual and relational rights and duties."[3]

The immunity doctrine is currently in a state of retreat as twentieth-century logic is forging to the front. Progressive courts are recognizing the fact that marital harmony, or lack thereof, remains unaffected by allowing a wife to sue her husband. As long as liberal divorce laws exist, and a husband remains criminally liable for a tortious assault on his spouse, domestic tranquillity cannot be disrupted by allowance of interspousal tort actions. As was acutely observed in *Bogen v. Bogen*:[4]

> Whenever a man has laid open his wife's head with a bludgeon, put out her eyes, broken her arm, or poisoned her body, he is no longer exempt from liability to her on the ground that he vowed at the altar to love, cherish, and protect her. We have progressed that far in civilization and justice.[5]

With the increasing number of family owned vehicles and the advent of automobile insurance, the immunity concept has taken on new dimensions of importance. However, even though the possibility of insurance fraud exists by allowing interspousal tort actions, modern courts should not be so inexorably bound by any common law doctrine which cannot be justified by logic and sound reasoning. The law is not so static and rigid that it should recognize and adhere to an outmoded concept of marital relations.[6] The purpose of this comment is to set forth the development and rationale behind the adoption and abridgement of the interspousal immunity doctrine as it is applied in various situations.

3. McCurdy, *Torts Between Persons in a Domestic Relation*, 43 HARV. L. REV. 1030 (1930).

4. 219 N.C. 51, 12 S.E.2d 649 (1941).

5. *Id.* at 53, 12 S.E.2d, at 651.

6. In Cowgill v. Boock, 189 Ore. 282, 286, 218 P.2d 445, 450 (1950), the court declared:

> Whatever may be the early common law rule, we should not be bound thereby unless it is supported by reason and logic. The law is not static. It is a progressive science. What may have been a wholesome common law rule a hundred years ago may not be adapted to the changed economic and social conditions of the modern age.

Similarly, in Rozell v. Rozell, 281 N.Y. 106, 112, 22 N.E.2d 254, 257 (1939), the court stated:

> The genius of the common law lies in its flexibility and its adaptability to the changing nature of human affairs and in its ability to enunciate rights and to provide remedies for wrongs where previously none had been declared.

II. Historical Evolution of Interspousal Immunity

A. *A Common Law Beginning*

At common law neither spouse could maintain a tort action against the other.[7] This rule was based on the doctrine that the husband and wife were one legal person, and that person was the husband.[8] The origin of the unity concept has been assigned to a statement attributed to Adam after the creation of woman from his rib: "This is now bone of my bones and flesh of my flesh."[9] Other writers go back to the early Roman era where the wife had no legal personality of her own.[10] Wherever its origin may lie,[11] this unity concept became firmly entrenched in early domestic relations law.

The first important inroad on the unity concept occurred in situations where the court upheld the interspousal immunity theory, but not on the basis of unity of the spouses. In *Phillips v. Barnet*,[12] a divorcee brought an action against her former husband for an alleged assault and battery which occurred during coverture. The court held that:

> [T]he action is not [denied] because it is one in which husband and wife ought to be joined, but because husband and wife cannot contract with or convey to each other. . . .[13]

In *Abbot v. Abbot*,[14] the court supported the *Phillips* decision based on a public policy criteria:

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7. Since a married woman at common law lacked the capacity to enter into a contract or to sue or be sued, it logically followed that she could not maintain a tort action against her husband. Jewell v. Porter & Rolfe, 31 N.H. 34 (1855); Firebrass v. Pennant, 2 Wils 254 (1764). If a cause of action existed prior to the marriage it was extinguished by the subsequent exchange of vows. Baker v. Gaffney, 141 F. Supp. 602 (D.D.C. 1956); Bohenek v. Niedzwiecki, 142 Conn. 278, 113 A.2d 509 (1955); Hunter v. Livingston, 125 Ind. App. 422, 123 N.E.2d 912 (1955). Also, any right or obligation she had during coverture, an action by or against her was brought in the names of both husband and wife. Bishop v. Readsboro Chaik Mfg. Co., 85 Vt. 141, 81 A. 454 (1911); the wife during the marriage was said to have lost the individual capacity to sue or be sued. Stockton v. Farsley, 10 W. Va. 171, 27 Am. Rep. 566 (1877); Norris v. Lentz & Hyde, 18 Md. 260 (1861); Ferrar v. Bessey, 24 Vt. 89 (1852).

8. It was said that since the husband and wife were one person, a person could not sue himself. Phillips v. Barnet, 1 Q.B.D. 436 (1876); Abbot v. Abbot, 67 Me. 304, 24 Am. Rep. 27 (1877). In Thompson v. Thompson, 218 U.S. 611, 615 (1910), the court indicated that:

> At the common law the husband and wife were regarded as one, the legal existence of the wife during coverture being merged in that of the husband.

9. Genesis 2:23.

10. 2 Pollack & Maitland, History of English Law 349 (2d ed. 1959).

11. In Damm v. Elyria Lodge No. 465, 158 Ohio St. 107, 107 N.E.2d 337 (1952), the court stated that:

> [T]he historical basis of these rules is a mixture of the Biblical and medieval metaphysics, the position of the father of the family in Roman law, the natural law concept of the family as an informal unit of government with the physically stronger person at the head, or the property law of feudalism.

12. 1 Q.B.D. 436 (1876).

13. *Id.* at 438.

14. 67 Me. 304, 24 Am. Rep. 27 (1877).

> If an assault was actionable, then would slander and liable and other torts be. Instead of settling a divorce [it] would very much unsettle all matters between named parties. The private matters of the whole period of married existence might be exposed by suits.[15]

The rationale of these early decisions was adopted by the United States Supreme Court in *Thompson v. Thompson*.[16] In holding that a wife has no cause of action against her husband for assault and battery, the Court stated that to allow such an action would

> [O]pen the doors of the courts to accusations of all sorts of one spouse against the other, and bring into public notice complaints for assault, slander and libel. . . .[17]

It is interesting to note that while many contemporary courts justify the existence of interspousal immunity on the basis of unity of the spouses, early courts began to realize the fallaciousness of this fictitious concept and resorted to a public policy explanation. However, the majority of courts today also espouse this public policy argument as a basis for maintaining the common law position.

Under the immunity concept no cause of action accrues to either spouse for an intentional tort[18] or for an injury resulting from negligence.[19] Nor can either spouse maintain an action for false imprisonment,[20] malicious prosecution,[21] libel,[22] or slander.[23] This rule was carried to the extent of denying liability on the part of the husband for deliberately infecting his wife with a venereal disease.[24] The doctrine applies equally whether the tort occurred before or during coverture.[25]

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15. *Id.* at 307.

16. 218 U.S. 611 (1910).

17. *Id.* at 616.

18. *E.g.*, Thompson v. Thompson, 218 U.S. 611 (1910); Johnson v. Johnson, 201 Ala. 41, 77 So. 335 (1917); Strom v. Strom, 98 Minn. 427, 107 N.W. 1047 (1906); Wilson v. Barton, 153 Tenn. 250, 283 S.W. 71 (1926).

19. *E.g.*, Spector v. Weisman, 40 F.2d 792 (D.C. Cir. 1930); Dawson v. Dawson, 224 Ala. 13, 138 So. 414 (1931); Corren v. Corren, 47 So.2d 774 (Fla. 1950); Kelly v. Williams, 94 Mont. 19, 21 P.2d 58 (1933).

20. Abbot v. Abbot, 67 Me. 304, 24 Am. Rep. 27 (1877); Rogers v. Rogers, 265 Mo. 200, 177 S.W. 382 (1915).

21. *E.g.*, Webster v. Snyder, 103 Fla. 1131, 138 So. 755 (1932); Watson v. Watson, 39 Cal. App. 2d 305, 246 P.2d 19 (1952); Lapides v. Lapides, 143 Misc. 549, 256 N.Y.S. 798 (1932); State v. Kirby, 167 Tenn. 307, 69 S.W.2d 886 (1934).

22. *E.g.*, Clark v. Clark, 11 F.2d 871 (2d Cir. 1926); Faris v. Hope, 298 Fed. 727 (8th Cir. 1924); Freethy v. Freethy, 42 Barb. 641 (N.Y. 1865).

23. Ewald v. Lane, 104 F.2d 222 (D.C. Cir. 1939); Gowin v. Gowin, 264 S.W. 529 (Tex. Ct. App. 1924).

24. Bandfield v. Bandfield, 117 Mich. 80, 75 N.W. 287 (1898); Schultz v. Christopher, 65 Wash. 496, 118 Pac. 629 (1911).

25. *E.g.*, Spector v. Weisman, 40 F.2d 792 (D.C. Cir. 1930); Scales v. Scales, 168 Miss. 439, 151 So. 551 (1934); Newton v. Webber, 119 Misc. 240, 196 N.Y.S. 113 (1922).

Similarly, an action cannot be brought even after the spouses are divorced.[26] However, it should be noted that the wife receives limited protection from the criminal law, which refuses to adopt the unity concept.[27] In addition, evidence of a tort committed during coverture certainly adds weight to the maintenance of a divorce action by the injured spouse.[28]

Thus, the family unity concept provided a major obstacle at common law for the allowance of interspousal actions. In addition to the metaphysical anomaly concerning the relationship between husband and wife, there was the practical problem that any recovery by the wife would immediately become the property of her husband. So in essence the husband would be suing himself, and the action would result in a circuitous futility.[29] With the statutory enactment of the Women's Emancipation Act, the common law doctrine came under heavy attack.

B. *Effect of the Married Women's Emancipation Acts*

Over the past one hundred years, the state legislatures, under the pressure of social and economic progress, enacted the Married Women's Emancipation Acts. The purpose of these Acts was to relieve married women of the disabilities of coverture and allow them to independently hold property and sue and be sued in their own name.[30] However, the overwhelming majority of these statutes are silent as to whether the specific act will allow an interspousal tort action.[31] An example of such an Act is Florida Statute 708.08 which provides that:

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26. *E.g.*, Holman v. Holman, 73 Ga. App. 205, 35 S.E.2d 923 (1945) (separation); Abbot v. Abbot, 67 Me. 304, 24 Am. Rep. 27 (1877); Strom v. Strom, 98 Minn. 427, 107 N.W. 1047 (1906); Phillips v. Barnet, 1 Q.B.D. 436 (1876).

27. *E.g.*, Commonwealth v. McAffee, 108 Mass. 458, 11 Am. Rep. 383 (1871) (homicide); State v. Fulton, 149 N.C. 485, 63 S.E. 145 (1908) (slander); State v. Lankford, 6 Boyce 594, 102 Atl. 63 (1917) (battery).

28. In Thompson v. Thompson, *supra* note 18, the United States Supreme Court indicated that, apart from suing her husband in tort, the wife is not without remedy for wrongs committed by him during coverture. See *infra* note 93.

29. In Austin v. Austin, 136 Miss. 61, 62, 100 So. 591, 592 (1924), the court gave an illustration of the circuitous result:

> The husband and wife are living together. She recovers judgment against him for an assault and battery and collects the judgment and puts the money in the bank to her credit. They continue to live together as man and wife if the lawsuit has not separated them. Result: The money would still be available for family purposes, except what had been expended in court costs and lawyer's fees. It would be like the husband taking money out of one of his pockets and putting it back in another.

Accord, Smith v. Smith, 287 P.2d 572 (Ore. 1955).

30. McCURDY, *Torts in Domestic Relation*, in SELECTED ESSAYS ON FAMILY LAW §§ 167, 179, 180 (1935).

31. ALA. CODE ANN. tit. 34, § 72 (1946); ALASKA COMP. LAWS ANN. §§ 21-211, 21-212 (1949); ARK. STAT. ANN. §§ 55-401 (1947); CAL. CODE CIV. PROC. § 370 (1956); COLO. REV. STAT. ANN. §§ 90-2-6 (1956); CONN. GEN. STAT. §§ 46-9 (1958); D.C. CODE ANN. §§ 30-208 (1951); DEL. CODE ANN. tit. 13, § 311 (1953); FLA. STAT. § 708.08 (1965); IDAHO CODE ANN. § 5-304 (1955); IND. STAT. ANN. § 60-404 (1949); IOWA CODE R.C.P. 10 (1951); KY. CRIM. CODE PRAC. ANN. § 404.060 (1953); KAN. GEN. STAT. ANN. § 60.404 (1949); ME. REV. STAT.

