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INTERSPOUSAL IMMUNITY IN PENNSYLVANIA— A CONCEPT IN EVOLUTION

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At common law there could be no tort liability between husband and wife. It has been said that the historical genesis of this prohibition was probably a mixture of biblical and medieval metaphysics, the position of the father in the family under Roman law, the natural concept of the family as an informal unit of government with the physically stronger person at the head, and the property law of feudalism.[1] Probably some combination of these factors resulted in the English common-law theory, viewing husband and wife as one person or "one entity." Prosser suggests that "it is perhaps idle to speculate at this late date"[2] as to the exact historical basis of interspousal immunity since, "all this state of affairs belonged to a social order which has been dead for more than a century. Beginning about 1844 statutes known as Married Women's Acts or Emancipation Acts were passed in all American jurisdictions, which were designed primarily to secure to a married woman a separate legal entity and a separate legal estate in her own property."[3]

Yet, it is not so idle to speculate; for despite the trend toward emancipation provided by the Married Women's Acts, some last vestiges of the common-law theory have been preserved. The prevailing view in the majority of American jurisdictions refuses to recognize, as separate property, a right in tort for injury to the person.[4] In Pennsylvania, the immunity has been continued by case law and by the following statutory proviso:

> Hereafter a married woman may sue and be sued civilly, in all respects, and in any form of action, and with the same effect and results and consequences, as an unmarried person; *but she may not sue her husband, except in a proceeding for divorce, or in a proceeding to recover her separate property; nor may he sue her*, except in a proceeding for divorce or in a proceeding to protect or recover his separate property; nor may she be arrested or imprisoned for her torts.[5]

This Article will examine the problems which have been spawned by and pervade this legislation. Commencing with a discussion of the underlying public policies relating to interspousal immunity, the Article will then focus

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1. See PROSSER, TORTS 671 (2d ed. 1955).
2. *Id.* at 672.
3. *Ibid.*
4. *Id.* at 673
5. PA. STAT. ANN. tit. 48, § 111 (1950). (Emphasis added.)

on specific problems which have arisen: the tolling of the statute of limitations, the point of imposition of the immunity, the point of dissolution of immunity, the meaning of "a proceeding to protect or recover separate property" and the effect of joinder of third parties.

Public Policy

As has been suggested, the basis for interspousal immunity is largely historical, premised on the one entity theory of husband and wife. If the husband and wife were really one entity, then any injury inflicted by one upon the other would create in the same person a right to recover and a liability to respond in damages—an anomaly. Theoretically, then, if a husband harmed his wife he would be obligated to pay damages to himself.[6] Without debating the logic of this argument, it is reasonably clear that as a practical matter the typical husband and wife relationship is financially interwoven. A co-mingling of monies and property and a sharing of benefits is the rule rather than the exception. Thus, any verdict rendered against one spouse in favor of the other must be at once both a detriment and benefit to the family entity with the most likely result being a monetary standoff.

In addition to the legalistic theory of one entity,[7] there are other considerations more contemporary and more properly categorized in the realm of public policy. By far the most important of these policy considerations is that policy which seeks to preserve domestic peace, harmony and marital happiness by prohibiting interspousal litigation.[8]

Another policy argument for maintaining this immunity requires the assumption that the defendant spouse is only a nominal defendant with his insurer being the real party in interest. Removal of the immunity, it is argued, would lift the flood gates on collusive and fraudulent claims.[9] The reasoning

6. 1 Harper & James, Law of Torts 643 (1956).

7. Justice Musmanno has termed this theory a "palpable impossibility." Meisel v. Little, 407 Pa. 546, 551, 180 A.2d 772, 775 (1962) (dissenting opinion).

8. See Johnson v. Peoples First Nat'l Bank and Trust Co., 394 Pa. 116, 119, 145 A.2d 716, 717 (1958).

One of the curious incongruities which has resulted under this policy is the fact that a great number of courts will allow interspousal actions for intentional torts. See cases collected in Ford, *Interspousal Liability for Automobile Accidents in the Conflict of Laws: Law and Reason Versus the Restatement*, 15 U. Pitt L. Rev. 397, 401 n.14 (1954).

Likewise, the alternative remedy through criminal prosecution which is frequently suggested, *e.g.*, Thompson v. Thompson, 218 U.S. 611, 619 (1910), may give some psychological satisfaction to the wife and redress to society, but it will hardly contribute to the peace and harmony of the home.

9. See Parks v. Parks, 390 Pa. 287, 296, 135 A.2d 65, 71 (1957). See also Ford, *Interspousal Liability for Automobile Accidents in the Conflicts of Laws: Law and Reason Versus the Restatement*, 15 U. Pitt L. Rev. 397 (1954).

