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Domestic Relations - Abrogation of Interspousal Immunity - An Analytical Approach - Beaudette v. Frana, - Minn. -, 173 N.W.2d 416 (1969)

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interrogation be delayed until the advisor arrives? Should the government advise a potential defendant or even a taxpayer being audited that he may be accompanied by his accountant or his attorney? The list could go on. *Tarlowski* represents but one decision on a continuum, and certainly these questions will eventually be answered. The importance of *Tarlowski* is in its extension of the term "liberty" to a new right for individuals under our adversary theory of justice. Today a man who is being interrogated by a representative of the federal government may request the presence of his attorney, accountant, psychiatrist, or even his best friend and expect that request to be fulfilled.

Arthur H. Boelter

DOMESTIC RELATIONS— ABROGATION OF INTERSPOUSAL IMMUNITY— AN ANALYTICAL APPROACH

On April 12, 1968, Jacqueline Beaudette was injured while a passenger in an automobile driven by Garry H. Frana. Miss Beaudette subsequently filed a complaint alleging that the accident and the resulting injuries to her person were caused by the negligence of Frana. After the action commenced, but prior to the entry of judgment, Miss Beaudette and Mr. Frana were married. The trial court, upon motion by the defendant-husband, entered a summary judgment in his favor based upon the absolute defense of interspousal immunity.[1] The Supreme Court of Minnesota reversed, abrogating the absolute defense of interspousal immunity in tort actions. *Beaudette v. Frana,* — Minn. —, 173 N.W.2d 416 (1969).[2]

This decision is significant because it represents the most recent effort by a state court of last resort to dismantle the defense of marital immunity—a doctrine which prevents an injured spouse from receiving due satisfaction for injuries caused by the tortious conduct of the other spouse,

1. *See* Hovanetz v. Anderson, 276 Minn. 543, 148 N.W.2d 564 (1967); Karalis v. Karalis, 213 Minn. 31, 4 N.W.2d 632 (1942); Kyle v. Kyle, 210 Minn. 204, 297 N.W. 744 (1941); Patenaude v. Patenaude, 195 Minn. 523, 263 N.W. 546 (1935); Woltman v. Woltman, 153 Minn. 217, 189 N.W. 1022 (1922); Drake v. Drake, 145 Minn. 388, 177 N.W. 624 (1920); Strom v. Strom, 98 Minn. 427, 107 N.W. 1047 (1906).

2. The case under analysis was consolidated for trial with the case of Green v. Green, — Minn. —, 173 N.W.2d 416 (1969). Since both cases involved substantially the same facts, the Minnesota Supreme Court made no distinction between the two and held the same in both.

whether such conduct occurs before or after marriage.[3] The purpose of this case note is to examine the doctrine of interspousal immunity and to analyze critically both the reasoning of the *Beaudette* court and the efficacy of its judgment.

At common law husband and wife were considered to be one legal person—the husband.[4] Hence, neither spouse could maintain an action against the other.[5] However, in the nineteenth century the individual rights of married women were recognized by the passage of the Married Women's Emancipation Acts, which conferred "upon married women the separate ownership and control of their own property, including their choses in action, and the capacity to sue or be sued without joinder of the husband."[6] Since these statutes were directed toward freeing married women from their husbands' control in property matters, the courts have generally agreed that a wife can maintain an action against her husband for any tort to her property interests.[7] Marked differences in

3. *See Alabama*—Johnson v. Johnson, 201 Ala. 41, 77 So. 335 (1917); *Alaska*—Cramer v. Cramer, 379 P.2d 95 (Alaska 1963); *Arkansas*—Leach v. Leach, 227 Ark. 599, 300 S.W.2d 15 (1957); *California*—Klein v. Klein, 58 Cal. 2d 692, 376 P.2d 70 (1962); *Colorado*—Rains v. Rains, 97 Colo. 19, 46 P.2d 740 (1935); *Connecticut*—Brown v. Brown, 88 Conn. 42, 89 A. 889 (1914); *Idaho*—Lorange v. Hays, 69 Idaho 440, 209 P.2d 733 (1949); *Kentucky*—Brown v. Gosser, 262 S.W.2d 480 (Ky. 1953); *New Hampshire*—Gilman v. Gilman, 78 N.H. 4, 5 A. 657 (1915); *New York*—Coster v. Coster, 289 N.Y. 438, 46 N.E.2d 509 (1943); *codified by*, N.Y. GEN. OBLIGATIONS LAW § 3-313 (1964); *North Carolina*—Jernigan v. Jernigan, 236 N.C. 430, 72 S.E.2d 912 (1952); *codified by*, N.C. GEN. STAT. § 52-5 (1965); *North Dakota*—Fitzmaurice v. Fitzmaurice, 62 N.D. 191, 242 N.W. 526 (1932); *Oklahoma*—Courtney v. Courtney, 184 Okla. 395, 87 P.2d 660 (1938); *South Carolina*—Pardue v. Pardue, 167 S.C. 129, 166 S.E. 101 (1932); *South Dakota*—Scotvold v. Scotvold, 68 S.D. 53, 298 N.W. 266 (1941); *Wisconsin*—Fehr v. General Accident, F. & L. Assurance Corp. Ltd., 246 Wis. 228, 16 N.W.2d 787 (1944); *codified by*, WIS. STAT. ANN. § 246.075 (1967).

