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PERSONAL INJURY TORTS BETWEEN SPOUSES

WILLIAM E. McCURDY

A MARRIED WOMAN may have been injured by her husband by conduct which if it had injured a person not his wife would be actionably tortious; or a married man may have suffered such injury from acts of his wife. Such acts may have arisen from or have been connected with marital relation; injuries may have been inflicted intentionally and wilfully; carelessness may have occurred in the operation of the domestic establishment or of the family automobile and there may or may not have been liability insurance. The fact that the injured person and the person causing the injury were husband and wife may have been co-incidental; or one spouse may have injured the other while acting as servant or employee of a third person. Or tortious injury to one spouse caused by the other may have occurred prior to marriage, as for example when one is injured by the other's negligent operation of an automobile and the parties later marry. Do causes of action in tort arise and are civil remedies that would be available to persons not husband and wife available to one spouse against the other? *

I.

At common law a woman upon marriage continued to own property which she owned at such time,¹ with the exception of chattels

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* For an earlier discussion see McCurdy, Torts Between Persons in Domestic Relation, 43 Harv. L. Rev. 1030, 1041 (1930).
For a discussion of property torts see McCurdy, Property Torts Between Spouses and Use During Marriage of the Matrimonial Home Owned by the Other, 2 Vill. L. Rev. 447 (1957).

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personal which became her husband's by operation of law.² The husband acquired certain rights in her other property,³ among which was the right during coverture to reduce to possession, and then keep as his own, the proceeds of her choses and rights in action.⁴ She also continued subject to antenuptially incurred obligations and liabilities.⁵ With similar effect a woman during marriage had legal capacity to acquire and own⁶ (except that the husband had an unqualified right to her services and earnings;⁷ he also came under a duty to support).⁸ A married woman had no capacity to contract,⁹ but for tortious injury to her person she acquired a right of action,¹⁰ and for her own tortious acts she became liable.¹¹ But she had no capacity to sue or be sued. If a right or liability or obligation sought to be enforced or redressed during coverture was substantively hers, action was brought by or against her in the joint names of husband and wife.¹² The usual application of this joinder was in actions to obtain judgments for antenuptial debts owed the wife¹³ and for tortious injury to the wife caused by a third person (either antenuptial or during marriage).¹⁴ Conversely, if a woman was a debtor¹⁵ or subject to a tort liability¹⁶ at the time of marriage, or after marriage committed a tort,¹⁷ since the liability was substantively hers but she lacked capacity to be sued in her own name, husband and wife would be joined as parties defendant. A judgment if obtained during coverture belonged to or became the obligation of the husband. If marriage terminated before judgment, the right or liability remained that of the woman.¹⁸

Since a married woman lacked capacity to contract with third persons or to sue or be sued in her own name, it would follow that she could not contract or enter into transactions with her husband, or sue, or be sued by him. But another reason or explanation for such result was also advanced. Husband and wife were legally one person, and no person can contract with or sue himself. Consequently these were disabilities of the husband (who was not otherwise under disabilities as the result of marriage) as well as those of his wife. Not only could they not sue one another for allegedly tortious conduct but in accordance with this unity concept there could be no cause of action, it would seem, anymore than there could come into existence a contract between them. Causes of action for antenuptial torts committed by one against the other having come into existence (and there being no incapacity to sue or be sued until marriage) were nevertheless extinguished upon marriage, just as were antenuptial debts of one to the other.

Apart from the above and at a time when valid marriage could terminate only by death, no action for personal injury tort between spouses could be maintained after the marriage ended, for if it could be contended that a cause of action arose in spite of coverture, that the reason why no action would lie was only because of the necessity of joinder of husband and wife as parties to the suit, and that the procedural disability would end upon death, nevertheless no action could be maintained thereafter because a cause of action for tort would not survive the death of either party.

Dissolution of valid marriage by divorce was not provided for in England by general law until 1857 when Parliament enacted the

20. See 1 BLACKSTONE, COMMENTARIES *430, 432, 433.

But the unity concept is inconsistent with most of the respective property rights of the spouses at common law. It was applied in the criminal law to acts of the one against the property of the other; but otherwise it was disregarded in criminal law. It was not applied in non interspousal torts committed by or against the person of a married woman. It was disregarded in courts of equity, and was not applicable in the ecclesiastical courts in determinations of validity and invalidity of marriage and in divorces a mensa et thoro. It rather serves to sum up a result reached. See McCurdy, Torts Between Persons in Domestic Relation, 43 HARV. L. REV. 1050, 1034, 1035 (1930); McCurdy, Property Torts Between Spouses and Use During Marriage of the Matrimonial Home Owned by the Other, 2 VILL. L. REV. 447, 450 (1957). See also Tooth v. Tillyer, [1956] Argus L.R. 891, where it was said that "one may suppose that the conception of the unity of husband and wife was but an ex post facto explanation and not a source of the state of early English law ..." referring to 4 BRACKTON, DE LEGIBUS, 335 (Woodbine ed. 1942) and to 2 POLLOCK & MAITLAND, THE HISTORY OF ENGLISH LAW, 405-06 (2d ed. 1898).
22. See cases cited note 133 infra.
Matrimonial Causes Act which specified the grounds for divorce and established a court with jurisdiction over such cases.  

Could it now be thought that interspousal non-liability in tort was a rule applicable only in interspousal suits? 

In Phillips v. Barnet, which arose after the enactment of the Act of 1857, it was held that no action after divorce could be brought by a former wife against her former husband for alleged assaults and batteries committed during coverture. Blackburn, J., reasoned: "I was at first inclined to think, having regard to the old procedure and the form of pleas in abatement, that the reason why a wife could not sue her husband was a difficulty as to parties; but I think that when one looks at the matter more closely, the objection to the action is not merely with regard to the parties, but a requirement of the law founded upon the principle that husband and wife are one person. . . . [T]he reason is not the technical one of parties, but because, being one person, one cannot sue the other. Then does dissolution of the marriage by divorce make that a cause of action which was not so before? I do not see why it should." Lush, J., expressed the same view. Field, J., added: "I think that we should be establishing a dangerous precedent if we held that this action would lie." The reason why it would do so is not explained.

Phillips v. Barnet was followed the next year in Maine in Abbott v. Abbott where after divorce the former wife brought action against her former husband and others for alleged assault and battery in placing her forcibly and wrongfully in an insane asylum. It was held the action was not maintainable, the court saying: "The theory upon which the present action is sought to be maintained is, that coverture merely suspends and does not destroy the remedy of the wife against her husband. But the error in the proposition is the supposition that a cause of action or a right of action ever exists in such a case. There

25. 20 & 21 Vict. c. 85. Prior to that time and starting about 1669 a dissolution of divorce could be obtained only by act of Parliament. Jurisdiction of the ecclesiastical courts extended only to declaring a marriage valid or invalid and to granting divorces from bed and board. In the colonies, and later in the early days of the states, matrimonial causes were dealt with by governor and council or by private act of the legislature. General divorce statutes to be applied by the courts appeared earlier than in England. Divorce by private statute has become obsolete. See McCurdy, Divorce—A Suggested Approach With Particular Reference to Dissolution for Living Separate and Apart, 9 Vand. L. Rev. 685, 686-89 (1956).


27. See also Tooth v. Tillyer, [1956] Argus L.R. 891: "... [T]hat conception [of the unity of husband and wife] is as much inconsistent with the existence of a liability of the one to the other as it is inconsistent with the existence of a remedy against the other."

28. 67 Me. 304 (1877).
is not only no civil remedy but there is no civil right, during coverture, to be redressed at any time. There is, therefore, nothing to be suspended. Divorce cannot make that a cause of action which was not a cause of action before divorce. The legal character of an act of violence by husband upon wife and of the consequences that flow from it, is fixed by the condition of the parties at the time the act is done. If there is no cause of action at the time, there never can be any.” The court expressed the opinion that the plaintiff had remedy enough in the criminal law, habeas corpus, and divorce, and that it would be poor policy to grant the remedy sought. The policy referred to may be, because of the context, an objection to multiplying litigation. It was also held that the co-defendants who allegedly helped the husband were not liable since they had acted under his authority.29 There was no suggestion that the reason why the husband was not liable was because of a personal immunity.

At common law, therefore, the combination of the various incidents of marriage, some substantive, some procedural, some conceptual, made it impossible for one spouse ever to be held civilly liable as a tortfeasor,30 in any situation, and without exception, to the other for any act, antenuptial or during marriage, causing personal injury which would have been a tort but for the marriage.31 Is the matter of liability different as a result of Married Women’s Property (or Emancipation) statutes or related legislation? 32

II.

The first English Married Women’s Property Act general in scope was enacted in 1870.33 After making provision for holding and

29. Cf. Ewald v. Lane, 104 F.2d 222 (D.C. Cir. 1939) (25 Cornell L.Q. 312; 27 Geo. L.J. 991; 38 Mizz. L. Rev. 745) (holding that a third person would be liable for conspiring with the husband to injure the wife).
30. Acts committed by husband or wife against the person of the other would not necessarily be lawful. Some acts would be crimes, such as assaults and murder, and punishable as such. Some would furnish grounds for divorce a mensa et thoro, such as acts of extreme cruelty.
31. See McCurdy, Torts Between Persons in Domestic Relation, 43 Harv. L. Rev. 1030 (1930).
32. The evolution of the doctrine of the married woman’s equitable separate estate (starting at the beginning of the Eighteenth Century and forecasting the later married women’s statutes of the next century) developed important modifications in matters of property and contract but did not operate in matters of tort beyond injuries to or interference with the separate estate, and then on equitable principles in controversies including those between the wife and her husband. See McCurdy, Torts Between Persons in Domestic Relation, 43 Harv. L. Rev. 1030, 1035 (1930); McCurdy, Property Torts Between Spouses and Use During Marriage of the Matrimonial Home Owned by the Other, 2 Vill. L. Rev. 447, 450-53 (1957).
33. 33 & 34 Vict. c. 93 (1870).
acquiring certain separate property, it provided\(^{34}\) that a married woman "shall have in her own name the same remedies, both civil and criminal, against all persons whomsoever for the protection and security of such [separate property] as if such . . . property belonged to an unmarried woman . . . ."