New York has an interesting solution to the problem of fraud in interspousal personal injury actions where one spouse has negligence liability insurance. In 1937 the New York legislature enacted simultaneously with a statute giving either

presupposes that spouses may become overzealous in finding tortious acts in the conduct of an insured spouse.[10]

Still another pro-immunity policy which requires an assumption of the existence of insurance and incorporates the one entity theory is that policy which views recovery by one spouse as a benefit to the defendant tort-feasor spouse. When liability on a verdict is assumed by an insurance company and monetary damages are paid to the "one entity," the result will be recovery by the wrongdoer for his own wrong. Such a result is universally sought to be avoided.[11]

Interestingly, the insurance factor has been advanced as an argument for the *dissolution* of interspousal immunity. The advocates of this approach recognize the existence of insurance as the great equalizer, offsetting the antagonistic policy concerned with the preservation of domestic felicity. The argument is advanced that so long as an impersonal third party, *i.e.*, the insurer, is the buffer of the brunt of a judgment, then a verdict rendered against one spouse can have no adverse effects on family unity. Conversely, such recovery will serve as a monetary balm to soothe and promote the tranquility of the domicile.[12] Aligned against the foregoing policy is the deeply entrenched policy of Pennsylvania, viewing as prejudicial any mention of insurance at trial. This policy stems from the fear that juries would tend to favor plaintiff verdicts over the impersonal and supposedly "wealthy benefactor" image projected by insurance companies.[13] On the other hand, the policy underlying interspousal immunity goes procedurally to the institution of suit and not to the conduct of the trial or admission of evidence. Thus, the apparent conflict in policies could be resolved by limiting the allegation of insurance to the pleadings, *i.e.*, to stating a cause of action, but by continuing the bar against such evidence reaching the ears of the jury at trial.

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spouse a right of action against the other for personal tort, a statute which provides that a liability insurance policy shall not cover any liability of an insured for injuries to or death of his spouse unless express provision for such coverage is included in the policy. Thus, New York allows interspousal personal tort actions but liability insurance policies ordinarily exclude liability to one's spouse.

35 TEMP. L.Q. 107, 109 (1961).

10. See Long v. Landy, 60 N.J. Super. 362, 158 A.2d 728 (1960). See also 35 TEMP L.Q. 107, 109 (1961).

11. See Stitzinger v. Stitzinger Lumber Co., 187 Pa. Super. 453, 144 A.2d 486 (1958). Neiman v. Watkins, 81 Dauph.Co..Rep. 344 (Pa. C.P. 1963). Here, contributory negligence of the wife barred recovery by the husband for damage to the automobile owned by the entireties.

12. Meisel v. Little, 407 Pa. 546, 553, 180 A.2d 772, 776 (1962) (dissenting opinion). On the basis that liability insurance is almost invariably involved in interspousal suits for damages inflicted in automobile accidents, Oklahoma allows such litigation. Courtney v. Courtney, 184 Okla. 395, 401-04, 87 P.2d 660, 667-70 (1938).

13. See Meisel v. Little, 407 Pa. 546, 550, 180 A.2d 772, 774 (1962).

TOLLING OF THE STATUTE OF LIMITATIONS

When a cause of action accrues between spouses during coverture, does the statute of limitations begin to run immediately, or is it tolled until the disability to sue is removed? The answer requires an examination of the interrelation of the limitations acts with the Married Women's Acts, the case law under these acts with the common law, and turns finally on the type of action which is brought.

The Act of March 27, 1713,[14] after enumerating various limitations on actions provides:

> That if any person or persons who is or shall be entitled to any such action . . . be, or at the time of any cause of such action given or accrued, fallen or come shall be . . . feme covert . . . that then such person or persons shall be at liberty to bring the same actions, so as they take the same within such times as are hereby before limited . . . after . . . discoverture . . . as other persons.

The essence of this "saving clause" provision is to hold an action in abeyance until the removal of the disability. Seemingly clear on its face, the law was not to remain free from subsequent complication. Although the Act of 1713 included a limitation period for trespass on the case which includes an action for personal injuries,[15] the Act of June 24, 1895,[16] expressly limited such an action to two years *without* benefit of a "saving clause."

With the passage of the Act of June 3, 1887,[17] conferring upon married women the right to sue and be sued as if they were not married, whatever validity the savings clause in the Act of 1713 may have retained for actions other than personal injury was cast into doubt. In *Nissley v. Brubaker*[18] the Pennsylvania Supreme Court held that the Act of June 3, 1887, "operated as a repeal of the proviso in the limitation Act of March 27, 1713, which prevents the statute of limitations from running against married women until they become discovert."[19] The court considered this conclusion "inevitable because a right to sue is fundamentally inconsistent with a disability to sue and by consequence removes the disability."[20] To the same effect was *Hick's Estate*,[21] "where the object and reason for which a statute was passed is removed by a later enactment, there is an implied repeal of the former statute."[22]

14. PA. STAT. ANN. tit. 12, § 35 (1950).
15. See Hasson v. Pennsylvania R.R. Co., 1 Pa. County Ct. 531 (1886).
16. PA. STAT. ANN. tit. 12, § 34 (1950).
17. Pa. Laws 1887, at 332, as amended, PA. STAT. ANN. tit. 48, § 111 (1950).
18. 192 Pa. 388, 43 Atl. 967 (1899).
19. *Id.* at 392, 43 Atl. at 968.
20. *Ibid.*
21. 7 Pa. Super. 274 (1898).
22. *Id.* at 280.

These opinions suggest that when the reason for the savings clause has been vitiated by subsequent legislation, namely, the Married Women's Acts, the "savings clause" legislation must fall by the wayside. The logic of these statements can hardly be disputed; nevertheless, they have little pertinence when applied in the framework of inter-spousal litigation. This is so for the reason that "no right to sue" was conferred to spouses, *inter se*, by the Act of 1887 and its successors.

