Montana Law Review

Volume 60
Issue 1 *Winter 1999*

Article 5

1-1999

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THE IMMINENT DEMISE OF INTERSPOUSAL TORT IMMUNITY

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During the decade of the 1980s, I extensively explored the doctrine of interspousal tort immunity in the United States.[1] I examined the origins and development of the concept; how the notion survived intact in every jurisdiction throughout the nation until 1914; the first successful efforts to abolish immunity during the teens; the slow pace of abrogation in the five decades between 1920 and 1970; and the steady decline of the doctrine thereafter.

Indeed, only a small number of states in the country still retain any form of interspousal tort immunity, even though some jurisdictions evince concern about certain issues involving the doctrine. Illustrative are questions implicating the validity of family exclusion clauses in insurance policies whose application can have the effect of retaining immunity and the issue of whether a divorced spouse can maintain a personal injury suit in intentional tort separate from a marital dissolution action.[2]

I also analyzed all of the major public policy arguments articulated in favor of immunity's retention and the important policy contentions enunciated for its abolition. I concluded that none of the ideas espoused for retaining immunity - such as preservation of marital harmony as well as prevention of fraud and collusion and the pursuit of frivolous litigation - had much validity and recommended that the doctrine be completely abrogated. However, I acknowledged that abolition would not

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1. *See* Carl Tobias, *Interspousal Tort Immunity in America*, 23 GA. L. REV. 359 (1989).

2. *See, e.g.*, Hill v. Hill, 415 So. 2d 20, 21 (Fla. 1982); Tevis v. Tevis, 400 A.2d 1189, 1196 (N.J. 1979); Dairyland Ins. Co. v. Finch, 513 N.E.2d 1324, 1329 (Ohio 1987). *See generally* LEONARD KARP, DOMESTIC TORTS: FAMILY VIOLENCE, CONFLICT AND SEXUAL ABUSE (1994).

substantially improve conditions for women in the United States.

In the course of that research, I searched for patterns relating to the immunity doctrine. The material in the first paragraph of this essay illustrates temporal dimensions which were relevant to interspousal immunity's retention and abrogation. More specifically, the rise of the women's movement and its culmination in winning the suffrage during the teens may explain the early group of decisions which overruled the doctrine. The relative quiescence of the women's movement over the succeeding four decades seems to explain the slow pace of abolition in that period, while the revitalization of the movement during the mid-1960s appears to explain the doctrine's rapid decline from 1970 until the present. These explanations have some surface plausibility, although they may be too "structuralist." Numerous other factors, such as developments in the relevant areas of substantive tort law involving, for instance, its compensatory purpose, are at least as persuasive.

I searched for additional patterns in my research on interspousal tort immunity. Another avenue was the notion of geographic patterns. I was cognizant of the legendary William Prosser's suggestion that courts in the South and West tended to be more conservative, particularly in matters involving personal honor and chivalry.[3] My preliminary efforts to detect geographical patterns, however, failed to yield much material that I considered particularly meaningful.[4]

I want to revisit that possibility and to explore other ideas in this essay primarily by tracing the rise and demise of interspousal tort immunity in the jurisdictions of Montana and Virginia. I have selected Montana and Virginia for several reasons. Each may serve as a surrogate for its respective region, even if neither is necessarily a perfect representative. Tracing the doctrine in the two states might reveal patterns or at least afford helpful insights that could be applied to seek immunity's abolition in the few jurisdictions that cling to this antiquated concept. I am also familiar with the jurisprudence of each state, and I feel relatively comfortable with the local legal cultures and broader cultures of the two jurisdictions. I am a member of the

3. *See* JOHN W. WADE ET AL., PROSSER, WADE & SCHWARTZ'S CASES AND MATERIALS ON TORTS 104-05 (9th ed. 1994); *see also* Fox Butterfield, *Why America's Murder Rate is So High*, N.Y. TIMES, July 26, 1998, § 4 at 1.

4. *See generally* Tobias, *supra* note 1, at 409-22.

bars in Montana and Virginia, while I lived much of my adult life in Montana and most of my earlier years in Virginia.

