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The Law of Interspousal Immunity in Ohio

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THE LAW OF INTERSPOUSAL IMMUNITY IN OHIO

I. INTRODUCTION

THE OHIO SUPREME COURT HAS RECENTLY REAFFIRMED the retention of interspousal immunity in Ohio. In *Varholla v. Varholla*,[1] a wife brought a negligence action against her husband for injuries she suffered as a result of an automobile accident. The Ohio Supreme Court affirmed a summary judgment in favor of the defendant husband on the ground that one cannot bring a negligence suit against his or her spouse when the parties are living together as husband and wife at the time of the injury. However, two recent cases decided by the Eighth and Eleventh District Courts of Appeals have allowed suits between spouses under certain circumstances. In *Resmondo v. Martin*,[2] the Eleventh District Court of Appeals held that the estate of a deceased wife could maintain a wrongful death action against the husband where the wife's death had resulted from an alleged beating on the part of the husband. In *Kobe v. Kobe*,[3] a wife who had divorced her husband was allowed to sue him for injuries sustained during coverture, where the husband's alleged beating had caused her injuries.

The purpose of this note will be to discuss Ohio's current position on interspousal immunity as well as the problems that are created by the retention of that doctrine.

II. HISTORICAL BACKGROUND[4]

At common law a woman's identity became merged with her husband's upon marriage, and husband and wife were viewed by the law as one.[5] Along with her identity, a woman lost her capacity to own and dispose of property, to contract, and to sue and be sued.[6] If a wife was injured, her husband would sue on her behalf; if, on the other hand, she should injure another, only her husband would be liable. As a result, a suit between husband and wife in essence was a suit by the husband against himself.[7] These common law infirmities were remedied by the passage of Married Women's Acts[8] which

[1] 56 Ohio St. 2d 269, 383 N.E.2d 888 (1978).

[2] No. 75-844 (Ohio 11th Dist. Ct. App. Oct. 6, 1975).

[3] 61 Ohio App. 2d 67, ___ N.E.2d ___ (8th Dist. 1978.

[4] For a general summary of the historical background of the doctrine of interspousal immunity, see F. HARPER & F. JAMES, THE LAW OF TORTS § 8.10 (1956); W. PROSSER, THE LAW OF TORTS § 122 (4th ed. 1971); McCurdy, *Personal Injury Torts Between Spouses*, 4 VILL L. REV. 303 (1959) [hereinafter cited as *Torts Between Spouses*]; McCurdy, *Torts Between Persons in Domestic Relations*, 43 HARV. L. REV. 1030 (1930); Sanford, *Personal Torts Within the Family*, 9 VAND. L. REV. 823 (1956); Sullivan, *Intra-Family Immunities and the Law of Torts in Ohio*, 18 WEST. RES. L. REV. 447 (1967).

[5] W. PROSSER, *supra* note 4, at 859.

[6] *Id.* Indeed, the very legal existence of the wife was regarded as suspended for the duration of the marriage.

[7] *Id.* at 860.

[8] *See, e.g.*, OHIO REV. CODE ANN. § 2307.09 (Page 1956): "A married woman may sue and be sued as if she were unmarried, and her husband may be joined with her only when the cause of action is in favor of or against both." *See also id.* § 2307.10: "When husband and wife are sued together, the wife may defend for her own right; and if the husband neglects to defend she may also defend for his right."

allowed a married woman to own and dispose of property, to contract, and to sue and be sued over these property and contract rights;[9] the statutes destroyed the common law unity of husband and wife.[10] Currently Married Women's Acts are in effect in all fifty states as well as in the District of Columbia.

The enactment of these statutes raised the question whether one spouse could sue the other not only to enforce contract and property rights, but to recover for personal injuries as well. In 1910 this question was presented to the United States Supreme Court in *Thompson v. Thompson*,[11] a case involving the interpretation of the District of Columbia's Married Women's Act. The Court followed the general rule of narrowly construing statutes that abrogate the common law and held that because the statute did not specifically allow a wife to sue her husband for personal injuries, the common law rule that a wife could not sue her husband in tort still applied.[12] Other reasons for the court's holding were that marital harmony would be disrupted by allowing suits for personal injury between husband and wife, and that there were adequate remedies under the divorce and criminal laws.[13]

By the middle of the twentieth century, a number of courts began to take positions contrary to that of the *Thompson* Court and held that the Married Women's Acts did in fact allow suits for personal injuries between husband and wife.[14] In 1952 Ohio joined this growing minority[15] of states. In *Damm v. Elyria Lodge No. 465*[16] the Ohio Supreme Court held that Ohio's Married

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[9] W. PROSSER, *supra* note 4, at 861. These statutes began to be enacted about 1844. They were also referred to as Emancipation Acts.