What is the current state of the law? Regarding personal injury claims it has been noted that the Act of June 24, 1895, limiting personal injury claims to two years has no savings clause.[23] Cases construing this legislation have held that such actions are not protected from the running of the statute.[24] Thus, a spouse is forever barred from suing a tort-feasor spouse, if coverture continues for more than two years after the injury.

On the other hand, all cases other than those for personal injuries and those allowed by the Married Women's Acts remain valid under the savings clause.[25] Indeed, there is authority that even without the statutory savings clause the tolling of the statute of limitations was authorized in these cases by the common law.[26] However, no common law case to this effect was found involving an action for personal injuries.[27]

Imposition of Immunity

The fact that the status of coverture may come into existence at any point along a sequence of events—injury (contract breach), institution of suit, trial, judgment or appeal creates another problem. At what point is imposition of the bar demanded? Considering the basic underlying public policy, one might assume that that stage of the proceedings which begins to rend asunder the domestic tranquility is most critical.

In the recent case of *Ondovchik v. Ondovchik*,[28] the court was presented with these facts. Plaintiff, female guest occupant of an auto, brought suit for personal injuries sustained by her, against the operators of two other auto-

23. Pa. Stat. Ann. *tit.* 12, § 34 (1950).

24. See Walker v. Mummert, 394 Pa. 146, 146 A.2d 289 (1959); Ditch v. Baylor, 7 Lebanon 33 (Pa. C.P. 1959); Tocus v. D. & H. Ry. Corp., 35 Luz. L.J. 167 (Pa. C.P. 1940); Hasson v Pennsylvania R.R. Co., 1 Pa. County Ct. 531 (1886).

25. See Lineweaver's Estate, 284 Pa. 384, 131 Atl. 378 (1925); Kennedy v. Knight, 174 Pa. 408, 34 Atl. 585 (1896); Gracie's Estate, 158 Pa. 521, 25 Atl. 1083 (1893).

26. See Miller v. Miller, 44 Pa. 170, 173 (1863); Dougherty v. Snyder, 15 S. & R. 84, 91 (Pa. 1826).

27. In Cardamone v. Cardamone, 9 Pa. D. & C. 723 (1927), (personal injury action) the court cites Kennedy v. Knight, 174 Pa. 408, 34 Atl. 585 (1896), which was an action on a promissory note, for the proposition that "the statute of limitations does not begin to run until the right of action is complete." Cardamone v. Cardamone, *supra* at 729. It is suggested, however, that the cases cited *supra* note 24 are controlling.

28. 411 Pa. 643, 192 A.2d 389 (1963).

mobiles involved in the accident. One of the latter joined the operator of the car in which plaintiff was riding as an additional defendant. Thereafter, but prior to trial, plaintiff married the operator of the car in which she had been injured. A jury verdict was rendered solely against the operator of plaintiff's car, who was at that time her husband. In a 4-3 decision, the Pennsylvania Supreme Court reversed the trial court's order setting aside the verdict with the resulting effect that a wife recovered against her husband.

Because two reasons were assigned for the majority's holding, its underlying logic is somewhat obscured. The opinion first excludes the case from the operation of the prohibition because the suit was instituted before coverture.[29] This would seem to fix the "critical stage" as the institution of suit. The opinion continues, however, with a discussion of the effect of joinder.[30] In essence, it is stated that if a wife does not sue her husband directly and if the eventual verdict is rendered solely against her husband as a result of the fortuity of joinder and the fortuity of a jury verdict then, "the mere presence of a husband or a prospective husband as an additional defendant in a suit does not bar recovery."[31] The court interestingly observed that the statutory prohibition states that a wife may not sue her husband; it does not say "may not recover against her husband."[32]

The fact situation presented by *Ondovchik* was not the first to raise the "critical stage" question. Only a year earlier in *Meisel v. Little*,[33] the plaintiff, female guest passenger was similarly injured in an auto driven by her prospective husband. Here, however, the suit was brought after marriage and solely against the husband-defendant. As to this sequence of events, the immunity was held applicable and a bar to recovery.[34]

One might be justifiably puzzled by the *Ondovchik* result. The rule that interspousal immunity is inapplicable so long as suit is instituted before marriage defies reason. Surely, it is only after the institution of suit that the blows to domestic tranquility will—if at all—be struck. The testimony at trial, the money verdict, the judgment and appeal all seem to be equally crucial stages. It would seem, therefore, that to allow recovery at any stage after the occurrence of coverture would defeat the policy of the prohibitory proviso.[35]

29. *Id.* at 646, 192 A.2d at 391.
30. *Id.* at 647, 192 A.2d at 391.
31. *Ibid.* Note how the court does not limit this statement to the facts of the case, *viz.*, to a "prospective husband"; but, also makes it equally applicable to a "husband."
32. *Id.* at 647-48, 192 A.2d at 382. (Emphasis added.)
33. 407 Pa. 546, 180 A.2d 772 (1962).
34. *Accord,* Borzik v. Miller, 399 Pa. 293, 159 A.2d 741 (1959); Lipschultz v. Kohl, 16 Pa. D. & C. 386 (1931). In Cardamone v. Cardamone, 9 Pa. D. & C. 723 (1927), the sequence of events were substantially the same as *Ondovchik*. Holding the immunity applied, the court made no distinction between suit brought before or after marriage. *Ondovchik* would seem to have overruled *Cardamone*.
35. PA. STAT. ANN. tit. 48, § 111 (1950).

