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Interspousal Immunity in Pennsylvania

John L. Gedid

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I. INTRODUCTION

In spite of a growing movement which questions the fairness and justice of the interspousal immunity rule in civil cases involving intentional and unintentional torts, Pennsylvania continues to follow that doctrine. As a result, in Pennsylvania a married person cannot bring a civil damage action in tort against his or her spouse. Many state courts that have abrogated this doctrine have done so in jurisdictions in which, like Pennsylvania, there is in existence a Married Women's Act; thus, most of the state courts that have abrogated the doctrine have done so in the context of adjudicating questions of statutory construction. In fact, the analysis employed by those courts has focused upon examination of conditions or supposed policies which form the basis or reason for existence of the doctrine. When courts have concluded that the reasons or policies which formerly justified the rule no longer exist, or that the supposed policies served by the rule are either incorrect or are no longer being effectuated, they have not hesitated to abrogate interspousal immunity. Although the Pennsylvania courts have, at various times, identified the policies which the interspousal immunity doctrine supposedly serves, they have not analyzed or examined these policies, nor have they inquired as to whether those objectives are advanced or impaired by retention or abrogation of the doctrine.

All of this activity in the various states has occurred in the context of judicial abrogation of other immunities, all of which had been recognized for many years at common law. In other states, as well as in Pennsylvania, parental, governmental and charitable immunities have been eliminated, usually by judicial action. Abrogation of these other immunities has been justified on the basis of changed conditions, after reexamination of the policies which those immunities were thought to promote. But interspousal immunity—at least in Pennsylvania—is one of the last remaining blanket prohibitions against litigation based solely on status. As a result of these developments and trends, the question of whether Pennsylvania courts should continue to follow the broad prohibition of interspousal immunity in civil cases involving torts is one which merits examination and analysis. This article

* Professor of Law, Duquesne University School of Law. B.A., 1963, University of Pittsburgh; J.D., 1967, Duquesne University School of Law; LL.M., 1975, Yale University.

undertakes consideration of that issue in the context of the development of the doctrine in Pennsylvania and other states.

II. History and Development of Interspousal Immunity

Interspousal immunity had its origin in the common law. An early case which denied a wife's right to bring an action for waste against her husband explained that: "It is a well-settled principle of the common law that no suit will lie between husband and wife. To every action there must be parties, and so they are both treated as one, a man might as well be permitted to sue himself."[1] Thus, the premise of the common law doctrine was the idea that husband and wife are one person or identity.[2]

This conceptualization or characterization had numerous consequences. For example, at common law a wife had no capacity to contract,[3] and no capacity to sue or be sued.[4] In the limited number of situations when it was recognized that the wife possessed a substantive cause of action against a third party, the action had to be brought in the name of her husband.[5] A husband possessed the right to the use of rents and profits of his wife's real estate;[6] and chattels of the wife became the property of her husband by operation of law upon marriage.[7] Consequently, the effects of marriage at common law upon a wife have been accurately described as both substantive and procedural.[8] The substantive incidents took away certain rights of the wife (often in property) or refused to recognize that those rights constituted a cause of action, and in effect vested them in the husband; the procedural incidents destroyed the legal capacity of the wife so that even if she owned a substantive right or cause of action, she could not prosecute that action herself.[9]

The interspousal immunity doctrine was a corollary or outgrowth of these specific rules. Thus, it was thought that no tort action could be maintained by a wife against her husband because, as a substantive proposition, the injury could not create liability; or else, even if it were

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1. Miller v. Miller, 44 Pa. 170 (1863).
2. Meisel v. Little, 407 Pa. 546, 180 A.2d 772 (1962).
3. Lowell v. Daniels, 68 Mass. (2 Gray) 161 (1854); Gregory v. Pierce, 45 Mass. (4 Met.) 478 (1842).
4. Bishop v. Readsboro Chair Manuf. Co., 85 Vt. 141, 81 A. 454 (1911).
5. Dengate v. Gardiner, 150 Eng. Rep. 1320 (Ex. 1838).
6. McCurdy, *Torts Between Persons in Domestic Relation*, 43 Harv. L. Rev. 1030, 1031-32 (1930) [hereinafter cited as *Torts Between Persons in Domestic Relation*].
7. Jordan v. Jordan, 52 Me. 320 (1864).
8. *Torts Between Persons in Domestic Relation*, *supra* note 6, at 1031.
9. Jayme, *Interspousal Immunity: Revolution and Counterrevolution in American Tort Conflicts*, 40 S. Cal. L. Rev. 307, 315 (1967) [hereinafter cited as Jayme].

conceded that the injury could give rise to a cause of action in the wife, a procedural bar existed, since the wife could only sue or be sued with and through her husband, who would thus be both plaintiff and defendant in the action.[10]

The common law approach has not lacked critics; as has been observed, its basis is that husband and wife are one person, and that person is the husband.[11] Some commentators have traced the historical roots of the common law concept to Biblical and medieval metaphysics; to the position of father as *pater familias* in Roman law; and to the property law of the English feudal system.[12] Because the origin of, and rationale for, the rule is perceived to rest in a metaphysical conceptualism or an outmoded fiction not consistent with modern notions about the family, it has been much criticized in recent years.[13] Other writers have criticized the rule as resting upon a fiction which, because it was assumed without thought or analysis, remained essentially unexamined;[14] and the Pennsylvania courts themselves have explicitly recognized that the common law doctrine was based upon the fiction of spousal identity.[15] Still other writers have questioned the common law doctrine as one that "explains little," because it was merely a useful label to describe a result in a particular case.[16] One implication of this last criticism should not be ignored. It suggests that the results in common law decisions cannot be explained by resort to the substantive or procedural incidents of marital law, while at the same time implying that the interspousal immunity doctrine was founded upon certain conceptions or assumptions about the marital relationship or status. Analysts who are aware of these implications question whether interspousal immunity, premised as it is upon articulated or unarticulated common law assumptions about marriage, should be retained when modern conceptions about marriage have changed. It can hardly be disputed that the social perspective of the status of married women changed drastically even before the twentieth century;[17] and it is fair

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10. *Id.*

11. W. PROSSER, LAW OF TORTS 809 (4th ed. 1971) [hereinafter cited as PROSSER].

12. J. BRICE, STUDIES IN HISTORY AND JURISPRUDENCE 819 (1901); F. POLLOCK & F. MAITLAND, THE HISTORY OF ENGLISH LAW 339-430 (2d ed. 1923).

13. *E.g.*, Case Comment, *Lewis v. Lewis: Dissolving the "Metaphysical" Merger in Interspousal Torts*, 12 NEW ENG. L. REV. 333 (1976) [hereinafter cited as *"Metaphysical" Merger*]. *See* Immer v. Risko, 56 N.J. 482, 267 A.2d 481 (1970).

14. Comment, *Toward Abolition of Interspousal Tort Immunity*, 36 MONT. L. REV. 251 (1975) [hereinafter cited as *Toward Abolition of Interspousal Tort Immunity*].

15. Kaczarowski v. Kalkosinski, 321 Pa. 438, 443, 184 A. 663, 665 (1936).

16. *See Torts Between Persons in Domestic Relation*, *supra* note 6, at 1035.

17. *See, e.g.*, A. DICEY, LAW AND PUBLIC OPINION IN ENGLAND DURING THE NINETEENTH CENTURY 371-98 (2d ed. 1920); R. GRAVESON & J. CRONE, A CENTURY OF FAMILY LAW (1957).

to conclude that the "state of affairs" upon which the common law doctrine of interspousal immunity was based "has been dead for more than a century."[18]

In spite of these changes, the courts of some states, including Pennsylvania, have expressed a fondness for the common law doctrine, even while recognizing that the common law conceptualisms upon which the doctrine was based no longer exist.[19] These courts achieved the same result as would have occurred at common law, but gave different explanations for that result. It may fairly be asked whether the law of spousal immunity in Pennsylvania has been frozen into a mold which is premised upon conditions, assumptions and attitudes which ceased to exist in the distant past.

Another development which affected the growth of the interspousal immunity doctrine was the Married Women's Acts, which nearly all the states began to enact in the mid-nineteenth century.[20] The wording of these statutes differed from state to state, but they can be generally described as having provided, in broad terms, for equality of legal treatment between spouses.[21] Some of these statutes attempted to assure the separate identity (capacity) and estate or property of a wife by providing that a married woman could sue in her own name, and by recognizing separate ownership and control of a married woman's property.[22] One commentator described the growth of the Married Women's Acts as follows:

> During the course of the past century the various state legislatures, under the pressures of our changing environment, changing social theories and philosophies and the feminist movement, enacted Married Women's Emancipation Acts. As their name implies, the general purpose of these acts was to . . . emancipate [married women] so that they might stand as equals with their husbands in the eyes of the law and contract, hold property, sue and be sued as individuals in their own right.[23]

There is general agreement that one definite effect of the Married Women's Acts was to destroy the unity fiction of husband and wife,

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18. PROSSER, *supra* note 11, at 861.

19. *E.g.*, Miller v. Miller, 44 Pa. 170, 172 (common law interspousal immunity doctrine is "great" and "salutary").

20. For a compilation of these statutes see McCurdy, *Personal Injury Torts Between Spouses*, 4 VILL. L. REV. 303, 310 (1959) [hereinafter cited as *Personal Injury Torts Between Spouses*].

21. *See* RESTATEMENT (SECOND) OF TORTS § 895F, Comment c (1979).

22. *See* PROSSER, *supra* note 11, at 861-63; *Toward Abolition of Interspousal Tort Immunity*, *supra* note 14, at 253-54.