[10] Damm v. Elyria Lodge No. 465, 158 Ohio St. 107, 107 N.E.2d 337 (1952). *See* text accompanying notes 20 & 21 *infra*.

[11] 218 U.S. 611 (1910).

[12] *Id.* at 618-19. The court's decision was premised on the contention that while these acts conferred additional rights on married women, it was not the legislative intention to revolutionize the law governing the relation of husband and wife between themselves.

[13] *Id.*

[14] The trend was to first allow interspousal suits when an intentional tort was involved, later extending the ability to sue to negligent torts, as can be seen by the following chronology of cases: Brown v. Brown, 88 Conn. 42, 89 A. 889 (1914) (intentional torts); Fiedler v. Fiedler, 42 Okla. 124, 140 P. 1022 (1914) (intentional torts); Gilman v. Gilman, 78 N.H. 4, 95 A. 657 (1915) (intentional torts); Johnson v. Johnson, 201 Ala. 41, 77 So. 335 (1917) (intentional torts); Crowell v. Crowell, 180 N.C. 516, 105 S.E. 206, *reh. denied*, 181 N.C. 66, 106 S.E. 149 (1920) (intentional torts); Prosser v. Prosser, 114 S.C. 45, 102 S.E. 787 (1920) (intentional torts); Roberts v. Roberts, 185 N.C. 566, 118 S.E. 9 (1923) (negligent operation of an automobile); Bushnell v. Bushnell, 103 Conn. 583, 131 A. 432 (1925) (negligent operation of an automobile); Wait v. Pierce, 191 Wis. 202, 209 N.W. 475 (1926) (negligent operation of an automobile); Penton v. Penton, 223 Ala. 282, 135 So. 481 (1931) (negligent operation of an automobile); Fitzmaurice v. Fitzmaurice, 62 N.D. 191, 242 N.W. 526 (1932) (negligent operation of an automobile); Pardue v. Pardue, 167 S.C. 129, 166 S.E. 101 (1932) (negligent operation of an automobile); Rains v. Rains, 97 Colo. 19, 46 P.2d 740 (1935) (negligent operation of an automobile); Mitlimore v. Milford Motor Co., 89 N.H. 272, 197 A. 330 (1938) (negligent operation of an automobile); Courtney v. Courtney, 184 Okla. 395, 87 P.2d 660 (1938) (negligent operation of an automobile); Scotvold v. Scotvold, 68 S.D. 53, 298 N.W. 266 (1941) (negligent operation of an automobile); Lorang v. Hayes, 69 Idaho 440, 209 P.2d 733 (1949) (international torts). *See* Annot., 43 A.L.R.2d 632, 647-51 (1955).

[15] Annot., 43 A.L.R.2d 632, 650 (1955); McCurdy, *Torts Between Spouses*, *supra* note 4, at 319; Sullivan, *supra* note 4, at 457.

[16] 158 Ohio St. 107, 107 N.E.2d 337 (1952).

Women's Acts[17] abolished the unity of husband and wife and permitted a wife to maintain an action for personal injuries caused by her husband. Just slightly over four months before, in *Signs v. Signs*,[18] the Ohio Supreme Court had abrogated parent-child immunity for personal injury suits. The court had noted in *Signs* that the only distinguishable feature between parent-child immunity and interspousal immunity was the common law unity of husband and wife; such unity did not exist between parent and child.[19] Therefore, once the court was to decide that this unity no longer existed between husband and wife, the door would be open for the court to dispose of interspousal immunity in the same manner that it had disposed of parent-child immunity.

In *Damm v. Elyria Lodge* a woman brought a negligence action against an unincorporated association. Since the defendant was unincorporated, the wife's ability to maintain the suit could only be based on her ability to maintain a suit against each of the individual members of the association. However, because the plaintiff's husband had been a member of the association at the time of the alleged injury, the trial court dismissed the action on the grounds of interspousal immunity. The precise question on appeal was "the right of a wife to recover damages for a tort committed by her husband. . . ."[20] The Ohio Supreme Court held that because the Married Women's Act had abrogated the common law unity of husband and wife, the Act authorized a suit by a wife against her husband for his torts; consequently, the plaintiff had standing to sue the defendant association.[21]

In the past two decades an increasing number of states have joined the trend of abolishing interspousal immunity, and the minority has now become the majority.[22] States have abolished interspousal immunity in varying degrees: some have limited suits between husbands and wives to wilful or intentional torts;[23] most have abolished it for negligence as well.[24] The three

[17] OHIO REV. CODE ANN. § 2307.09-.10 (Page 1956), printed in full at note 8 *supra*.

[18] 156 Ohio St. 566, 103 N.E.2d 743 (1952).

