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INTRODUCTION

Cessant ratione—cessat lex.[1] This legal maxim applies to no legal rule with greater vigor than it does to the doctrine of interspousal tort immunity, which prohibits one spouse from suing the other in tort. Drawing increasing criticism from courts and scholars alike, the rule has been abrogated[2] or substantially modified[3] in a rapidly increasing minority of states, although a majority of states continue to cling to it.[4] *State ex rel. Angvall v. District Court*,[5] the most recent case dealing with the topic in Montana, has reaffirmed the doctrine of interspousal tort immunity in this state, thus continuing Montana's adherence to the swiftly dwindling majority rule. This note will discuss the origin and development of the immunity rule, as well as analyzing the arguments pro and con for its continued application, with particular regard to Montana law.

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1. When the reason for the rule ceases, the rule itself should cease. REVISED CODES OF MONTANA, §49-103 (1947) [hereinafter cited R.C.M. 1947].

2. *Alabama*: Johnson v. Johnson, 201 Ala. 41, 77 So. 335 (1917); *Alaska*: Cramer v. Cramer, 379 P.2d 95 (Alaska 1963); *Arkansas*: Katzenberg v. Katzenberg, 183 Ark. 626, 37 S.E.2d 696 (1931); *California*: Klein v. Klein, 58 Cal.2d 692, 376 P.2d 70, 26 Cal. Rptr. 102 (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*: Lorang v. Hays, 69 Idaho 440, 209 P.2d 733 (1949); *Indiana*: Brooks v. Robinson, 284 N.E.2d 794 (Ind. 1972); *Kentucky*: Brown v. Gosser, 262 S.W.2d 480 (Ky. 1953); *Michigan*: Hosko v. Hosko, 385 Mich. 39, 187 N.W.2d 236 (1971); *Minnesota*: Beaudette v. Frana, 285 Minn. 366, 173 N.W.2d 416 (1969); *New Hampshire*: Gilman v. Gilman, 78 N.H. 4, 95 A. 657 (1915); *New Jersey*: Immer v. Risko, 56 N.J. 482, 267 A.2d 481 (1970); *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*: Prosser v. Prosser, 114 S.C. 45, 102 S.E. 787 (1922); *South Dakota*: Scotvold v. Scotvold, 68 S.D. 53, 298 N.W. 266 (1941); *Washington*: Freehe v. Freehe, 81 Wash.2d 183, 500 P.2d 771 (1972); *Wisconsin*: Wait v. Pierce, 191 Wis. 202, 209 N.W. 475 (1926) (wife can sue husband), *but see* Fehr v. General Fire & Life Assur. Corp., 246 Wis. 228, 16 N.W.2d 787 (1944) (husband can't sue wife).

3. *Arizona*: Windauer v. O'Connor, 107 Ariz. 267, 485 P.2d 1157 (1971) (wife may maintain action for intentional tort against husband after their divorce); *Louisiana*: Gremillion v. Caffey, 71 So.2d 670 (La. App. 1954) (divorce terminates wife's incapacity to sue husband for tort committed during coverture); *Missouri*: Hamilton v. Fulkerson, 285 S.W.2d 642 (Mo. 1955) (wife may sue for antenuptial tort); *Oregon*: *compare* Apitz v. Dames, 205 Ore. 242, 287, P.2d 585 (1955) (wife may sue for intentional tort) *with* Smith v. Smith, 205 Ore. 286, 287 P.2d 572 (1955) (wife may not sue husband for negligent tort); *Virginia*: Surratt v. Thompson, 212 Va. 191, 183 S.E.2d 200 (1971) (wife may sue husband for negligence in automobile accident).

4. For list of majority jurisdictions, *see* Note, *Interspousal Immunity in Personal Torts - Missouri's Position Clarified?* 38 Mo. L. REV.) 333 n. 7 (1973).

5. State ex rel. Angvall v. District Court, 151 Mont. 483, 444 P.2d 370 (1968).

ORIGIN OF THE DOCTRINE

Common Law

Interspousal tort immunity is a judicially created doctrine having its origin in the common law. At common law, the married woman was subject to numerous legal disabilities, which burdened neither single women nor married men. The wife had no power to contract, no power to sue or be sued in her own name, was not liable for her debts, and her right to hold property was subject to her husband's right to reduce personal property to his possession and to receive the rents and profits from the real estate which he managed for her.[6] Thus, it was said that the husband and wife were deemed to be one person in law, that person being the husband.[7] This concept of the legal identity of husband and wife, thought to have its roots in the Bible[8] or early Roman law,[9] created a substantive bar to the existance of a cause of action by one spouse against the other,[10] since no person could sue himself.[11] Furthermore, the union of husband and wife into a single legal entity, resulted in the union of the right and duty to make compensation for tortious injury as between the spouses, thereby discharging the duty and precluding any cause of action from arising.[12]

Even if a cause of action could have arisen, suit would have been barred by a procedural difficulty. Although at common law a married woman was liable for her tortious acts and acquired a right of action for tortious injury, she lacked capacity to sue or be sued in her own name, thereby necessitating joinder of her husband in

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6. McCurdy, *Torts Between Persons in Domestic Relation*, 43 HARV. L. REV. 1030, 1031-1032 (1930).