23. Sanford, *Personal Torts Within the Family*, 9 VAND. L. REV. 823, 825 (1956) [hereinafter cited as Sanford].

which was the basis for the common law interspousal immunity doctrine.[24] One court explained that "[a]lthough the original basis for the common law immunity doctrine was the theory of legal identity of husband and wife, this metaphysical concept cannot be seriously defended today."[25] The Pennsylvania courts have also recognized that this common law basis for interspousal immunity no longer exists.[26]

The specific provisions of the different states' Married Women's Acts, as might have been expected, varied widely. For example, some statutes provided simply that a married woman could sue or be sued in the same manner as if she were single;[27] others provided that she could sue in her own name.[28] Many, if not most statutes, explicitly recognized a wife's property rights[29] as well as her power to sue anyone, including her husband, to vindicate rights of this type.[30] At present, this proposition is recognized in nearly every state.[31] Few of the Married Women's Acts, however, specifically mentioned torts, although some made general mention of the subject.[32] A very few impliedly authorized actions for injury to person or character,[33] and still fewer authorized tort actions between spouses in explicit terms.[34] Thus, it can be accurately

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24. *See* Greenstone, *Abolition of Intrafamilial Unity*, 7 FORUM 82 (1972); Jayme, *supra* note 9, at 315; Comment, *Limitations on Personal Injury Tort Litigation by Married Persons In Community Property States: Interspousal Immunity and the Community Property Classification of Personal Injury Recovery*, 11 IDAHO L. REV. 225, 233-34 (1975); *"Metaphysical" Merger, supra* note 13, at 337.

25. Immer v. Risko, 56 N.J. at 488, 267 A.2d at 484. *See also* 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); Brown v. Brown, 88 Conn. 42, 89 A. 889 (1914).

26. *See* Meisel v. Little, 407 Pa. 546, 180 A.2d 772 (1962).

27. *E.g.*, ARK. STAT. ANN. § 55-401 (1971); DEL. CODE tit. 13, § 311 (1974); KAN. STAT. § 23-202 (Supp. 1979); MICH. STAT. ANN. § 27A.2001 (1976); N.H. REV. STAT. ANN. § 460:2 (1968); VA. CODE § 55-36 (1974). *See also* PA. STAT. ANN. tit. 48, § 111 (Purdon 1965) ("Hereafter a married woman may sue or be sued civilly, in all respects, and in any form of action . . . as an unmarried person . . . .").

28. *E.g.*, CONN. GEN. STAT. § 46b-36 (Supp. 1980); WIS. STAT. ANN. § 246.07 (West 1957).

29. *E.g.*, ARIZ. REV. STAT. §§ 25-214 to 215 (1976); ARIZ. R. CIV. P. 17(e); FLA. STAT. ANN. § 708.08 (West. Supp. 1979); IND. CODE ANN. § 31-1-9-1 (Burns 1973).

30. Hamilton v. Hamilton, 255 Ala. 284, 51 So.2d 13 (1950); Walker v. Walker, 215 Ky. 154, 284 S.W. 1042 (1926); Masterman v. Masterman, 129 Md. 167, 98 A. 537 (1916); Freitag v. Bersano, 123 N.J. Eq. 515, 198 A. 845 (1938).

31. For an extensive treatment of this subject see McCurdy, *Property Torts between Spouses and Use of the Matrimonial Home Owned by the Other*, 2 VILL. L. REV. 446 (1957).

32. *E.g.*, D.C. CODE § 30-201 (Supp. 1977); N.D. CENT. CODE § 14-07-05 (1971).

33. *E.g.*, IND. CODE ANN. § 31-1-11-2 (Burns 1973).

34. S.C. CODE ANN. § 15-5-170 (1977).

stated that virtually none of the statutes explicitly dealt with personal injury torts between spouses.[35]

The statutes of the various states were so varied, and judicial reaction to them so disparate, that some commentators have attempted explanation of different results in the states by classifications based upon the type of statute.[36] Although some state courts have agreed that there is no interspousal immunity with regard to tort actions, this area has been the subject of major disagreement among the various states. One reason for this dichotomous treatment is, of course, the fact that so few of the statutes specifically provided for tort actions, but in more general terms appeared to grant substantive rights and to destroy procedural incapacities.[37] As a result, it has been observed that statutory construction by state courts has in large part determined whether the Married Women's Acts abrogated the interspousal immunity doctrine for torts.[38] On this specific issue, a sharp polarization has developed. About half of the state courts have held that their statutes preclude spousal tort actions;[39] the other half have held that such actions are authorized.[40] In recent years, an increasing number of states have judicially abrogated the immunity.[41]

The arguments of those state courts which have retained spousal immunity for torts are numerous as well as various. For example, some courts have observed that no substantive cause of action existed in the wife at common law for a tort committed by her husband. These courts have concluded that the Married Women's Acts do not create substan-

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35. *See Personal Injury Torts Between Spouses, supra* note 20, at 312. *See also* N.Y. GEN. OBLIG. LAW § 3-313 (McKinney 1978); N.C. GEN. STAT. § 52-5 (1976); WIS. STAT. ANN. § 246.07 (West 1957).

36. *See, e.g., Torts Between Persons in Domestic Relation, supra* note 6, at 1050-51 (author subdivides Married Women's Acts into seven categories for purpose of analysis).

37. For a collection of statutes and cases, see Annot., 43 A.L.R.2d 632 (1955).

38. *See, e.g.*, 19 DE PAUL L. REV. 590, 592 (1970); 13 DUQ. L. REV. 156, 163 (1974).

39. *E.g.*, Eddleman v. Eddleman, 183 Ga. 766, 189 S.E. 833 (1937); Hunter v. Livingston, 125 Ind. App. 422, 123 N.E.2d 912 (1955); Ennis v. Donovan, 222 Md. 536, 161 A.2d 698 (1960); Kircher v. Kircher, 288 Mich. 669, 286 N.W. 120 (1939); Peopping v. Lindemann, 268 Minn. 30, 127 N.W.2d 512 (1964); Prince v. Prince, 205 Tenn. 451, 326 S.W.2d 908 (1959); Comstock v. Comstock, 106 Vt. 50, 169 A. 903 (1934); McKinney v. McKinney, 59 Wyo. 204, 135 P.2d 940 (1943).

40. Bennett v. Bennett, 224 Ala. 335, 140 So. 378 (1932); Leach v. Leach, 227 Ark. 599, 300 S.W.2d 15 (1957); Klein v. Klein, 58 Cal. 2d 692, 376 P.2d 70, 26 Cal. Rptr. 102 (1962); Rains v. Rains, 97 Colo. 19, 46 P.2d 740 (1935); Foster v. Foster, 264 N.C. 694, 142 S.E.2d 638 (1965); Pardue v. Pardue, 67 S.C. 129, 166 S.E. 101 (1932); Fehr v. General Accident Fire & Life Assur. Corp., 246 Wis. 228, 16 N.W.2d 787 (1944).

41. *E.g.*, Rogers v. Yellowstone Park Co., 97 Idaho 14, 539 P.2d 566 (1974); Lewis v. Lewis, 370 Mass. 619, 351 N.E.2d 526 (1976); Rupert v. Stienne, 90 Nev. 397, 528 P.2d 1013 (1974); Immer v. Risko, 56 N.J. 482, 267 A.2d 481 (1970); Freehe v. Freehe, 81 Wash. 2d 183, 500 P.2d 771 (1972).

tive rights, but merely remove a procedural bar—incapacity; and, as a result, the common law substantive bar, the nonexistence of a cause of action in a married woman, continues.[42] Other courts, which have retained the interspousal immunity rule for tort actions, have reasoned that the Married Women's Acts are in derogation of the common law,[43] and therefore must be strictly construed.[44] Some state courts have even employed a mutuality argument in this matter. These courts concede that one objective of the Married Women's Acts was to create equality with her spouse for a married woman; but, since a husband at common law could not sue his wife, these courts reasoned that a wife cannot now be permitted to sue her husband![45] The courts in still other states have concluded that their Married Women's Act was intended to affect only contract and property rights. These courts reason from that premise that permitting spousal tort actions involves a change in conception about the marriage relationship which goes beyond the purpose of their Married Women's Act.[46]

The jurisdictions which have construed their Married Women's Act to abrogate interspousal tort immunity have also given various explanations. Some courts have reasoned that the Married Women's Acts, because they recognize the capacity to sue as well as the possession of separate substantive causes of action by the wife, have destroyed the basis for the common law rule—the premise of fictional unity; hence, the reason for the rule having ceased to exist, the common law rule of necessity has been abrogated by the Married Women's Acts.[47] Other decisions reasoned that the destruction of the unity fiction accomplished by their state's Married Women's Acts, coupled with a failure of the legislature affirmatively to modify the status of married women in their statute, relegated married women to the status

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42. Furstenburg v. Furstenburg, 152 Md. 247, 136 A. 534 (1927); Dishon's Adm'r v. Dishon's Adm'r, 187 Ky. 497, 219 S.W. 794 (1920); Romero v. Romero, 58 N.M. 201, 269 P.2d 748 (1954); Keister's Adm'r v. Keister's Ex'rs, 123 Va. 157, 96 S.E. 315 (1918); Comstock v. Comstock, 106 Vt. 50, 169 A. 903 (1934).

43. Thompson v. Thompson, 218 U.S. 611 (1910); Lyons v. Lyons, 2 Ohio St. 2d 243, 208 N.E.2d 533 (1965); Fisher v. Toler, 194 Kan. 701, 401 P.2d 1012 (1965).

44. Lillienkamp v. Rippetoe, 133 Tenn. 57, 179 S.W. 628 (1915); Keister's Adm'r v. Keister's Ex'rs, 123 Va. 157, 96 S.E. 215 (1918); Poling v. Poling, 116 W. Va. 187, 179 S.E. 604 (1935).

