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THE FLORIDA LEGISLATURE TOLLS THE DEATH KNELL FOR INTERSPOUSAL IMMUNITY IN TORT

COMMENT BY
LANSING C. SCRIVEN*

By marriage, the husband and wife are one person in law: that is, the very being or existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband: under whose wing, protection, and cover she performs everything . . . .

The prohibition against spouses' suing each other in tort is one of the last remnants of the common law that needs to be discarded. In its 1985 Regular Session, the Florida Legislature made significant progress toward abolishing this antiquated rule when it passed Senate Bill 196. As originally drafted, both the Senate bill and its companion, House Bill 68, would have abrogated the doctrine of interspousal immunity for the intentional torts of assault, battery, false imprisonment, trespass to real property, trespass to personal property, and conversion. After receiving a favorable report from the Senate Judiciary-Civil Committee, the Senate bill was later amended on the Senate floor to abrogate the doctrine only for the intentional torts of assault, battery, and false imprisonment. House Bill 68 met similar opposition in the House Judiciary Committee, and after two days of vigorous debate, a committee substitute was adopted which would have abrogated interspousal immunity only for the intentional tort of battery. In the waning days of the session, the Senate bill was amended by the House to

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1. 1 W. BLACKSTONE, COMMENTARIES *442.
2. Ch. 85-328, 1985 Fla. Laws 1970 (to be codified at Fla. Stat. § 768.35). S.B. 196 (1985) was introduced by Sen. Roberta Fox, Dem., Miami. A companion measure, H.B. 68 (1985), was introduced by Rep. Art Simon, Dem., Miami. Similar bills were introduced during the 1984 Regular Session (Fla. CS for SB 75 passed out of the Senate Comm. on Jud'y-Civ. and subsequently died on the calendar, FLA. LEGIS, HISTORY OF LEGISLATION, 1984 REGULAR SESSION, HISTORY OF SENATE BILLS at 24, SB 75; Fla. HB 638 passed out of the House Comm. on Jud'y and subsequently died on the calendar, id. HISTORY OF HOUSE BILLS at 210, HB 638); and the 1983 Regular Session (Fla. SB 330, which would have completely abolished the doctrine of interspousal tort immunity for both negligent and intentional torts, died in the House Comm. on Jud'y-Civ., FLA. LEGIS, HISTORY OF LEGISLATION, 1983 REGULAR SESSION, HISTORY OF SENATE BILLS at 114, SB 330). See infra note 37.
conform to the House bill and passed by a vote of 109-0. Subsequently, the Senate concurred in the House amendment to the Senate bill by a vote of 37-0. Accordingly, the interspousal immunity rule has been abrogated only for the intentional tort of battery, effective October 1, 1985.

I. HISTORICAL DEVELOPMENT OF THE RULE

The genesis of the interspousal immunity rule is believed to emanate from the Biblical concept that upon marriage the husband and wife "shall be one flesh." By the time of Blackstone, the "unity fiction" had become so prevalent that it was axiomatic that during coverture the legal existence of the wife was merged and incorporated into that of the husband. Because the husband and wife were considered a single entity at common law, they were precluded from contracting with or suing each other inasmuch as a person cannot contract with or sue himself. Similarly, the wife lost the capacity to contract for herself, or to sue or be sued without the joinder of her husband as a party to the action. As Dean Prosser deftly stated:

[At common law], [t]he husband acquired the right to possession and use of his wife's real and personal property, and he was entitled to all her choses in action, provided that he "reduced them to possession" during marriage by some act by which he appropriated them to himself, such as collecting the money or obtaining judgment in a suit in his own name.

Thus, even though the unity fiction purported to treat the husband and wife as a single entity, even the least intuitive mind could readily ascertain that the unity fiction, itself, was illusory. As one commentator laconically observed, "[M]an and wife are one—but

5. Id. at 695 (Reg. Sess. May 28, 1985).
9. See Prosser, supra note 8, at 859-60.
10. Id. at 860 (footnotes omitted).
the man is the one."

Beginning around the mid-1800's, the unity fiction was significantly weakened by the passage of the Married Women's Property Acts. These statutes, also known as Emancipation Acts, have been promulgated in all American jurisdictions and are designed to empower women to own and have separate legal estates in their own property, free from the constraints of their husbands. By liberally construing the Married Women's Acts, courts in several jurisdictions have held that the unity concept has been destroyed.

