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The Unwarranted Abrogation of Interspousal Tort Immunity: *Fernandez v. Romo*

For hundreds of years the common-law doctrine of interspousal tort immunity has barred actions between spouses for tortious conduct. Although originally an appendage to the concept of unity by coverture,[1] the doctrine has been retained by most modern courts because of two public policies: (1) preserving family harmony and (2) preventing collusion between spouses to collect insurance proceeds.[2] In *Fernandez v. Romo*[3] the Arizona Supreme Court rejected common-law precedent[4] and abrogated the interspousal tort immunity doctrine.

I. The *Fernandez* Case

In July 1974, Joseph N. Ashford II was returning from a family vacation to his home in Parker, Arizona. Mr. Ashford was accompanied by his wife and two of their three children, Michael, age nine, and Joseph III, age twelve. As the Ashfords approached Lake Havasu City, Arizona, they encountered heavy rainstorms that caused a stream to flood across the highway. As Mr. Ashford drove toward the flooding stream, his wife repeatedly asked him not to attempt the crossing.[5] Despite these protests, Mr. Ashford continued driving, and the car was swept off the road into the river. Joseph III escaped through the car's rear window, but Mr. and Mrs. Ashford and Michael were drowned.

The surviving children initiated a wrongful death action against their father's estate for the death of their mother. The trial court granted the defendant's motion for summary judg-

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1. 1 W. Blackstone, Commentaries on the Laws of England *442. Blackstone explains that the wife "is said to be *covert-baron*, or under the protection and influence of her husband, her *baron*, or lord; and her condition during her marriage is called her *coverture*." *Id.*

2. *See, e.g.*, Burns v. Burns, 111 Ariz. 178, 526 P.2d 717 (1974); Corren v. Corren, 47 So. 2d 774 (Fla. 1950); Holman v. Holman, 73 Ga. App. 205, 35 S.E.2d 923 (1945); Lyons v. Lyons, 2 Ohio St. 2d 243, 208 N.E.2d 533 (1965); Smith v. Smith, 240 Pa. Super. 97, 361 A.2d 756 (1976); Rubalcava v. Gisseman, 14 Utah 2d 344, 384 P.2d 389 (1963).

3. 132 Ariz. 447, 646 P.2d 878 (1982).

4. For examples of common-law precedent in Arizona, see Burns v. Burns, 111 Ariz. 178, 526 P.2d 717 (1974); Schwartz v. Schwartz, 103 Ariz. 562, 447 P.2d 254 (1968).

5. *Fernandez*, 132 Ariz. at 448, 646 P.2d at 879.

ment based on the interspousal tort immunity doctrine and Arizona's wrongful death statute.[6] Since the interspousal tort immunity doctrine would have prevented Mrs. Ashford from suing her husband for negligence had she lived, the trial court ruled that representatives of the estate were also precluded from suing.[7]

On appeal, the Arizona Supreme Court narrowed its consideration to whether the doctrine of interspousal tort immunity should be abolished or retained.[8] The defendant maintained that two important public policies supported retention of the doctrine: (1) suits between spouses may detrimentally affect marital harmony and the solidity of the family unit, and (2) interspousal suits could open the door to collusion between parties, especially when insurance proceeds are involved.[9] The court rejected both arguments, holding that there would be no adverse effect on marital harmony because "[a] person would not sue his spouse if there were . . . harmony."[10] Although the court acknowledged the collusion argument to be "most persuasive,"[11] it held that courts and insurance company attorneys were capable of preventing collusion between spouses.

II. Analysis

Although the Arizona Supreme Court correctly noted that the common-law concept of marital rights has significantly changed, the court went too far in completely abrogating interspousal tort immunity. The court's decision detrimentally affects the public's interest in preserving domestic tranquility and preventing collusion in interspousal lawsuits. Had the court limited the abrogation only to intentional torts, a remedy for deserving spouses injured by tortious conduct would have been

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6. Ariz. Rev. Stat. Ann. § 12-611 (1956). This statute reads as follows:

> When death of a person is caused by wrongful act, neglect or default, and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action to recover damages in respect thereof, then, and in every such case, the person who or the corporation which would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured . . . .

