



3-1-1978

Interspousal Immunity Doctrine Will Not Bar Claims for Intentional Torts.

Edward L. Kurth

Follow this and additional works at: <https://commons.stmarytx.edu/thestmaryslawjournal>



Part of the [Torts Commons](#)

Recommended Citation

Edward L. Kurth, *Interspousal Immunity Doctrine Will Not Bar Claims for Intentional Torts.*, 10 ST. MARY'S L.J. (1978).

Available at: <https://commons.stmarytx.edu/thestmaryslawjournal/vol10/iss1/12>

This Article is brought to you for free and open access by the St. Mary's Law Journals at Digital Commons at St. Mary's University. It has been accepted for inclusion in St. Mary's Law Journal by an authorized editor of Digital Commons at St. Mary's University. For more information, please contact egoode@stmarytx.edu, sfowler@stmarytx.edu.

**TORTS—Interspousal Immunity—Interspousal Immunity
Doctrine Will Not Bar Claims for Intentional Torts**

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

On March 1, 1971, Mrs. Robbie Bounds died from two gunshot wounds inflicted during a domestic quarrel with her husband, Dr. L.D. Bounds. Mrs. Bounds' children by a former marriage brought suit for the wrongful death¹ of their mother, and were awarded damages upon a jury finding that Dr. Bounds intentionally and wrongfully caused Mrs. Bounds' death. The Corpus Christi Court of Civil Appeals reversed and rendered a take nothing judgment in the wrongful death action. The court reasoned that since the doctrine of interspousal tort immunity would have barred any civil action under article 4672² by Mrs. Bounds had she survived, an action by her children was also barred.³ Held—*Reversed and remanded*. The rule of interspousal tort immunity is abolished insofar as it would bar interspousal claims founded on willful or intentional torts.⁴

The doctrine of interspousal immunity evolved from the common law fiction that a husband and wife possessed only one legal identity.⁵ As a matter of law, the wife was absorbed into the legal personality of her husband.⁶ Upon marriage, the husband acquired the right to possession and use of his wife's real and personal property.⁷ In addition, he acquired the right to her choses in action, to the extent that he reduced them to possession during the marriage by either collecting the award or obtaining

1. The Texas Wrongful Death Statute provides that "[w]hen an injury causing the death of any person, occurring either within or without this state, is caused by the wrongful act, neglect, carelessness, unskillfulness, or default of another person . . . such persons . . . shall be liable in damages for the injuries causing such death." TEX. REV. CIV. STAT. ANN. art. 4671 (Vernon Supp. 1978).

2. See TEX. REV. CIV. STAT. ANN. art. 4672 (Vernon 1952). This statute provides that "[t]he wrongful act, negligence, carelessness, unskillfulness or default mentioned in the preceding article must be of such character as would, if death had not ensued, have entitled the party injured to maintain an action for such injury." *Id.*

3. *Bounds v. Caudle*, 549 S.W.2d 438, 442 (Tex. Civ. App.—Corpus Christi), *rev'd*, 560 S.W.2d 925 (Tex. 1977).

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

5. See generally 1 F. HARPER & F. JAMES, THE LAW OF TORTS § 8.10, at 643 (1956); W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 122, at 859 (4th ed. 1971).

6. 1 W. BLACKSTONE, COMMENTARIES 441 (3d ed. Cooley 1883). The origin of the unity concept has been attributed to a statement made by Adam after creation of woman from his rib: "This is now bone of my bones and flesh of my flesh." *Genesis* 2:23. Other authorities point to the early Roman law, feudal law, and the natural law concept of the family where the wife was under her husband's authority and had no legal personality of her own. See *Damm v. Elyria Lodge* No. 465, 107 N.E.2d 337, 341 (Ohio 1952); W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 122, at 860 (4th ed. 1971).

7. See generally H. CLARK, LAW OF DOMESTIC RELATIONS IN THE UNITED STATES § 7.1, at 219-20 (1968); W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 122, at 860 (4th ed. 1971).

judgment in a suit in his own name.⁸ Within this context, the doctrine of interspousal immunity was the logical extension of the common law unity fiction.⁹ There was not only a "conceptual problem of the single marital entity suing itself, but also, as a practical matter, the rules of liability rendered such suits idle exercises."¹⁰ Thus, under the traditional common law concept of conjugal unity, each spouse was precluded both procedurally and substantively from suing the other in tort. Procedurally, the husband would be both plaintiff and defendant, while substantively, the wife had no personal right of action.¹¹

Beginning in 1844, state legislatures, under the pressure of social and economic progress, enacted Emancipation or Married Women's Acts which were designed to alleviate some of the disabilities of coverture placed upon the wife as a result of the unity doctrine.¹² Although the language in these statutes lacked uniformity, the basic purpose was to return the married woman to the legal status she occupied as a *femme sole*.¹³ Most of these statutes failed to state whether the doctrine of interspousal immunity was abrogated by their enactment.¹⁴ The first courts to interpret these statutes held that although a wife could maintain a suit against her husband for the protection of her separate property rights, no right of action had been conferred with respect to personal interspousal torts.¹⁵ The foundation was

8. The wife had no right to sue or be sued without the joinder of her husband, and was unable to contract in her own name or to own, control, or manage her separate property. McCurdy, *Torts Between Persons in Domestic Relation*, 43 HARV. L. REV. 1030, 1031-32 (1930).