[19] *Id.* at 569, 103 N.E.2d at 747.

[20] 158 Ohio St. at 113, 107 N.E.2d at 340-41.

[21] *Id.* at 121, 107 N.E.2d at 344. This position has been reaffirmed in subsequent cases; *see* Le Crone v. Ohio Bell Tel. Co., 120 Ohio App. 129, 135, 201 N.E.2d 533, 539 (10th Dist. 1963); Lowman v. Lowman, 166 Ohio St. 1, 9-10, 139 N.E.2d 1, 6-7 (1956).

[22] Casey, *The Trend of Interspousal and Parental Immunity — Cakewalk Liability*, 45 INS. COUNSEL J. 321, 322 (1978).

[23] Lusby v. Lusby, 390 A.2d 77 (Md. Ct. App. 1978); Apitz v. Dames, 205 Or. 242, 287 P.2d 585 (1955).

[24] The following is a list of states which have abolished interspousal immunity for negligence actions: Alabama — Penton v. Penton, 223 Ala. 282, 135 So. 481 (1931); Alaska — Cramer v. Cramer, 379 P.2d (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, 26 Cal. Rptr. 102 (1962); Colorado — Rains v. Rains, 97 Colo. 19, 46 P.2d 740 (1935); Connecticut — Bushnell v. Bushnell, 103 Conn. 583, 13 A. 432 (1925); Idaho — Lorang v. Hayes, 69 Idaho 440, 209 P.2d 733 (1949); Indiana — Brooks v. Robinson, 259 Ind. 16, 284 N.E.2d 794 (1972); Kentucky — Brown v. Gosser, 262 S.W.2d 480 (Ky. 1953); Massachusetts — Lewis v. Lewis, 351 N.E.2d 526 (Mass. 1976); Minnesota — Beaudette v. Frana, 285 Minn. 366, 173 N.W.2d 416 (1969); Nebraska — Imig v. March, 203 Neb. 537, 279 N.W.2d 382 (1979); Nevada — Rupert v. Stienne, 90 Nev. 397, 527 P.2d 1013 (1974); New Hampshire — Morin v. Le Tourneau, 102 N.H. 309, 156 A.2d 131 (1959); New Jersey — Immer v. Risko, 56 N.J. 482, 267 A.2d 481 (1970); New Mexico — Maestras v. Overton, 87 N.M. 213, 531 P.2d 947 (1975); New York — N.Y. GEN. OBLIG. LAW § 3-313 (McKinney 1978); North Carolina — Roberts v. Roberts, 185 N.C. 566, 118 S.E. 9 (1923); 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

most recent states to drop the doctrine of interspousal immunity are Nebraska and West Virginia, where it was abrogated completely,[25] and Maryland, where immunity for "outrageous intentional torts" was abrogated.[26] One state, Illinois, when its highest court abrogated interspousal immunity,[27] reinstituted it through legislation.[28] Not only a majority of states, but many commentators as well, support abrogation of interspousal immunity.[29]

III. The Interspousal Immunity Doctrine in Ohio

In the 1965 case of *Lyons v. Lyons*,[30] the Ohio Supreme Court retreated from the position it had taken in *Damm v. Elyria Lodge*. In *Lyons* a man brought suit against his wife for personal injuries allegedly sustained as a result of her negligent operation of an automobile. The court affirmed a judgment in favor of the plaintiff's wife on the grounds that the doctrine of interspousal immunity barred the suit. The court cited three justifications to support its conclusion: 1) permitting such a suit would foster marital disharmony contrary to public policy;[31] 2) in the case where the defendant is insured, such a suit may foster fraud and collusion as well as encourage raids upon the insurance companies;[32] and 3) because interspousal immunity represents the public policy of the state, any change should be left to the legislature.[33] The court was able to distinguish *Damm v. Elyria Lodge* because that case involved a suit against an unincorporated association rather than an individual husband, and, therefore, the policy reasons favoring interspousal immunity did not apply.[34] However, the court's holding was limited to negligence actions where the injury occurred while the parties were living together as man and wife.[35]

Recently the Ohio Supreme Court reaffirmed *Lyons*. In *Varholla v.*

(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); Vermont — Richard v. Richard, 131 Vt. 98, 300 A.2d 637 (1973); Virginia — Surratt v. Thompson, 212 Va. 191, 183 S.E.2d 200 (1971); Washington — Freehe v. Freehe, 81 Wash. 2d 183, 500 P.2d 771 (1972); West Virginia — Coffindaffer v. Coffindaffer, 244 S.E.2d 338 (W. Va. 1978); Wisconsin — Wait v. Pierce, 191 Wis. 202, 209 N.W. 475 (1926).