7. *Fernandez*, 132 Ariz. at 448, 646 P.2d at 879.

8. *Id.*

9. *Id.* at 450-51, 646 P.2d at 881-82.

10. *Id.* at 450, 646 P.2d at 881 (quoting Immer v. Risko, 56 N.J. 482, 488, 267 A.2d 481, 484 (1970)).

11. *Fernandez*, 132 Ariz. at 451, 646 P.2d at 882.

created without abandoning other important public policy interests.

A. Historical Background

The precise origins of interspousal tort immunity are not clear. Some believe the immunity originated under Roman civil law,[12] while others consider it to be of Biblical origin.[13] Despite the variety of opinions about the source of interspousal tort immunity, it is clear that by the nineteenth century it was an accepted tenet of English common law.[14]

The English courts viewed husband and wife as a single legal entity, openly declaring that "[b]y marriage, the husband and wife are one person, . . . that is, the very being or existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband."[15] A wife, therefore, could sue only in her husband's name.[16] This concept made interspousal suits impossible because they amounted to the husband's suing himself.

The doctrine of interspousal tort immunity was first adopted in the United States by the Supreme Judicial Court of Maine. In *Abbot v. Abbot*,[17] a wife sued her husband, alleging that he and several others had illegally attempted to confine her in an insane asylum and that she was beaten and wounded.[18] The court ruled that the wife's suit was improper even though the parties were divorced before the suit was filed.

> There is not only no civil remedy but there is no civil right, during coverture, to be redressed at any time . . . . Divorce cannot make that a cause of action which was not a cause of action before the divorce. The legal character of an act of vio-

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

13. Scholars supporting this proposition refer to Adam's statement after the creation of Eve that "[t]his is now bone of my bones and flesh of my flesh." *Genesis* 2:23; *see* Karell, *Toward Abolition of Interspousal Tort Immunity*, 36 MONT. L. REV. 251, 252 (1975).

14. *See* W. PROSSER & W. KEETON, PROSSER AND KEETON ON THE LAW OF TORTS § 122 (5th ed. 1984); McCurdy, *Personal Injury Torts Between Spouses*, 4 VILL. L. REV. 303, 304 (1959).

15. *See* 1 W. BLACKSTONE, *supra* note 1, at *442; *see also* W. PROSSER & W. KEETON, *supra* note 14, § 122, at 901-02.

16. *See* 1 W. BLACKSTONE, *supra* note 1, at *443.

17. 67 Me. 304 (1877), *overruled in* MacDonald v. MacDonald, 412 A.2d 71 (Me. 1980).

18. *Id.* at 305.

> lence by husband upon wife and of the consequences that flow from it, is fixed by the [marital] condition of the parties at the time the act is done.[19]

Until recently, the common-law formulation of interspousal immunity was recognized and upheld in the majority of jurisdictions within the United States. However, a trend to abrogate interspousal immunity emerged with the widespread passage of Married Women's Acts.[20] Although there are minor variations, most of the statutes provide that a married woman may sue or be sued in the same manner as if she were single.[21]

The passage of Married Women's Acts gave women a personal legal identity, and courts in every jurisdiction began to allow interspousal suits in cases involving property interests.[22] However, most courts continued to prohibit interspousal suits in cases involving personal injury. This disparity developed because only four states' statutes specifically dealt with injuries resulting from tortious conduct.[23] Most courts strictly construed the Married Women's Statutes as evidence of legislative intent to abolish only the legal disabilities attached to married women at common law—not to totally eliminate interspousal tort immunity.

B. Modern Application of the Doctrine

In recent years, interspousal tort immunity has developed into one of the most unsettled areas of the law.[24] Debate over the efficacy of abrogating the immunity under Married Women's Acts has led to a general questioning of the immunity's propriety and has caused one court to observe that the interspousal tort immunity's "efficacy as a legal principle has divided juris-

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19. *Id.* at 306.

