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The Absolute Defense of Interspousal Immunity in Actions for Tort is Abrogated Prospectively, as to All Causes of Action Arising after This Date, and is Abrogated as to the Instant Cases.

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CASE NOTES

HUSBAND AND WIFE—INTERSPOUSAL IMMUNITY—THE ABSOLUTE DEFENSE OF INTERSPOUSAL IMMUNITY IN ACTIONS FOR TORT IS ABROGATED PROSPECTIVELY, AS TO ALL CAUSES OF ACTION ARISING AFTER THIS DATE, AND IS ABROGATED AS TO THE INSTANT CASES. *Beaudette v. Frana*, 173 N.W.2d 416 (Minn. 1969).

Plaintiff and defendant in each case[1] are wife and husband respectively, the wife claiming damages for personal injuries resulting from the husband's negligence in the operation of an automobile in which she was a passenger. In the first case, the plaintiff and defendant were not married at the time of the accident, but were married prior to entry of judgment. In the second case, the parties were married at the time of injury and at the time of trial. Summary judgment was entered against plaintiff in each case due to the existing rule of interspousal immunity. Plaintiffs have appealed from these judgments. Held—*Reversed and Remanded.* The absolute defense of interspousal immunity in actions for tort is abrogated prospectively, as to all causes of action arising after this date, and is abrogated as to the instant cases.

At common law the identity of the husband and wife as one precluded either from suing the other.[2] The husband and wife were one and that one was the husband. "A married woman had no separate identity before the law; she was regarded as a chattel with neither property nor other rights which were enforceable against anyone."[3] The bonds of coverture removed the legal identity of the wife and replaced that identity with that of her husband. The natural result was that neither spouse could maintain an action against the other for either a personal tort[4] or a tort against the property of the other,[5] whether committed prior to coverture or during coverture. It was impossible to successfully raise the question after termination of coverture by death because of non-survival of causes of action in tort, and divorce was not possible prior to the English Reformation.[6] This common law doctrine of interspousal immunity extinguished all antenuptial tortious liabilities[7] and all antenuptial contractual liabilities not in contemplation of marriage.[8]

[1] The instant case, No. 41829, was consolidated on appeal to the Supreme Court of Minnesota with Green v. Green, No. 41798, which involved the same issue.
[2] 1 W. BLACKSTONE COMMENTARIES *442.
[3] Heckendorn v. First National Bank of Ottowa, 166 N.E.2d 571, 572 (Ill. 1960).
[4] Thompson v. Thompson, 218 U.S. 611, 615, 31 S. Ct. 111, 54 L. Ed. 1180, 1181 (1910).
[5] McCurdy, *Torts Between Persons In Domestic Relations*, 43 HARV. L. REV. 1030, 1033 (1930).
[6] *Id.* at 1034.
[7] W. PROSSER, HANDBOOK OF THE LAW OF TORTS 880 (3d ed. 1964).
[8] *See In Re* Callister's Estate, 47 N.E. 268 (N.Y. 1897).

Near the middle of the nineteenth century statutes known as Married Women's Act or Emancipation Acts were passed in all American jurisdictions.[9] These statutes made women a legal entity with separate ownership of property and gave her the capacity to sue or be sued. As a direct result of these acts, the wife was permitted to maintain an action against her husband for his wrongful interference with her property.[10] It has been the contention of most litigants that the legislative intent of the acts was to give the woman, and particularly the wife, identical rights and liabilities as those possessed by the husband. Even with the institution of the Married Women's Acts, the majority of the jurisdictions of the United States deny the spouses the right of civil redress for injuries suffered through the negligent or intentional tort of one against the other by upholding the interspousal immunity doctrine.[11] Proponents of the doctrine argue that the spouses are not without an adequate remedy for such wrongs as either may sue for divorce and be awarded relief commensurate with the injury sustained.[12] Additionally, if the offense is one against the public, the injured spouse may resort to the criminal courts where presumably, proper punishment will be assessed.[13] Adherence to the common law rule has primarily been defended on the basis that to allow such actions on the part of the husband and wife would be to disrupt and destroy the peace and tranquility of the home which is against public policy.[14] This is on the bald theory that after a husband has beaten his wife, there is a state of peace and tranquility remaining in the marriage; and that if the wife is sufficiently injured or angry to sue the husband for it, she will be soothed and deterred from reprisals by denying her the legal remedy even though she has left him or divorced him for that very act.[15] Others have rejected this public policy argument implying that it lacks in substance,[16] and have preferred to defend the doctrine on the theory that to allow such actions would open the doors of the courts to fraudulent and collusive actions by one spouse against the other and admit to public notice claimants for assault, slander and libel, and alleged injuries by husband against wife or wife against husband.[17] The rationale of the proponents of the doctrine as to the adequacy of