45. Strom v. Strom, 98 Minn. 427, 107 N.W. 104 (1906); Rogers v. Rogers, 265 Mo. 200, 177 S.W. 382 (1915); Conley v. Conley, 92 Mont. 425, 15 P.2d 922 (1932).

46. Henneger v. Lomas, 145 Ind. 287, 44 N.E. 462 (1896); Conley v. Conley, 92 Mont. 425, 15 P.2d 922 (1932).

47. *See, e.g.*, Johnson v. Johnson, 201 Ala. 41, 77 So. 335 (1917); Rains v. Rains, 97 Colo. 19, 46 P.2d 740 (1935); Lewis v. Lewis, 370 Mass. 619, 351 N.E.2d 526 (1976); Immer v. Risko, 56 N.J. 482, 267 A.2d 481 (1970).

which they enjoyed before marriage—a separate legal identity.[48] The courts of other jurisdictions simply discovered in the legislative design or the substantive provisions of their statute an intent to adopt a completely new policy which permits tort actions between spouses.[49] Other state courts concluded that the purpose of their Married Women's Act was not to give a wife the same rights which her husband had at common law, but rather to accord to her the same rights as any unmarried woman,[50] or to give the particular wife the same rights which *she* had before she married.[51] The courts of some states concluded that wives were clearly given the right by their statute to maintain a suit to vindicate property rights, and concluded that tort claims are choses in action which are personal property rights.[52] Finally, the courts of numerous states concluded that based upon the extensive substantive and procedural changes to promote equality of treatment of married women made by their statutes, the purpose of their Married Women's Act is remedial in character. As a result, the statute must be construed in a liberal fashion to effectuate that purpose, which includes permitting civil tort actions between spouses.[53]

III. THE PENNSYLVANIA POSITION

The current Married Women's Act in force in Pennsylvania provides that:

> Hereafter a married woman may sue and be sued civilly, in all respects, and in any form of action, and with the same effect and results and consequences, as an unmarried person; but she may not sue her husband, except in a proceeding for divorce, or in a proceeding to protect and recover her separate property; nor may he sue her . . . .[54]

This provision is, of course, only the latest in a serious of amendments and revisions to Pennsylvania's Married Women's Act. The earliest statute of this type was passed in 1848,[55] and was amended in 1856,[56]

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48. Bushnell v. Bushnell, 103 Conn. 583, 131 A. 432 (1925); Brown v. Brown, 88 Conn. 42, 89 A. 889 (1914).

49. Brown v. Gosser, 262 S.W.2d 480 (Ky. 1953); Damm v. Elyria Lodge No. 465, 158 Ohio St. 107, 107 N.E.2d 337 (1952).

50. Fitzmaurice v. Fitzmaurice, 62 N.D. 191, 242 N.W. 526 (1932).

51. *See* Brown v. Brown, 88 Conn. 42, 89 A. 889 (1914).

52. *E.g.*, Prosser v. Prosser, 114 S.C. 45, 102 S.E. 787 (1920).

53. *See, e.g.*, Rains v. Rains, 97 Colo. 19, 46 P.2d 740 (1935); Damm v. Elyria Lodge No. 465, 158 Ohio St. 107, 107 N.E.2d 337 (1952); Courtney v. Courtney, 184 Okla. 395, 87 P.2d 660 (1938).

54. PA. STAT. ANN. tit. 48, § 111 (Purdon 1965).

55. Act of April 11, 1848, No. 342, §§ 6-11, 1848 Pa. Laws 536.

56. Act of April 11, 1856, No. 334, §§ 1-14, 1856 Pa. Laws 315.

1887,[57] 1893,[58] and 1913.[59] Given the language of the current statute and the earlier provisions, the focus of the Pennsylvania Supreme Court has been upon whether the words "separate property" in the current statute include tort claims by a wife against her husband.

One of the earliest decisions to address the issue of the effect of Pennsylvania's Married Women's Act was *Miller v. Miller*.[60] In that case the court held that a wife could not maintain an action against her husband for failure to repair a farm in violation of an antenuptial contract. The court gave two explanations for this result. First, the damages were unliquidated damages and not property in "common parlance or technical language."[61] Second, the court relied upon general principles of statutory construction. The court concluded that if the legislature intended to give married women a general power or capacity to maintain a civil suit like a *feme sole*, it would have done so expressly. The explanation for this conclusion was that the then current Married Women's Act (the Act of 1856):

> may . . . be treated as a remedial statute . . . ; but as it countervails a great common law principle, which makes the husband and wife one, and overturns a salutary rule of public policy, which prohibits and discourages all litigation between husband and wife, it should be strictly construed, and not extended beyond the letter . . . . [E]strangements are often temporary; but should the courts encourage litigation between the parties, they will become perpetual, and it is also to be feared of much more frequent occurrence.[62]

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57. Act of June 3, 1887, No. 224, §§ 1-7, 1887 Pa. Laws 332.

58. Act of June 8, 1893, No. 284, § 6, 1893 Pa. Laws 344.

59. Act of March 27, 1913, No. 18, §§ 1-4, 1913 Pa. Laws 14. The 1913 version is codified at PA. STAT. ANN. tit. 48, § 111 (Purdon 1965).

60. 44 Pa. 170 (1863).

61. *Id.* at 172. The court cited no authority or precedent, and set forth no explanation or analysis for this conclusion.

62. *Id. See also* Ritter v. Ritter, 31 Pa. 396 (1858). In *Ritter*, the court discussed the perceived virtues of the common law approach as follows:

> The marriage relation, as old as the human race, and the basis of the family, which is itself the basis for society and civil states, has always been sedulously guarded and cherished by the common law.
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> . . . .
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> It is doubtless competent for the legislative power to change and modify the qualities of the marriage relation, . . . but if the history of the human race teaches any lesson whatever, it is, that concubinage is the alternative of marriage. . . .
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> Nothing could . . . complete . . . severance and degradation, as to throw open litigation to the parties. The maddest advocate for woman's rights, and for the abolition on earth of all divine institutions, could wish for no more decisive blow from the courts than this. . . .
>
> But will the courts expose this fundamental relation to the consequences of unbridled litigation? Never.

Id. at 398. One could easily conclude that the court in the *Ritter* case did not care about

Even the most cursory analysis of the court's position in the *Miller* decision reveals major weaknesses. In the first place, no citation is necessary for the proposition that a court is required to effectuate legislative intent or purpose in construing a statute. The *Miller* court *explicitly conceded* that the purpose of the statute under consideration may well have been remedial;[63] and, if that was so, the court was *obligated* to give effect to that intent by a liberal construction of the statute.[64] Instead, the court refused to consider the issue at all, and avoided the problem by reliance on a general maxim of statutory construction. Thus, the court avoided, assumed away, or evaded what should be the principal inquiry in every case involving the meaning of a statute: legislative intent or policy.

In the second place, the court in *Miller* appeared to admit that the statute eliminates ("countervails") the basis or rationale for the common law interspousal immunity rule—the fiction of spousal unity. If the basis for the rule has ceased to exist,[65] how could the court maintain that the rule itself must nevertheless be followed? The weakness of the argument is apparent: *cessante ratione legis, cessat et ipsa lex.*

In the third place, the segment of the opinion quoted above makes it clear that the real basis for the *Miller* decision is the court's notions of policy ("salutary rule of public policy"). It must be observed that there is nothing untoward or incorrect in a court's examination and employment of its own notions or conceptions about public policy in appropriate cases. But was this an appropriate case? In *Miller*, there was a clearly applicable statute, which presumably must have embodied or represented policies of the legislature. The court in *Miller*, however, either refused to consider what the legislative will might be, or else recognized and then ignored it. The conclusion strongly suggested by this analysis is that the basis for the decision is *judicially* created policy.

One could well ask why such a protracted analysis of the *Miller* decision is necessary. Some of the reasons are that the *Miller* opinion is both an example of the characterization and approach employed in later decisions involving interspousal immunity; and the fact that the *Miller* decision has been extensively employed as a precedent in many later cases involving that doctrine. Recurrent themes which repeat the *Miller* court's characterization and approach in those later cases are: the idea that the term "property" used in the Married Women's Act

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the intent or purpose of the legislature, and that the position taken is that the courts will resist any change whatever from the common law rule regardless of legislative purpose.

63. 44 Pa. at 172.

64. *Id.*

65. *See* text accompanying notes 47-49 *supra.*

somehow intrinsically cannot include an unliquidated claim; the idea that the Pennsylvania Married Women's Act derogates the common law and consequently must be grudgingly construed; and statements by the court of its own judicial notion of policy as an explanation for retention of the rule of interspousal immunity.

Meisel v. Little[66] is a good example of such a later case. In *Meisel*, the court refused to permit a wife to bring an action against her husband for an antenuptial tort. The opinion explained that this result was necessary because, as a general legal or linguistic proposition, the term "separate property" used in the Married Women's Act does not include unliquidated tort claims.[67] The *Meisel* court also cited *Miller* and *Sensenig v. Pennsylvania Railroad*[68] as support for this conclusion. But the authority of *Miller* as precedent is at best dubious; for there was neither analysis of the term "separate property" nor reliance on *any* precedents there. The court in the *Miller* decision simply *assumed* that unliquidated claims are not property, and that assumption was uncritically repeated in *Meisel*. Moreover, *Sensenig* was totally inapposite to this issue. That case did not involve any issue of interspousal immunity, nor did the court's decision construe the Married Women's Act. Instead, the *Sensenig* decision involved the assignability of a right created by a federal statute. Moreover, the court in *Sensenig* held that the disputed right was not assignable because it was *personal*. Thus, not only is the issue different from *Meisel* and other decisions construing the term "separate property," but the rationale, even if it is conceded to be related, does not support the proposition for which it is offered. The issue in *Meisel* was not whether the wife's right was assignable, but whether a tort claim is property of the wife. It does not logically follow that a right or alleged cause of action cannot be property because it is characterized as personal in nature; for it may be the property of the injured person whether that person can transfer it or not.