The distinction made by *Ondovchik* based on the date when suit is brought, *viz.*, prior to marriage, may no longer be valid. In the recent case of *Daly v. Butterbaugh*,[36] the Supreme Court of Pennsylvania deemed it necessary to reconsider, in detail, its holding in *Ondovchik*. In a statement which can only be accorded the weight of dictum, since the Dalys were married at the time of their accident, Justice Jones, speaking for the court, noted:

> The distinctions between *Meisel* and *Ondovchik* are not of such nature as to justify the application of two different rules. First, whether the husband's tort occurred prior to or during coverture should be of no moment; the impact in the family relationship is the same and the public policy which denies the right to maintain an action for a tort occurring during coverture applies equally to the denial of the right to maintain an action for a tort occurring prior to marriage.[37]

Of course, the main distinction between *Meisel* and *Ondovchik* was not when the tort occurred—in both the tort occurred prior to marriage—but when the suit was brought. Still, considering public policy, the distinction is nonetheless specious. In any event, although the *Daly* case may properly be deemed to overrule *Ondovchik* on other matters, it would seem that the distinction drawn permitting interspousal litigation so long as the action is instituted prior to marriage is still valid.

Dissolution of the Immunity

The question is posed, what eventuality during coverture will serve to lift the bar of immunity without offending the underlying public policy? Various possibilities are suggested; among them are voluntary separation, desertion, divorce *a mensa et thoro*, divorce *a vinculo*, and death. In addition to determining which of these events obviates the necessity for continuing the immunity, it is further material to question—as it is with the imposition of the bar—at what point in the proceedings the termination of the status would be effective to allow recovery.

Discoverture by Desertion

In the Act of May 1, 1913,[38] there is language which allows "any wife, who has been deserted, abandoned or driven from her home by her husband" to sue her husband as if she were a feme sole. The statute is silent as to when the cause of action must have accrued. Likewise, there is no appellate authority, relating to personal injury claims, on whether such claim must

36. Daly v. Buterbaugh, 207 A.2d 412 (Pa. 1965).
37. *Id.* at 417.
38. Pa. Stat. Ann. tit. 48, § 114 (1950).

have accrued before or after the desertion. Pennsylvania lower courts, however, do seem to agree that the tort, whether intentional or negligent, must have occurred *after* the desertion.

In *Candidi v. Candidi*,[39] the court said "[W]hen the only remaining vestige of marriage is the legal contract and the parties thereto have ceased to cohabit as a result of a husband's misconduct, we see no reason why the marital status, in name only, should exempt a wife-beater from answering in damages for his tortious act."[40] The assault here occurred after desertion.[41] An opposite result was reached in *Ellis v. Brenninger*,[42] where the tort occurred before the spouse was "driven from her home." *Ellis*, however, may be conditioned by the situation presented in *Paskevich v. Paskevich*,[43] where, although the assault took place before the plaintiff spouse was driven from her home, the acts complained of were in effect simultaneous with the wife's immediate withdrawal.

Appellate cases under the Act of 1913, relating to assumpsit claims, do not appear to follow the requirement that the action accrue after desertion.[44] It should be noted, however, that most of these cases incorporate the added element that the wife is suing "to protect and recover her separate property."[45]

It should be noted that the Act of 1913, providing the desertion exception to interspousal litigation, is limited to suits *brought by a wife and only in the enumerated instance.* The act affords no like remedy for a husband; nor is there case law which would afford him a remedy under these circumstances.[46] Finally, no statutory authority is available on what other events might serve to terminate the immunity.

Discoverture by Death

Whether the death of one spouse will remove the interspousal immunity bar to the surviving spouse or to the deceased spouse's estate is also considered. In the case of *Parks v. Parks*[47]—concerning a suit by an unemanci-

39. 87 Pa. D. & C. 96 (1953).
40. *Id.* at 100.
41. *Accord*, Waterman v. Waterman, 3 Pa. D. & C.2d 126 (1954) (negligence after desertion).
42. 71 Pa. D. & C. 583 (1950).
43. 5 Northumb.L.J. 266 (Pa. C. P. 1920).
44. See Gessler v. Gessler, 181 Pa. Super. 357, 124 A.2d 502 (1956). Adler v. Adler, 171 Pa. Super. 508, 90 A.2d 389 (1952).
45. See, *e.g.*, Ertel v. McCloskey, 167 Pa. Super. 120, 74 A.2d 652 (1950).
46. But see, Gabrielli v. Gabrielli, 31 Dauph. Co. Rep. 283 (Pa. C.P. 1927), where the court stated in dictum that under the Act of June 8, 1893, Pa. Laws at 344, a husband might sue his wife *to recover his seperate estate* whenever she may have deserted him or separated herself from him without just cause.
47. 390 Pa. 287, 135 A.2d 65 (1957).

pated minor child rather than a spouse—the following dicta is found:

> We have, however, recognized that the doctrine of interfamily immunity from suit by a member of the family expires upon the death of the person protected and does not extend to a descendent's estate for the reason that death terminates the family relationship and there is no longer a relationship in which the state or public policy has an interest.[48]

The court further stated: "[W]ith death there comes an irreversible end and termination of the family relationship. . . ."[49]

In *Parks*, however, the unemancipated minor child was denied recovery, since she had not in fact been killed, but merely faced a prospective lifelong internment in a state institution. The court refused to equate this situation with death. Furthermore, the authority upon which *Parks* relies for the above quoted dicta is questionable.