20. By 1958, every state had adopted a Married Women's Act. *See* McCurdy, *supra* note 14, at 310 (footnotes 52-79 and the accompanying text list the specific statutes from each state). *See generally* Annot., 92 A.L.R.3D 901, 907 (1979).

21. *See, e.g.*, OKLA. STAT. ANN. tit. 32, § 15, (West 1976); WASH. REV. CODE ANN. § 26.16.150 (1961).

22. *See, e.g., In re* Crawford's Estate, 155 Kan. 388, 12 P.2d 354 (1942).

23. McCurdy, *supra* note 14, at 312. Although all four of these statutes have since been repealed or renumbered, the original enactments were found at ILL. ANN. STAT. ch. 68, § 1 (Smith-Hurd Supp. 1953); N.Y. DOM. REL. LAW § 57 (McKinney 1909); N.C. GEN. STAT. § 52-10.1 (1953); WIS. STAT. § 246.075 (1955).

24. *See* Merenoff v. Merenoff, 76 N.J. 535, 540-42, 388 A.2d 951, 944-45 (1978). The New Jersey Supreme Court lists nine different conclusions courts have reached regarding interspousal tort immunity.

dictions; and its utility as a social tool . . . has confounded courts, legislators, and commentators."[25]

The interspousal tort immunity controversy began in 1910 when the United States Supreme Court in *Thompson v. Thompson*[26] articulated reasons for continued application of the doctrine.

> It must be presumed that the legislators who enacted this [Married Women's] statute were familiar with the long-established policy of the common law . . . . Had it been the legislative purpose not only to permit the wife to bring suits free from her husband's participation and control, but to bring actions against him also for injuries to person . . . it would have been easy to have expressed that intent in terms of irresistible clearness.[27]

Although *Thompson* seemed dispositive, several states rejected the Supreme Court's interpretation and held that the newly passed acts abrogated interspousal tort immunity in both property- and tort-related cases.[28]

In deciding whether the interspousal tort immunity should be retained, courts have focused on three areas of concern: first, whether retention of the immunity would violate the personal guarantees of the fifth and fourteenth amendments; second, whether abrogation of the immunity would lead to collusion between spouses; and third, whether abrogation would destroy domestic tranquility.[29]

1. Constitutionality of the doctrine

The constitutionality of interspousal immunity has been questioned based on the equal protection clause of the four-

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25. *Id.* at 542, 388 A.2d at 955.

26. 218 U.S. 611 (1910).

27. *Id.* at 618.

28. *See, e.g.*, Johnson v. Johnson, 201 Ala. 41, 77 So. 335 (1917); Katzenberg v. Katzenberg, 183 Ark. 626, 37 S.W.2d 696 (1931); Rains v. Rains, 97 Colo. 19, 46 P.2d 740 (1935); Crowell v. Crowell, 180 N.C. 516, 105 S.E. 206 (1920); Courtney v. Courtney, 184 Okla. 395, 87 P.2d 660 (1938).

29. The *Fernandez* court addressed a fourth issue, community property interests. The court pointed to a prior Arizona case which held that "[t]he body which he brought to the marriage is certainly his separate property. The compensation for injuries to his personal well-being should belong to him as separate property." *Fernandez*, 132 Ariz. at 451, 646 P.2d at 882 (quoting Jurek v. Jurek, 124 Ariz. 596, 598, 606 P.2d 812, 814 (1980)).

teenth amendment[30] and the due process clause of the fifth amendment.[31] Claims under the equal protection clause stem from the different treatment received by married and unmarried persons in suits for tortious conduct.[32]

Many courts considering such claims have failed to apply the proper standard of review for equal protection cases. The standard specified by the Supreme Court is that allegedly discriminatory classifications are not unconstitutional if they serve "important" governmental objectives and are "substantially related to achievement of those objectives."[33] Courts traditionally have maintained that protection of the family unit is an "important" governmental objective.[34] The immunity doctrine has also been held to be "substantially related" to achieving the objective of preserving family harmony.[35]

In addition, many commentators and litigants have argued that the immunity doctrine openly violates the fifth amendment by denying a spouse the opportunity to be heard or to seek a remedy at law.[36] However, the principle of due process has never

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30. *See, e.g.*, Robinson v. Trousdale County, 516 S.W.2d 626, 634 (Tenn. 1974) (Henery, J., concurring). The equal protection clause requires that "[n]o State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONS. amend. XIV, § 1.