9. *Lewis v. Lewis*, 351 N.E.2d 526, 527 (Mass. 1976).

10. *Id.* at 527-28. See also *Rains v. Rains*, 46 P.2d 740, 741 (Colo. 1935). If the husband were the tortfeasor, he could reduce his wife's chose in action to possession thereby becoming a plaintiff against himself and entitled to the proceeds. If his wife committed the tort, he would be joined as a defendant and liable to himself. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 122, at 860 (4th ed. 1971).

11. McCurdy, *Personal Injury Torts Between Spouses*, 4 VILL. L. REV. 303, 307 (1959).

At common law . . . the combination of various incidents of marriage, some substantive, some procedural, some conceptual, made it impossible for one spouse ever to be held civilly liable as a tortfeasor, in any situation, and without exception, to the other for any act, antenuptial or during marriage, causing personal injury which would have been a tort but for marriage.

Id. at 307. See generally Comment, *Intrafamily Immunity—The Doctrine and Its Present Status*, 20 BAYLOR L. REV. 27 (1967).

12. See W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 122, at 861 n.20 (4th ed. 1971).

13. Hinkle, *Intrafamily Litigation—Husband and Wife*, 1970 INS. L.J. 133, 133. The acts were designed to confer upon women a separate legal identity and to give them a separate legal estate in their own property. They conferred upon a wife the capacity to sue or be sued without the joinder of her husband and made the wife separately responsible for her torts committed against third persons. *Self v. Self*, 376 P.2d 65, 66, 26 Cal. Rptr. 97, 98 (1962). See also 1 F. HARPER & F. JAMES, THE LAW OF TORTS § 8.10, at 643 (1956).

14. Comment, *Husband and Wife Are Not One: The Marital Relationship In Tort Law*, 43 U.M.K.C. L. REV. 334, 336 (1975); see, e.g., ARK. STAT. ANN. § 55-401 (Bobbs-Merrill 1971); OKLA. STAT. ANN. tit. 32, § 15 (West 1976); VA. CODE §§ 55-35 to -47 (Michie 1974).

15. The leading case is *Thompson v. Thompson*, 218 U.S. 611 (1910) (assault and bat-

thus laid for what subsequently became the majority view: that immunity remained the rule governing personal torts between spouses.¹⁶ Nevertheless, those jurisdictions which continued to uphold the doctrine of interspousal immunity recognized that the emancipation statutes had eroded the common law foundation for the doctrine.¹⁷

The common law historical basis for denying interspousal tort actions has generally been replaced by various public policy arguments.¹⁸ The principal policy rationale upon which the courts rely is the argument that personal interspousal tort actions would disrupt the domestic peace and conjugal harmony of the home.¹⁹ The fear of fraud and collusion between spouses in cases involving liability insurance frequently has been advanced as justification for the denial of interspousal actions founded on negligence.²⁰ Judicial concern that the court system would be burdened with trivial interspousal litigation has been stated as a basis for continued immunity,²¹ while the reasoning that abrogation of the doctrine is the province of the legislature and not the courts also has been submitted as a ground for denying interspousal tort actions.²² Additionally, courts have

tery), in which the Supreme Court stated: "The [District of Columbia] statute was not intended to give a right of action as against the husband, but to allow the wife, in her own name, to maintain actions of tort which at common law must be brought in the joint names of herself and her husband." *Id.* at 617; *accord*, *Maine v. James Maine & Sons Co.*, 201 N.W. 20, 21 (Iowa 1924); *Strom v. Strom*, 107 N.W. 1047, 1048 (Minn. 1906). The rule that any statute in derogation of the common law must be strictly construed resulted in most states holding that the emancipation of married women did not confer upon them the right to sue their husbands. *See Hinkle, Intrafamily Litigation—Husband and Wife*, 1970 *INS. L.J.* 133, 133.

16. *E.g.*, *Amendola v. Amendola*, 121 So. 2d 805, 806 (Fla. Dist. Ct. App. 1960); *Fisher v. Toler*, 401 P.2d 1012, 1015 (Kan. 1965); *Ensminger v. Ensminger*, 77 So. 2d 308, 310 (Miss. 1955).

17. *See generally* W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 122, at 859-61 (4th ed. 1971); McCurdy, *Torts Between Persons in Domestic Relation*, 43 *HARV. L. REV.* 1030, 1035-41 (1930).

18. *Thompson v. Thompson*, 218 U.S. 611, 617-18 (1910); *Abbott v. Abbott*, 67 Me. 304, 307 (1877); *Nickerson v. Nickerson*, 65 Tex. 281, 285 (1886).