Kaczorowski v. Kalkosinski,[50] upon which *Parks* relies, involved an auto accident in which both husband and wife were killed. The father of the deceased wife instituted the suit against the husband's estate for the wrongful death of the wife as a result of the husband's negligence. The court noted that "the disability of the wife to sue is personal. It does not inhere in the tort itself as is the case where she is guilty of contributory negligence."[51] "The relation of husband and wife intervening between the tortious act and a third injured party ought not to defeat recovery simply because the wife cannot sue the husband for the tort to her. As to other parties there may be an independent wrong for which recovery should be allowed."[52] It would seem that this logic would have been more appropriate had the action been one of survival rather than wrongful death. In any event, dissolution of interspousal immunity in *Kaczorowski* was accomplished not because of the death of one of the party litigants but because of the court's reasoning that a wrongful death action somehow "interposes" or "once removes" the tort for which recovery is sought. The wrongful death situation, then, must be allocated a separate pigeonhole of its own for dissolution of interspousal immunity.[53]

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48. *Id.* at 296, 135 A.2d at 71.
49. *Id.* at 297, 135 A.2d at 71.
50. 321 Pa. 438, 184 A.2d 663 (1936).
51. *Id.* at 442, 184 A.2d at 665.
52. *Id.* at 441, 184 A.2d at 664.
53. Perhaps the real explanation is to be found in the *Parks* case itself. The *Parks* court cited Minkin v. Minkin, 336 Pa. 49, 7 A.2d 461 (1939) (unemancipated minor versus surviving parent in wrongful death), in which it was noted that such an action is sanctioned only because it *"is a property right granted by the Death Statute* and it does not sanction generally the maintenance of a tort action by an unemancipated minor child against its parent for damages for acts of negligence affecting the person." *Id.* at 56, 7 A.2d at 66. (Emphasis added.)

In *Davis v. Smith*,[54] also cited by *Parks* to support its dicta, the plaintiffs were a minor son *and* a widow suing the estate of the deceased parent-husband for injuries sustained by the boy as a result of the decedent's negligence. While these facts are more "on point" for the topic under discussion, the authority cited in *Davis* is not. In holding that interspousal immunity is destroyed at death, *Davis* cites as Pennsylvania authority *Kaczorowski, Gracie's Estate*,[55] and *Doughtery v. Snyder*.[56] *Kaczorowski* is distinguishable because of the wrongful death exception. *Gracie* and *Doughtery* are distinguishable because both were assumpsit actions. Thus, after tracing the authority for the dicta in the *Parks* case, there doesn't seem to be any real authority at all.

In fact it was not until a year after *Parks* that the supreme court in *Johnson v. Peoples First Nat'l Bank and Trust Co.*,[57] finally answered the question of whether a widow could maintain a trespass action against her deceased husband's estate for personal injuries received by her as the result of the husband's negligent operation of a motor vehicle, occurring during coverture. By answering in the affirmative the court laid to rest a controversy which had long raged in the lower courts.[58]

Discoverture by Divorce A.V.M.: Absolute Divorce

Another eventuality which could be considered as removing the immunity is divorce *a.v.m.*—a total dissolution of the marriage bond. At least one Pennsylvania lower court has answered that such is not the case. In *Smith v. Smith*,[59] an action was brought for injuries received as a result of an assault and battery occurring during coverture. A divorce *a.v.m.* was granted prior to the institution of the suit, but the immunity was held to continue. No Pennsylvania authority was cited to justify this result. The *Smith* case, however, was cited with approval in *Stimson v. Stimson*,[60] sustaining preliminary objections to a bill in equity for an accounting.

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54. 126 F. Supp. 497 (1954).
55. 158 Pa. 521, 27 Atl. 1083 (1893).
56. 15 S. & R. 84 (Pa. 1826).
57. 394 Pa. 116, 145 A.2d 716 (1958).
58. See Johnson v. Johnson, 38 Wash. Co. R. 158 (Pa. C.P. 1958), where the court held that immunity continued after death, citing the Fiduciaries Act of 1949, PA. STAT. ANN. tit. 20, § 320.603 (1950). The act says that "an action or proceeding to enforce any right or liability which survives a decedent may be brought against his personal representative alone or with other parties *as though the decedent were alive.*" (Emphasis added.) The *Johnson* court reasoned that as public policy prohibited the action if "decedent were alive" it remained necessary to continue the legal bar after death. *Accord,* Lewellyn v. Mensch, 5 Pa. D. & C.2d 67 (1955) (Estate v. Estate). *Contra, e.g.,* Pittman v. Deiter, 10 P. D. & C.2d 360 (1957).
59. 14 Pa. D. & C. 466 (1930) (Northam. Co.).
60. 346 Pa. 68, 74, 29 A.2d 679, 682 (1942).

In *Swaney v. Cabet*,[61] a like result was achieved without any reference to the *Smith* or *Stimson* cases. In concluding that the disability continued after divorce for torts which occurred during marriage the court first noted the lack of appellate authority[62] and then used the *Parks* case to justify its refusal to accept anything but death as the solvent of the domestic harmony policy. The *Swaney* court concluded with the observation that an ability to bring suit if divorced "would undoubtedly encourage divorce in some cases."[63]

In spite of *Smith* and *Swaney*, there may yet be some doubt whether interspousal immunity continues after divorce. The *Johnson* case,[64] holding the immunity dissolved on death, mentions in a closing footnote that the *Smith* case is contrary to that result.[65] Were it not for the fact that *Johnson* was concerned with death and *Smith* with divorce, one might be tempted to conclude that *Johnson* overrules *Smith* and that divorce *a.v.m.* does destroy interspousal immunity. There is also language in the *Dougherty* case, which, as justification for permitting an assumpsit action after death, includes a citation to an English case,[66] allowing suit after divorce.