In addition to the "statutory" basis for the term "separate property," the *Meisel* decision also set forth another rationale for interspousal immunity, which it described as "decisional."[69] The court explained that it had stated "repeatedly over a long period of years that the common law prohibition of litigation between spouses has not been abrogated."[70] Although the *Meisel* court conceded that the common law

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66. 407 Pa. 546, 180 A.2d 772 (1962).
67. *Id.* at 549, 180 A.2d at 773.
68. 229 Pa. 168, 78 A. 91 (1910).
69. 407 Pa. at 548, 180 A.2d at 773.
70. *Id.* at 549, 180 A.2d at 773.

spousal unity fiction is no longer a tenable basis for interspousal immunity, in this "decisional" branch of the opinion the court nevertheless relied upon stare decisis to justify retention of that doctrine. However, the opinion observed that the interspousal immunity doctrine is now based upon social reasons and public policy.[71]

One case relied upon in *Meisel* was *Koontz v. Messer.*[72] *Koontz* involved a suit by a wife against her husband's employer, for a tort committed by the husband. The significance of the *Koontz* decision, in which the wife's suit was permitted, lies in the court's explanation of the modern basis for interspousal immunity in Pennsylvania—the policy of preserving domestic peace and harmony.[73] What is probably more important is that this basis for retention of the immunity appears to be *judicially* created policy.

Another precedent upon which the court relied in *Meisel* was *Kaczarowski v. Kalkosinski.*[74] In that case, after husband and wife were killed in an automobile accident caused by the husband, the wife's mother brought a wrongful death action against the husband's estate for support which the parent had been receiving from her daughter. In holding that interspousal immunity did not bar the action, the court again analyzed the policies and reasons for the rule. At common law that basis was spousal identity, but the court explained that after the enactment of the Married Women's Act, the prohibition of suits between spouses was justified as a means of effectuating the policy of preserving peace and tranquility:

> With the emancipation of the wife and her separate control over her property and actions, there has grown up a more compelling theory to account for the continued prohibition upon suits for personal torts between husband and wife which, in large degree, has superseded the reason of fictional unity of husband and wife. That reason is . . . "*preserving peace and felicity.*"[75]

The court did not explain the source or genesis of this new policy of, or explanation for, interspousal immunity. It is obviously judge-made, not statutory.

A final case relied upon in the *Meisel* decision was *Johnson v. Peoples First National Bank and Trust Co.*[76] In the *Johnson* case, the Pennsylvania Supreme Court reiterated the modern basis for interspousal immunity, stating that "[a]n examination of our decisions clearly indicates that 'the personal immunity which protects [the

71. *Id.* at 548, 180 A.2d at 773.
72. 320 Pa. 487, 181 A. 792 (1935).
73. *Id.* at 493, 181 A. at 794.
74. 321 Pa. 438, 184 A. 663 (1936).
75. *Id.* at 443, 184 A. at 665 (emphasis added).
76. 394 Pa. 116, 145 A.2d 716 (1958).

spouse] is based simply upon the policy of preserving domestic peace and felicity.'"[77] Thus, the court emphasized the judicial origin of the modern policy basis for interspousal immunity in Pennsylvania.

The most recent case in which the Pennsylvania Supreme Court addressed interspousal immunity is *DiGirolamo v. Apanavage*.[78] The majority opinion in the *DiGirolamo* case was premised principally upon statutory construction. The majority concluded that in the most recent enactment and amendment of the Married Women's Property Acts of the commonwealth,[79] the Legislature continued a longstanding limitation on the power of a married woman to sue and be sued civilly. That limitation is that a woman cannot sue her husband except in a proceeding for divorce or in a proceeding "to protect and recover her separate property." Whether a wife may maintain a tort action against her husband depends upon the meaning of the term "separate property" as used in the statute.

The majority in *DiGirolamo* reaffirmed that the term "separate property" does not permit a tort action by a wife against her husband. First, the opinion pointed out that the court had consistently adopted the view that unliquidated damages are not separate property within the meaning of the statute.[80] In support of this conclusion the court cited a line of precedent beginning with *Miller v. Miller*,[81] and concluding with *Meisel v. Little*,[82] and *Falco v. Pados*,[83] all of which, the majority concluded, had held that the term separate property does not include tort claims.

The majority also explained that, in addition to the legislative design, the position that separate property does not include an unliquidated tort claim is also logically and generally understood. The court reasoned that a workable definition of separate property is: "The right of any person to possess, use, enjoy, and dispose of a thing."[84] An unliquidated damage claim does not possess all of the attributes of property because it may not be assigned or disposed of; therefore, it is not "separate property" of a wife.

The opinion also expounded a second reason why the phrase "separate property" could not include an unliquidated tort claim. The legislature did not simply enact a Married Women's Property Act

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77. *Id.* at 119, 145 A.2d at 717. *Accord*, Turner v. Turner, 409 A.2d 412 (Pa. 1979).
78. 454 Pa. 557, 312 A.2d 382 (1973).
79. For the text of the Pennsylvania Married Women's Act see text accompanying note 54 *supra*.
80. 454 Pa. at 560, 312 A.2d at 384.
81. 44 Pa. 170 (1863).
82. 407 Pa. 546, 180 A.2d 772 (1962).
83. 444 Pa. 372, 282 A.2d 351 (1971).
84. 454 Pa. at 562, 312 A.2d at 384.

which invests a wife with the legal right to own every type of property. Instead, the court explained that the legislature "preserved some of the common law by enacting the statute herein under discussion."[85] Reasoning from this premise, the court concluded that to hold that the phrase "separate property" includes unliquidated tort claims would render the most recent Married Women's Property Act meaningless. The majority reasoned that if unliquidated tort claims were held to constitute separate property, *every* suit between spouses would be to protect or recover separate property.[86]

Justice Roberts wrote a dissenting opinion, in which Justice Nix joined. Justice Roberts disagreed with the statutory construction, which the majority premised upon the legislative design and the history of the various Married Women's Property Acts in this commonwealth. He argued that the Pennsylvania statutes "affirmatively mandate that married women be permitted to sue their husbands for tortious conduct."[87] He based this conclusion upon comparison of the various reenactments and amendments of the Married Women's Property Acts. The thrust of Justice Roberts' analysis was that most of the Married Women's Acts of this commonwealth have given married women the status of *feme soles*. He emphasized that nowhere do any of the acts state that a chose in action, such as an unliquidated tort claim, is not separate property.[88] Moreover, he also concluded that the history of the Married Women's Property Acts shows conclusively that the act of 1893 does not codify the common law of interspousal immunity. He premised his argument upon analysis of the Married Women's Act of 1887.[89] That statute clearly abrogated the common law rule which gave a husband title to all of his wife's property. But that same rule was also the principal basis for the common law interspousal immunity doctrine. Justice Roberts posed what appears to be a fair question by then asking how the majority could conclude that the legislature had impliedly codified the common law doctrine in the 1893 statute when it had six years earlier eliminated the doctrine upon which common law immunity was premised.[90]

Justice Roberts concluded that the court was free to abolish common law spousal immunity, since that common law doctrine had never been codified by the legislature:

> If one refuses to accept the evidence of legislative abrogation of common-law spousal immunity, even the most grudging analysis of the

85. *Id.*
86. *Id.*
87. *Id.* at 564, 312 A.2d at 386 (Roberts, J., dissenting).
88. *Id.* at 565-66, 312 A.2d at 387 (Roberts, J., dissenting).
89. *Id. See* note 56 *supra.*
90. 454 Pa. at 568-69, 312 A.2d at 388 (Roberts, J., dissenting).

> Married Women's Acts shows that the legislature has not codified the common law. Because this is the case, this court, as a common law court, is free to modify or abolish common-law spousal immunity.[91]

Mr. Justice Manderino wrote a separate dissenting opinion in which he argued that, if the statute deprives a married woman of her right to file a claim against her husband, it is unconstitutional.[92] His reason was that the legislature *cannot* constitutionally grant immunity from suit to one person who has wronged another. He based this opinion on the declaration of rights contained in the Pennsylvania Constitution,[93] which provides that every man for an injury done him in his lands, conditions, person or reputation shall have a remedy by due course of law.[94]

IV. Analysis of the Pennsylvania Position

This review of the major Pennsylvania cases establishes several recurrent themes or explanations for retention of interspousal immunity. One basis for the Pennsylvania position has been the consistent use of the term "separate property" in the Married Women's Acts, which, it is argued, reveals a legislative intent to preclude interspousal tort actions by retention of the common law approach. This explanation is not persuasive. One frequently cited source of this rule is the *Miller* decision, which was written in 1856.[95] One problem with reliance on *Miller* is that it involved an interpretation of one of the earliest Pennsylvania Married Women's Acts, the Act of 1856. That Act, however, was extensively amended in later years.[96] Even if it could be assumed that the intent of the legislature in the 1856 version of the Married Women's Act was to retain the common law, it does not follow that that intent, once established, was maintained and continued in later amendments to and versions of the Married Women's Act. The legislative intent may have changed. Another problem approach which began with *Miller* and was sometimes blindly followed in later decisions was to ignore legislative intent under the guise of statutory construction, because of a fondness for the common law. In short, judicial, not legislative, purpose and intent controlled.