7. 1 BLACKSTONE, COMMENTARIES 422 (1768); W. PROSSER, HANDBOOK OF THE LAW OF TORTS, § 122 (4th ed. 1971). But it should be noted that this was not strictly true as stated in 1 BLACKSTONE, COMMENTARIES 430, 432, 433 (1768):

> But the unity concept is inconsistent with most of the respective property rights of the spouses at common law. It was applied in the criminal law to acts of the one against the property of the other; but otherwise it was disregarded in criminal law. It was not applied in non-interspousal torts committed by or against the person of a married woman. It was disregarded in the courts of equity and was not applicable in the ecclesiastical courts in determinations of validity and invalidity of marriage and in divorces *a mensa et thoro*. It rather serves to sum up a result reached.

8. *Genesis 2:23*—"This is now my bones and my flesh. . ."; *Ephesians 5:31*—"They two (husband and wife) shall be one flesh."

9. Comment, *Interspousal Tort Immunity—California Follows the Trend*, 36 So. CAL. L. REV. 456, 459 (1963).

10. Bassett v. Bassett, 122 Mass. 99 (1873). *See* McCurdy, *Torts Between Persons in Domestic Relation*, *supra* note 6; McCurdy, *Personal Injury Torts Between Spouses*, 4 VILL. L. REV. 303 (1959).

11. McCurdy, *Personal Injury Torts Between Spouses*, *supra* note 10 at 305.

12. McCurdy, *Torts Between Persons in Domestic Relation*, *supra* note 6 at 1033.

any action to which she was a party.[13] Thus, a suit between husband and wife would have been subject to the procedural disability of the husband being both plaintiff and defendant.[14] As Professor McCurdy appropriately concluded:

> At common law, therefore, the combination of various incidents of marriage, some substantive, some procedural, some conceptual, made it impossible for one spouse ever to be held civilly liable as a tortfeasor, in any situation, and without exception, to the other for any act, antenuptial or during marriage, causing personal injury which would have been a tort but for the marriage.[15]

Married Women's Property Acts

The common law legal disability of the wife was modified to some extent by the enactment in every state of married women's property statutes,[16] which generally empower a married woman to hold and enjoy a separate legal estate in her own property and endow her with the same civil and criminal remedies for the protection of that estate as if she were a "femme sole."[17] The effect of these statutes on the common law disabilities of the married woman vary from state to state, according to the specific statutory provision in question[18] and the construction given that statute by the state court. Since the basic purpose of the statutes was to "emancipate a married woman from her husband's control in property matters", courts generally have agreed that the wife has enforceable property rights against both the husband and third parties, and may sue in her own name.[19] However, in the absence of a specific statutory provision to the contrary,[20] a majority of courts have refused to extend the effect

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13. *Id.* at 1032; McCurdy, *Personal Injury Torts Between Spouses, supra* note 10 at 304.

14. McCurdy, *Torts Between Persons in Domestic Relation, supra* note 6 at 1032 - 1033; McCurdy, *Personal Injury Torts Between Spouses, supra* note 10 at 304.

15. McCurdy, *Personal Injury Torts Between Spouses, supra* note 10 at 307.

16. For a discussion of these statutes and their effect, *see Id.* at 310 - 322.

17. McCurdy, *Personal Injury Torts Between Spouses, supra* note 10 at 307-308; PROSSER, *supra* note 7 at 861.

18. McCurdy, *Torts Between Persons in Domestic Relation, supra* note 6 at 1037, suggests that remedially and procedurally, these statutes may be classified into seven general groups:

> (1) those which deal with property and are silent as to remedies; (2) those which permit a married woman to sue or be sued only in respect to property which constitutes her separate estate; (3) those which expressly exclude or refuse to authorize suits between husband and wife; (4) those which do not permit a married woman to sue or be sued by a third person alone in her own name for personal torts; (5) those which permit a married woman to sue separately for torts committed against her; (6) those which in terms permit suit by and against married women as though they were sole; and (7) those which in terms permit suits between husband and wife.