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9 W. PROSSER, *supra* note 7, at 881.

10 The statutes are collected in 3 VERNIER, AMERICAN FAMILY LAWS, 1935, § 167, 179, 180.

11 *See generally* 43 A.L.R.2d 636 and 40-48 A.L.R.2d L.C.S. 332.

12 Thompson v. Thompson, 218 U.S. 611, 619, 31 S. Ct. 111, 113, 54 L. Ed. 1180, 1183 (1910).

13 *Id.*

14 *E.g.*, Nickerson v. Nickerson, 65 Tex. 281, 285 (1886).

15 W. PROSSER, HANDBOOK OF THE LAW OF TORTS 674 (2d ed. 1955).

16 *See* Rogers v. Rogers, 177 S.W. 382 (Mo. 1915).

17 *E.g.*, Thompson v. Thompson, 218 U.S. 611, 618, 31 S. Ct. 111, 112, 54 L. Ed. 1180, 1182 (1910).

remedy available to the aggrieved spouse is illogical in that it fails to provide for the spouse who has sustained injury and does not desire to see his mate placed before a criminal tribunal. Moreover, the alternative, being an action for divorce, is diametrically opposed to the maintenance of domestic peace and harmony. The possibility of fraud and collusion by the husband and wife in actions against each other is a present danger. However, the rationale of this defense of the doctrine fails to consider the many situations where the marriage partners are actually antagonistic and not disposed to action in concert.

The right of one spouse to obtain relief in a civil action for the tortious act of the other was judicially recognized as early as 1914.[18] Since that date, other jurisdictions have followed the trend in increasing numbers.[19]

Beaudette v. Frana is the Supreme Court of Minnesota's disposition of the last remaining vestige of the judicially established rule of intrafamilial immunity in actions for tort. The immunity of an unemancipated child from an action by his parent for personal injuries resulting from the child's negligence in driving an automobile was abrogated without exception in *Balts v. Balts*.[20] In *Balts*, the court through Mr. Justice Otis disavowed that they advocated the abrogation of the remaining immunities within the family maintaining that those "are relationships which may well involve different and distinguishable policy considerations."[21] Nevertheless, slightly more than a year later in *Silesky v. Kelman*[22] the court likewise abrogated parental immunity in an action by an unemancipated child for personal injuries resulting from his mother's negligent operation of an automobile. The majority of the court in *Silesky* employed the *Balts* case to support their decision stating, "no shadow of difference in principle or policy has been shown to exist between the two situations."[23] The decision in *Balts* had so thoroughly destroyed the rationale on which parent-child immunity was established, that the similarities of the relationship as shown in *Silesky* would not support a different rule.

The rule of absolute interspousal immunity in actions for tort was

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18 Brown v. Brown, 89 A. 889 (Conn. 1914).

19 The following states recognize the right of one spouse to sue the other in actions for tort: Alas., Ala., Ariz., Ark., Cal., Colo., Conn., Idaho, Ky., Minn., N.H., N.J., N.Y., N.C., N.D., Okla., S.C., S.D., Utah, Wis. *See generally* 43 A.L.R.2d 647 and 40-48 A.L.R.2d L.C.S. 338.