19. In an 1858 decision, the Pennsylvania Supreme Court stated: "The flames which litigation would kindle on the domestic hearth would consume in an instant the conjugal bond, and bring on a new era indeed—an era of universal discord, of unchastity, of bastardy, of dissoluteness, of violence, cruelty, and murders." *Ritter v. Ritter*, 31 Pa. 396, 398 (1858) (action on a debt); *accord*, *Corren v. Corren*, 47 So. 2d 774, 776 (Fla. 1950) (automobile negligence); *Bandfield v. Bandfield*, 75 N.W. 287, 288 (Mich. 1898) (infliction of venereal disease).

20. *See, e.g.*, *Harvey v. Harvey*, 214 N.W. 305, 306 (Mich. 1927) (automobile negligence); *Newton v. Weber*, 196 N.Y.S. 113, 114 (Sup. Ct. 1922) (automobile negligence); *Lyons v. Lyons*, 208 N.E.2d 533, 535-36 (Ohio 1965) (automobile negligence). In *Newton* a New York court stated that the only reason a wife would want to sue her husband for a negligent tort was as a raid on the insurance company. *Newton v. Weber*, 196 N.Y.S. 113, 114 (Sup. Ct. 1922).

21. *See Thompson v. Thompson*, 218 U.S. 611, 617-18 (1910) (assault and battery).

22. *E.g.*, *Wright v. Wright*, 70 S.E.2d 152, 154 (Ga. Ct. App. 1952) (automobile negli-

dismissed interspousal tort suits on the theory that the injured spouse has an adequate remedy at law, either through divorce or criminal prosecution.²³ Finally, in community property jurisdictions, the right of action between spouses has been denied on the ground that the recovery from the tortfeasor spouse would be community property and thus would unjustly enrich the wrongdoer.²⁴

Texas adopted the common law of England as the rule of decision; however, in the area of marital rights, the framers of the constitution attempted to preserve the community property concept of Spanish law which refuted the common law principle that coverture created a merger of the wife's legal identity into that of her husband.²⁵ As early as 1852, Texas recognized that one spouse might be liable to the other for conversion or trespass against the other spouse's property.²⁶ In areas other than property rights, however, the wife continued under the disabilities of coverture embraced by the common law concept of unity. One spouse was precluded from bringing suit against the other for personal torts,²⁷ even when the commission of the tort predated coverture.²⁸ Interspousal tort actions also were barred when asserted after dissolution of the marriage, although the injury could be considered by a trial court in arriving at the property division in a divorce.²⁹

Prior to the decision in *Bounds v. Caudle*,³⁰ the leading case in Texas

gence); *Flogel v. Flogel*, 133 N.W.2d 907, 911 (Iowa 1965) (automobile negligence); *Morrissett v. Morrissett*, 397 P.2d 184, 185 (Nev. 1964) (automobile negligence).

23. *E.g.*, *Drake v. Drake*, 177 N.W. 624, 625 (Minn. 1920) (harrasment); *Austin v. Austin*, 100 So. 591, 592 (Miss. 1924) (automobile negligence); *Gowin v. Gowin*, 292 S.W. 211, 215 (Tex. Comm'n App. 1927, judgmt adopted) (intentional infliction of emotional distress).

24. *E.g.*, *Dunbar v. San Francisco-Oakland Terminal Rys.*, 201 P. 330, 332 (Cal. Dist. Ct. App. 1921) (negligence); *Teague v. Fairchild*, 15 S.W.2d 585, 588 (Tex. Comm'n App. 1929, judgmt adopted) (action on a debt); *Bell v. Phillips Petroleum Co.*, 278 S.W.2d 407, 408 (Tex. Civ. App.—Amarillo 1954, writ ref'd n.r.e.) (automobile negligence); *Chase v. Beard*, 346 P.2d 315, 318 (Wash. 1959) (negligence). See generally Comment, *Husband and Wife Are Not One: The Marital Relationship In Tort Law*, 43 U.M.K.C. L. Rev. 334, 341-46 (1975).

25. See Comment, *Intrafamily Immunity—The Doctrine and Its Present Status*, 20 BAYLOR L. REV. 27, 30 (1967).

26. *O'Brien v. Hilburn*, 9 Tex. 297, 299 (1852); accord, *Trimble v. Farmer*, 157 Tex. 533, 537, 305 S.W.2d 157, 159 (1957); *Richardson v. Hutchins*, 68 Tex. 81, 88, 3 S.W. 276, 279-80 (1887); *Borton v. Borton*, 190 S.W. 192, 193 (Tex. Civ. App.—Galveston 1916, writ ref'd).

27. See *Turner v. Turner*, 385 S.W.2d 230, 232 (Tex. 1964); *Donsbach v. Offield*, 488 S.W.2d 494, 495-96 (Tex. Civ. App.—Austin 1972, no writ); *Wilson v. Brown*, 154 S.W. 322, 324 (Tex. Civ. App.—Austin 1912, writ ref'd).

