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INTER-SPOUSAL TORT IMMUNITY

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TABLE OF CONTENTS

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INTER-SPOUSAL TORT IMMUNITY

I. INTRODUCTION

The common law rule was that neither a husband nor a wife might sue the other in tort. The rule was based on the theory that marriage caused the legal existence of the wife to be merged into that of the husband. Under the common law the unity of husband and wife was not merely fictitious; it possessed a considerable measure of reality. On marriage the husband acquired all the personal chattels of his wife; he became entitled to the sole management and income of any freehold property owned by his wife; he had the power to sell any leasehold property of his wife and to retain the proceeds. The husband was personally liable at common law for the torts of his wife which were committed both before and during the marriage.

Through legislation the wife acquired the right to her own property and the husband ceased to be liable for the torts of his wife. Inter-spousal tort immunity, however, has only been partially abrogated. In 1936, a wife in Alberta acquired the right to sue her husband in tort but only for the protection and security of her own property.[1] A married man acquired comparable rights against his wife in 1973.[2]

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1. The Married Women's Act, 1936, S.A. 1936, c. 23, s. 3.

2. The Attorney General Statutes Amendment Act, 1973, S.A. 1973, c. 61, s. 11.

Because of section 5 of The Contributory Negligence Act, we were led to consider, in our Working Paper on Contributory Negligence and Concurrent Tortfeasors, the issue of whether inter-spousal tort immunity should be abolished. Section 5 has the effect of imputing to the plaintiff-spouse any negligence by the other spouse and so reducing the recovery by the plaintiff-spouse.

It was as a result of this provision that our Working Paper posed the following questions: "Should one spouse be able to sue the other in tort in all cases, or in some special cases such as those involving insurance or separated spouses? Should Section 5 of The Contributory Negligence Act be repealed?"[3] We subsequently decided that despite the presence of this section in the Contributory Negligence Act, this topic is unrelated to contributory negligence and should not be included in a Report on that subject. We therefore decided to issue this Report on inter-spousal tort immunity which we regard as part of our studies in the reform of family law.

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3. Working Paper, Contributory Negligence and Concurrent Tortfeasors (March, 1975), p. 58.

II. THE PRESENT STATE OF THE LAW

1. Alberta.

Section 3 of The Married Women's Act[4] provides that one spouse is not entitled to sue the other for a tort except for the protection and security of the property of the first. A wife may not sue her husband for assault, for false imprisonment and malicious prosecution, for deceit, for libel, for fraudulent conspiracy or for personal injuries caused by her husband's negligence.[5] Such suits are not remedies for the protection and security of her property. A tort claim for damage done to a wife's property after marriage by her husband comes within the exception because "Damages stands in the place of the damage to the property and represents the means by which the property may be restored to its condition before the negligent act."[6] A wife who has obtained a judgment for judicial separation, however, may sue her husband during the separation for wrongs and injuries as though she were unmarried but a similar right has not been

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4. R.S.A. 1970, c. 227 as amended by S.A. 1973, c. 61, s. 11.

5. For a comprehensive review of the law see D. Mendes Da Costa, "Husband and Wife in The Law of Torts", chapter 16 in Studies in Canadian Tort Law (1968) edited by A.M. Linden, and S.J. Bailey "Interfamily Tort Immunity: Alberta Position", (1978), 16 Alberta L. Rev. 417.

6. Laxton v. Ulrich (1964), 41 D.L.R. (2d) 476 (Ont. C.A.) at p. 479.

accorded to a husband in like circumstances.[7]

2. Other Common Law Provinces of Canada

Inter-spousal tort immunity has been completely abolished in Manitoba,[8] Ontario[9] and Prince Edward Island.[10] In Manitoba, section 7(2) of The Married Women's Property Act provides that: "A husband and a wife have the same right to sue the other for tort as if they were not married." In Ontario, The Family Law Reform Act, 1975 provides in subsection 1(3)(a) that "each of the parties to a marriage has the like right of action in tort against the other as if they were not married." The abolition of inter-spousal tort immunity in these provinces occurred after their law reform commissions had recommended such abolition. Prince Edward Island has also passed a statute which permits spouses to sue each other for any kind of tort. The Newfoundland Family Law Study has also recommended an unrestricted right of action in tort between spouses[11] but this recommendation has not been implemented. With the exception of Manitoba, Ontario and Prince Edward Island, inter-spousal tort immunity is part of the

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7. The Domestic Relations Act, R.S.A. 1970, c. 113, s. 11.

8. An Act to Amend the Married Women's Property Act, S.M. 1973, c. 12, s. 1.

9. The Family Law Reform Act, 1975, S.O. 1975, c. 41, s. 1(3)(a).

10. Family Law Reform Act, S.P.E.I. 1978, c. 6, s. 60.

11. Family Law in Newfoundland, R. Gushue et al. (1973) at p. 340.

law of all the common law provinces. However, in New Brunswick, a spouse may sue the other spouse for a tort if they are living apart under a decree or order of judicial separation provided that the tort was committed during the separation.[12]

3. Other Commonwealth Countries

In 1960, the English Law Reform Committee advocated that married persons should be able to sue each other for torts. The Committee considered however, that there should not be unfettered freedom to proceed with tort actions between spouses. It stated that:[13]

> If either spouse were able without let or hindrance to bring an action in tort against the other in respect of injuries of a personal nature, it might easily lead to harmful results. Litigation in respect of petty acts of negligence in the domestic sphere would certainly not be conducive to the continuance of the marriage and would, we think, do nothing but harm.

The Committee recommended that the Court should have discretionary authority to stay proceedings in order to prevent petty grievances from being aired and that the power should be exercisable even though the parties were no longer cohabiting. The Committee's recommendations were implemented by the United

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12. The Married Woman's Property Act, R.S.N.B. 1973, c. M-4, s. 6(2)(a).

