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for creating a danger to his servants because the creation is unreasonable, it seems that the servant should be barred from recovery for taking a chance only if such chance amounts to contributory negligence.⁵³

Richard M. Hull

Abolition of the Interspousal Immunity in Community Property States

The wife brought action against the husband in a California court for an assault committed upon her person during coverture. An action for divorce was then pending. The husband moved for summary judgment on the ground that a wife cannot sue a husband for a tort in California. The motion for summary judgment was granted; judgment for the husband was entered by the trial court. *Held, reversed*: The interspousal immunity is abolished; one spouse may sue the other for an *intentional* tort.¹ *Self v. Self*, — Cal. 2d —, 376 P.2d 65 (1962). The wife sued the husband alleging that she slipped and broke her leg while walking on the deck of the husband's boat (in which she had no right, title or interest). It was further alleged that the husband negligently caused the slippery condition and failed to give warning of the unsafe condition of which he had knowledge. The husband demurred on several grounds; the principal one was the alleged incapacity of the wife to sue the husband during coverture. The demurrer was sustained without leave to amend on the ground that one spouse may not sue the other in California for a personal tort, and judgment was entered in favor of the husband. *Held, reversed*: The interspousal immunity is abolished; one spouse may sue the other for a *negligent* tort. *Klein v. Klein*, — Cal. 2d —, 376 P.2d 70 (1962).

I. THE TWO APPROACHES—DEVELOPMENT AND RATIONALE

At early common law, husband and wife were a legal unit with the identity of both merged in the husband.² A wife could not sue

⁵³ Keeton, *op. cit. supra* note 40, at 118.

¹ The doctrine which prevents suits between spouses is sometimes referred to as "spousal immunity" and other times as "spousal disability." No distinction of substance is intended; a plaintiff-spouse is under a disability when a defendant-spouse has an immunity. However, in order to distinguish between these cases and instances where wives suffer under the general coverture disability and cannot sue or be sued by anyone including their husbands, the term "immunity" is employed hereafter to refer to interspousal suits.

² 1 Blackstone, Commentaries 442 (1765); 2 Blackstone, Commentaries 443 (1766). Similarly, at Roman law, the wife was under her husband's authority (*manus*) and had

anyone without her husband's joinder,³ and one spouse could not sue the other for a tort committed upon either his or her person⁴ or property⁵ by the other spouse. Suits for divorce were exceptions to the general rule against interspousal suits.⁶ Also, courts of equity treated husband and wife as separate individuals for the purpose of litigating certain property rights and interests relating to the wife's separate estate.⁷

Many of the common-law disabilities of the wife have been removed during the nineteenth century by the widespread enactment of statutes granting married women additional rights.⁸ Nonetheless, because of the disparate interpretations given those statutes, two different views as to interspousal immunity have developed. The critical question is whether the statutes are to be construed as preserving or abolishing the fundamental unity of husband and wife in the area of personal torts. In the leading case of *Thompson v. Thompson*,⁹ the Supreme Court held that a District of Columbia statute¹⁰ did not create a new cause of action in the wife *against* the husband, but merely authorized the wife to sue in her own name in tort actions which at common law had to be brought in both their names. Therefore, in states that follow *Thompson*,¹¹ the wife can sue in her own name, but she cannot sue her spouse. In those states not following the *Thompson* holding,¹² the argument continues to be advanced that the statutes abrogate the rule of spousal immunity.¹³ In these states, a wife can sue in her own name and can also sue her husband in tort.

The courts in a majority of jurisdictions continue to adhere to the common-law rule that one spouse has no right of action against the other for damages arising from personal injuries.¹⁴ Moreover,

no separate legal personality. Radin, *Roman Law* 40 (1927); Sohm, *Institutes of Roman Law* 459 (3d ed. 1907).

³ See *Hawkins v. Front St. Cable Ry.*, 3 Wash. 592, 28 Pac. 1021 (1892), and Barton, *The Impact of the Community Property System on Tort Suits*, 42 Calif. L. Rev. 486, 493 (1954).

⁴ 27 Am. Jur. *Husband & Wife* § 589 (1940).

⁵ *Austin v. Austin*, 136 Miss. 61, 100 So. 591 (1924); See Annot., 33 A.L.R. 1388 (1924).

⁶ 3 Vernier, *American Family Laws* § 180 (1935).

⁷ 27 Am. Jur. *Husband & Wife* §§ 585, 586 (1940).

⁸ See McCurdy, *Torts Between Persons in Domestic Relation*, 43 Harv. L. Rev. 1030 (1930).

⁹ 218 U.S. 611 (1910).

¹⁰ D.C. Code Ann. § 30-208 (1926), 31 Stat. 1189, 1374 (1901).

¹¹ See note 14 *infra* for a list of the states.

¹² See note 20 *infra* for a list of the states following the minority view.

¹³ Annot., 43 A.L.R.2d 626 (1955); see also *Thompson v. Thompson*, 218 U.S. 611, 622 (1910) (dissenting opinion).