> Every married woman is hereby empowered to take charge of, and manage and control her separate property, to contract and to be contracted with, to sue and be sued . . . without the joinder of her husband, in all respects as fully as if she were unmarried.[32]

The problem then is a matter of statutory construction given to the particular act in question.[33] The viewpoint of the respective statutes generally depends on whether the court interpreting the Act determines that the common law unity concept has been either abrogated or preserved by the statute. Eight states specifically allow husband and wife to sue each other,[34] while in six jurisdictions interspousal suits are prohibited by statute.[35] In only four states, however, do the statutes specifically mention interspousal *tort* actions.[36]

As a result of the vague and equivocal wording of the majority of the statutes, the respective state legislatures have failed to furnish a basis for the abridgement by the courts of the interspousal immunity concept. However, it is noteworthy that the promulgation of these Acts is largely responsible for the great amount of current intramarital litigation.

ANN. ch. 166, § 39 (1954); MD. ANN. CODE art. 45, § 5 (1956); MICH. STAT. ANN. §§ 26-658 (1956); MINN. STAT. § 519.01 (1952); MO. ANN. STAT. § 451.290 (1956); MONT. REV. CODE ANN. §§ 36-128, 93-2803 (1947); NEB. REV. STAT. § 25-305 (1955); NEV. COMP. LAWS § 123.120 (1949); N.H. REV. STAT. ANN. § 460:2 (1955); N.M. STAT. ANN. §§ 21-6-6 (1955); N.D. REV. CODE §§ 14-0705 (1953); OHIO REV. CODE ANN. § 2307.09 (1956); OKLA. STAT. ANN. tit. 12, § 224 (1956); ORE. REV. STAT. § 108.010 (1955); R.I. GEN. LAWS ANN. §§ 15-4-14 (1956); S.D. CODE § 14.0207 (1939); TENN. CODE ANN. § 36-601 (1956); TEX. REV. CIV. STAT. art. 4626 (1948); UTAH CODE ANN. §§ 78-11-1 (1953); VA. CODE ANN. § 55-36 (1950); W. VA. CODE ANN. § 4749 (1955); WYO. COMP. STAT. ANN. §§ 50-203 (1945).

32. FLA. STAT. § 708.08 (1965).

33. The courts are in general agreement that under these acts the wife or the husband may recover for torts committed against property interest. *E.g.*, Notes v. Snyder, 4 F.2d 426 (D.C. Cir. 1925) (replevin); Hamilton v. Hamilton, 255 Ala. 284, 51 So.2d 13 (1950) (conversion); Eshom v. Eshom, 18 Ariz. 170, 157 P. 974 (1916); Larison v. Larison, 9 Ill. App. 27 (1881) (trespass to wife's land); Moreau v. Moreau, 250 Mass. 110, 145 N.E. 43 (1924) (fraud); Goodwin v. Goodwin, 172 Misc. 118, 13 N.Y.S.2d 894 (1939) (ejectment); Bruner v. Hart, 178 Okla. 222, 62 P.2d 513 (1936) (unlawful detention of chattels); Hall v. Hall, 193 Tenn. 74, 241 S.W.2d 919 (1951) (unlawful detainer); Borton v. Borton, 190 S.W. 192 (Tex. Civ. App. 1916) (waste).

34. A typical statute is MISS. CODE ANN. § 452 (1942) which simply provides: "Husband and wife may sue each other." *Accord*, ARIZ. REV. STAT. ANN. R.C.P. § (17e) (1956); IND. ANN. STAT. § 2-204 (Supp. 1955); N.C. GEN. STAT. § 52-10 (1950); N.Y. DOM. REL. LAW § 57 (1964); S.C. CODE §§ 10-216 (1952); WASH. REV. CODE § 26.16.180 (1956); WIS. STAT. § 246.075 (1955).

35. A typical statute is ILL. ANN. STAT. 68 § 1 (1953) which provides:

> 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.

Accord, GA. CODE ANN. §§ 53-511 (1953); HAWAII REV. LAWS §§ 325-5 (1955); MASS. ANN. LAWS ch. 209, § 6 (1956); N.J. STAT. ANN. §§ 372-5 to 372-9 (1940); PA. STAT. ANN. tit. 48, § 111 (1930).

36. ILL. ANN. STAT. ch. 68, § 1 (1953); N.C. GEN. STAT. §§ 52-10.1 (1950); N.Y. DOM. REL. LAW § 57 (1964); WIS. STAT. § 246.075 (1955).

C. *A Rising Minority and Declining Majority*

The courts in a majority of jurisdictions have strictly adhered to the common law immunity rule.[37] However, these courts have attempted to fortify their position by arguments not propounded in earlier decisions. Aside from the unity concept, the courts have refused to allow intramarital tort actions on the basis that it would facilitate defrauding of insurance companies, the domestic tranquillity of the home would be destroyed, it would lead to a deluge of litigation, there is ample protection for the spouses through criminal and divorce laws, and that the changing of the law should be left to the legislature.[38] With minor deviation the courts have applied these rationales to intentional torts as well as premarital torts.[39] Some states, however, admittedly recognize the fact that the negligent infliction of injury by a husband upon his wife is a wrongful act. The courts of these states take the position that the statute does not condone the husband's actions, it merely serves to disable the wife from suing her mate in tort. The statute, by this view, immunizes the husband from suit by his mate.[40] The tenor of this position was appropriately stated in *Schubert v. August Schubert Wagon Co.*:[41]

> [A] trespass, negligent or willful, upon the person of a wife, does not cease to be an unlawful act though the law exempts the husband from liability for the damage.[42]

The ever-increasing minority of states allow an injured spouse to

37. Cimijotti v. Paulsen, 230 F. Supp. 39 (N.D. Iowa 1964); Baker v. Gaffney, 141 F. Supp. 602 (D.D.C. 1956); Scruggs v. Meredith, 135 F. Supp. 376 (D. Hawaii 1955); Saunders v. Hill, 202 A.2d 807 (Del. 1964); Sullivan v. Sessions, 80 So.2d 706 (Fla. 1955); Hubbard v. Ruff, 97 Ga. App. 251, 103 S.E.2d 134 (1958); Heckendorn v. First Nat'l Bank, 19 Ill. 2d 190, 166 N.E.2d 571 (1960); Hary v. Arney, 128 Ind. App. 174, 145 N.E.2d 575 (1957); Scholle v. Home Mut. Cas. Co., 273 Wis. 387, 78 N.W.2d 902 (1956); Gremillion v. Caffey, 71 So.2d 670 (La. App. 1954); Bedell v. Reagan, 159 Me. 292, 192 A.2d 24 (1963); Ennis v. Donovan, 222 Md. 536, 161 A.2d 698 (1960); Callow v. Thomas, 322 Mass. 550, 78 N.E.2d 637 (1948); Kircher v. Kircher, 288 Mich. 669, 286 N.W. 120 (1939); Poepping v. Lindemann, 268 Minn. 30, 127 N.W.2d 512 (1964); Tobias v. Tobias, 83 So.2d 638 (Miss. 1955); Conley v. Conley, 92 Mont. 425, 15 P.2d 922 (1932); Deatherage v. Deatherage, 328 S.W.2d 624 (Mo. App. 1959); Emerson v. Western Seed & Irrigation Co., 116 Neb. 180, 216 N.W. 297 (1927); Morrissett v. Morrissett, 397 P.2d 184 (Nev. 1964); Taibi v. DeGennard, 65 N.J. Super. 294, 167 A.2d 667 (1961); Rodgers v. Galindo, 68 N.M. 215, 360 P.2d 400 (1961); Smith v. Smith, 205 Ore. 286, 287 P.2d 572 (1955); Meisel v. Little, 407 Pa. 546, 180 A.2d 772 (1962); Oken v. Oken, 44 R.I. 291, 117 Atl. 357 (1922); Gordon v. Pollard, 207 Tenn. 45, 336 S.W.2d 25 (1960); Worden v. Worden, 222 S.W.2d 254 (Tex. Civ. App. 1949); Rubalcava v. Gisseman, 14 Utah 2d 344, 384 P.2d 389 (1963); Vigilant Ins. Co. v. Bennett, 89 S.E.2d (Va. 1955); Furey v. Furey, 193 Va. 727, 71 S.E.2d 191 (1952); Goode v. Martinis, 361 P.2d 941 (Wash. 1961); Campbell v. Campbell, 145 W. Va. 245, 114 S.E.2d 406 (1960); McKinney v. McKinney, 59 Wyo. 204, 135 P.2d 940 (1943).

38. A thorough treatment of each of these policy considerations is given in Section III of this comment.

39. *Infra* Section IV.

40. See, *e.g.*, Koplik v. C.P. Trucking Corp., 27 N.J. 1, 141 A.2d 34 (1958); Hudson v. Gas Consumers Ass'n, 123 N.J.L. 252, 8 A.2d 337 (1939); Johnson v. Peoples First Nat'l Bank & Trust Co., 394 Pa. 116, 145 A.2d 716 (1958).

41. 249 N.Y. 253, 164 N.E. 42 (1928).

42. *Id.* at 254, 164 N.E. at 43.

sue his or her spouse in the same way is if the marriage had not existed.[43] Even though these courts give a variety of reasons for abrogating the immunity doctrine, in many instances the result can be traced to the courts' interpretation of the Married Women's Act. The courts in certain situations have indicated that if the wife's right to bring a tort action against her husband were denied, she would be left without a means of redress.[44] In addition, this surging minority has found blatant fallacies in the policy considerations set forth by the declining majority.

III. PUBLIC POLICY CONSIDERATIONS

While many courts verbalize about statutory construction of the Married Women's Act as a basis for their decisions, they often take refuge under the nebulous concept of "public policy." Divergent views have been reached even though the wording of the respective applicable statutes has been almost the same. Many courts have emerged from the retreat of the statutes and have piously indicated that "public policy" considerations dictate that the immunity concept is sound and should not be abridged. The more prominent of these arguments, both pro and con, are set forth below.

A. *The Legal Unity of Husband and Wife*

As previously indicated, many courts continue to follow the common law doctrine that the husband and wife are one legal entity.[45] Courts adopting this argument reason that since the Married Women's Acts are in derogation of the common law, they must be strictly construed and since the majority of these statutes do not mention interspousal tort actions,[46] the common law unity concept still exists. Other courts support the unity theory on the basis that since the statutes are silent as to the husband's rights, the legislature did not intend to give the wife a right of action while denying the husband the same right.[47] Similarly,

43. Cramer v. Cramer, 379 P.2d 95 (Alaska 1963); Penton v. Penton, 223 Ala. 282, 135 So. 481 (1931); Leach v. Leach, 300 S.W.2d 15 (Ark. 1957); Self v. Self, 58 Cal. 2d 683, 26 Cal. Rptr. 97, 376 P.2d 65 (1962); Rains v. Rains, 97 Colo. 19, 46 P.2d 740 (1935); Silverman v. Silverman, 145 Conn. 663, 145 A.2d 826 (1958); Lorang v. Hays, 69 Idaho 440, 209 P.2d 733 (1949); Brown v. Gosser, 262 S.W.2d 480 (Ky. 1953); Fitzmaurice v. Fitzmaurice, 62 N.D. 191, 242 N.W. 526 (1932); Priddle v. Farm Bureau Mut. Ins. Co., 100 N.H. 73, 119 A.2d 97 (1955); Pryor v. Merchants Mut. Cas. Co., 12 Misc. 2d 801, 174 N.Y.S.2d 24 (1958); Crowell v. Crowell, 180 N.C. 516, 105 S.E. 206 (1920); Damm v. Elyria Lodge No. 465, 158 Ohio St. 107, 107 N.E.2d 337 (1952); Courtney v. Courtney, 184 Okla. 395, 87 P.2d 660 (1938); Oshiek v. Oshiek, 244 S.C. 249, 136 S.E.2d 303 (1964); Scotlvold v. Scotlvold, 68 S.D. 53, 298 N.W. 266 (1941); Haumschild v. Continental Cas. Co., 7 Wis. 2d 130, 95 N.W.2d 814 (1959).