I. MONTANA

Although states began recognizing interspousal tort immunity as early as 1863, Montana did not adopt the doctrine until 1932.[5] The Montana Supreme Court relied substantially on the notion that a woman's legal identity merged into her husband's upon marriage, the common law rule against interspousal tort suits which could only be changed by a Married Women's Act, and the determination that the Montana legislation was not meant to modify the doctrine.[6]

Subsequent opinions issued the following year and in 1968 simply cited the earlier precedent and depended on legislative inaction respecting tort immunity.[7] In 1975, the Montana Supreme Court reiterated that the Married Women's measure failed to authorize interspousal tort claims and proclaimed that the doctrine's abolition was a public policy issue that should be left to the legislature, which is the appropriate entity to ascertain and prescribe public policy.[8] It is interesting to note that women whose husbands' negligent driving injured them brought each of these four cases.[9]

Before 1979, no woman had ever pursued an intentional tort suit against her husband in Montana that resulted in the issuance of a reported judicial opinion. The 1979 session of the Montana Legislature abrogated the immunity for intentional torts in the context of enacting legislation, the primary purpose of which was to rectify or ameliorate the problem of spousal abuse.[10]

In 1986, the Montana Supreme Court abolished

5. *See* Conley v. Conley, 92 Mont. 425, 15 P.2d 922 (1932). In this section of the essay, I rely on Carl Tobias, *Interspousal Tort Immunity in Montana*, 47 MONT. L. REV. 23, 27-29 (1986).

6. *See Conley*, 92 Mont. at 438-40, 15 P.2d at 925-26. The court relied somewhat on the notion that permitting litigation would disrupt marital harmony and on the idea that the court should defer to the legislature on this issue. *See id.* at 440, 15 P.2d at 926.

7. *See* Kelly v. Williams, 94 Mont. 19, 21 P.2d 58 (1933); State *ex rel.* Angvall v. District Court, 151 Mont. 483, 484-86, 444 P.2d 370, 370-71 (1968). The two decisions treat legislative inaction as important to, if not dispositive of, the immunity issue.

8. *See* State Farm Mutual Auto. Ins. Co. v. Leary, 168 Mont. 482, 485-86, 544 P.2d 444, 446-47 (1975).

9. *See* Tobias, *supra* note 4, at 27 n.24.

10. *See* MONT. CODE ANN. § 40-2-109 (1997); *see also* Tobias, *supra* note 4, at 28 & n.31.

interspousal tort immunity in negligence actions.[11] The court found the concept of unity between husband and wife to be outmoded and that statutory and case law had significantly eroded the notion.[12] The Montana Supreme Court also stated that the filing of civil litigation would not destroy family harmony in a sound family and remarked that this was particularly true when redress was sought against the spouses' insurance company.[13] The court correspondingly rejected the argument that husbands and wives would engage in fraud and collusion, suggesting that judges and juries can ascertain whether spouses are participating in that type of behavior.[14]

II. VIRGINIA

In a 1918 case, a woman intentionally injured by her husband asked the Virginia Supreme Court to find that the 1877 Married Women's Act permitted tort litigation between spouses.[15] The court rejected her request, finding that the legislation did not afford married women a new cause of action but only expanded remedies which those women already possessed at common law.[16]

During 1952, the Virginia Supreme Court refused to permit a tort suit by a woman to recover for personal injuries which her spouse inflicted on her before their marriage.[17] The court determined that the common law rule precluded liability for prenuptial personal injuries.[18] Three years later, however, the Supreme Court did allow a husband to recover from his wife for a property tort.[19]

The Virginia Supreme Court began partially abrogating interspousal tort immunity for negligent torts in 1971. The court permitted the administrator of a deceased woman's estate to pursue a wrongful death action against the husband, who had

11. *See* Miller v. Fallon County, 222 Mont. 214, 721 P.2d 342 (1986).

12. *See id.* at 218-19, 721 P.2d at 345.

13. *See id.*

14. *See id.*

15. *See* Keister's Adm'r v. Keister's Ex'r, 96 S.E. 315 (Va. 1918). In this section of the essay, I rely on Lisa Anderson-Lloyd, Comment, *The Legislative Abrogation of Interspousal Immunity in Virginia*, 15 U. RICH. L. REV. 939 (1981).

16. *See Keister*, 96 S.E. at 317.

17. *See* Furey v. Furey, 71 S.E. 2d 191 (Va. 1952).