¹⁴ Delaware: *Ferguson v. Davis*, 48 Del. 299, 102 A.2d 707 (1954) (negligence); District of Columbia: *Thompson v. Thompson*, 218 U.S. 611 (1910) (intentional tort);

in at least two jurisdictions, statutes have been enacted to specifically abrogate the right of the spouses to sue each other.¹⁵ In order to reconcile the continued application of the spousal immunity doctrine in the area of personal torts with the emancipation of women by statute, these courts advance several arguments. Some hold that a

Florida: Corren v. Corren, 47 So. 2d 774 (Fla. 1950) (negligence); Georgia: Wright v. Wright, 85 Ga. App. 721, 70 S.E.2d 152 (1952) (negligence), and cases cited therein; Holman v. Holman, 73 Ga. App. 205, 35 S.E.2d 923 (1945) (intentional tort); Illinois: Heckendorn v. First Nat'l Bank, 19 Ill. 2d 190, 166 N.E.2d 571 (1960) (intentional tort against husband's administrator), and cases cited therein; Indiana: Hunter v. Livingston, 125 Ind. App. 427, 123 N.E.2d 912 (1955) (negligence); Blickenstaff v. Blickenstaff, 89 Ind. App. 529, 167 N.E. 146 (1929) (negligence), and cases cited therein; Iowa: *In re Dolmage's Estate*, 203 Iowa 231, 212 N.W. 553 (1927) (intentional tort); Peters v. Peters, 42 Iowa 182 (1875) (intentional tort; this is often cited for the majority position); Kansas: Sink v. Sink, 172 Kan. 217, 239 P.2d 933 (1952) (negligence), and cases cited therein; Louisiana: Gremillion v. Caffey, 71 So. 2d 670 (La. App. 1954) (intentional tort); Addison v. Employers Mut. Liab. Ins. Co., 64 So. 2d 484 (La. App. 1953) (negligence; both Louisiana cases holding that, although the wife technically has a cause of action, the right to sue is abrogated); Maine: Gray v. Gray, 87 N.H. 82, 174 Atl. 508 (1934) (negligence, stating Maine rule); Maryland: Ennis v. Donovan, 222 Md. 536, 161 A.2d 698 (1960) (negligence); Massachusetts: Lubowitz v. Taines, 293 Mass. 39, 198 N.E. 320 (1955) (negligence); Michigan: Kircher v. Kircher, 288 Mich. 669, 286 N.W. 120 (1939) (negligence), and cases cited therein; Minnesota: Shumway v. Nelson, 259 Minn. 319, 107 N.W.2d 531 (1961) (negligence); Karalis v. Karalis, 213 Minn. 31, 4 N.W.2d 632 (1942) (negligence), and cases cited therein; Mississippi: Ensminger v. Ensminger, 222 Miss. 799, 77 So. 2d 308 (1955) (negligence), and cases cited therein; Missouri: Brawner v. Brawner, 327 S.W.2d 808 (Mo. 1959) (negligence), and cases cited therein; Montana: Conley v. United States Fid. & Guar. Co., 98 Mont. 31, 37 P.2d 565 (1934) (negligence), and cases cited therein; Nebraska: Emerson v. Western Seed & Irr. Co., 116 Neb. 180, 216 N.W. 297 (1927) (negligence); Nevada: Kennedy v. Kennedy, 72 Nev. 302, 353 P.2d 833 (1960) (negligence); New Jersey: Long v. Landy, 35 N.J. 44, 171 A.2d 1 (1961) (negligence), and cases cited therein; New Mexico: Rodgers v. Galindo, 68 N.M. 215, 360 P.2d 400 (1961) (negligence), and cases cited therein; North Carolina: Scholtens v. Scholtens, 230 N.C. 149, 52 S.E. 350 (1949) (negligence; only applicable to suits by a husband against a wife; the courts have permitted the wife to sue the husband); Jernigan v. Jernigan, 236 N.C. 430, 72 S.E.2d 912 (1952); Oregon: Kowaleski v. Kowaleski, 227 Ore. 45, 361 P.2d 64 (1960) (negligence; interspousal immunity does *not* apply to intentional torts); Smith v. Smith, 205 Ore. 286, 287 P.2d 572 (1955) (negligence); Pennsylvania: Kaczorowski v. Kalkosinski, 321 Pa. 438, 184 Atl. 663 (1936) (negligence); Rhode Island: Kelley v. Kelley, 51 R.I. 173, 153 Atl. 314 (1931) (intentional tort of trespass and ejection); Oken v. Oken, 44 R.I. 291, 117 Atl. 357 (1922); Tennessee: Gordon v. Pollard, 207 Tenn. 45, 336 S.W.2d 25 (1960) (negligence); Lillienkamp v. Rippetoe, 133 Tenn. 57, 179 S.W. 628 (1915) (intentional tort), and cases cited therein; Texas: Nickerson v. Nickerson, 65 Tex. 281 (1886) (intentional tort; see note 33 *infra*); Gowin v. Gowin, 292 S.W. 211 (Tex. Comm. App. 1924) (intentional tort); Latiolais v. Latiolais, 361 S.W.2d 252 (Tex. Civ. App. 1962) (negligence); Vermont: Comstock v. Comstock, 106 Vr. 50, 169 Atl. 903 (1934) (negligence); Virginia: Keister v. Keister, 123 Va. 157, 96 S.E. 315 (1918) (intentional tort); Washington: Goode v. Martinis, 58 Wash. 2d 229, 361 P.2d 941 (1961) (intentional tort), and cases cited therein; West Virginia: Campbell v. Campbell, 145 W. Va. 245, 114 S.E.2d 406 (1960) (negligence), and cases cited therein; Wisconsin: Fehr v. General Acc. Fire & Liab. Assur. Corp., 246 Wis. 228, 16 N.W.2d 787 (1944) (negligence; although the husband has no right of action against his wife, the wife does against the husband); Wyoming: McKinney v. McKinney, 59 Wyo. 204, 135 P.2d 940 (1943) (negligence).

¹⁵ See *Hindman v. Holmes*, 4 Ill. App. 2d 279, 124 N.E.2d 344 (1955), Ill. Rev. Stat. ch. 68, § 1 (1961); *Palmer v. Edwards*, 155 So. 483 (La. App. 1934), La. Rev. Stat. Ann. § 9:291 (1961).

change in the rule is a matter for the legislature.¹⁶ Others state that a personal action between husband and wife would destroy the peace and harmony of the home and thus would be contrary to the policy of the law.¹⁷ Also, if marital suits were permitted, it has been predicted that there would be an increase in vexatious litigation—some of which would be collusive.¹⁸ Finally, courts have urged that adequate remedies are provided by divorce and criminal courts.¹⁹

A minority of the jurisdictions permit a person to sue his or her spouse for personal injuries as if the two were not married.²⁰ Justice

¹⁶ See *Paulus v. Bauder*, 106 Cal. App. 2d 589, 235 P.2d 422 (1951); *Cubbison v. Cubbison*, 73 Cal. App. 2d 437, 166 P.2d 387 (1946), overruled by principal cases.