28. See *Latiolais v. Latiolais*, 361 S.W.2d 252, 253 (Tex. Civ. App.—Beaumont 1962, writ ref'd n.r.e.).

29. See *McGlothlin v. McGlothlin*, 476 S.W.2d 333, 334 n.2 (Tex. Civ. App.—San Antonio 1972, writ ref'd n.r.e.); *Sykes v. Speer*, 112 S.W. 422, 424 (Tex. Civ. App. 1908), *rev'd on other grounds*, 119 S.W. 86 (Tex. 1909) (cannot recover after divorce for torts committed during coverture).

30. 560 S.W.2d 925 (Tex. 1977).

on interspousal tort immunity was *Nickerson v. Nickerson*,³¹ in which the supreme court dismissed an action against the husband for false imprisonment of his wife on the theory that the wife had no right of action against her husband in tort.³² Although the opinion noted that the rationale generally advanced for barring interspousal tort actions depended upon the common law unity concept, it was intimated that the real basis rested upon grounds of public policy.³³ Texas decisions have relied primarily on three public policy considerations to bar interspousal tort litigation. First, the argument has been advanced that tort actions between spouses would promote discord and disruption of marital and family relations.³⁴ Another line of decisions has relied upon the argument that interspousal tort suits should be barred because there are two adequate remedies at law available; the injured spouse may seek relief from the marital status through divorce, or protection from further abuse through criminal prosecution.³⁵ Finally, several cases have denied the right of interspousal tort action on the ground that personal injury recoveries collected by the injured spouse would be classified as community property, thus unjustly enriching the tortfeasor spouse.³⁶

The enactment of the Texas Family Code, which altered the concept of the wife's status in the marital relationship, represented the first major step in Texas in the erosion of the historical basis for the doctrine of interspousal tort immunity.³⁷ The Texas Supreme Court's decision in *Graham v. Franco*,³⁸ which abolished the doctrine of imputed negligence as a bar to the separate recovery of an injured spouse and displaced some misconceived concepts of marital property characterization,³⁹ laid the necessary judicial foundation for a re-examination of interspousal tort immu-

31. 65 Tex. 281 (1886).

32. *Id.* at 286.

33. *Id.* at 285.

34. See *Latiolais v. Latiolais*, 361 S.W.2d 252, 253 (Tex. Civ. App.—Beaumont 1962, writ ref'd n.r.e.).

35. See *Cohen v. Cohen*, 66 F. Supp. 312, 312 (N.D. Tex. 1946) (applying Texas law); *Gowin v. Gowin*, 292 S.W. 211, 215 (Tex. Comm'n App. 1927, judgment adopted); *Sykes v. Speer*, 112 S.W. 422, 424-25 (Tex. Civ. App. 1908), *rev'd on other grounds*, 119 S.W. 86 (Tex. 1909).

36. See *Teague v. Fairchild*, 15 S.W.2d 585, 588 (Tex. Comm'n App. 1929, judgment adopted); *Bell v. Phillips Petroleum Co.*, 278 S.W.2d 407, 408 (Tex. Civ. App.—Amarillo 1954, writ ref'd n.r.e.); *Northern Tex. Traction Co. v. Hill*, 297 S.W. 778, 780 (Tex. Civ. App.—El Paso 1927, writ ref'd).

37. TEX. FAM. CODE ANN. § 5.01(a)(3) (Vernon 1975). This section provides that a wife's recovery for personal injury other than loss of earning capacity is her separate property. *Id.* Section 4.04 provides that a wife may sue or be sued without joinder of her husband and section 5.21 gives the wife sole management, control, and disposition of her separate estate. *Id.* §§ 4.04, 5.21.

38. 488 S.W.2d 390 (Tex. 1972).

39. *Id.* at 397.

ity.⁴⁰ The progressive trend toward greater judicial recognition of the wife's expanding legal rights in the marital relationship continued in the supreme court decision of *Schwing v. Bluebonnet Express, Inc.*⁴¹ The *Schwing* opinion announced that the contributory negligence of the surviving spouse does not bar recovery by other statutory beneficiaries of the deceased spouse in an action against a third party tortfeasor under the Texas Wrongful Death Statute.⁴² Thus, the supreme court's decision in *Graham*, which reclassified personal injury recoveries as the separate property of the injured spouse, and the subsequent decision in *Schwing*, removed the "community property defense" that previously had represented a major obstacle to the abrogation of the interspousal tort immunity rule.⁴³

In *Bounds v. Caudle*⁴⁴ the Texas Supreme Court abolished the rule of interspousal tort immunity insofar as it would bar interspousal claims founded on willful or intentional torts.⁴⁵ The court noted that there had been substantial changes in the laws defining the marital relationship since the interspousal immunity doctrine had last been examined.⁴⁶ The recently enacted Family Code provides in section 4.04 that a woman can sue or be sued without the joinder of her husband.⁴⁷ Section 5.01(a)(3) of the code provides that a wife's personal injury recovery, except for the portion representing lost earning capacity, is her separate property.⁴⁸ The wife also has been given sole management, control, and disposition of her separate estate in section 5.21 of the code.⁴⁹ In view of these changes, the court felt that the common law basis for the immunity doctrine, the fic-

40. Contributory negligence of the husband with respect to an automobile accident was held not to bar the separate recovery by the wife for injuries she sustained in the accident. The recovery for personal injuries by the wife, including disfigurement and physical pain and suffering, determined to be the separate property of the wife in article 4615, was held to be constitutional. *Id.* at 397.