44. The wife who is injured by fault of her husband is not afforded an adequate remedy from the criminal or divorce laws. See Johnson v. Johnson, 201 Ala. 41, 77 So. 335 (1917); Crowell v. Crowell, 180 N.C. 516, 105 S.E. 206 (1920).

45. *Supra* note 37.

46. *Supra* note 31.

47. In Schultz v. Christopher, 65 Wash. 496, 118 Pac. 629 (1911), the court in con-

it is argued that the common law doctrine is predicated in substantive as well as procedural rights. The statutory removal of the procedural incapacity of the wife does not create a substantive cause of action.[48]

The conception of a legal unity of the spouses grew out of common law conditions which no longer exist. The harshness of this early doctrine which rendered the wife little more than a chattel,[49] has been greatly refuted by a modern society which accords a married woman a place of equality with her husband. The courts have gradually realized the utter fallaciousness if not total impracticality of applying this rule in a society where women actively engage in business, participate in politics, hold executive positions, contract freely, and generally have the same rights and incur the same type of liabilities as their male counterparts.[50] As indicated by the court in *King v. Gates*,[51] "the fiction of the wife's merged existence has long been exploded."[52]

B. *Possibility of Insurance Fraud*

As the courts have cogently observed, the modern lawsuit is actually against the insurance company and not the defendant spouse. These courts have reasoned that the danger of collusion between the injured person and the insured is much greater when the parties maintain a close relationship.[53]

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struing the Married Woman's Act indicated that when it is conceded that the husband had no right to sue his wife at common law and has no such right under the statute, it is plain that no such right is conferred upon the wife. See also, Austin v. Austin, 136 Miss. 61, 100 So. 591 (1924); Strom v. Strom, 98 Minn. 427, 107 N.W. 1047 (1906).

48. The court in Keister's Adm'r v. Keister's Ex'rs, 123 Va. 157, 96 S.E. 315 (1918), invented a legal peg on which to hang its hat. The court reasoned that in construing the statute the question is not whether the statute has given married women the same remedies they would have if unmarried, but whether the statute has conferred on married women the particular substantive right to sue her husband. The court went on to say that a married woman may have the same rights as an unmarried woman, but this does not give her the specific civil right to sue her spouse.

49. BACON, in his Abridgement, TITLE BARON & FEMME (——) states:

> The husband hath by law power and dominion over his wife, and may keep her by force within the bounds of duty, and may beat her, but not in a violent and cruel manner.

50. See Rains v. Rains, 97 Colo. 19, 46 P.2d 740 (1935); Wait v. Pierce, 191 Wis. 202, 209 N.W. 475 (1926).

51. 231 N.C. 537, 57 S.E.2d 765 (1950).

52. *Id.* at 539, 57 S.E.2d, at 767.

53. In Maine v. James Maine & Sons, 198 Iowa 1278, 1279, 201 N.W. 20, 21 (1924), the wife was injured due to the negligent operation of an automobile driven by her husband who at the time of the accident was acting within the scope of his employment. The court in denying action against the husband's employer stated that:

> The occasion for a controversy of this character between parties so related and associated may be found in the fact . . . that the appellant company carried a policy protecting it against liability for damages caused by the automobile.

In Harvey v. Harvey, 239 Mich. 142, 143, 214 N.W. 305, 306 (1927), the court in holding that a wife cannot sue her husband for an injury caused by his negligence, indicated that:

> We can conceive of circumstances where liability insurance carried by the husband might prove the moving factor and not at all disrupt connubial bliss in collecting from an insurance company.

In *Rubalcava v. Gisseman*,[54] the court in deciding that a wife could not maintain a tort action against her husband or his estate, stated that

> the fact cannot be ignored that where there is insurance and this is known to both parties, the temptation to collusion exists; and this is increased when the supposedly adverse parties are in the symbiotic relationship of husband and wife. The risk of loss . . . may be negligible or nonexistent, and [is] supplanted by the covert hope of mutual benefit. It is obvious that for persons so disposed, the situation would provide spawn for lawsuits that otherwise would not be brought.[55]

However, this rationale presupposes that the courts are so inefficient and the jury system so impotent, that fraudulent claims cannot be distinguished from legitimate ones.[56]

Many states supporting the majority view have tended to treat the question of insurance as irrelevant. The courts of these states have taken the stance that if under the law of the place where the accident occurred no cause of action exists, any action against the insurance company necessarily fails.[57] They overlook the fact that to allow the maintenance of the suit against the insurance company presents no problem of marital discord nor financial harm to the negligent spouse.[58] As the court indicated in *Klein v. Klein*,[59] the allowance of such a tort action

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Similarly in Abbot v. Abbot, 67 Me. 304, 24 Am. Rep. 27 (1877), the court stated that to allow such an action "would allow new methods by which estates could be plundered." And in Newton v. Webber, 119 Misc. 240, 196 N.Y.S. 113, 114 (1922), the court indicated that no wife would want to sue her husband for a negligent tort except as a "raid upon an insurance company." *Accord*, Lubowitz v. Taitnes, 293 Mass. 39, 198 N.E. 320 (1935).

54. 14 Utah 2d 344, 384 P.2d 389 (1963).

55. *Id.* at 346, 384 P.2d, at 391.

56. In Brown v. Gosser, 262 S.W.2d 480, 484 (Ky. 1953), the court allowed the wife to recover from her husband for injuries sustained in an automobile accident. The court disposed of the question of possible fraudulent insurance claims by stating that:

> The fear that relaxation of the common law rule will open the door to fraudulent and fictitious claims . . . against insurance companies, has less force than the argument of domestic peace and felicity. We are not willing to admit that the courts are so ineffectual, nor our jury system so imperfect, that fraudulent claims cannot be detected and disposed of accordingly.

Accord, Goode v. Martinis, 361 P.2d 941 (Wash. 1961).

57. Boisvert v. Boisvert, 94 N.H. 357, 53 A.2d 515 (1947). See also, Burke v. Massachusetts Bonding & Ins. Co., 209 La. 495, 24 So.2d 875 (1946); Fehr v. General Acc. Fire & Life Assur. Co., 246 Wis. 228, 16 N.W.2d 787 (1944). *But see*, Jacobs v. U.S. Fid. & Guar. Co., 2 Misc. 2d 428, 152 N.Y.S.2d 128 (1956), wherein the court indicated that even though New York allows an interspousal tort action, there is a state statute providing that the liability insurer is not liable unless there is an express provision in the policy covering the injured spouse.

58. In Clement v. Atlantic Cas. Ins. Co., 25 N.J. Super. 96, 95 A.2d 494 (1953), the wife recovered a judgment in New York against her husband for negligence. The court allowed the maintenance of an action against a New Jersey insurance company even though New Jersey does not allow suits between the spouses. The court reasoned that there was no problem of marital discord involved when the suit is brought against the insurance company.

59. 58 Cal. App. 2d 692, 376 P.2d 70 (1962). The plaintiff and her husband went on a boat trip. In the course of cleaning the exterior deck, the plaintiff fell and broke her leg. She alleged that her husband negligently caused water to run down the exterior deck and this was the proximate cause of her injuries. The husband demurred on the ground that in

> would not disturb the family peace and harmony; on the contrary, the domestic harmony will not be disrupted so much by allowing the action as by denying it.[60]

It is somewhat of an anomalous situation to allow an injured passenger to recover from the driver's insurance company, but disallow recovery to a spouse injured in the same accident.

The potentiality of collusion or fraud exists in all litigation and certainly should not be a valid basis for denying a cause of action. Similarly, the fact that an insurance company is the real party in interest furnishes no basis for the immunity concept. As appropriately stated by Justice Traynor in *Emery v. Emery*:[61]

> [T]he mere possibility of fraud or collusion because of a possible existence of liability insurance, does not warrant immunity from liability where it would otherwise exist.[62]

C. *Disruption of Marital Harmony*

One of the major arguments for the preservation of the immunity doctrine is that allowing interspousal tort actions would encourage the disruption of marital harmony.[63] In *Corren v. Corren*,[64] the Supreme Court of Florida elucidated this view when it stated:

> When one ponders the effect upon the marriage relationship were each spouse free to sue the other for every real or fancied wrong springing even from pique or inconsequential domestic squabbles one can imagine what the havoc would be to the tranquillity of the home. Certainly the success of the sacred institution of marriage must depend in large degree upon harmony between the spouses, and the relationship could easily be disrupted and the lives of offspring blighted if bickering blossomed into lawsuits and conjugal disputes into vexations, if not expensive litigation.[65]

California one spouse may not sue the other for a personal tort. The court in holding for the wife stated that the argument of collusion and fraud against the insurance company as a bar to such a suit is without merit and not convincing.

60. *Id.* at 694, 376 P.2d, at 72.

61. 45 Cal. App. 2d 421, 289 P.2d 218 (1955).

62. *Id.* at 427, 289 P.2d, at 224.

63. In Ritter v. Ritter, 31 Pa. 396, 398 (1858), the court stated:

> The flames which litigation would kindle on the domestic hearth would consume in an instant the conjugal bond, and bring on a new era indeed—an era of universal discord, of unchastity, of bastardy, of dissoluteness, of violence, cruelty, and murderers.

A large majority of courts that support the immunity concept have elaborated on the domestic tranquillity argument. *E.g.*, Thompson v. Thompson, 218 U.S. 611 (1910); Shiver v. Sessions, 80 So.2d 905, (Fla. 1955); Holman v. Holman, 73 Ga. App. 205, 35 S.E.2d 923 (1945); David v. David, 161 Md. 532, 157 Atl. 755 (1932); Woltman v. Woltman, 153 Minn. 217, 189 N.W. 1022 (1922); Kennedy v. Camp, 14 N.J. 300, 102 A.2d 595 (1954); Lilliencamp v. Rippetoe, 133 Tenn. 57, 179 S.W. 628 (1915).

64. 47 So.2d 774 (Fla. 1950).

65. *Id.* at 776.

This policy has also been held to apply to suits by a husband against his wife.[66]

It has even been extended to antenuptial torts,[67] and situations where the parties were separated[68] or divorced.[69] In *Holman v. Holman*[70] the court declared that: "It is as much in the interest of tranquil domestic relationships and unbroken homes to prevent obstructions to the reunion of separated spouses as it is to guard against separation in the first instance."[71]

This position is incongruous in that when the parties are separated or divorced the conjugal harmony has been disrupted and the prohibition of a tort action will certainly not mend the nuptial wounds. It has logically been asserted that when the real party in interest is the insurance company, conjugal bliss will not be broken by an interspousal tort action.[72] The jurisdictions which refuse to give credence to the domestic tranquillity argument have also held that death of one of the spouses eliminates the basis for the marital harmony concept.[73] In *Pelowski v. Frederickson*,[74] the court in allowing an action against the estate of the deceased husband, reasoned that the public policy considerations that exist during marriage do not extend to the estate of the deceased because death terminates the family relationship.[75]

The opponents of the "domestic harmony" argument have advanced several other noteworthy objections. They reason that if a tort has been committed between the spouses, marital tranquillity has already been greatly disturbed.[76] As indicated by the court in *Self v. Self*:[77]

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66. See Latiolais v. Latiolais, 361 S.W.2d 252 (Tex. Ct. App. 1962); Brawner v. Brawner, 327 S.W.2d 808 (Mo. App. 1959).