¹⁷ In *Ritter v. Ritter*, 31 Pa. 396 (1858), 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, or bastardy, of dissoluteness, of violence, cruelty, and murders." *Id.* at 398.

¹⁸ *Abbott v. Abbott*, 67 Me. 304, 308 (1877).

¹⁹ See *Cohen v. Cohen*, 66 F. Supp. 312 (N.D. Tex. 1946).

²⁰ Alaska: *Cramer v. Cramer*, 379 P.2d 95 (Alaska Sup. Ct. 1963) (negligence); Arizona: No Arizona case in point. But, see *Jaeger v. Jaeger*, 262 Wis. 14, 53 N.W.2d 740 (1952), applying Arizona law and citing *Hageman v. Vanderdoes*, 15 Ariz. 312, 138 Pac. 1053 (1914), for the proposition that the unity of husband and wife has been severed. Arkansas: *Katzenberg v. Katzenberg*, 183 Ark. 626, 37 S.W.2d 696 (1931) (negligence); see also *Lucas v. Phillips*, 205 Tenn. 444, 326 S.W.2d 905 (1957) (Tennessee court applying Arkansas law); Colorado: *Rains v. Rains*, 97 Colo. 19, 46 P.2d 740 (1935) (negligence); Connecticut: *Overlock v. Ruedemann*, 147 Conn. 649, 165 A.2d 335 (1960) (negligence), and cases cited therein; Ginsberg v. Ginsberg, 126 Conn. 146, 9 A.2d 812 (1939) (negligence), and cases cited therein; Brown v. Brown, 88 Conn. 42, 89 Atl. 889 (1914) (intentional tort); *Williamson v. Massachusetts Bonding & Ins. Co.*, 19 Conn. Supp. 59, 109 A.2d 896 (1954) (negligence); Idaho: *Lorang v. Hays*, 69 Idaho 440, 20 P.2d 733 (1949) (intentional tort); Kentucky: *Brown v. Gosser*, 262 S.W.2d 480 (Ky. 1953); Missouri: *Ennis v. Truhitte*, 306 S.W.2d 549 (Mo. 1957) (action by wife against her husband's administrator for negligence of the husband, even though Missouri does not permit actions between the spouses); New Hampshire: *Morin v. Letourneau*, 102 N.H. 309, 156 A.2d 131 (1959) (negligence), and cases cited therein; New Jersey: *Koplik v. C. P. Trucking Corp.*, 47 N.J. Super. 196, 135 A.2d 555 (1957) (negligence; when plaintiff married defendant *pendente lite*, the action was not abated and suit could be maintained, even though New Jersey does not permit action between spouses for torts committed during coverture); New York: *Coster v. Coster*, 289 N.Y. 438, 46 N.E.2d 509 (1943) (negligence; all recent cases, decided under a New York statute (N.Y. Dom. Rel. Law § 57 (1937)), specifically permit a suit by husband or wife against the other for personal injuries. The statute, in effect, overruled a long series of New York cases which supported the common law rule of spousal immunity.); *Lee v. Lee*, 184 Misc. 686, 57 N.Y.S.2d 97 (Sup. Ct. 1945) (intentional tort), and cases cited therein; North Carolina: *Jernigan v. Jernigan*, 236 N.C. 430, 72 S.E.2d 912 (1952) (wife may sue husband, but husband cannot sue wife); North Dakota: *Fitzmaurice v. Fitzmaurice*, 62 N.D. 191, 242 N.W. 526 (1932) (negligence); Ohio: *Damm v. Elyria Lodge No. 465*, 158 Ohio St. 107, 107 N.E.2d 337 (1952) (negligence); Oklahoma: *Courtney v. Courtney*, 184 Okla. 395, 87 P.2d 660 (1938) (negligence); *Fiedler v. Fiedler*, 42 Okla. 124, 140 Pac. 1022 (1914) (intentional tort); Oregon: *Apitz v. Dames*, 204 Ore. 242, 287 P.2d 585 (1955) (abrogated common-law rule of interspousal immunity only as to intentional torts); see *Kowaleski v. Kowaleski*, 227 Ore. 45, 361 P.2d 64 (1960) (immunity exists in negligence cases); South Carolina: *Pardue v. Pardue*, 167 S.C. 129, 166 S.E. 101 (1932) (negligence); *Prosser v. Prosser*, 114 S.C. 45, 102 S.E. 787 (1920) (intentional tort); South Dakota: *Scotvold v. Scotvold*, 68 S.D. 53, 298 N.W. 266 (1941) (negligence); Utah: *Taylor v. Patten*, 2 Utah 2d 404, 275 P.2d 696 (1954) (intentional tort); Wisconsin: *Wait v. Pierce*, 191 Wis. 202, 209 N.W. 475 (1926) (negligence; limited to actions by wife against husband);