The wife's right in the security of her person, brought into the marital relationship at its inception, was held to be the separate and individual property of the wife based on the Spanish community property concept of onerous title. The personal injury recovery was reasoned to be the replacement of separate property brought into the marriage by the wife, insofar as practicable, and not the acquisition of an asset by the community estate. *Id.* at 394-95.

41. 489 S.W.2d 279 (Tex. 1973).

42. *Id.* at 281.

43. "Cases which have . . . used the community property defense ('imputed negligence') are therefore wrong and should be overruled." *Graham v. Franco*, 488 S.W.2d 390, 397 (Tex. 1972); see *Schwing v. Bluebonnet Express, Inc.*, 489 S.W.2d 279, 280-81 (Tex. 1973). See generally Comment, *Husband and Wife Are Not One: The Marital Relationship in Tort Law*, 43 U.M.K.C. L. REV. 334, 341-46 (1975).

44. 560 S.W.2d 925 (Tex. 1977).

45. *Id.* at 927.

46. *Id.* at 927.

47. TEX. FAM. CODE ANN. § 4.04 (Vernon 1975).

48. *Id.* § 5.01(a)(3).

49. *Id.* § 5.21.

tional unity of the marriage partners, was no longer valid.⁵⁰ In light of the invalidity of the common law rationale, the court questioned whether public interest necessitated the continuation of the doctrine. While recognizing a paramount interest in maintaining the harmony of the family relationship, the court nevertheless indicated that such harmony would not be further impaired by allowing interspousal tort actions where one spouse had already committed a physical assault upon the other.⁵¹ The court, therefore, found no compelling reason to continue the doctrine of interspousal immunity insofar as it barred intentional tort actions between spouses.⁵²

The abrogation of interspousal immunity for intentional torts by the Texas Supreme Court in *Bounds* represents the modernization of Texas marital relations law.⁵³ As noted in the opinion, the recent promulgation of the Texas Family Code has effectively provided women with legal parity in the marital relationship.⁵⁴ In reaffirming the invalidity of the common law concept of spousal unity expressed in *Nickerson*,⁵⁵ the court in *Bounds* scrutinized the public policy argument that interspousal tort suits would create undue strain and animosity in the conjugal relationship.⁵⁶ Justice Barrow, speaking for the court, noted that "[t]he peace and harmony of a home which has already been strained to the point where an intentional physical attack could take place will not be further impaired by allowing a suit to be brought to recover damages for the attack."⁵⁷ Although the opinion did not address the public policy justification that other adequate remedies exist in the form of divorce or criminal prosecution,⁵⁸ there is little reasonable support for such a position as the basis for perpetuation of interspousal tort immunity.⁵⁹ Divorce ends the relationship, while criminal prosecution exacts punishment or revenge; neither, however, compensate

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

51. *Id.* at 927.

52. *Id.* at 927.

53. The majority of jurisdictions have now abrogated the doctrine of interspousal immunity to some extent. The decisions are collected in Annot., 43 A.L.R.2d 632 (1955).

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

55. *Nickerson v. Nickerson*, 65 Tex. 281, 285 (1886).

56. *Bounds v. Caudle*, 560 S.W.2d 925, 927 (Tex. 1977). The Massachusetts Supreme Court has noted:

When the rationales which gave meaning and coherence to a judicially created rule are no longer vital, and the rule itself is not consonant with the needs of contemporary society, a court not only has the authority but also the duty to re-examine its precedents rather than to apply by rote an antiquated formula.

Lewis v. Lewis, 351 N.E.2d 526, 531 (Mass. 1976).

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

58. *See id.* at 927. *See also* *Gowin v. Gowin*, 292 S.W. 211, 215 (Tex. Comm'n App. 1927, judgment adopted) (adequate remedy at law).