Discoverture by Divorce a mensa et thoro: Separation Agreements

Where there is a separation, either by court decree or voluntary, the parties are, of course, still married in the eyes of the law. As a general rule, "neither a separation without divorce nor a divorce *a mensa et thoro* removes the common-law disability of one spouse to sue the other."[67] There appears to be no reason why this rule should not be followed in Pennsylvania.

However, the Act of 1913[68] is a statutory exception to this rule. While the act is limited to cases of desertion, abandonment, or where the wife is driven from her home, there seems to be no logical reason why interspousal immunity should be arbitrarily dissolved only in these cases. In a situation where either spouse has committed an act which would give rise to a valid cause of action in divorce, and there is a subsequent voluntary separation or divorce *a mensa et thoro*, the aggrieved spouse ought to be allowed relief for the wrongs done to him by the other.[69] It would seem the family unity

61. 23 Fay. L.J. 175 (Pa. C.P. 1960).
62. *Id.* at 180.
63. *Id.* at 184.
64. Johnson v. Peoples First Nat'l Bank and Trust Co., 394 Pa. 116, 145 A.2d 716 (1958). See text accompanying note 57 *supra*.
65. *Id.* at 124 n.6 145 A.2d at 720 n.6.
66. Marshall v. Rutton, 8 T.R. 545, 101 Eng. Rep. 1538 (1800).
67. 12 AM. JUR. *Husband & Wife* § 584 (1940).
68. PA. STAT. ANN. tit. 48, § 114 (1950). See text accompanying note 38 *supra*.
69. However, some justification for not allowing relief in this situation would be that each of these trials would present the offending collateral issue of whether a ground for divorce existed.

is already at an end, and that there would be no remaining domestic peace and felicity to be preserved. Thus, public policy would no longer be served by prohibiting an interspousal suit for actions which accrued during coverture or after separation.

PROCEEDING TO PROTECT AND RECOVER SEPARATE PROPERTY

The next question presented is whether a cause of action for personal injuries is "separate property."

In *Thompson v. Thompson*,[70] a provision of the District of Columbia Code[71] similar to that of Pennsylvania[72] was construed. An authorative dissent by Justices Harlan, Holmes and Hughes observed:

> If the husband violently takes possession of his wife's property and withholds it from her she may, *under the statute*, sue him, separately, for its recovery. But such a civil action will be one in tort. If he injures or destroys her property she may, *under the statute*, sue him, separately, for damages. That action would also be in tort. If these propositions are disputed, what becomes of the words in the statute to the effect that she may "sue separately for the recovery, security and protection" of her property?
>
> But if they are conceded—as I think they must be—then Congress, under the construction now placed by the court on the statute, is put in the anomalous position of allowing a married woman to sue her husband separately, in tort, for the recovery of her property, but denying her the right or privilege to sue him separately, in tort, for damages arising from his brutal assaults upon her person. I will not assume that Congress intended to bring about any such result. I cannot believe that it intended to permit the wife to sue the husband separately, in tort, for the recovery, including damages for the retention of her property, and at the same time deny her the right to sue him separately, for a tort committed against her person.[73]

As did the majority in *Thompson*, most jurisdictions, including Pennsylvania, have ignored Mr. Justice Harlan's rationale.[74]

The result has not, however, gone unchallenged. In an emphatic dissent in *Meisel v. Little*,[75] Justice Musmanno conducted a challenging analysis of the question—what is separate property. Citing *Walker v. Philadelphia*,[76]

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70. 218 U.S. 611 (1910).

71. D.C. CODE ANN. § 1155 (1961).

72. PA. STAT. ANN. tit. 48, § 111 (1950), dealing with right of spouses to sue to recover their separate property. See text accompanying note 5 *supra*.

73. 218 U.S. at 623.

74. See Meisel v. Little, 407 Pa. 546, 180 A.2d 772 (1962); Borzik v. Miller, 399 Pa. 293, 159 A.2d 741 (1959); Shoyer v. Shoyer, 33 Pa. D. & C. 673 (1939); Smith v. Smith, 14 Pa. D. & C. 466 (1930).

75. 407 Pa. 546, 557, 180 A.2d 772, 778 (1962).

76. 195 Pa. 168, 45 Atl. 657 (1900).

he noted that under the Act of June 3, 1887,[77] "the right of a wife in an action for a tort done to her is her separate property."[78] He further noted that the rule in California allows a wife's claim for personal injuries against her husband as her separate property.[79] The English rule, as stated in *Curtis v. Wilcox*,[80] is also in accord with the dissent. In all of the above cases, *Meisel*, *Walker*, and *Curtis*, the injuries sued upon were sustained prior to coverture. Whether a cause of action for similar injuries occurring after the termination of the marriage would be considered "separate property" is not considered in these cases.