Harlan's dissent in *Thompson v. Thompson*²¹ is the forerunner of the arguments advanced in support of this viewpoint. These jurisdictions regard as untenable the majority view that suppression of interspousal suits promotes domestic tranquility because "such [disharmony] is accomplished by the desire to recover as fully as by the recovery."²² Moreover, the "tranquility" argument is said to be inapplicable to those cases that have prevented the suit for a tort committed during coverture even after a divorce,²³ annulment,²⁴ separation,²⁵ or the death of one spouse or even both.²⁶ The majority viewpoint is characterized as a "bald theory" which assumes "that after a husband has beaten his wife, there is a state of peace and harmony left to be disturbed; and that if she is sufficiently injured or angry to sue him for it, she will be soothed and deterred from reprisals by denying her the legal remedy. . . ."²⁷ Some jurisdictions following the minority view indicate that if the right to suit were denied, the injured party would have no adequate remedy.²⁸ It has also been suggested that the majority doctrine defeats just claims of innocent members of a family and protects wrongdoers who would otherwise be responsible for the injuries they have inflicted.²⁹ One writer suggests that suits between married persons need not breed "vexatious litigation" if the courts imply from the marriage relation consent to do unimportant acts which are technically torts.³⁰ However, "in cases of more serious injury where there is no license, grave injustice is often worked by denial of a legal remedy."³¹

II. THE PROBLEM IN TEXAS

In Texas, one spouse cannot sue the other for damages arising from a personal tort, whether negligent³² or intentional.³³ Also, a

see also *Darian v. McGrath*, 214 Minn. 389, 10 N.W.2d 403 (1943), applying Wisconsin law.

²¹ 218 U.S. 611, 619 (1910).

²² *Hamilton v. Fulkerson*, 285 S.W.2d 642, 647 (Mo. 1955).

²³ See *Lang v. Lang*, 24 N.J. Misc. 26, 45 A.2d 822 (Cir. Ct. 1946).

²⁴ See *Callow v. Thomas*, 322 Mass. 550, 78 N.E.2d 637 (1948).

²⁵ See *Clark v. Clark*, 11 F.2d 871 (S.D.N.Y. 1925).

²⁶ See *Wright v. Davis*, 132 W. Va. 722, 53 S.E.2d 335 (1949).

²⁷ Prosser, *Torts* § 674 (2d ed. 1955).

²⁸ See *Johnson v. Johnson*, 201 Ala. 41, 77 So. 335 (1917); *Crowell v. Crowell*, 181 N.C. 66, 106 S.E. 149 (1920); *Courtney v. Courtney*, 184 Okla. 395, 87 P.2d 660 (1938).

²⁹ See Green, *The Community Property Defense in Personal Injury and Death Actions*,

33 Texas L. Rev. 88, 89 (1954).

³⁰ 3 Vernier, *op. cit. supra* note 6, at § 180.

³¹ *Id.* at § 269.

³² *Latiolais v. Latiolais*, 361 S.W.2d 252 (Tex. Civ. App. 1962).

³³ *Nickerson v. Nickerson*, 65 Tex. 281 (1886). This is the leading case in Texas for the proposition that one spouse cannot sue the other. Here, the wife sued her husband and

cause of action for breach of the marriage contract other than divorce does not exist.³⁴ The doctrine of spousal immunity has even been extended to preclude a husband from suing his wife during coverture for a pre-marital tort.³⁵ If the tort occurs *during* marriage, a subsequent annulment³⁶ or divorce³⁷ will not remove the bar to suit.³⁸ These prohibitions continue after death so that a suit for damages between representatives of a deceased spouse and the living spouse cannot be maintained.³⁹ However, despite the unswerving precedent which holds that suit cannot be instituted between spouses for *personal* injuries, the Texas courts have permitted one partner to sue the other for the protection of *property* rights.⁴⁰ Furthermore, in *Worden v. Worden*,⁴¹ which did not involve property rights, the Texas Supreme Court stated that a wife could sue her husband by way of *habeas corpus* for the custody of their minor child, although no divorce proceedings were pending, and even though the wife predicated her action upon misdeeds of the husband.⁴²

another for the tort of false imprisonment. The court allowed the action against the co-defendant who was not her husband and stated that the proceeds were her separate property. This created an exception to the general rule of *Ezell v. Dodson*, 60 Tex. 331 (1883), in which it was held that damages to be recovered from a third person for a tort committed upon a wife, by such person alone, would be community property. The *Nickerson* court reasoned that if the recoverable damages were community property in this case, then the husband would profit from his own wrong. This case is widely cited for the premise that interspousal suits are prohibited in Texas. See *Speers*, *Marital Rights in Texas* at 633 (4th ed. 1961); 30 Tex. Jur. 2d § 143 (1962); *Latiolais v. Latiolais*, 361 S.W.2d 252 (Tex. Civ. App. 1962); *Worden v. Worden*, 222 S.W.2d 254 (Tex. Civ. App. 1949), *rev'd on other grounds*, 224 S.W.2d 187 (1949); *Lunt v. Lunt*, 121 S.W.2d 445 (Tex. Civ. App. 1938); *Wilson v. Brown*, 154 S.W. 322 (Tex. Civ. App. 1913); *Sykes v. Speer*, 112 S.W. 422 (Tex. Civ. App. 1909), *modified*, 119 S.W. 86 (1909); *Cohen v. Cohen*, 66 F. Supp. 312 (N.D. Tex. 1946).

³⁴ *Gowin v. Gowin*, 292 S.W. 211 (Tex. Comm. App. 1929).

³⁵ *Latiolais v. Latiolais*, 361 S.W.2d 252 (Tex. Civ. App. 1962) *error ref. n.r.e.*

³⁶ *Lunt v. Lunt*, 121 S.W.2d 445 (Tex. Civ. App. 1938).

³⁷ *Sykes v. Speer*, 112 S.W. 422 (Tex. Civ. App. 1908), *modified*, 119 S.W. 86 (1909).

³⁸ *Nickerson v. Nickerson*, 65 Tex. 281 (1886). "Whatever cause of action the wife had, accrued when the acts of which she complains were committed; and the fact of divorce subsequently granted, can not make that a cause of action which was not so at the time the facts transpired." *Id.* at 283.