59. *See* *Courtney v. Courtney*, 87 P.2d 660, 666 (Okla. 1938); *Freehe v. Freehe*, 500 P.2d 771, 775 (Wash. 1972).

for the present injury and the loss of maintenance or support.⁶⁰

Despite the significance of *Bounds*, some important questions are left unanswered by the decision. The opinion clearly limits the holding to intentional torts in "similar cases,"⁶¹ leaving intact the bar against interspousal tort actions based on negligent conduct. The court has given no indication of how narrowly the phrase "similar cases" is to be interpreted. The holding might be understood to apply to all intentional torts, or only to those intentional torts resulting in the death of the injured spouse so as to create a cause of action for wrongful death.⁶² In view of the holding by the supreme court in *Graham*, and the later case of *Schwing*, a more liberal reading of *Bounds*' applicability appears to be justified.⁶³

In distinguishing intentional from negligent interspousal torts, the opinion has disregarded entirely the extent of the injury suffered and the interest invaded.⁶⁴ Instead, the court focused on the state of mind of the wrongdoer, ignoring the plight of a negligently injured spouse seeking compensation. This distinction seems to be inconsistent with the modern foundation of tort law, which is concerned foremost with compensation for injury and only secondarily with punishment.⁶⁵ The first question in a given case should be whether there has been unprivileged conduct of a tortious nature.⁶⁶ If so, the potential liability for an alleged tortious breach of duty between spouses should be the same as if the partners were strangers.⁶⁷ The relationship, per se, should not bar any action.⁶⁸ The nature of the injury

60. See *Crowell v. Crowell*, 105 S.E. 206, 209 (N.C. 1920) (inadequacy of criminal prosecution); *Courtney v. Courtney*, 87 P.2d 660, 666 (Okla. 1938). See also *McCurdy, Torts Between Persons in Domestic Relation*, 43 HARV. L. REV. 1030, 1052 (1930).

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

62. It should be noted that a number of jurisdictions, while declining to fully abrogate interspousal immunity for intentional torts, have instead chosen to allow such actions in cases where death has ended the marital relation, and a wrongful death action has been brought against the surviving tortfeasor spouse. See, e.g., *Welch v. Davis*, 101 N.E.2d 547, 551 (Ill. 1951); *Deposit Guar. Bank & Trust Co. v. Nelson*, 54 So. 2d 476, 477 (Miss. 1951); *Rodney v. Staman*, 89 A.2d 313, 315 (Pa. 1952); *Johnson v. Ottomeier*, 275 P.2d 723, 725 (Wash. 1954).

63. Compare *Graham v. Franco*, 488 S.W.2d 390, 397 (Tex. 1972) and *Schwing v. Bluebonnet Express, Inc.*, 489 S.W.2d 279, 280-81 (Tex. 1973) with *Bounds v. Caudle*, 560 S.W.2d 925, 927 (Tex. 1977).

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

65. W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 1, at 6 (4th ed. 1971).

66. See *McCurdy, Personal Injury Torts Between Spouses*, 4 VILL. L. REV. 303, 338 (1959). See also *Klein v. Klein*, 376 P.2d 70, 72, 26 Cal. Rptr. 102, 104 (1962); *Rogers v. Yellowstone Park Co.*, 539 P.2d 566, 570 (Idaho 1974); *Brooks v. Robinson*, 284 N.E.2d 794, 796-97 (Ind. 1972).

67. See *Klein v. Klein*, 376 P.2d 70, 72, 26 Cal. Rptr. 102, 104 (1962); *Rupert v. Stienne*, 528 P.2d 1013, 1016 (Nev. 1974); *Freehe v. Freehe*, 500 P.2d 771, 777 (Wash. 1972).

68. See *Freehe v. Freehe*, 500 P.2d 771, 777 (Wash. 1972). In addition to the continuing judicial bar on interspousal negligence actions, the Texas Guest Statute presents a further obstacle to an interspousal negligence action arising from an automobile accident by creating a lesser duty or standard of care between spouses than that required between unrelated persons. The Guest Statute provides in pertinent part that no passenger who is related within

suffered is not mitigated because the plaintiff is married to the tortfeasor.⁶⁹ If the negligence action is denied, the injured spouse may be without an adequate remedy. In such a case, the expense of caring for an injured spouse must of necessity come from the family's own financial resources, yet the average citizen surely anticipates that his liability insurance will protect him in the event his negligence injures another.⁷⁰

While the court in *Bounds* recognized the fallacy of the contention that marital harmony would be disturbed by interspousal suits based on intentional torts,⁷¹ decisions from other jurisdictions have noted that the argument is similarly groundless when applied to negligent torts.⁷² As a practical matter, the real defendant in a negligence suit is often an insurance company.⁷³ Thus, there is little danger that litigation by one spouse against the other for injuries sustained as the result of the tortfeasor's alleged negligence will result in disruption of the family relationship.⁷⁴

The most common ground for barring interspousal negligence actions rests upon the fear that the close relationship of the parties will encourage fraud and collusion against the tortfeasor's insurance carrier.⁷⁵ The Texas Supreme Court considered this argument in *Felderhoff v. Felderhoff*,⁷⁶ where it noted that the possibility of fraud and collusion is present in all liability insurance cases.⁷⁷ Although the opinion conceded that such suits presented good cause for additional caution in examining the particular facts of each case, the court held that there was "no reason for denial of a cause of action in all cases in which a close relationship exists between the

the second degree of affinity to the operator of a motor vehicle may maintain a cause of action against the operator unless he was guilty of gross negligence. TEX. REV. CIV. STAT. ANN. art. 6701b, § 1(a) (Vernon 1977).