11. See Williams, supra note 8, at 17. At common law, the unity fiction barred an action between former spouses as well. In the seminal case of Phillips v. Barnett, 1 Q.B. 436 (1876), a former wife brought an action against her former husband for alleged assaults and batteries which were inflicted upon her person during coverture. In holding that no action could lie, even after the parties were divorced, Judge Blackburn opined:

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.

. . . The reason is not the technical one of parties, but because, being one person, one cannot sue the other.

Then, does the dissolution of the marriage by divorce make that a cause of action which was not so before? I do not see why it should.

Id. at 438-39 (emphasis added).

Maine was the first American jurisdiction to follow the reasoning of Phillips v. Barnett. In Abbott v. Abbott, 67 Me. 304 (1877), a former wife brought an action against her former husband for an assault and battery allegedly committed by him when she was wrongfully and forcibly placed in an insane asylum. In holding that an action in tort did not lie, the Maine court reasoned:

Divorce cannot make that [the alleged assault and battery] a cause of action which was not a cause of action before divorce. The legal character of an act of violence caused 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 [was] no cause of action at [that] time, there never can be any.

Id. at 306.

12. See Comment, supra note 8, at 459-60. FLA. STAT. ch. 708 (1983) embodies the Florida Act. For example, FLA. STAT. § 708.08 provides, in pertinent part, that:

Every married woman is empowered to take charge of and manage and control her separate property, to contract and to be contracted with, to sue and be sued, to sell, convey, transfer, mortgage, use, and pledge her real and personal property and to make, execute, and deliver instruments of every character without the joiner or consent of her husband in all respects as fully as if she were unmarried.

Id.

Indeed, this seems to be the better view. Nonetheless, several states, including Florida, have refused to construe the Married Women’s Acts to authorize interspousal tort actions, absent a clear and unequivocal legislative intent to do so. The illogic of this reasoning was best captured by Justice Harlan’s dissenting opinion in Thompson v. Thompson when he noted that construing the Married Women’s Acts to prohibit interspousal claims would lead to the anomalous result of encouraging “a married woman to sue her husband separately, in tort, for the recovery of her property, but denying her the right or privilege to sue him separately, in tort, for damages arising from his brutal assaults upon her person.”

As the fallacies of the unity fiction became more manifest, an increasing number of jurisdictions began to allow spouses to sue each other in tort. A number of jurisdictions have abolished the interspousal immunity rule, while several others have partially abrogated it. With the passage of Senate Bill 196, Florida has fi-

14. On at least three occasions, the Florida Supreme Court has repudiated the contention that the interspousal immunity doctrine has been abolished by the Married Women’s Property Acts. See Hill v. Hill, 415 So. 2d 20, 22 (Fla. 1982); Raisen v. Raisen, 379 So. 2d 352, 354 (Fla. 1979), cert. denied, 449 U.S. 886 (1980); Corren v. Corren, 47 So. 2d 774, 775-76 (Fla. 1950) (en banc). In Corren, the court reasoned that “any change in the law so far-reaching and radical as to obliterate the common law unity ‘should only be wrought [by the legislature] by language so clear and plain as to be unmistakable evidence of the legislative intention.’” Id. at 776 (quoting Thompson v. Thompson, 218 U.S. 611, 618 (1910)).

15. 218 U.S. at 611.

16. Id. at 623.

17. See, e.g., Gates v. Foley, 247 So. 2d 40, 44 (Fla. 1971) (stating “that the unity concept of marriage [had] . . . given way to the partner concept,” the Florida Supreme Court discarded the unity concept as a medieval doctrine which was incompatible with the current belief that the husband and the wife enjoy separate and equal existences).

nally begun to align itself with those jurisdictions which have recognized that interspousal immunity is a doctrine whose time has come and gone. Yet, like many states that have refused to modify or abrogate the doctrine,19 both the Florida judiciary and legislature continue to advance certain policy arguments for its retention which, like the unity concept, can at best be described as specious.20