19. *Id.* at 1037-1041.

20. Ten states have statutes dealing expressly with interspousal suits. Prohibiting suit:

of the statutes to permit personal injury tort suits between spouses.[21] This conclusion has been supported on various theories. Some courts argue that since no substantive cause of action existed at common law, in absence of a statute that creates such a cause of action, the substantive bar remains even though the statute gives a married woman complete procedural capacity.[22] Other courts employ the "reciprocity" argument, contending that since the statute is not for the protection or benefit of married men, it cannot be supposed that a cause of action was given to the wife and not to the husband, who also lacked a cause of action at common law.[23] It has been argued in response, however, that if a woman is given a right, she must be held to be subject to an equivalent duty, unless the statute plainly provides otherwise.[24] The existence in the wife of both a right and a duty would thus permit suit either by or against the wife.

One of the leading cases in this area which has provided the basis for the conclusions of many of the majority courts is *Thompson v. Thompson*.[25] Involving an assault and battery suit by a married woman against her husband under a District of Columbia statute empowering married women to "sue separately . . . for torts committed against them,"[26] the case held that:

> 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.[27]

Montana, in *Dutton v. Hightower & Lubrecht Construction Company*, has endorsed this position, holding that Montana's Married Women's Acts are "procedural and create no new rights, but only remove the common law disability of married women to enforce their rights otherwise created and existing."[28]

HAWAII REV. STAT. § 573-5 (1968); ILL. ANN. STAT. ch. 68, § 1 (1971); LA. REV. STAT. ANN. § 9.291 (1965); MASS. ANN. LAWS ch. 209, § 6 (1969); PA. STAT. ANN. tit. 48, § 111 (1965). Permitting suit: N.Y. GEN. OBLIGATIONS LAW § 3-313 (McKinney 1964); N.C. GEN. STAT. § 52-5 (1965); N.D. CENT. CODE § 14-07-05 (1971); S.C. CODE ANN. § 10-216 (1962); WIS. STAT. ANN. § 246.075 (1967).

21. *See* discussion, *supra* note 4.

22. Dishon v. Dishon, 187 Ky. 497, 219 S.W. 794 (1920); Keister v. Keister, 123 Va. 157, 96 S.E. 215 (1918).

23. Heyman v. Heyman, 19 Ga. App. 634, 92 S.E. 25 (1917); Austin v. Austin, 136 Miss. 61, 100 So. 591 (1924); Rogers v. Rogers, 265 Mo. 200, 177 S.W. 382 (1915).

24. McCurdy, *Torts Between Persons in Domestic Relation*, *supra* note 6 at 1050-1051.

25. Thompson v. Thompson, 218 U.S. 611 (1910).

26. D.C. CODE § 1155 (1925).

27. Thompson v. Thompson, *supra* note 25 at 617.

28. Dutton v. Hightower & Lubrecht Construction Company, 214 F. Supp. 298, 300 (D. Mont. 1963).

A substantial minority of states, however, have construed the Married Women's Acts to allow personal injury suits between spouses.[29] "[I]n allowing such actions no distinctions are usually made between intentional and negligent conduct or whether the action is brought during marriage or after separation, divorce, or death."[30] In the leading case of *Brown v. Brown*, sustaining an action by a wife against her husband for damages for assault, battery, and false imprisonment, the court construed the Connecticut Married Women's Act broadly as effecting a change in "the foundation of the legal status of husband and wife."[31] After marriage, husband and wife were held to retain their legal identities and to continue in possession of those rights they had enjoyed before marriage, thus abolishing the common law theory of unity and permitting one spouse to sue the other in tort.[32] Similarly, the Idaho supreme court in *Lorang v. Hays* held that "in Idaho a married woman has a legal status of her own. She is not submerged in the identity of her husband."[33] The minority jurisdictions thus view the Married Women's Acts as abolishing the common law unity of husband and wife, as removing the common law disabilities of the wife, and as maintaining the separate rights of the spouses in the marriage relation.

PUBLIC POLICY CONSIDERATIONS

Attempting to buttress the tenuous legal basis for interspousal immunity, a number of courts have enunciated public policy arguments in its support. However, even these policy considerations have been subjected to increasing criticism on various grounds, leaving the immunity doctrine with a weakening foundation of support.

Disruption of Domestic Harmony

The major policy argument offered in support of interspousal tort immunity is that actions between spouses for personal torts would disrupt the harmony, peace, and tranquility of the marriage. *Ritter v. Ritter*, a leading case in support of this argument, noted:

> The flames which litigation would kindle on the domestic hearth would consume in an instant the conjugal bond, and bring on a

29. *See* list of cases, *supra* note 2.