[25] Imig v. March, 203 Neb. 537, 279 N.W.2d 382 (1979); Coffindaffer v. Coffindaffer, 244 S.E.2d 338 (W. Va. 1978).

[26] Lusby v. Lusby, 390 A.2d 77 (Md. Ct. App. 1978).

[27] Brandt v. Keller, 413 Ill. 503, 109 N.E.2d 729 (1953). The court liberally construed the state's Married Women's Act establishing the separate identity of a married woman in all litigation to include all actions against all persons, including her husband.

[28] Ill. Ann. Stat. ch. 68, § 1 (Smith-Hurd 1959). The Illinois legislature added the following language to the Illinois Married Women's Act: "[N]either husband nor wife may sue the other for a tort to the person committed during coverture."

[29] *See* authorities cited in note 4 *supra*.

[30] 2 Ohio St. 2d 243, 208 N.E.2d 533 (1965).

[31] *Id.* at 244, 208 N.E.2d at 535.

[32] *Id.* at 245, 208 N.E.2d at 535.

[33] *Id.* at 247, 208 N.E.2d at 537.

[34] *Id.* at 245-46, 208 N.E.2d at 536.

[35] The syllabus of the court states: "A spouse may not maintain an action against the other spouse for personal injuries resulting from the negligence of the other spouse where the married parties are living together as husband and wife at the time of the alleged injury." *Id.* at 243, 208 N.E.2d at 534 (syllabus).

Varholla,[36] a woman brought an action against her husband for injuries allegedly sustained as a result of his negligent operation of an automobile. In a *per curiam* opinion the court rejected a request to reconsider its position on interspousal immunity and instead reiterated the three policy reasons which supported the *Lyons* opinion. However, one fact should be noted: in *Varholla* the plaintiff had alleged that she and her husband were having "marital difficulties" and she had filed for divorce twice before the date she brought the action.[37] The fact that the parties were having marital difficulties may obviate both the policy against fostering marital disharmony and the policy against fraudulent and collusive suits. If the marriage has already broken up, there is no longer any marital harmony to promote; furthermore, there would no longer be the close relationship that would lead to collusion against the insurance company. One Ohio court has recognized this distinction and allowed a husband to bring a negligence action against his wife where the parties had separated and a divorce was pending.[38]

Recently two cases in the Ohio courts of appeals have carved exceptions into interspousal immunity. In *Resmondo v. Martin*[39] the executor of a wife's estate brought a wrongful death action against the husband alleging that the wife's death was the result of the husband's beating. The trial court granted summary judgment for the husband, but the Eleventh District Court of Appeals reversed. The executor's right to maintain the action was derivative of the deceased's right to bring an action had she survived, and interspousal immunity would have barred such an action by the deceased.[40] Nevertheless, the court held that the executor of one's estate could bring an action against the surviving spouse notwithstanding the doctrine of interspousal immunity. The court indicated that the policies behind interspousal immunity all but disappeared in the case of wilful torts.[41] Although the court's holding was limited to the right of the *executor* to bring the action,[42] there are broad dicta to indicate that the *wife* could have maintained the action as well had she survived.[43]

A more recent case, *Kobe v. Kobe*,[44] also involved an alleged wife beating. This time the wife survived but not without suffering serious and permanent injuries. After obtaining a divorce, the wife brought an action for assault and battery against her ex-husband. The trial court denied the defendant's motion to dismiss, and the defendant appealed. The Eighth District Court of Appeals held that interspousal immunity did not apply to suits for intentional torts where the parties had divorced prior to the commencement of the action. As in *Resmondo*, the court held that the policies behind interspousal immunity

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[36] 56 Ohio St. 2d 269, 383 N.E.2d 888 (1978).

[37] Varholla v. Varholla, Brief of Appellant at 4.

[38] Markley v. Closson, 25 Ohio Misc. 87, 89, 266 N.E.2d 264, 266 (C.P. Richland County 1970).

[39] No. 75-844 (Ohio 11th Dist. Ct. App. Oct. 6, 1975).

[40] OHIO REV. CODE ANN. § 2125.01 (Page 1976).

[41] No. 75-844, slip op. at 4.

[42] *Id.* at 6.

[43] *Id.* at 7.