The difficulty with the position taken by Justice Musmanno is that the separate property provision in the Act of 1887 is of an exemptive nature.[81] Were this language expanded to the all encompassing interpretation suggested, the primary purpose of this legislation would be largely circumvented.[82]

Thus, the proper conclusion would seem to be that all trespass actions based on an unliquidated claim for injuries to the person are not separate property[83] excepting, as above noted, wrongful death and survival actions.[84] All other claims in trespass and assumpsit do fall within this exclusionary term.[85]

Effect of Joinder

There is an old legal maxim that the law will not permit to be done indirectly that which it will not allow to be done directly. Accordingly, it had always been clear that the same rule which prohibited a wife from suing her husband directly also prohibited her from recovering against him indirectly where he was joined as a third party defendant. In *Fisher v. Diehl*,[86]

77. Pa. Laws 1887, at 332, as amended, Pa. Stat. Ann. tit. 48, § 111 (1950).
78. 407 Pa. at 558, 180 A.2d at 779.
79. *Ibid.*
80. [1948] 2 K. B. 474.
81. See text accompanying note 5 *supra*.
82. See Algard v. Algard, 39 Pa. D. & C. 486 (1940).
83. See Chromy v. Chromy, 10 Pa. D. & C.2d 291 (1958).
84. See note 53 and accompanying text *supra*.
85. See Stemniski v. Stemniski, 403 Pa. 38, 169 A.2d 51 (1961); Lindenfelser v. Lindenfelser, 383 Pa. 423, 119 A.2d 87 (1956); Geary v. Geary, 338 Pa. 385, 12 A.2d (1940). *But see*, Davis v. Davis, 23 Pa. D. & C.2d (1950), disallowing an unliquidated assumpsit claim as not being separate property, citing, Miller v. Miller, 44 Pa. 170 (1863), which held that an action in covenant to prevent waste and destruction of real estate was unliquidated and not separate property. Note also that property owned as tenants by the entireties is not "seperate property"; Mower v. Mower, 367 Pa. 325, 80 A.2d 856 (1957); Wakefield v. Wakefield, 149 Pa. Super. 9, 25 A.2d 841 (1952) unless or until there is an offer to partition or until some violation of the entireties agreement occurs. Stemniski v. Stemniski, *supra*; Lindenfelser v. Lindenfelser, *supra*; Shank v. Shank, 54 Dauph. Co. Rep. 255 (Pa. C.P. 1944).
86. 156 Pa. Super. 476, 40 A.2d 912 (1944).

a husband and wife instituted a trespass action against a third party to recover damages arising from a collision between the husband's vehicle, operated by him, and the third party's vehicle, operated by his employee. The third party secured a severance of the actions and joined the husband as an additional defendant on the theory that the husband was solely or jointly liable for the accident. A jury verdict was rendered against the third party and the husband. Passing on the propriety of the joinder, the Pennsylvania Supreme Court stated:

> The action of the court below was not equivalent to permitting an action by the wife against her husband. Her husband is not a party defendant to the action as far as she is concerned. The judgment against him, as restricted by the Court,[87] is not enforceable by her nor does it enure to her benefit. It is simply a judgment enuring to the benefit of the original defendant if he pays or is required to pay the wife's judgment; and it then requires the husband to pay to the original defendant only one-half of the damages paid by the latter as a result of the joint negligence of both.[88]

In other words, the joinder of the husband as an additional defendant was held proper provided that "no execution be issued by the plaintiff [wife] on the judgment entered against the additional defendant [husband], 'so that . . . [the wife] may recover only from the original defendant . . . [third party], and that the . . . [third party], original defendant, may obtain only contribution from . . . [the husband].' "[89]

In *Koontz v. Messer*,[90] a similar result was achieved by using this same logic. In that case a wife instituted a trespass action against the employers of her husband for injuries alleged to have been sustained by her through the negligence of her husband while engaged in the course of his employment. On the theory that the husband-employee was liable over to his employers, the husband was brought upon the record as an additional defendant and the jury returned a verdict in favor of the wife against the employers and in favor of the employers against the husband-employee. The Pennsylvania Supreme Court held that the wife, on the theory of *respondeat superior*, could sue the employers of her husband even though she could not sue her husband, since the personal immunity of the husband from suit by his wife

87. The trial court stated that it was its duty "to see that the rights of the parties are preserved and to control *any execution* that might be issued on any judgments rendered, so that (the wife) may recover only from the original defendant, [the third party], and that the [third party] may obtain only contribution from [the husband]." *Id.* at 480, 40 A.2d at 914. (Emphasis added.)

88. *Id.* at 483, 40 A.2d at 916.

89. *Id.* at 487, 40 A.2d at 918.

90. 320 Pa. 487, 181 A.2d 792 (1935).

did not prevent him, as an additional defendant, from being liable by way of contribution to the third parties sued by the wife.