20 142 N.W.2d 66 (Minn. 1966).

21 *Id.* at 75.

22 161 N.W.2d 631 (Minn. 1968). The abrogation of parental immunity was subject to exception with respect to negligent acts involving an exercise of reasonable parental authority and negligent acts involving an exercise of ordinary parental discretion with respect to provision of food, clothing, housing, medical and dental services and other care.

23 *Id.* at 635.

announced in Minnesota in 1906.[24] Although being under continuous attack since that time, the rule withstood change.[25] The court first intimated that it was inclined to reexamine its position in the post-*Balts* but pre-*Silesky* case of *Hovanetz v. Anderson*.[26] In a *per curiam* opinion, the court while admitting that the case was an appropriate one for a change in the rule, refused to abrogate the doctrine and issued an invitation from the bench for a legislative determination on the subject.[27] In so doing, they expressly reserved the issue for future consideration in the event of inaction on the part of the legislature.[28] Although *Hovanetz* was reported to the Minnesota Legislature in January, 1968, in compliance with state statute,[29] they did not consider the problem in either a direct or comprehensive way.[30] The majority in *Beaudette v. Frana* construed the inaction of the legislature to the *Hovanetz* invitation not as indifference to the issue but rather as an exhibition of its preference that the court resolve the question.[31] The court was moved to its decision in the instant case as a result of their previous decisions involving the parent-child relationship in *Balts* and *Silesky* saying, "These differences do not so distinguish the relationships of husband-wife and parent-child as to warrant a drastically different rule of immunity. . . ."[32] In arriving at its decision, the court did not fail to recognize the inherent dangers which arise when marriage partners who share the same interests are allowed to maintain actions against each other. The greatest danger being the inducement to collusion and spurious claims because an award to one spouse would in effect amount to an increase in family funds in which both would share equally.[33] Such domestic accord based on fraud could possibly result in an "insidious impairment of future trust between the

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24 Strom v. Strom, 107 N.W. 1047 (Minn. 1906).

25 Drake v. Drake, 177 N.W. 624 (Minn. 1920); Woltman v. Woltman, 189 N.W. 1022 (Minn. 1922); Patenaude v. Patenaude, 263 N.W. 546 (Minn. 1935); Kyle v. Kyle, 297 N.W. 744 (Minn. 1941); Karalis v. Karalis, 4 N.W.2d 632 (Minn. 1942); Hovanetz v. Anderson, 148 N.W.2d 564 (Minn. 1967).

26 148 N.W.2d 564 (Minn. 1967).

27 *Id.* at 566.

28 *Id.*

29 MINN. STAT. ANN. § 482.09(9) (1959) requires the Revisor of Statutes to make a biennial report concerning any statutory changes recommended or discussed or statutory deficiencies noted in any opinion of the Supreme Court of Minnesota.

30 The Minnesota Legislature reacted to the report of the Revisor of Statutes by enacting MINN. STAT. ANN. § 72A.149, Subd. 1 (1969), prohibiting the writing of house-hold-exclusion clauses in automobile liability insurance policies, and MINN. STAT. ANN. § 72A.1492 (1969), which authorizes the inclusion of supplemental accident indemnity coverage for members of an insured's family.

31 Beaudette v. Frana, 173 N.W.2d 416, 418 (Minn. 1969).

32 *Id.* at 419.