The Married Women's Property Act of 1882\(^{35}\)—considered the basic English Act—enlarged the scope of the separate estate and provided that every married woman "shall have in her own name against all persons, including her husband, the same civil remedies and also (subject, as regards her husband, to the proviso hereinafter contained)\(^{36}\) the same remedies and redress by way of criminal proceedings, for the protection and security of her own separate property, as if such property belonged to her as a femme sole, but, except as aforesaid, no husband or wife shall be entitled to sue the other for a tort. . . ."\(^{37}\)

It is clear that under this statute neither husband nor wife can sue the other for a personal injury tort\(^{38}\) committed during marriage.\(^{39}\)

Married women's property statutes were enacted by a few legislatures in the United States prior to 1850.\(^{40}\) Thereafter a steady progression of such enactments in those and other states occurred, some states amending and extending their statutes several times.\(^{41}\) Most of the earlier statutes were modeled upon the equitable separate estate doctrine but made the statutory estate a legal one and made changes in some of the inherent shortcomings of the equitable estate.

In *Peters v. Peters*,\(^ {42}\) an action was brought by a wife against her husband for assaults and batteries alleging that he had been con-

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\(^{34}\) 33 & 34 Vict. c. 93 § 11 (1870).

\(^{35}\) 45 & 46 Vict. c. 75 (1882).

\(^{36}\) The proviso contains limitations upon criminal proceedings taken by the wife against her husband concerning acts of the husband in reference to her property: no such proceeding while living together, nor while living apart for conduct while living together except done when leaving or deserting or about to do so.

Section 16 contains similar limitations in reference to the husband.

\(^{37}\) 45 & 46 Vict. c. 75 § 12 (1882). The Married Women's Property Act, 1893, 56 & 57 Vict. c. 63, deals with contracts and wills. The Law Reform (Married Women and Tortfeasors) Act, 1935, 25 & 26 Geo. 5, c. 30, abolished the husband's liability for his wife's antenuptial contracts and torts and her postnuptial torts, which the Act of 1882 in § 14 had limited. It also reafirms § 12 of the Act of 1882.

\(^{38}\) See for property torts, McCarty, *Property Torts Between Spouses and Use During Marriage of the Marital Home Owned by the Other*, 2 Vill. L. Rev. 447, 454 (1957).


\(^{40}\) Me. Laws, c. 117 (1844); Mass. Laws, c. 208 (1845); N.H. Laws, c. 327 (1846); N.Y. Laws, c. 200 (1848).


\(^{42}\) 42 Iowa 182 (1875).
vicited of the offense and that she had been forced to leave him. The Iowa Code (section 2211) provided that “a wife may . . . prosecute and defend all actions at law or in equity, for the preservation and protection of her property rights, as if unmarried.” Section 2204 provided that either husband or wife could maintain an action for his or her property against the other (who had obtained possession and control of it) “in the same manner and extent as if they were unmarried.” It was held that the action for assault and battery could not be maintained, since the statute contained no provisions for it. Section 2204 controlled actions between spouses, and Section 2211 applied only in respect to actions by or against third persons. The contention that a personal injury tort action was property was rejected: such action is not property unless the action will lie, and the action will not lie unless it is property. There is no reference in the opinion to any considerations of policy furthering marital harmony.

But in an earlier case in a New York lower court, Longendyke v. Longendyke,43 conjugal tranquillity had been referred to. There it was also held that a wife could not maintain an action against her husband for assault and battery. New York Laws of 1860 provided “married women may sue and be sued in all matters relating to their property and may bring actions to recover damages to their person or character, against any person or body corporate, which damages when so recovered shall be their sole and separate property.” The court was of the opinion that although the words of the statute might literally be read to confer the right of action contended for, it did not do so since it was only a property act; to apply it literally would be contrary to policy and destructive of conjugal union and tranquillity, and there might be perpetual controversies. The same result was reached in Freethy v. Freethy44 (an action for slander). New York Laws 1862, section seven provided that “any married woman may bring and maintain an action in her own name, for damages, against any person, or body corporate, for any injury to her person or character, the same as if she were sole.” The court reasoned that the common law in the matter in question had not been changed by the statute and observed there was nothing contained in it that would authorize suits by husbands against their wives; moreover public policy of fostering peace and happiness of the conjugal relation (particularly in alleged wrongs to character) precludes finding a legislatival intent to make such a striking innovation, unless such intent is

43. 44 Barb. 366 (N.Y. Sup. Ct. 1863).
44. 42 Barb. 641 (N.Y. Sup. Ct. 1865).
clearly manifested; it is not to be thought that the legislature would
leave it to the construction of the courts. In *Schultz v. Schultz* the
New York Supreme Court declined to follow these cases, observing
that ill treatment of the wife by the husband (assault) “is more de-
structive to conjugal union and tranquillity than the declaration of a
right in the wife to maintain an action against her husband” and that
it was not unlikely that such a right “would operate as a restraint
upon militant husbands.” This ruling was, however, reversed in the
Court of Appeals without opinion. The later New York Domestic
Relation Law provided that “a married woman has a right of action
for an injury to her person, property or character or for an injury
arising out of the marital relation, as if unmarried.” Again it was
held, *Allen v. Allen,* without opinion, that an action by a wife
against her husband for malicious prosecution would not lie. In 1937
a statute was enacted amending the Domestic Relation Law to pro-
vide expressly that husband or wife has a right of action against the
other for wrongful or tortious acts resulting in injury to person or
property.

Married women’s statutes have by now been enacted in every
state. A few of the statutes are closer to the common law in some
matters at least than are others, but most of the statutes are no longer
so closely confined to the model of the equitable separate estate, nor
deal exclusively with matters of separate property. Some are more
comprehensive than others. In addition to providing typically that
property owned by a woman at the time of marriage or acquired by
her during marriage shall be and remain hers in the same manner
and to the same extent as though she were unmarried, most of the
statutes deal variously with capacity to contract and to convey or
otherwise transfer, with services and earnings, and rights of action
and suits by and against married women.

45. 27 Hun 26 (N.Y. Sup. Ct. 1882).
46. 89 N.Y. 644 (1882).
48. 246 N. Y. 571, 159 N.E. 656 (1927) (37 Yale L.J. 834).
49. Pound, J., dissenting in an elaborate opinion.
50. N.Y. Laws, c. 669 (1937). At the same time a provision was enacted amending
the insurance law in respect to liability insurance.

See note 16 infra.
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In most states it is provided that a married woman may (or can
or shall) sue (or be sued) as if (or in the same manner as if) single
(or unmarried).52 In some of these states she may sue, or be sued,
"separately" or "without joinder of her husband".53 In some she
may sue or be sued in her own name, or alone.55 In Nevada she may
sue and be sued alone when living separate and apart from her
husband.56 Torts may or may not be mentioned. Some statutes ex-
pressly include them but in general terms;57 some mention injuries
to person or character.58

The Texas statute provides that a married woman may sue and
be sued in her own name after disability of coverture is removed
with consent of her husband for mercantile or trading purposes.59
The Tennessee statute provides that a married woman is fully emanci-
pated from all disability on account of coverture.60 In Alaska civil
disabilities of a married woman not recognized of her husband are
repealed;61 in Minnesota she has the same rights as a woman as her
husband has as a man,62 in Oklahoma she has the same right to re-

(1953); Conn. Gen. Stat. § 46-9 (1958); Del. Code Ann. tit. 13, § 311 (1953);
Ann. § 21-6-6 (Supp. 1955); N.D. Rev. Code § 14-0705 (Supp. 1953); Ohio Rev.

(1958); Fla. Stat. Ann. § 708.08 (1955); Iowa Code R.C.P. 10 (1951); Me. Rev.
§ 30-208 (1951).


(1956).


(Supp. 1956); N.D. Rev. Code § 14-0705 (Supp. 1953); S.D. Code § 14.0207 (1939);


cover for her injuries as the husband has for his; in Oregon all civil
rights that a husband has, his wife has also.

Few statutes specifically refer to actions between the spouses.
In Arizona, Indiana, and South Carolina a married woman may
sue alone when the action is between her and her husband. In Mis-
sissippi spouses may sue each other; in Washington husband or
wife may maintain an action for property against the other as if un-
married.

In Massachusetts (also Hawaii) suits between husband and
wife are not authorized (actions can be brought to the same extent
as before the statute, i.e., as at common law and equity). In New
Jersey the statute permits no suit between husband and wife except
as heretofore or herein authorized. In Pennsylvania no suit between
husband and wife is permitted except for divorce or to protect and
recover separate property or after the wife has been deserted.
In Georgia either husband or wife can recover for tort to the person
or reputation of the woman (a provision which seems referable to
injuries committed by a third person)—otherwise her legal civil
existence is merged in that of the husband.