67. In Patenaude v. Patenaude, 195 Minn. 523, 263 N.W. 546 (1935), the wife sued to recover damages for injuries caused by the negligent operation of an automobile by her husband prior to the marriage. In denying the wife recovery the court alluded to the case of Drake v. Drake, 145 Minn. 388, 389, 177 N.W. 624, 625 (1920), wherein it was stated:

> [T]he welfare of the home, the abiding place of domestic love and affection, the maintenance of which in all its sacredness, undisturbed by a public exposure of trivial family disagreements is so essential to society, demands and requires that no new grounds for its disturbance be engrafted on the law by rule of court. . . .

68. *Infra* note 136.

69. See cases in note 127, *infra*.

70. 73 Ga. App. 205, 35 S.E.2d 923 (1945).

71. *Ibid.*

72. See Harvey v. Harvey, *supra* note 53.

73. *E.g.*, Long v. Landy, 60 N.J. Super. 362, 158 A.2d 728 (1960); Johnson v. Peoples First Nat'l Bank & Trust Co., 394 Pa. 116, 145 A.2d 716 (1958). See also, Saunders v. Hill, 202 A.2d 807 (Del. 1964) (Wrongful Death Statute creates a new cause of action).

74. 263 Minn. 371, 116 N.W.2d 701 (1962).

75. *Id.* at 374, 116 N.W.2d, at 704.

76. Brown v. Brown, 88 Conn. 42, 89 Atl. 889 (1914) (action by wife for assault and battery and false imprisonment); Lorang v. Hays, 69 Idaho 440, 209 P.2d 733 (1949) (wife seeking damages for false arrest and false imprisonment); Brown v. Gosser, 262 S.W.2d 480 (Ky. 1953) (automobile accident).

77. 26 Cal. Rptr. 97, 376 P.2d 65 (1962).

> [T]he contention that immunity is necessary to maintain conjugal harmony is unsound because after a husband has beaten his wife there is little peace and harmony left to be disturbed. . . .[78]

The proponents of the minority view also point out that where interspousal property actions are permitted, it is just as capable of undoing conjugal harmony as a tort action.[79] Futhermore, as long as the parties are living in a felicitous and agreeable family environment, the bringing of a tort action is highly improbable.[80] It is only when the "peace" has been disturbed that litigation will be likely to result. In such an instance when the purposes of the marriage have wholly failed, an injured spouse should be able to recover for personal injuries.[81] The "domestic tranquillity" argument is further deflated by the fact that interspousal actions are allowed in other areas of the law—both criminal and civil law.[82] This point was poignantly evident in *Fiedler v. Fiedler*[83] wherein the wife alleged that her husband had assaulted her with a shotgun. The court held that the action could be maintained and stated:

> Nor are we able to perceive wherein the sensitive nerves of societry are worse jarred by such a proceeding than it would be to allow the parties to go into a divorce court and lay bare every act of their marriage relation in order to obtain alimony.[84]

So as can be readily observed, once the family tranquillity has been disturbed, the fact that a tort action cannot be maintained will not preserve marital harmony. When analyzed, it is apparent that the source of marital discord lies not in the court proceeding, but in the wrong which caused it. Therefore, to urge that the immunity rule survive because it is an aid to nuptial bliss is to disregard reality. Conjugal peace would be as seriously impaired by any other civil or criminal action that the law sanctions. The only effect the "domestic tranquillity" argument serves is to deny a rightful cause of action to an injured spouse.

D. *Trivial Suits and a Deluge of Litigation*

Some courts still adhere to the marital immunity rule on the basis that without it trivial suits would be instituted and the courts would be

78. *Id.* at 101, 376 P.2d, at 69.

79. As stated by the court in Brown v. Gosser, *supra* note 76:

> The argument would have a truer ring except for the fact a wife may now . . . sue her husband for tort affecting her property interest. . . . It is difficult to perceive how a tort action for personal injuries would disrupt the domestic peace and tranquillity to any greater extent than a tort action for damage to property.

Accord, Muir v. City of Pocatello, 36 Idaho 532, 212 Pac. 345 (1922); Brandt v. Keller, 413 Ill. 503, 109 N.E.2d 729 (1952); Courtney v. Courtney, 184 Okla. 395, 87 P.2d 660 (1938); Scotvold v. Scotvold, 68 S.D. 53, 298 N.W. 266 (1941).

80. Brown v. Brown, *supra* note 76.

81. *Id.* at 45, 89 Atl., at 892.

82. See notes 93 *et seq.* accompanying Section III, *infra.*

83. 42 Okla. 124, 140 Pac. 1022 (1914).

84. *Id.* at 126, 140 Pac., at 1024.

swamped with meaningless litigation.[85] Typical of this line of thought is the dissenting opinion in *Wait v. Pierce*,[86] which declared:

> The uninvited kiss, no matter how cold and chaste, upon the unconsenting female brow is an assault and battery, and substantial damages may be awarded for such.[87]

An example of such a trivial action was evident in *Drake v. Drake*.[88] In that case the court declined to enjoin a wife from nagging her husband. However, the overwhelming majority of interspousal tort actions are based on meritorious claims and cases like *Drake* are a rarity.

The court in *Brown v. Brown*[89] epitomized the view of the progressive courts.

> The danger that . . . the courts will be filled with [interspousal] actions for assault, slander, and libel, . . . we think is not serious.[90]

Similarly in *Spellens v. Spellens*,[91] the court indicated that a suit should not be denied on the basis that in the future some trifling domestic difficulties might be the subject of litigation. The argument of "multiplicity of suits" could be raised in almost any area of the law. Nevertheless, the courts have almost uniformly refuted this theory. In addition, there is nothing in the experience of the jurisdictions which have abrogated the immunity concept that would indicate that court calendars have become congested with insignificant marital squabbles.[92]

E. *Other Adequate Remedies Available to an Injured Spouse*

The courts, in jurisdictions which uphold the immunity theory, have frequently alluded to the fact that remedies other than damages are available to the injured spouse.[93] In *Austin v. Austin*,[94] the court held

85. See Bandfield v. Bandfield, 117 Mich. 80, 75 N.W. 287 (1898), wherein the court declared that the result of an interspousal tort action "would be another step to destroy the sacred relationship of man and wife and open the door to lawsuits between them for every real and fancied wrong." The United States Supreme Court in Thompson v. Thompson, *supra* note 63 indicated support of this rationale.

86. 191 Wis. 202, 209 N.W. 475 (1926).

87. *Id.* at 209, 209 N.W., at 482.

88. 145 Minn. 388, 177 N.W. 624 (1920).

89. 88 Conn. 42, 89 Atl. 889 (1914).

90. *Id.* at 44, 89 Atl. 891.

91. 49 Cal. App. 2d 210, 317 P.2d 613 (1957).

92. In Klein v. Klein, 26 Cal. Rptr. 102, 376 P.2d 70 (1962), the court in holding that the immunity rule was no longer valid in California, alluded to the fact that the courts of the states that have repudiated this ancient concept have not been inundated with trifling suits.

93. In Thompson v. Thompson, *supra* note 63, the United States Supreme Court declared that an injured wife has an adequate remedy in that she may resort to the criminal court for redress or sue for divorce and alimony. The court also pointed out that the wife has recourse in equity for protection of her property rights. *Accord,* Abbot v. Abbot, 67 Me. 304, 24 Am. Rep. 27 (1877) (wife cannot sue husband for assault since criminal courts are open to

that a wife could not bring a tort action against her husband for injuries resulting from his negligent operation of an automobile. The court declared that:

> The divorce courts and the criminal courts furnish ample redress to the hubsand and wife. . . . Husband and wife . . . have enough grievances for the courts and scandalmongers without . . . another being added.[95]

This argument was countered in *Johnson v. Johnson*,[96] where a wife sued her husband for assault and battery. The court indicated that remedies by way of a criminal prosecution or an action for divorce and alimony are illusory and inadequate. Furthermore, as observed in *Courtney v. Courtney*,[97] these remedies may be adequate to prevent future wrongs but they certainly do not compensate for past injuries.

The argument that divorce and criminal laws furnish suitable remedies to an injured spouse leaves much to be desired. There are conceivably numerous instances where a wife may not want to inflict herself with more misery by criminally prosecuting her husband. A criminal conviction may in essence deprive the family of its breadwinner and impose a stigma on the entire family. Also, a wife might not want to permanently part with her husband through divorce. But the area where the wife is really left without a remedy is where she is injured due to the negligent operation of an automobile by her husband. Under these circumstances how can it logically be argued that the wife has an adequate means of redress? If, however, she were allowed to maintain an action against her husband's insurance company, just as any other passenger in the car, then she would be justly compensated for her injuries. If the insurance company wants to exclude the wife from coverage, then the policy should so state. As can be readily observed, to deny the wife a personal injury action against her husband, would in many instances actually leave her without a proper remedy.

F. *The Constitution and the State Legislatures*

The majority of courts supporting the immunity doctrine have frequently declared that abrogation of this rule is a matter of legislative concern[98] and in this respect the legislatures have remained silent.[99] In

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an assaulted wife); Drake v. Drake, 145 Minn. 388, 177 N.W. 624 (1920) (husband cannot sue wife in tort as divorce court is open to him); Kennedy v. Camp, 14 N.J. 390, 102 A.2d 595 (1954); Rogers v. Rogers, 265 Mo. 200, 177 S.W. 382 (1915); Gowin v. Gowin, 292 S.W. 211 (Tex. 1927).

94. 136 Miss. 61, 100 So. 591 (1924).

95. *Id.* at 62, 100 So., at 592.

96. 201 Ala. 41, 77 So. 335 (1917).

97. 184 Okla. 395, 87 P.2d 660 (1938).

98. *E.g.*, Corren v. Corren, 47 So.2d 774 (Fla. 1950); Wright v. Wright, 85 Ga. App. 721, 70 S.E.2d 152 (1952); Koenigs v. Travis, 246 Minn. 466, 75 N.W.2d 478 (1956); Karalis

Ensminger v. Ensminger,[100] a wife brought an action against her husband for injuries sustained when her husband negligently drove an automobile into a tree. The court, in deciding that the wife could not maintain such an action, aptly summarized this attitude:

> [T]he right of a wife to sue her husband for a tort is brought with such far-reaching results that the grant thereof should not be made by judicial fiat, but if such right is to be afforded, it should be granted only . . . through legislative processes.[101]

Other courts have reasoned that in deference to the solidarity of the law, any change by the courts would be justified only to correct patent defects. Otherwise, it should be made by the legislature so that the courts will be able to act accordingly.[102] Futhermore, it is argued that the constitutional provision of due process of law does not authorize a wife to sue her husband for a tort, since the tort constitutes no legal wrong.[103] The provision of the Constitution guaranteeing every individual a remedy for injury to his person, property or reputation, guarantees only all recognized rights, and not a right in every case involving personal injury.[104]

Advocates of abolishing the immunity doctrine dismiss the above argument as merely judicial buck-passing in light of the fact that the immunity concept was initiated by judicial decree. As is generally known, the courts are often called on to interpret ambiguous legislative acts. It is their duty not to shirk this responsibility. In addition, by determining that the legislature has not decided the question of the immunity rule, the courts are in essence construing away the changes made by corrective legislation.[105] The purpose of the enactment of the Married Women's Acts was to break the shackles of the common law and remove all marital disabilities.[106] By not recognizing this purpose to its fullest extent, the courts have actually impeded the legislative processes.

The proponents of the minority position refute the above constitutional argument as purely fallacious. The Constitution provides that no state shall deprive *any person* of life, liberty or property, without due

v. Karalis, 213 Minn. 31, 4 N.W.2d 632 (1942); Willott v. Willott, 333 Mo. 896, 62 S.W.2d 1084 (1933); Kennedy v. Camp, 14 N.J. 390, 102 A.2d 595 (1954).

99. See *supra* note 36 which points out that only four jurisdictions mention interspousal tort actions in their Women's Emancipation Act.

100. 222 Miss. 799, 77 So.2d 308 (1955).

101. *Id.* at 801, 77 So.2d, at 310.