31. *See, e.g.*, Primes v. Tyler, 43 Ohio St. 2d 195, 202, 331 N.E.2d 723, 729 (1975). The due process clause states simply that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. V.

32. Even though the common-law marital disabilities pointedly refer only to women, allegations of gender-based discrimination are inapplicable. Although Married Women's Acts purportedly have given women the right to sue their husbands, no comparable statute exists to allow men to sue their wives; yet interspousal tort immunity has always prevented suits by both husbands and wives. *See* Smith v. Smith, 205 Or. 286, 287 P.2d 572 (1955); *see also* Patrons Mut. Ins. Ass'n v. Norwood, 231 Kan. 709, 647 P.2d 1335 (1982) (interspousal tort immunity held to bar a husband's suit against his wife).

33. *See* Craig v. Boren, 429 U.S. 190, 197 (1976). Although the intermediate standard of *Craig* is arguably the proper standard because of the gender-based overtones of the interspousal immunity doctrine, other courts have applied the rational basis standard. *See* Alfree v. Alfree, 410 A.2d 161 (Del. 1979); Primes v. Tyler, 43 Ohio St. 2d 195, 205, 331 N.E.2d 723, 729 (1975). It has also been suggested that "because the fundamental right of the family is involved, a higher standard of review may be required." Note, *The Law of Interspousal Immunity in Ohio*, 28 CLEV. ST. L. REV. 115, 124 (1979). No court has adopted a strict scrutiny standard, but if a court were to do so, it could find that preservation of the family unit is a compelling governmental interest.

34. *See, e.g.*, Corren v. Corren, 47 So. 2d 774 (Fla. 1950); Thomas v. Herron, 20 Ohio St. 2d 62, 253 N.E.2d 772 (1969).

35. *See, e.g.*, Burns v. Burns, 111 Ariz. 178, 526 P.2d 717 (1974); Bencomo v. Bencomo, 200 So. 2d 171 (Fla. 1967), *cert. denied*, 389 U.S. 970 (1967); Holman v. Holman, 73 Ga. App. 205, 35 S.E.2d 923 (1945); Lyons v. Lyons, 2 Ohio St. 2d 243, 208 N.E.2d 533 (1965); Lillienkamp v. Rippetoa, 133 Tenn. 57, 179 S.W. 628 (1915).

36. *See generally* Note, *supra* note 33, at 124-25.

required that a cause of action be granted for every injury suffered at the hands of another.[37] This is especially true in cases dealing with marital and familial issues.[38] In short, "there appears to be no Federal constitutional limitation on the interspousal immunity doctrine."[39]

2. The danger of collusion

Even courts that have abolished interspousal immunity agree that its abrogation results in a possibility of fraud and collusion.[40] The danger is especially acute when insurance proceeds are available.[41] When liability insurance exists and the immunity doctrine is not enforced, individuals have an incentive to sue their spouses for injuries sustained in a common accident, even if the accident was caused solely by their spouses' negligence. If the individuals prevail, the spouses will suffer no loss because the insurance company is the "true defendant."[42] The insurer must defend the insured spouses as the named defendants and pay damages should it lose. As one dissenting judge aptly noted, "this really results in a 'joint venture,' with 'the husband calling

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37. *See* Smith v. Smith, 205 Or. 286, 296, 287 P.2d 572, 576 (1955). Two obvious statutory examples are injuries involving workers' compensation and apportionment cases in comparative negligence jurisdictions. *See generally* Annot., 46 A.L.R.3D 1279 (1972); 57 AM. JUR. 2D *Negligence* §§ 433-35 (1971).

38. Hill v. Hill, 415 So. 2d 20 (Fla. 1982). The Florida Supreme Court stressed that proceedings dealing with marital and familial issues have created several unique due process restrictions including forced alimony, protection of homestead property from creditors, judicial bars on the garnishment of head-of-family wages, and the protection of a surviving family member's interest in a decedent spouse's estate. *Id.* at 23.