In only four states—Illinois, New York, North Carolina, and Wisconsin—do the statutes contain provisions dealing expressly
with interspousal personal injury torts. They will be considered at
later points, after consideration of cases arising under other statutes.

Since a basic purpose of married women's statutes is to place a
married woman in respect to her property in the same position as
though she was not married not only with reference to outsiders but
in reference to her husband's interests therein and control thereof, it
would be a negation of such purpose not to afford her actions and
remedies for its protection and redress of injuries thereto. In a few

70. Cf. P.R. Laws Ann. tit. 32, § 304; tit. 31, § 286 (when deserted by her
husband or when action is between spouses the woman may sue or be sued alone).
77. N.Y. Dom. Rel. Law § 57. See also N.Y. Ins. Law § 167(3).
jurisdictions she is in the position of a feme sole with reference to third persons, but in the same position with reference to her husband as she would have been if had her property been an equitable separate estate (and the husband is similarly treated with reference to his property). But in almost all states where the statute does not provide differently a spouse has been afforded the same actions and remedies against the other spouse as against third persons even though the statute does not expressly deal with the matter. It is often said that in property matters the unity concept has been abrogated, and that the spouses have separate legal identities and are to this extent strangers to each other. It is apparent, however, that these actions can be as disruptive of domestic harmony, in some cases more so, than actions for some types of personal injuries. But denial of the action can also be disruptive and this can be equally so in some types of personal injuries.

In some of the states whose statutes do not deal specifically with interspousal personal injury torts, it is clear that the statutes (for example Massachusetts and New Jersey) are so worded as to preclude or prohibit civil actions between husband and wife for any kind of tortious personal injury (limiting redress to the criminal and divorce law). It is also clear that some of the statutes in dealing with a married woman's rights of action and liabilities for tort and capacity to sue and be sued by using such terms as "separately" or "separate from her husband" cover expressly only the position of the married woman with respect to persons other than her husband. On the other hand the statutes of some states while not dealing specifically with personal injury torts between husband and wife do expressly permit actions between them without mentioning any qualification. Many married women's statutes, however, are worded in such a way that no express distinction between property injuries and personal injuries is made and the language is not referring to third persons only, but actions between spouses are neither expressly prohibited nor expressly recognized, and literally by not being excluded are included. The terminology is simply broad and neutral.

By the weight of authority personal injury actions between spouses have not been allowed by the courts. The common law has not been changed unless the statute expressly or by necessary implication so

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80. McCurdy, Property Torts Between Spouses and Use During Marriage of the Matrimonial Home Owned by the Other, 2 Vill. L. Rev. 447 (1957); McCurdy, Torts Between Persons in Domestic Relation, 43 Harv. L. Rev. 1030, 1037-41 (1930).
provides. Unity of husband and wife has been abrogated only as
to property. This conclusion is usually buttressed by stressing public
policy against disruption of domestic peace, harmony, and tranquillity.
This result is reached irrespective of the nature of the conduct, whether
it is intentional, wilful or wanton (such as assault and battery, malici-
ous prosecution, false imprisonment, libel and slander) or negligent
(almost always situations such as automobile injury cases where lia-
Bility insurance would compensate if there were liability), and irre-
spective of whether the action is brought after separation, divorce or
death. Sometimes additional reasons are given in support of this re-
sult such as the possibility of opening a Pandora's box of litigation
and the danger of plundering estates or of interspousal collusion. A
leading case has been that of Thompson v. Thompson which involved
assault and battery and was decided under a District of Columbia
statute which empowered married women "to sue separately" for torts
committed against them. The domestic harmony objection voiced
in that case has been applied in cases where the statutes were not so
restrictively worded.

81. "... [A] legislative intention to modify this ancient common-law concept of
the oneness of the spouses cannot rest upon doubtful implication". Kennedy v. Kamp,

82. "It [marital immunity] is as much a part of our law as if it were statutory
and cannot now be repudiated by the judiciary". American Auto Ins. Co. v. Molling,
239 Minn. 74, 57 N.W.2d 847 (1953).

83. Brown v. Gosser, 262 S.W.2d 480 (Ky. 1953) (42 Ky. L.J. 497; 32 Tex
L. Rev. 884) ; "The common law rule was originally based upon the historical fiction
of the unity of husband and wife, plus the inability of a person to sue himself. But
this concept has been abrogated by the enactment of women's emancipation statutes.
Since then courts have seized upon other theories to deny the right. The principal
one is that to permit suits for torts between husband and wife would be to
disturb domestic tranquility and conjugal bliss . . . ."

84. 218 U.S. 611 (1910). Harlan, J., with whom concurred Holmes and Hughes,
JJ., delivered a dissenting opinion.

85. Welch v. Davis, 342 Ill. App. 69, 95 N.E.2d 108 (1950) (22 Miss. L.J. 256);
Willott v. Willott, 333 Mo. 896, 62 S.W.2d 1084 (1933); Comstock v. Comstock,
106 Vt. 50, 169 Atl. 903 (1934); McKinney v. McKinney, 59 Wyo. 204, 135 P.2d
940 (1943) (9 U. Surr. L.J. 16).

See also Cubbison v. Cubbison, 73 Cal. App. 2d 436, 166 P.2d 387 (1946);
Shiver v. Sessions, 80 So. 2d 905 (Fla. 1955); Carmichael v. Carmichael, 53 Ga.
App. 663, 187 S.E. 116 (1936); Sink v. Sink, 172 Kan. 217, 239 P.2d 933 (1952);
New Amsterdam Casualty Co., 6 So. 2d 774 (La. App. 1942); Lubowitz v. Gaines,
293 Mass. 39, 198 N.E. 320 (1936); Kircher v. Kircher, 288 Mich. 669, 286 N.W.
120 (1939); American Auto. Ins. Co. v. Molling, 239 Minn. 74, 57 N.W.2d 847
(1953); Smith v. Smith, 205 Ore. 20, 269 P.2d 748 (1954); Apitz v. Dames,
205 Ore. 242, 287 P.2d 885 (1955); Smith v. Smith, 205 Ore. 286, 287 P.2d 572
(1955); Serrano v. Gonzalez, 68 F.R. 579 (1948); Furey v. Furey, 193 Va. 727,

See further Bissonnette v. Bissonnette, 20 Conn. Super. 403, 137 A.2d 354 (1957),
aff'd, 142 A.2d 527 (Conn. 1958) (applying Massachusetts law); Esminger v.
Esminger, 222 Miss. 799, 77 So. 2d 308 (1954); Hansen v. Hansen, 274 Wis. 262,
80 N.W.2d 230 (1956) (applying Missouri law); Garlin v. Garlin, 260 Wis. 187,
50 N.W.2d 373 (1951) (applying Illinois law).
In *Sink v. Sink*, express approval was given to the policy against allowing personal tort actions between husband and wife, and in *Vigilant Insurance Co. v. Bennett*, approval was given to the distinction between allowing actions for property torts and not allowing actions for personal torts.

A substantial minority of courts, however, have allowed personal injury actions between spouses. Unless the statute expressly or by necessary implication precludes them, interspousal actions will lie.

A leading case has been that of *Brown v. Brown*, an action by a wife against her husband for damages for assault and battery and false imprisonment. The court construed the Connecticut Married Women's Act broadly as changing the foundation of the legal status of husband and wife, and, the statute not having modified the civil rights that accord with the status founded upon separate legal identities, the rights of the spouses are the same as before marriage, except the reciprocal rights and obligations inherent in the marital relation. In the fact that the wife has a cause of action against her husband for personal injuries the court saw nothing "injurious to the public, or against the public good, or against good morals." "The danger that the domestic tranquillity may be disturbed" and "courts will be filled with actions" the court thought "not serious." The same result was reached in *Bushnell v. Bushnell* where the action was for negligence.

Again in allowing such actions no distinctions are usually made between intentional and negligent conduct or whether the action is brought during marriage or after separation, divorce, or death.

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87. Leach v. Leach, 300 S.W.2d 15 (Ark. 1957) (7 Catholic U.L. Rev. 59; 23 Mo. L. Rev. 103; 34 N.D.L. Rev. 71; 11 Vand. L. Rev. 618) refers to the majority view as dwindling.
88. To allow the action broad provisions in statutes and even very general rights/remedies provisions in constitutions have been at times relied on. See Damm v. Elyria Lodge, 158 Ohio St. 107, 107 N.E.2d 337 (1952) (32 B.U.L. Rev. 467; 14 Ohio St. L.J. 331; 22 U. Cinc. L. Rev. 122).
89. 88 Conn. 42, 89 Atl. 889 (1914) (23 Yale L.J. 613).
90. 103 Conn. 583, 131 Atl. 432 (1925) (24 Mich. L. Rev. 618; 10 Minn. L. Rev. 439).
91. "A strong minority of the more recent cases hold in favor of recovery by a wife for intentional injuries inflicted by the husband, the opinions in which cases are very persuasive." Damm v. Elyria Lodge, 158 Ohio St. 107, 107 N.E.2d 337 (1952) (32 B.U.L. Rev. 467; 14 Ohio St. L.J. 331; 22 U. Cinc. L. Rev. 122).
See also Langley v. Schumacker, 46 Cal. App. 607, 297 P.2d 977 (1956); Rains v. Rains, 97 Colo. 19, 46 P.2d 740 (1935); Lorang v. Hays, 69 Idaho 440, 209 P.2d...
In some states that have generally denied the action there has been more recently a tendency to question the soundness of the majority rule as broadly applied. A few have overruled prior decisions. And some recent cases of first impression have joined the minority view.

