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**INTERSPOUSAL TORT LITIGATION: A HISTORICAL AND  
LEGAL ANALYSIS**- Aditi Shrivastava<sup>1</sup>**ABSTRACT**

The scope of this research paper is to explore one of the significant aspects of tort law, that is, inter-spousal tort litigation. This research paper discusses how the identity of spouses used to be viewed as a single entity and the ultimate recognition of the individuality of the spouses in tort cases through the application of theories and court rulings. Even the abolition of the antiquated immunity laws of the common law and the place of women in society is discussed. The researcher used secondary data from previously published papers, books, and scholarly publications to arrive at the conclusion. Upholding the concept of equity over the prolonged concept of unity was a necessity considering the advancement of society towards becoming more egalitarian.

**INTRODUCTION**

In the past, and to some degree even in the present, legal doctrines known as immunities existed under common law that prevented members of the same family from suing each other for torts.<sup>2</sup> The issue that must be answered is whether it is appropriate to restrict such claims at this time or if they should be considered in the same manner as any other tort case. For instance, if a pedestrian gets hit by a heavily intoxicated driver, the remedy for this exists in the law of torts. But if the same pedestrian happened to be the spouse of that intoxicated driver, then in many states, there is no remedy available because of the immunities provided by common law. These cases are actions in tort, not family law, and have no connection to family law in general; they do not interact with it, criticize it, or strive to modify it in any

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way.<sup>3</sup> But even though these actions are called "pure tort claims," they are not the same as other tort claims in a very important way, i.e., the people on both sides of the action are related to each other. The common law considered a family as a government, with the husband and father at the top.<sup>4</sup> From the same perspective of the law, the husband and wife were one entity, and the law recognized the husband as the primary individual.<sup>5</sup> Nonetheless, the current rate of urbanization and mechanization of our environment has made the social interests underpinning the law of torts increasingly essential and has also expedited, if not caused, a great change in the notion of the family as a legal and social organization. Today, husbands and fathers are seen less as dictators to be obeyed and more as friends, even bosom buddies.<sup>6</sup> Upon marriage, women are no longer legally subject to the authority of their husbands and are granted equal rights to those of men in all spheres of life, including the ownership of property, the ability to enter contracts, the franchise, the right to bring and defend legal actions, and the right to be sued.<sup>7</sup> It is now more common and accepted to have a divorce.

This paper discusses the evolution of tort law between spouses, that is, from the time before the demolition of certain immunities provided by the common law with respect to spouses and torts. This paper will also present a theoretical and practical foundation for understanding the unique characteristics of tort litigation involving spouses, as opposed to other tort claims.

## RESEARCH METHOD

This research paper has been written with the help of secondary data collected from previously published research papers and books. A qualitative analysis of the available material has been conducted in order to analyze data from multiple resources in a flexible and open-ended manner. However, a personal interpretation of the data collected has also been made. The deductive reasoning method has been taken into consideration in order to advance a supposition for the said topic and to derive an appropriate conclusion from the stated facts relevant to the topic.

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<sup>3</sup>Ibid.

<sup>4</sup>John L. Gedid, Interspousal Immunity in Pennsylvania, 18 Duq. L. Rev. 475(1980).

<sup>5</sup>Pound, Roscoe. "Common Law and Legislation." Harvard Law Review 21 (1907): 383.

<sup>6</sup>Law Reform Husband and Wife Act 1962. (2023, June 30). Retrieved from [https://en.adgm.thomsonreuters.com/sites/default/files/net\\_file\\_store/24\\_Law\\_Reform\\_Husband\\_and\\_Wife\\_Act\\_1962.pdf](https://en.adgm.thomsonreuters.com/sites/default/files/net_file_store/24_Law_Reform_Husband_and_Wife_Act_1962.pdf).