39. Alfree v. Alfree, 410 A.2d 161, 163 (Del. 1979). Note 3 of the *Alfree* decision indicates that only one case, Alexander v. Alexander, 140 F. Supp. 925 (W.D.S.C. 1956), has suggested that federal constitutional provisions do affect the doctrine of interspousal tort immunity.

40. *See, e.g.*,Klein v. Klein, 58 Cal. 2d 692, 695, 376 P.2d 70, 73, 26 Cal. Rptr. 102, 105 (1962); Rupert v. Stienne, 90 Nev. 397, 401, 528 P.2d 1013, 1015 (1974); Immer v. Risko, 56 N.J. 482, 490, 267 A.2d 481, 485 (1970). In *Immer*, the New Jersey Supreme Court abolished interspousal tort immunity for automobile related injuries but conceded that the danger of fraud or collusion exists in every action involving insurance. The court noted that "[t]he closer the parties are to each other, the greater is the danger . . . . In the family context, the danger of collusion is the greatest of all." *Id.* at 490, 267 A.2d at 485. The collusion argument is inapplicable to cases like *Fernandez* in which one or both spouses are killed.

41. *See* Smith v. Smith, 205 Or. 286, 311, 287 P.2d 572, 583 (1955). *See generally* Casey, *The Trend of Interspousal and Parental Immunity—Cakewalk Liability*, 45 INS. COUNS. J. 321 (1978).

42. Peters v. Peters, 63 Hawaii 653, 665, 634 P.2d 586, 594 (1978).

his insurance agent, the wife calling her lawyer, and both entertaining visions of better days ahead.' "[43]

The *Fernandez* court addressed the collusion argument by asserting that courts are capable of screening and ferreting out fraudulent claims.[44] Other courts have suggested that those individuals who feel the possibility of fraud and collusion justifies interspousal tort immunity make "a sad commentary on our adversary system of justice."[45]

Such high regard for the judicial system is laudable but must be kept within the bounds of realism. One court recently stated:

> Under such circumstances, it is unrealistic to think that the defendant spouse will do all within his or her power to defeat the claim of the plaintiff spouse. We expect too much of human nature if we believe that a husband and wife who sleep in the same bed, eat at the same table, and spend money from the same purse can be truly adversary to each other in a lawsuit when any judgment obtained by the plaintiff spouse will be paid by an insurance company and will ultimately benefit both spouses.[46]

Several dissenting opinions have pointed out that it is naive to believe that lawsuits involving insurance proceeds will be true adversary proceedings.[47] An insurance company, like any other party involved in litigation, is "entitled to expect its insured to behave in an adversary manner towards the injured plaintiff."[48] When this does not occur, insurance companies will be, except in rare instances, "impotent to defend."[49]

Although opponents of the immunity doctrine acknowledge the dangers connected with abrogation, they nonetheless insist that attempted collusion may be adequately dealt with through

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43. Shook v. Crabb, 281 N.W.2d 616, 621-22 (Iowa 1979) (LeGrand, J., dissenting) (quoting Hosko v. Hosko, 385 Mich. 39, 48, 187 N.W.2d 236, 240 (1971) (Brennan, J., dissenting)).

44. *Fernandez*, 132 Ariz. at 451, 646 P.2d at 882 (citing Rupert v. Stienne, 90 Nev. 397, 401, 528 P.2d 1013, 1015 (1974)); *see also* Imig v. March, 203 Neb. 537, 541, 279 N.W.2d 382, 385 (1979).