4. 1 BLACKSTONE, COMMENTARIES 442 (1768): "By marriage, the husband and wife are one person in law; that is, the very being or legal existence of the woman is suspended during marriage, or at least is incorporated and consolidated into that of the husband." *See also* McCurdy, *Personal Injury Torts Between Spouses*, 4 VILL. L. REV. 303, 303-307 (1959).

5. The grounds for a denial of relief in suits between spouses was clearly announced in Phillips v. Barnett, 1 Q.B.D. 436 (1876) wherein a woman after divorce sued her former husband for alleged assaults and batteries committed during coverture. The court held no action would lie. Justice Blackburn stated: "[T]he objection to the action is not merely with regard to the parties, but a requirement of law founded upon the principle that the husband and wife are one person." *Accord*, Norris v. Lantz & Hyde, 18 Md. 260 (1861); Ferrar v. Bessey, 24 Vt. 89 (1852).

6. *See* PROSSER, §116 at 881 (3d ed. 1964). *See also infra* note 12.

7. *See, e.g.*, Hamilton v. Hamilton, 255 Ala. 284, 51 So.2d 13 (1950); Hubbard v. Ruff, 97 Ga. App. 251, 103 S.E.2d 134 (1958); Larison v. Larison, 9 Ill. App. 27 (1881); Moreau v. Moreau, 250 Mass. 110, 145 N.E. 43 (1924); Whiting

judicial interpretation of these acts, however, have called into question their applicaton with respect to interspousal personal injury suits. Since only a few states have passed legislation conclusively resolving this problem,[8] there is to date remaining within the judiciary a distinct polarization of views: a majority of jurisdictions precluding the actions and a minority of jurisdictions allowing interspousal action.[9] By analogy, the majority of courts preclude a husband from bringing suit against his wife, and the minority allow such suits.[10]

The courts of the majority have used four arguments to sustain the doctrine of interspousal immunity: (1) The Married Women's Acts are in derogation of the common law and are thus to be strictly construed so as to preclude a wife from maintaining a personal injury action against her husband; (2) the criminal and divorce courts provide adequate remedies to redress the wrong which has been committed; (3) to allow interspousal actions in tort would lead to the disruption of domestic harmony; and (4) if the action were allowed, the relationship of the parties would provide a basis for spurious suits brought solely to defraud the insurance company covering the wrongdoer.[11] The minority courts, on the other hand, have rejected each of these arguments and contend that the doctrine of interspousal immunity should be abrogated. This case note will critically evaluate the positions taken by both the majority and the minority with respect to each of these arguments.

It is fundamental, in understanding the position of the majority and minority courts within the area of interspousal immunity, to examine the reasoning used by each side in construing the Married Women's Acts.[12]

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v. Whiting, 114 Me. 382, 96 A. 500 (1916); Carpenter v. Carpenter, 154 Mich. 100, 117 N.W. 598 (1908); Madget v. Madget, 850 Ohio App. 18, 87 N.E.2d 918 (1949); Bruner v. Hart, 178 Okla. 222, 62 P.2d 513 (1936); Freiler v. Kear, 126 Pa. 470, 17 A. 668 (1889); Good v. Good, 39 W. Va. 357, 19 S.E. 382 (1894).

8. N.Y. GEN. OBLIGATIONS LAW §3-313; N.C. GEN. STAT. §52-5; WIS. STAT. ANN. §246.075. All of these statutes allow the action in tort to be maintained. Contra, ILL. REV. STAT. ch. 68, § 1 (1969), which specifically denies the action in torts between the spouses.

9. *See supra* note 3.

10. *See* Leach v. Leach, *supra* note 3.

11. *See generally,* Farage, *Recovery for Torts between Spouses,* 10 IND. L. J. 290 (1935); Jayme, *Interspousal Immunity: Revolution and Counterrevolution in American Tort Conflicts,* 40 S. CAL. L. REV. 307 (1967); Keegan, *Family and Tort Actions: Liability and Immunity,* 1962 U. ILL. L.F. 557; McCurdy, *Torts Between Persons in Domestic Relations,* 43 HARV. L. REV. 1030 (1930); McCurdy, *Property Torts between Spouses and Use During Marriage of the Matrimonial Home Owned by the Other,* 2 VILL. L. REV. 447 (1957); Sanford, *Personal Torts within the Family,* 9 VAND. L. REV. 823 (1956).

12. These statutes are collected at 3 VENIER, AMERICAN FAMILY LAWS, §§ 167, 179, 180 (1935), and are discussed in McCurdy, *supra* note 4.