<sup>7</sup>United States Department of State, U.S. Department of State Country Report on Human Rights Practices 1994 - China, 30 January 1995, available at: <https://www.refworld.org/docid/3ae6aa8114.html> [accessed 30 June 2023].

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## DOCTRINE OF INTERSPOUSAL IMMUNITY

The inter-spousal immunity principle prevents spouses from suing one another for torts, which are civil wrongs that hurt another person. This means that the injured spouse cannot file a claim for damages if one spouse commits a tort against the other spouse.<sup>8</sup> English common law is the origin of inter-spousal immunity, and it was established to prevent spouses from successfully prevailing in civil cases for the recovery of damages in the event of a personal injury. Inter-spousal immunity is based on the premise that the legal identity of a woman is united with her that of her husband following marriage. This idea emerged in the 1960s.<sup>9</sup> According to this reasoning, it was absurd for someone to file a lawsuit against themselves. Some also feared that enforcing tort laws between a husband and wife would wreak havoc on the home front. Due to this, the courts have determined that such instances threaten the stability of the family and its wealth.<sup>10</sup> This viewpoint provided even more backing for the doctrine of marital immunity.

On this concept of inter-spousal immunity, two distinct lines of thought reach the same conclusion. In *Maine v. James Maine & Sons Co. (1924)*<sup>11</sup>, the court ruled that the husband's immunity under common law from liability for a tortious or negligent injury to his wife's person arises from the nature of their relationship and is not based solely on the absence of a suitable remedy. In *Broadus v. Wilkenson (1940)*, however, the court determined that a spouse's immunity from an action brought by the other spouse does not exclude the existence of a right to bring an action, but rather that when the action is brought against the spouse, the remedy for that right is denied.<sup>12</sup> In other words, the court recognized that a spouse had the right to file a lawsuit against their husband for damages, but it decided not to uphold that right. This is so that the protection of marriage, which the law recognizes to be a unique relationship that should be upheld, is not jeopardized by permitting spouses to file lawsuits against one another.

Although there was immunity in tort between the spouses, the common law traditionally recognized a variety of actions against third parties for intentional interference with the

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<sup>8</sup>Jack L. Herskowitz, *Tort Liability Between Husband and Wife: The Interspousal Immunity Doctrine*, 21U. Miami L. Rev. 423 (1966).

<sup>9</sup>Ibid.

<sup>10</sup>*Maine v. James Maine & Sons Co.*, 198 Iowa 1278, 201 N.W. 20 (1924).

<sup>11</sup> Ibid.

<sup>12</sup>*Broadus v. Wilkenson*, 281 Ky. 601, 136 S.W.2d 1052 (1940).

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marital relationship.<sup>13</sup> In *Broom v Morgan (1953)*, both husband and wife were employed in the wine and beer house of the defendant. The wife got injured because of the negligent act of the husband during his course of employment, and thus, the defendant was held vicariously liable for the actions of his employee, who was the husband in this case. The court said that the relationship aspect between the plaintiff and spouse would not be considered in this scenario, and thus, the husband was held liable for his negligent act against the wife.<sup>14</sup>

Similarly, in the landmark case of *Self v. Self (1961)*<sup>15</sup>, Catherine Self filed a lawsuit against her husband, claiming he "unlawfully assaulted plaintiff and beat upon, scratched and abused the person of the plaintiff" on July 14, 1960, causing her to "sustain physical injury to her person and emotional distress, and among other injuries, did receive a broken arm." It was well known at the time that spouses were not legally liable to each other in tort in California or any other state; therefore, he naturally filed a motion for summary judgment. A year after Catherine Self won her case, the California Supreme Court overturned the idea of inter-spousal immunity in intentional tort claims, ushering in the contemporary era of marital torts. The courts eventually recognized the ridiculousness of protecting couples from being sued by each other for intentional wrongdoing. Its early demise can be traced back to the inherent unfairness of the concept. As a direct result of the women's suffrage campaign and the advancement of women's rights, this was abolished. The women's suffrage movement advocated for women's participation in politics and the right to vote. Women's legal position also changed as a result of this movement, including their ability to contract and possess property. The idea of inter-spousal exemption became outmoded as women's rights increased. Due to the immunity's foundation in the notion that husbands and wives were one legal entity and that suing one's spouse amounted to suing oneself, this is the case. The women's suffrage movement, on the other hand, contributed to overturning this conventional understanding of marriage and establishing that spouses are two distinct persons with their own legal rights.<sup>16</sup> Many of the justifications for inter-spousal exemption have become moot since women have been recognized as individuals under the law in every state, regardless of whether they are married or not.