102. In Rubalcava v. Gisseman, 14 Utah 2d 344, 384 P.2d 389 (1963), a wife sued her husband's estate for injuries sustained in an automobile-train collision. The Utah Supreme Court held that the wife could not maintain the suit because among other things the immunity doctrine is one of legislative concern.

103. *Supra* note 100. See also, Austin v. Maryland Cas. Co., 105 So. 640 (Miss. 1925) (notation of court: "not to be officially reported").

104. See Smith v. Smith, 205 Ore. 286, 287 P.2d 572 (1955); Noonan v. City of Portland, 161 Ore. 213, 88 P.2d 808 (1938).

105. See Bogen v. Bogen, 219 N.C. 51, 12 S.E.2d 649 (1941).

106. See MCCURDY, *op. cit. supra* note 30.

process of law, or deny to any person equal protection of the laws.[107] This wording is sufficiently broad to include any human being who is a citizen of the United States. Both the Constitution and the laws of the various states recognize that a married woman is a person and an individual entitled to the same protection of the laws as any other individual. Therefore, not only have the respective majority of state legislatures implied that the immunity concept has been repealed, but the constitutional provisions are contrary to the immunity concept and must prevail over this ancient common law doctrine.

IV. Negligent Torts vs. Intentional Torts

A small minority of states draw a distinction between actions based on intentional torts and those predicated on negligent torts.[108] The criteria for such an intermediate view was lucidly expressed by the court in *Apitz v. Dames*:[109]

> [W]hen a husband inflicts intentional harm upon the person of his wife, the peace and harmony of the home has been so damaged that there is no danger that it will be impaired by the maintenance of an action for damages. . . .[110]

These states while adhering to the immunity concept, concede that the spouse's exemption from intramarital suits is not absolute.[111] "In the case of intentional wrongs, considerations of great potency are involved which are not present in cases involving negligence only."[112] As indicated by the court in *Ennis v. Truhitte*,[113] there is in certain types of cases a trend against the common law immunity.

In *Self v. Self*[114] the wife brought an action against her husband to recover damages for a broken arm received when he allegedly assaulted her. The California Supreme Court decided to abandon the interspousal immunity rule where the tort involved was intentional. In the companion case of *Klein v. Klein*[115] the same court held that the reasons for the immunity doctrine no longer exist and should be repudiated as to negligent torts as well as intentional ones. The court expounded that if a tort has been committed then a cause of action exists and there is no logical rea-

107. U.S. Const. amend. XIV, § 1 provides that:
No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any *person* of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the law. (Emphasis added.)

108. Ennis v. Truhitte, 306 S.W.2d 549 (Mo. App. 1957); Kowaleski v. Kowaleski, 227 Ore. 45, 361 P.2d 64 (1961).

109. 205 Ore. 242, 287 P.2d 585 (1955).

110. *Id.* at 255, 287 P.2d, at 598.

111. See Kowaleski v. Kowaleski, *supra* note 108.

112. Smith v. Smith, *supra* note 104.

113. 306 S.W.2d 549 (Mo. App. 1957).

114. 26 Cal. Rptr. 97, 376 P.2d 65 (1962).

115. *Supra* note 92.

son for drawing a distinction. The jurisdictions which have vitiated the immunity concept have uniformly adopted this position.[116]

The argument in favor of retaining the distinction between intentional and negligent torts was voiced by Justice Schauer in a vigorous dissent to the *Klein* decision. He indicated that the rule should be abrogated as to intentional torts but not as to negligent torts because:

> Accident liability policies do not ordinarily insure against intentionally inflicted injuries, and hence the incentives for trumped up actions against insurers based on intentional torts are few or nonexistent. But negligent injuries offer a fertile field for conjugal collusion and fraud.[117]

To elucidate his point Justice Schauer posed a hypothetical situation: The wife is shaken up in an automobile accident caused by the husband's inattentive driving. Perhaps, on reflection, she discovers symptoms of a whiplash injury. An action for damages is brought nominally against the husband who, being insured stands only to gain by losing and hence willingly plays the role of defendant. "The variations of this theme are limited only by the ingenuity of the parties and the patience of the insurance company."[118] While Justice Schauer's argument has some merit, it displays a lack of confidence in the judicial system to ferret out the false claims from the valid ones.[119]

The majority of courts apply the immunity rule to both negligent and intentional torts.[120] However, those courts which have abolished the rule as to intentional torts, while still applying it to negligence, have taken a step out of the past.[121] The next logical step for these courts is to get in line with the progressive courts and repudiate this outmoded concept in its entirety.

V. EFFECT OF PREMARITAL TORTS

In the jurisdictions that support the immunity concept, the disability rule is generally applied to torts committed prior to the marriage as well as those committed during coverture.[122] The reasons normally given

116. *Supra* note 43.

117. *Supra* note 92, at 107, 376 P.2d, at 75. Justice Schauer also indicated that the repealing of the immunity doctrine as to negligent torts should be left to the state legislature. He felt that judicial interference in this sensitive area of substantive law may have the same effect it had in Illinois where, within a few months after the Supreme Court of Illinois judicially abrogated the immunity concept in an action based on willful and wanton conduct, the Illinois Legislature reinstated the immunity rule as to all personal torts between the spouses.

118. *Id.* at 107, 376 P.2d at 76.

119. See note 56 *supra.*

120. *Supra* note 37.

121. *Supra* notes 108 and 109.

122. Baker v. Gaffney, 141 F. Supp. 602 (D.D.C. 1956); Amendola v. Amendola, 121 So.2d 805 (Fla. 2d Dist. 1960); Taylor v. Vezzani, 109 Ga. App. 167, 135 S.E.2d 522 (1964);

are the same as those advocated in support of the doctrine when the tort has been perpetrated during the marriage.[123] These courts recognize that a cause of action existed prior to the marriage, but they hold that the subsequent marriage to the tortfeasor either extinguished or suspended that right. In *Koplik v. C.P. Trucking Corp.*,[124] the court expressed the tenor of this position:

> [It] would be . . . illogical . . . to declare that a wife is not a wife, or suing as a wife, within its meaning, because her action is predicated upon an antenuptial tort.[125]

Some courts have allowed a suit based on an antenuptial tort on the grounds that the wife's cause of action was her separate property, for the protection of which she could maintain an action against her husband tortfeasor.[126] The court in *Hamilton v. Fulkeson*[127] held that a wife could maintain an action against her husband for a premarital tort even though Missouri followed the immunity concept. The court went so far as to declare that there are no logical reasons based upon considerations of public policy which would justify extending the spousal disability to prenuptial torts.[128] Proponents of this position indicate that it is irrelevant whether or not the suit was instituted prior to, or after the marriage.[129]

Thus by holding that a cause of action is a separate property right, a liberal construction of the Married Women's Act would allow an action for personal injuries based on a premarital tort. While the majority of courts deny such an action in order to remain consistent in policy, they are in essence dismissing a valid cause of action because the parties were subsequently married.

VI. Where the Marital Bond Has Been Severed by Separation, Divorce or Annulment

A. *Divorce*

The fact that the parties have obtained a divorce has not prevented the majority of courts from applying the immunity rule to actions

Hudson v. Hudson, 226 Md. 521, 174 A.2d 339 (1961); Patenaude v. Patenaude, 195 Minn. 523, 263 N.W. 546 (1935); Taibi v. DeGennaro, 65 N.J. Super. 294, 167 A.2d 667 (1961); Manning v. Hyland, 42 Misc. 2d 915, 249 N.Y.S.2d 381 (Sup. Ct. 1964); Meisel v. Little, 407 Pa. 546, 180 A.2d 772 (1962); Benevides v. Kelly, 90 R.I. 310, 157 A.2d 821 (1960); Latiolais v. Latiolais, 361 S.W.2d 252 (Tex. 1962).

123. See Section III Public Policy Considerations.

124. 27 N.J. 1, 141 A.2d 34 (1958).

125. *Id.* at 5, 141 A.2d, at 38.

126. Carver v. Ferguson, 40 Cal. App. 2d 459, 254 P.2d 44 (1953); O'Grady v. Potts, 193 Kan. 644, 396 P.2d 285 (1964); Hamilton v. Fulkerson, 285 S.W.2d 642 (Mo. App. 1956); Shirley v. Ayers, 201 N.C. 51, 158 S.E. 840 (1931); Prosser v. Prosser, 114 S.C. 45, 102 S.E. 787 (1920).

127. *Supra* note 126.

128. *Id.* at 646.

129. Berry v. Harmon, 329 S.W.2d 784 (Mo. App. 1959).

brought for torts committed during coverture.[130] In *Wallach v. Wallach*,[131] the plaintiff sued her ex-husband for injuries sustained while they were married. She alleged that her cause of action was only suspended during coverture and once the parties became divorced, the right of action came into being. The court found for the defendant on the basis that when the husband and wife are not liable to each other for torts committed during coverture, they do not, upon being divorced, become liable to each other. The court added that:

> The divorce cannot in itself create a cause of action in favor of the wife upon which she may sue, where it was not a cause of action before the divorce.[132]

However, when the husband and wife are liable to each other, a divorce will not affect this liability.[133]

It is obvious that after the parties have obtained a divorce, the public policy reasons for continuing the immunity rule are no longer valid. Recent decisions have indicated that the courts are starting to recognize this fact. In *Goode v. Martinis*,[134] the husband sexually assaulted his wife after they were separated but before the final divorce decree was awarded. After obtaining a final decree the ex-wife brought suit against her former husband for injuries sustained as a result of the assault. The court in allowing the ex-wife's action recognized the fact that

> divorce proceedings had already been instituted and the parties . . . were living apart. It is obvious that there is no domestic harmony left to be disrupted or destroyed.[135]

It has also been pointed out that since a divorce dissolves the bonds of matrimony, a wife's incapacity to sue her husband is ended by the divorce.[136]

There are a small number of cases where the divorced spouse sued her ex-husband for a tort committed after an interlocutory decree was obtained but before the entry of the final decree. Prior to the abolition of the immunity doctrine in California, the court in *Paulus v. Bauder*,[137] ruled that an interlocutory decree did not sever the marital bonds so as

130. Cimijotti v. Paulsen, 230 F. Supp. 39 (D.C. Iowa 1964); Lynn v. Gaskins, 212 F. Supp. 951 (N.D. Ind. 1963); Bandfield v. Bandfield, 117 Mich. 80, 75 N.W. 287 (1898); Strom v. Strom, 98 Minn. 427, 107 N.W. 1047 (1906); Ensminger v. Campbell, 242 Miss. 519, 134 So.2d 728 (1961); Nickerson v. Nickerson, 65 Tex. 281 (1886).

131. 94 Ga. App. 576, 95 S.E.2d 750 (1956).

132. *Id.* at 577, 95 S.E.2d, at 751. See also Abbot v. Abbot, 67 Me. 304, 24 Am. Rep. 27 (1877); Bandfield v. Bandfield, *supra* note 130.

133. See Taylor v. Patten, 2 Utah 2d 404, 275 P.2d 696 (1954).

134. 58 Wash. 2d 229, 361 P.2d 941 (1961).

135. *Id.* at 232, 361 P.2d, at 944.

136. Gremillion v. Caffey, 71 So.2d 670 (La. 1954).

137. 106 Cal. App. 2d 589, 235 P.2d 422 (1951).

to warrant abridgement of the immunity rule. The court reasoned that reconciliation of the spouses was possible during this interim and therefore the rule was applicable. However, in *Steele v. Steele*,[138] the court recognized the immunity rule but held that despite the fact that the marriage is not entirely dissolved, the marital relationship on which the immunity concept is predicated does not continue during this waiting period. Similarly in *Gremillion v. Caffey*,[139] the court held that the wife could not maintain an action against her husband for a tort committed when they were legally separated. However, after the decree of an absolute divorce, the ex-wife could maintain the suit.

