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Torts - Rights of the Husband and Wife to Sue Each Other for Negligence of the Other - Doctrine of Interspousal Immunity

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jurisdictional problem (*Murphy* dealt with a question of interjurisdictional immunity while *Kastigar* dealt with immunity in an intrajurisdictional situation).[36] In resolving the immunity question in favor of use and derivative use immunity, the Court expressed the belief that the transactional immunity statutes in effect for the past seventy years were wastefully broad.

The Court did not expressly overrule the holding of *Counselman* that the immunity granted must be coextensive with the scope of the fifth amendment privilege, but, on the contrary, expressly affirmed that principle. Because of *Kastigar*, the *Counselman* case itself, along with the other transactional statutory and case law, has been trimmed to the more essential use and derivative use immunity of *Kastigar*. The problem that is seen in the Court's limiting of the *Counselman* decision rather than expressly overruling that decision is that although the decision in *Kastigar* is "consistent with the conceptual basis of *Counselman*,"[37] the immunity adopted in *Kastigar* is the type of immunity that the *Counselman* case specifically found insufficient to replace the fifth amendment's privilege.

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TORTS—RIGHTS OF THE HUSBAND AND WIFE TO SUE EACH OTHER FOR NEGLIGENCE OF THE OTHER—DOCTRINE OF INTERSPOUSAL IMMUNITY—The Indiana Supreme Court has held that the common law doctrine of interspousal immunity in tort actions is abrogated.

Brooks v. Robinson, 284 N.E.2d 794 (Ind. 1972).

Plaintiff sued to recover damages for injuries sustained by her on January 6, 1964, while riding as passenger in an automobile driven by the defendant. The complaint was filed on July 28, 1964. While the action was still pending plaintiff and defendant were married on June 8, 1969.[1]

36. 378 U.S. at 79. The *Murphy* Court granted the petitioner only use and derivative use immunity but this was in a situation where the state witness was compelled to give testimony which might be incriminating under federal law. Since *Murphy*, there is now use and derivative use immunity with respect to the federal government. The witness is left in substantially the same position as if he had claimed the privilege while this permits the state to secure the needed information.

37. 406 U.S. at 453.

1. Brooks v. Robinson, 284 N.E.2d 794 (Ind. 1972).

The Indiana Appellate Court affirmed the trial court's decision sustaining the defendant's motion for summary judgment and entering a judgment for the defendant based upon the doctrine of interspousal tort immunity.[2] The Indiana Supreme Court reversed the appellate court and held that the common law doctrine of interspousal immunity in a tort action is abrogated based upon a finding that the reasons advanced for the promulgation of the doctrine were no longer sound.[3]

It is argued by the proponents of the doctrine that to allow suits between the husband and wife would only tend to disrupt the tranquility of the home.[4] The Pennsylvania Supreme Court is often quoted for expressing such a fear:[5]

> The flames which litigation would kindle on the domestic hearth would consume in an instant the conjugal bond, and bring a new era indeed—an era of universal discord, of unchastity, of bastardy, of dissolute, of violence, cruelty, and murders.

Such an argument was considered unpersuasive by the court in *Brooks*, especially in light of the numerous decisions allowing the wife to bring actions against her husband in areas other than in tort.[6] The court relied on Prosser[7] to answer the question as to how a cause of action in torts can cause a disruption of domestic tranquility while a cause of action in contracts cannot.

The second argument advanced by the proponents of the doctrine claim that to allow such suits would only tend to promote fraud, collusion, and trivial litigation, especially when insurance is involved.[8] "Remove from the defendant the risk of loss and substitute the covert hope of profit and a situation arises that should give us pause."[9] The

2. Brooks v. Robinson, 270 N.E.2d 338 (Ind. App. 1971).
3. Brooks v. Robinson, 284 N.E.2d 794, 798 (Ind. 1972).
4. *See* Comment, *Interspousal Immunity—a policy oriented approach*, 21 RUTGERS L. REV. 491, 493 (1967).
5. Ritter v. Ritter, 31 Pa. 396, 398 (1858).
6. *See* Carter v. Carter, 118 Ind. 521, 21 N.E. 290 (1889) (wife permitted to bring action of ejectment against her husband); Pavy v. Pavy, 121 Ind. App. 194, 98 N.E.2d 224 (1951) (spouse permitted to maintain an action in partition against the other spouse); Hinton v. Dragoo, 77 Ind. App. 563, 134 N.E. 212 (1922) (either spouse permitted to enforce an agreement to repay monies).
7. *See* W. PROSSER, LAW OF TORTS § 122 (4th ed. 1971). In referring to those jurisdictions that deny the wife the right to sue husband in tort on the basis that it would cause a disruption of domestic tranquility but yet allow her to sue in contract or bring criminal prosecutions, Prosser commented: "If this reasoning appeals to the reader let him by all means adopt it." *Id.* at 863.
8. *See* Comment, *Interspousal Immunity—a policy oriented approach*, 21 RUTGERS L. REV. 491, 493 (1967).
9. Smith v. Smith, 205 Ore. 286, 295, 282 P.2d 572, 578 (1955).