30. McCurdy, *Personal Injury Torts Between Spouses*, *supra* note 10 at 315. *But see* discussion, *supra* note 3.

31. Brown v. Brown, 88 Conn. 42, 89 A. 889, 891-892 (1914).

32. *Id.* The same result was reached in *Bushnell v. Bushnell*, 103 Conn. 583, 131 A. 432 (1925) where the action was for negligence.

33. Lorang v. Hays, *supra* note 2 at 737.

> new era indeed—an era of universal discord, of unchastity, of bastardy, of dissoluteness, of violence, cruelty, and murders.[34]

The rationale of this position, however, cannot withstand analysis. Proponents of the minority view have argued that if there is marital harmony capable of disruption, the bringing of a tort action will be highly improbable.[35] It is also likely that after a husband has intentionally beaten his wife or committed other intentional torts there will be little peace or harmony left to disturb.[36] Furthermore, denial of a remedy to the injured spouse may actually disrupt domestic peace rather than preserve it:

> No greater public inconvenience and scandal can thus arise than would arise if they (husband and wife) were left to answer one assault with another and one slander with another slander until the public peace is broken and the criminal law invoked against them.[37]

On the other hand, if interspousal suits were permitted, knowledge that a tort action could be maintained might actually serve as a deterrent to a potential wrongdoer and prevent the occurrence of the wrong in the first instance. Finally, it is difficult to comprehend how domestic peace may be disturbed to any greater extent by a personal injury tort suit than it would by a property, divorce, or criminal suit, which the states universally allow one spouse to initiate against the other.[38]

Flood of Trivial Litigation

A number of majority courts have argued against permitting interspousal tort suits on the ground that their allowance would open the courts to a flood of litigation. As the Supreme Court noted in *Thompson v. Thompson*:

> [Allowing such suits would] open 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 . . . by husband against wife or wife against husband.[39]

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34. Ritter v. Ritter, 31 Pa. 396, 398 (1858). *See* Thompson v. Thompson, *supra* note 25 at 618; Patenaude v. Patenaude, 195 Minn. 523, 263 N.W. 546, 547-548 (1935); Austin v. Austin, *supra* note 23 at 592.

35. Brown v. Brown, *supra* note 31 at 891-892; Immer v. Risko, *supra* note 2 at 484; Freehe v. Freehe, *supra* note 2 at 774.

36. W. PROSSER, *supra* note 7 at 863.

37. Brown v. Brown, *supra* note 31 at 892. *See* Klein v. Klein, *supra* note 2 at 72.

38. *Property*: Self v. Self, 58 Cal.2d 683, 376 P.2d 65, 69, 26 Cal. Rptr. 97 (1962); Brandt v. Keller, 413 Ill. 503, 109 N.E.2d 729, 733 (1952); Brown v. Gosser, *supra* note 2 at 484. *Divorce*: Fiedler v. Fiedler, 42 Okla. 124, 140 P. 1022, 1024 (1914). *Criminal*: W. PROSSER, *supra* note 7 at 863.

39. Thompson v. Thompson, *supra* note 25 at 617-618.

This fear of a potential avalanche of litigation was evident in the decisions in *Drake v. Drake*, wherein the court declined to enjoin a wife from nagging her husband,[40] and in *Wait v. Pierce*, wherein the dissent noted that "the uninvited kiss, no matter how cold and chaste" would constitute an assault and battery, and thus provide grounds for a potential suit.[41]

Such fears, however, have failed to materialize in those jurisdictions which have abandoned the immunity rule. None of the minority jurisdictions have reported a flood of trivial actions, "either real or fancied."[42] The Washington supreme court offered a pragmatic explanation for the lack of any such flood by observing that "we think it is fair to assume that few litigants would consider it worthwhile to initiate such actions."[43] It would indeed seem improbable that spouses would be willing to invest the necessary time and money to seek costly court adjudication of a trivial matter which could easily and more inexpensively be settled privately. Furthermore, the mere possibility or unfounded apprehension of a mass of trivial litigation should not preclude the courts from considering those meritorious actions between spouses which justly require adjudication.[44] To presume that the courts in our judicial system are unable to distinguish between those suits which are meritorious and those which are frivolous is to disparage the entire judicial process as being incapable of administering justice.