In Smith v. Smith, under a statute vesting in the wife such civil rights belonging to the husband which had not heretofore been granted her by statute, it was held that spouses could not sue one another for negligent tort injury. Speaking generally, however, the court said: "It would seem that the effect of suit upon marital felicity must depend upon the facts of the particular case. Action by a wife against her husband may conceivably engender great bitterness where it is based on an intentional wrong or where there is serious and bitter disagreement as to the facts. It is not unusual that the credibility of witnesses is questioned in damage cases." But "at least so far as acts of negligence are concerned, courts and writers alike recognize that there are areas of marital intimacy within which actions for negligence should not be allowed. . . . Those areas are not and we think,


Our consideration of the question convinces us that the minority rule is more in keeping with modern thought and the later cases on the subject." Brown v. Gosser, 262 S.W.2d 480 (Ky. 1953) (42 KY. L.J. 497; 32 TEXAS L. Rev. 884).

93. . . . That a wife has the right to sue her husband for a broken promise involving property, and for a wrecked house belonging to her, but not for a broken arm nor a broken body" was characterized as appearing to be "a glaring inconsistency" of the law. "To make such a distinction renders the person of the wife in a marriage completely subjugated to the will of her husband, as far as civil liability is concerned, for willful and wanton injuries, and . . . such injuries are of no concern or value when placed in the scales of justice alongside property rights. This seems to be inconsistent, inhumane, and contrary to the true spirit and intent of the acts passed for the emancipation of women in an enlightened civilization. However . . . the remedy lies with the legislature." Hunter v. Living- 

94. . . . In the rare instances where the wife will sue her husband despite his objection there is probably not much tranquility to preserve . . . . In any event, it is difficult to see how a personal injury action would disrupt tranquility more than a property or contract action which is admittedly maintainable." Jacobs, J., dissenting in Koplik v. C.P. Trucking Corp., 27 N.J. 1, 141 A.2d 34 (1958).

95. Stare decisis and implied legislative acquiescence, in addition to the other reasons, have at times been referred to as precluding change. See Furey v. Furey, 193 Va. 727, 71 S.E.2d 191 (38 VA. L. Rev. 973), where the court referred to the fact that during the thirty-four years since it had been held in Keisters' Adm'r v. Keister's Ex'rs, 123 Va. 157, 96 S.E. 315 (1918), that an action would not lie for assault because the statute did not confer substantive rights, the legislature had amended the statute, but had not changed this rule.
We are not disposed to carve out the area within which actions for negligence should be allowed, or that other area in which the intimacy of the family relationship forbids recovery by the spouses."

In *Apitz v. Dames*, the same court held where a husband had shot and killed his wife and had then killed himself that an action would lie by the wife's administrator against the husband's administrator, under a statute requiring the case to be one where the deceased could have maintained an action in his lifetime, the court saying "could the wife have sued the husband for intentionally shooting her if the result had not been fatal? If it be determined by judicial decision that the wife could have sued her husband, then we recognize that the same rule would apply [to a husband attacked by his wife], for no statute has given to either husband or wife the right to bring such an action, and at early common law neither could sue the other for intentional tort. . . ." The court referred to their recent decision holding that a minor child could sue his parent for wilful and wanton injury, and after observing that "the same rule of public policy was established at common law in both situations" continued: "By strong analogy, the case also applies to husband and wife. We conclude that our duty in the pending case is clear. We must hold that if the wife had survived . . . she would have had a right of action against her husband, or against his representative. It is the virtue of the common law that as mores change, the law will also change. An old rule is eroded and a new rule attaches to the body of the law by accretion. The process is best accomplished by gradual change as justice may require in the individual case." The court concluded: "We hold that when a husband inflicts intentional harm upon the person of his wife, the peace and harmony of the home has been so damaged that there is no danger that it will be further impaired by the maintenance of an action for damages and she may therefore maintain an action." 

In *Ennis v. Truhitte*, the court referring to *Apitz v. Dames* said "there is, at least in certain types of cases, a 'trend' against the common-

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99. 306 S.W.2d 549 (Mo. 1957).
law rule [of no action]" and that that case "demonstrates plainly
enough the soundness of the trend." "In one sense, of course, if one
spouse may not sue the other there is no enforceable cause of action,
but it belies reality and fact to say that there is no tort when the
husband either intentionally or negligently injures his wife." Although
the married women's acts do not "either expressly deny or expressly
grant to a wife the right to sue her husband . . . it is now recognized that
the terminology of the statutes is broad enough to permissively cover
the matter." Two judges dissented in the holding that a wife may
sue the estate of her deceased husband for alleged wilful, wanton
and intentional injury (in the operation of an automobile). The majority
was of the opinion that the husband being dead, the policy reasons
of preserving domestic harmony upon which denial of the action is
based had vanished. The minority thought the change so far reach-
ing that it should come from the legislature.

In Taylor v. Patten\textsuperscript{100} it was held under a statute neutrally worded,
two justices dissenting, that a wife assaulted by her husband after a
divorce decree nisi becomes final can maintain an action in tort. The
court reasoned that the husband's rights to his wife's property and
the procedural requirement of joinder were the reasons at common
law against suit, that these had been abolished, and that no specific
statutory authorization was necessary. But the "special license" (in
marital and domestic conduct) should continue to prevent many suits.
The holding is perhaps limited to intentional tortious injury. A con-
curring opinion would limit it to conduct after a nisi decree.

In Brown v. Gosser\textsuperscript{101} the court, overruling prior decisions, held
under a neutrally worded statute that a wife may maintain an action
against her husband for injuries negligently caused (operation of
automobile). After observing that some of the courts professing ad-
herence to the common-law rule have departed from it "upon any
plausible excuse" and that the common-law rule of no action had been
maintained in Kentucky "to promote domestic peace and felicity" the
court said: "The argument would have a truer ring except that a wife
may now sue her husband for tort affecting her property interest . . .
It is difficult to see how an action for personal injuries would disrupt
domestic peace and tranquillity more than an action for damage to
property. But, whether this is so or not . . . the Legislature . . . has

\textsuperscript{100} 2 Utah 2d 404, 275 P.2d 696 (1954) (8 Ala. L. Rev. 142; 18 U. Det. L.J.

\textsuperscript{101} 262 S.W.2d 480 (Ky. 1953) (42 Ky. L. J. 497; 32 Tex. L. Rev. 884).
enunciated the public policy on this subject in this state by saying a married woman may sue and be sued as a single woman."

In *Damm v. Elyria Lodge*,102 a case of first impression in Ohio, it was held generally that a wife can maintain an action against her husband for negligent injury (the husband had not caused the injury but was a member of an unincorporated association at whose social gathering the wife had been injured by a portable screen). After referring to the Ohio married women's statute (whose wording was neutral) the court observed "no statute expressly prohibits actions by a wife to recover damages from her husband for personal injuries inflicted upon her by him" and that "a complete change of policy is unmistakable and should not be disregarded." 103

In *Brandt v. Keller*104 it was held that a wife can maintain an action against her husband for negligent injury. The Illinois statute provided that "a married woman may, in all cases, sue and be sued without joining her husband with her, to the same extent as if she were unmarried." Earlier statutes not containing the words "in all cases" had been construed to permit a wife to sue her husband where it was necessary to protect her own property but not to institute any other type of action against him. The court reasoned that "it may be assumed, therefore, to expand the rights of a married woman to sue and be sued . . . It is logical, therefore, that if a married woman can assert contract rights against her husband without any specific statutory mandate other than the foregoing provision allowing her to sue 'in all cases,' she should be able to assert tort rights against her husband under that same general provision. The statute cannot be construed to abrogate a husband's common-law immunity from suit by his wife for contract purposes, and be construed to perpetuate his immunity for another purpose." The court referred to the fallacy of the public policy rationale of "domestic tranquillity" saying "while courts verbalize about statutory construction, they frequently retreat under the protection of the nebulous concept 'public policy' . . . while at the same time giving approbation to criminal proceedings instituted by spouses against each other, and to actions on contracts or property rights between spouses."

Following the decision in the *Brandt* case Illinois enacted a statute providing that neither husband nor wife may sue the other for a tort

102. 158 Ohio St. 107, 107 N.E.2d 337 (1952).
103. The injury here, however, not only was not caused by an act of the husband but did not arise out of conduct of the domestic establishment.
104. 413 Ill. 503, 109 N.E.2d 729 (1952) (2 De Paul L. Rev. 285; 41 Ill. B. J. 283; 48 Nw. U. L. Rev. 75).
to the person committed during coverture.\textsuperscript{105} This is the only instance, it is believed, of an American statute that in express terms bars such actions.

In Leach v. Leach,\textsuperscript{106} it was held that a husband has a cause of action against his wife for negligent injury. The court re-affirmed its earlier decisions allowing a wife to sue her husband for either intentional or negligent injury. "By a dwindling majority which now stands at about two to one the American courts hold that she cannot maintain the action . . . . The courts following the majority view construe the emancipation acts strictly, as being in derogation of the common law, and usually suggest that recognition of suits between spouses would adversely affect harmony within the home. . . . This reasoning has never appealed to us." As to action by a husband the court reasoned: "This clause [in the married women's act that she may sue and be sued] was the basis for our holding that a wife may sue her husband in tort. There can be no sound basis for a different conclusion when the shoe is on the other foot, for in the same breath the legislature abolished her disability to sue and her immunity from being sued."\textsuperscript{107} Two justices dissenting expressed the opinion that the earlier decision allowing action by a wife for negligent injury should be overruled, but not the decision allowing action by her for intentional injury.