19. Delaware: Alfrez v. Alfre, 410 A.2d 161 (Del. 1979) (rule acknowledged and sustained); Georgia: rule of immunity imposed by statute, see Ga. Code Ann. § 19-3-8 (Michie Supp. 1985), but see Harris v. Harris, 313 S.E.2d 88, 90 (Ga. 1984) (the Georgia Supreme Court held that a wife’s action against her husband was not barred by the interspousal tort immunity rule where the husband and wife had been separated for ten years, during which time the husband had cohabitated with another woman); Hawaii: Peters v. Peters, 634 P.2d 586 (Hawaii 1981) (rule acknowledged and sustained); Louisiana: rule of immunity imposed by statute, see La. Rev. Stat. Ann. § 9:291 (West Supp. 1985); Mississippi: Matthews v. State Farm Mut. Auto Ins. Co., 471 So. 2d 1223 (Miss. 1985) (rule acknowledged and sustained); Missouri: In Re Marriage of Lacey, 659 S.W.2d 313 (Mo. Ct. App. 1983) (spouse may not maintain an action for personal injuries against the other spouse as the result of an intentional or negligent tort during coverture).

20. See infra notes 27-58 and accompanying text.
II. INTERSPOUSAL IMMUNITY IN FLORIDA

Perhaps more irrational than the doctrine of interspousal immunity itself are the reasons traditionally assigned for its justification. Chief among these reasons are: (1) the common law notion that the husband and wife were considered a single entity during marriage;21 (2) the specter of the judicial system becoming inundated with trivial marital claims;22 (3) the promotion of domestic tranquility and peace within the home;23 (4) the avoidance of fraudulent or collusive claims;24 (5) the availability of alternative remedies such as divorce or criminal proceedings;25 and (6) the reluctance of the judiciary to impinge upon the province of the legislature and alter the long-standing doctrine of interspousal immunity.26

21. See supra notes 1-11 and accompanying text.  
22. See infra notes 35-47 and accompanying text.  
23. See infra notes 48-50 and accompanying text.  
24. See infra notes 51-58 and accompanying text.  
25. Some courts have asserted that alternative remedies, such as criminal or divorce proceedings, are adequate to deal with interspousal torts. See, e.g., Thompson v. Thompson, 218 U.S. 611, 619 (1910) (divorce and criminal actions); Mims v. Mims, 305 So. 2d 787, 789 (Fla. 4th DCA 1974) (divorce). Contra Merenoff v. Merenoff, 388 A.2d 951, 962 (N.J. 1978) (criminal, divorce, and private sanctions not sufficient); Flores v. Flores, 506 P.2d 345, 347 (N.M. Ct. App. 1973) (divorce and criminal actions not sufficient); Freehe v. Freehe, 500 P.2d 771, 774-75 (Wash. 1972) (en banc) (divorce and criminal actions not sufficient).

While resort to criminal or divorce actions might be sufficient to prevent future wrongdoing, it does nothing to compensate a spouse for past injury. Furthermore, encouraging spouses to seek remedies in criminal and divorce courts is totally inconsistent with the desirability of maintaining marital accord in the home. Rarely, if ever, will a spouse be soothed by the fact that a criminal complaint has been sworn out against him or that his partner has filed for divorce. Notwithstanding this rudimentary exercise in logic, during committee debate on Fla. H.B. 68 (1985), Rep. Thomas Drage, Repub., Orlando, made the following remarks when expressing his opposition to abrogating the doctrine of interspousal immunity for the intentional tort of false imprisonment:

I would simply point out that if that [false imprisonment] happens, that is something that is criminal. That's what we're talking about is being able to bring a lawsuit, and I think that in the interest of trying to maintain marriages and trying to maintain harmony even after dissolution of marriage cases, it's one thing when we're talking about being able to bring a criminal action; it's another thing when you're talking about being able to bring a lawsuit against the other party.

Fla. H.R., Subcomm. on Ct. Sysys. & Misc., tape recording of proceedings (Apr. 9, 1985) (on file with committee) (discussion of HB 68) (emphasis added) [hereinafter cited as tape recording].