Danger of Fraud and Collusion

A frequent rationale given for the retention of the majority rule is that to allow personal injury tort suits between spouses would engender fraud and collusion, particularly where insurance is involved. As one court noted:

> [I]t is obvious that the risk of collusive action increases when the parties plaintiff and defendant are in confidential relationship. The risk of financial loss is ordinarily inducement enough to encourage a sturdy defense. Remove from a defendant the risk of loss and substitute the covert hope of profit and a situation arises which should give us pause.[45]

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40. Drake v. Drake, 145 Minn. 388, 177 N.W. 624 (1920).

41. Wait v. Pierce, *supra* note 2 at 482 (dissenting opinion).

42. Comment, *Interspousal Tort Immunity—California Follows the Trend*, *supra* note 9 at 466. *See* Klein v. Klein, *supra* note 2 at 72; Freeche v. Freehe, *supra* note 2 at 775, citing Goode v. Martinis, 58 Wash.2d 229, 361 P.2d 941, 944 (1961).

43. Goode v. Martinis, *supra* note 42 at 944.

44. Spellins v. Spellins, 49 Cal.2d 210, 317 P.2d 613, 632 (1957) (concurring and dissenting opinion).

45. Smith v. Smith, *supra* note 3 at 583.

Many courts contend that the inducement to such collusion is greater than normal in the family situation because an award to one spouse is, in effect, an increase in the family funds in which both spouses may share.[46] As one court pointed out: "[Allowing the wife to recover from the husband] would be like the husband taking money out of one of his pockets and putting it back in another."[47] One New York court, envisioning even greater potential abuse of such suit, has contended that no wife would want to sue her husband except as a "raid on an insurance company."[48]

This argument patently lacks merit. The possibility for fraud or collusion exists in many types of litigation, but that fact alone does not justify denial of the right to maintain those actions which have merit.[49] Courts must not abandon their obligation to adjudicate bona fide controversies on the facile assumption that fraudulent suits may abound.[50] Instead, "courts must depend upon the efficacy of the judicial processes to ferret out the meritorious from the fraudulent in particular cases."[51]

The Indiana supreme court in *Brooks v. Robinson*[52] was thoroughly convinced that the courts were endowed with adequate means to ensure the prevention of fraud. Therein the court noted that "it should not be overlooked that the testimony of both parties will be extremely vulnerable to impeachment at trial on the grounds of bias, interest, and prejudice."[53] Further, the validity of the litigant's claim and testimony will be subject not only to the scrutiny of the judge and opposing counsel, but also to that of the jurors who cannot be presumed to "check their common sense at the courtroom door."[54] The California court in *Klein v. Klein* appropriately summarized these arguments:

> It would be a sad commentary on the law if we were to admit that the judicial processes are so ineffective that we must deny relief to a person otherwise entitled simply because in some future case a litigant may be guilty of fraud or collusion . . . Our legal system is not that ineffectual.[55]

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46. Beaudette v. Frana, *supra* note 2 at 419. Although adopting the minority position, the case is cited for a majority argument noted in the opinion.

47. Austin v. Austin, *supra* note 23 at 592.

48. Newton v. Weber, 119 Misc. 240, 196 N.Y.S. 113, 114 (Sup. Ct. 1922).

49. Brandt v. Keller, *supra* note 38 at 733; Brown v. Gosser, *supra* note 2 at 484.

50. Borst v. Borst, 41 Wash.2d 642, 251 P.2d 149, 155 (1952) citing Rozelle v. Rozelle, 281 N.Y. 106, 22 N.E.2d 254, 257 (1939).

51. Immer v. Risko, *supra* note 2 at 487.

52. Brooks v. Robinson, *supra* note 2.

53. *Id.* at 797.

54. *Id.* at 797, citing United States v. Freeman, 357 F.2d 606, 620 (6th Cir. 1966).

55. Klein v. Klein, *supra* note 2 at 73.

Adequate Remedies Exist in Criminal and Divorce Courts

It is frequently stated that the wife is provided ample protection in the criminal and divorce courts, and that, therefore, there exists no compelling need to provide her the additional remedy of a tort suit against the husband. As one court concluded:

> There is no necessity for [permitting the wife to sue her husband in tort] . . . The criminal courts are open to her. She has the privilege of the writ of *habeas corpus* if unlawfully restrained. As a last resort, if need be, she can prosecute at her husband's expense a suit for divorce.[56]

These conclusions, however, are untenable in light of various considerations:[57]

> (1) Ordinary negligence is nowhere a crime or a ground for divorce.[58]
> (2) The wife may have no desire to part with her husband by divorce or through his imprisonment.
> (3) If the husband is imprisoned, the wife will not be able to benefit from her husband's legal duty to support her and she will be thrown upon her own resources. . .
> (4) A divorce action may not be adequate by way of compensation for damages. As Mr. Justice Sayre said in *Johnson v. Johnson*:
>
> > . . . The wife's remedies, by a criminal prosecution or an action for divorce and alimony, which in some jurisdictions are allowed to stand as her adequate remedies for wrongs of the sort described in this complaint (assault and battery) . . . appear to us to be illusory and inadequate.[59]
>
> (5) A statute may not grant an action under the circumstances, or
> (6) Religious scruples may, on the part of the wife, prevent her from attempting to secure [a divorce].