45. Note, *supra* note 33, at 122.

46. Raisen v. Raisen, 379 So. 2d 352, 355 (Fla. 1979).

47. Immer v. Risko, 56 N.J. 482, 490, 267 A.2d 481, 488 (1970) (Francis, J., dissenting).

48. Ard v. Ard, 414 So. 2d 1066, 1070 (Fla. 1982) (Boyd, J., dissenting).

49. Immer v. Risko, 56 N.J. 482, 490, 267 A.2d 481, 488 (1970) (Francis, J., dissenting).

preventive measures.[50] A preventive measure suggested by several courts is judicial acknowledgement of an insurance company's presence in the lawsuit.[51] While this would make jurors more aware of possible collusion, it would also make them aware that insurance proceeds are available.[52] The implications of such awareness led the Oregon Supreme Court to say, "We revere the jury system as the bulwark of individual liberty, but we are also realists, and we know that juries are, as a Kentucky mountaineer once said—'tolerable generous with other people's money,' especially when the aroma of insurance permeates the courtroom."[53] The possibility of collusion in interspousal suits is a problem that could endanger our adversarial form of justice and should not be simply brushed aside with a euphemistic pledge of judicial protection.

3. *The importance of marital harmony*

Preservation of the family unit and marital harmony are important public policies.[54] The crucial role played by the family in maintaining an orderly society has long been recognized in the American judicial system.[55] One court has concluded that "[t]he family continues to be an unofficial sociological governmental structure necessary and vital to our free, independent society."[56]

The *Fernandez* court, however, maintained that allowing a suit against a spouse causes no greater disturbance of family harmony than allowing the injury to go unredressed.[57] While this may be true of intentional torts, the same cannot be said of neg-

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50. *See generally*, Note, *The Impact of Abrogation of Interspousal Tort Immunity in Nebraska:* Imig v. March, 13 CREIGHTON L. REV. 423, 427 (1979).

51. *See, e.g.*, Ford, *Interspousal Liability for Automobile Accidents in the Conflict of Laws: Law and Reason versus the Restatement*, 15 U. PITT. L. REV. 397, 421-23 (1954); Comment, Brown v, Brown: *The Current Status of Interspousal Immunity in Massachusetts*, 16 NEW ENG. L. REV. 573, 592 (1981).

52. It is well recognized that even the mention of available insurance proceeds may be prejudicial and should be avoided. *See* Annot., 47 A.L.R.3D 1299 (1973); *see also* C.R. Owens Trucking Corp. v. Stewart, 29 Utah 2d 353, 356, 509 P.2d 821, 823 (1973) (mention of insurance in a jury trial should be avoided by botb counsel and the court wherever and whenever possible).

53. Smith v. Smith, 205 Or. 286, 311, 287 P.2d 572, 583 (1955).

54. *See supra* notes 34-35 and accompanying text.

55. *See generally* Comment, *A Job Half Done: Florida's Judicial Modification of the Intrafamilial Tort Immunities*, 10 FLA. ST. U.L. REV. 639, 639 (1983).

56. Hill v. Hill, 415 So. 2d 20, 23 (Fla. 1982).

57. *Fernandez*, 132 Ariz. at 450, 646 P.2d at 881.

ligent torts.[58] In cases in which the peace and harmony of a home have been strained to the point that an intentional physical assault has resulted, there is admittedly little harmony left to protect.[59] In contrast, after the commission of a negligent tort,[60] there may still be marital harmony to protect—harmony that a suit for damages could eradicate.

The *Fernandez* court stressed that the threat to marital harmony is even smaller when the probable existence of liability insurance is considered—that no feelings of contention arise when only the insurance company stands to lose.[61] This contention fails to recognize the necessary relationship between efforts to preserve marital harmony and attempts to prevent collusion. A lawsuit between spouses that is truly adversarial will, by its very nature, have a destructive effect on their marital relationship. Conversely, when the only purpose of a lawsuit is to collect the defendant's insurance proceeds, family harmony is not threatened, but the probability of collusion sharply increases.[62]

Efforts to protect the family unit are matters of great judicial concern and should weigh heavily in interspousal actions. When some degree of harmony still exists between marital part-

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58. Much of the confusion on this issue stems from a frequently cited statement by Professor Prosser that interspousal tort immunity is based "on the bald theory that after a husband has beaten his wife, there is a state of peace and harmony left to be disturbed." W. PROSSER, HANDBOOK OF THE LAW OF TORTS, § 122, at 863 (4th ed. 1971). (Although a fifth edition of Prosser's work has been published, the fourth edition is referred to here because of courts' reliance on the quoted language.) However, several judges have taken issue with this statement. For example, a dissenting judge recently stated that

> [a]lthough it may be heresy to disagree with the gospel according to Prosser, nevertheless if the good professor is actually suggesting that such stotement justifies the abolition of interspousal immunity in negligence cases as distinguished from intentional torts,, I must confess my admiration at the sine qua non of non sequiturs.