26. See, e.g., Corren v. Corren, 47 So. 2d 774, 776 (Fla. 1950) (en banc). On two notable occasions, the Florida Supreme Court has held that the interspousal immunity rule was not applicable in tort actions between spouses. However, it should be noted that in those decisions, the court was simply determining whether the immunity rule should be controlling in light of two statutes whose language did not expressly indicate whether the legislature in-
A. A Case of Judicial Inertia

The Florida Supreme Court has steadfastly adhered to the notion that it is not within the ambit of the judiciary to abrogate or modify the doctrine of interspousal immunity, notwithstanding the fact that the doctrine is a creature of the common law. In *Raisen v. Raisen*, 27 the court reaffirmed its commitment to this notion when it declared that “[only] in very few instances and with great hesitation has this Court modified or abrogated any part of the common law enacted by section 2.01, and then only where there was a compelling need for change and the reason for the law no longer existed.” 28 Apparently, the *Raisen* court was suffering from a case of selective amnesia because only eight years earlier, in *Gates v. Foley*, 29 the court stated that it had not been hesitant in “overturning unsound precedent in the area of tort law.” 30 Likewise, in *Hoffman v. Jones*, 31 the landmark decision which abolished the common law doctrine of contributory negligence, the court reiterated that it would not be constrained by principles of stare decisis to enforce archaic common law rules which had become obsolete in contemporary society.32

27. 379 So. 2d 352 (Fla. 1979), cert. denied, 449 U.S. 886 (1980).
28. *Id.* at 354. FLA. STAT. § 2.01 (1983) provides:

The common and statute laws of England which are of a general and not a local nature, with the exception hereinafter mentioned, down to the fourth day of July, 1776, are declared to be of force in this state; provided, the said statutes and common law be not inconsistent with the constitution and laws of the United States and the acts of the Legislature of this state.

*Id.*

29. 247 So. 2d 40 (Fla. 1971).
30. *Id.* at 43. In fact, the court suggests that the abrogation of the common law is primarily a function of the court, rather than the legislature. *Id.*
31. 280 So. 2d 431 (Fla. 1973).
32. *Id.* at 435-36. Closely akin to the doctrine of interspousal immunity is the doctrine of parental immunity, which precludes children from bringing suits against their parents. Although parental immunity did not have its origin in the common law of England, as did interspousal immunity, many of the policy reasons relied upon to justify parental immunity are similar to those relied upon to justify interspousal immunity. *See Ard v. Ard, 414 So. 2d*
Without doubt, the doctrine of interspousal immunity qualifies equally as well as, if not better than, the doctrine of contributory negligence as a progeny of medieval thinking. Nevertheless, the Florida Supreme Court has lulled itself into a state of impotence by failing to abrogate this court-made rule. Not only has the court disregarded the initiative taken by other jurisdictions, but more importantly it has committed an even greater sin by turning a deaf ear to its own precedent. Even the least sagacious of jurisprudential minds would realize that the only justification for interspousal immunity today must be that of mere historical survival.

B. Marital Harmony

With the demise of the unity concept as a cogent justification for the interspousal immunity rule, Florida courts have embraced the

1066, 1068 (Fla. 1982). Notably, in Ard, the Florida Supreme Court, while reaffirming its adherence to parental immunity, held that "in a tort action for negligence arising from an accident and brought by an unemancipated minor child against a parent, the doctrine of parental immunity is waived to the extent of the parent's available liability insurance coverage." Id. at 1067. Accordingly, the Ard opinion demonstrates that the supreme court will exercise its authority as a "legislative body," notwithstanding the fact that it may be dealing in an area (family immunity) that is traditionally considered to be within the province of the legislature.

In Tubbs v. Dressler, 419 So. 2d 1151, 1154 (Fla. 5th DCA), aff'd on other grounds, 435 So. 2d 792 (Fla. 1982), the Fifth District Court of Appeal certified the following question to the Florida Supreme Court: Is the Doctrine of Interspousal Immunity, like the Doctrine of Parental Immunity, Waived to the Extent of Available Liability Insurance, When the Action is for a Negligent Tort Causing Injury or Death? 419 So. 2d at 1154. Regrettably, the court affirmed the judgment of the district court on other grounds and did not reach the certified question. In a vigorous dissenting opinion, Justice Alderman opined that there were several distinctions between parental and interspousal immunity and that he would, therefore, answer the certified question in the negative. 435 So. 2d at 795 (Alderman, J., dissenting).