13. Law Reform Committee, Ninth Report, Liability in Tort Between Husband and Wife (1961), Cmnd. 1268, para. 9.

Kingdom Parliament in 1962.[14] Similar enactments were passed in New Zealand in 1963 and in the Australian states of Tasmania, Queensland and South Australia in 1965, 1968 and 1972 respectively.[15] In 1968, both Victoria and the Australian Capital Territory abolished inter-spousal tort immunity without any provision for the exercising of judicial discretion to stay actions. In New South Wales and Western Australia, inter-spousal tort immunity was only abrogated in regard to motor vehicle accidents. However, the Parliament of the Commonwealth of Australia has now abolished inter-spousal tort immunity without any restriction.

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14. Law Reform (Husband and Wife) Act, 1962, c. 48 (U.K.).

15. J.G. Fleming, The Law of Torts (5th ed., 1977) at p. 665 for a concise summary of New Zealand and Australian law.

III. ASSESSMENT OF ARGUMENTS FOR RETAINING INTER-SPOUSAL TORT IMMUNITY.

1. Domestic Harmony.

The usual justification for preserving inter-spousal tort immunity is that its abolition would jeopardize family harmony. The force of this argument is greatly diminished because the public policy of preserving family harmony has not been accorded sufficient weight for the law to prohibit tort actions between parents and minor children. The force of the argument is also decreased because a spouse can sue the other spouse for negligent damage to his or her goods but not for negligent injury to his or her person. In addition, the commission of intentional wrongs by one spouse against another is strong evidence that there is no family harmony to be preserved. It should also be recognized that the most common inter-spousal tort is the spouse-passenger who is injured through the other spouse's negligent operation of a motor vehicle. In a harmonious family, a spouse would not wish to sue the other spouse for such injury unless the other spouse were insured. If the negligent spouse has insurance coverage for injury to the other spouse, the negligent spouse would only be a nominal party to such litigation and in no real sense an adversary.

We certainly agree with Clement J.A. who stated in Bourbeau v. Szabo that "the family unit is still fundamental to the

structure of our societal institutions".[16] We also believe, however, that if there is insurance coverage, the granting of a right to a spouse to sue the other spouse in tort will not result in any family disharmony. If the guest passenger provision is abolished, as we have recommended, it would seem illogical that a hitch-hiker would be able to recover if the driver were negligent but that a spouse-passenger would be unable to do so. If one spouse was severely injured as a result of the negligent driving of the other spouse, it would seem fair to permit the injured spouse to sue the negligent spouse and to obtain compensation from that spouse's insurance company. Assuming that tort compensation is provided by the sharing of risk through insurance, it is legitimate to argue that allowing recovery in tort between spouses would contribute to family harmony because the damage award would permit the family to live a life which bears a closer approximation to their former life than if recovery were denied.

Intentional wrongs between spouses, especially those affecting the person, are symptomatic of marital discord. If one spouse wishes to sue the other for such a wrong, this is cogent evidence that there is no domestic harmony remaining in the marriage to be preserved. It is also difficult to perceive that the wronged spouse will be pacified or placated through the denial of a civil remedy. If she has been subjected to an

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16. (1978), 5 Alta. L.R. (2d) 372 (App. Div.) at p. 382.

assault and battery by her husband, she may bring criminal prosecution against him. Her husband may obtain a criminal record but she will receive no compensation. By giving a spouse a right of action in tort against the other spouse, the wronged spouse would have a meaningful remedy which might incidentally preserve the other spouse from obtaining a criminal record.

Dr. Glanville Williams has indicated in his usual cogent way the anomalies which arise out of inter-spousal tort immunity. He has written that:[17]

> Actions in tort are supposed to be inconsistent with the affection that ought to prevail between husband and wife. But observe the limitations upon the rule. If a husband "beats up" his wife, she cannot sue him, because to sue him would be unwifely. She can, however, prosecute him in the criminal courts, and have him fined or imprisoned; there is nothing unwifely in these proceedings. Actions in contract are allowed between spouses, even though the breach of contract is also a tort, and even though the action is fought with bitterness; but an action in tort for negligence is disallowed, though conducted by the parties in perfect amity, for the indirect purpose of making an insurance company contribute to the family exchequer.

It is anomalous that a spouse cannot sue the other spouse in tort except for the protection and security of his or her property. Mr. Justice Maxwell in Waugh v. Waugh has emphasized this anomaly by quoting from an unnamed source that "Her husband

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17. "Some Reforms in the Law of Tort" (1961), 24 Modern L. Rev. 101.

may break her leg with civil impunity but not her watch."[18] Until 1973, a wife in Alberta could break not only her husband's leg but also his watch with civil impunity. Now, however, a wife would be civilly liable for breaking her husband's watch. It reflects little credit upon the law that it appears to place more importance upon the protection of property than of the person of the spouse. This emphasis of the law seems difficult to justify because a tort claim by one spouse for negligent or intentional injury to the other spouse's goods seems to have as great a potential for disrupting domestic tranquility as would a tort claim for injury to the person of the spouse.

In England, it was held in Curtis v. Wilcox[19] that a wife can sue her husband for a tort committed by him against her before her marriage. The reasoning of the Court of Appeal was that her right of action was a chose in action and by the Married Women's Property Act, 1882 became part of her separate estate upon marriage which she could reduce into possession through an action after marriage for the purpose of securing her separate property. Professor Kahn-Freund has cogently criticized this case and states that: "it is a fallacy to say that an action in tort is brought for the protection of the right of action...in that it confounds the thing which protects with the thing which

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18. (1950), 50 S.R. (N.S.W.) 210 at p. 213.

19. [1948] 2 K.B. 474 (C.A.).

is protected."[20]

The Ontario Law Reform Commission in a Report has stated:[21]

> Litigation between spouses has been said to be unseemly, distressing and embittering. If this is the principle behind the prohibition of action between husband and wife, there seems no good reason to distinguish between torts committed before and torts committed after marriage.

This appears to be very valid criticism of Curtis v. Wilcox. However, if the Appellate Division's decision in Bourbeau v. Szabo prevails over Curtis v. Wilcox, Alberta courts will make no distinction between torts committed before and those committed during marriage.