69. See, e.g., *Brooks v. Robinson*, 284 N.E.2d 794, 795-96 (Ind. 1972); *Courtney v. Courtney*, 87 P.2d 660, 661 (Okla. 1938); *Graham v. Franco*, 488 S.W.2d 390, 393-94 (Tex. 1972).

70. See *Sorensen v. Sorensen*, 339 N.E.2d 907, 914 (Mass. 1975) (parent-child immunity); *Immer v. Risko*, 267 A.2d 481, 484-85 (N.J. 1970).

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

72. See *Lewis v. Lewis*, 351 N.E.2d 526, 529 (Mass. 1976); *Ruppert v. Stienne*, 528 P.2d 1013, 1016 (Nev. 1974); *Courtney v. Courtney*, 87 P.2d 660, 667 (Okla. 1938).

73. See, e.g., *Courtney v. Courtney*, 87 P.2d 660, 668 (Okla. 1938); *Felderhoff v. Felderhoff*, 473 S.W.2d 928, 932 (Tex. 1971) (parent-child immunity); *Richard v. Richard*, 300 A.2d 637, 641 (Vt. 1973).

74. See *Klein v. Klein*, 376 P.2d 70, 72, 26 Cal. Rptr. 102, 104 (1962); *Rogers v. Yellowstone Park Co.*, 539 P.2d 566, 569 (Idaho 1974); *Richard v. Richard*, 300 A.2d 637, 641 (Vt. 1973).

75. See *Klein v. Klein*, 376 P.2d 70, 76, 26 Cal. Rptr. 102, 108 (1962) (dissenting opinion); *Newton v. Weber*, 196 N.Y.S. 113, 114 (Sup. Ct. 1922); *Smith v. Smith*, 287 P.2d 572, 583 (Ore. 1955).

76. 473 S.W.2d 928 (Tex. 1971). Injured by the negligence of his father in the operation of farm machinery, an unemancipated minor son sued his father in his occupational capacity as a member of a farming partnership and was permitted recovery on the partnership liability insurance. *Id.* at 933.

77. *Id.* at 932.

insured and the injured party."⁷⁸ Under provisions ordinarily included in an insurance policy, the insurer has the right to disclaim liability when there are inconsistent or contradictory statements by the insured or when collusion between the insured and the injured party results in false statements to the insurance company.⁷⁹ Any overt attempt at collusion constitutes a criminal offense and would be punished as such.⁸⁰

The proposition that there are other adequate remedies for the injured spouse to pursue simply has no realistic justification as a bar to interspousal negligence actions. Ordinary negligence is nowhere a crime or a ground for divorce.⁸¹ The decisions in *Graham* and *Schwing* have effectively repudiated the community property defense.⁸² The only rationale upon which the court could base a continued refusal to abrogate the bar to interspousal negligence actions rests upon the argument that such a change is solely within the province of the legislature.⁸³ This argument has not proven persuasive, having been rejected in numerous decisions from other jurisdictions.⁸⁴ The rule originally emanated from the courts during a period in the history of the common law when its result was consistent with the contemporary trend of legal thought regarding the unity of husband and wife,⁸⁵ and thus should be abrogated today as an unjustifiable concept inconsistent with modern tort theories of compensation.

Nevertheless, it should be noted that because of the normal, incidental, physical contacts of the marital relation, some tort actions which could be maintained if the partners were strangers, should not be allowed between

78. *Id.* at 932. The court commented:

We believe that our laws and judicial system are adequate to ferret out and prevent collusion if and when proper allegations and proof are presented in a particular case without the necessity of adopting an absolute immunity rule which would apply to this and all other cases in which no collusion is alleged.

Id. at 932.

79. See *Griffin v. Fidelity & Cas. Co.*, 273 F.2d 45, 48 (5th Cir. 1959) (applying Texas law) (need to prove actual prejudice); *Williams v. Travelers Ins. Co.*, 115 N.E.2d 378, 381 (Mass. 1953). In *Frazier v. Glens Falls Indem. Co.*, 278 S.W.2d 388, 392 (Tex. Civ. App.—Fort Worth 1955, writ ref'd n.r.e.) the court held that under the cooperation clause of an automobile liability policy, the insured owed to the insurer an affirmative duty to make a full, frank, and fair disclosure to the insurer of the facts of the accident, and a negative duty to refrain from any fraudulent or collusive act which might operate to the prejudice of the insurer in the conduct of a defense against, or settlement of a claim against the insured. *Id.* at 392.

80. See TEX. PENAL CODE ANN. § 31.03 (Vernon Supp. 1978).

81. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 122, at 862-63 & n.45 (4th ed. 1971).

82. *Schwing v. Bluebonnet Express, Inc.*, 489 S.W.2d 279, 281 (Tex. 1973); *Graham v. Franco*, 488 S.W.2d 390, 397 (Tex. 1972).