In North Carolina, although it was held that a wife could maintain an action against her husband for personal injury tort, the husband could not maintain such action against his wife.\textsuperscript{108} Subsequently a statute was enacted expressly allowing either to have an action against the other.\textsuperscript{109}

In Wisconsin, in dealing with the same situation,\textsuperscript{110} a statute\textsuperscript{111} was enacted expressly allowing husbands to bring personal injury actions against their wives. Since the court had already held\textsuperscript{112} that a wife could maintain such action, her action was not included.

\textsuperscript{106} 300 S.W.2d 15 (Ark. 1957) (7 Catholic U. L. Rev. 59; 23 Mo. L. Rev. 103; 34 Notre Dame Law. 71; 11 Vand. L. Rev. 618).
\textsuperscript{110} Fehr v. General Acc. Fire & Life Assur. Corp., 246 Wis. 228, 16 N.W.2d 787 (1944) (1945 Wis. L. Rev. 463).
\textsuperscript{111} Wis. Stat. § 246.075 (1931).
\textsuperscript{112} Wait v. Pierce, 191 Wis. 202, 209 N.W. 745, aff'd on rehearing, 210 N.W. 822 (1926).
New York, after the courts had repeatedly held that a wife could not maintain an action against her husband for a personal injury tort, enacted a statute expressly providing that either husband or wife has a right of action against the other for wrongful or tortious acts resulting in injury to person or property.\footnote{113} Where the defendant spouse has died after the conduct complained of, a few cases have allowed an action for personal injury tort for the reason that although the action could not have been maintained if the defendant had not died the policy of preservation of domestic harmony and tranquillity no longer operates to bar\footnote{114} or that the bar of unity has been removed.\footnote{116} When the injury has resulted in death of the plaintiff the wrongful death statute may be of the type that creates a cause of action not dependent upon whether deceased would have had an action if death had not occurred.\footnote{118} If the statute is a survival statute or creates a cause of action in terms of decedent's own right of action, denying a right of action to an injured spouse would logically result in denying recovery.\footnote{117} In intentional injuries some cases have permitted recovery, reasoning that the action could be maintained during coverture for intentional harm at least, or, if not, that the policy reason of preserving domestic harmony has ceased.\footnote{118} If the death of the defendant is the sole reason for allowing the action because there is no home thereafter to preserve, the same reason would

\footnote{113. N.Y. Laws, 1937, c. 669, added to § 57 of the Domestic Relation Law; "A married woman has a right of action against her husband for his wrongful or tortious acts resulting to her in any personal injury as defined in section thirty-seven-a of the general construction law, or resulting in injury to her property, as if they were unmarried, and she is liable to her husband for her wrongful or tortious acts resulting in any such personal injury to her husband or to his property, as if they were unmarried." See Risikoff v. Risikoff, 120 N.Y.S.2d 776 (Sup. Ct. 1953), aff'd mem., 283 App. Div. 732, 127 N.Y.S.2d 522 (Sup. Ct. 1954) (not retroactive).


115. Franklin v. Wills, 217 F.2d 899 (6th Cir. 1954) (23 Tenn. L. Rev. 1056).


lologically apply to divorce.119 Here, however, another public policy should be considered, if an action will not lie during coverture, i.e., whether divorce might thereby be encouraged, particularly in negligent injury cases where damages may be large, and the negligent spouse insured against liability.

III.

In Gottliffe v. Edelston120 an action was brought by a wife against her husband for injuries suffered from the defendant's negligent operation of a motor car prior to the marriage. The Married Women's Property Act, 1882,121 providing that a married woman shall continue to hold as her separate property all real and personal property belonging to her at the time of marriage, further defined "property" as including choses in action.122 No action would have existed if the injury had occurred during coverture, for the statute provided that with the exception of civil remedies for the protection and security of a married woman's property no husband or wife shall be entitled to sue the other for a tort. It was held that the action could not be maintained, since the meaning of choses in action does not include a tort claim for personal injuries, and moreover the social purpose of the statute in prohibiting such actions for injuries occurring during coverture would apply equally to antenuptial torts.

This decision was expressly overruled some eighteen years later by the Court of Appeal in Curtis v. Wilcox123 which held that ante-

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120. In Callow v. Thomas, 322 Mass. 550, 78 N.E.2d 637 (1948) (26 CHI.-KENT L. REV. 352; 48 COLUM. L. REV. 961; 33 MINN. L. REV. 199; 28 NEB. L. REV. 625) it was held that a tort action for personal injury committed during a voidable marriage as distinguished from a void one could not be maintained after annulment, since "no cause of action arises in favor of either husband or wife for a tort committed by the other during coverture" and the effect of avoidance, even though it could be considered as relating back for purposes of the non-existence of the status, would not make actionable an injury that was not actionable when it occurred.

121. 45 & 46 Vict., c. 75.

122. 45 & 46 Vict., c. 75, § 24.

nuptial personal injury tort claims are within the meaning of "chooses in action" included in the term property in the Act of 1882, and that a married woman can maintain an action against her husband for such injury, although such would still not be the case for personal injuries occurring during marriage.

In Baylis v. Blackwell\(^{124}\) it was held, however, that a husband cannot maintain an action against his wife for an antenuptial personal tort. Such action is possible only by provision of the Act of 1882 which was confined in this respect to property actions by a married woman. This distinction the court recognized as possibly anomalous\(^{125}\) and indicated that the denial of causes of action for personal torts during coverture might also, because of changing times, be anomalous but it is "so firmly engrained in our law that it can only rightly be removed by legislation." In so far as it is based on public policy such policy may change but "it is difficult to see why it [civil litigation between spouses] should be considered seemly today" if it was unseemly in the 1880's.

In states that recognize interspousal personal injury tort actions for conduct during marriage, actions for antenuptial torts would of course be recognized.\(^{126}\) But in states that do not recognize actions for conduct during coverture the almost unanimous view has been that an action for an antenuptial tort will not lie.

In Newton v. Weber\(^{127}\) it was held that the antenuptial action abates. In Furey v. Furey\(^{128}\) it was said that the right of action was substantively extinguished. In Lubowitz v. Taines\(^{129}\) it was also said that a right of action for an antenuptial personal tort is not property.

In Koplik v. C. P. Trucking Corp.,\(^{130}\) it was held that where the parties married while an action was pending for injuries suffered from

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125. See also Gottliebe v. Edelson, [1930] 2 K.B. 378, where it was said: "Though the wife can sue the husband for antenuptial debts, yet the husband has no right whatsoever to sue the wife for the debts she owed to him before marriage. Such is the astonishing state of the law."
128. See also Webster v. Snyder, 103 Fla. 1131, 138 So. 755 (1932) (10 U. Pa. L. Rev. 1207).
alleged negligent operation of an automobile the action did not abate. This seems to be the only American recognition of the view of Curtis v. Wilcox that an antenuptial personal injury tort claim is property within the term "chose in action." Moreover the court reasoned that identity of husband and wife is no longer the bar, but rather policy against disturbing domestic tranquillity, and that "if the pendency of such an action was no obstacle to the deliberate entry of the parties into the marital relationship itself in the first instance, we see no rational basis for the entertainment of a presumption that the continued prosecution of the action, patently contemplated when the parties married, will be substantially deleterious to that relationship." The decision was, however, reversed,\(^\text{131}\) three judges dissenting, on the ground that the New Jersey statute provided that a husband or wife could not sue each other "except as heretofore, and except as authorized in this chapter" and nothing was contained therein to authorize it. "It would be an illogical interpretation to declare that a wife is not a wife, or suing as a wife, within its meaning, because her action is predicated upon an antenuptial tort."\(^\text{132}\) The court held that the action abates.\(^\text{133}\)

In Hamilton v. Fulkerson\(^\text{134}\) it was held that an action could be maintained by a wife for an antenuptial negligent personal injury tort, the statute providing "any personal property, including rights in action, belonging to any woman at the time of marriage ... shall be and remain her separate property" and she "may in her own name and without joining her husband as a party plaintiff institute and maintain any action ... with the same force and effect as if such married woman was a feme sole." After holding that "rights in action" included any


\[^{132}\] Id., 141 A.2d at 39.


\[^{134}\] 285 S.W.2d 642, 646 (Mo. 1955).
cause of action, the court dealt with the matter of public policy and expressed itself as being unconvinced "that there are any logical reasons based upon considerations of public policy which should extend the spousal disability to actions for personal torts which occurred prior to marriage. . . . It is not apparent to us that the maintenance of an action by one spouse against the other for an antenuptial personal tort would disrupt domestic tranquillity any more than do permitted actions between spouses based on wrongful acts affecting their separate property. And if the domestic tranquillity is to be disturbed, such is accomplished by the desire to recover as fully as by recovery."  

IV.

If a spouse has a cause of action against the other spouse the defendant spouse's employer would also be liable to the injured spouse if the act of the employee was such as to subject the employer to liability under the principle of respondeat superior. Is the employer subject to liability, if no action can be maintained by the injured spouse against the employee spouse?