The leading case explaining the position taken by the majority of jurisdictions is *Thompson v. Thompson.*[13] In an action brought by a wife against her husband for personal injuries she sustained, the United States Supreme Court was called upon to interpret the meaning of a District of Columbia statute authorizing married women, "to sue separately for the recovery, security, or protection of their property, and for torts committed against them, as fully and as freely as if they were unmarried."[14] In upholding the doctrine of interspousal immunity, the Supreme Court stated:

> The statute was not intended to give a right of action as against the husband, but to allow the wife, in her own name, to maintain actions of tort which, at common law, must be brought in the joint names of herself and her husband.[15]

In reaching this conclusion, the Court reasoned that the legislature must clearly indicate within the terms of the statute its intention to abolish a rule established at the common law.[16] The Court may only interpret and apply the law to the facts of a given case; they cannot imply an intent of a legislature.[17]

In those jurisdictions which still adhere to the doctrine of interspousal immunity, the construction placed on the District of Columbia statute by the Supreme Court in *Thompson* is consistent with their interpretation of the proper roles to be played by the judiciary and the legislature.[18] The Iowa Supreme Court, for example, indicated in *Flogel v.*

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13. 218 U.S. 611 (1910).

14. DISTRICT OF COLUMBIA CODE, 31 STAT. 1189 § 1155 (1901); as found today in D.C. CODE § 30-208 (1961).

15. *Supra* note 13, at 617. *Accord,* Strom v. Strom, *supra* note 1, at 428, 107 N.W. at 1048, wherein the Supreme Court of Minnesota stated: "This statute gives to a married woman the same right of action in her own name for any injuries sustained to her reputation, person, or property as her husband has in his own name to maintain an action for like injuries sustained by him, and no other or greater right. The purpose of the statute was to place the husband and wife on an equality as to actions by either for injuries to person, reputation or property. The husband cannot and never could bring an action against his wife for a personal tort committed by her against him during coverture. It follows that the statute does not authorize her to bring an action against him for a personal tort committed by him against her during coverture for her rights in this respect are expressly limited by the statute to the rights to which the law gives to him."

16. *Supra* note 13. *See also* Paulus v. Bauder, 106 Cal. App. 2d 589, 235 P.2d 422 (1951); Karalis v. Karalis, *supra* note 1; Rogers v. Rogers, 265 Mo. 200, 177 S.W. 382 (1915); Willott v. Willott, 333 Mo. 896, 62 S.W.2d 1084 (1933); Morrissett v. Morrissett, 80 Nev. 566, 397 P.2d 184 (1964).

17. *Supra* note 13.

18. *See, e.g.,* Sink v. Sink, 172 Kan. 217, 239 P.2d 933 (1952); Hudson v. Hudson, 226 Md. 521, 174 A.2d 339 (1961); Ensminger v. Ensminger, 222 Miss. 799, 77 So.2d 308 (1955).

Flogel[19] that the Married Women's Acts were not enacted for the purpose of allowing a wife to sue her husband in tort, but rather that the doctrine of interspousal immunity must remain in force until the legislature takes positive steps to declare its demise.[20] Thus, the majority contends that it is the duty of the legislature, not the courts, to effectuate any departure from the common law rule of interspousal immunity.

As the decision in *Thompson* serves the majority jurisdictions, so also the Supreme Court of Connecticut's decision in *Brown v. Brown*[21] serves the minority. The Connecticut court, in construing the Connecticut's Married Women's Act,[22] held that the act not only liberated the woman from her husband in her rights of contract, but also gave her those rights which she enjoyed prior to coverture. The court stated:

> In marriages which have occurred since the Act took effect the parties retain their legal identity, and their civil rights are to be thus established. These rights . . . are the same as they were before marriage. The statute leaves nothing to implication.[23]

The court went on to say that it is immaterial whether the statute confers on the wife the right to sue her husband in tort, for "these are rights which belonged to her before marriage, and . . . are not lost by the fact of marriage."[24]

In examining both the majority and minority courts' construction of these statutes in their most favorable light, the position taken by the minority courts is undoubtedly more consistent. While the majority would sever the fictional unity of husband and wife with respect to interspousal property suits, they deny the right of a woman, *qua* woman, to sue her spouse in a tort action. But as the minority courts have pointed out, the Married Women's Acts serve to separate completely the legal identity of the husband and wife, and thus a wife has the right to sue her husband either in tort or property.

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19. 257 Iowa 547, 133 N.W.2d 907 (1965).

20. *Id. Accord,* Brief for Appellee at 13, Beaudette v. Frana, — Minn. —, 173 N.W.2d 416 (hereinafter cited as Beaudette), where it is stated: "The legislative approach has a recognized advantage over the judicial approach in its being flexible and able to make provision for the ramifications and consequences of any change in law that is being made." *See also* Peck, *The Role of the Courts and Legislatures in the Reform of Tort Law*, 48 MINN. L. REV. 265 (1963).

21. 88 Conn. 42, 89 A. 889 (1914).

22. CONN. GEN. STAT. ANN. ch. 809, § 46-9 (1958).

23. *Supra* note 21, at 47, 89 A. at 891.

24. *Compare* Brown v. Brown, *supra* note 21, at 47, 89 A. at 891, *with* O'Grady v. Potts, 193 Kan. 644, 396 P.2d 285 (1964), where the Kansas Supreme Court held that prior to the marriage, the wife had an accrued property right (her chose in action) which was protected under the Married Women's Act, and so could not be denied by the doctrine of interspousal immunity.