³⁹ *Dallas Ry. & Terminal Co. v. High*, 129 Tex. 219, 103 S.W.2d 735 (1937) (negligence).

⁴⁰ *Trimble v. Farmer*, 157 Tex. 533, 305 S.W.2d 157 (1957); *McCartney v. McCartney*, 93 Tex. 359, 55 S.W. 310 (1900); *Vercelli v. Provenzano*, 28 S.W.2d 316 (Tex. Civ. App. 1930); *Kelly v. Gross*, 4 S.W.2d 296 (Tex. Civ. App. 1928) *error ref.*; *Newman v. Newman*, 86 S.W. 635 (Tex. Civ. App. 1905).

In *Heintz v. Heintz*, 56 Tex. Civ. App. 403, 120 S.W. 941 (1909), the court held that the wife could sue her husband for conversion of certain monies belonging to her separate estate. In *Borton v. Borton*, 190 S.W. 192 (Tex. Civ. App. 1916) *error ref.*, the court stated: "We think it well settled by the cases cited that, besides actions for divorce, a wife may maintain suit against her husband for the recovery of her separate estate wrongfully converted by him. . . ." *Id.* at 193.

⁴¹ 222 S.W.2d 254 (Tex. Civ. App. 1949), *rev'd on other grounds*, 148 Tex. 356, 224 S.W.2d 187 (1949).

⁴² 224 S.W.2d at 189:

We think that both of the courts below were correct in holding that the

The decisions in Texas do not reflect any substantial reliance upon the common-law theory that spousal immunity flows from the unity of husband and wife.⁴³ Rather, the hostility to personal injury actions between husband and wife appears to be based upon three grounds: (1) a fear that the suit would disrupt domestic tranquility,⁴⁴ (2) a belief that other adequate remedies exist,⁴⁵ and (3) because a defendant-spouse would share equally in any damages recovered, which, under well-established Texas law, belong to the community estate of both.⁴⁶ The first two principles have been dis-

wife had the right to bring this suit. The husband relies on decisions such as *Nickerson v. Nickerson*, 65 Tex. 281 [1886], to the effect that the wife may not sue her husband for personal injuries which he does to her during coverture. It is argued in effect that the present case is analogous because the wife here relies upon misdeeds of the husband toward her as grounds for securing relief. We think, however, that this suit is essentially different, because the principal consideration in this case is the welfare of the child rather than the rights of the spouses as against each other. No reason of public policy which might prevent one spouse from suing the other is present here, *because the home has already been broken up* and the real issue to be decided is the future care of the child in the light of this unfortunate actuality. . . ." (Emphasis added.)

⁴³ Whether the common law with respect to marital rights has been adopted in Texas is an open question. Compare *Gowin v. Gowin*, 264 S.W. 529 (Tex. Civ. App. 1924), *aff'd*, 292 S.W. 211 (1927), with *Barkley v. Dumke*, 99 Tex. 150, 87 S.W. 1147 (1905); *Burr v. Wilson*, 18 Tex. 368, 370 (1857); *Bradshaw v. Mayfield*, 18 Tex. 22, 29 (1856). See also *Latiolais v. Latiolais*, 361 S.W.2d 252, 253 (Tex. Civ. App. 1962) *error ref. n.r.e.*, which acknowledged that "the common law of England in regard to spousal disability [immunity] was never adopted in this state with the intentment that it govern our courts in the determination of marital rights," but refused the husband recovery.

⁴⁴ See *Latiolais v. Latiolais*, *supra* note 43:

In this connection we have no hesitancy in adopting the holding and reasoning of the Minn. Sup. Ct. in *Patenaude v. Patenaude*, 195 Minn. 523, 263 N.W. 546 (1935), where the sole question was presented of whether a wife could, during coverture, bring an action against her husband for a tort committed against her person prior to her marriage to him. The court first stated: "Quite generally, one of the reasons why a husband or wife cannot bring suit for a personal tort against the other, during coverture at least, is that so to do would disturb and tend to disrupt the marriage and family relations, which it is the public policy of the state to protect and maintain inviolable." *Id.* at 253.

⁴⁵ *Gowin v. Gowin*, 292 S.W. 211 (Tex. Comm. App. 1927). In *Cohen v. Cohen*, 66 F. Supp. 312 (N.D. Tex. 1946), a federal district court considering Texas law said: "The punishment of the husband who engages in such excesses is in the hands of the government. Officers of the state, or city, speedily and quickly enter and discipline the assaulting husband and the annulment courts are open to the wife for excesses and cruelties so visited upon her." *Ibid.*

⁴⁶ *Welch v. Bauer*, 186 F.2d 1002 (5th Cir. 1951); *McAdams v. Dallas Ry. & Terminal Co.*, 149 Tex. 217, 229 S.W.2d 1012 (1950); *Taylor v. Catalon*, 140 Tex. 38, 166 S.W.2d 102 (1942); *Pickens v. Pickens*, 125 Tex. 410, 83 S.W.2d 951 (1935); *Lee v. Lee*, 112 Tex. 392, 247 S.W. 828 (1923); *Gallagher v. Bowie*, 66 Tex. 265, 17 S.W. 407 (1886); *T.C. Ry. v. Burnett*, 61 Tex. 638 (1884); *Ezell v. Dodson*, 60 Tex. 331 (1883); *Teague v. Fairchild*, 15 S.W.2d 585 (Tex. Comm. App. 1929); *Texas & Pac. Ry. v. Leatherman*, 351 S.W.2d 633 (Tex. Civ. App. 1961) *error ref. n.r.e.*; *Ellis v. San Antonio*, 341 S.W.2d 508 (Tex. Civ. App. 1961) *error ref. n.r.e.*; *Piro v. Piro*, 327 S.W.2d 335 (Tex. Civ. App. 1959) *error dism.*; *Missouri K. & T.R.R. v. Hamilton*, 314 S.W.2d 114 (Tex. Civ. App. 1958) *error ref. n.r.e.*; *Bell v. Phillips Petroleum Co.*, 278 S.W.2d 407 (Tex. Civ. App. 1954) *error ref. n.r.e.*; *Garrett v. Reno Oil Co.*, 271 S.W.2d 764 (Tex. Civ. App. 1954)

cussed above.⁴⁷ The third reason, the most utilized and the most equivocal, is analyzed below.