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<sup>13</sup>Broom v Morgan [1953] 1 QB 597.

<sup>14</sup>Ibid.

<sup>15</sup>Self v. Self, 376 P.2d 65 (Cal. 1962).

<sup>16</sup>Tobias, C. (1999). The Imminent Demise of Interspousal Tort Immunity. *Mont. L. Rev.*, 60, 101.

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## UNITY VS. EQUITY: HUSBAND-WIFE AS ONE OR DIFFERENT LEGAL IDENTITY?

### i. Concept of Unity

On December 5, 1945, news of a decision made by the *Tonbridge Bench* surprised some people. The newspapers said that the judge ruled that a man did not break the law when he used the return half of a non-transferable train ticket of his wife. This is because a husband and wife are one person in the eyes of the law. This unification of husband and wife is known as the "concept of unity."<sup>17</sup> Similarly, *Lush j.* stated in the case of *Phillips v. Barnett (1876)* that "It is a well-established maxim of the law that a husband and wife is one person. For many purposes, no doubt, this is a mere figure of speech, but for other purposes, it must be understood in its literal sense."<sup>18</sup>

Despite widespread acceptance in common law, the original authority for the notion that "upon marriage, a man and a woman are united, in legal cognition, and become one, that one being the husband" remains elusive. At least according to this idea of "unity", it was long established in common law that a married woman could not contract in her own name in order to seek legal remedy under the contract in the event of a breach by the other party. Therefore, just as a married woman is not legally able to enter a contract with an unknown third party, she is also not legally able to enter a contract with or be a valid grantee of her husband's property.<sup>19</sup> So too, a husband could not sue his wife for breach of contract. The husband would be essentially suing himself, and the suit would be futile. This went on until 1874, when the Married Women's Acts,<sup>20</sup> also called the "Emancipation Acts," were passed.

### ii. Problems associated with the concept of Unity

The concept of legal unity between spouses originated from outdated common law requirements. Modern culture, which affords married women equal status with their husbands, vehemently refutes the severity of this ancient ideology, which reduced the wife to little more than a possession. Courts have increasingly acknowledged the inherent illogical and impracticality of upholding rules and regulations that were made at a period when

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<sup>17</sup>Ibid.

<sup>18</sup>Lush J., *Husband and Wife*, 4th ed. 58.

<sup>19</sup>Hotes, C. H. (1960). Tort Actions between Husband and Wife. *Clev.-Marshall L. Rev.*, 9, 265.

<sup>20</sup>Herskowitz, J. L. (1966). Tort liability between husband and wife: The interspousal immunity doctrine. *U. Miami L. Rev.*, 21, 427; Hotes, C. H. (1960). Tort Actions between Husband and Wife. *Clev.-Marshall L. Rev.*, 9, 265; Married women's act: *secure to a married woman a separate legal identity and a separate legal estate in her own property.*

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women were seen as submissive to males as societies have become more progressive and women have taken on more active roles in society. The courts are becoming less willing to maintain these rules and regulations since they are now viewed as antiquated and discriminatory. Even in the case of *King v. Gates (1950)*, the court stated that “the fiction of the wife's merged existence has long been exploded.”<sup>21</sup>