This latter argument gains added impact and force upon consideration of the evidence that *does* exist to shed light upon legislative intent. One obvious consequence of the approach begun in *Miller* was to

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91. *Id.* at 570, 312 A.2d at 389 (Roberts, J., dissenting).
92. *Id.* at 574-75, 312 A.2d at 385 (Manderino, J., dissenting).
93. Pa. Const. art. I, § 11.
94. 454 Pa. at 574-75, 312 A.2d at 385 (Manderino, J., dissenting).
95. *See* notes 60-65 and accompanying text *supra* for a discussion of *Miller*.
96. *See* notes 54-59 and accompanying text *supra*.

obscure or prevent examination of what, in fact, the legislative intent might be. If the question of legislative intent or policy as to interspousal immunity embodied in the Married Women's Acts is examined on its merits in light of all available evidence, the strongest argument in favor of the majority position in Pennsylvania is that the evidence is equivocal. But a much more persuasive argument based upon this evidence is that the purpose or intent of the legislature on abrogation of spousal immunity is contrary to the majority position. Analysis of the substance and legislative design of the various Married Women's Acts lends persuasive support to the idea that the legislature sought either to cut down extensively or to abrogate totally the common law interspousal immunity doctrine. For example, it is beyond question that the fictional unity basis for interspousal immunity at common law has been destroyed by the Married Women's Acts in Pennsylvania, which is a point recognized in the Pennsylvania decisions themselves.[97] It is difficult to understand how the majority can plausibly argue that the legislature could have removed the foundation and basis of the rule, but intended to continue the rule in its common law form. The Act of 1887 furnishes another related example, for that act itself destroyed another of the substantive bases for the common law rule by providing that title to a wife's property would no longer vest in her husband.[98] There is also another, more specific, argument supported by the Act of 1887. That statute, which provided that a married woman had the same rights as a *feme sole*, also explicitly established that separate property included unliquidated tort claims.[99] Moreover—and this matter has been apparently overlooked by both the Pennsylvania majority and minority opinion writers—the Pennsylvania Supreme Court itself has held that the meaning of the statutory language includes unliquidated tort claims.[100] It is true that the Act of 1887 was repealed by the Act of 1913. However, if the Act of 1913 does not explicitly provide for a new meaning of the term separate property, should not that judicial decision which defined separate property continue to control? The position of the majority that all of the Married Women's Acts in Pennsylvania have incorporated the common law interspousal immunity doctrine is thus simply inaccurate.

The explanations of the Pennsylvania courts that a long line of precedents has fixed a meaning to the term "separate property" is untenable for several other reasons. Aside from the fact that in the

97. *See* notes 70, 71 & 75 and accompanying text *supra*.

98. *See* DiGirolamo v. Apanavage, 454 Pa. at 569-70, 312 A.2d at 388-89 (Roberts, J., dissenting).

99. *Id.* at 565, 312 A.2d at 387 (Roberts, J., dissenting).

100. Walker v. Philadelphia, 195 Pa. 168, 45 A. 657 (1900).

Miller and *Meisel* opinions the court simply assumed that construction without analysis and examination,[101] another group of decisions adopted a wholly different and inconsistent construction. Generally, the *Koontz*,[102] *Kaczarowski*,[103] and *Johnson*[104] decisions either adopted a different position or opened up broad exceptions to the rule. For example, in *Johnson*, the court flatly held that "separate property" included unliquidated tort claims.[105] Consistency has been notably absent in another line of decisions, in which the court first permitted a wife's claim,[106] then decided to overrule that position.[107] As a result, the position of the court in *DiGirolamo*, the most recent interspousal immunity decision—that as a matter of stare decisis the court must continue to follow the meaning established for property in a long line of precedents—is something less than convincing.

Lack of consistency is only one flaw in the court's approach to definition of the term "separate property." Another problem is inherent in the position taken by the court that, as a logical and generally understood proposition, property does not include unliquidated tort claims.[108] This proposition is totally without analytical or precedential support in the Pennsylvania cases.[109] This style of analysis assumes that there is a plain meaning of the term sought to be defined. One criticism of this type of approach may be drawn from the area of conflicts of law, in which problems of statutory interpretation frequently occur. As a result of experience in that area, many analysts have concluded that statutory terms can only be defined contextually—according to the purpose for which they are used.[110] So widespread is recognition of this principle of interpretation that some writers have concluded that it is generally accepted.[111] Moreover, even accepting the proposi-

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101. *See* notes 67-68 and accompanying text *supra*.

102. Koontz v. Messer, 320 Pa. 487, 181 A. 792 (1936).

103. Kaczarowski v. Kalkosinski, 321 Pa. 438, 184 A. 663 (1936).

104. Johnson v. Peoples First Nat'l Bank and Trust Co., 394 Pa. 116, 145 A.2d 716 (1958).

105. *Id.* at 120-21, 145 A.2d at 718.

106. *See* Ondovchik v. Ondovchik, 411 Pa. 643, 192 A.2d 389 (1963).

107. *See* Daly v. Buterbaugh, 416 Pa. 523, 207 A.2d 412 (1964).

108. *See* notes 68-69 and accompanying text *supra*.

109. *See* notes 65-73 and accompanying text *supra*.

110. *See, e.g.*, W. COOK, THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS 194-210 (1942); R. CRAMTON, D. CURRIE & H. KAY, CONFLICTS OF LAWS 47 (1975) [hereinafter cited as CONFLICTS OF LAWS]; Reese, *Does Domicle Bear a Single Meaning?*, 55 COLUM. L. REV. 589 (1955). Courts and commentators, in analyzing contracts, have reached similar conclusions and have rejected any "plain meaning" rule. *See, e.g.*, Masterson v. Sine, 68 Cal. 2d 222, 436 P.2d 561, 65 Cal. Rptr. 545 (1968). *See also* 3 A. CORBIN, CONTRACTS § 582 (1960); 9 J. WIGMORE EVIDENCE § 2431 (3d ed. 1940); Murray, *The Parol Evidence Rule: A Clarification*, 4 DUQ. L. REV. 337, 341 (1966).

111. CONFLICTS OF LAWS, *supra* note 110, at 47.

tion that there can be some plain, generally understood meaning of the statutory term "separate property," other courts[112] and commentators[113] have concluded that the term property does include unliquidated claims. What is plain to the Pennsylvania court is evidently not as plain to others. If that is true, then there is no obvious, plain, or generally understood meaning of the words "separate property" as used in the Pennsylvania statute.

V. THE BASIS FOR THE PENNSYLVANIA APPROACH — JUDICIALLY CREATED POLICY

As discussed above, the Pennsylvania courts have concluded that the common law justification for the interspousal immunity doctrine no longer exists,[114] but have invented other reasons for retention of that rule. Essentially, the Pennsylvania Supreme Court has identified two newly-created policies as justifying the retention and continued application of the doctrine of interspousal immunity. The first of these policies, enunciated by the court in *Koontz*, *Johnson*, and *Kaczarowski*, is the preservation of domestic peace and felicity.[115] A corollary explanation of this policy was offered in *Miller*, where the court postulated that denying the right to sue will force spouses to reconcile, even if a marital breach has occurred.[116] The apparent basis of this corollary is the assumption that the rigors of the adversary process will augment or aggravate even trivial estrangements.

The second policy adopted by the Pennsylvania Supreme Court for retention of interspousal immunity is that recognition of unliquidated tort claims between spouses will create the danger of fraudulent or collusive claims, especially in situations where liability insurance coverage is in effect:

> The public policy of this state precludes the institution of this type of intra-family litigation. It is a sound policy and one to which we should strictly adhere, particularly in a situation when so much opportunity

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112. *See, e.g.*, Carver v. Ferguson, 115 Cal. App. 2d 641, 254 P.2d 44 (1953); O'Grady v. Potts, 193 Kan. 644, 396 P.2d 285 (1964); Berry v. Harmon, 329 S.W.2d 784 (Mo. 1959); Prosser v. Prosser, 114 S.C. 45, 102 S.E. 787 (1920); Curtis v. Wilcox, [1948] 2 K.B. 474.

113. Sanford, *supra* note 23, at 828; Williams, *Is a Right of Action in Tort a Chose in Action?*, 10 LAW. Q. REV. 143 (1894); 13 DUQ. L. REV. 156 (1973).

114. *See* notes 70-77 and accompanying text *supra*.

115. *Id. See also* Daly v. Buterbaugh, 416 Pa. at 535, 207 A.2d at 417 ("Our case law and public policy have forbidden tort litigation for personal injuries between a husband and wife because of the potential danger to the marriage relationship inherent in such litigation . . . .").

116. *See* Miller v. Miller, 44 Pa. at 172 ("estrangements are often temporary; but should the courts encourage litigation between the parties, they will become perpetual, and it is also to be feared of much more frequent occurrence").

> would exist for collusive action between members of a family if the rule were otherwise.[117]

The point that is being made here, that the true reason for retention of interspousal immunity is judicial perception of public policy, has not gone unnoticed. While a few analysts have concluded that statutory interpretation can explain the difference in result between those states which have retained and those which have abrogated interspousal tort immunity,[118] numerous other commentators have concluded that the real basis for the difference in treatment lies in policy determinations overtly made or covertly assumed. For example, one writer has concluded that the courts which retain the interspousal immunity rule have "invented" new policies to support their position.[119] Another analyst has concluded that the connection between those judicial policies and the question of statutory construction is at best "tenuous."[120] Still another commentator has criticized these policies as being mere suppositions.[121] These writers are persuasive, for it is clear that the controversy in the various states is only "superficially" over statutory construction.[122]

There are several persuasive reasons which support this conclusion. The most important is that principles of statutory construction do not explain the differences in result between states which have retained and states which have abrogated the rule, *but a policy analysis does explain those different outcomes.* This point is emphasized when it is recalled that several states have reached different results even though they were construing identical statutory provisions. This phenomenon led one court to describe the varying results as being beyond reconciliation:

> At this point it may be observed that the decisions of the appellate courts of the nation, viewed as an entirety in construing the Married Women's Acts of the several States of the Union, are in hopeless conflict. . . , even when the statutory language before them has been identical or substantially so. It would be useless to endeavor to reconcile them.[123]

There is considerable support for the Wyoming court's view.[124] Some analysts have concluded that the cases disclose "confusion com-

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117. Parks v. Parks, 390 Pa. 287, 303, 135 A.2d 65, 74 (1957).