In Maine v. Maine & Sons Co. it was held that the employer was not liable: the freedom of the spouse "from liability does not rest merely upon the lack of remedy" but "it arises out of the very relationship itself. . . . Unless the servant is liable, there can be no liability on the part of the master. . . . Where there is no right of action [in the wife against the husband for a wrongful or negligent personal in-

135. It is generally held that the law of the place of the injury determines whether a tort cause of action is created. If no cause of action arises or if it has been terminated by the law of its creation due to a cause inherent therein (as in antenuptial torts) no action will lie elsewhere. Bohencik v. Niedzwiecki, 142 Conn. 278, 113 A.2d 509 (1955) (8 Baylor L. Rev. 350); Coster v. Coster, 289 N.Y. 438, 46 N.E.2d 590 (1943) (12 Fordham L. Rev. 182); Buckeye v. Buckeye, 203 Wis. 248, 234 N.W. 342 (1931) (31 Colum. L. Rev. 884; 44 Harv. L. Rev. 1138; 29 Mich. L. Rev. 937; 79 U. Pa. L. Rev. 804; 6 Wis. L. Rev. 103). See Miltimore v. Milford Motors Co., 89 N.H. 272, 197 Atl. 330 (1938); Gray v. Gray, 87 N.H. 82, 174 Atl. 508 (1934).

If a cause of action exists by the law of the place of its creation and action is brought elsewhere where such action is not allowed, it is generally held that no action can be maintained at the forum. Kircher v. Kircher, 288 Mich. 669, 286 N.W. 120 (Mich. St. B.J. 141); Mertz v. Mertz, 271 N.Y. 466, 3 N.E.2d 597 (1936) (6 Brooklyn L. Rev. 100; 36 Colum. L. Rev. 1158; 5 Fordham L. Rev. 496; 50 Harv. L. Rev. 35; 14 N.Y.U.L. Rev. 93; 11 St. John's L. Rev. 122; 10 U. Cinc. L. Rev. 473); Poling v. Poling, 116 W. Va. 187, 179 S.E. 704 (1935) (4 Fordham L. Rev. 475, 41 W. Va. L. Rev. 429).


jury inflicted by the husband] there can be no liability therefor on his [the master's] part.”

The contrary conclusion was reached in Schubert v. Schubert Wagon Co. The court was of the opinion that only if the servant's act was lawful is the master not liable under the rule of respondeat superior; the spouse's disability having its origin in marital identity does not make his act lawful which would otherwise be unlawful; the spouse is exempt or has a personal immunity from liability; and the employer must answer for the damage whether he directly commanded a trespass be committed or whether the trespass was incidental to his business, for “in each case the maxim governs that he who acts through another, acts by himself.” True the master would have a remedy over against the servant but this is not based on subrogation but is based on an independent duty owed by the servant to the master to render faithful service. The court did not feel that there was any conflict between liability of the employer to the injured spouse and the servant's “exemption” from liability to his spouse. But if one or the other must yield “the exemption would have to give way as an exception, more or less anomalous, to a responsibility which to-day must be accepted as a general rule,” i.e., to the explicit provision of the New York Domestic Relation Law as it then read that “a married woman has a right of action for an injury to her person, property, or character . . . as if unmarried.”

The result reached in the Schubert case has been reached in a number of cases in other American jurisdictions and in England. In Broom v. Morgan husband and wife were both employed by a

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139. Treated as an immunity in § 217(2) of the Restatement of Agency; comment (b) follows Schubert case.
141. See Mi-Lady Cleaners v. McDaniel, 235 Ala. 469, 179 So. 908 (1938); Mully v. Langinberg Bros. Grain Co., 339 Mo. 582, 98 S.W.2d 645 (1936).
142. [1953] 1 Q.B. 597 (C.A.). See 27 Austl. L.J. 323, 498, seemingly critical of the case, in which it is said that the trend in the British Commonwealth cases is in the direction of the result reached.
third person (a woman) licensee of a public house, the husband as manager and his wife as his helper, both to devote entire time to the business and reside on the premises. The wife was injured when she fell through a trap door that had been left open. After it was concluded that there had been negligence under the circumstances, it was held that the employer was liable to the wife. Singleton, L. J., thought there was no reason why the employer should have an “immunity” which springs from the “fiction” that husband and wife are one and from “the desire that litigation between husband and wife shall not be encouraged.” Denning, L. J., considered the husband as guilty of a tort and his lack of liability as an immunity which under the Married Women’s Act of 1882 is “a mere rule of procedure and not a rule of substantive law” and that the master’s liability was his own notwithstanding the servant’s immunity, but if this were not so and if the master’s liability were a vicarious one only he would still be liable because the servant was doing his master’s business, and the master’s duty was to see that it was properly done, he taking the benefit when properly done should have the burden when not properly done.

Hodson, L. J., did not agree that the disability was procedural only but nevertheless thought that the language of section 12 of the Married Women’s Act “presupposes the existence of the tort” from the consequences of which there was personal immunity, which immunity did not extend to a master vicariously liable.

It is to be noted that there might have been a liability here based on the defendant’s being an occupier of premises, or on her being the employer of the injured person. Some of the reasoning seems referable to those aspects rather than to respondeat superior.

In the decision of this case below143 Goddard, C. J., said “the master is just as much liable as though he commits the tort himself because the servant’s act is his act” and observed that “it appears that since 1928 the American cases have [held the employer liable] beginning with Schubert v. August Schubert Wagon Co.”

In the Schubert case it was recognized that a master held liable to the injured spouse of the employee under respondeat superior can hold the employee liable for breach of duty to the master subjecting the latter to loss. And in Broom v. Morgan, Goddard, C. J., remarked that “I suppose that in this case, if the defendant [master] is liable,

she [the master] will be able to bring an action (if it be worth her while) against the husband whose negligence has caused her to pay damages to his wife,” and made reference to “authorities which say that, in view of the master’s right to look to the servant whose acts have made him liable, such a suit would seem to be an indirect action against a husband in favour of a wife who was barred from the direct action.”

This point was made in Maine v. Maine & Sons as another reason for holding the defendant employer not liable to the injured spouse. And in Jones v. Kinney the husband’s employer when sued by the employee’s wife brought in the husband in order to recover over. The court regarded this as permissible since the master’s liability was based on principles of agency and his right against the employee was predicated neither on subrogation nor on contribution between joint tort-feasors but was a right to indemnity.

Even if the rule of respondeat superior rests on the reasons given in the above cases it is apparent that if an employee spouse is discharged by the employer or compelled to indemnify the employer that this becomes in fact an indirect liability and capable of resulting in just as much disruption of domestic harmony as a direct liability would be unless such disruption is thought to result only when the spouses are direct adversary parties in litigation. If, however, both employer and employee are covered by insurance, harmony may be enhanced, rather than disrupted.

The principle of the Schubert case was applied in Silverman v. Silverman to a situation where liability of the owner of an automobile was based on the family purpose doctrine, and in May v. Palm Beach Chemical Corp. to a situation where the owner’s liability was based on the operation with his consent of an automobile by the husband of the injured plaintiff.

Where, however, a wife has been injured by the negligence of her husband while he was engaged in partnership business she cannot

144. Ibid.
145. 113 F. Supp. 923 (W.D. Mo. 1953).
146. 145 A.2d 826 (Conn. 1958).
147. 77 So. 2d 468 (Fla. 1955).


maintain an action against the other partners if she cannot maintain an action against the husband.\textsuperscript{148}

Where two persons combine negligently as in an automobile collision to injure the spouse of one of them and the injured person may recover from the person not his or her spouse but may not maintain an action against the spouse, it has generally been held that there can be no contribution from the latter to the other defendant, even though otherwise a proper case for contribution.\textsuperscript{149}

V.

Many of the interspousal personal injury cases reaching appellate courts have been cases of negligence rather than conduct such as violence or other intentional aggression; most of the negligence cases arise out of the operation of automobiles, and perhaps in a high percentage of these cases the offending spouse has a policy of insurance covering his liability. If the offending spouse is legally liable\textsuperscript{150} the insurer would be liable to him, and under some policies in some situations subject to suit by the injured person,\textsuperscript{151} unless the policy ex-

\textsuperscript{150} Cf. also Tobin v. Hoffman, 202 Md. 382, 96 A.2d 597 (1953).

Where a wife may maintain an action against her husband, see Jacobs v. United States Fid. & Guar. Co., 152 N.Y.S.2d 128 (1956); Travelers Indem. Co. v. Unger, 158 N.Y.S.2d 892 (1956).

149. See Ferguson v. Davis, 42 Del. 299, 102 A.2d 707 (1954); Koenigs v. Travis, 246 Minn. 466, 75 N.W.2d 478 (1956); American Auto Ins. Co. v. Molling, 239 Minn. 74, 57 N.W.2d 847 (1953); Kennedy v. Camp, 14 N.J. 390, 102 A.2d 595 (1954).


See also Yellow Cab. Co. v. Dreslin, 181 F.2d 626 (D.C. Cir. 1950); Steele v. Steele, 65 F. Supp. 329 (D.D.C. 1946) (26 Neb. L. Rev. 442); Koenigs v. Travis, 246 Minn. 466, 75 N.W.2d 478 (1956).


150. Insurance may of course be of the type that covers an event and certain losses resulting therefrom irrespective of fault, i.e., a policy referable to accidents in the legal sense of the term. An automobile liability policy often contains a medical expenses or payments coverage and in terms includes members of the insured's family injured through the operation of the automobile irrespective of legal liability.

151. It has been suggested that this feature may affect the liability of the insurer. See Mesite v. Kirchstein, 143 Atl. 753 (Conn. 1929); Smith v. Morrison, 185 N.C. 577, 118 S.E. 12 (1923).
cludes the particular risk. 152 If there is no legal liability on the part of the insured, the policy does not cover. 153 It covers liability, does not create it. 154

In Tooth & Co., Ltd. v. Tillyer, 155 a married woman, who was an employee of a third person, was, while in the course of employment and a passenger in an automobile operated by her husband, injured through his negligent operation. She recovered workmen’s compensation from her employer, who in turn sought to recover from the husband under a clause in the workmen’s compensation statute allowing the employer to recover from one legally liable for the injury resulting in the employee’s compensation. It was held that the employer could not recover, since the husband was not legally liable to his wife, distinguishing the Broom and Schubert cases.