Curtis v. Wilcox has been followed in Canada in German v. Whaley[22] and in Bourbeau v. Szabo[23] but the latter case has been reversed on appeal. In the Bourbeau case, the wife was injured prior to her marriage in a collision between a car and a motorcycle on which she was a passenger and which was driven by her future husband. After her marriage, she sued the driver and owner of the car and they issued a third party notice against her husband claiming indemnity or contribution. The basic issue was

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20. "Inconsistencies and Injustices in the Law of Husband and Wife" (1952), 15 Modern L. Rev. at p. 151.

21. Report on Family Law: Torts (1969) at p. 23.

22. (1971), 16 D.L.R. (3d) 511 (Ont. Co. Ct.).

23. (1977), 2 Alta. L.R. (2d) 269 (Dist. Ct.), reversed on appeal (1978), 5 Alta. L.R. (2d) 372 (App. Div.).

whether the wife after marriage had a cause of action against her husband for a tort committed by him prior to the marriage. The Appellate Division by a two to one decision followed Gottliffe v. Edelston[24] and held that "the marriage of the plaintiff to George Bourbeau destroyed the cause of action possessed by the plaintiff against him while a spinster."[25] The dissenting judge reached the opposite conclusions by applying Curtis v. Wilcox which overruled Gottliffe v. Edelston. In the absence of a decision of the Supreme Court of Canada, the law is consequently uncertain because there are two lines of authority about the effect of marriage on a tort claim between two persons who subsequently inter-marry.

In Manning v. Howard,[26] the Ontario Court of Appeal held that the proper interpretation of section 7 of the Married Women's Property Act (section 3 of our Married Women's Act) is that it permits a former wife whose marriage has been terminated by a divorce or nullity decree to sue her former husband for personal injury arising out of the negligent operation of a motor vehicle which occurred while the marriage subsisted. Jessup J.A. quoted with approval Denning L.J. in Broom v. Morgan[27] where he

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24. [1930] 2 K.B. 378.

25. (1978), 5 Alta. L.R. (2d) 372 (App. Div.) at p. 374.

26. (1975), 59 D.L.R. (3d) 176 (Ont. C.A.).

27. [1953] 1 Q.B. 597 (C.A.).

stated:[28]

> His immunity does not rest on the theory that husband and wife are one. That fiction no longer has any place in our law. His immunity nowadays rests simply on the wording of section 12 of the Married Women's Property Act, 1882.... His immunity is a mere rule of procedure and not a rule of substantive law. It is an immunity from suit and not an immunity from duty or liability.

In regard to the decision in Manning v. Howard, one can say that since there is no longer a marriage such litigation cannot disrupt the marriage. However, the disturbing feature about this decision is that if a spouse has a tort claim against the other spouse, this claim can be perfected by obtaining a divorce. If the tort claim were large, there could be strong financial incentive to obtain a divorce, and it is anomalous that in some circumstances the law should provide such an inducement. The Manning case has recently been followed in Imperadeiro v. Imperadeiro[29] with the result that a former wife was able to recover damages against her former husband for a libel published during the marriage. However, the Bourbeau case suggests that the Appellate Division of our Supreme Court may consider inter-spousal tort immunity as providing substantive protection and not simply procedural protection. Therefore it might choose not to apply Manning v. Howard but to apply Phillips v. Barnet[30]

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28. Supra, footnote 11, at p. 186.

29. (1977), 76 D.L.R. (3d) 765 (B.C.S.C.).

30. (1876), 1 Q.B.D. 436.

in which it was held that a former wife had no right of action for damages for assault committed by her husband prior to the divorce.

If Manning v. Howard does represent the law in Alberta, the anomalous provision of an inducement to divorce could be corrected by amending the Married Women's Act so that torts which occur during marriage are not actionable after marriage. However, we think that a preferable solution is to abolish inter-spousal tort immunity. We believe in the importance of marriage in our society and see no reason why the law should deprive married persons of rights which it confers upon unmarried persons.

2. Collusion

A second argument advanced for inter-spousal tort immunity is that it is necessary to prevent collusion between spouses where there is insurance coverage. As the most prevalent inter-spousal tort is the spouse-passenger who is injured by the other spouse's negligent operation of a motor vehicle, we will consider the problem of collusion in this context. We must concede that the motive and opportunity for fraud is greater than in the case of a guest passenger who is not married to the driver or owner of a motor vehicle. However, we cannot accept that a blanket immunity in regard to tort claims between spouses is the appropriate mode of dealing with the possibility of collusion

between them. We believe that in the vast majority of cases spouses will only bring actions based on meritorious claims against the other spouse. Meritorious inter-spousal claims should not be defeated merely because of the possibility that a small percentage of married people might collude to bring an invalid claim. The principle that persons injured by the negligence of others should receive compensation is too important for it to continue to be subordinated to concerns about the possibility of collusive claims against insurers.

We believe that it is necessary to place one's trust in the basic honesty of most individuals. In those cases in which spouses are tempted to collude in order to defraud an insurance company, they may be deterred from doing so by a fear of prosecution for perjury. If they are not deterred, we believe that reliance can be placed upon the ability of the courts to distinguish between the fraudulent and the meritorious claim. This is the approach which we have adopted in our Report on the Guest Passenger Legislation and which caused us to recommend that the guest passenger should be able to recover from the host driver on proof of ordinary negligence rather than having to prove gross negligence.

Although the risk of collusion may be somewhat greater as between spouses, it is only a matter of degree. As the Manitoba

Law Reform Commission in its Report #10 stated:[31]

> It should also be noted that there are many other potential collusion situations to which no similar immunity attaches: actions by fiancees and close friends, actions by children, and even actions by spouses if property damage is involved. Why should inter-spousal tortious injury cases be singled out for special immunity? In all other areas of law the normal techniques for detecting and punishing fraudulent litigation practices have proved to be effective, and there is no logical reason why personal injury claims arising from inter-spousal litigation require special additional safeguards, particularly when the safeguards frustrate so many meritorious claims.

We concur with these comments of the Manitoba Law Reform Commission.