Thus, it can be seen that to deny the wife a tort action against her husband actually denies her any kind of effective relief.

In addition to these considerations, it must be noted that restricting an injured spouse to a divorce or criminal action against the other spouse is logically inconsistent with any policy of preserving domestic tranquility.[60] The court in *Abbott v. Abbott*, a leading

56. Abbott v. Abbott, 67 Me. 304, 307 (1877). *See* Austin v. Austin, *supra* note 23 at 592.

57. Comment, *Interspousal Tort Immunity—California Follows the Trend*, *supra* note 9 at 466-467.

58. *Id.*, citing W. PROSSER, *supra* note 7 at 674.

59. *Id.*, citing Johnson v. Johnson, *supra* note 2 at 338. *Accord*, Goode v. Martinis, *supra* note 42 at 944; "[While] a criminal action may be adequate to prevent future wrongs . . . it certainly affords no compensation for past injuries."

60. Freehe v. Freehe, *supra* note 2 at 775.

case for the majority position, has even conceded that "instead of settling, a divorce would very much unsettle all matters between married parties."[61]

Any Change Must Come From the Legislature

> [S]uch radical and far-reaching results should be wrought by language so clear and plain as to be unmistakeable evidence of legislative intent.[62]

This language echoes the conclusion of some majority courts that the proper body to effect any change in the interspousal immunity doctrine must be the legislature. These courts have reasoned that the common law theory of unity of husband and wife precluded the existence of a cause of action between spouses, and that even if the Married Women's Statutes give married women procedural capacity, they cannot be construed to remove the substantive defect of lack of a cause of action.[63] The burden therefore rests with the various state legislatures to refrain from action and allow the immunity doctrine to continue or to abandon it by the creation, in precise terms, of a cause of action between spouses.

An apparent explanation for this attitude of the courts is their belief that the legislatures are better equipped to meet this challenge. As Mr. Justice Shauer stated in his dissent to *Klein v. Klein:*

> When the legislature sees fit to change the common law rule it is able—as we are not—to view the problem in all of its ramifications and to provide the necessary safeguards against abuses of the law.[64]

The realities of the situation, however, do not support such an argument.[65] Interspousal immunity is a judicially created doctrine based on the common law fictional unity of husband and wife. Having judicial origins, the doctrine is likewise subject to judicial modification or abrogation.[66] Indeed, the court bears a responsibility when applying a common law doctrine, to carefully scrutinize that doctrine in order to ensure that "the conditions and needs of the times have not so changed as to make further application of it the instrument of injustice."[67] It has been said that "the strength and

61. Abbott v. Abbott, *supra* note 56 at 309.
62. Thompson v. Thompson, *supra* note 25 at 618.
63. McCurdy, *Torts Between Persons in Domestic Relation, supra* note 6 at 1050.
64. Klein v. Klein, *supra* note 2 at 75 (dissenting opinion).
65. But it should be noted that the majority argument is valid as to those few states which have enacted statutes specifically prohibiting interspousal tort suits. In those states (*see* list *supra* note 20), legislative action will be necessary to effect any change in the statutory rule.
66. Brooks v. Robinson, *supra* note 2 at 797; Freehe v. Freehe, *supra* note 2 at 775.
67. State v. Culver, 23 N.J. 495, 129 A.2d 715, 721 (1957).

genius of the common law lies in its ability to adapt to the changing needs of the society it governs,"[68] and the court abdicates its responsibility both to those litigants before it and to the public at large when it neglects or refuses to scrutinize those common law rules it summarily applies. As the Indiana supreme court aptly stated in *Brooks v. Robinson*:

> We cannot close our eyes to the legal and social needs of our society, and this court should not hesitate to alter, amend, or abrogate the common law when society's needs so dictate.[69]