[44] 61 Ohio App. 2d 67, ___ N.E.2d ___ (8th Dist. 1978).

announced in *Lyons* had little relevance to the facts of the case.[45] However, because the holding was limited to suits brought by former spouses for intentional torts, the court left the matter unclear as to whether this exception to interspousal immunity was based on the fact the parties were divorced or the fact that an intentional tort was committed. In cases involving intentional torts, there is little problem with this unanswered question because usually the injured spouse will obtain a divorce. However, still unanswered is the question whether a spouse may sue the other spouse for negligence after obtaining a divorce.[46]

IV. Problems with the Ohio Position on Interspousal Immunity

A. *Interspousal Immunity Does Not Effectuate Its Policies*

The direction the law of interspousal immunity is taking in Ohio is uncertain. There are two factors in both *Resmondo* and *Kobe* which distinguish those cases from *Lyons* and *Varholla*. The first factor is that in both *Resmondo* and *Kobe* the marriage relationship had come to an end, either by death or divorce. The second factor is that both cases involved wilful, rather than negligent, torts. It is not clear which of these two factors is the key one in distinguishing *Resmondo* and *Kobe* from *Lyons* and *Varholla*. Nevertheless, whether the distinguishing factor is the marital status of the parties or the degree of culpability, such a distinction would be inconsistent with the goals of tort law and the promotion of marital harmony.

The major goal of tort law is to *compensate* the victim rather than punish the tortfeasor.[47] Yet the distinction made between negligent and wilful torts completely ignores the policy of compensation. It allows an injured spouse to recover for a few cuts and scratches wilfully inflicted by the other spouse, yet it denies any recovery whatsoever to a spouse who has been crippled for life in an automobile accident caused by his or her mate. The one who most needs compensation is not entitled to it.

Recognizing a distinction between suits brought before and after the dissolution of a marriage presents problems as well. If the marriage is already broken, as is the case with most wilful tort actions,[48] there is no problem; however, by allowing negligence actions only after dissolution of the marriage, the law may be promoting marital break-ups. A marriage may become unstable where one spouse has negligently injured the other. The marriage may be able to be saved, but if recovery for the injuries can only be obtained if the couple divorces, then the balance of this shaky marriage may

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[45] *Id.* at 70, ___ N.E.2d at ___.

[46] The plaintiff in *Varholla* attempted to obtain a divorce after the accident. However, no decree had been granted, and the parties were still married at the time the suit was filed. Varholla v. Varholla, Brief of Appellant at 3-4.

[47] Prosser describes the goal of tort law as follows:

> There remains a body of law which is directed toward the compensation of individuals, rather than the public, for losses which they have suffered in respect of all their legally recognized interests, rather than one interest only, where the law considers that compensation is required. This is the law of torts.

W. Prosser, *supra* note 4, at 6.

[48] *See* text accompanying notes 39-46 *supra*.

be tipped and the marital relationship dissolved. Thus the public policy of fostering marital harmony would be defeated.

Not only do the exceptions carved into the doctrine of interspousal immunity create problems, the doctrine itself creates problems. The three policies announced by the Ohio Supreme Court as justifications for the retention of the doctrine are not relevant to the conditions of today. Lawsuits between spouses will not disrupt marital harmony unless it has already been disrupted.[49] In most automobile negligence actions the defendant spouse will be insured, and there will be no disruption of marital life. If a spouse sues an uninsured spouse (for either wilful conduct or negligence), the filing of a lawsuit indicates the marriage has already broken up. Where a spouse sues his or her partner seeking his or her assets rather than peacefully settling the dispute, there is no marital harmony to promote.

Furthermore, denying an injured spouse recovery, especially where recovery can be had from an insurance company, may tend to break up the marriage rather than safeguard it. Hospital bills are rapidly rising these days, and if a spouse is seriously injured, the family may run into extreme financial hardship. In view of the fact that financial hardship is a major factor in divorce,[50] the denial of recovery may very well lead to divorce and thereby defeat the policy of promoting marital harmony.

Finally, Ohio's Married Women's Property Act[51] has always allowed suits between spouses in contracts and personal property claims. There is little justification in allowing a wife a tort action for her husband's conversion of a hundred dollar bank account while prohibiting a tort action against him for serious and crippling injuries. The personal injury suit should not create any more disharmony than the conversion suit.[52]

The policy of preventing collusion and fraud does not justify interspousal immunity. A husband and wife may be more likely to collude because of the closeness of their relationship, but this close relationship exists between parent and child, brother and sister, or for that matter even between a couple living together. There is no immunity recognized for them, and apparently there is no great fear of fraud or collusion.[53] In addition, our adversary system of justice is designed to weed out fraudulent and collusive claims.[54] With liberal discovery rules, the ability to vigorously cross-examine witnesses and the use of skillful counsel by insurance companies, there can be little fear of fraud escaping the courts' eyes.[55]

It is claimed that where insurance is involved, a suit between a husband

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[49] As Justice W. Brown, dissenting in *Varholla*, stated: "Marital harmony either exists or it does not. The harmonious marriage will not be hurt by allowing one spouse to benefit from the insurance coverage of the other; and the unhappy marriage will not be helped by denying legal rights to an already disgruntled spouse." 56 Ohio St. 2d at 273, 383 N.E.2d at 891 (Brown, W., J., dissenting).