118. *See Torts Between Persons in Domestic Relation*, *supra* note 6, at 1050; Sanford, *supra* note 23, at 826.

119. PROSSER, *supra* note 11, at 862. *Accord*, RESTATEMENT (SECOND) OF TORTS § 895F, Comment d (1979).

120. *Toward Abolition of Interspousal Tort Immunity*, *supra* note 14, at 255.

121. *Personal Injury Torts Between Spouses*, *supra* note 20, at 337.

122. *See* 27 OHIO ST. L.J. 550 (1966).

123. McKinney v. McKinney, 59 Wyo. 204, 216-17, 135 P.2d 940, 943 (1943).

124. 27 OHIO ST. L.J. 550, 553 (1966).

pounded;"[125] that the only way to account for the different results in various states is to refer to public policy articulated by the courts; and that the different approaches to interspousal immunity are not principally or "necessarily" a matter of differences between the terminology of state statutes.[126] The Pennsylvania decisions are squarely subject to this criticism.

One implication is that judicial policy in large part constitutes the rationale for retention of interspousal immunity in Pennsylvania. If that is so, then simply repeating, as the Pennsylvania courts have done, that the outcome in interspousal immunity cases is the result of statutory mandate, obscures explanation of the true rationale for the Pennsylvania approach. Moreover, the policies actually employed remain unexamined. Only if the courts identify the policies which support their decisions, then examine and evaluate those policies, can they hope to achieve rational and just results in the cases before them. Since this identification and analysis has not been undertaken by the Pennsylvania courts, it becomes necessary to evaluate the policy reasons for retention of the interspousal immunity doctrine.

VI. Policies Involved in Retention of Interspousal Immunity

A. Domestic Peace and Felicity

It is abundantly clear that one policy basis for retention of interspousal immunity in Pennsylvania is preservation of domestic peace and felicity. It is only fair that the argument in favor of this position be stated forcefully and in its entirety before examination and analysis. This argument would be as follows. Retention of interspousal immunity promotes marital harmony, a necessary condition for the institution of marriage, which in turn is vital to society. Abrogation of interspousal immunity will cause spouses to sue for trivial or fanciful or imagined wrongs. Moreover, regardless of whether a wrong is trivial or more serious, the natural course of events in marriage is that breaches between the spouses are worked out or healed by the spouses on their own, and of their own accord. Legal recognition of marital torts will create a serious burden on or danger to the marriage relationship. First, such recognition would magnify the trivial annoyances and wrongs which occur in a marriage by, in effect, placing an imprimatur upon them; the result of this outside (of the marital relationship) interference would be to prevent the healing which normally occurs in spousal wrongs, especially minor ones. Second, the adversary

125. Sanford, *supra* note 23, at 839.
126. *Id.* at 846.

posture or role required in the prosecution or defense of a lawsuit will not only prevent natural healing of marital breaches, but will actually encourage them or increase their severity or intensity. Thus, refusal to recognize spousal torts promotes marital harmony.

This argument sounds persuasive, for, after all, fostering marital harmony is a goal shared by virtually all persons in our culture. Unfortunately, upon reflection and examination, there appear several patent flaws in this defense of retention of interspousal immunity. The most important of these flaws is simply that interspousal immunity does not promote or serve marital harmony, no matter how desirable that goal may be.

One of the clearest deficiencies in this argument is that it is illogical. In Pennsylvania, suit is concededly permitted to vindicate a wife's property rights.[127] Is this type of action permitted because it is less disruptive than a tort action? If marital harmony is the basis for interspousal immunity, then it would seem that *no* type of spousal action should be accorded legal recognition. As one court has observed:

> It is difficult to perceive how a personal [tort] action would disrupt the tranquility or the marital state to any greater degree than would actions in partition, ejectment, of for contesting of wills, all of which actions may be maintained by a wife against her husband when such actions involve her . . . property.[128]

This is not, however, the only type of illogic or inconsistency inherent to the "peace and harmony" policy defense of interspousal immunity. Another equally persuasive criticism is founded on the simplest of observations: if there exists any marital peace and felicity between the spouses, *then no action will be brought.* In short, if peace, harmony and felicity exist between the spouses, the filing of a tort action will be highly improbable:

> If a state of peace and tranquility exists between the spouses, then the situation is such that either no action will be commenced or that the spouses—who are, after all, the best guardians of their own peace and tranquility—will allow the action to continue only so long as their personal harmony is not jeopardized. If peace and tranquility is nonexistent or tenuous to begin with, then the law's imposition of a technical disability seems more likely to be a bone of contention than a harmonizing factor.[129]

The logic of these arguments speaks for itself.

The policy of preservation of domestic peace and harmony is illogical

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127. PA. STAT. ANN. tit. 48, § 111 (Purdon 1965).

128. Rogers v. Yellowstone Park Co., 97 Idaho 14, 19, 539 P.2d 566, 569 (1965). *See also* Self v. Self, 58 Cal. 2d 683, 376 P.2d 65, 26 Cal. Rptr. 97 (1962). This view has also been generally accepted by commentators. *See, e.g.*, F. HARPER & F. JAMES, THE LAW OF TORTS § 8.10 (1956); PROSSER, *supra* note 11, at § 116.

129. Freehe v. Freehe, 81 Wash. 2d 183, 187, 500 P.2d 771, 774 (1972).

in still another sense: it is premised upon the assumption, or else implies, that an uncompensated tort is less likely to disturb family harmony than a lawsuit between the spouses. When this a priori assumption is examined, it is soon perceived to be clearly incorrect. If there is disruption of family harmony, it is caused, not by the legal action for damages, but primarily by the "injury itself, resulting from misconduct."[130] Family harmony is more likely to be disturbed by the desire to recover than by recovery,[131] and harmony consequently will not be disrupted so much by allowance of the action as by denial.[132] Two facts of modern life give added weight to this argument, at least in spousal cases involving negligence. Nowadays, most spousal tort actions of this type arise out of the operation of automobiles, and liability insurance coverage is present. When it is realized that insurance proceeds paid for with premiums will be reached by permitting suit, it is clear that family harmony will be promoted by permitting the action, because the recovery will not deplete the other assets of the spouses.[133] The best statement of this position was made by the New Jersey Supreme Court in *Immer v. Risko*:

> Domestic harmony may be more threatened by denying a cause of action than by permitting one when there is insurance coverage. The cost of making the injured spouse whole would necessarily come out of the family coffers, yet a tortfeasor spouse surely anticipates that he will be covered in the event that his negligence causes his spouse injuries. This unexpected drain on the family's financial resources could likely lead to an interference with the normal family life.[134]

In *Beaudette v. Frana*,[135] the Minnesota Supreme Court went further and attempted to weigh the effect of retention or abrogation of interspousal immunity for torts in light of this policy. The court concluded that the "social gain of providing tangible financial protection for those whom an insured wrongdoer ordinarily has the most natural motive to protect transcends the more intangible social loss of impairing the integrity of the family relationship."[136] The logic of the court in *Beaudette* cannot be criticized; and it becomes more persuasive when it is realized that instead of engaging in bald assertions of general policy based upon assumption, speculation and hypothesis, the court

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130. Sorenson v. Sorenson, 339 N.E.2d 907, 913 (Mass. 1975).

131. *See* Brown v. Brown, 88 Conn. 42, 89 A. 889 (1914); Hamilton v. Fulkerson, 285 S.W.2d 642, 647 (1955).

132. *See* PROSSER, *supra* note 11, at 889. *Accord*, Jayme, *supra* note 9, at 317; *Personal Injury Torts Between Spouses*, *supra* note 20, at 336.

133. Sorenson v. Sorenson, 369 Mass. 350, 339 N.E.2d 907 (1975).

134. Immer v. Risko, 56 N.J. 482, 489, 267 A.2d 481, 485 (1970).

135. 285 Minn. 366, 173 N.W.2d 416 (1969).

136. *Id.* at 371, 173 N.W.2d at 419.

there carefully attempted to identify, analyze and weigh the competing policy considerations.

Analysis of the domestic peace and harmony policy for interspousal immunity has thus far focused principally upon negligent torts. The same illogic and inconsistency pervades the cases in which spousal recovery has been denied for intentional torts. Indeed, it is difficult to perceive how anyone could plausibly maintain that domestic peace and felicity will be disturbed by permitting a spouse to maintain a civil action in tort after a battery. In that situation, it is clear that domestic peace has *already* been destroyed. Not only must there have been little, if any, affection between the spouses before the tort, but also, if one spouse has filed an action—or even if the spouse is willing to file an action but cannot because of interspousal immunity—there must be even less affection remaining after the tort has been committed. Moreover, it is almost impossible to imagine how denying a remedy to the injured spouse will dissipate her anger and resentment, or prevent her from retaliating or taking reprisals.[137] The fact of the matter is that the commission of the tort shows that harmony has already been destroyed, and denial of a remedy *further* disrupts family harmony:

> Courts are established and maintained to enforce remedies for every wrong, upon the theory that it is for the public interest that personal differences should thus be adjusted rather than that the parties should be left to settle them according to the law of nature. No greater public inconvenience and scandal can thus arise than would arise if they were left to answer one assault with another and one slander with another slander until . . . the criminal law is invoked . . . .[138]

The quaint assumption, or pure speculation, of the Pennsylvania Supreme Court in the *Miller*[139] and *Ritter*[140] decisions that, left to their own devices, spouses will work things out, is simply unfounded.