Currently pending before the supreme court is a question certified by the Third District Court of Appeal which is the same question as was certified by the Fifth District Court of Appeal in Tubbs. Zimmerman v. Zimmerman, 447 So. 2d 1019, 1019 (Fla. 3d DCA 1984), question certified, No. 65,261 (Fla. May 9, 1985). Zimmerman is particularly interesting because Justice Alderman has recently resigned from the court.

33. See, e.g., Lewis v. Lewis, 351 N.E.2d 526, 531 (Mass. 1976) ("When the rationales which gave meaning and coherence to a judicially created rule are no longer vital, . . . a court not only has the authority but also the duty to reexamine its precedents rather than to apply by rote an antiquated formula."); Rubert v. Stienne, 528 P.2d 1013, 1014 (Nev. 1974) ("Having been created and preserved by the courts, the [interspousal immunity] doctrine is subject to amendment, modification and abrogation by the courts if current conditions so dictate."); Digby v. Digby, 388 A.2d 1, 2 (R.I. 1978) ("[W]e abdicate our own function, in a field peculiarly nonstatutory, when we refuse to reconsider an old and unsatisfactory court-made rule." (quoting Woods v. Lancet, 102 N.E.2d 691, 694 (N.Y. 1951))).

34. See supra notes 29-32 and accompanying text.
marital harmony argument as its new rationalization. Undoubtedly, the preservation of marital accord is a laudable goal in a society beleaguered by rising divorce rates. However, within the context of allowing interspousal claims for intentional torts, particularly those of a physical nature, the marital harmony argument is totally inapposite.

Dean Prosser eloquently summarized the speciousness of the marital harmony concept when he wrote that it is based upon the bald theory that after a husband has beaten his wife, there is a state of peace and harmony left to be disturbed; and that if she is sufficiently injured or angry to sue him for it, she will be soothed and deterred from reprisals by denying her the legal remedy—and this even though she has left him or divorced him for that very ground, and although the same courts refuse to find any disruption of domestic tranquility if she sues him for a tort to her property, or brings a criminal prosecution against him. If this reasoning appeals to the reader, let him by all means adopt it.

35. See, e.g., Raisen, 379 So. 2d at 354-55.
36. But see tape recording, supra note 25.
37. See Prosser, supra note 8, at 863. Rep. Simon captured the essence of Dean Prosser’s reasoning when he made the following remarks during a meeting of the House Judiciary Committee:

These [intentional torts] are situations where marital harmony has already gone out the window. When they [spouses] start beating each other; when they start locking each other out; when they start burning down their property; when they do things which constitute criminal offenses, more often than not, we’re beyond the point where marital harmony is going to be preserved.

Fla. H.R., Comm. on Jud’y, tape recording of proceedings (April 10, 1985) (on file with committee); Accord Freehe v. Freehe, 500 P.2d 771, 774 (Wash. 1972) (en banc). The Florida Legislature, however, remains unconvinced for as originally drafted, HB 68 and SB 196 were designed to abrogate the doctrine of interspousal immunity for the intentional torts of assault, battery, false imprisonment, conversion, trespass to real property, and trespass to personal property. There was strong sentiment in both houses that there was no need to abrogate the doctrine for the so-called economic crimes (conversion, trespass to real property, and trespass to personal property).

Despite a concession by Rep. Simon that he would be willing to support an amendment to HB 68 that would abrogate interspousal immunity only for the offenses against the person (assault, battery, and imprisonment), the House Comm. on Jud’y deemed it necessary to abrogate the doctrine only for battery based simply upon the dubious distinction that “battery is the one area where harm can be done to a spouse.” Fla. H.R., Subcomm. on Ct. Syss. & Misc. tape recording of proceedings (April 9, 1985) (remarks by Rep. Drage). See supra notes 1-7 and accompanying text; see generally, 1 F. HARPER & F. JAMES, THE LAW OF TORTS § 8.10, at 646-46 (1956); Comment, Tort Actions Between Members of the Family—Husband and Wife—Parent and Child, 26 Mo. L. Rev. 152, 160 (1961); Comment, Lewis v. Lewis: Dissolving the “Metaphysical” Merger in Interspousal Torts, 12 New Eng. L. Rev. 333, 353 (1976); Note, Domestic Relations—Abrogation of Interspousal Immunity—An Analytical Approach, 19 De Paul L. Rev. 590, 597-98 (1970).
Apparently, this reasoning does appeal to the Florida Supreme Court. In *West v. West*, a woman sued her former husband alleging that during their marriage, he intentionally injured her by throwing her to the floor, causing a severe fracture of her ankle. The trial court, relying upon the doctrine of interspousal immunity, dismissed the complaint for failure to state a cause of action. The Second District Court of Appeal affirmed the trial court's dismissal and certified the following question to the supreme court: *Whether a former spouse can maintain an action in tort against the other spouse for an intentional tort allegedly committed during marriage where such marriage has since been dissolved by divorce.* Notwithstanding the gross injustice of denying the wife access to the courts, the supreme court answered the question in the negative on the basis of its earlier decision in *Hill v. Hill*.