Apart from construing legislation to facilitate an adherence to the doctrine of interspousal immunity, the majority courts have posed, and the minority courts have rebutted, the contention that the injured spouse is not left without a remedy. Although precluded in the majority courts from maintaining an action in tort, the injured spouse may seek relief in the criminal courts. This view, presented quite early in the controversy,[25] holds that the injuries sustained are afforded adequate relief through prosecution by the state for the violation of a right charged with the state's keeping.

Furthermore, some courts have held that a suit for divorce also provides the wife with an adequate remedy for interspousal torts. For example, in *Abbott v. Abbott*,[26] a wife brought an action against her husband for false imprisonment. The Maine Supreme Court realized the non-compensating effect of a criminal prosecution, but the court sustained the majority jurisdictions' position and upheld the doctrine of interspousal immunity. The court stated that if the injury be so great, the wronged spouse has an adequate remedy by suing for a divorce. If this is done by a wife, then the decree, when entered, would entitle her to dower in her husband's estate, and "all her needs and all her cause of complaint, including any cruelties suffered, can be considered by the court, and compensation in the nature of alimony for them . . . ."[27] The *Abbott* court would, therefore, expand the majority jurisdictions' proposition that the criminal prosecution provides a remedy either supplemental, or as an alternative, to a suit for a divorce; when the two are taken together, an adequate remedy is available to the injured spouse.[28]

The weakness of the majority's argument is seen not only in the rebuttal by the courts of the minority, but also by the fact that today it has all but vanished from any case considering interspousal immunity. The minority courts have seen the adequate remedies argument as "illusory and inadequate,"[29] in that a criminal prosecution of the tort-feasor, or a suit for divorce, neither compensates for damages done, nor encompasses all torts that may be committed.[30] Furthermore, the minority courts point out that the criminal remedy postulated by the majority can only be in-

25. Bandfield v. Bandfield, 117 Mich. 80, 75 N.W. 287 (1898); Drake v. Drake, *supra* note 1; Austin v. Austin, 136 Miss. 61, 100 So. 591 (1924); Gowin v. Gowin, 295 S.W. 211 (Tex. 1927); Nickerson v. Nickerson, 65 Tex. 281 (1886).

26. 67 Me. 304 (1877).

27. *Id.* at 307. *See also* Rogers v. Rogers, *supra* note 16.

28. *Supra* note 26.

29. Johnson v. Johnson, *supra* note 3.

30. Damm v. Elyria Lodge No. 465, 158 Ohio St. 107, 107 N.E.2d 337 (1952).

stituted for violations of criminal statutes prescribing penalties for actions solely intentional in nature. Also, the wrongdoer, though subject to fine or imprisonment, cannot be made to compensate directly to the injured spouse for the damages suffered. Thus, though subsequent conduct may be prevented, that of the past is left unsatisfied.[31]

Divorce is also not the remedy the early majority courts thought it would be: first, negligent conduct is not a ground for divorce; second, the religious doctrine of the injured spouse may prevent attempting to secure a divorce;[32] and finally, the divorce action, to be compensatory, must be brought by the wife and not the husband. Thus divorce, though it may be *a* remedy, can never be *the* remedy which an action in tort could provide.

The next argument advanced by the courts of the majority asserts that actions between spouses would destroy the peace and tranquility of the home.[33] This argument, as the Maryland court stated in *David v. David*,[34] is based

> upon the broader "sociological and political" ground that [suits between spouses] would introduce into the home, the basic unit of organized society, discord, suspicion and distrust, and would be inconsistent with the common welfare.[35]

The validity of this contention rests on the majority jurisdictions' conclusive presumption that the promotion of marital harmony is a necessary requirement to the furtherance of a viable society. By abrogating the doctrine of interspousal immunity, the courts would be encouraging a husband and wife to sue each other for "real or fanciful wrongs." This would place an additional burden upon the marital relationship and "the home may well be split apart by the adversary roles which the spouses will be required to assume."[36] Thus, by retaining the doctrine, the majority courts have achieved the objective of preserving family unity and thereby have fulfilled public policy requirements.[37]

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31. Goode v. Martinis, 58 Wash. 2d 229, 361 P.2d 941 (1961). Though upholding the doctrine of interspousal immunity this court rejected the contention that adequate remedies could be found in the criminal or divorce courts.

32. *See* Comment, 36 S. CAL. L. REV. 456 (1963).

33. *See, e.g.*, Holman v. Holman, 73 Ga. App. 205, 35 S.E.2d 923 (1945); Hamilton v. Fulkerson, 285 S.W.2d 642 (Mo. 1955); Deatherage v. Deatherage, 328 S.W.2d 624 (Mo. 1959); Castelluci v. Castelluci, 96 R.I. 34, 188 A.2d 467 (1963); Smith v. Southern Farm Bureau Cas. Ins. Co., 174 So.2d 122 (La. 1965); Lillienkamp v. Rippetoe, 133 Tenn. 57, 179 S.W. 628 (1915).

34. 161 Md. 532, 157 A. 755 (1932).