The Ontario Law Reform Commission and the Manitoba Law Reform Commission made inquiries in Australia and in the United Kingdom to determine whether the abolition of inter-spousal tort immunity had created problems for insurers arising out of collusion between spouses. These inquiries indicated that collusion was not a significant problem. One typical response which was received from the Sun Alliance and London Insurance Group stated: "Our experience does not lead us to believe that the abolition of inter-spousal immunity in tort actions leads to any significant increase in collusion or fraud."[32]

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31. Report on the Abolition of Inter-spousal Immunity in Tort (1972) at p. 4.

32. Ibid., p. 6.

We considered the question whether inter-spousal tort claims should only be permitted for injury arising out of the operation of motor vehicles where insurance coverage could be made available. We have concluded that the protection offered to the spouse by a total abolition of inter-spousal tort immunity is more important than any small additional danger which inter-spousal tort claims pose for marital harmony. In our opinion, when a spouse wishes to sue the other spouse in tort where there is no insurance coverage, the marriage is probably so unstable that it cannot be saved.

3. Indirect Benefit from Own Wrongful Conduct.

A third argument sometimes advanced for inter-spousal tort immunity is that it prevents the one spouse who has committed a tort from obtaining an indirect benefit through the other injured spouse's tort recovery which is derived from insurance. Professor Mendes Da Costa has in our view successfully answered this argument in an article in which he states:[33]

> In such circumstances it is of course possible to contend that damages paid to a wife form, in general, part of the family funds; and that, therefore, if suit were permitted the result would be to allow a husband to benefit as a result of his own tort. But this reasoning may have equal application to damage awards made, in analogous situations, to other members of the family. In any event to so argue is to lose sight of the fact that damages are awarded to compensate the

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33. D. Mendes Da Costa, "Husband and Wife in The Law of Torts", chapter 16 in Studies in Canadian Tort Law (1968) edited by A.M. Linden at p. 473.

> injured wife; and compensation should not be denied merely on the basis that as a fact of family life, an accretion to the family funds may benefit both spouses.

If inter-spousal tort immunity is abolished, we believe that most tort claims between spouses will arise where there is insurance coverage and this will occur mainly in motor vehicle accidents. In a considerable proportion of cases, even though the driver-spouse is negligent, it would be difficult to categorize the momentary inadvertence which causes injury to the passenger-spouse as culpable or blameworthy in a moral sense. Therefore, we do not believe that in general a valid argument can be made that abolition of inter-spousal tort immunity would enable a wrongdoer to obtain an indirect advantage from his or her wrongful conduct. Even in those cases in which a spouse's conduct is morally blameworthy, we think that compensation should not be denied. In most cases, the largest part of the damages awarded is to compensate either for loss of wages and of earning capacity or for medical expenses and future care. There is no net monetary gain in regard to that part of such damage awards. Where a part of the damages awarded is for pain and suffering or other non-pecuniary damage, there will be a net monetary gain but it is intended only to be compensatory. The theoretical possibility that general damages may redound occasionally to the benefit of a wrongdoing spouse through an increase in family funds should not stand in the way of providing true compensation to injured spouses generally. As we have previously indicated,

if a spouse-passenger has been severely injured by the negligence of the spouse-driver, compensation paid to the injured spouse-passenger may enable the family to lead a more harmonious life than if compensation were denied and the family were faced with serious financial hardships and its resulting stresses.

It should also be noted that in 1972, when "no-fault" accident benefits were introduced, the benefits were made available to all occupants of insured vehicles with no exclusion for spouses. Thus a spouse-passenger may recover up to the "no-fault" benefit limit whether the spouse-driver has been negligent or not and even if the spouse-driver's conduct went beyond negligence and was morally culpable or blameworthy. The "no-fault" accident benefits are structured without concern that a spouse may obtain an indirect benefit from his or her wrongful conduct through compensation paid to the other spouse. Similarly, we believe that our general tort liability system should provide compensation on proof of negligence without concern for any indirect benefit which may occur through the fact of family life. We also believe that there is no justification for the enormous discontinuity in the rights of a spouse-passenger. A spouse-passenger may recover up to the "no-fault" benefit limit whether or not the spouse-driver was negligent but has no right to compensation from the spouse-driver above that limit even though the spouse-driver was negligent. The abolition of inter-spousal tort immunity would rectify this discontinuity.

4. Subrogation

A fourth argument in favour of inter-spousal tort immunity is that, if it were abolished, the result would be that insurers would bring actions against one spouse by subrogation to the rights of another. The case of Liberty Mutural Insurance Co. v. Partridge[34] indicates how this result can come about. In that case, the husband was in possession of his wife's car with her consent and as a result of his negligence, a collision occurred in which the wife's car sustained over $3,000 in damages. The insurer, under a provision of the policy of insurance which covered loss or damage to the insured automobile, paid the wife the loss sustained. The insurer then claimed to be subrogated to the rights of the wife against the husband. It was held that the husband was liable to the insurer for the damage to the wife's car because, following Laxton v. Ulrich,[35] the wife has a cause of action in tort for recovery of damages to her separate property and the insurer is subrogated to this claim.

It would appear that the same result would pertain in Alberta in this particular case in that the husband was convicted of impaired driving under section 234 of The Criminal Code. The Standard Automobile Policy S.P.F. No. 1 (Alberta), as approved by the Superintendant of Insurance under section 284 of The Alberta

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34. (1976), 67 D.L.R. (3d) 603 (Ont. Co. Ct.).

35. (1964), 41 D.L.R. (2d) 476 (Ont. C.A.).

Insurance Act, provides that the insurer agrees to waive its right of subrogation against every person who with the insured's consent has custody of the automobile with the exception of a person who is in a business related to automobiles or who has committed a breach of any condition of the policy. Driving while impaired is a breach of a condition of the policy and therefore the insurer would not have waived its rights of subrogation. The existing exception for inter-spousal tort immunity would accordingly permit the insurer to sue the spouse who negligently caused damage to the other spouse's car. However, in most cases, the insurer will have waived its right to subrogation under the terms of the standard automobile policy.