THE MONTANA POSITION

Montana Case Law

Conley v. Conley,[70] a 1932 case of first impression in Montana requiring the construction of Montana's Married Women's Statutes,[71] involved a suit by a wife against her husband for injuries sustained while riding in his car, through the negligence of the husband's chauffeur. In holding that such a cause of action could not be maintained, the Montana supreme court grounded its argument on the common law fictional unity of husband and wife and the consequent substantive bar to an interspousal tort suit.[72] Noting that the primary purpose of Montana's Married Women's Statutes was to free the wife from the husband's domination in property matters,[73] the court stated that:

> . . . there is not seen the slightest intention to disturb the marital unity except as to property rights; on the contrary, the maintenance of the family is regarded with the highest solicitude.[74]

In addition, the court supported its adoption of the majority rule on the basis of three policy considerations. First, implicit in that portion of the opinion previously quoted[75] is the court's recognition of the importance of the maintenance of family harmony. Second, the court implied that any change to be made in the doctrine would have to be accomplished by the legislature, as evidenced by

68. Brooks v. Robinson, *supra* note 2 at 797.

69. *Id.*

70. Conley v. Conley, 92 Mont. 425, 15 P.2d 922 (1932).

71. R.C.M. 1947, §§ 36-110, 36-128. Section 36-110. A married woman in her own name may prosecute an action for injuries to her reputation, person, property, and character, or for the enforcement of any legal or equitable right, and may in like manner defend any action brought against herself. Section 36-128. A married woman may sue or be sued in the same manner as if she were sole.

72. Conley v. Conley, *supra* note 70 at 925.

73. *Id.* at 923.

74. *Id.* at 924.

75. *See* discussion in text, *supra* note 74.

its statement: "We see nothing in any of the . . . statutes to indicate a purpose to create a right which neither husband nor wife had at common law."[76] Finally, the court determined that to allow such suit would create "the novel situation of the wife having a cause of action against her husband for a personal tort, while the husband would have no such right against his wife, since there is nothing in Montana's statutes or constitution giving such a right to the husband.[77]

In 1933 the court was faced, in *Kelly v. Williams*[78] with the similar question of whether a personal injury negligence suit could be maintained by a wife against her husband's estate. In a painfully brief opinion, the court succinctly noted the basis for its decision by stating: "the case is ruled directly by the decision of this court in *Conley v. Conley*."[79] In addition, the court concluded that the legislature seemed satisfied with the *Conley* decision since in a recent session a bill designed to enlarge the right of spouses to sue one another "did not receive favorable attention even in the house in which it originated."[80]

State ex rel. Angvall v. District Court[81] provided the Montana supreme court its most recent opportunity to re-evaluate the interspousal immunity rule in light of the changed social and economic conditions of 1968. The case involved an action by Patricia Angvall against her husband Jon to recover damages for injuries sustained when struck by an automobile driven by him. Rather than face the challenge presented, however, the court merely reverted to its previous declaration that "in Montana the rule has always been that a wife may not maintain an action against her husband for personal injuries inflicted upon her by her husband while they are married."[82]

Proceeding further, the court stated that "since no statute has been enacted subsequent to the *Kelly* and *Conley* cases allowing a wife to sue her husband for personal injuries he inflicts upon her, the rule is still that as laid down in *Conley* and *Kelly*"[83]—an apparent attempt by the court to buttress its previous argument that any change in the doctrine must emanate from the legislature.

Apparently unconcerned that the rapid legal and social developments of the preceding four decades since the rule was first enun-

76. Conley v. Conley, *supra* note 70 at 925.
77. *Id.* at 926.
78. Kelly v. Williams, 94 Mont. 19, 21 P.2d 58 (1933).
79. *Id.* at 58.
80. *Id.*
81. State ex rel. Angvall v. District Court, *supra* note 5.
82. *Id.* at 370, citing Conley v. Conley, *supra* note 70 and Kelly v. Williams, *supra* note 78.
83. *Id.* at 371.

ciated in Montana might have rendered the doctrine outmoded and unjust, the court did not even bother to re-articulate or to re-examine the basis for the immunity doctrine. Rather, it merely cited, without analyis, the previous cases establishing the rule. It is submitted, however, that had the court re-examined the rule, it would have discovered that the bases for the rule, both legal and policy-related, no longer exist, and that its continued application is unjustifiable.