Shook v. Crahb, 281 N.W.2d 616, 621 (Iowa 1979) (LeGrand, J., dissenting) (citing Rogers v. Yellowstone Park Co., 97 Idaho 14, 22, 537 P.2d 566, 574 (1975)).

59. Bounds v. Caudle, 560 S.W.2d 925, 927 (Tex. 1977).

60. In intorspousal suits, the most commonly cited examples of negligent torts are a wife tripping over her husband's slippers in the dark and a husband slipping on a highly-polished kitchen floor. These examples are not farfetched hypotheticals. *See, e.g.*, Klein v. Klein, 58 Cal. 2d 692, 376 P.2d 70, 26 Cal. Rptr. 102 (1962) (suit for injuries suffered by a wife when she slipped on the wet deck of her husband's boat).

61. *Fernandez*, 132 Ariz. at 450, 646 P.2d at 881-82. Here the court indirectly admits that the presence of an insurance company eliminates the conflict necessary for a true adversarial proceeding.

62. Raisen v. Raisen, 379 So. 2d 352, 355 (Fla. 1979).

ners, placing the adversary system between them will seldom, if ever, facilitate reconciliation.[63]

C. *Partial Abrogation—An Alternative Proposal*

There is little hope for a uniform resolution of the problems involved in interspousal tort actions because of the "all or nothing" attitude of courts. Most jurisdictions have required either complete abrogation[64] or complete retention[65] of interspousal tort immunity. However, since important interests support both sides of the argument, the best resolution of the problem lies somewhere between the two extremes.

Cases supporting abrogation point out that the American judicial system is imbued with the notion of providing redress for every wrong.[66] On the other hand, courts advocating retention of the immunity also correctly observe that, at least for negligent tort actions, certain policy arguments support retaining the doctrine. A partial retention of the immunity doctrine provides the solution to this conflict of interests. Unfortunately, courts that have recognized the practicality of a partial retention approach have defined the scope of the immunity differently. Many courts allow actions when the marriage has been terminated by death or divorce.[67] Some permit recovery for antenuptial torts.[68] Others have abrogated the immunity for actions involving automobile accidents[69] or intentional torts.[70] Still other courts have oscillated depending on the nature of the case.[71]

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63. Hill v. Hill, 415 So. 2d 20, 23 (Fla. 1982). The Florida Supreme Court raised the question of how "the abolition of this common law doctrine will affect the family unit, including children and the family resources" and concluded that "abolition would be detrimental to the family as a whole." *Id.* at 23.

64. *See, e.g.*, Klein v. Klein, 58 Cal. 2d 692, 376 P.2d 70, 26 Cal. Rptr. 102 (1962); Freehe v. Freehe, 81 Wash. 2d 183, 500 P.2d 771 (1972). *See generally* Note, *Interspousal Immunity—Automobile Negligence*—Surratt v. Thompson, 6 U. RICH. L. REV. 379, 380 (1972).

65. *See, e.g.*, Paiewonsky v. Paiewonsky, 446 F.2d 178 (3d Cir. 1971), *cert. denied*, 405 U.S. 919 (1972); Monk v. Ramsey, 223 Tenn. 247. 443 S.W.2d 653 (1969).

66. See Shook v. Crabb, 281 N.W.2d 616, 620 (Iowa 1979), in which the Iowa Supreme Court said there is a "fundamental proposition of public policy that the courts should afford redress for a wrong."

67. *E.g.*, Apitz v. Dames, 205 Or. 242, 287 P.2d 585 (1955).

68. *See, e.g.*, O'Grady v. Potts, 193 Kan. 644, 396 P.2d 285 (1964); Moulton v. Moulton, 309 A.2d 224 (Me. 1973).