The abolition of inter-spousal tort immunity would not create any significant number of new cases in which automobile insurers could bring subrogated claims. Section 290(1) of the Alberta Insurance Act provides that "Every contract evidenced by an owner's policy insures the person named therein and every other person who with his consent personally drives an automobile owned by the insured..." against third party liability. The spouse of the owner will be an unnamed insured and if that spouse through negligence causes damage to a third person, the insurer will not have a right of subrogation against that negligent spouse. It is only in regard to collision insurance and not automobile liability insurance that a right of subrogation can result in a defendant spouse being the real party in interest in

an action in which the other spouse is the nominal plaintiff and the insurance company is the real plaintiff. Even with regard to collision insurance, the insurer will have waived its right of subrogation unless there has been a breach of any condition of the policy.

At the present time if a home is owned by one spouse and the other spouse negligently causes a fire which destroys it, the fire insurance company which satisfies the claim of the owner would have a right of subrogation to recover the loss from the negligent spouse provided that only the owner is insured. This is the result of the existing exception to inter-spousal tort immunity for the protection and security of the property of a spouse and section 227(1) of the Alberta Insurance Act which provides that:

> The insurer, upon making any payment or assuming liability therefor under a contract of fire insurance, is subrogated to all rights of recovery of the insured against any person, and may bring action in the name of the insured to enforce such rights.

We are not aware of any case in which a fire insurance company has made payment under a policy to the owner and has then brought a subrogated action against the spouse of the owner who negligently caused the fire. In Midland Insurance Co. v. Smith,[36] a wife wilfully set fire to the house owned and insured by the husband at a time when no action could be brought by one

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36. (1881), 6 Q.B.D. 561.

spouse against another even for the protection or security of the property of the first. The husband claimed on the policy and the company without admitting liability brought an action against the wife and the husband. It was held that it was only by indemnifying the insured that the company would be entitled to a cause of action vested in the insured and that such a cause of action "could only be enforced in the name of the assured and for the purpose of enforcing his rights, and inasmuch as he could have no such claim or right against his wife, it follows that in no possible view of the case is the plaintiffs' claim sustainable."[37]

In Alberta since 1973 the husband does have a claim in tort against his wife for the protection of his own property. Therefore, in such a case where the fire insurance company indemnified the husband, the insurance company would be subrogated to the rights of the husband against his wife unless the wife was also an insured person. In the Insurance Bureau of Canada's Homeowners and Tenants Package Forms, which are advisory and not mandatory but which are in general use in Alberta, the definition section provides that "The unqualified word 'Insured' includes (1) the Named Insured, and (2) if residents of his household, his spouse, the relatives of either, and any other person under the age of 21 in the care of an Insured". The definition of "insured" would therefore seem to prevent a

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37. Ibid., at p. 565.

subrogated action in the name of the owner against the spouse of the owner who has negligently caused fire damage because the negligent spouse will be an "insured". This would be so provided that the wide definition of "insured" does not simply enable the spouse who does not have title to the real property to claim for loss or damage to his or her own personal property.

The problem of subrogation which might result in a spouse being the nominal plaintiff with the insurance company the real plaintiff and the other spouse the real defendant seems to be solved in regard to both the homeowners' fire insurance coverage and the homeowners' comprehensive personal liability insurance by the extended definition of "insured". However, with the exception of automobile insurance where there is a statutory form, the avoidance of the problem which could arise out of subrogation rests upon the use of forms which are simply advisory and not mandatory. If insurance companies ceased to use these forms and the insured were limited to the named insured, and inter-spousal tort immunity were abolished, this combination could result in an action between spouses where the insurance company is the real plaintiff, with one spouse only the nominal plaintiff, and the other spouse the real defendant. Such actions, even if they did not cause marital friction, would cause financial problems for spouses as the insurance company would be thrusting the burden onto the negligent spouse rather than spreading the risk. If these potential problems were to

materialize, it might be necessary to have legislation which would either abolish the right of subrogation in certain circumstances or provide for the waiving of the right of subrogation or provide for an extended definition of insured. We think that it is unlikely that these potential problems will actually occur and therefore we will make no recommendation about them. However, there is one subrogation problem which arises out of section 52 of the Alberta Hospitals Act which we think requires a legislative solution and which we will later in this report recommend.

IV. CONCLUSION

1. Section 3 of The Married Women's Act.

We do not believe that there is any merit in placing any restriction upon the type of case in which a tort action can be brought between spouses nor do we believe that the right to bring a tort action should be dependent upon their previous separation. We also do not believe that there is merit or need in giving a court discretion to stay proceedings as has been done in Britain. The granting of such a discretionary power to stay would, we believe, be tantamount to telling married persons that the courts know better what is good for their marriage than they themselves do. The Statute Law Revision Committee of the State of Victoria carefully considered and rejected the recommendation of the English Law Reform Committee that the courts should be granted discretionary power to stay proceedings between spouses. In its Report the Committee stated:[38]

> 23. This Committee does not agree with the English Committee's recommendation that the court should be vested with discretionary authority to stay proceedings between husband and wife which appear trivial, or to serve no useful purpose. Under this procedure, an application to have proceedings stayed would be heard first and if the stay was refused, the case would have to be heard again to determine the extent of the claim. At present spouses may sue each other in respect of trivial personal possessions. However, the Committee is satisfied that this right is not being abused nor does it appear to have resulted in a spate of petty

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38. Report of the Statute Law Revision Committee (Victoria) on Action in Tort Between Husband and Wife, 2046/66.

> claims. Granting husband and wife the right to sue generally in tort merely broadens the present provision. As it has apparently not been necessary to grant the court power to stay proceedings that can at present be conducted, it does not appear necessary or logical that a provision for a stay should be applied to any extended field of action.

We agree with the Statute Law Revision Committee of the State of Victoria, the Ontario Law Reform Commission,[39] the Newfoundland Family Law Study[40] and the Manitoba Law Reform Commission[41] that inter-spousal tort immunity should be abolished with no special provision for a stay of proceedings.

RECOMMENDATION #1

> **We recommend that subsection (2) of section 3 of The Married Women's Act, R.S.A. 1970, c. 227 as amended by section 11(b) of The Attorney General Statutes Amendment, 1973, S.A. 1973, c. 61 be repealed and that a new subsection (2) of section 3 of The Married Women's Act be enacted as follows: Each of the parties to a marriage has the same right of action in tort against the other as if they were not married.**

2. Section 52 of The Alberta Hospitals Act.

The abolition of inter-spousal tort immunity which we have recommended combined with section 52 of The Alberta Hospitals Act will, in our opinion, create difficulties. Section 52 reads as

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39. Report on Family Law: Torts (1969) at p. 58.