But in determining the question of whether interspousal personal injury actions are to be allowed in negligence cases should the matter of liability insurance be an important factor? 156 Here again irrespective of the terminology of the married women’s statutes some courts discuss supposed policy. It would seem clear that the policy argument generally advanced that interspousal actions disrupt domestic harmony, peace, and tranquillity is not persuasive. The danger is not domestic discord, but the possibility of domestic collusion in presenting fraudulent claims for insurers to pay. In Brandt v. Keller 157 it was said: “Other courts stress the danger of collusion in tort actions between spouses, and hold that consequently such actions are against public policy. . . . However, the potentiality of collusion, or of the perversion of the administration of justice exists in all litigation, and cannot

Cf. Scholle v. Home Mut. Cas. Co., 273 Wis. 387, 78 N.W.2d 902 (1956) (the guest statute involved did not give an action but was a restriction).

But see Addison v. Employers Mut. Liab. Co., 64 So. 2d 484 (La. App. 1953) where it was held that a wife injured by her husband could recover from the insurer, although the insurance policy provided that the insurer would pay on behalf of the insured all sums which the insured “shall become legally obligated to pay.” It was reasoned that a tort occurred and a cause of action arose against the insured, but no right of action, because of the husband’s “personal immunity.” See also McLain v. National Cas. Co., 28 So. 2d 680 (La. App. 1947).


156. See Esmingor v. Esminster, 77 So. 2d 308 (Miss. 1955).

157. 413 Ill. 503, 109 N.E.2d 729 (1952) (2 De Paul L. Rev. 285; 41 Ill. B.J. 283; 48 Nw. U.L. Rev. 75).
properly constitute legal grounds for construing a statute in an abortive manner, nor be a determinative factor in construing rights. . . . Nor does the fact that an insurance company may be the real defendant in interest in such cases constitute a ground for barring the action. In fact, this type of liability constitutes an additional risk which may be insured against, and would ultimately redound to the benefit of the insurer, rather than against its interest. . . .”

And in *Brown v. Gossar:*¹⁵⁸ “the fear that relaxation of the common-law rule will open the door to fraudulent and fictitious claims, especially against insurance companies, has less force than the argument of 'domestic peace and felicity.' We are not willing to admit that the courts are so ineffectual, nor our jury system so imperfect, that fraudulent claims cannot be detected and disposed of accordingly.

“There is opportunity for fraud in many types of claims which reach the courts, but that does not justify denying the right to maintain those which have merit. This same argument has been advanced against most proposals for changes in our legal procedure, and especially in regard to the emancipation of women. . . .”¹⁵⁹

But in *Smith v. Smith*¹⁶⁰ these observations are countered: “The minority rulings brush aside the risk of collusion by the husband and wife by the simple assertion that the courts know how to deal with collusive suits. But it is obvious that the risk of collusive action increases when the parties plaintiff and defendant are in confidential relationship. The risk of financial loss is ordinarily inducement enough to encourage a sturdy defense. Remove from a defendant the risk of loss and substitute the covert hope of profit and a situation arises which should give us pause. . . . It would seem that if husband and wife want protection by insurance, accident policies are available. We do see a substantial risk of miscarriage of justice, when, in the peace and harmony of conjugal bliss, a wife prepares a damage suit against her husband over the solitary protest of an insurance company. . . .”

In 1937 the same New York statute that amended the Domestic Relation Law to allow interspousal rights of action in tort also amended the Insurance Law to provide that no liability insurance policy insured

¹⁵⁸. 262 S.W.2d 840 (Ky. 1953) (42 Ky. L.J. 497; 32 Texas L. Rev. 884).
¹⁵⁹. See dissenting opinion of Jacobs, J., in *Kophik v. C. P. Trucking Corp.,* 27 N.J. 1, 141 A.2d 34, 42 (1958): "... [T]he husband, protected by insurance, may welcome her action. . . . The fear of fraudulent actions, and collusive actions where the husband is insured, furnishes equally tenuous basis for the majority view. There is opportunity for fraud and collusion in many legal proceedings, but our system of courts and juries is very well designed to seek them out and its presence clearly furnishes no just or moral basis for precluding honest and meritorious actions.”
against liability for injuries to person or property of an insured's spouse unless expressly (later the word "specifically" was added) included in the policy.161

In Fuchs v. London & Lancashire Indemnity Co.162 these simultaneous enactments were characterized as disclosing "a considered legislative intent to create a right of action theretofore denied, and at the same time to protect insurance carriers against loss through collusive actions between husband and wife."

No New York case of express coverage has been found.163 The cases that have arisen have been concerned mainly with the application of the statutes to injuries occurring in other states where interspousal causes of action are also recognized and to the question of who is an insured within the meaning of the statute.

The exclusion provision of the insurance law is not a part of the domestic relations law and has no effect upon the creation or recognition of the interspousal cause of action.164 The terms of the New

161 N.Y. Laws, 1937, c. 669 at the same time amended N.Y. Ins. Laws 109—
a section added by Laws, 1917, c. 524, and thereafter amended—by inserting a new subdivision 3a: "No such policy, however, heretofore or hereafter issued shall be deemed to insure against any liability of an insured for injuries to his or her spouse or for injury to property of his or her spouse, unless express provision for such insurance is included in the policy." See also Laws, 1939, c. 882, § 167(3), which added "or destruction of" before "property" and changed "express provision for such insurance" to read "express provision relating specifically thereto"; as changed in 1939 this was further changed in Laws, 1945, c. 409 to insert "death of or" before "injuries." In General Acc. Fire & Life Assur. Corp. v. Morgan, 33 F. Supp. 190 (W.D.N.Y. 1940), it was held before the amendment of 1945 that "injuries" did not include "death" within the meaning of subdivision 3. 162 171 Misc. 908, 14 N.Y.S.2d 387, aff'd, 17 N.Y.S.2d 338 (App. Div. 1940).

But see N.Y. Law Revision Comm'n Report, Recommendations and Studies, 65, 77 (1938). Reasons for the interspousal suits and insurance provision are not stated. The Commission carried revision of this provision in its Proposals for Future Consideration from 1937 through 1945 and 1948. It was not listed beginning with the 1949 Report.

163 In Priddle v. Farm Mut. Ins. Co., 100 N.H. 73, 119 A.2d 97 (1955), a New York automobile liability policy insuring against liability to any person (the injury to the insured's wife caused by the insured occurring in New Hampshire, the parties being residents of New York) contained a provision that anything in the policy in conflict with the New York statute should be deemed to conform to the statute, was held to cover the husband's liability for injury occurring outside New York (although not if it had occurred in New York) since such an intention was manifested. However, it is difficult to regard this as an express and specific inclusion or reference.

164 The insurance exclusion does not apply to antenuptial injuries, since the liability by virtue of the Domestic Relations Law becomes fixed at the time of the accident. Stonborough v. Preferred Acc. Ins. Co., 292 N.Y. 154, 54 N.E.2d 342 (1944).

Cf. Pryor v. Merchants Mut., 12 Misc. 2d 801, 174 N.Y.S.2d 24 (Sup. Ct. 1958), where antenuptial injury occurred in Pennsylvania (the parties being residents of New York) and it was held that there could be no recovery, since by the law of Pennsylvania there was no cause of action created for liability, despite the fact that the New York Domestic Relations Law had been amended since the Coster case decided before New York allowed an interspousal action.

Cf. also Maryland Cas. Co. v. Jacek, 156 F. Supp. 43 (D.N.J. 1957), where the insurance policy was a New Jersey contract and the injury occurred in New York
York contract as affected by the Insurance Law are controlling\textsuperscript{165} as to the insurance contract only.

The exclusion of the Insurance Law is applicable not only to the named insured whose spouse is injured but to any one else whose spouse is injured if he is within the insurance contract's definition of insured, whenever the insurer's liability is predicated on liability of that person.\textsuperscript{166} In the latter case the exclusion would not be applicable to the named insured and consequently if the named insured is liable his liability would be covered. And so an employer, if liable to the employee's spouse, would be covered by the insurance contract.\textsuperscript{167}

The employee in such a case would not be covered against his liability to his employer although not a liability to the spouse, for it is liability resulting from operation of the automobile that is the subject of the insurance contract, not liability of an employee to indemnify an employer.\textsuperscript{168} Where an action is against an owner of an automobile for

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\textsuperscript{165} At a time when a liability arose under the law of New York. New Jersey would not have created a cause of action if the injury had occurred in New Jersey, nor permitted the spouse against the other if the injury occurred elsewhere. The injured wife had obtained a judgment in New York. It was held that direct suit by the wife against the insurer (in accordance with provisions of the New Jersey contract) could be maintained on the contract to collect the judgment, the insurance policy being governed by New Jersey law and not by that of New York. See also Clement v. Atlantic Cas. Ins. Co., 13 N.J. 439, 100 A.2d 273 (1953).


\textsuperscript{168} Before these cases were decided a contrary view was taken in \textit{Williamson v. Mass. Bonding & Ins. Co.}, 142 Conn. 573, 116 A.2d 169 (1955), on the ground that although the interpretation of the New York insurance contract is governed by the New York Insurance Law it was only intended to relate to the liability action simultaneously created by the Domestic Relation Law and not to liability actions allowed by the law of other states, particularly in the case of an injury in Connecticut whose law had already for a long time allowed interspousal personal injury actions.