[50] *See* Cutright, *Income and Family Events: Marital Stability*, 33 J. MARR. & FAM. 291 (1971).

[51] OHIO REV. CODE ANN. § 2307.9-.10 (Page 1956), printed in full at note 8 *supra*.

[52] Sullivan, *supra* note 4, at 476; Thompson v. Thompson, 218 U.S. 611, 623 (1902) (Harlan, J., dissenting).

[53] *See* Signs v. Signs, 156 Ohio St. 566, 576, 103 N.E.2d 743, 748 (1952).

[54] *See* Klein v. Klein, 58 Cal. 2d 692, 376 P.2d 70, 26 Cal. Rptr. 102 (1962).

[55] Coffindaffer v. Coffindaffer, 244 S.E.2d 338, 342-43 (W. Va. 1978). However:

and wife would involve only one real party.[56] However, most insurance contracts (at least in automobile insurance) require that the insured cooperate in defending any action as a condition to indemnification. The insurance company has protected itself from attempts at fraud or collusion. If an insured party's admission of fault is fraudulent, it can be exposed through the adversary process. If it is not fraudulent, there should be no cause to complain.

The Ohio Supreme Court has made a sad commentary on our adversary system of justice by maintaining that the possibility of fraud and collusion justifies the doctrine of interspousal immunity.[57] The real tragedy lies in the fact that the state's highest court has such little faith in the judicial system it represents.

Finally, the insurance companies can insulate themselves from fraud through family or household exclusion provisions. Many policies already contain such provisions,[58] and generally where there is no such provision, the rates are higher. The problem presented here is that the existence of family or household exclusion provisions may be inconsistent with the abrogation of interspousal immunity. The insurance companies themselves would be overturning the law.[59] Some states have specifically prohibited such clauses.[60]

The argument that the abrogation of interspousal immunity should be left to the legislature can be dealt with quite briefly: because interspousal immunity is a judicially created doctrine, it may be judicially abolished.[61] Furthermore, legislative silence does not mean that the legislature favors retaining interspousal immunity. There was legislative silence during the

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> There may be those desperate couples who would conclude that the prospect of a substantial monetary recovery is worth the pain of self-inflicted injuries. One can hardly imagine that the legal system will break down with cases brought by spouses who have flung themselves down the cellar steps or permitted the other spouse to strike them with the family car in order to achieve the type of substantial injury that makes jury litigation worthwhile.

Id. at 342-43.

[56] Lyons v. Lyons, 2 Ohio St. 2d 243, 245, 208 N.E.2d 533, 535-36 (1965).

[57] The Supreme Court of West Virginia succinctly pointed out:

> We do an injustice not only to the intelligence of jurors, but to the efficacy of the adversary system, when we express undue concern over the quantum of collusive or meritless law suits. There is, to be sure, a difference between the ability to file a suit and to achieve a successful result. It is upon the anvil of litigation that the merit of a case is finally determined. Forged in the heat of trial, few but the meritorious survive.

Coffindaffer v. Coffindaffer, 244 S.E.2d 338, 343 (W. Va. 1978).

[58] Insurance firms such as Aetna Insurance Co., State Farm Mutual Automobile Insurance Co., and MFA Mutal Insurance Co. all have automobile policies with household exclusion clauses. Ashdown, *Intrafamily Immunity, Pure Compensation, and the Family Exclusion Clause*, 60 IOWA L. REV. 239, 254 n.96 (1974).

[59] *Id.* at 255. Many courts, however, have upheld these exclusionary provisions. *See, e.g.*, Senn v. State Farm Mut. Auto. Ins. Co., 287 S.W.2d 439 (Ky. 1956).

[60] WIS. STAT. ANN. § 632.34(3) (West Special Pamphlet 1979). Minnesota had also outlawed family exclusions before it adopted its no fault insurance law of 1975. MINN. STAT. ANN. § 65 B.23 (West Supp. 1974) (repealed 1975). *See also* N.Y. INS. LAW § 167(3) (McKinney Supp. 1979).

[61] Varholla v. Varholla, 56 Ohio St. 2d 269, 273, 383 N.E.2d 888, 891 (1978) (Brown, W., J., dissenting); Markley v. Closson, 25 Ohio Misc. 87, 90, 266 N.E.2d 264, 266-67 (C.P. Richland County 1970). *See also* Crowell v. Crowell, 180 N.C. 518, 105 S.E. 210 (1920), where the court said that common law concepts which come from a "barbarous age," such as the unity of husband and wife, need no longer be followed.

period after the decision abolishing immunity in *Damm v. Elyria Lodge*. Silence on the part of the legislature does not indicate agreement with the judiciary as much as it indicates a willingness on the legislature's part to leave a particular matter up to the judiciary. The legislature's silence while the judiciary has wavered over this doctrine indicates such a willingness.