40. R. Gushue et al., Family Law in Newfoundland (1973) at p. 340.

41. Report on the Abolition of Inter-spousal Tort Immunity (1972) at p. 8.

follows:

> 52.(1) Where as a result of a wrongful act or omission of another, a person suffers personal injuries and becomes a beneficiary,
>
> (a) the beneficiary has the same right to recover the cost of insured services against the person guilty of the wrongful act or omission as he would have had if he had been required to pay for the whole cost of the hospital services which he received, and
>
> (b) the Minister is subrogated to the right of recovery of the beneficiary in respect of the cost of insured services furnished and the Minister may maintain an action either in his own name or in the name of the beneficiary to recover the cost of the insured services to which he is hereby subrogated.

If inter-spousal tort immunity is abolished, section 52 of The Alberta Hospitals Act would empower the Minister of Hospitals and Health Care to bring an action, either in his own name or in the name of the injured spouse, against the negligent spouse who caused the injury to recover the insured hospital services rendered to the injured spouse. If the negligent spouse is not protected by liability insurance, we have no doubt that the Minister would be very reluctant to sue the negligent spouse for insured hospital services rendered to the injured spouse.

Unfortunately the matter is complicated by an agreement. On June 27, 1958, the Government of Canada and the Government of the Province of Alberta entered into an agreement which provides for

payment by Canada of contributions in respect of insured hospital services. Section 2(1)(f) of the agreement reads as follows:

> The Province will do all things and keep, observe and perform all terms, provisions, covenants and agreements as set forth and provided in the Federal Act and this Agreement, and without restricting the generality of the foregoing, the Province will -
>
> (f) make and continue provision for the recovery of the cost of insured services furnished to an insured person in respect of an injury or disability where such person is legally entitled to recover the cost of such services from some other person by way of damages for negligence or other wrongful act, and for the recovery from such other person by way of subrogation or otherwise, and take all proper and reasonable steps to effect such recovery.

We would not wish to see the Minister placed in the unenviable position of either being in breach of the agreement with the federal government or having to bring an action for hospital services rendered to the injured spouse against a negligent spouse who may have no liability insurance. We think that section 52 of The Alberta Hospitals Act should be amended so that a spouse injured as a result of a wrongful act or omission of the other spouse will not have a right to recover the cost of insured hospital services from the other spouse. Therefore in that situation there would be no rights to which the Minister of Hospitals and Health Care might be subrogated.

RECOMMENDATION #2

We recommend that section 52(1) of The

> Alberta Hospitals Act, R.S.A. 1970, c. 174 be amended by striking out the first three lines and substituting the following: "Where a person suffers personal injuries as a result of a wrongful act or omission of another person who is not his spouse, and becomes a beneficiary...".

3. Section 5 of The Contributory Negligence Act.

If inter-spousal tort immunity is abolished, it follows that there is no reason to retain section 5 of The Contributory Negligence Act which imputes the negligence of one spouse to the other spouse and prevents recovery for the portion of the damge or loss caused by the fault of the other spouse. The spouse who has suffered damage should be able to obtain judgment in full against any concurrent tortfeasor in the same manner as any other person in spite of the negligence of the other spouse. The spouse who has been negligent should be liable to other tortfeasors for contribution to the extent that the negligent spouse was responsible for the damage suffered by his or her spouse.

RECOMMENDATION #3

> We recommend that section 5 of The Contributory Negligence Act, R.S.A. 1970, c. 65 be repealed.

4. Section 296(b)(i) and Section 298(a) of The Alberta Insurance Act.

Section 296(b)(i) of the Alberta Insurance Act provides that automobile insurance policies shall not render the insurer liable

for bodily injury or death of a spouse or child of an insured while the spouse or child is either a passenger or getting into or out of the automobile. This section frustrates the effective distribution of such losses among the members of the motoring public which we believe to be the proper function of insurance, and, if inter-spousal immunity is abolished, will impose on spouses a liability against which they cannot insure. To refrain from amending this provision would render almost nugatory the abolition of inter-spousal tort immunity in the very field, the negligent operation of a motor vehicle, that the vast proportion of such tort claims are to expected.

Assuming that inter-spousal tort immunity is abolished, that section 5 of The Contributory Negligence Act is repealed and that the restriction on the guest passenger's right of recovery is eliminated, we will consider the result of a two-car collision in which a spouse-passenger suffers bodily injuries as a result of the negligence of the spouse-driver and the driver of the other vehicle. The two drivers are concurrent tortfeasors and would be jointly and severally liable for injury sustained by the spouse. The injured spouse could sue the driver of the other vehicle and obtain judgment in full against him and recover from his insurance company, assuming he has sufficient insurance coverage. The driver of the other vehicle, or rather his insurance company, would be entitled to contribution against the tortfeasor-spouse according to the extent of the tortfeasor-spouse's responsibility

for the damage. However, the insurer of the tortfeasor-spouse would not be liable for contribution because the liability would arise out of the bodily injury to the spouse of the insured which is an exception to liability of the insurer under section 296(b)(i) of The Alberta Insurance Act. Consequently, the insurer of the other vehicle would only realize on its subrogated contribution judgment against the tortfeasor-spouse provided that he had sufficient assets. This does not appear to be fair to the insurer of the other vehicle, nor does it seem fair that the tortfeasor-spouse was not allowed to insure against this liability. Assuming it is a one-car, or a two-car collision in which only the spouse-driver is negligent, the injured-spouse would be able to obtain judgment against the spouse-driver but the insurer of the spouse-driver would not be liable because of section 296(b)(i) of The Alberta Insurance Act. If the injured spouse were not able to recover on the judgment against the tortfeasor-spouse, the injured spouse would be able to claim from the Motor Vehicle Accident Claims Fund upon assignment of the judgment against the tortfeasor-spouse.