The distinguishing feature of the *Fisher* and *Koontz* cases is illustrated by the situation presented by the recent case of *Kiser v. Schlosser*.[91] Here, a wife brought an action to recover damages for personal injuries against a third party, who, in turn, joined the husband as an additional defendant. This time a jury verdict was returned in favor of the wife against her husband alone. It was held that although the husband was properly joined as a defendant for purposes of contribution in the action by his wife against the third party he could not be directly liable to his wife.[92]

Whatever the propriety of the logic behind the state of the law regarding joinder and interspousal immunity, as thus far illustrated an abrupt change occurred with the recent case of *Ondovchik v. Ondovchik*.[93] Over the dissents of Chief Justice Bell and Justice Jones, the Pennsylvania Supreme Court reversed the trial courts *n.o.v.* action of setting aside a verdict rendered solely against the defendant spouse. As in the *Fisher* case, the plaintiff spouse did not sue her husband directly but allowed the fortuity of joinder to bring him into the action. The court said:

> The mere presence of a husband or a prospective husband as an additional defendant in a suit does not bar recovery. The action proceeds against the original defendants only, exactly as it would have had the additional defendant not been named. The verdict of the jury does not change the nature of the litigation; it is rather the end result and not the equivalent of a suit or action so as to bar commencement of suit itself.[94]

It is true that the statutory prohibition uses the word "sue" and not the word "recover";[95] yet, the public policy underlying interspousal immunity hardly seems served by such a narrow construction. In addition, the approach taken by *Ondovchik* might well open the door to spouse plaintiffs for "defendant shopping" as a means of circumventing the immunity statute by the joinder procedure. It is even conceivable that a counterclaim by one spouse against another might be sought as an exemption from the prohibition, although at least one lower court case has answered that it should not so operate.[96]

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91. 389 Pa. 131, 132 A.2d 344 (1957).

92. The court concluded that the error was not prejudicial to the husband and wife and could be corrected by striking the verdict in favor of the wife against her husband from the record.

93. 411 Pa. 643, 192 A.2d 389 (1963).

94. *Id.* at 647, 192 A.2d at 391.

95. See PA. STAT. ANN. tit. 48 § 111 (1950).

96. Coyle v. Coyle, 3 Pa. D. & C.2d 32 (1954).

The difficulties and incongruities presented by *Ondovchik* were short lived for in *Daly v. Buterbaugh*,[97] reexamination of that rational resulted in its explicit rejection:

> The distinctions between *Meisel* and *Ondovchik* are not of such nature as to justify the application of two different rules. . . . [R]ecognition of the right of joinder as an additional defendant in an action by a wife against a third party is only for the purpose of protecting the right to contribution of the third party against the husband and does not create any right in the wife as against her husband. . . . [I]t is the impact of litigation upon the relationship of a wife and husband which our case law and public policy proscribe, and vice versa. Lastly, the distinction drawn in Ondovchik between the *verdict*—the so-called "end result" of the litigation, and the *suit*, the inception of the litigation, is a distinction without a difference.[98]

In *Daly* the husband and wife instituted joint trespass actions against a third party who, in turn, secured a severance of the actions and joined the husband plaintiff as an additional defendant. The jury returned a verdict in favor of the wife plaintiff against both husband and the third party. It was only the judgment as entered in favor of Mrs. Daly against her husband which was the subject of appeal and which was reversed. The rejection of *Ondovchik* by the *Daly* case may properly be construed as a return to the rationale of *Koontz, Fisher* and *Kiser*.[99]

The only remaining situation where the interjection of a third party or agency might serve potentially to circumvent the statutory immunity is that concerned with the estate of tenancy by the entireties. What result should be reached when an estate of tenancy by entireties—as an entity separate and apart from the husband and wife as individuals—attempts to sue or is sued for injuries sustained or originated by it? The factor of tenancy by the entireties has not yet appeared in cases concerned with interspousal immunity, but it has received attention in the area of imputation of negligence and where unconsionability of recovery by one for his own wrong is a factor. In both of the latter situations the courts have tended to look beyond the separate entity concept of tenancy by the entireties to the husband and wife as individuals.

Thus, while it would be improper to state that the negligence of a guilty spouse is imputed to the innocent and injured spouse—absent an agency relationship (not created by virtue of the family relation alone)[100] neverthe-

97. 207 A.2d 412 (Pa. 1965).

98. *Id.* at 417. Justice Roberts joined by Justice Musmanno filed a lengthy dissent.

99. See text accompanying notes 85, 89, 90 *supra*.

100. Rodgers v. Saxton, 305 Pa. 479, 158 Atl. 166 (1931); Cox v. Roehler, 316 Pa. 417. 175 Atl. 417 (1924); Maloney v. Rodgers, 184 Pa. Super. 342, 135 A.2d 88 (1957); Fry v. Marconi, 20 Pa. D. & C.2d 575 (1959).

less, recovery is denied on the theory that the guilty party would be recovering for his own wrong.[101] Consequently, it would appear that whatever use of the estate of tenancy by entireties might be attempted to circumvent interspousal immunity would be defeated by the public policy argument of unconscionability of recovery by one for his own wrong.

CONCLUSION: WHAT THE RULE SHOULD BE

The statute which bars interspousal litigation should be repealed. While this Article attempts to be objective in its presentation of the present status of interspousal immunity in Pennsylvania, it is believed that two factors have been shown to contribute heavily in favor of repeal. First, the underlying public policy supporting the retention of immunity have little or no value in today's modern society. Second, the wealth of exceptions, many of them inconsistent with the basic-policies, have created confusion, uncertainty and may even spawn procedures which constitute fraud upon our courts. Anyone agreeing that the "knowne certaintie of the law is the saftie of all" and that fraud upon our courts in domestic relations cases is already too plentiful will concur in such a repeal.

101. See Stitzinger v. Stitzinger Lumber Co., 187 Pa. Super. 453, 144 A.2d 486 (1958); Nieman v. Watkins, 81 Dauph. Co. Rep. 344 (Pa. C.P. 1963).

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