court in *Brooks* felt to summarily deny relief to all litigants in these cases was contrary to the spirit of our legal system.[10] The court, therefore, adopted the same philosophy that the Supreme Court of California adopted in *Klien v. Klien*[11] when it balanced the interest of every citizen's right to have a judicial forum for the redress of injuries against the possibility of fraudulent claims.[12] In addition, the possibility of fraud is substantially reduced since the testimony of both the husband and wife are subject to impeachment under the normal evidentiary procedure.[13]

A third argument advanced by many of the proponents of the doctrine involves the concept that the abolition of the doctrine should come from the legislature rather than from the judiciary.[14] The court responded in *Brooks* by stating that since this doctrine was judicially created in *Henneger v. Lomas*[15] it can and should be judicially abolished: "The strength and genius of the common law lies in its ability to adapt to the changing needs of the society it governs."[16] The court, however, in judicially abolishing the common law doctrine of interspousal tort immunity, did so in light of a state statute specifically recognizing the doctrine.[17] Such a statute, the court felt, was nothing more than legislative awareness of a judicially created doctrine, and, in light of the letter and spirit of the Indiana Constitution,[18] the court felt the doctrine was now unsound and should be abolished.[19]

The doctrine of interspousal tort immunity has its origin in the common law concept of unity of the husband and wife.[20] The concept of

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10. Brooks v. Robinson, 284 N.E.2d 794, 797 (Ind. 1972).
11. *See* 58 Cal. 2d 692, 376 P.2d 70, 26 Cal. Rptr. 102 (1962).
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.
Id. at 696, 376 P.2d at 73, 26 Cal. Rptr. at 105.
12. Brooks v. Robinson, 284 N.E.2d 794, 797 (Ind. 1972).
13. *Id*; *see* J. McCORMICK, LAW OF EVIDENCE 66-108 (2d ed. 1972).
14. *See* Comment, *Interspousal Immunity—California Follows the Trend*, 36 S. CAL. L. REV. 456, 467 (1963).
15. 145 Ind. 287, 44 N.E. 462 (1896).
16. Brooks v. Robinson, 284 N.E. 794, 797 (Ind. 1972).
17. IND. R. TRIAL P., RULE T.R. 17(d) (Supp. 1970) (emphasis added):
Sex, marital, and parental status. For the purpose of being sued there shall be no distinction between men and women because of marital or parental status; *provided however that this subsection (d) shall not apply to action in tort.*
18. All courts shall be open; and every man, for injury done to him in his person, property, or reputation, shall have remedy by due course of law.
IND. CONST. art. I, § 12.
19. Brooks v. Robinson, 284 N.E.2d 794, 798 (Ind. 1972).
20. *See* Comment, *Interspousal Immunity—California Follows the Trend*, 36 S. CAL. L. REV. 456, 459 (1963).

unity between the spouses is said to have its origin in Genesis.[21] This concept of unity, as developed by the scriptures, was adopted by the common law courts.[22] The Indiana Supreme Court in *Dodge v. King*[23] specifically considered this unity concept and found it to be the common law doctrine of the Indiana jurisdiction. The wife during the common law period was said to have lost the capacity to contract.[24] If any property was conveyed to the husband and wife they held the land by entireties and were unable to dispose of any part of the land without the assent of the other.[25] Any contracts made between the husband and wife, without the intervention of a trustee, were void, although they were sometimes upheld in courts of equity.[26] As a result of marriage all the wife's choses in action, rights, and personal property vested in the husband.[27] The husband was liable for all actions brought against the wife, committed during or before coverture.[28] The wife could bring no action for redress of her injuries whether the injury occurred before or after the marriage unless the husband was joined as a party to the suit.[29] Such common law principles were based on the idea that the husband and wife were one and not on the theory that the wife was under a legal disability.[30]

As a result of the wide acceptance of the concept of unity between husband and wife, the doctrine of interspousal immunity, in a tort action, developed throughout the United States.[31] The Supreme Court of the United States in *Thompson v. Thompson*[32] accepted the doctrine of interspousal tort immunity as the common law rule for the District of Columbia. The Supreme Court of Indiana first recognized the doctrine, in the tort area, by way of dictum in *Henneger v. Lomas*.[33]

21. *Id.* at 458. "This now my bones and my flesh . . . ." *Genesis* 2:23. "They two (man and woman) shall be one flesh." *Ephesians* 5:31.

22. 1 W. BLACKSTONE, COMMENTARIES 422:

> By marriage the husband and wife are one person in law; that is, the very being or legal existence of the woman is suspended during the marriage, or is at least incorporated and consolidated into that of the husband.