The results in motor vehicle accidents which flow from the abolition of inter-spousal tort immunity, the repeal of section 5 of The Contributory Negligence Act and the elimination of the discrimination against the gratuitous passenger are undesirable, in some cases as indicated above, unless section 296(b)(i) of the Alberta Insurance Act is amended so that an insurer is liable for

injury or death of the spouse of the insured. If the law subjects a person to liability, the law should not specifically provide that the insurer is not responsible for such liability. If there is a risk, one should be able to insure against the risk. There appears to be no justification for preventing insurance companies from providing insurance against the risk of bodily injury or death of the spouse of the insured while being carried in an automobile.

The only issue is whether the coverage should be permitted or whether it is to be required. We believe that an injured spouse should have the same rights as any member of the general public. A member of the general public has the benefit of compulsory automobile insurance. We therefore think that The Alberta Insurance Act should be amended so that the injured-spouse receives comparable protection. This means not only an amendment of section 296(b)(i) of The Alberta Insurance Act but also the repeal of section 298(a) of that Act. Section 298(a) of the Act provides that an insurer may by endorsement exclude liability for loss or damage resulting from bodily injury or the death of a passenger of an automobile. However, the standard automobile policy approved by the Superintendent of Insurance under section 284 of The Alberta Insurance Act does not exclude this liability. In 1977, an amendment was made to The Alberta Insurance Act which would no longer permit an insurer to do so but this section is only to come into force on a date fixed

by proclamation and no date has yet been fixed. We concur with the 1977 amendment to The Alberta Insurance Act and think that it should be proclaimed as soon as possible.

If a spouse is to have the same rights as a member of the general public, it would be anomalous for section 296(b)(i) of The Alberta Insurance Act to continue to provide that the insurer is not liable under a motor vehicle liability policy for injury or death of a child of any person insured by the contract. At the present time, an injured child-passenger can sue the parent-driver provided that person has been grossly negligent and, if our recommendation for the elimination of the restriction on the right of recovery of a gratuitous passenger is accepted, the injured child-passenger will be able to sue where the parent-driver has simply been negligent. If insurance is unavailable, no action is likely to be brought where the family is living together. If the parents are separated or divorced and a child is injured in the automobile of the parent who has not been granted custody, it is possible that an action may be brought against the grossly negligent driver-parent and when the guest passenger restriction is removed against the negligent driver-parent. This appears to be a risk for which insurance should be available. In addition, since we do not believe that the possibility of collusive claims as between spouses is a valid argument for either inter-spousal tort immunity or the denial of motor vehicle liability insurance coverage for a spouse, it must

also be rejected for the denial of such insurance coverage for claims of children against their parents. This is the conclusion reached by the Ontario Law Reform Commission,[42] the Newfoundland Family Law Study[43] and the Manitoba Law Reform Commission.[44] We concur in their conclusion.

We recognize that the additional motor vehicle liability insurance coverage may result in an increase in premiums. In a letter to the Institute dated February 18, 1976, the Insurance Bureau of Canada stated that "an increase in pure claims costs of up to 2 1/2% can be expected if there is an elimination of inter-spousal immunity from suit". Since the date of that letter, there has been an increase in the "no-fault" accident benefits under which a spouse-passenger is compensated without proof of negligence, and this part of the cost of compensating the spouse-passenger is presumably included in the existing premiums. In view of this, we hope that no increase in premiums may be necessary. However, we regard such insurance coverage as vital in a compassionate society which is concerned with an equitable distribution of the losses which arise inevitably out of motor vehicle traffic. Section 296(b)(i) of The Alberta Insurance Act appears to proclaim that bodily injury or death to

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42. Report on Family Law: Torts (1969) at p. 69.

43. R. Gushue et al., Family Law in Newfoundland (1973) at p. 340.

44. Report on the Abolition of Inter-spousal Tort Immunity (1972) at pp. 11-12.

a spouse or child of any insured person is not a risk that should be shared among the motoring public through the mode of insurance. We do not accept such a premise. We think that a spouse and child should be entitled to share with all other members of the general public in the protection accorded by compulsory automobile insurance.

RECOMMENDATION #4

> **We recommend that section 296(b)(i) of The Alberta Insurance Act, R.S.A. 1970, c. 187 be repealed and that section 6 of The Alberta Insurance Amendment Act, 1977, S.A. 1977, c. 76 should be proclaimed as soon as possible.**

5. Section 296(b)(ii) of The Alberta Insurance Act.

We have previously recommended that section 296(b)(i) and section 298(a) of The Alberta Insurance Act should be repealed because these provisions would effectively nullify to a very significant extent the abolition of inter-spousal tort immunity in the field of motor vehicle negligence, a field in which the bulk of tort claims would be likely to arise. We also believe that section 296(b)(ii) of the Alberta Insurance Act should be repealed. This section provides that the insurer is not liable under a motor vehicle liability policy for any liability resulting from bodily injury or death of any person insured by the contract. We believe that this section should be repealed because of the anomalous results which would occur were it to

remain while section 296(b)(i) and 298(a) of The Alberta Insurance Act were repealed and the guest passenger discrimination abolished.

The anomalous result which would flow from a failure to repeal section 296(b)(ii) can be illustrated by the following two examples. Both examples will assume that inter-spousal tort immunity has been abolished, that sections 296(b)(i) and 298(a) of The Alberta Insurance Act have been repealed and that guest passenger discrimination has been abolished.

Firstly, we will assume that the husband and wife drive one car which is owned and insured by the husband. If a one-car collision occurs in which the husband is negligent and the wife-passenger is injured, the wife will be able to obtain a judgment against her husband and will be able to recover from his insurance company on the judgment. However, if husband-passenger is injured in a one-car collision as a result of his wife's negligent driving, the husband will be able to obtain a judgment against his wife but because he is the person insured by the contract his insurance company will not indemnify the wife. If the car were owned and insured by the wife, we would have the opposite results.

Secondly, we will assume that we have a two car family in which the husband (H) owns and is the named insured of car A and the wife (W) owns and is the named insured of car B. The four

results of a one-car collision will be as follows:

(1) W is a passenger in car A owned and driven by H; H is negligent and W is injured; W may recover from H's insurance company on judgment against H.