There have been other justifications advanced for the doctrine of interspousal immunity which have not been used by the Ohio Supreme Court in its decisions. One is that there are remedies available in the divorce and criminal courts for injured spouses.[62] However, these remedies are clearly inadequate.[63] Only certain awards may be made in a divorce proceeding, and these may not necessarily include compensation for personal injuries to an aggrieved spouse.[64] The non-compensatory aspect of criminal remedies is obvious.[65]

One final justification is that recovery between spouses in a case where the wrongdoer is insured may benefit the wrongdoer. Such an argument is inconsistent with the policies of tort law which look toward compensating the victim rather than punishing the wrongdoer.[66] In addition the so-called "benefit" to the tortfeasor was paid for; he or she is entitled to the benefit of his or her bargain with the insurance company.

B. Constitutional Problems

Notwithstanding the problems with interspousal immunity discussed above, the doctrine may also be unconstitutional under both the United States and Ohio constitutions.[67] Both of these provide for the equal protection of the laws.[68] In *Primes v. Tyler*,[69] the Ohio Supreme Court held that Ohio's Guest Statute[70] violated the equal protection provisions of the United States and Ohio constitutions. The provisions of the Guest Statute are similar to the doctrine of interspousal immunity insofar as the statute renders a host driver immune from negligence suits brought by the injured guest passengers in his or her car. The justifications for the statute were that it promoted hospitality

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[62] Thompson v. Thompson, 218 U.S. 611, 619 (1902).

[63] W. PROSSER, *supra* note 4, at 862; Note, *Husband and Wife Are Not One: The Marital Relationship in Tort Law*, 43 UMKC L. REV. 334, 337-38 (1975).

[64] *See* OHIO REV. CODE ANN. § 3105.18 (Page Supp. 1978). Although alimony awards are to be based on equitable grounds, personal injuries suffered at the hands of the other spouse are not included in the listed factors.

[65] W. PROSSER, *supra* note 4, at 862.

[66] One commentator noted that "[t]he argument that the husband should not share in the benefits of the judgement and in effect be awarded for his own wrong is consistent with traditional notions of tort." Note, *supra* note 63, at 338. Nevertheless, the author concludes that this "argument lacks any foundation in logic."

[67] Varholla v. Varholla, 56 Ohio St. 2d 269, 273, 383 N.E.2d 888, 891 (1978) (Brown, W., J., dissenting).

[68] U.S. CONST. amend. XIV; OHIO CONST. art. I, § 2.

[69] 43 Ohio St. 2d 195, 331 N.E.2d 723 (1975).

[70] OHIO REV. CODE ANN. § 4515.02 (Page 1973):

> The owner, operator, or person responsible for the operation of a motor vehicle shall not be liable for loss or damage arising from injuries to or death of a guest, resulting from the operation of said motor vehicle, unless such injuries or death are caused by the wilful or wanton misconduct of such operator, owner, or person responsible for the operation of said motor vehicle.

and prevented collusive suits. Applying a rational basis test, the Ohio Supreme Court held that the statute did not suitably further these objectives and therefore violated the equal protection clauses of the United States and Ohio constitutions.[71] The objectives of the Guest Statute and of interspousal immunity are similar: both seek to promote a particular social relationship, and both seek to prevent fraudulent and collusive law suits. As stated above,[72] these objectives are furthered no more by interspousal immunity than they are by the Guest Statute. For the same reasons stated in *Primes v. Tyler* interspousal immunity should be declared unconstitutional. One federal court has so held.[73]

Because the fundamental right of the family relationship is involved,[74] a higher standard of review may be required. The doctrine of interspousal immunity denies a class of people relief because of the existence of the marital relationship, and consequently it infringes upon that relationship. When a state infringes upon fundamental rights, it violates the equal protection clause of the United States Constitution unless there is a compelling state interest and no narrower means to achieve that interest.[75] Both the promotion of marital harmony and the prevention of fraud can be attained in a less intrusive manner than interspousal immunity. The doctrine is overinclusive because it prohibits spouses who would not divorce or commit fraud upon the insurance company from bringing a suit against the other spouse. It is underinclusive as well because it does not effectively eliminate marital disharmony — in fact it may further it — nor is it a very effective safeguard against fraudulent suits. Since the doctrine does not employ means narrowly tailored to fit its ends, it violates the equal protection clause of the United States Constitution.[76]

The doctrine of interspousal immunity raises due process questions as well. Without granting a spouse an opportunity to be heard, it creates an irrebuttable presumption that the spouse and his or her partner will perpetrate a fraud upon the court. Such irrebuttable presumptions have been held to be