35. *Id.* at 535, 157 A. at 756. *Accord*, Taibi v. DeGenaro, 65 N.J. Super. 294, 167 A.2d 667 (1961).

36. Lyons v. Lyons, 2 Ohio St. 2d 243, 244, 208 N.E.2d 533, 535 (1965).

37. Kennedy v. Camp, 14 N.J. 390, 102 A.2d 595 (1954); Kaczorowski v. Kal-

The courts of the minority have accepted the preservation of "domestic peace and tranquility" as an expression of sound public policy, but contend that the statement of this objective does not answer the pertinent question, which is:

> Does denying a wife [or husband] the right to file against her husband [or his wife] a meritorious suit for personal injuries contribute to any appreciable degree to the attainment of the laudable objective?[38]

The minority courts have responded negatively to this question. Judge Crouch, in his dissenting opinion in *Mertz v. Mertz*,[39] expressed the minority's position as follows:

> Neither in the history of the rule of interspousal immunity nor in its operation is there anything to indicate that that policy is founded upon a definite view—or even upon some feeling—that justice or the public welfare would be affected by a contrary rule . . . . It is enough to say that the rule exists merely as a product of judicial interpretation, is vestigial in character, and embodies no tenable policy of morals or of social welfare.[40]

He concluded by indicating that the doctrine of interspousal immunity survives, not because of the necessity to preserve domestic harmony, but because of the inability of the majority courts to realize the shallowness and inequality of the doctrine.

In supporting the argument that the doctrine of interspousal immunity does *not* preserve domestic harmony, the minority courts have chided the majority for its failure to distinguish an action brought upon an intentional tort, from an action brought upon a negligent tort.

When considering an intentional tort, such as assault and battery, the minority courts have held that it would be difficult to conceive that any type of peace and tranquility remains which the personal injury action could destroy.[41] This contention was clearly stated in the Oregon case of *Apitz v. Dames*.[42] In an action brought by the executor of decedent-wife's estate against the administrator of decedent-husband's estate for damages resulting from the murder of decedent-wife by decedent-husband, the court said:

> The chief reason relied upon by all these courts [referring to the majority courts], however, is that personal tort actions between husband and wife would disrupt

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kosinski, 321 Pa. 438, 184 A. 663 (1936); Lunt v. Lunt, 121 S.W.2d 445 (Tex. Civ. App. 1938); Poling v. Poling, 116 W. Va. 187, 179 S.E. 604 (1935).

38. Brown v. Gosser, *supra* note 3, at 483-84.

39. 271 N.Y. 466, 3 N.E.2d 597 (1936).

40. *Id.* at 476, 3 N.E.2d at 601.

41. *See, e.g.*, Self v. Self, 58 Cal. 2d 683, 376 P.2d 65 (1962); Bushnell v. Bushnell, 103 Conn. 583, 131 A. 432 (1925).

42. 205 Or. 242, 287 P.2d 585 (1955).

and destroy the peace and harmony of the home, which is against the policy of the law. This is on the bald theory that after a husband has beaten his wife, there is a state of peace and harmony left to be disturbed; and that if she is sufficiently injured or angry to sue him for it, she will be soothed and deterred from reprisals by denying her the legal remedy . . . .[43]

Thus the language of the *Apitz* court clearly shows that the intentional tort breeds disharmony, and, therefore, should not be within the purview of interspousal immunity.

When considering interspousal torts based upon negligence, the minority holds that though domestic harmony would not be destroyed, the maintenance of these actions should not be denied. They argue that most of these actions are founded upon injuries sustained through automobile accidents wherein the negligent spouse-driver is covered by a liability insurance policy.[44] Therefore, the solidarity of marital relations would be left unaffected because the insurance company, not the wrongdoing spouse, would pay for the damages sustained.

Apart from the distinctions made by the minority courts with reference to intentional and negligent tort actions, the minority jurisdictions have attacked the majority courts' "domestic harmony" argument on one other ground. The minority courts have pointed to the inconsistency in the majority's position in allowing actions for breach of contract, on a promissory note, or for injury to property, but denying the personal injury action.[45] The minority courts contend that if "domestic harmony" is disturbed by the personal injury action, then it is also disturbed by property actions as well.[46] Therefore, either all actions between spouses should be denied as being contrary to public policy, or all should be allowed.

In attempting to defend its position against the minority's attacks, the majority courts have remained silent except for the area of the negligent tort. The majority jurisdictions' position in the situation where the action is brought for negligence and the possibility of liability insurance

43. *Id.* at 264, 287 P.2d at 595.

44. Balts v. Balts, 273 Minn. 419, 142 N.W.2d 66 (1966). The court, with regard to intra-family litigation, indicated that the negligent tort action is increasingly founded upon the automobile accident where the driver carries liability insurance. Thus the possibility of intra-family discord is greatly diminished.

45. *See* PROSSER, *supra* note 6, at 883, wherein Dean Prosser examines the inconsistency of the majority courts' position which would preclude a spouse from bringing an action in tort for personal injuries because this will preserve domestic harmony, while allowing an action for divorce, or for a tort to property, or a criminal prosecution on the same basis.