The policy reasons supporting the immunity theory become academic after the parties have been divorced or have obtained an interlocutory divorce decree. The court's rationale in *Goode v. Martinis*[140] appropriately expresses the logic of this position:

> Where at the time of the tort the marital relationship of the parties has completely lost its original character and the parties have taken concrete legal steps to dissolve the marital relationship together, we can perceive of no convincing reason for depriving an injured spouse of his or her cause of action.[141]

B. *Separation*

Few courts that recognize the immunity concept will allow the maintenance of a tort action while the spouses are separated.[142] The courts reason that it is as much in the interest of domestic tranquillity to prevent an impediment to the reconciliation of the estranged spouses as it is to guard against separation in the first instance.[143] The denial of such a right can more easily be supported at the separation stage than after the parties have obtained a divorce. During the legal separation the marriage is not dissolved, and the wife's disability to sue her husband for a tort still exists.[144] However, after the divorce, this disability is removed.[145]

C. *Annulment*

Whether the disability rule applies to marriages which are subsequently annulled, appears to hinge on whether the marriage was merely voidable or void ab initio. In *Callow v. Thomas*,[146] the plaintiff was in-

138. 65 F. Supp. 329 (D.D.C. 1946).
139. *Supra* note 136.
140. *Supra* note 134.
141. *Id.* at 945.
142. *But see* Goode v. Martinis, *supra* note 134, where the court held that even though Washington adheres to the immunity doctrine, a divorced wife can maintain an action against her former husband for a tort committed while the parties were legally separated.
143. Holman v. Holman, 73 Ga. App. 205, 35 S.E.2d 923 (1945).
144. *Supra* note 137.
145. *Supra* note 136.
146. 322 Mass. 550, 78 N.E.2d 637 (1948).

jured when the automobile in which she was a passenger was negligently driven into a tree by her husband. Subsequently, the marriage was annulled for fraud and the plaintiff brought a tort action to recover compensation for her injuries. The court in denying the plaintiff's cause of action reasoned that at the time of the accident the parties were husband and wife. Had no proceedings been brought to annul the marriage, this status would have endured until the marriage was terminated by death or divorce. The court intimated that if the marriage was prohibited by law, that is void ab initio, the interspousal immunity doctrine would not apply to disable the wife from maintaining a suit.

The court in *Gordon v. Pollard*[147] alluded to the *Callow* decision by holding that a subsequent annulment did not entitle the wife to sue her husband for a tort which occurred between the marriage and the annulment. This court was of the opinion that an annulment of a voidable marriage did not render the marriage void ab initio for all purposes.[148] However, in *Henneger v. Lomas*,[149] after the plaintiff obtained an annulment, the court allowed her to maintain an action against her former husband for premarital seduction. The court found that the marriage had been obtained by fraud and was therefore voidable. But, the majority view appears to disallow tort actions for subsequently annulled voidable marriages while allowing such actions when the marriage is void ab initio.[150]

It is obvious that when the parties have separated, divorced or obtained an annulment, the purposes of the marriage have failed. To deny a cause of action based on public policy considerations geared to preserve marital harmony is totally incongruous. It is more realistic to recognize the failure of the marriage and allow the maintenance of a suit as if the conjugal bonds had never been tied.

VII. ACTIONS AGAINST ESTATE OF SPOUSE

The question of whether an interspousal tort action could be maintained after the death of one spouse did not arise at common law because of the general rule that tort actions did not survive the death of a tortfeasor or his victim.[151] However, in many states there are survival statutes or wrongful death acts which allow post-mortem suits. It follows that if the statute provides that a tort action survives the death of the tortfeasor, it should equally apply to spouses as well as unrelated parties.

When death has ended the marital relationship, many of the policy

147. 207 Tenn. 45, 336 S.W.2d 25 (1960).

148. *Id.* at 46, 336 S.W.2d, at 26. See also Lunt v. Lunt, 121 S.W.2d 445 (Tex. Ct. App. 1938).

149. 145 Ind. 287, 44 N.E. 462 (1896).

150. *Supra* notes 146 and 147.

151. See Friedman v. Greenberg, 110 N.J.L. 462, 166 Atl. 119 (1933).

considerations lose much of their validity. Some states that support the immunity concept have held that it is inapplicable after one spouse has died.[152] In *Long v. Landy*[153] the husband was killed when the automobile he was driving collided with another vehicle. His wife, a passenger in the car, was rendered mentally incompetent as a result of injuries sustained in the collision. In her action against her husband's estate, the court declined to recognize the applicability of the interspousal immunity theory and allowed the surviving widow to bring an action against her deceased husband's estate. In reaching this conclusion, the court acknowledged the fact that the immunity doctrine is followed in New Jersey. However, the court reasoned that the public policy which seeks to prevent disharmony in the home has no basis after the death of one spouse, because there is no longer any matrimonial harmony to be protected.[154] Also, the danger of fraud when the deceased defendant-spouse is insured has been reduced to such an extent that it cannot be said to exist to any greater degree than in an ordinary negligence action between unrelated parties. "It is self-evident that the ground for the special fear of collusion between the spouses is eliminated upon the death of the tortfeasor."[155]

In *Shumway v. Nelson*,[156] the statutory trustee of the deceased wife brought an action against the estate of the deceased husband. The Minnesota Supreme Court held that the action could be maintained even though the marital immunity doctrine would have precluded the wife from maintaining an action against her husband. The court reasoned that since the Wrongful Death Act creates a new cause of action, the rule of immunity is no longer involved. This was so even though the Death Act spoke in terms of an action that "decedent might have maintained . . . had he lived."[157] The court further added that while they believed that any change in the immunity doctrine was properly a legislative rather than judicial function,

152. See notes 153 and 156 *infra*. In Kaczorowski v. Kalkosinski, 321 Pa. 438, 184 Atl. 663 (1936), both husband and wife were killed in an automobile accident. The court held that the wife's surviving father could bring suit against the husband's estate because the parties to the action are free from disabilities. In Robinson's Adm'r v. Robinson, 188 Ky. 49, 229 S.W. 1074 (1920), the administrator of the wife's estate was allowed to sue the husband for the benefit of the minor children. Similarly, in Welch v. Davis, 410 Ill. 130, 101 N.E.2d 547 (1951), the husband shot himself and his wife and left a minor daughter. The court in allowing the administrator of the wife's estate to maintain an action against the husband's executor stated:

> Today the immunity can be based solely upon the ground that domestic tranquillity is fostered by the prohibition of actions by wife against her husband. An immunity based upon the preservation of marital harmony can have no pertinence in this case, for here the marriage has been terminated, husband and wife are both dead, and the action is brought for the benefit of a third person.

Accord, Poepping v. Lindemann, 268 Minn. 30, 127 N.W.2d 512 (1964); Johnson v. Peoples First Nat'l Bank & Trust Co., 394 Pa. 116, 145 A.2d 716 (1958).

153. 35 N.J. 44, 171 A.2d 1 (1961).

154. *Id.* at 49, 171 A.2d, at 6.

155. *Ibid.*

156. 259 Minn. 319, 107 N.W.2d 531 (1961).

157. *Id.* at 327, 107 N.W.2d, at 533.

> we do not believe that we should ascribe to the legislature an intent to extend the intrafamily immunity doctrine to situations where its existence is without any reasonable justification.[158]

Similarly, in *Ennis v. Truhitte*,[159] the wife sued the estate of her deceased husband to recover for harm caused by his willful, wanton and negligent operation of an automobile. The court allowed the action on the basis that the reasons of public policy upon which the immunity rule is based have vanished when one spouse has died and the Married Women's Act and the Survival Statute do not preclude a post-mortem action.[160]

Other jurisdictions have found certain policy considerations applicable for continuing the immunity concept after the death of one or both spouses.[161] One of the major factors is the possibility of the surviving spouse conjuring up false insurance claims against the estate.[162] Another reason is the temptation to file suit for trivial matters in an effort to recover from the administrator.[163] After the marriage has been dissolved by death, the bonds of matrimony would no longer inhibit an interspousal tort action, with the estate as a party, and this would encourage attempts by the surviving spouse to recover as much as possible from the decedent's estate. Furthermore, the temptation to proffer perjured testimony is greatest when the claim cannot be rebutted. It is also argued that since the unity of spouse concept was effective to preclude such suits during coverture, no cause of action ever arose in favor of the surviving spouse.[164] In *Saunders v. Hill*,[165] the court recognized that the Wrongful Death Act does create a new cause of action, but denied an action by the wife's administrator against the husband's estate on the premise

> that such right of action is dependent upon the right of the person injured had he not died in consequence of his injury, to maintain an action for personal injuries.[166]

Proponents of this view have taken the position that the legislative intent was to prevent a cause of action from coming into being, and under such a statute a nonexistent cause could not survive the death of a spouse.[167] However, the stand adopted by these courts is somewhat untenable as the

158. *Ibid.*

159. 306 S.W.2d 549 (Mo. App. 1957).

160. *Id.* at 551.

161. See notes 53 and 85 *supra* and notes 163 and 164 *infra*.

162. *Supra* note 53.

163. See note 85 *supra*. See also Drake v. Drake, 145 Minn. 388, 177 N.W. 624 (1920); Wait v. Pierce, 191 Wis. 202, 209 N.W. 475 (1926) (dissent).

164. See *In Re* Dolmage's Estate, 203 Iowa 231, 212 N.W. 553 (1927), where the husband intentionally shot his wife and then himself. The court held that no action could be maintained by the wife's administrator against the executor of the husband's estate. For authority supporting the unity of the spouses concept in this context, see Castellucci v. Castellucci, 188 A.2d 467 (R.I. 1963); Levlock v. Spanos, 101 N.H. 22, 131 A.2d 319 (1957).

165. 202 A.2d 807 (Del. 1964).

166. *Id.* at 809.

167. See Heckendorn v. First Nat'l Bank, 19 Ill. 2d 190, 166 N.E.2d 571 (1960).

policy factors influencing the preservation of the immunity concept during coverture certainly should not be given equal weight after the marriage has been dissolved by death.

The trend toward interspousal actions for personal torts should be extended by all the states to instances where the common law immunity theory is inapplicable and irrational. Each time a common law rule is utilized it should be carefully scrutinized to insure that social conditions and policy considerations have not changed so as to make its further application an instrument of injustice.[168] The public policy behind the rule—legal unity, insurance fraud, preservation of domestic tranquillity, trivial suits, etc., disappear when the marriage is terminated by death. In addition, as indicated in *Shumway v. Nelson*,[169] Death Acts generally create a cause of action where it was previously nonexistant. Thus the modern trend is to logically lift the bar of immunity when the marriage relationship has ceased to exist.

VIII. HUSBAND V. WIFE

In the overwhelming majority of interspousal suits, the action is brought by the wife against her husband. The courts have had little opportunity to view the immunity concept when the suit is initiated by the husband. However, the states recognizing the immunity doctrine apparently would hold that the disability applies to all interspousal tort actions.[170] Likewise, the jurisdictions which have abrogated the rule generally recognize the correlative right of the husband against his wife.

Perhaps the leading case in this area is the Arkansas decision of *Leach v. Leach*.[171] In *Leach*, the husband brought an action against his wife for damages sustained when the husband's pickup truck collided with an automobile being driven by his wife on the wrong side of the street. The court in upholding the husband's right of action pointed out that the public policy arguments that the court previously rejected in allowing a wife to sue her husband[172] are equally without merit when the situation is reversed. Since the legislature provided in the Married Women's Act that a married woman may "sue and be sued" there can be no sound basis for a different conclusion when the shoe is on the

168. State v. Culver, 23 N.J. 495, 129 A.2d 715 (1957); Johnson v. Peoples First Nat'l Bank & Trust Co., 394 Pa. 116, 145 A.2d 716 (1958).

169. *Supra* note 156.

170. In Brawner v. Brawner, 327 S.W.2d 808 (Mo. App. 1959), the Supreme Court of Missouri held that a husband cannot maintain an action against his wife for a personal tort. The court indicated that the same public policy considerations which prevent a wife from suing her husband also apply to an action instituted by the husband, and any change in the common law rule should be made by the legislature.