[71] 43 Ohio St. 2d at 205, 331 N.E.2d at 729 (1975). However, the United States Supreme Court had reached a different result. *See* Silver v. Silver, 280 U.S. 117 (1929). More recently the United States Supreme Court has denied *certiorari* in a case which affirmed the constitutionality of a guest statute. *See* Sidle v. Majors, 536 F.2d 1156 (7th Cir.), *cert. denied*, 429 U.S. 945 (1976). Nevertheless, a growing number of courts is declaring guest statutes to be unconstitutional. *See, e.g.*, Brown v. Merlo, 8 Cal. 3d 855, 506 P.2d 212, 106 Cal. Rptr. 388 (1973); Thompson v. Hagan, 96 Idaho 19, 523 P.2d 1365 (1974); Henry v. Bander, 213 Kan. 751, 518 P.2d 362 (1974); Manistee Bank & Trust Co. v. McGowan, 394 Mich. 655, 232 N.W.2d 636 (1975); Laakonen v. Eighth Judicial Dist. Court, 91 Nev. 506, 538 P.2d 574 (1975); Johnson v. Hassett, 217 N.W.2d 771 (N.D. 1974) (decided on state grounds); McGeehan v. Bunch, 88 N.M. 308, 540 P.2d 238 (1975).

Furthermore, the United States Supreme Court has been willing to strike down legislation previously upheld by a three-judge district court under a rational basis test where apprehension of fraud and collusion is the justification for the legislation. *See* Jimenez v. Weinberger, 417 U.S. 628 (1974).

[72] *See* pages 120-23 *supra*.

[73] Alexander v. Alexander, 140 F. Supp. 925, 928 (W.D.S.C. 1956): "The Constitution and laws of the United States recognize that a married woman is a person and an individual and that she is entitled to the same protection of the law as other individuals regardless of ancient provisions of the common law."

[74] *See* Zablocki v. Redhail, 434 U.S. 374, 383-87 (1978); Moore v. City of East Cleveland, 431 U.S. 494 (1977); Loving v. Virginia, 388 U.S. 1, 12 (1967).

[75] Zablocki v. Redhail, 434 U.S. 374, 388 (1978). *See also* Shapiro v. Thompson, 394 U.S. 618 (1969); Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966).

[76] *See* Zablocki v. Redhail, 434 U.S. 374, 390 (1978).

unconstitutional,[77] especially where the right to be heard in court is concerned.[78] It would not be unduly burdensome upon the courts of Ohio to give a litigant the opportunity to try his case; as stated earlier, our adversary system is well equipped to weed out fraudulent and collusive claims. Finally interspousal immunity violates due process under the Ohio Constitution[79] because it closes the courts and denies a remedy by due course of law to a spouse who wishes to sue his or her partner.[80]

V. Conclusion

States that retain the doctrine of interspousal immunity are part of a shrinking minority. As has been seen, there are compelling explanations for this trend. Although historically the doctrine may have served a useful purpose and may have accurately reflected the values of society, this is no longer true. Currently the doctrine is inconsistent with the goals of tort law which are designed to compensate the injured. Marital status cannot be determinative of the remedy available to redress the injury. In this respect the doctrine is inconsistent with recent developments in the law of torts which are moving away from a system based on fault to one based on compensation.

The reasons that have been used to justify the doctrine have all but disappeared. Overriding policy concerns of promoting marital harmony and preventing fraud upon insurance companies are not adequately served by this doctrine. Marriages in modern society are subject to a variety of stresses; interspousal lawsuits would certainly be minor compared to the economic and social pressures already in action. In fact, the financial hardships created by the doctrine undoubtedly outweigh the minimal risks of strife that it is designed to prevent. A recognition of these factors opposing the continuation of the doctrine has already caused it to become riddled with judicially created exceptions, and, if it is retained in Ohio, the exceptions will continue to proliferate. This slow death of the doctrine will lead to more litigation and confusion. The courts will bear the burden of this approach in the long run. It would behoove them to relieve this burden by giving the doctrine of interspousal immunity the quick burial in Ohio that it has been given in most other jurisdictions.

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[77] Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974); Vlandis v. Kline, 412 U.S. 441 (1973); Primes v. Tyler, 43 Ohio St. 2d 195, 202, 331 N.E.2d 723, 728 (1974); *see* Varholla v. Varholla, 56 Ohio St. 2d 269, 275, 383 N.E.2d 888, 892 (1978) (Brown, W., J., dissenting).

[78] *See* Stanley v. Illinois, 405 U.S. 645 (1972).

[79] Ohio Const. art. I, § 16: "All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay."

[80] Primes v. Tyler, 43 Ohio St. 2d 195, 205, 331 N.E.2d 723, 729 (1975).