23. 101 Ind. 102 (1881).

24. *See* Parks v. Barrouman, 83 Ind. 561 (1882); Godfrey v. Wilson, 70 Ind. 50 (1880).

25. *See* Patton v. Rankin, 68 Ind. 245 (1879); Arnold v. Arnold, 30 Ind. 302 (1868); Davis v. Clark, 26 Ind. 424 (1866).

26. *See* Hileman v. Hileman, 85 Ind. 1 (1882); Resor v. Resor, 9 Ind. 347 (1857).

27. *See* Fleriner v. Fleriner, 29 Ind. 564 (1868).

28. *See* Ball v. Bennett, 21 Ind. 427 (1863).

29. *See* Rogers v. Smith, 17 Ind. 323 (1861).

30. *See* Barnett v. Harshbarger, 105 Ind. 410, 5 N.E. 718 (1886).

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

32. 218 U.S. 111 (1910) (action by the wife against the husband for assault and battery).

33. 145 Ind. 287, 44 N.E. 462 (1896) (action by wife for her own seduction by the husband which occurred before the marriage).

Henneger has been continually cited as authority for establishing the common law doctrine of interspousal tort immunity within the Indiana jurisdiction.[34]

But both common law concepts, husband and wife unity and interspousal immunity, have been modified by statute and case law. The passage of the Married Women's Act[35] by the Indiana Legislature undermined the common law unity theory of husband and wife. In fact, some jurisdictions with similar Married Women's Acts have held that those statutes abolished the doctrine of interspousal tort immunity.[36] The doctrine of interspousal immunity, other than in tort actions, has been equally modified by case law.[37] Even in the tort area the doctrine has been riddled with numerous exceptions. *Henneger v. Lomas*,[38] the case that established the doctrine, was itself an exception. The Indiana court in *In re Estate of Pickens*[39] held the doctrine inapplicable when the action was based upon wrongful death. Similar exceptions have been carved out where the action has been based on intentional tort,[40] or when the marriage has been terminated by separation[41] or divorce.[42]

The Indiana Supreme Court made its heaviest criticism of the interspousal tort immunity doctrine in the *Pickens* case, some seventy years after it was first recognized. The *Pickens* court felt that the doctrine was almost completely overruled by the Married Women's Act.[43] But despite such criticism the court in *Pickens* decided not to overrule the doctrine but rather distinguished the case on its facts.[44] The Supreme

34. *See* Harry v. Arney, 128 Ind. App. 174, 145 N.E.2d 575 (1957); Hunter v. Livingston, 125 Ind. App. 422, 123 N.E.2d 912 (1955); Blickenstaff v. Blickenstaff, 89 Ind. App. 529, 167 N.E. 146 (1929).

35. *See* IND. STAT. ANN. tit. 38, § 101-26 (1949). As an example of the scope of the act, section 101 states: "All legal disabilities of married women to make contracts are hereby abolished."

36. *See* Cramer v. Cramer, 379 P.2d 95, 97 (Alas. 1963) (based on a statute very similar to the Indiana statute the Alaska court held that a wife may sue her husband during the marriage).

37. *See* cases cited note 6 *supra*. Carter v. Carter, 118 Ind. 521, 21 N.E. 290 (1889) (wife permitted to bring action of ejectment against her husband); Pavy v. Pavy, 121 Ind. App. 194, 98 N.E.2d 224 (1951) (spouse permitted to maintain an action in partition against other spouse); Hinton v. Dragoo, 77 Ind. App. 563, 134 N.E. 212 (1922) (either spouse permitted to enforce an agreement to repay monies).

38. 145 Ind. 287, 44 N.E. 462 (1898) (doctrine held not to apply since the marriage was considered a nullity).

39. 263 N.E.2d 151 (Ind. 1970).

40. Apitz v. Dames, 205 Ore. 242, 287 P.2d 585 (1955) (intentional shooting of wife resulting in her death).

41. Goode v. Martinis, 58 Wash. 229, 361 P.2d 941 (1961) (wife permitted to maintain action while parties were legally separated).

42. Gaston v. Pittman, 413 F.2d 1031 (5th Cir. 1969).

43. 263 N.E.2d 151, 153 (Ind. 1970).

44. *Id.* at 156. The court distinguished the case since the action was based on the wrong-

Court of Indiana, only nine months after the *Pickens* case, finally laid to rest the common law doctrine of interspousal tort immunity in *Brooks*.[45]

The court in *Brooks* was not forced under the factual situation to abolish the common law doctrine of interspousal tort immunity. The court could have followed the philosophy in the *Pickens* case, limiting its holding to the strict facts of the case. The court could have held that the doctrine of interspousal tort immunity is inapplicable when both the injury and filing of the complaint occur prior to the marriage. Such a holding would not have conflicted with the policy reasons advanced by the proponents of the doctrine. One could not argue that to bring such a suit would cause a disruption in domestic tranquility. The exchange of vows occurred long after the complaint was filed. Nor could it be argued that allowing such suits would encourage fraudulent claims. They were at most mere friends at the time of the filing of the complaint.