18. *See id.* at 192.

19. *See* Vigilant Ins. Co. v. Bennett, 89 S.E.2d 69 (Va. 1955).

killed her in an automobile accident.[20] The court characterized the common law notion of unity as an "outmoded concept" which would not prevent suit.[21] It also rejected the major public policy reasons that judges had announced in support of the immunity doctrine. The Virginia Supreme Court found that the existence of insurance minimized any threat to family harmony and that the potential for fraud and collusion between husbands and wives was insufficient to preclude recovery for personal injuries.[22]

In a 1975 case, the court adopted another exception to tort immunity by allowing the administrator of an estate to pursue a wrongful death action for the deceased's parents and brothers against the husband's committee.[23] The court did recognize the public policy of promoting connubial tranquility but determined that it was inapplicable when one spouse's intentional act ended the marriage and the "deceased spouse is survived by no living child or grandchild."[24]

In a notorious 1980 case, however, the Virginia Supreme Court refused to abrogate interspousal immunity for an intentionally inflicted tort.[25] A woman hired a third party to murder her husband. While the third party failed to kill the husband, the third party succeeded in severely injuring the husband.[26] The husband divorced his wife and filed a tort suit soon thereafter.

The court asserted that permitting damage actions in this context "would contribute to the disruption of many marriages" because of the incentive to sue for personal injuries[27] and refused to add another "abrasive and unnecessary ingredient" to the connubial relationship.[28] The Virginia Supreme Court also resuscitated earlier policy arguments, observing that redress in criminal or divorce courts afforded adequate relief and evincing concern about a flood of frivolous or trivial litigation over petty conjugal grievances.[29]

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20. *See* Surratt v. Thompson, 183 S.E.2d 200 (Va. 1971).
21. *Id.* at 202.
22. *See id.*
23. *See* Korman v. Carpenter, 216 S.E.2d 195 (Va. 1975).
24. *See id.* at 198.
25. *See* Counts v. Counts, 266 S.E.2d 895 (Va. 1980).
26. *See id.* at 895-96.
27. *Id.* at 897-98.
28. *Id.* at 898.
29. *See id.* at 898 n.4.

The next year, the Virginia General Assembly passed legislation abrogating interspousal tort immunity. The statute provided that the "common law defense of interspousal immunity in tort is abolished and shall not constitute a valid defense to any such cause of action arising on or after July 1, 1981."[30]

III. MONTANA AND VIRGINIA

These stories of the rise and fall of interspousal tort immunity in Montana and Virginia exhibit some common themes. Both states recognized the doctrine relatively late in its existence and for rather similar public policy reasons. The two jurisdictions fully abrogated negligence immunity within the same decade, while the state legislatures essentially abolished intentional tort immunity.

Yet there were important differences. At the same time that the Montana Legislature eliminated intentional tort immunity to protect wives from spousal abuse, the Virginia Supreme Court decided to retain this immunity for antiquated reasons implicating the preservation of marital harmony only to have the state legislature fully abrogate the doctrine the following year.

The legislatures of the two jurisdictions, although reaching the same conclusion, apparently passed these statutes for dissimilar reasons. Montana treated immunity's abolition as a women's rights issue, enacting the measure as a component of a package aimed at spousal abuse, while Virginia principally reacted to an archaic judicial decision. The state supreme courts partially eliminated immunity in specific contexts, but the state legislatures in each jurisdiction shared substantial responsibility for the doctrine's complete abolition.

The timing and manner of interspousal tort immunity's abrogation in Montana and Virginia illuminate minimally Professor Prosser's suggestion that courts in the South and the West tend to be conservative, especially as to issues of chivalry and personal honor.[31] First, it is unclear what conservative means in the immunity context. For example, both the Montana stereotype of independent, self-reliant frontier women and the Virginia stereotype of southern belles could have been instrumental in eliminating the doctrine much earlier than was

30. VA. CODE ANN. § 8.01-220.1 (Michie 1997).

31. *See supra* note 3 and accompanying text.

done out of respect for women or to protect them. Second, the concepts of chivalry and personal honor do not explain why each jurisdiction waited so long to permit intentional tort suits against wife batterers who had treated their spouses in the least chivalrous and honorable manner imaginable. Of course, some issues related to the timing of the doctrine's demise are random and merely reflect when plaintiffs were willing to bring, and attorneys were willing to file, cases.

