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Abolition of the Interspousal Immunity in Community Property States

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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.\footnote{Keeton, \textit{op. cit. supra} note 40, at 118.}

\textit{Richard M. Hull}

\section*{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. \textit{Held, reversed}: The interspousal immunity is abolished; one spouse may sue the other for an \textit{intentional} tort.\footnote{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.} \textit{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. \textit{Held, reversed}: The interspousal immunity is abolished; one spouse may sue the other for a \textit{negligent} tort. \textit{Klein v. Klein}, — Cal. 2d —, 376 P.2d 70 (1962).

\section*{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.\footnote{1 Blackstone, Commentaries 442 (1765); 2 Blackstone, Commentaries 443 (1766). Similarly, at Roman law, the wife was under her husband's authority (\textit{manus}) and had} A wife could not sue
anyone without her husband's joinder, and one spouse could not sue the other for a tort committed upon either his or her person or property by the other spouse. Suits for divorce were exceptions to the general rule against interspousal suits. 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.

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. 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, the Supreme Court held that a District of Columbia statute 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, the wife can sue in her own name, but she cannot sue her spouse. In those states not following the Thompson holding, the argument continues to be advanced that the statutes abrogate the rule of spousal immunity. 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. Moreover,
in at least two jurisdictions, statutes have been enacted to specifically abrogate the right of the spouses to sue each other.\textsuperscript{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

change in the rule is a matter for the legislature. 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. 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. Finally, courts have urged that adequate remedies are provided by divorce and criminal courts.

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

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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 instead—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).


Harlan’s dissent in *Thompson v. Thompson* 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." 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, annulment, separation, or the death of one spouse or even both. 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. . . ." Some jurisdictions following the minority view indicate that if the right to sue were denied, the injured party would have no adequate remedy. 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. 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. However, "in cases of more serious injury where there is no license, grave injustice is often worked by denial of a legal remedy."

**II. THE PROBLEM IN TEXAS**

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

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21 See Darian v. McGrath, 214 Minn. 389, 10 N.W.2d 403 (1943), applying Wisconsin law.
22 Hamilton v. Fulkerson, 285 S.W.2d 642, 647 (Mo. 1955).
30 Vernier, *op. cit. supra* note 6, at § 180.
31 *Id.* at § 269.
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. The doctrine of spousal immunity has even been extended to preclude a husband from suing his wife during coverture for a pre-marital tort. If the tort occurs during marriage, a subsequent annulment or divorce will not remove the bar to suit. These prohibitions continue after death so that a suit for damages between representatives of a deceased spouse and the living spouse cannot be maintained. 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. Furthermore, in Worden v. Worden, 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.  

8 Nickerson v. Nickerson, 65 Tex. 281 (1886).  
9 Dallas Ry. & Terminal Co. v. High, 129 Tex. 219, 103 S.W.2d 735 (1937) (negligence).  
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.  
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. 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, (2) a belief that other adequate remedies exist, 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. 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.)

42 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. Dunke, 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 intendment that it govern our courts in the determination of marital rights," but refused the husband recovery.

43 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 (1931), 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.

cussed above. 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 defense in the third reason. Obviously, in a community property state, 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, (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, or (3) a direct invasion of the wife’s rights, as in a suit for alienation of affections.

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

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. . . .

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

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.

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

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

Nickerson v. Nickerson, 61 Tex. 281 (1886).


Texas Const. art. 16, § 15.

The Supreme Court of Texas, in Arnold v. Leonard, 114 Tex. 135, 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,
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. 156, 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 281 (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 612 (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."

64 Ezell v. Dodson, 60 Tex. 331 (1881).


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


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." 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." 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 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 negligence of either spouse is community property. . . . This indicates that article 4619 could plausibly be interpreted on the basis of the onerous title theory. 79 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, Zaragosa 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. 4613 (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.

78 Peters v. Peters, 116 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.  

*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. 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. 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 rule 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-

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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 74 *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.

Neil Weatherhogg