(2) H is a passenger in car A owned by H and driven by W; W is negligent and H is injured; H may obtain a judgment against W but W is not indemnified by H's insurance company because H is the person insured by the contract.

(3) H is a passenger in car B owned and driven by W; W is negligent and H is injured; H may recover from W's insurance company on judgment against W.

(4) W is a passenger in car B owned by W and driven by H; H is negligent and W is injured; W may obtain a judgment against H but H is not indemnified by W's insurance company because W is the person insured by the contract.

These anomalous results stem from section 296(b)(ii) of The Alberta Insurance Act and flow from the fortuitous event of which spouse owns and insures the car and which spouse is a passenger in the car which is involved in a one-car accident. As a result we think that section 296(b)(ii) should also be repealed. There is also another reason why we think that the section should be repealed. If an insurer made both the owner of the car and his or her spouse the named insured, the insurer would not be liable

for bodily injury or death of either spouse as each would be persons insured by the contract regardless of which spouse is driving.

It may appear to be unusual that a named insured should be able to recover from that person's insurer for injury which that person sustains as a result of the other spouse's negligence. However, it is the negligent spouse who would be indemnified by the insurance under section A of the standard automobile policy for liability imposed upon the negligent spouse. The repeal of section 296(b)(ii) of The Alberta Insurance Act would not enable a named insured who negligently inflicted injury to himself or herself to recover under the policy. This is because the standard automobile policy only indemnifies an insured or a person driving with his consent against liability imposed by law.

The repeal of section 296(b)(ii) will confer the greatest benefit upon the spouse of the insured by indemnifying that spouse for any liability imposed by law resulting from personal injury to the owner-spouse which is caused by the driver-spouse. The repeal will also confer a benefit in another situation. If the owner and insured permits a person to drive his car and the owner as a passenger in his own car is injured by the negligence of the driver, the driver would be indemnified under the owner's policy for the liability imposed upon him for injury to the owner. Without the repeal of section 296(b)(ii), the driver would not be indemnified under the owner's policy in regard to

personal injury caused to the owner of the car because this liability results from injury to a person insured by the contract. At the present time, the driver would be indemnified against liability owed to the owner in this situation only if the driver himself were an insured under another standard contract and the automobile which he was driving was not regularly or frequently used by him or by any other person residing with him.

When the owner of an automobile has permitted another person to drive and is a passenger in his own vehicle, it may be that it is the driver's insurer who should indemnify the driver for any personal injury caused to the owner through negligent driving rather than the owner's insurer. We have no opinion about which of two policies should indemnify the driver against liability which arises through the negligent operation of a motor vehicle which causes personal injury to the owner of the motor vehicle. We do, however, believe that insurance should be available to meet this risk. We do not think that a separate driver's policy to indemnify the spouse who was driving the owner-spouse for liability for personal injury negligently caused to the owner-spouse is a practicable solution. Although The Alberta Insurance Act provides for drivers' policies, these policies are very unusual. We think that this protection should be available under the standard automobile policy.

RECOMMENDATION #5

We recommend that section 296(b)(ii) of The Alberta Insurance Act, R.S.A. 1970, c. 187 be repealed.

W.F. BOWKER

W.H. HURLBURT

D.B. MASON

J.P.S. MCLAREN

ELLEN PICARD

W.A. STEVENSON

W.E. WILSON

BY _____

Chairman

_____

Director

April, 1979

(Mrs. Margaret Donnelly and Mr. R.P. Fraser were members of the Board when the substantive decisions about this Report were made and Mr. D.B. Mason joined the Board subsequently.)

APPENDIX A

Recommendations

Recommendation #1

We recommend that subsection (2) of section 3 of The Married Women's Act, R.S.A. 1970, c. 227 as amended by section 11(b) of The Attorney General Statutes Amendment, 1973, S.A. 1973, c. 61 be repealed and that a new subsection (2) of section 3 of The Married Women's Act be enacted as follows: Each of the parties to a marriage has the same right of action in tort against the other as if they were not married.

Recommendation #2

We recommend that section 52(1) of The Alberta Hospitals Act, R.S.A. 1970, c. 174 be amended by striking out the first three lines and substituting the following: "Where a person suffers personal injuries as a result of a wrongful act or omission of another person who is not his spouse, and becomes a beneficiary...".

Recommendation #3

We recommend that section 5 of The Contributory Negligence Act, R.S.A. 1970, c. 65 be repealed.

Recommendation #4

We recommend that section 296(b)(i) of The Alberta Insurance Act, R.S.A. 1970, c. 187 be repealed and that section 6 of The Alberta Insurance Amendment Act, 1977, S.A. 1977, c. 76 should be proclaimed as soon as possible.

Recommendation #5

We recommend that section 296(b)(ii) of The Alberta Insurance Act, R.S.A. 1970, c. 187 be repealed.

ACKNOWLEDGMENTS

The Institute acknowledges the continuing grant from the Alberta Law Foundation which, together with the funds provided by the Attorney-General and the University of Alberta, makes the Institute's work possible.

We have been greatly assisted in the project by the excellent research paper prepared by Professor Lewis Klar of The Faculty of Law of the University of Alberta. We also wish to acknowledge our indebtedness to Miss N.L. Foster, Mr. R. Sadownik, Mr. G.C. Stewart, Mr. E.D.D. Tavender and Mr. N.C. Wittman who served on a committee of the Canadian Bar Association, Alberta Branch and provided assistance to us.

We wish to think Mr. J.P. Brumlik, Q.C. who discussed with us some of the insurance law implications of the abolition of inter-spousal tort immunity and provided valuable assistance to us. We are also grateful to Mr. J. Saleh, Deputy Superintendent of Insurance who assisted us by answering several inquiries made to him.

We have also received much benefit from reports of other law reform agencies and we are grateful to them.

In addition to the Director, the members of the Institute staff who have participated in the project are Mr. Gordon Bale, Mr. V.K. Bhardwaj and Mr. Andrew R. Hudson.