Need for Change

Legal and social changes, wrought by both legislative enanctment and changing societal conceptions of the married woman, have eliminated the concept of marital unity of husband and wife, both in theory and in fact. The married woman in Montana today enjoys a separate interest in property,[84] the right to contract both with her husband and with third parties,[85] the right to serve as an executrix, administratrix, guardian or trustee,[86] the right to sue and be sued as if sole,[87] and neither husband nor wife is answerable for the acts or liable for the debts of the other.[88] In addition, the 1972 Constitution of Montana specifically mandates equal protection of the law for women by proscribing discrimination on the basis of sex by either the state or individuals.[89]

It is doubtful today in light of the legal protection and societal recognition of the rights of women, both single and married, that any serious argument could be made in support of the fictional unity of husband and wife. That concept has evolved from what was, at best, a tenuous legal conclusion of the common law,[90] to what today may best be described as a legal anachronism, inapplicable in the present state of the law. The common law unity concept having thus been outmoded, there exists no legal basis for the continued application of the interspousal tort immunity doctrine. Furthermore, as previously discussed, the policy arguments typically cited by courts in support of the doctrine are unpersuasive and likewise do not merit its retention.

On the other hand, a number of policy arguments provide strong support for the abolition of the doctrine. First, the purpose of the law of torts is to provide a remedy for those injured by the

84. R.C.M. 1947, §§ 36-104, 36-111.
85. R.C.M. 1947, §§ 36-105, 36-130.
86. R.C.M. 1947, § 36-127.
87. R.C.M. 1947, §§ 36-110, 36-128.
88. R.C.M. 1947, §§ 36-109, 36-114, 36-129.
89. *Montana Constitution*, art. II, § 4.
90. *See* discussion, *supra* note 7.

acts of another. As the court in *Klein v. Klein* aptly observed:

> It is . . . fundamental in the law of torts that any person proximately injured by the act of another, whether that act be wilfull or negligent, should, in the absence of statute or compelling reasons of public policy, be compensated.[91]

If a woman should be struck by a negligently driven car while crossing the street and suffer severe injury, it makes little sense and serves no rational purpose to deny that woman recovery on the mere basis that she happens to be the wife of the tortfeasor. Such rationale neither renders the injury any less real and painful nor any less deserving of compensation.

The doctrine is particularly unjustifiable when it is considered that spouses may sue one another in contract and property actions, but not for personal torts. As the court in *Brown v. Brown* queried: "If the wife may sue the husband for a broken promise, why should she not be able to sue him for a broken arm?"[92] The policy arguments which have been offered by the courts in support of the interspousal immunity rule as to personal torts would seem to apply with equal force to contract and property actions between spouses, yet the courts have raised no great outcry against the maintenance of such suits. It is difficult to imagine that allowance of personal injury suits between spouses would create unmanageable problems when similar actions for contract and property injuries have existed for nearly a century without severe criticism.

Furthermore, allowance of property but not personal injury actions between spouses evidences an apparent belief that injuries to property are more serious and merit more concern than do injuries to the person. Such philosophy has no place in today's society as the court in *Brooks v. Robinson* noted:

> To make such a distinction renders the person of the wife in a marriage completely subjugated to the will of her husband, as far as civil liability is concerned, for wilfull and wanton injuries inflicted upon her person either before or during marriage, and that such injuries are of no concern or value when placed in the scales of justice alongside property rights. This seems to be inconsistent, inhumane, and contrary to the true spirit and intent of the acts passed for the emancipation of women in an enlightened civilization.[93]

Certainly an individual's interest in mental and physical well-being outweigh, or are at least on a par with, his or her economic interests

91. Klein v. Klein, *supra* note 2 at 72.
92. Brown v. Brown, *supra* note 31 at 891.
93. Brooks v. Robinson, *supra* note 2 at 795.

in property. The law should adequately reflect the relative importance of these interests.

Finally, the existence of liability insurance to compensate victims of negligent injury provides additional impetus for the abolition of the majority rule. The general availability of liability insurance for car and home will ensure that the social costs of allowance of interspousal tort actions are borne by the general public. The writing of policies to cover negligent torts between spouses will increase premiums and thereby shift the monetary burden from the innocent victim to society at large. Should society be unwilling or unable to bear this additional cost, insuarance policies may simply be written to exclude coverage of the spouse.

CONCLUSION

The interspousal tort immunity doctrine is a legal anachronism. The rapidly changing social and economic conditions of today have destroyed the common law basis for the rule and have rendered the doctrine a legal skeleton, unsupported by the muscle and sinew of legal principle and practical common sense. The courts must not allow judicial inertia to perpetuate a doctrine which lacks rational foundation. As societal conditions and legal perceptions change, the common law must be shaped and molded to reflect those changes, and to thereby ensure the continued role of the common law as an effective vehicle for the administration of justice. As Supreme Court Justice Felix Frankfurter once thoughtfully observed: "Wisdom too often never comes, and so one ought not to reject it merely because it comes late."[94]

94. Henslee v. Union Planters Nat'l. Bank, 335 U.S. 595, 600 (1949) (dissenting opinion).