\textsuperscript{168} In \textit{Feinman v. Bernard Rice Sons, Inc., supra}, it was held that, where the employee's wife was injured through the negligence of her husband, the husband cannot claim indemnity from the insurer against the employer's claim to indemnity from the employee.

See to the same effect \textit{Reis v. Economy Hotels and Restaurants Purveyors, Inc.}, 155 N.Y.S.2d 713 (Sup. Ct. 1956), holding that an employee who was impaled by his employer in an action by the employee's wife and who had brought in the insurer could not recover.

See also \textit{Katz v. Wessel}, 207 Misc. 456, 139 N.Y.S.2d 564 (Sup. Ct. 1955), where it was said that collusive actions between husband and wife "are as much a
injury caused by a borrower to the borrower's spouse, the insurer is liable; but where the owner brings action against or resorts to the borrower, the insurer is not liable to the borrower, although he is within the policy's definition of insured (although not a named insured), since for that reason he is excluded by the statute. Where the injured person is the husband or wife of a person who is a partner with a third person the statutory exclusion does not operate to exclude liability of that partner nor of the partnership, the insurer having separate obligations to each partner.

Does allowing interspousal personal injury actions lead to a substantial number of claims and to abuse where such actions are within liability insurance coverage and particularly where injury results from operation of an automobile? It is clear that where there is covering insurance an action will not involve any impairment of domestic harmony, but is there a basis, sufficiently established empirically, for applying a policy against "domestic collusion"?

In general insurers do not (according to information informally gathered) have figures showing the number or amount of interspousal automobile liability claims or their impact on general insurance liability losses, and no tables or computations isolate this factor and analyze these claims, although at times large, and it would seem that their rate effect is not regarded as being significant. Premium rates are figured for risks in an area, and accidents although occurring elsewhere are charged to the home area of the car involved. Factors such as age of drivers and number of cars and accidents are susceptible of statistical classification. Interspousal claims, even though they may be substantial, are probably not susceptible of such classification. In any particular state a comparison, if possible, between the situations as they existed before and after a change in statute or decisions allowing or prohibiting such causes of action would not be useful because so many other factors affect the rate structure and rates have been constantly rising. And so too of a comparison between states; some states where interspousal actions are not allowed are the highest rate areas. In states where they are allowed (standard policies do not ex-

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See Note, 6 BUFFALO L. REV. 320 (1957) discussing the insurer's right of subrogation to the right of the owner, the named insured.
there are indications that they have increased, particularly in more recent years, insurance motivating the action if the injury is severe; and there is reason to believe there may be much fraudulent collusion. Some insurers issuing non-standard policies do exclude coverage against such liability.

Is there experience available in New York to show the effect of the two statutes, the one allowing interspousal personal injury claims but the other excluding liability of an insurer for such liability unless expressly and specifically included, upon the number of such inclusions, the number of such claims, and the matter of rates for the special inclusion clause, or, if no separate premium is charged, the effect on overall rates? In respect to automobile liability which would seem to be the most important liability category and for which available information has been obtained, there has been no experience with the effect of inclusion. Standard policies filed with the Insurance Department do not contain any such inclusion and policies written in New York containing such inclusion would have to be so filed. In other words insurers do not insure against this category of liability. It may be that this is due to a feeling that there is danger of collusion, fraud and abuse, that such coverage could not be given without extra charge, and that the setting of special premium rates would be impracticable.

Nevertheless, the New York statute itself is an interesting compromise in the matter of negligence liability. Express and specific interspousal insurance policy coverage, if written, and if considered a special risk category, should furnish comparative empirical data with which to check a priori assumptions.

VI.

The majority of courts have held that neither husband nor wife has a personal injury tort action against the other. A substantial minority have allowed such action. Usually no distinction is made by either view between intentional and careless conduct, nor between antenuptial conduct and conduct that occurs during marriage, nor between actions brought during marriage and those brought after its termination. There has been some tendency, however, on the part of courts whose general rule does not allow interspousal personal injury actions to depart from it in cases of serious intentional and wilful injuries, and in wrongful death cases. There has been some, but less, tendency to make a distinction between antenuptial torts and
conduct during marriage. There has been a strong tendency, almost, if not entirely, without exception among the more recent decisions, to allow an action based on respondeat superior against the employer of the spouse causing the injury, despite the fact that no action would lie by the injured spouse against the other, and despite also the fact that the right of the employer to recover over from the employee has the potential of making the employee indirectly liable to his injured spouse. Otherwise a distinction based on the difference between conduct within business activities and that within the activities of family life has not been found except in some parent and child cases.  

At common law for a combination of reasons, usually summed up in the concept of unity of husband and wife, no cause of action arose or could be maintained between spouses for tortious conduct. Whether after enactment of married women's acts and related legislation such cause of action can arise or can be maintained has been considered to depend upon statutory construction. Few statutes are express upon this question. The terminology of most of the statutes is consistent with either conclusion. The majority view takes the position that such statutes should be strictly construed; the minority, that they should be liberally construed. The question is usually assumed to be to what extent has there been a departure from the unity concept. This concept is almost without exception, considered by both views as having been abrogated in matters of property. The majority view considers that it has not been abrogated in the matter of tort liability for injuries affecting the person; the minority, that it has been entirely abrogated except in the matter of marital rights and obligations. However, supposed policy reasons are often advanced or denied, the principal ones being that actions between husband and wife tend to marital disharmony and to disruption of domestic peace and tranquility, and in the matter of negligent conduct where there is liability insurance would tend to marital fraudulent collusion.

There is no reason to think that in the case of intentional, wilful, and wanton injury an action would disrupt domestic harmony, since the conduct leading to the action has already caused the disruption; and indeed there is every reason to think that denial of an action might be more disruptive in that it might lead to resort to other admittedly available redress such as to be found in the criminal and divorce law. Besides, a substantial number of states have for years allowed such

171. See Worrell v. Worrell, 174 Va. 11, 4 S.E.2d 343 (1939); Lusk v. Lusk, 113 W. Va. 17, 166 S.E. 538 (1932).

Cf. however note 103 supra.
interspousal tort actions either by decision or by express statute and it would be impossible to demonstrate that more domestic disharmony exists because of it. In the case of negligent injury where there is liability insurance it is quite implausible to think that a civil damage action would be productive of domestic disharmony except in the employer cases if the employee is not covered. The danger of fraudulent collusion is more plausible. But is there any indication that there would be more danger of fraudulent claims than in cases between persons not so related, and that the courts cannot cope with the one as well as the other? In a substantial number of states interspousal actions for negligent injury have also for years been allowed. And again neither the extent of such claims can be given nor the extent of suspected marital collusion be demonstrated even by liability insurers who would be in a position to have figures in such cases if it were thought sufficiently worthwhile. Questions of policy should not be injected and determined by purely a priori conceptions.172

Admittedly there was no interspousal tort action allowed at common law. But attitudes of society in respect to activities and rights of women, married and unmarried, within or without the family have substantially and perhaps basically changed during the past century.178 And the common law has within itself the capacity of development and adaptation to new or changed conditions.174 But the majority view would result in judicially freezing the common law of a long bygone era.

Where a statute does not forbid or clearly preclude tort actions between spouses for personal injury the judicial approach should be that the unity concept of husband and wife has ceased to be a legal concept in matters affecting the person as well as in matters affecting

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172. See Crownhart, J., dissenting in Wick v. Wick, 192 Wis. 260, 264-5, 212 N.W. 787, 789 (1927), a case holding that a minor child cannot maintain a personal injury tort action against his parent although the court had previously held that a wife could maintain such action against her husband: "Courts may prophesy, but the practice often leads to embarrassment," referring to the fact that in 1875 the court had denied women the right to practice law because it would be a gravest injury to them and to their social and moral relations, yet after 1878 when a statute was enacted opening admission to the bar to women, the prophecy did not materialize; also to the fact that in 1890 the court denied married women a right of action for alienation of affections predicting that if allowed, such actions would be numberless (held again in 1903 state decisions) yet after 1905 when a statute provided for it expressly, the predicted result did not follow.


property, and that interests of a spouse in the redress of injuries to the person should be given recognition no less than interests in the protection of and redress of injuries to property. The pertinent question should be whether there is unprivileged conduct tortious in character. Apart from conjugal rights the exercise of which would be ordinarily privileged and only the abuse of which would be wrongful, there are factors present in the relation of husband and wife that might well lead to a conclusion that conduct that would be tortious if occurring between persons not husband and wife is not necessarily tortious. Normal interspousal conduct is not the same as that between others either in the case of intentional acts or in the case of carelessness. Acts that are reasonable in view of the close relation, and carelessness in the operation of the home or in common activities should be distinguished from conduct not so referable and which would be actionable if the parties were not husband and wife. Courts should not be unable to deal with such distinctions. Establishment and development of standards appropriate for application to human behavior, with variations depending upon particular circumstances, are familiar functions of the judicial process.

175. See McCurdy, Torts Between Persons in Domestic Relation, 43 Harv. L. Rev. 1030, 1055 (1930).
   See also Sanford, Personal Torts Within the Family, 9 Vand. L. Rev. 823 (1956); comment, 51 Nw. U.L. Rev. 610 (1956).
   See further Farage, Recovery for Torts Between Spouses, 10 Ind. L.J. 290, 300 (1935); Albertsworth, Recognition of New Interests in the Law of Torts, 10 Cal. L. Rev. 461 (1922).