46. Katzenberg v. Katzenberg, 183 Ark. 626, 37 S.W.2d 696 (1931); Ginsberg v. Ginsberg, 126 Conn. 146, 9 A.2d 812 (1939); Roberts v. Roberts, 310 S.W.2d 55 (Ky. 1958); Combs v. Combs, 262 S.W.2d 821 (Ky. 1953).

exists was best expressed by the Supreme Court of Utah in *Rubalcava v. Gisseman.*[47] In an action brought by a wife against the estate of her deceased husband, for injuries sustained to her as a result of the decedent's negligence, the court stated:

> [To argue that] discord will not be engendered when the insurance company is to pay, is neither sound nor entirely realistic. The question of liability can be ascertained justly only upon its own merits. Whether there is insurance or not is immaterial to this determination.[48]

This defense of the majority position is patently erroneous, for the Utah Supreme Court is admitting that only by an examination upon the merits can the question of liability be decided. Yet it would deny the wronged spouse the right to try the cause of action on the merits.

The final argument of the majority courts is that the interspousal action, if allowed, would provide an opportunity for spurious and collusive suits between the spouses.[49] This contention is founded upon the fact that most interspousal actions are brought for damages sustained by the injured spouse because of the negligence of the other spouse. With the increase of liability insurance, as exemplified by numerous interspousal automobile accident cases,[50] it is the insurance company, although not named as a party,[51] which stands to lose. Because of the intimacy of the marital

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47. 14 Utah 2d 344, 384 P.2d 389 (1963).

48. *Id.* at 348, 384 P.2d at 391. *Accord,* Boisvert v. Boisvert, 94 N.H. 357, 53 A.2d 515 (1947); Prince v. Prince, 205 Tenn. 451, 326 S.W.2d 908 (1959).

49. *See* Maine v. James Maine & Sons, 198 Iowa 1278, 1279, 201 N.W. 20, 21 (1924), wherein the court stated in denying the action: "The occasion for a controversy of this character may be found in the fact . . . that the appellant company carried a policy protecting it against liability for damages caused by the automobile." *See also* Harvey v. Harvey, 239 Mich. 142, 146, 214 N.W. 305, 306 (1927), wherein the court in holding that a wife cannot sue her husband for an injury caused by his negligence stated: "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." *Cf.*, Newton v. Webber, 119 Misc. 240, 196 N.Y.S. 113 (1922); Lubowitz v. Taitness, 293 Mass. 39, 198 N.E. 320 (1935).

50. *See, e.g.*, Rains v. Rains, 97 Colo. 19, 46 P.2d 740 (1935); Sink v. Sink, *supra* note 18; Schneider v. Schneider, 160 Md. 18, 152 A. 498 (1930); Holder v. Holder, 384 P.2d 663 (Okla. 1962); Smith v. Smith, 205 Or. 286, 287 P.2d 572 (1955).

51. Horsford v. Carolina Glass Co., 92 S.C. 236, 258, 75 S.E. 533, 541 (1912), wherein the court stated: "There can be no doubt on the bench or at the bar that . . . both reason and authority forbid bringing into the evidence or argument the fact that defendant is protected by . . . liability insurance. Such evidence or argument has a manifest and strong tendency to carry the jury away from the real issue and to lead them to regard carelessly the legal rights of the defendant on the ground that someone else will have to pay the verdict . . . ." *See also* Wood v. England, 226 S.C. 73, 76, 83 S.E.2d 644, 645 (1954), wherein the court stated: "It is a well

relationship and the existence of insurance, the majority courts hold that the proceeding would loose its adversary nature, creating a strong inducement to "trump up claims and conceal possible defenses."[52] The ultimate result of allowing such actions was expressed by Justice Sims in his dissenting opinion in *Brown v. Gosser*.[53] The dissent stated that to allow interspousal actions

> encourages raids on insurance companies through unmeritorious claims which never would be instituted where the husband did not carry liability insurance, thus possibly raising insurance rates on thousands of honest persons for the benefit of a fraudulent few.[54]

Thus Justice Sims and the majority courts believe that the doctrine of interspousal immunity is necessary to prevent collusive suits between spouses.

The minority courts' position, with respect to the possibility of collusion in interspousal litigation, has been best discussed by the California Supreme Court in *Klein v. Klein*.[55] In an action brought by a wife for personal injuries sustained because of the negligence of her husband, the court recognized the majority courts' contention. The California Supreme Court also realized, however, that the possibility of fraud and collusion exists to some degree in all cases, and a right of action cannot be denied merely because of this possibility.[56] The courts must, therefore,

> depend upon the efficacy of the judicial process to ferret out the meritorious from the fraudulent claim in particular cases. If those processes prove inadequate, the problem becomes one for *the Legislature*. Courts will not immunize tortfeasors from liability in a whole class of cases because of the possibility of fraud, but will depend upon *the Legislature* to deal with the problem as a question of public policy.[57]

The court in *Klein* and the minority jurisdictions have clearly indicated a much sounder basis for handling the problem of collusion in interspousal tort actions. The minority courts' position is not only protective of the spouse who does have a valid cause of action, but also attempts to indicate where the solution to the possibility of fraud and collusion should lie in the absence of judicial capability in dealing with the problem.