An examination of Texas community property law reveals confusion and inconsistency in the application of the community property defense⁴⁸ in the third reason. Obviously, in a community property state,⁴⁹ it is pointless to speak of free litigation between married persons if all recovery is considered the property of both. In Texas, damages recovered for personal injuries, regardless of the source, are community property except in three instances: (1) a statute creates a right of action for the special benefit of the wife,⁵⁰ (2) the husband would otherwise benefit from his own wrong, *e.g.*, if the husband and a third party committed a tort upon his wife,⁵¹ or (3) a direct invasion of the wife's rights, as in a suit for alienation of affections.⁵²

The following are well-recognized premises of Texas law:

(1) All property acquired by the wife during coverture except by gift, devise, or descent belongs to the community estate.⁵³

(2) The legislature is prohibited from adding to or taking from the circumstances specified.⁵⁴

error ref. n.r.e.; *Roberts v. Magnolia Petroleum Co.*, 142 S.W.2d 315 (Tex. Civ. App. 1940) *error ref.*, 135 Tex. 289, 143 S.W.2d 79 (1940); *Dixie Motor Coach Corp. v. Watson*, 138 S.W.2d 314 (Tex. Civ. App. 1940); *Texas Cities Gas Co. v. Martinez*, 82 S.W.2d 1040 (Tex. Civ. App. 1935); *Houston Gas & Fuel Co. v. Spradlin*, 55 S.W.2d 1086 (Tex. Civ. App. 1932); *Lincoln v. Stone*, 42 S.W.2d 128 (Tex. Civ. App. 1931), *rev'd on other grounds*, 59 S.W.2d 100 (Tex. Comm. App. 1933); *Feille v. San Antonio Traction Co.*, 107 S.W. 367 (Tex. Civ. App. 1908) *error ref.*; *Ainsa v. Moses*, 100 S.W. 791 (Tex. Civ. App. 1907); *Vaughn v. St. Louis Sw. Ry.*, 79 S.W. 345 (Tex. Civ. App. 1904) *error ref.*; *Galveston H. & S.A. Ry. v. Baumgarten*, 72 S.W. 78 (Tex. Civ. App. 1903) *error ref.*; *Jackson v. Bradshaw*, 67 S.W. 438 (Tex. Civ. App. 1902); *Western Union Tel. Co. v. Kelly*, 29 S.W. 408 (Tex. Civ. App. 1894); *Rice v. Mexican Nat'l R.R.*, 27 S.W. 921 (1894). This is also the general rule followed in many other community property states. See 1 deFuniak, *Principles of Community Property* § 82 (1943):

Property or money recovered as damages or compensation for personal injuries sustained by a spouse belongs to the community estate, under the doctrine usually followed in our community property states. This has been explained on the ground that the right to recover damages for personal injuries is a chose in action and property; and this right of action having been acquired during the marriage is community property, as is, consequently, the damages or compensation recovered for such personal injuries. . . .

⁴⁷ See notes 17, 19, 22-30 *supra* and accompanying text for both majority and minority arguments.

⁴⁸ The community property defense is simply that the proceeds for recovery for personal injuries are community property, and if one spouse is allowed to recover damages, then the defendant-spouse will benefit from his own wrong by sharing in the proceeds—so the “community property defense” bars the action between spouses.

⁴⁹ The states of Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, and Washington have community property systems.

⁵⁰ See *Wright v. Tipton*, 92 Tex. 168, 46 S.W. 629 (1898).

⁵¹ *Nickerson v. Nickerson*, 65 Tex. 281 (1886).

⁵² *Smith v. Smith*, 225 S.W.2d 1001 (Tex. Civ. App. 1949).

⁵³ Tex. Const. art. 16, § 15.

⁵⁴ The Supreme Court of Texas, in *Arnold v. Leonard*, 114 Tex. 535, 273 S.W. 799

(3) The right to sue for damages for a tort is a chose in action and, therefore, "property" within the legal sense of that term.⁵⁵

(4) This cause of action, not acquired by gift, devise, or descent, but acquired during marriage, is community property.⁵⁶

(5) It logically follows that any damages acquired in pursuance of a "community" cause of action are community funds.⁵⁷

However, the same Texas courts have laid down the following rules, which are inconsistent with the ones above:

(1) Damages received by the wife for personal injuries inflicted on her by a third person are community property, *unless* the husband was a joint tortfeasor, in which case such damages are the separate property of the wife.⁵⁸

(2) Damages received by the wife for personal injuries suffered as a result of the alienation of the husband's affections are (implied to be)⁵⁹ the separate property of the wife.⁶⁰

(3) Proceeds of an insurance policy on the life of one spouse,

(1925), declared unconstitutional a statute (Tex. Rev. Civ. Stat. Ann. art. 4614 (1917)) which sought to render the rents and revenues from the wife's separate property likewise her separate property. The court took the view that the description of the wife's separate property in the constitution created an implied exclusion of all property not listed and that the legislature could not validly add to or subtract from her separate estate as described.

⁵⁵ *Ezell v. Dodson*, 60 Tex. 331 (1883).