There are several other less important arguments which have been made against the domestic harmony policy. One of these criticisms is directed against the policy of preventing the courts from being flooded with trivial litigation, mentioned by the court in *Miller*.[141] However, it is clear that this danger—if it is a danger—could be eliminated simply by holding that there is consent to the ordinary everyday irritations of

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137. *See* Klein v. Klein, 58 Cal. 2d 692, 376 P.2d 70, 26 Cal. Rptr. 102 (1962); Brown v. Brown, 88 Conn. 42, 89 A. 889 (1914). *See also* J. FLEMING, AN INTRODUCTION TO THE LAW OF TORTS 640 (3d ed. 1965); PROSSER, *supra* note 11, at 863; *Torts Between Persons in Domestic Relation*, *supra* note 6, at 1036.

138. Brown v. Brown, 88 Conn. 42, 49, 89 A. 889, 892 (1914).

139. Miller v. Miller, 44 Pa. 170 (1863).

140. Ritter v. Ritter, 31 Pa. 396 (1858).

141. Miller v. Miller, 44 Pa. at 172. *See* Thompson v. Thompson, 218 U.S. 611 (1910); Drake v. Drake, 145 Minn. 388, 177 N.W. 624 (1920); Wait v. Pierce, 191 Wis. 202, 209 N.W. 475 (1926).

marriage, or by an assumption of the risk analysis.[142] In any event, there is no question that this danger is purely imaginary, because in those jurisdictions where abrogation of interspousal immunity has occurred, there has been no flood of trivial litigation.[143] Most important, it is simply unfair that the mere *possibility* of some trivial litigation should preclude, in a blanket fashion, consideration of all spousal suits, many of which will be substantial and nontrivial.

Another less important consideration which has been adopted as part of the domestic peace policy is the argument that a spouse has an alternative remedy in a criminal or divorce proceeding. The illogic of this position is obvious when it is considered that many intentional torts, in the absence of immunity, give rise to both criminal and civil liability. If a criminal action is not precluded by interspousal immunity, why is a civil action? Recognition of a spousal criminal action would seem to be, if anything, *more* disruptive of marital peace than a civil suit, since the state is involved, and since one potential penalty is incarceration. Neither can it be argued that a criminal action is recognized between spouses because it is compensatory, for that proposition is not recognized generally in our legal system. In fact, it has been recognized that one problem with arguing that a criminal remedy is an alternative to a spousal tort suit is precisely because a criminal suit is not compensatory, and, hence is "illusory and inadequate" as a remedy for an injured spouse.[144] Other cases have held that both criminal and divorce proceedings are not an alternative to a civil suit, not only because they are not compensatory, but also because they do not include all torts which might be committed.[145] It is generally conceded that this defense of the peace and harmony policy of interspousal immunity is a relic of older cases which is not taken seriously at present.[146]

B. Danger of Fraud and Collusion

Another policy which has been offered to justify retention of interspousal immunity is the danger of fraud and collusion by spouses if spousal tort actions are recognized for negligence.[147] Although this policy justification for interspousal immunity has been described as

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142. *See* PROSSER, *supra* note 11, at 863; *Personal Injury Torts Between Spouses*, *supra* note 20, at 303; 59 MICH. L. REV. 1263 (1961).

143. *See, e.g.*, 27 OHIO ST. L.J. 550, 555 (1966). *See also* Klein v. Klein, 58 Cal. 2d 692, 376 P.2d 70, 26 Cal. Rptr. 102 (1962).

144. Johnson v. Johnson, 201 Ala. 41, 77 So. 335 (1917).

145. *See* Damm v. Elyria Lodge No. 465, 158 Ohio St. 107, 107 N.E.2d 337 (1952); Goode v. Martinis, 58 Wash. 2d 29, 361 P.2d 941 (1961).

146. *See* 19 DE PAUL L. REV. 590, 595-98 (1970).

147. *See* Parks v. Parks, 390 Pa. 287, 135 A.2d 65 (1957).

more "plausible"[148] than the marital peace justification, it suffers from several serious deficiencies. One major problem is that this approach assumes serious doubt about the efficiency of the judicial process, and is premised in part upon the widespread existence of liability insurance coverage. This argument thus takes for granted that, since insurers will pay most or all of the claims filed, an incentive would exist for spouses to collaborate in fabricating fraudulent and collusive claims.

In the first place, this argument is wholly inconsistent with the domestic peace and harmony policy. That argument assumes that permitting a spousal suit will shatter domestic harmony; but this collusion policy argument contradicts that idea by assuming spousal cooperation. The courts cannot have their cake both ways: if recognition of a spousal suit destroys domestic harmony, then there is little danger of collusion; if spousal suits are recognized and the spouses cooperate, then the effect of permitting the action is to encourage or foster harmony. Moreover, the probable reason why this inconsistency has been able to continue to exist in the judicial opinions for so many years is that the fraud and collusion basis for interspousal immunity is purely an assumption or speculation; consequently, it has not been subjected to examination. That this policy is premised upon pure assumption has been recognized by most commentators.[149] As one perceptive commentator observed, the argument proves too much, since it assumes that "a wife's love for her husband is such that she is more likely to bring a false suit against him than a genuine one."[150] That the assumption is inaccurate is attested to by the experience of a number of jurisdictions which have abrogated interspousal immunity. Their experience has been that neither the number of claims, nor the number of apparently fraudulent or collusive claims has increased.[151]

The most effective rebuttal of this collusion argument is its cynical view of the judicial process, for it assumes that the judicial system is wholly ineffective to discover fraudulent and collusive claims; and, in doing so, it abdicates the judicial responsibility to decide worthy and genuine claims. To state it another way, those courts which have adopted this argument have taken the position that, because the danger of collusion exists in *some* cases, the courts must refuse to hear

148. *Personal Injury Torts Between Spouses*, *supra* note 20, at 337. Professor McCurdy, however, after examining this justification for the doctrine, firmly rejects it. *Id.*

149. *See, e.g.*, PROSSER, *supra* note 11, 863 (a "dubious assumption"); *Personal Injury Torts Between Spouses*, *supra* note 20, at 337 ("An *a priori* assumption"). *See also* Jayme, *supra* note 9, at 321-22; Sanford, *supra* note 23, at 828-29; RESTATEMENT (SECOND) OF TORTS § 895F, Comment d (1979).

150. PROSSER, *supra* note 11, at 863.

151. *See Personal Injury Torts Between Spouses*, *supra* note 20, at 337.

all spousal claims. The courts of many states have recognized the fallacy of this argument.[152] For example, the Supreme Court of Washington has dismissed the fraud and collusion argument as follows:

> "The courts may and should take cognizance of fraud and collusion *when found to exist in a particular case*. However, the fact that there may be a greater opportunity for fraud and collusion in one class of cases than another does not warrant courts of law in closing the door to all cases of that class."[153]

This observation was argued even more forcefully in *Klein v. Klein*,[154] where the California Supreme Court reasoned that:

> It would be a sad commentary on the law if we were to admit that the judicial processes are so ineffective that we must deny relief to a person otherwise entitled simply because in some future case a litigant may be guilty of fraud or collusion. . . . Our legal system is not that ineffectual.[155]

Indeed, one premise of the *Klein* decision is that the assumption of collusion causes the courts to avoid or to evade a public responsibility. That responsibility is to award relief for genuine, meritorious claims. This evasion of duty is compounded when viewed from the perspective of the duty owed by the judicial system to insurers. Insurance companies are entitled to protection from fraudulent claims, but not from genuine ones. Thus, insurers (in the absence of insurance policy terms otherwise) receive more protection than they are entitled to because of the interspousal immunity rule and its policy against collusion. From the viewpoint of the insured, there is injustice created by this policy as well, for its effect is to take away from a family member financial protection; and the insured tortfeasor will most often have purchased that insurance for the purpose of protecting family members, who, after all, the insured has a natural motive to protect.[156] In addition, as a practical matter, is it not clear that in a spousal personal injury action—just as in other personal injury actions—the control of the insurer over the conduct of the litigation, and the requirements of proof as to liability and damages at trial will eliminate fraudulent and collusive claims?

In Pennsylvania the fraud and collusion argument is moot, or at least it should be held to be moot when an appropriate case reaches

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152. *E.g.*, Brooks v. Robinson, 259 Ind. 16, 284 N.E.2d 794 (1972); Lewis v. Lewis, 370 Mass. 619, 351 N.E.2d 526 (1976); Hosko v. Hosko, 385 Mich. 39, 187 N.W.2d 236 (1971); Rozell v. Rozell, 281 N.Y. 106, 22 N.E.2d 254 (1939); Richard v. Richard, 131 Vt. 98, 300 A.2d 637 (1973).

153. Freehe v. Freehe, 81 Wash. 2d 183, 189, 500 P.2d 771, 775 (1972) (emphasis added) (quoting Borst v. Borst, 41 Wash. 2d 642, 251 P.2d 149 (1952)).

154. 58 Cal. 2d 692, 376 P.2d 70, 26 Cal. Rptr. 102 (1962).

155. *Id.* at 696, 376 P.2d at 73, 26 Cal. Rptr. at 105.