69. *See, e.g.*, Rupert v. Stienne, 90 Nev. 397, 528 P.2d 1013 (1974); Richard v. Richard, 131 Vt. 98, 300 A.2d 637 (1973).

70. *See, e.g.*, Lusby v. Lushy, 283 Md. 334, 390 A.2d 77 (1978).

71. *Compare* Taylor v. Patten, 2 Utah 2d 404, 275 P.2d 696 (1954) (abrogating the

Before uniformity can occur, a single standard must be found that accommodates the anomalies of interspousal tort cases. Delineation of an acceptable standard should begin with the application of two well-grounded tort principles, implied consent[72] and assumption of risk.[73] Courts have agreed that to prevent every touching from being classified as a battery, the judicial system must acknowledge that "[t]here would be a considerable amount of express or implied consent due to the fact of the marital relation, and even where there was a lack of actual consent the relation would license much conduct."[74] This concept of implied consent renders the "ordinary frictions of wedlock"[75] nonactionable and removes injuries arising out of simple domestic negligence from judicial cognizance.[76]

The assumption-of-risk concept should also be utilized in creating a uniform standard. Since husband and wife are "engaged in a common enterprise, for common benefit, often with common control, each should bear the risk that the other takes in the ordinary conduct of the domestic establishment."[77] It is doubtful that a couple enters into marriage without assuming that sooner or later some everyday occurrence might prove injurious to one of them.[78] An assumption-of-risk analysis allows only conduct outside the ordinary scope of marital relationships to be actionable.

Partial abrogation thus addresses both sides of the interspousal immunity argument.[79] Partial abrogation based on the

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immunity) *with* Rubalcava v. Gisseman, 14 Utah 2d 344, 384 P.2d 389 (1963) (reinstating the immunity).

72. Many of the paradoxes are created because "[c]onduct, tortious between two strangers, may not be tortious between spouses because of the mutual concessions implied in the marital relationship." Lewis v. Lewis, 370 Mass. 619, 630, 351 N.E.2d 526, 532 (1976)73. Assumption of risk is defined to include situations where the plaintiff voluntarily enters into some relation with the defendant, with knowledge that the defendant will not protect him against one or more future risks that may arise from the relation. He may then be regarded as tacitly or *impliedly* consenting to the negligence, and agreeing to take his own chances.

W. PROSSER & W. KEETON, *supra* note 14, § 68, at 481 (emphasis in original).

74. McCurdy, *Torts Between Persons in Domestic Relation*, 43 HARV. L. REV. 1030, 1055 (1930).

75. W. PROSSER, *supra* note 58, § 122, at 863. Prosser uses the phrase to denote the everyday occurrences of married life.

76. Merenoff v. Merenoff, 76 N.J. 535, 388 A.2d 951 (1978).

77. McCurdy, *supra* note 75, at 1055.

78. *See supra* note 74 and accompanying text.

79. Even commentators supporting the abrogation of interspousal tort immunity have acknowledged the need for a standard that recognizes the unique aspects of interspousal actions. *See, e.g.*, McCurdy, *supra* note 14, at 338. McCurdy states, "Acts that

doctrines of implied consent and assumption of risk would bar suits for negligent torts that adversely affect marital harmony and invite collusion and fraud. However, partial abrogation of interspousal immunity would not result in immunity for intentional or outrageous torts because neither involves an assumption of risk or implied consent.

III. Conclusion

Although the *Fernandez* court correctly held that the outdated common-law concept of marital rights is no longer desirable, it went too far in completely abrogating the doctrine of interspousal tort immunity. Any benefit gained by increasing the remedies available to injured spouses is procured at the expense of other important familial and societal interests. Limiting abrogation of the doctrine to intentional torts would extend a remedy to deserving spouses for actionable wrongs and serve the public interests of preventing spousal collusion and preserving domestic harmony.

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are reasonable in view of the close relation, and carelessness in the operation of the home or in common activities, should be distinguished from conduct not so referable and which would be actionable if the parties were not husband and wife."