### iii. The emerging concept of Equity

In the eighteenth century, Equity acknowledged that a married woman could file a lawsuit against her husband for concerns involving her separate property.<sup>22</sup> In *Rozell v. Rozell (1939)*, the court stated: “*The genius of the common law rests in its flexibility and adaptability to the ever-changing nature of human affairs, as well as in its capacity to articulate rights and provide remedies for wrongs where none had been declared previously.*”<sup>23</sup> Similarly, in *Cowgill v. Boock (1950)*, the court stated that “*Whatever the early common law rule may have been, we should not be bound by it unless it is rational and logical. The law is not unchanging. It is an evolving science. What may have been a sound common law rule a century ago may not be applicable to the altered economic and social realities of the twenty-first century.*”<sup>24</sup>

It is not possible for the law to be so unchanging and unyielding that it should accept and uphold an antiquated view of the nature of marital relations. The objective of this comment is to explain the history of the inter-spousal immunity concept as well as the reasoning that led to its introduction and subsequent narrowing of its scope so that it can be applied to a variety of different scenarios. With the intervention of equity and later with the enactment of law

<sup>21</sup>*King v. Gates*, 231 N.C. 537, 57 S.E.2d 765 (N.C. 1950).

<sup>22</sup>Iowa Code e-Section 2202: “A married woman may own in her own right, realty and personality acquired by descent, gift, or purchase, and manage, sell, convey and devise same by will to same extent and in like manner that her husband can property belonging to him.”

Section 2211:

“A wife may receive wages of her personal labor and maintain an action therefore in her own name and hold same in her own right; and she may prosecute and defend all actions at law and in equity for the preservation and protection of her rights and property as if unmarried. Neither husband nor wife is liable for debts or liabilities of the other incurred before marriage and except as herein otherwise declared, they are not liable for the separate debts of the other; nor are wages, earnings or property of either liable for separate debts of the other.”

Section 2562:

“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, and an attachment or judgment in such action shall be enforced by or against her as if she were a single woman.”

<sup>23</sup>*Rozell v. Rozell*, 281 N.Y. 106, 22 N.E.2d 254 (N.Y. 1939).

<sup>24</sup>*Cowgill v. Boock*, 189 Or. 282, 218 P.2d 445 (Or. 1950).

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reforms (husband and Wife) act in the year 1962, it became crystal clear that a woman in marriage retained a legal personality distinct from that of her husband.<sup>25</sup>

### **LAW REFORM (HUSBAND AND WIFE) ACT, 1962**

Several provisions of the Married Women's Property Act (*hereinafter* MWP) were substantially revised and included in this statute (1882).<sup>26</sup> The common law and Section 12 of the MWP Act of 1882 have long held that spouses cannot commit torts against one another or file tort claims against one another.<sup>27</sup> With the intervention of this act, however, section 12 was repealed, and married couples can now sue each other under tort, with two exceptions<sup>28</sup>; firstly, where the court believes that legal action would be of little benefit (in which case it can stay the proceedings); and secondly, when the dispute involves property (title or possession), it is at the discretion of the court to invoke section 17 of the MWP act to resolve the dispute. This exactly states that "*actions in tort between husband and wife are subject to the provisions of this section, each of the parties to a marriage shall have the like right of action in tort against the other as if they were not married.*"<sup>29</sup>

If one of the parties to a marriage brings a tort action against the other during the marriage, the court has the authority to stay the action if it appears that neither party stands to gain anything meaningful from continuing the proceedings. Wife-husband lawsuits have multiple possible theoretical categories. Depending on the time frame, it has been classified into four<sup>30</sup> different scenarios:

- (a) *Suits where the cause of action, if any, arose prior to marriage and the suit was brought during marriage;*
- (b) *Suits where the cause of action, if any, arose before marriage and the suit was brought after termination;*
- (c) *Suits where the cause of action, if any, arose during marriage and suit was brought during the marriage; finally*

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<sup>25</sup>Kowbel v. R., [1954] S.C.R. 101.