156. Beaudette v. Frana, 285 Minn. 366, 173 N.W.2d 416 (1969).

the Pennsylvania Supreme Court. In *Falco v. Pados*,[157] decided in 1971, the Pennsylvania Supreme Court abrogated the analogous doctrine of parental immunity. There, the court firmly rejected the fraud and collusion justification for immunity:

> "In a day when automobile accidents are unfortunately becoming so frequent and the injuries suffered by the passengers are often so severe, it seems unjust to deny the claims of the many because of the potentiality for fraud by the few. Moreover, there is something wanting in a system of justice which permits strangers, friends, relatives and emancipated children to recover for injuries suffered as a result of their driver's negligence but denies this right to the driver's spouse and minor children who are also passengers in the same vehicle."
>
> Juries and trial courts are constantly called upon to distinguish the frivolous from the substantial and the fraudulent from the meritorious, sometimes even reaching erroneous results in the process. Such flexibility, inherent in the judicial process, offers no reason for substituting for the case-by-case resolution of causes an artificial and indefensible barrier, such as the intrafamily immunity rule. In the last analysis it is much to be preferred that we depend upon the efficacy of the judicial process to ferret out the meritorious from the fraudulent rather than using a broad broom to sweep away a class of claims, a number of which are admittedly meritorious.[158]

The analogy between this area is not only apt, but it is virtually incontrovertible. If anything, the reasoning of the court is probably more accurately applied to spouses over whom, unlike minor children, the negligent spouse tortfeasor is likely to have less influence.

VII. Conclusion

This examination of interspousal immunity impels the conclusion that the doctrine should be abrogated, and that the judiciary has the power to accomplish that change. The rule had its origin in the common law spousal identity fiction. But even that fictional basis for the doctrine long ago concededly ceased to exist. The enactment of Married Women's Emancipation Acts as well as changes in thinking about marriage have destroyed the underlying reasons for, or presuppositions about, marriage that formed the basis for the immunity.

Unfortunately, in Pennsylvania, as well as some other states, these changes in thinking about the nature and conditions of modern marriage have had no impact on judicial thinking about interspousal torts. Under the guise of statutory construction, courts continue to reach the same results as those reached at common law. It is clear, however, that statutory interpretation does not account for the different results

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157. Falco v. Pados, 444 Pa. 372, 282 A.2d 351 (1971).

158. *Id.* at 380-81, 282 A.2d at 355-56 (quoting Immer v. Risko, 56 N.J. at 495, 267 A.2d at 488) (citations and footnotes omitted).

as to abrogation or retention of interspousal immunity which have occurred in the various states, because many of those states reach different conclusions even when construing statutes which are identical, or nearly so. In addition, within a single state—Pennsylvania—the decisions which purportedly or apparently construe identical statutory language are contradictory.

The only approach which reconciles these apparently inconsistent results both inside and outside of Pennsylvania is one which identifies the policy basis which the courts have adopted to justify their decisions. When the policies are identified, and the court's thinking about whether or not those policies are promoted is examined, the seeming contradictions in the decisions vanish. Thus, it is clear that notions about policy which form the basis for the current existence of interspousal immunity, and not statutory construction, explain modern differences in decisions dealing with that doctrine. This conclusion is particularly justified by the Pennsylvania decisions on interspousal immunity. The Pennsylvania courts have in many cases taken a position which, in effect, either ignores or refuses to consider evidence of legislative intent revealed in the legislative design of, and amendments to, the Pennsylvania Married Women's Act; they have employed maxims of strict statutory construction in spite of conceding that those Acts may well be remedial; they have argued inconsistently in some cases that the Married Women's Acts are in derogation of the common law, and in other cases they have argued that the Pennsylvania Married Women's Act *adopts* the common law; and without any analysis or real explanation, they have held that the phrase "separate property" used in the Pennsylvania Married Women's Act cannot include unliquidated tort claims.

In short, although the Pennsylvania Supreme Court has repeatedly emphasized that its action in retaining interspousal tort immunity is required because of statutory mandate, the court has never actually examined the purpose, objective or intent of the legislature in enacting the Married Women's Acts. The intent of the legislature in the statute appears to be almost irrelevant to the court, yet the court has argued (inconsistently) that it cannot abrogate interspousal immunity, because that is a matter for the legislature.[159] The fact of the matter is that the bases for the position of the Pennsylvania courts are judicially created policies. If those policies were invented by the courts, then the interspousal immunity doctrine can be abrogated by judicial action.

The Pennsylvania Supreme Court has identified two policies which it has offered as justification for retention of interspousal immunity:

159. *E.g.*, DiGirolamo v. Apanavage, 454 Pa. at 563, 312 A.2d at 385.

preservation of domestic peace and felicity, and prevention of fraud and collusion.[160] But the court did not explain the statutory source of the policies, and it would appear that the court simply assumed the existence of these policies of its own accord. Aside from the obvious problem that this approach may actually *frustrate* legislative intent, another equally serious deficiency which it creates is that the a priori assumptive nature of the judicial thinking involved in invoking these policies prevents rational examination and evaluation of the nature of the policies themselves; and it also precludes examination of whether retention of interspousal immunity in fact promotes or serves these policies.

Examples of this lack of analysis have not been difficult to find. Whether the domestic peace and felicity policy is served by retention of interspousal immunity is questionable at best. Other types of spousal actions are recognized, and surely they are as disruptive of marital peace as an interspousal tort action. Moreover, with intentional torts, the commission of the tort is a rather clear indication that at the *time of commission* domestic affection and harmony have already ceased to exist. And, as a practical matter, if any affection and domestic harmony remains between the spouses, an action will not be brought in any event. Thus, the filing of a suit *follows* a breakdown of domestic peace and harmony, and it is difficult to understand how refusal to permit a tort action can be justified as a preservation of something which has already been destroyed.[161] Probably the most telling criticism of this policy lies in its assumption that refusal to permit suit and the consequent failure to compensate for a tort is less disruptive than permitting compensation. Under modern conditions, where insurance coverage is usually present, it would appear that familial disruption may well be less if suit and compensation were permitted.[162] It is true that opinions may indeed differ about this last proposition, but the problem is that the Pennsylvania court has never considered either side of the proposition, because of the policy assumptions made by the court.

The other Pennsylvania policy advanced for retention of interspousal immunity—prevention of fraud and collusion—is perhaps even more illogical. First, the policy actually contradicts the domestic peace and harmony rational, for, while the latter policy assumes that recognition of spousal suits fosters or creates disruption, the former assumes that recognition *encourages* spousal cooperation. This incon-

160. *See* notes 115-126 and accompanying text *supra*.

161. *See* Freehe v. Freehe, 81 Wash. 2d 183, 500 P.2d 771 (1972). *See also* notes 127-129 and accompanying text *supra*.

162. Immer v. Risko, 56 N.J. 482, 489, 267 A.2d 481, 485 (1970).

sistency is, however, only the least telling problem created by this rationale. A more serious criticism of the policy relates to its apparent conception of the judicial process. This approach assumes that the judicial process cannot separate the fraudulent and collusive claim from the legitimate claim. Fraudulent claims can occur in many types of litigation, and most persons familiar with our system concede that our adversary process is capable of separating illegitimate from legitimate claims. In fact, it can be persuasively argued that this philosophy leads to avoidance of the judicial duty to hear and decide meritorious cases: assuming that there might be some collusive spousal claims, the courts in effect take the position that they should refuse to hear all—even meritorious—spousal suits. The Pennsylvania Supreme Court itself has recognized this precise principle, and has rejected the fraud and collusion argument in abrogating the closely analogous doctrine of parental immunity.[163] It would be difficult to justify different treatment of interspousal immunity on the basis of either logic or experience in light of this development in a closely related area.

Although the focus of this article has been upon case analysis and the implications of that analysis, there are probably more basic underlying reasons urging abolition of interspousal immunity. The cynical remark that at common law the husband and wife were one, and that the one was the husband, is a telling indictment of interspousal immunity. For the idea which this now outdated adage conveys is that interspousal immunity originated in and was based upon a notion of gross inequality of treatment for married women based upon their status. That status included almost a total lack of any substantive or procedural rights, and married women, powerless and subservient, were little more than chattels of their husbands. Conditions of modern life have changed. Those changes have been recognized at least generally by statute in Pennsylvania and in many other states.[164] But the position taken by the Pennsylvania courts has in effect continued some of the most onerous characteristics of the common law approach. As a result, if a third party intentionally maims or negligently cripples a person, damages can be recovered. But if the tortfeasor happens to be the spouse of the victim, all possibility of recovery is precluded. There is no basis for this difference in treatment; the policies for the rule are either mistaken in that they do not justify retention of interspousal immunity, or else the policies themselves are not promoted or served by that doctrine. One basic policy of tort law is

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163. Falco v. Pados, 444 Pa. 372, 282 A.2d 351 (1971).

164. *See* notes 20-35 and accompanying text *supra* for a discussion of the Married Women's Acts enacted by the various states.

compensation. To single out one class—married persons—and arbitrarily impose a blanket disability based solely on status effectively frustrates that compensatory policy. And it is an arbitrary, unjustifiable difference in treatment which may thus be unconstitutional as well.[165]

It is clear that, since interspousal immunity has been judicially created and maintained both at common law and afterwards, the courts may abrogate the doctrine. The principle of stare decisis includes the potential for change as well as stability. The inequality of the interspousal immunity doctrine, its inconsistency and illogic, and its failure to accommodate changed conditions in modern society all persuasively justify the conclusion that abrogation is urgently required. One tenet of stare decisis is that a rule which has served one era well may disserve another. When such disservice is perceived, the courts have not only the authority, but the responsibility to adjust or change the rule to deal with changed circumstances. The problems, inadequacies and injustices created by interspousal immunity are clear, and the time for the courts to abrogate that doctrine has arrived.

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165. *See* DiGirolamo v. Apanavage, 454 Pa. at 574-75, 312 A.2d at 385 (Manderino, J., dissenting).