171. 227 Ark. 559, 300 S.W.2d 15 (1957).

172. See Fitzpatrick v. Owens, 124 Ark. 167, 186 S.W. 832 (1916) where the Arkansas Supreme Court rejected the interspousal immunity rule and allowed a wife to sue her husband for personal injuries.

other foot. "For in the same breath the legislature abolished her disability to sue and her immunity from being sued."[173] However, it is interesting to note that the courts in two jurisdictions recognized the immunity rule when the suit was brought by the husband, even though the rule was rejected when the wife instituted suit.

In *Scholtens v. Scholtens*,[174] the North Carolina Supreme Court held that a husband could not maintain an action for personal injuries suffered due to his wife's negligent operation of an automobile. The court indicated that the North Carolina Married Women's Act permits a wife to sue her husband, but contains no provision authorizing the husband to sue his wife. Therefore, the common law disability still obtained to the husband even though it had been repealed as to the wife. This same position was advocated by the Wisconsin Supreme Court in *Fehr v. General Acc. Fire & Life Assur. Corp.*[175] The court denied the husband's insurance company the right to recover for personal injuries caused by the negligent operation of an automobile by his wife on the basis that the Married Women's Act was passed to broaden the rights and privileges of married women and not to create and enlarge their liabilities. The result under this construction of the Act was to remove the wife's disability to sue but not the husband's. However, after this decision, Wisconsin enacted a statute allowing a husband to sue his wife.[176]

The position adopted by the North Carolina and Wisconsin courts is somewhat incongruous. For if the Married Women's Act has abolished the common law disability rule, then it has done so for the husband as well as the wife. To construe these acts otherwise would in essence be giving the wife greater rights than her husband. The purpose of the acts was to emancipate the wife and to place her on an equal legal plane with her husband, and not to give the husband less rights than his wife. With an ever-increasing number of courts abolishing the immunity concept, this writer believes that the *Leach* rationale is indicative of the current progressive trend.

IX. WHERE SPOUSE IS A THIRD PARTY DEFENDANT

Suppose that a poor man, without liability insurance, is driving along the highway with his wife as a passenger. There is a collision with an insured driver due to mutual negligence and the poor man's wife is injured. When the wife brings suit against the insured driver, the insured's insurance company will immediately seek to implead the husband claiming

173. *Supra* note 171, at 17.
174. 230 N.C. 152, 52 S.E.2d 350 (1949).
175. 246 Wis. 228, 16 N.W.2d 787 (1944).
176. WIS. STAT. ANN. § 246.075 (1957) provides that
A husband shall have and may maintain an action against his wife for the recovery of damages for injuries sustained to his person caused by her wrongful act, neglect or default.

a right of contribution against him.[177] If the insurance company is allowed to do this, a part of anything which any member of the family recovers will in essence come out of the family purse. In effect the injured wife would have to pay half of her own claims because her husband was contributorily negligent.[178] The majority of states have solved this problem by denying contribution by the husband on the basis that since the immunity doctrine precludes interspousal torts, there was never any common liability between the tortfeasors to furnish a basis for contribution.[179] In *Yellow Cab Co. v. Dreslin*,[180] the wife sued the Cab Co. for injuries sustained in a collision between a taxicab and an automobile driven by her husband. The Cab Company filed a cross-claim for damages to the taxicab and for contribution for any sums recovered by the wife. The court denied contribution on the basis of the immunity concept:

> Contribution . . . depends on joint liability. . . . Here there was no liability by Dreslin to his wife . . . and hence nothing to which a right of contribution could attach. . . .[181]

The court used the preservation of domestic tranquillity rationale to dispose of the argument that it would be inequitable to allow Mrs. Dreslin to be enriched at the sole expense of the Cab Co. while permitting her husband who was equally at fault to escape any of the burden.[182] Similarly in *Kennedy v. Camp*,[183] the court alluded to the unity of the spouses concept in not allowing contribution from the negligent husband of the plaintiff.

The Pennsylvania courts have made an exception to the interspousal immunity rule where the immune spouse is a third party defendant and the defendant seeks contribution.[184] The Pennsylvania Supreme Court in *Puller v. Puller*[185] allowed contribution by a joint tortfeasor husband even though the plaintiff wife would be precluded from enforcing liability against him. The court reasoned that

> as between the two tortfeasors the contribution is not a recovery for the tort but the enforcement of an equitable duty to share liability for the wrong done.[186]

177. See Yellow Cab Co. v. Dreslin, 181 F.2d 626 (D.C. Cir. 1950); Guerriero v. U-Drive It Co., 22 N.J. Super. 588, 92 A.2d 140 (1952); Pasquinelli v. Reed, 174 Pa. Super. 566, 102 A.2d 219 (1954).

178. This hypothetical situation is posed in 21 NACCA L.J. 365 (1958).

179. *E.g.*, Schroeder v. Longenecker, 7 F.R.D. 9 (E.D. Mo. 1947); Scruggs v. Meredith, 135 F. Supp. 376 (D. Hawaii 1955); Kennedy v. Camp, 14 N.J. 390, 102 A.2d 595 (1954).

180. 181 F.2d 627 (D.C. Cir. 1950).

181. *Id.* at 627.

182. *Ibid.*

183. 14 N.J. 390, 102 A.2d 595 (1954).

184. The Pennsylvania courts have been the major proponents of this position. See Fisher v. Diehl, 156 Pa. Super. 476, 40 A.2d 912 (1945); Maio v. Fahs, 339 Pa. 180, 14 A.2d 105 (1940); Kaczorowski v. Kalkosinski, 321 Pa. 438, 184 Atl. 663 (1936).

185. 380 Pa. 219, 110 A.2d 175 (1955).

186. *Id.* at 221, 110 A.2d, at 177.

This decision exhibits the sound judicial reasoning of the Pennsylvania courts. The considerations of marital unity and domestic peace underlying the ancient immunity concept have no place when either spouse is a third party defendant. Contribution is an equitable principle of equality in the sharing of a common burden. It certainly is not equitable for the defendant to pay one hundred percent of the damages when, except for the marital relationship between plaintiff and the third party defendant, he would be contributing fifty percent of the damages. In addition, the fact should not be overlooked that the injured spouse will recover fifty percent of the damages if contribution were allowed.

X. VICARIOUS LIABILITY FOR TORTS OF SPOUSE

What effect does interspousal immunity have on the liability of an employer for the tort of his employee where the employee negligently injures his own wife? The courts are split on this question. In some states the employer's liability is denied on the basis that under the doctrine of respondeat superior there is no liability on the part of the employer unless the employee is also liable.[187] However, the majority of states have not allowed the employer of a servant who has harmed his spouse to hide behind the shield of the servant-husband's personal immunity.[188]

In *Kowaleski v. Kowaleski*[189] the court, in allowing the injured wife to recover against her negligent husband's employer, rejected the arguments that disruption of the family harmony, diminution of the family wealth and the possibility of collusion should bar a recovery. The court indicated that the employer does not have a right of indemnity from the agent-husband, and whether the employer will sue the employee is a collateral issue that has no bearing on the wife's right to sue the employer. In answering the argument that the maintenance of such a suit will foster collusion between the spouses, the court indicated that the same fear

187. *E.g.*, Baker v. Gaffney, 141 F. Supp. 602 (D.D.C. 1956); Myers v. Tranquillity Irrigation Dist., 26 Cal. App. 2d 385, 79 P.2d 419 (1938); Maine v. James Maine & Sons Co., 198 Iowa 1278, 201 N.W. 20 (1924); Sacknoff v. Sacknoff, 131 Me. 280, 161 Atl. 669 (1932); Riegger v. Bruton Brewing Co., 178 Md. 518, 16 A.2d 99 (1940); Riser v. Riser, 240 Mich. 402, 215 N.W. 290 (1927); Emerson v. Western Seed & Irrigation Co., 116 Neb. 180, 216 N.W. 297 (1927); Raines v. Mercer, 165 Tenn. 415, 55 S.W.2d 263 (1932).

188. *E.g.*, Chase v. New Haven Waste Material Corp., 111 Conn. 377, 150 Atl. 107 (1930); May v. Palm Beach Chemical Co., 77 So.2d 468 (Fla. 1955); Garnto v. Henson, 88 Ga. App. 320, 76 S.E.2d 636 (1953); Tallios v. Tallios, 345 Ill. App. 387, 103 N.E.2d 507 (1952); Broaddus v. Wilkenson, 281 Ky. 601, 136 S.W.2d 1052 (1940); Pittsley v. David, 298 Mass. 552, 11 N.E.2d 461 (1937); Aasen v. Aasen, 228 Minn. 1, 36 N.W.2d 27 (1949); McLaurin v. McLaurin Furniture Co., 166 Miss. 180, 146 So. 877 (1933); Mullally v. Langenberg Bros. Grain Co., 339 Mo. 582, 98 S.W.2d 645 (1936); Miltimore v. Milford Motors Co., 89 N.H. 272, 197 Atl. 330 (1938); Eule v. Eule Motor Sales, 34 N.J. 537, 170 A.2d 241 (1961); Schubert v. August Schubert Wagon Co., 249 N.Y. 253, 164 N.E. 42 (1928); Wright v. Wright, 229 N.C. 503, 50 S.E.2d 540 (1948); Metropolitan Life Ins. Co. v. Huff, 48 Ohio App. 412, 194 N.E. 429 (1933); Kowaleski v. Kowaleski, 227 Ore. 45, 361 P.2d 64 (1961); Fisher v. Diehl, 156 Pa. Super. 476, 40 A.2d 912 (1945); Poulin v. Graham, 102 Vt. 307, 147 Atl. 698 (1929).

189. 227 Ore. 45, 361 P.2d 64 (1961).

exists in practically all actions. The position advocated by the majority of jurisdictions was lucidly stated by the court:

> [I]t would be a sad reflection upon the courts if a group of people were injured in one accident by an employee and everyone injured could recover from the employer but the wife of the negligent employee.[190]

In *Schubert v. August Schubert Wagon Co.*,[191] the court speaking through Justice Cardozo allowed the injured spouse to recover from her husband's employer on the basis that when the employer commits a trespass by the hand of his servant upon the person of another, the employer incurs a distinct and independent liability of his own. The court pointed out that the statute expressly authorizes a married woman to sue persons other than her husband for personal injuries. Similarly in *Tallios v. Tallios*,[192] the court declared that the husband's immunity from suit is based on public policy considerations and does not mean that the tortious act is not unlawful. Therefore, even though the immunity rule denies a remedy against the spouse, it certainly does not extend to his employer.

The applications of the vicarious liability concept notwithstanding the immunity rule was carried to the extent of holding a partnership liable for the torts of one partner where the partner was the spouse of the plaintiff.[193] In *Eule v. Eule Motor Sales*,[194] the wife of a partner sued the partnership for injuries sustained in an automobile collision. The court held that the partnership was not immunized from suit even though the partnership assets could be reached to satisfy the judgment as well as the private assets of the husband if the partnership assets were insufficient. The court reasoned that the same considerations which deny the employer the right to hide behind the family relationship would apply in this situation. However, some courts still assert that the concept of vicarious liability is an unjustified means of side-stepping the immunity rule.

The leading case denying recovery is *Maine v. James Maine & Sons*.[195] In this case the wife sought to recover from her husband's employer for injuries received due to the negligence of her husband-employee. The court in denying recovery extended the immunity rule to her husband's employer:

> Where there is no right of action in the wife for a wrongful or negligent personal injury inflicted upon her by her husband,

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190. *Id.* at 52, 361 P.2d, at 71.

191. 249 N.Y. 253, 164 N.E. 42 (1928).

192. 345 Ill. App. 387, 103 N.E.2d 507 (1952).

193. *Infra* note 194. See also, Damm v. Elyria Lodge No. 465, 158 Ohio St. 107, 107 N.E.2d 337 (1952), where a wife was allowed to sue an unincorporated association for the tort of her husband who was a member.