33 Minnesota, while being a common law state, provides for the maintenance of separate property for the wife under MINN. STAT. ANN. § 519.02. The award would only amount to an increase in family funds in which both would share equally if utilized to the advantage of the community estate by the recovering spouse.

spouses."[34] Where there is no such fraud and collusion between the spouses, the secondary evil is domestic discord arising from the adversary setting of the courtroom.[35] The court issued a challenge to judicial resourcefulness to be always vigilant for the slightest appearance of spurious of collusive interspousal claims and admonished future courts to act promptly and firmly should their indications be detected.[36] In addition to issuing this *caveat* to the courts in future actions of this nature, the court established minimal guidelines for the instruction of juries as to intentional and unintentional torts between the spouses. Because of the risks of intentional contact in marriage which can in no way be classed with contacts among strangers, "one spouse should not recover damages from the other without substantial evidence that the injurious contact was plainly excessive or a gross abuse of normal privilege."[37] Negligent contacts being as frequent as those which are intentional, "it would be an unusual case in which the trial court would not instruct the jury as to the injured spouse's peculiar assumption of risk."[38] An overall view of the demise of the family immunity doctrine in Minnesota reveals the dominoe effect which was begun with *Balts* and perpetuated through the instant case. The abrogation of the rule as to parent-child actions destroyed the rationale on which the remaining immunities were based and rendered them unsupportable; thus bearing out the wisdom of Mr. Justice Sheran who dissented in *Balts* saying, "acceptance of the reasoning which supports this decision forecasts the end of immunity with respect to actions for . . . tort between husband and wife as well."[39]

The total abrogation of the doctrine of interspousal immunity has been avoided in several minority jurisdictions.[40] They have chosen to take an intermediate view of the issue in denying the spouses a right of action against each other for negligent torts, but allowing a right of action for those which are intentional. These jurisdictions require proof of more than ordinary negligence to sustain an action between the spouses. A willful or malicious intent, or conduct which is grossly negligent on the part of the offending spouse is a condition precedent to the right of action.[41] Such a requirement as a prerequisite to the bringing of an action between the spouses greatly reduces the possibility that fraudulent and collusive claims will be presented to the court.[42]

34 Beaudette v. Frana, 173 N.W.2d 416, 419 (Minn. 1969).
35 *Id.* at 419.
36 *Id.* at 420.
37 *Id.*
38 *Id.*
39 Balts v. Balts, 142 N.W.2d 66, 78 (Minn. 1966).
40 Kowaleski v. Kowaleski, 361 P.2d 64 (Ore. 1961); Ennis v. Truhitte, 306 S.W.2d 549 (Mo. 1957); Self v. Self, 376 P.2d 65 (Cal. 1962).
41 *See Id.*
42 Kowaleski v. Kowaleski, 361 P.2d 64 (Ore. 1961).

Furthermore, this requirement presents an effective argument to the traditional "domestic peace" rationale used as a basis for maintaining the old rule because the conjugal harmony of the marriage would most likely have been long since disrupted as a result of the tort which has been committed.[43] Such a modification of the doctrine would appear to strike a happy median as it presents more inflexible safeguards to the evils encountered in allowing intrafamilial actions for tort. This was the view taken by the Fort Worth Court of Civil Appeals in *Aboussie v. Aboussie*[44] where an unemancipated child, through her next friend, brought an action against her father for his negligent tort. The court in that decision rejected the previous holding of *Garza v. Garza*[45] and adopted the rule announced by the Supreme Court of Oregon in *Cowgill v. Boock*,[46] that being, ordinary negligence or the doing of an unintentional wrong cannot be the basis for an action by an unemancipated child against the parent.[47] It was further held that the established rule of absolute immunity should be modified to allow an unemancipated minor child to maintain an action against his parent for a willful or malicious tort.[48] The court in that case rationalized its decision by contending that the stated rule would best preserve the peace and tranquility of the home and subserve the best interest of minor children.[49] *Aboussie* was a progressive step in the recognition of the rights of unemancipated children, while the rights of the marriage partners remain as disabled as when the doctrine of interspousal immunity was first presented in Texas in *Nickerson v. Nickerson*.[50] That decision, while being more than ninety years old, has defied change. In *Nickerson* where the tortious act of the husband and another upon the wife resulted in judgment for the wife in the trial court, the Supreme Court held that the act gave no right of action by the wife against the husband. Although the suit was brought after discoverture the Court was of the opinion that since there was no cause of action at the time of the commission of the offense, none could arise by reason of discoverture. The court based its decision not on the entire unity of the marriage relationship, but upon grounds of public policy.[51] The

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43 Spellens v. Spellens, 317 P.2d 613, 632 (Cal. 1957).