In *Hill*, a divorced wife filed suit against her former husband and his attorney for malicious prosecution, false imprisonment, and abuse of process. The principal allegation of the wife's complaint was that her husband sought to have her involuntarily committed for mental illness while the couple was undergoing a bitter custody dispute. Despite its concession that the parties' actions themselves were disruptive of marital tranquility, the court refused to modify the immunity doctrine, reasoning, "Protection of the family unit is a significant public policy and we are greatly concerned by any intrusion that adversely affects the family relationship . . . ." However, herein lies the cruel paradox of the majority's reasoning. By closing the courthouse doors to interspousal claims for intentional torts, the court has implicitly condoned serious tortious conduct by one spouse against the other. Rarely, if ever, will the denial of access to the courts promote domestic tranquility within the home.

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38. 414 So. 2d 189 (Fla. 1982).
39. *Id*.
41. *West*, 414 So. 2d at 190. The court did emphasize, however, that "where an intentional tort has occurred, the trial court in a subsequent dissolution proceeding, [does have] the authority 'to direct the offending spouse to pay the necessary medical expenses not covered by insurance and the . . . authority to consider any permanent injury, disfigurement, or loss of earning capacity caused by an intentional tort in establishing appropriate alimony . . . .'" *Id* (quoting *Hill v. Hill*, 415 So. 2d 20, 24 (Fla. 1982)).
42. 415 So. 2d 20 (Fla. 1982).
43. *Id*.
44. *Id* at 21.
45. *Id* at 23.
46. See *infra* notes 58-85 and accompanying text.
ther infuriate an already embittered spouse or else trigger retaliatory conduct by the defendant spouse who was dragged into court.\footnote{47}

\section*{C. The Specter of Frivolous Claims}

Proponents of interspousal immunity also claim that abrogation of the rule would lead to an inundation of the judicial system with trivial marital claims.\footnote{48} While control of voluminous caseloads may be a legitimate concern to members of the judiciary, this does not warrant the denial of judicial relief to an entire class of victims.\footnote{49} It must be noted that the risk of picayune claims in this context is no greater than it is in any other area of the law. Courts would still be confronted with the task of weighing the merits of an interspousal claim, as with any other type of claim, and ferreting out the spurious from the meritorious. Therefore, it cannot be gainsaid that the judicial system is less equipped to handle interspousal claims. Indeed, it appears that "in the name of caseload control,"\footnote{50} Florida courts have been willing to perpetuate the immunity doc-

\footnote{47} Only in extreme circumstances has the court waived from its adherence to the marital harmony concept. For example, in Dressler v. Tubbs, 435 So. 2d 792 (Fla. 1983), a wife's estate brought a wrongful death action against the estate of her husband and his aircraft liability insurer to recover damages sustained by the wife's estate and her heirs. Both the husband, Eugene Tubbs, and his wife, Carole Tubbs, were killed in the crash of a private airplane being piloted by Dr. Tubbs. \textit{Id.} at 793. In holding that the claim was not barred by the doctrine of interspousal immunity, Justice Ehrlich, speaking for the majority, said: "\textit{Raisen} was decided on the grounds that allowing such a suit would be disruptive of marital unity and harmony. Obviously, \textit{Raisen} cannot be applied to the factual situation here. Husband and wife are dead. There is no suit between spouses, just as there is no longer any marital unit to preserve." \textit{Id.} at 794. \textit{Cf.} Roberts v. Roberts, 414 So. 2d 190 (Fla. 1982) (court held that a claim was barred by interspousal immunity where a wife sued her husband's estate for damages arising from an intentional tort he had committed against her during their marriage).