194. 34 N.J. 537, 170 A.2d 241 (1961).

195. 198 Iowa 1278, 201 N.W. 20 (1924).

> there can be no liability on his part; and since there is no liability on his part . . . his employer cannot be made to respond in damages to her for his negligent act.[196]

However, this rationale was rejected in *Kowaleski v. Kowaleski*[197] as impeding the march of judicial progress.

A further ground for denying the employer's responsibility was enunciated in *Raines v. Mercer*.[198] The court in denying the wife's right of action against her husband's employer held that since she could not sue her negligent husband directly, if the court allowed such an action it would be sanctioning an encircling movement to accomplish what is forbidden by a frontal attack. It has also been indicated in opposition to the allowance of a vicarious suit, that a recovery by the wife would in essence be benefiting the negligent husband as the funds would go into the family purse.[199]

The principle upon which vicarious liability is based is that the act of the servant is the act of the master. The courts which would deny an injured wife the right to recover her husband's employer, are distorting the immunity concept, and the public policy principles upon which it is predicated. In addition, these courts overlook the fact that the Married Women's Acts give a married woman the right to sue. It certainly is not within the contemplation of the common law immunity doctrine to extend the wife's disability to those outside of her family. The immunity rule does not negate the fact that the wife was injured by her husband when he was acting for his employer. It should not serve to relieve the employer of his legal responsibility.

XI. FLORIDA'S POSITION

The common law "interspousal immunity" doctrine was adopted by statute in Florida in 1829[200] and has remained virtually unaltered by the enactment of the Married Women's Emancipation Act of 1943.[201] Even though this Act[202] allows a married woman to sue or be sued with respect to her separate property, the Florida courts have taken the position that the wife is not emancipated from her husband to the extent that she may maintain a tort action against him.[203] The Florida Supreme Court in

196. *Id.* at 1280, 201 N.W., at 22.

197. *Supra* note 189.

198. 165 Tenn. 415, 55 S.W.2d 283 (1932).

199. Myers v. Tranquillity Irrigation Dist., 26 Cal. App. 2d 385, 79 P.2d 419 (1938).

200. The common and statute laws of England which are of a general and not a local nature . . . are declared to be of force in this state. . . . FLA. STAT. § 2.01 (1965). See also Corren v. Corren, 47 So.2d 774 (Fla. 1950).

201. FLA. STAT. §§ 708.08-.09 (1965).

202. In State v. Herndon, 158 Fla. 115, 27 So.2d 833 (1946), the Florida Supreme Court found this statute to be constitutional.

203. *E.g.*, Shiver v. Sessions, 80 So.2d 905 (Fla. 1955); Sullivan v. Sessions, 80 So.2d 706 (Fla. 1955); Corren v. Corren, *supra* note 200. These cases and other Florida decisions

Taylor v. Dorsey[204] set forth the posture that the lower courts have uniformly embraced:

> [T]he woman and the man become one person upon marriage, and that person is the husband. . . . This unity, or more accurately, merger, has been called the foundation for the rights, duties and disabilities of marriage.[205]

The reluctance of the State Supreme Court to alter this common law rule in light of the Married Women's Act was poignantly evident in *Corren v. Corren*.[206] In this case a wife sued her husband for injuries resulting from alleged negligent operation of an automobile. After judgment for the husband, the wife appealed on the premise that Florida Statute 708.08 abrogates the common law doctrine because the Act provides that she may sue and be sued. The court construed the statute as applying solely to allowing the wife to exercise control over her separate property. After a lengthy discussion as to the policy considerations in preserving the "sacred institution of marriage,"[207] the court decided that if the "interspousal immunity" veil is to be lifted, it is the responsibility of the state legislature:[208]

> The legislature will assume grave responsibility when it enacts that each spouse may treat the other as a stranger so far as legal rights are concerned; and when it does so, the language proclaiming this revolutionary change should be positive and unambiguous.[209]

The Florida courts have also reasoned that the common law doctrine should be adhered to on the basis that domestic tranquillity is fostered

indicate that the effect of FLA. STAT. § 708.08 is to emancipate the wife only as to dealings with her own separate property, and with persons other than her husband.

204. 155 Fla. 305, 19 So.2d 876 (1944).

205. *Id.* at 309, 19 So.2d, at 880.

206. 47 So.2d 774 (Fla. 1950). In the earlier decision of Rogers v. Newby, 41 So.2d 451, 452 (Fla. 1949), the court indicated that not only can a wife not sue her husband in tort, but the husband is liable for the "pure" torts of his wife. The court sought to justify its position on the basis that when one contracts with a married woman pursuant to FLA. STAT. § 708.08 he does so voluntarily, but the injury to one derived from a tortious act of the wife is obviously involuntary on the part of the injured person; therefore, the court reasoned that the husband would not be liable when one voluntarily enters into a contract with his wife, but he would be liable if a third party is injured by an involuntary act.

207. When one ponders the effect upon the marriage relationship were each spouse free to sue the other for every real or fancied wrong springing even from pique or inconsequential domestic squabbles, one can imagine what the havoc would be to the tranquillity of the home. Certainly the success of the sacred institution of marriage must depend in large degree upon harmony between the spouses, and the relationship could easily be disrupted and the lines of offspring blighted if bickerings blossomed into law suits and conjugal disputes into vexatious, if not expensive litigation. 47 So.2d, at 776.

208. The court alluded to the United States Supreme Court's decision in Thompson v. Thompson, 218 U.S. 611 (1910), where the court expressed the view that any change in the law so far reaching as to obliterate the common law unity, should only be wrought by language so clear and plain as to be unmistakable evidence of the legislative intention.

209. *Supra* note 206, at 776.

by the prohibition of interspousal tort actions.[210] This rationale is also applied to premarital torts.[211]

Florida adopts the majority position in negating the immunity rule when vicarious liability is involved. In *Webster v. Snyder*,[212] the court held that while an injured woman's subsequent marriage to an employee who negligently caused her injuries terminates any cause of action against him, she can still maintain an action against his employer. Similarly in *May v. Palm Beach Chemical Co.*,[213] the court held that a wife's disability to sue her husband for personal injuries did not relieve the owner of the automobile from liability for injuries sustained as a result of her husband's negligence. These decisions indicate that Florida, while adopting the position of the majority of jurisdictions that adhere to the immunity rule, has cast aside the rationale that to allow interspousal tort actions would be to encourage fraud against third parties.

Unlike some states, Florida remains consistent in applying the immunity doctrine to actions by the wife or her estate against the husband or his estate. In *Sullivan v. Sessions*,[214] the wife's administrator brought an action under the Survival Statute[215] against the administrator of the husband who had murdered his wife and then committed suicide. The court denied recovery on the basis that the wife during her lifetime would have no right of action against her husband and therefore her personal representative stands in her shoes and has no greater rights than she would have.[216] In the companion case of *Shiver v. Sessions*,[217] the minor children were allowed to recover against the estate of the stepfather under the Wrongful Death Act.[218] The court resolved any apparent inconsistencies by holding that the Wrongful Death Act creates in the beneficiaries an entirely new cause of action for injuries suffered by them, and is independent of any suit the wife might have brought if she had lived.[219]

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210. *Supra* note 207.

211. In Amendola v. Amendola, 121 So.2d 805 (Fla. 2d Dist. 1960), the court held that the wife's cause of action against her husband for injuries sustained prior to the marriage due to her husband's negligence was not cancelled or purged by the marriage, but rather her right of action was abated or suspended by the marriage.

212. 103 Fla. 1131, 138 So. 755 (1932).

213. 77 So.2d 468 (Fla. 1955).

214. 80 So.2d 706 (Fla. 1955).

215. FLA. STAT. § 45.11 (1965).

216. *Supra* note 214, at 707. See Ellis v. Brown, 77 So.2d 845 (Fla. 1955); Ake v. Birnbaum, 156 Fla. 735, 25 So.2d 213 (1946).

217. 80 So.2d 905 (Fla. 1955).

218. FLA. STAT. §§ 768.01-.02 (1965).

219. *Supra* note 217, at 907. The court re-emphasized the fact that the interspousal immunity rule was inapplicable and that the trend of the courts is to allow recovery against a husband or his estate, in an action by or for the benefit of children for damages sustained by reason of the unlawful killing of their mother. *E.g.*, Welch v. Davis, 410 Ill. 130, 101 N.E.2d 547 (1951); Rodney v. Staman, 371 Pa. 1, 89 A.2d 313 (1952); Kaczorowski v. Kalkosinski, 321 Pa. 438, 184 Atl. 663 (1936); Johnson v. Ottomeier, 275 P.2d 723 (Wash. 1954). See also Epps v. Railway Express Agency, 40 So.2d 131 (Fla. 1949).

The first and only direct attack on the Florida courts' position was made by the Federal District Court in *Alexander v. Alexander*.[220] The court held that the "interspousal immunity" doctrine as recognized by the Florida courts is unconstitutional:

> [T]he common law of Florida has been abrogated by the Constitution of the United States, and by the Constitution of the State of Florida and that one spouse can now sue another in the State of Florida for tortious acts committed by one spouse upon the other spouse. . . .[221]

This opinion was predicated on the fact that both the Florida Constitution[222] and the United States Constitution[223] provide that every person is entitled to protection under the law. The court did not recognize, and specifically abridged, the common law fiction that husband and wife are one person.

While the Florida courts are not bound by the *Alexander* decision, it is indicative of a trend that will ultimately cause the complete disposal of this archaic common law doctrine. The Florida Supreme Court in *Shiver v. Sessions*[224] stated that "it is settled law in this jurisdiction that the wife's disability to sue her husband for his tort is personal to her, and does not inhere in the tort itself."[225] This statement indicates that the wife has a separate legal existence and that the unity theory is becoming passé. If the Florida courts adopt this realistic stance, it follows that the only rationale for supporting the immunity theory is public policy.[226] With the liberal divorce laws in effect in Florida, and the public policy arguments questionable if not actually untenable, this writer believes that the Florida Supreme Court will shed the cloak of antiquity and destroy, demolish and abrogate the interspousal immunity doctrine.

XII. Conclusion

A growing number of courts are recognizing that the interspousal immunity doctrine is without justification in our modern civilization.

220. 140 F. Supp. 925 (W.D. S.C. 1956). The court sitting in South Carolina applied Florida law.

221. *Id.* at 929. It is interesting to note that the Supreme Court of Florida held in Waller v. First Sav. & Trust Co., 103 Fla. 1025, 138 So. 780 (1931), that the English common law may be abrogated by the Constitution and laws of Florida when such common law is contrary to the intendments, effect, purpose, and object of § 4 of our Declaration of Rights.

222. Fla. Const. Decl. of Rights § 4 provides that every person shall have a remedy in this state for any injury done him in his lands, goods, person, or reputation.

223. U.S. Const. amend. IV.

224. *Supra* note 217.

225. *Id.* at 907.

226. Even though common law disabilities of married women have now been removed in many states, as in Florida, by Emancipation Acts such as ours, it is generally held that the rule should still be adhered to either on the ground that the Emancipation Act in question did not completely destroy the common law fiction of the unity of husband and wife, or on the ground that domestic tranquillity is fostered by the prohibition of actions by a wife against her husband for his torts against her. *Id.* at 906.

Women now hold title to a significant portion of the nation's wealth. They play a decisive role in the industrial life of the country and have risen to the heights of congressional and cabinet positions.[227] Before blindly applying a common law rule or concept, the courts should carefully determine whether modern social and economic change has in effect vitiated the purpose of the rule. What has been accomplished in the past is but one factor in determining the course of the law. The interspousal immunity rule should be abrogated simply because it is predicated on a foundation which no longer exists. In summation the words of Lord Coke seem quite appropriate:

"Blessed be the amending hand."[228]

227. See Brown v. Gosser, 262 S.W.2d 480 (Ky. 1953).

228. See State v. Culver, 23 N.J. 495, 129 A.2d 715, 721 (1957) quoting from Coke's Fourth Institute.