<sup>26</sup>Married Women's Property Act 1882, 45 & 46 Vict. c. 75 (Eng.).

<sup>27</sup>Ibid, § 12 (1882).

<sup>28</sup>O. K.-F. (1962). Law Reform (Husband and Wife) Act, 1962. *The Modern Law Review*, 25(6), 695.

<sup>29</sup>Ibid, 696.

<sup>30</sup>Ibid, 697.

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(d) Suits where the cause of action, if any, arose during marriage and suit was brought after termination.<sup>31</sup>

## DISCUSSION

Women currently own much of the nation's wealth. They dominate the industrial life of the nations and hold congressional and cabinet posts.<sup>32</sup> Before implementing a common law rule or notion, courts should consider whether modern social and economic change has vitiated its intent. The law is influenced by prior achievements. The concept of inter-spousal immunity is based on outdated ideas about marriage and the role of women in society.<sup>33</sup> As society becomes more egalitarian, it is becoming increasingly clear that spouses should have the same rights as other individuals, including the right to sue each other for torts. Some people argue that it can help to preserve marital harmony by discouraging spouses from suing each other.<sup>34</sup> Others argue that it can protect spouses from financial ruin if they are sued by their partners.<sup>35</sup> However, the literature utilized in this study proves that these arguments are more likely to be outweighed by the benefits of abolishing inter-spousal immunity. This study of one substantive part of tort law that is relevant to problems involving spouses highlights various concepts. It involves the discussion around the elimination of the notion of inter-spousal immunity for the benefit of both parties engaged in cases involving the researched portion of tort law.

This study highlights relevant concepts around the subject and derives the conclusion: 'Equity over the prolonged concept of unity.' Therefore, tort law should govern spouse tort claims, not family law. However, the possibility of the tort claims being a part of a family quarrel over money, control, and power is there. Parties can utilize a tort claim—even its filing for deterrence—to settle a vendetta.<sup>36</sup> Tort law could fill the gap left by a family law system that

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<sup>31</sup> Shmueli, B., *supra* note 1.

<sup>32</sup> Jack L. Herskowitz, Tort Liability Between Husband and Wife: The Interspousal Immunity Doctrine, 21 U. MIA L. Rev. 423 (1966).

<sup>33</sup> Shmueli, B., *supra* note 1.

<sup>34</sup> Spector, R. G. (1999). Marital Torts: The Current Legal Landscape. *Fam. LQ*, 33, 745.

<sup>35</sup> Sanford, V. (1955). Personal Torts Within the Family. *Vand. L. Rev.*, 9, 823.

<sup>36</sup> *Ibid.*

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ignores spouse abuse. Intra-familial tort claims should be handled more sensitively than claims between strangers, but they should not be banned under common law.<sup>37</sup>

A feasible solution is that inter-spousal tort claims shall require quasi-mandatory participation in two court-supervised mediation sessions to resolve the disagreement. While trying to resolve the disagreement extra-judicially, these sessions maintain the power and control of the court. Since emotional disputes sometimes include remedies that the law cannot provide, this solution partially fulfills tort law's four aims of the tort law, that is, compensation, corrective justice, distributive justice, and deterrent.<sup>38</sup> Thus, while the legal proceedings are temporarily halted, compelling the parties to participate in two sessions of mediation or therapy and ordering the mediator or therapist to file a report without compelling the parties to continue participating after these two sessions is not contrary to tort law and strike a balance between family and individualistic approaches. Modification of the understanding of 'de-minimis' defense in such circumstances is necessary considering the nature of the relationship that exists between the two parties, which is marital in this case.<sup>39</sup>

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<sup>38</sup>Farage, J. J. (1935). Recovery for Torts Between Spouses. *Indiana Law Journal*, 10(5), 3.

<sup>39</sup>Peterson, Martin. "What is a de minimis risk?" *Risk Management*. 4 (2002): 47-55.

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