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settled principal of law . . . that . . . the offering of evidence or the argument of counsel to the jury relative to insurance is highly improper and warrants the Court declaring a mistrial . . . ."

52. *Supra* note 36, at 245, 208 N.E.2d at 536.

53. Brown v. Gosser, *supra* note 3.

54. Brown v. Gosser, *supra* note 3, at 485.

55. Klein v. Klein, *supra* note 3.

56. Klein v. Klein, *supra* note 3.

57. Klein v. Klein, *supra* note 3, at 695-96, 376 P.2d at 73 (emphasis added).

These are the arguments of both the majority and minority courts which the Supreme Court of Minnesota was confronted with in the case of *Beaudette v. Frana.*[58] In choosing to abrogate the doctrine of interspousal immunity, the *Beaudette* court founded its decision upon two Minnesota cases, which dealt more broadly with the area of intra-family immunity. In *Balts v. Balts*[59] and *Silesky v. Kelman,*[60] the Minneosta Supreme Court abrogated the parent-child and child-parent immunities respectively. These cases formulated the rationale adopted by *Beaudette*: the social gain to be derived from the, "financial protection for those whom an insured wrongdoer ordinarily has the most natural motive to protect transcends the more intangible social loss of impairing the integrity of the family relationship."[61]

Apart from this public policy argument, *Beaudette* recognized the possibility of collusion in suits between spouses. To minimize collusion the burden is placed upon the court to act "promptly and firmly at any appearance of frivolous or fraudulent interspousal claims."[62] In each case, therefore, it is the court which must question the substance of the claim presented, within the intimate relationship of marriage, and strike a delicate balance between the wrong committed and the risk of collusion. In the final analysis, the possibility of collusive suits must be tested by the experience of future litigation to determine whether the proper balance of social interest has been achieved.[63]

The *Beaudette* decision has not left the Minnesota courts without tools to control interspousal litigation. Though the doctrine of interspousal immunity has been abrogated, the plaintiff-spouse, when bringing an action upon an intentional tort, will not recover unless substantial evidence is introduced showing that the "injurious contact was plainly excessive or a gross abuse of normal privilege."[64] Thus *Beaudette* has placed a burden upon the injured spouse which has never before been imposed by the other minority courts. By excluding those torts intentionally committed, but occurring as part of the marital union, the court has not only prohibited vexatious litigation, but has also protected the integrity of the valid interspousal suit.

In order to balance the restraints against collusive litigation with the

58. Beaudette, *supra* note 20.
59. *Supra* note 44.
60. 281 Minn. 431, 161 N.W.2d 631 (1968).
61. Beaudette, *supra* note 20, at —, 173 N.W.2d at 419.
62. Beaudette, *supra* note 20, at —, 173 N.W.2d at 420.
63. Beaudette, *supra* note 20.
64. Beaudette, *supra* note 20, at —, 173 N.W.2d at 420.

protection afforded the plaintiff-spouse, the court in *Beaudette* has specified that the defense of assumption of risk is available to the wrongdoing spouse when the suit sounds in negligence.[65] Thus the courts of Minnesota will not need to rely exclusively upon their own perceptiveness to discern the valid from the collusive, or spurious, suit. By allowing the defendant-spouse to use assumption of risk as a defense, the ordinary household accident, or even the automobile accident, may not give rise to a recovery, for these are matters upon which spouses, perhaps, assume the risk when entering into the marriage contract.[66]

The reasoning and the conclusion of the *Beaudette* court are sound. The court has not only abrogated the doctrine of interspousal immunity, but also has established guidelines by which the Minnesota courts can properly judge the efficacy of tort actions between spouses. Judicial abrogation of the doctrine of interspousal immunity, however, is not the sole means to the resolution of the problem,[67] nor is it the most expeditious method by which the doctrine can be confronted. Judicial action to abolish the doctrine of interspousal immunity may lead to legislative reaction in abrupt derogation of the court's decision. For example, the Illinois court in *Brandt v. Keller*[68] departed from prior Illinois case law[69] and abrogated the doctrine of interspousal immunity. This decision apparently turned Illinois away from the majority position. In 1953, just one year after *Brandt*, the General Assembly amended the Illinois Married Women's Act, to leave no doubt that the legislature intended the doctrine of interspousal immunity to remain in force.[70]

With the statutory resolution of the doctrine of interspousal immunity, Illinois returned to its pre-*Brandt* status. The attempted judicial action did not lead to a termination of the conflict, but to an awakening of the same. Therefore, the *Minnesota* Supreme Court may ultimately find itself defending a doctrine which it had previously renounced. This prospect, however, does not seem highly probable, for Illinois represents a clear minority of one.

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65. Beaudette, *supra* note 20.

66. Courtney v. Courtney, *supra* note 3.

67. *Supra* note 8.

68. 413 Ill. 503, 109 N.E.2d 729 (1952).