⁵⁶ *Northern Texas Traction Co. v. Hill*, 297 S.W. 778 (Tex. Civ. App. 1927), *error ref.* Cf. *Fort Worth & R.G. Ry. v. Robertson*, 103 Tex. 504, 131 S.W. 400 (1910), *adopting dissenting opinion in* 121 S.W. 202 (Tex. Civ. App. 1909), where it was held that a putative wife has no interest in husband's cause of action for personal injuries following his death, since it was not acquired by joint efforts; also, *Nickerson v. Nickerson*, 65 Tex. 281 (1886), in which a cause of action of damages was vested in the wife and the recovery was separate property.

⁵⁷ *1 deFuniak, op. cit. supra* note 46, at § 82.

⁵⁸ *Nickerson v. Nickerson*, 65 Tex. 281 (1886).

⁵⁹ 10 Texas L. Rev. 468 (1932):

It is submitted as axiomatic that if the judgment in *Norris v. Stoneham* [46 S.W.2d 363 (Tex. Civ. App. 1932)] represents community property, then the wife cannot properly sue therefor alone and without joining her husband, and further that the husband can sue for community property alone because the wife is not even a proper party to the action. This conclusion is reached because the opposite result would create between the procedural and substantive law with respect to community property in Texas an anomaly too great to be countenanced. The impropriety of allowing the wife to sue alone for a judgment that represents community property, and the still more striking anomaly of compelling her to join as party plaintiff the husband who incited the wrong for which she sues, lead to the unavoidable conclusion that there is no right of recovery whatever in the case if the nature of the recovery sought is such as to label it community property.

Since the court of appeals in *Norris v. Stoneham*, 46 S.W.2d 363 (Tex. Civ. App. 1932), allowed the wife to institute a suit in her own name without joinder by her husband, for alienation of affections, the recovery by the above reasoning, although the court did not say, must go to the wife's separate estate. *Id.* at 472.

⁶⁰ *Norris v. Stoneham*, 46 S.W.2d 363 (Tex. Civ. App. 1932).

payable to the other, are the separate property of the beneficiary.⁶¹

(4) Compensation for damages to separate *property* that is brought into the marriage is separate property,⁶² but compensation for damages to the *person*, which was also brought into the marriage, is community property.⁶³

(5) Physical violence by the husband can be the basis of a suit for divorce,⁶⁴ but physical violence cannot be the basis of a suit for damages.⁶⁵

Thus, the Texas courts have used various rationales to do what they have forbidden the legislature to do, *viz.*, to change the constitutional definition of the wife's separate property.⁶⁶ A more logical rule would be for the Texas courts to recognize that the wife has a right of personal security, a right that was recognized even at common law.⁶⁷ Because the right to recover for bodily injury is a personal right brought into the marriage, damages for injury to that right, as in the case of property brought into the marriage, should be the separate property of the injured spouse.⁶⁸ Another possible basis for declaring that damages for personal injuries are separate property lies in the "onerous title" theory, that is, community property consists only of that acquired by labor or industry of the spouses.⁶⁹

⁶¹ *Davis v. Magnolia Petroleum Co.*, 134 Tex. 201, 134 S.W.2d 1042 (1940); *Martin v. McAllister*, 94 Tex. 567, 63 S.W. 624 (1901).

⁶² *Texas & Pac. Ry. v. Medaris*, 64 Tex. 92 (1885); *Crosby County Cattle Co. v. Corn*, 25 S.W.2d 283 (Tex. Civ. App. 1928), *aff'd*, 29 S.W.2d 999 (Tex. Comm. App. 1930); *San Antonio & A.P. Ry. v. Flato*, 35 S.W. 859 (1896). See Speers, *Marital Rights in Texas* 632 (4th ed. 1961): "Now, a spouse has a right to retain separate property unimpaired in value by the unlawful acts of any other person, and when a cause of action accrues by reason of any damage thereto, the action is in behalf of the separate estate, and the recovery belongs to the owner of the separate estate in the same right."

⁶³ *Ezell v. Dodson*, 60 Tex. 331 (1883).

⁶⁴ *Mortensen v. Mortensen*, 186 S.W.2d 297 (Tex. Civ. App. 1945).

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

⁶⁶ Tex. Rev. Civ. Stat. Ann. art. 4614 (4621) (1917), making rents and revenues from the wife's separate property her separate property was declared unconstitutional in *Arnold v. Leonard*, 114 Tex. 535, 273 S.W. 799 (1925). Tex. Rev. Civ. Stat. Ann. art. 4615 (4621a) (1925), declaring damages recovered for personal injuries the separate property of the wife, was given effect in *Southern Pac. Co. v. Ulmer*, 286 S.W. 193 (Tex. Comm. App. 1926); but in the later case of *Fairchild v. Davis*, 295 S.W. 640 (Tex. Civ. App. 1927), the statute was expressly declared unconstitutional and was inferentially so declared by the Texas Commission of Appeals in *Teague v. Fairchild*, 15 S.W.2d 585 (Tex. Comm. App. 1929). Tex. Rev. Civ. Stat. Ann. art. 4613 (1925), relating to the rents and revenues from the husband's separate property was upheld in *Stephens v. Stephens*, 292 S.W. 290 (Tex. Civ. App. 1927) *error dismissed*, but was declared unconstitutional in *Commissioner v. Wilson*, 76 F.2d 766 (5th Cir. 1935).

⁶⁷ McKay, *Community Property* 378 (2d ed. 1925).

⁶⁸ See, e.g., *Underhill v. Anciaux*, 68 Nev. 69, 226 P.2d 794 (1951); *Fredrickson & Watson Constr. Co. v. Boyd*, 60 Nev. 117, 102 P.2d 627 (1940); *Soto v. Vandeventer*, 56 N.M. 483, 245 P.2d 826 (1952). See also McKay, *op. cit. supra* note 67, at 398.