The growing recognition of women's rights and the revival of the women's movement may partially explain the complete abolition of the doctrine in the two states during the 1980s. Developments in substantive tort law, and perhaps in family law—because interspousal immunity was apparently more a family, than a tort, law doctrine[32]—probably afford better explanations. After all, liability was rapidly expanding across a broad front of substantive tort law doctrines during the relevant period. Examples include: the closely related parent-child immunity; other immunities pertaining to the government and to charities; the evolution of products liability from negligence to warranty to strict liability; and the merger of contributory negligence and assumption of risk as complete defenses into comparative negligence.[33]

In short, Montana and Virginia abolished interspousal tort immunity in certain similar, and some different, ways. Neither jurisdiction may serve particularly well as a surrogate for its region. For instance, numerous states in the Rocky Mountains and the Northern Plains abrogated the immunity earlier in time and more comprehensively than Montana.[34] Illustrative are Colorado[35] and North Dakota[36] which completely eliminated the doctrine in the 1930s and Idaho[37] and South Dakota[38] that did so in the 1940s. Moreover, North Carolina and South Carolina, Virginia's rather close neighbors, and Alabama in the deep South were among the seven states whose supreme courts abolished interspousal tort immunity in the teens,[39] even as the

32. *See* Tobias, *supra* note 1, at 394-98.

33. *See* Tobias, *supra* note 1, at 437-38.

34. These states abolished interspousal tort immunity for intentional and negligent torts while Montana's abolition was accomplished in a piecemeal fashion.

35. *See* Rains v. Rains, 46 P.2d 740 (Colo. 1935).

36. *See* Fitzmaurice v. Fitzmaurice, 242 N.W. 526 (N.D. 1932).

37. *See* Lorang v. Hays, 209 P.2d 733 (Idaho 1949).

38. *See* Scotvold v. Scotvold, 298 N.W. 266 (S.D. 1941).

39. *See* Johnson v. Johnson, 77 So. 335, 338 (Ala. 1917); Crowell v. Crowell, 105 S.E. 206, 210 (N.C. 1920); Prosser v. Prosser, 102 S.E. 787, 788 (S.C. 1920); *see also*

evolution of the doctrine's abrogation in the contiguous, border states of Maryland and West Virginia resembles developments in Virginia,[40] while the southern states of Florida and Georgia have been among the last to eliminate immunity.[41]

Finally, the somewhat tortured paths to abolition that unfolded in the two states may afford insights for individuals and organizations, such as married women harmed by their husbands and women's rights groups in those jurisdictions that have not yet totally abolished interspousal tort immunity.

Perhaps most important, the developments in Montana and Virginia suggest that the most effective route to comprehensive reform is through legislation. Proponents of abrogation should tout these bills as facilitating the vindication of women's rights or as the appropriate elimination of a doctrine that has outlived any validity that it may have had. In states where abolition's advocates cannot persuade legislatures to jettison the immunity, proponents should pursue tort litigation seeking abrogation and rely on criticisms of the major policy arguments respecting marital harmony, fraud and collusion and frivolous and trivial suits articulated in Montana and Virginia as well as numerous other jurisdictions.

CONCLUSION

This survey of one substantive tort law doctrine that is significant to women illustrates several ideas. It indicates that developments in that substantive field may have been more important to abolition than the women's movement or women's rights arguments. The review shows that a number of similarities and some differences attended abrogation in the two jurisdictions, which are rather representative of their regions. It demonstrates the difficulty of finding very precise temporal or geographical patterns. The treatment affords as well proposals for reform in state legislatures and courts and suggests strategies for fully abolishing the doctrine.

Tobias, *supra* note 1, at 409-22.

40. *See* Lusby v. Lusby, 390 A.2d 77 (Md. 1978); Coffindaffer v. Coffindaffer, 244 S.E.2d 338 (W. Va. 1978); *see also supra* notes 14-29 and accompanying text.

41. *See, e.g.*, FLA. STAT. ANN. §741.235 (West 1997); Waite v. Waite, 618 So.2d 1360 (Fla. 1993); Shoemake v. Shoemake, 407 S.E.2d 134 (Ga. 1991).