44 270 S.W.2d 636 (Tex. Civ. App.—Fort Worth 1954, writ ref'd). Plaintiff, a 2—½ year old child, injured her hand in an electric fan which had been negligently placed on the floor by one of the members of a partnership, of which her father was a member.

45 209 S.W.2d 1012 (Tex. Civ. App.—Eastland 1948, no writ).

46 218 P.2d 445 (Ore. 1950). Action by a deceased child's administrator against the child's father, who while intoxicated, ordered the child to ride in an automobile with him and then negligently caused an accident in which the child was killed.

47 Aboussie v. Aboussie, 270 S.W.2d 636, 639 (Tex. Civ. App.—Fort Worth 1954, writ ref'd).

48 *Id.*

49 *Id.*

50 65 Tex. 281 (1886).

51 *Id.* at 285.

more recent case of *Latiolais v. Latiolais*[52] continues to uphold the old rule on the same grounds.

As previously pointed out, the contention that the old rule is necessary to maintain domestic peace is illogical and unsound. Texas has for many years permitted actions between spouses where property rights are involved[53] and it would not appear that domestic peace is any more impaired by tort actions than by property actions, yet the latter are allowed. But there exists another compelling reason why the rule of the *Nickerson* case should no longer be followed in this state. There are now statutes which are wholly inconsistent with any such concept. The legislature has seen fit to provide that the recovery for personal injuries sustained by a spouse during marriage, except for any recovery for loss of earning capacity during marriage is that spouse's separate property.[54] The legislature has further provided that a spouse may sue and be sued without the joinder of the other spouse.[55] Under previous case law both the cause of action and damages recovered for personal injuries to either spouse were community property.[56] The husband, being the manager of the community estate was the proper person to bring an action for his wife's personal injuries.[57] The incongruity of the situation is readily apparent.

In declaring that recoveries for personal injuries are now separate property, the legislature has removed the last bar to the adoption of a more modern rule.[58] In the absence of statute or some compelling reason of public policy, where there is negligence or intentional wrongdoing proximately causing an injury, there should be liability. Dean Prosser has aptly stated the argument of jurists and legal scholars alike, "The devastating attack on the old rule found in a number of recent decisions seems to leave no possible justification for it except that of historical survival."[59]

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52 361 S.W.2d 252 (Tex. Civ. App.—Beaumont 1962, writ ref'd n.r.e.).

53 Trimble v. Farmer, 157 Tex. 533, 305 S.W.2d 157 (1957); Pride v. Pride, 318 S.W.2d 715, 722 (Tex. Civ. App.—Dallas 1958, no writ); Bettis v. Bettis, 83 S.W.2d 1076 (Tex. Civ. App.—El Paso 1935, no writ); 30 TEX. JUR. 2d, *Husband and Wife*, § 168 (1962).

54 TEX. FAMILY CODE ANN. § 5.01(a)(3) (1970).

55 TEX. FAMILY CODE ANN. § 4.04(a) (1970).

56 Ellis v. City of San Antonio, 341 S.W.2d 508, 510 (Tex. Civ. App.—San Antonio 1960, writ ref'd n.r.e.).

57 *Id.*

58 A collateral obstacle remaining to suits between the spouses could be the application of TEX. CODE CRIM. PROC. ANN. art. 38.11 (1966) in allowing or disallowing testimony by one spouse against the other.

59 W. PROSSER, HANDBOOK OF THE LAW OF TORTS 675 (2d ed. 1955).