⁶⁹ See 1 deFuniak, *op. cit. supra* note 46, at § 82. Also, the Court of Appeals for the Tenth Circuit, *Hammonds v. Commissioner*, 106 F.2d 420, 425 (1939), has said of the Texas' community property statute, Tex. Rev. Civ. Stat. Ann. art. 4619 (1961): "Real property acquired in the state of Texas during coverture by the toil, talent, or productive

Obviously, a right of action for injuries to the person, reputation, or compensation received for such injury is not "acquired" by the labor or industry of the spouses and, therefore, should not be classified as community property. Application of either the "personal security" or "onerous title" theories would produce the same result and place Texas jurisprudence on a sounder, more sensible basis.

III. THE SOLUTION OFFERED IN CALIFORNIA

The court did not have to face the problem of the community property defense in the instant cases because the California statute provides: "All damages, special and general, awarded a married person in a civil action for personal injuries, are the separate property of such married person."⁷⁰ As the court recognized, "Obviously, it would be incongruous for a wife to sue her husband for a personal tort as long as the recovery would be community property controlled and managed by the husband."⁷¹ Nevertheless, the court had to overcome the arguments steeped in *stare decisis* of spousal immunity and the impropriety of allowing suits between married persons. The court answered the common-law rule as first laid down in the *Peters*⁷² case with the following statement:

Of course, the general rule is and should be that, in the absence of statute or some compelling reason of public policy where there is negli-

faculty of either spouse is community property. . . ." This indicates that article 4619 could plausibly be interpreted on the basis of the onerous title theory.

⁷⁰ Cal. Civ. Code § 163.5 (1960). Prior to 1957, both the cause of action and damages recovered for personal injuries to either spouse were community property in California, *Zaragoza v. Craven*, 33 Cal. 2d 321, 202 P.2d 73 (1949). Another California statute provides that "rents, issues, and profits" from separate property are the separate property of the spouse, Cal. Civ. Code §§ 162, 163 (1960). The Civil Code adds the word "bequest" and the phrase "with the rents, issues and profits thereof" to the language of the constitution, which reads: "All property, real and personal, owned by either husband or wife before marriage, and that acquired by either of them afterwards by gift, devise or descent shall be their separate property." Cal. Const. art. 20, § 8 (1879). Similar Texas statutes making compensation for injury to the person, Tex. Rev. Civ. Stat. Ann. art. 4615 (1917), and rents, Tex. Rev. Civ. Stat. Ann. art. 4614 (1917), from separate property the separate property of the party were declared unconstitutional. See note 66 *supra*. The California laws have the "implied" sanction of the courts. The question of whether the legislature has the power to enact that a married person can acquire separate property in ways which are not contained in the constitution was squarely raised in *Woodall v. Commissioner*, 105 F.2d 474 (9th Cir. 1939), *cert. denied*, 309 U.S. 655 (1940). The court stated:

In view of the fact that Section 169, C.C. has on many occasions been before the courts of the state of California, and passed upon, without question of its constitutionality, we are disinclined to seize upon a tax case as an opportunity to declare unconstitutional a legislative enactment standing for nearly 70 years upon the statute books. . . . We do not regard this provision of the constitution as limiting separate property to that enumerated therein—rather, we regard it as defining a point beyond which the legislature may not encroach upon the separate property of either spouse. *Id.* at 478.

⁷¹ 376 P.2d at 70.

⁷² *Peters v. Peters*, 156 Cal. 32, 103 Pac. 219 (1909). This case first established the common-law notion of the unity of husband and wife in California.

gence proximately causing an injury, there should be liability. Immunity exists only by statute or by reason of compelling dictates of public policy. Neither exists here.⁷³

Klein v. Klein, which involved negligence instead of an intentional tort, posed more of a problem for the court. An additional, troublesome element is present if one spouse is permitted to sue the other for negligence, instead of for an intentional tort—the possibility of fraud and collusion if insurance is involved.⁷⁴ However, no compelling reason exists for shielding insurance companies since they have accepted valuable consideration to insure the defendant spouse against his own negligence. Absent negligence itself, the insurance company and the defendant should not be permitted to deny liability because of the possibility of collusion. One meritorious suggestion is to deny certain negligence suits on the ground that each party assumes the risk if there is a common enterprise by husband and wife.⁷⁵ However, if there has been no assumption of the risk, the action in negligence should be allowed.

IV. CONCLUSION

The *Self* and *Klein* cases are illustrative of the modern trend to abrogate the common-law notion of interspousal immunity. However, in the absence of specific prohibitive legislation, the seven remaining community property states have a recognized obstacle to surmount before they can adopt such a rule, *viz.*, the theory that personal damages are community property and thereby inure to the benefit of the tortfeasor-spouse. Of these states, Texas, because of the restrictive interpretation and implied exclusion rule⁷⁶ applied to the constitutional definition of a wife's separate property, has the most serious impediment to allowing interspousal tort suits. However, the rationale of the community property defense is inconsistent if the reasoning applied to property actions between spouses is intentionally overlooked whenever the courts are concerned with the human body. Until the courts choose to abandon or delimit the interspousal immunity in community property states and, if neces-

⁷³ 376 P.2d at 69.

⁷⁴ Justice Peters, in writing for the majority, stated that such arguments should be made to the legislature and not to the courts. Justice Schauer, in his dissent, is not persuaded by this position. He believes that if negligence suits in this area are allowed, the possibility of collusion will be great.

However, since negligence suits comprise the bulk of trial time, it hardly seems practical to suggest, as does Justice Schauer, that this area of law be ignored.

⁷⁵ 3 Vernier, *op. cit. supra* note 6, at § 180.

⁷⁶ See note 54 *supra*.

sary, characterize the ensuing damages as separate property, it will remain a sad day for the law that there can be compensation for a tree, but not for a hand.

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