\footnote{48} See supra note 22. The "inundation" argument is a naked proposition. As one court observed, "[T]he fear of a flood of frivolous suits wasting limited judicial resources is unfounded. This flood does not appear to have materialized in states which permit suits between spouses." Moran v. Beyer, 734 F.2d 1245, 1247 (7th Cir. 1984). \textit{Cf.} Drake v. Drake, 177 N.W. 624 (Minn. 1920). In denying a husband's request to issue an injunction against his wife's nagging, the court reasoned: "[U]ntil the legislature decides otherwise, the law forbids] dragging into court for judicial investigation at the suit of a peevish, fault-finding husband, or at the suit of the nagging, ill-tempered wife, matters of no serious moment, which if permitted to slumber in the home closet would silently be forgiven or forgotten." \textit{Id.} at 625.

\footnote{49} See supra notes 58-85 and accompanying text.

\footnote{50} The quotation is from a brief of Sen. Roberta Fox, the sponsor of Fla. SB 196 (1985). \textit{See} Brief of Amicus Curiae at 8, Hill v. Hill, 415 So. 2d 20 (Fla. 1982); West v. West, 414 So. 2d 189 (Fla. 1982).
trine based simply upon the fortuitous possibility that some frivolous claim might become the subject of future litigation.

D. Fraud and Collusion

It has also been asserted that abrogation of interspousal immunity will lead to a proliferation of fraudulent and collusive claims between spouses.\footnote{51} Admittedly, fraud and collusion were not at issue in the debate surrounding House Bill 68 or Senate Bill 196. Those bills addressed interspousal immunity only as it relates to intentional torts; therefore, a fraudulent or collusive suit would serve no purpose, inasmuch as a person cannot insure himself against a loss arising from his commission of an intentional tort.\footnote{52} Nonetheless, this argument does warrant some consideration here, if for no other reason than to simply dismantle its justification as being equally as unsound as the other reasons which are advanced for the retention of the immunity doctrine.\footnote{53}

Undoubtedly, the possibility does exist that some spouses might become so overwhelmed by the prospect of recovering a substantial monetary judgment that, granted access to the courts, they might, indeed, succumb to the temptation of bringing a fraudulent suit.\footnote{54} However, as the West Virginia Supreme Court opined in Coffindaffer v. Coffindaffer:\footnote{55}

One can hardly imagine that the legal system will break down


52. See Hill, 415 So. 2d at 21. But see Staff of Fla. H.R. Comm. on Jud'y, HB 68 (1985) Staff Analysis 1 (Apr. 7, 1985) (on file with committee). Inexplicably, the “economic impact” section of the staff analysis reads: “Spouses, and insurers thereof, would become financially accountable for damages . . . [if interspousal immunity were abrogated].” Id.

53. See supra notes 21-50 and accompanying text.

54. Quite conveniently, it appears that advocates of the prohibition against spouses suing each other in tort have spun a nifty web in which victims of spousal negligence are hopelessly entangled in a catch-22 situation. As eloquently phrased by the New Jersey Supreme Court:

It is an irony, not lost to some courts and commentators, that objections based on marital disharmony and fraud are somewhat counter-cyclical. To the extent the threat of marital disharmony can be removed or reduced by the presence or availability of insurance, the potential for fraud is increased; conversely, when the threat of fraud is minimized or eliminated because there is no insurance or insurer to be victimized, the risk of creating marital disharmony is correspondingly augmented.


55. 244 S.E.2d 338 (W. Va. 1978).}
with cases brought by spouses who have flung themselves down the cellar steps or permitted the other spouse to strike them with the family car in order to achieve the type of substantial injury that makes jury litigation worthwhile.66

Even if one were not to accept the premise set forth by the Coffindaffer court, the validity of the fraud argument still remains questionable inasmuch as the problem of fraud is not unique to interspousal suits. In an amicus curiae brief to the Florida Supreme Court, Senator Fox, the sponsor of Senate Bill 196, wrote: "[T]he risk of fabricated accusations or the difficulty of evidentiary proof in these cases is no greater than [in] any other case."67 Notwithstanding this realization, Florida courts, as well as those of other jurisdictions, have continued to summarily deny relief to victims of spousal negligence because of their irrational conception that spouses will conspire to effect “fraudulent raid[s] on [the] treasur[ies] of . . . insurance compan[ies].”68