69. Welch v. Davis, 410 Ill. 130, 101 N.E.2d 547 (1951); Chestnut v. Chestnut, 77 Ill. 346 (1875); Tallios v. Tallios, 345 Ill. App. 387, 103 N.E.2d 507 (1952).

70. ILL. REV. STAT. ch. 68, § 1 (1969), which states: "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.*" (Emphasis added).

The criteria advanced by the majority and minority courts, and the reasoning of the Minnesota Supreme Court in *Beaudette*, do not encompass all of the methods which may be used to deal with the problems created by the doctrine of interspousal immunity. The problem of collusion, for example, could be somewhat resolved by the passage of an "Automobile Guest Statute."[71] Such a statute would preclude an injured passenger in an automobile accident from bringing an action against the negligent driver, absent gross negligence or intentional misconduct.

In the absence of an applicable state statute,[72] another alternative could be that the contract of insurance contain limitations excluding a spouse, or other family member, from coverage.[73] Therefore, where an insurance company has initially assumed the risk of covering the injured spouse and has derived the full benefit of the policy premiums, it would not be protected from its own improvidence.

A final alternative, most applicable to the collusion argument, was expressed by the Missouri court in the case of *Brawner v. Brawner*.[74] The court stated that:

> [A]ccident insurance coverage would be preferable to liability insurance. While the protection is limited to pecuniary losses. . . . including those resulting from automobile accidents, it is not dependent upon human fault and does not put the married couple in any adversary position as a prerequisite for recovery.[75]

Thus, by replacing liability insurance coverage with accident insurance coverage, the majority courts' position with reference to collusion would be greatly weakened, since it would be unnecessary.

As noted before, the doctrine of interspousal immunity is "vestigial in character and embodies no tenable policy of morals or of social welfare."[76] The doctrine exists, not because of the fear of domestic disharmony or collusion, but only because the majority courts refuse to depart from precedent.

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71. *See, e.g.*, ILL. REV. STAT. ch. 95½, § 9-201 (1969), which states: "No person riding in or upon a motor vehicle or motorcycle as a guest . . . nor his personal representative in the event of the death of such guest, shall have a cause of action for damages against the driver . . . unless such accident shall have been caused by the wilful and wanton misconduct of the driver . . . ."

72. *See, e.g.*, MINN. STAT. 474 § 1 (1969), and MINN. STAT. 713 § 3 (1969), wherein the legislature has prohibited household-exclusion clauses in liability insurance policies and also has provided for the inclusion of supplemental accident indemnity coverage for members of the household in automobile liability policies.

73. Courtney v. Courtney, *supra* note 3.

74. 327 S.W.2d 808 (Mo. 1959).

75. *Id.* at 814.

76. Mertz v. Mertz, *supra* note 39, at 476, 3 N.E.2d at 601.

The courts of the minority, and most recently the court in *Beaudette*, have recognized the necessity to break from tradition. They have effectively rebutted the criteria developed by the majority courts. This step is clearly a positive one, for the law can only function when it affords a means to hear the complaints of all of its subjects. Thus, the fiction of marital unity should no longer be used to prevent the furtherance of a goal of society: *the promotion of harmony through justice.*

Daniel E. Wanat

INSURANCE—EXCESS EXPOSURE—INSURER'S DUTY TO ADVISE INSURED OF HIS RIGHT TO CONTRIBUTE

John F. Kiely was fatally injured when struck by a truck owned by Nathan and Manuel Brockstein and driven by Irving Bloom, an employee of the Brocksteins. Kiely's estate sued the Brocksteins and Bloom on two causes of action, one for wrongful death, asking $50,000 for the widow, and the other claiming $500,000 for decedent's pain and suffering. The Brocksteins were insured by Nationwide Mutual Insurance Company for bodily injury liability arising out of the use of the truck. The maximum coverage for any one person was $50,000. Settlement negotiations collapsed, and a judgment was finally entered for $106,413.33.[1] Nationwide paid $50,000, plus costs and interest of $8,847.81. The balance of the judgment was settled by the payment of $25,000 by the Brocksteins.

The Brocksteins then brought an action against Nationwide on the theory that the insurer did not properly represent the interests of the insured in its efforts to settle the case. The United States District Court for the Eastern District of New York entered judgment for Nationwide. On appeal, the United States Court of Appeals reversed and remanded, holding that the insurer was guilty of bad faith because the insurer did not advise the insured during the settlement negotiations that he could contribute toward a settlement within the policy limits. *Brockstein v. Nationwide Mutual Insurance Company,* 417 F.2d 703 (2d Cir. 1969) (hereinafter cited as *Brockstein* II).

The significance of this decision is that in situations where a claim potentially exceeds policy limits, and a settlement demand is made within

1. Brochstein v. Nationwide Mut. Ins. Co., 266 F. Supp. 223 (E.D. N.Y. 1967) [hereinafter cited as *Brockstein* I]. Note that the spelling of this case title differs from the spelling of the title in the appellate court, Brockstein v. Nationwide Mut. Ins. Co., 417 F.2d 703 (2d Cir. 1969) [hereinafter cited as *Brockstein* II]; the "Brockstein" spelling will be used in this note.