83. See, e.g., *Wright v. Wright*, 70 S.E.2d 152, 154 (Ga. Ct. App. 1952); *Ensminger v. Ensminger*, 77 So. 2d 308, 310 (Miss. 1955); *Willott v. Willott*, 62 S.W.2d 1084, 1085-86 (Mo. 1933).

84. See, e.g., *Beaudette v. Frana*, 173 N.W.2d 416, 419 (Minn. 1969); *Immer v. Risko*, 267 A.2d 481, 483 (N.J. 1970); *Freehe v. Freehe*, 500 P.2d 771, 775 (Wash. 1972).

85. See *Brooks v. Robinson*, 284 N.E.2d 794, 797 (Ind. 1972); *Lewis v. Lewis*, 351 N.E.2d 526, 527 (Mass. 1976); *Freehe v. Freehe*, 500 P.2d 771, 773 (Wash. 1972).

spouses.⁸⁶ Reason dictates that there must exist a carefully circumscribed zone of privileged conduct based on the peculiar obligations created by the marital relation, which would encompass a range of behavior sufficient to prohibit trivial interspousal litigation.⁸⁷ In negligent torts the nature of the marital relationship should be treated as an element in the consideration of what is reasonable conduct under the particular circumstances. In the case of intentional torts, the existence of the relationship might warrant the application of implied consent in a proper situation.⁸⁸

A fundamental principle in the law of torts requires that persons injured by the willful or negligent acts of another be compensated, absent a statute or compelling reason to the contrary.⁸⁹ The commentators clearly favor a position which would never bar tort actions between husband and wife, and would draw no distinctions between intentional and negligent conduct.⁹⁰ *Bounds v. Caudle* did not consider the question of whether interspousal tort actions based on negligent conduct should continue to be prohibited, although it fairly can be ascertained from the opinion that such a bar remains in full effect.⁹¹ Examination of decisions from Texas and other jurisdictions indicates, however, that arguments advanced as justification for the continued ban of interspousal negligence suits have not withstood judicial scrutiny.⁹² The universal policy of compensating those injured as a result of another's tortious conduct would seem to require that any rule avoiding this policy must advance at least an equally important interest. Perhaps the Texas Supreme Court will act to abrogate the continuing bar to interspousal negligence actions when a proper case is presented.

86. See *Bushnell v. Bushnell*, 131 A. 432, 433 (Conn. 1925); *Lewis v. Lewis*, 351 N.E.2d 526, 532 (Mass. 1976); *Courtney v. Courtney*, 87 P.2d 660, 669 (Okla. 1938).

87. See *Beaudette v. Frana*, 173 N.W.2d 416, 420 (Minn. 1969); *Courtney v. Courtney*, 87 P.2d 660, 667-68 (Okla. 1938); *Fiederer v. Fiederer*, 140 P. 1022, 1025 (Okla. 1914).

88. See *Beaudette v. Frana*, 173 N.W.2d 416, 420 (Minn. 1969), in which the Supreme Court of Minnesota commented:

There is an intimate sharing of contact within the marriage relationship, both intentional and unintentional, that is uniquely unlike the exposure among strangers. The risks of intentional contact in marriage are such that one spouse should not recover damages from the other without [proof] that the injurious contact was . . . a gross abuse of normal privilege.

89. *Klein v. Klein*, 376 P.2d 70, 72, 26 Cal. Rptr. 102, 104 (1962). See also *Rupert v. Stienne*, 528 P.2d 1013, 1016 (Nev. 1974).

90. See generally H. CLARK, *LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* § 9.1, at 252-56 (1968); W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 122, at 861-64 (4th ed. 1971); Albertsworth, *Recognition of New Interests In the Law of Torts*, 10 CAL. L. REV. 461, 471-80 (1922); McCurdy, *Personal Injury Torts Between Spouses*, 4 VILL. L. REV. 303 (1959); McCurdy, *Torts Between Persons in Domestic Relation*, 43 HARV. L. REV. 1030, 1053 (1930); Sanford, *Personal Torts Within the Family*, 9 VAND. L. REV. 823, 829 (1956). But see Rhein-stein, *Challenge and Response in Family Law*, 17 VAND. L. REV. 239, 246-50 (1963).

91. 560 S.W.2d 925, 927 (Tex. 1977).

92. See, e.g., *Klein v. Klein*, 376 P.2d 70, 72, 26 Cal. Rptr. 102, 104 (1962); *Lewis v. Lewis*, 351 N.E.2d 526, 531 (Mass. 1976); *Felderhoff v. Felderhoff*, 473 S.W.2d 928, 932 (Tex. 1971).

The interspousal tort immunity rule was based originally on the common law fictional unity of husband and wife, and thus having judicial origins, the doctrine is likewise subject to judicial modification or abrogation. The court bears the responsibility when applying the doctrine to scrutinize its continued justification carefully, in order to ensure that "the conditions and needs of the times have not so changed as to make further application of it the instrument of injustice."⁹³

Edward L. Kurth

93. *State v. Culver*, 129 A.2d 715, 721 (N.J. 1957).