But the court, instead of making such a distinction, took the opportunity to totally abolish the interspousal tort immunity doctrine. It is difficult to criticize the actual holding of the case for the policy reasons behind the doctrine are no longer valid. But by totally abolishing the common law doctrine the court not only overruled a long history of case law but the court also overruled rule 17(d), the Indiana statute which specifically recognized the doctrine of interspousal tort immunity.[46]

Overruling the case law presents no real problem. The doctrine of stare decisis is not a doctrine that is strictly pursued when the law is out-moded. It is the function of the courts to keep pace with the changes in society. The real problem with this decision is that the court expressly overruled a statute that specifically recognized the interspousal tort immunity doctrine.[47] The court in *Brooks* argued that the statute

ful death statute and held that the common law doctrine of interspousal tort immunity did not apply.

45. 284 N.E.2d 794, 798 (Ind. 1972).

46. IND. R. TRIAL P., RULE T.R. 17(d) (Supp. 1970).

47. In overruling both the well established case law and the statutory law the question arises as to what is the proper role and function of the state supreme court. Can the judiciary adequately analyze the far reaching effects that may result from such a decision? For contrasting philosophies on this issue see both the majority and dissenting opinions in Molitor v. Kaneland Community Hosp., 18 Ill. 2d 11, 163 N.E.2d 89 (1959) (school district tort immunity held unjust, unsupported by any valid reasons, and without a rightful place in modern day society). *See also* Maki v. Frelk, 40 Ill. 2d 193, 239 N.E.2d 445 (1968) (any change from contributory negligence to comparative negligence can best be handled by the legislature).

was nothing more than legislative awareness of a judicially created doctrine; that is, the legislature never intended to incorporate the judicially created doctrine into the body of the statutory law. The Indiana Supreme Court is not alone in its interpretation of such a statute.[48] But there are courts that hold to the contrary when interpreting similar statutes.[49]

The question arises as to which interpretation is proper. If one begins with the premise, as did the court in *Brooks*, that the doctrine itself is unfair and the policy reasons behind the doctrine are no longer valid, and in addition finds that the state constitution confers upon its citizens a remedy for injuries through due course of law, one can conclude, and rightfully so, that the statute was given a proper interpretation. Building upon such premises one can properly conclude that the Indiana Supreme Court was acting within its bounds in overruling both its own precedent and the Indiana statute when it abolished the doctrine of interspousal tort immunity.

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48. The New Jersey Supreme Court, under its statute, N.J. STAT. ANN. tit. 37, § 2-5 (1959), which is similar to Indiana's, interpreted its statute in a manner similar to the court in *Brooks* when it was confronted with an identical problem. In Long v. Landy, 35 N.J. 44, 171 A.2d 1 (1961), the court construed the statute as not freezing the common law doctrine but held, "[w]hen the policy behind the rule no longer exists the rule should disappear." *Id.* at 51, 171 A.2d at 4. The New Jersey Supreme Court later in Immer v. Risko, 56 N.J. 482, 267 A.2d 481 (1970) (wife suing husband for injuries as a result of the negligent operation of an automobile), held that the reasons behind the tort immunity doctrine were not present in this case. *Id.* at 488, 267 A.2d at 485. Since the legislature did not intend to incorporate the common law doctrine into the statutory language but only intended the statute to be nothing more than legislative awareness of a common law doctrine, the court held that the statute did not apply to claims arising out of motor vehicle accidents. *Id.* at 495, 267 A.2d at 488. The *Immer* decision is especially interesting since in a prior case the New Jersey Supreme Court in Kaplik v. C.P. Trucking Corp., 27 N.J. 1, 141 A.2d 34 (1958), held that the common law doctrine of interspousal tort immunity is now part of the statutory law. *Id.* at 9, 141 A.2d at 38. It should be noted that the New Jersey Supreme Court went further than the Indiana Supreme Court in overruling the legislative statute. Not only did the New Jersey Supreme Court overrule the legislative statute that specifically recognized the common law doctrine of interspousal tort immunity, but it also overruled the *Kaplik* case which specifically incorporated the common law doctrine into the statutory law.

49. The Illinois Supreme Court, under its statute, ILL. STAT. ANN. tit. 68, § 1 (1959), which is similar to Indiana's, in Heckendorn v. First National Bank, 19 Ill. 2d 190, 166 N.E.2d 571 (1960) (wife suing husband's estate for injuries sustained during the marriage), held that the statute was intended to bar the present action. *Id.* at 195, 166 N.E.2d at 574.