III. DOES THE INTERSPOUSAL IMMUNITY RULE VIOLATE THE FLORIDA CONSTITUTION?

Necessarily emanating from the egregious manner in which the interspousal immunity rule operates is an inherent clash with constitutional guarantees of equal protection of the laws. Section 21 of

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56. Id. at 342-43. The court went on to explain that the question of fraud or collusion has little relevance in those cases where an insurance fund is not available. As the court noted, “It beggars the imagination to believe that a husband and wife will conspire with each other to accomplish a physical injury to one that will ultimately be paid out of the other's pocket, and additionally, the attorney's fees to obtain it.” Id.

57. Brief of Amicus Curiae at 8, Hill v. Hill, 415 So. 2d 20 (Fla. 1982); West v. West, 414 So. 2d 189 (Fla. 1982).

58. Vinci v. Gensler, 269 So. 2d 20, 22 (Fla. 2d DCA 1972) (Liles, J., dissenting). The author does not wish to suggest that courts should not be cognizant of the possibility of fraud and collusion in interspousal claims. Many courts have acknowledged the specter of fraudulent and collusive claims and concluded that the efficacy of the judicial process is more than capable of detecting such claims. See, e.g., Merenoff, 388 A.2d at 961 (court outlined several safeguards available within the judicial process to minimize the fear of fraudulent claims); see also Coffindaffer, 244 S.E.2d at 343 where the court stated:

Anyone who has confronted insurance defense counsel in personal injury cases knows that it is a rare occasion when the false or collusive claim escapes their searching examination. We do an injustice not only to the intelligence of jurors, but to the efficacy of the adversary system, when we express undue concern over the quantum of collusive or meritless law suits. There is, to be sure, a difference between the ability to file a suit and to achieve a successful result. It is upon the anvil of litigation that the merit of a case is finally determined. Forged in the heat of trial, few but the meritorious survive.

Id.
the Declaration of Rights of the Florida Constitution provides that "[t]he courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay." Similar guarantees are contained in section 1 of the fourteenth amendment to the United States Constitution which provides: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

Section 2.01, Florida Statutes, mandates that the common law be not inconsistent with the constitution and laws of the United States and the acts of the legislature of this state. Therefore, it is abundantly clear that interspousal immunity has been preempted by section 2.01 inasmuch as the doctrine's application blatantly contravenes guarantees contained in both the United States and Florida constitutions. Notwithstanding this glaring inconsistency, with few exceptions, both state and federal courts have ignored the constitutional issues invoked by the prohibition against spouses' suing each other in tort. In Bencomo v. Bencomo, the only re-

59. Fla. Const. art. I, § 21 (emphasis added). Also germane are §§ 2 and 9 of the Declaration of Rights. Section two provides, in relevant part, that "[a]ll natural persons are equal before the law. . . ." Id. § 1. Section nine reads: "No person shall be deprived of life, liberty, or property without due process of law. . . ." Id. § 9.
60. U.S. Const. amend XIV, § 1 (emphasis added).
62. See also Waller v. First Savings and Trust Co., 138 So. 780 (Fla. 1931) where the supreme court held that the common law of England could be abrogated by the laws and Constitution of Florida where such common law was "contrary to the intentions, effect, purpose, and object of section 4 of our Declaration of Rights . . ." Id. at 784.
63. See, e.g., Locklair v. Locklair, 256 F. Supp. 530 (D.S.C. 1966); Bencomo v. Bencomo, 200 So. 2d 171 (Fla. 1967). The gravaman of the equal protection argument is that married persons are denied the same protection of the laws as unmarried persons. Despite this rather simple exercise in logic, at least one court has failed to grasp the essence of this argument. For example, in Locklair v. Locklair, the federal district court commented:

[T]here is no discrimination nor denial of equal protection of the laws insofar as plaintiff is concerned, inasmuch as the Georgia law applies equally to husbands as well as to wives. If a wife negligently or recklessly injures her husband, he likewise has no cause of action against her. . . . Thus, it is not a matter of denying to a wife some right which the husband enjoys. Neither the husband nor the wife has a right of action against the other for a personal tort occurring in the State of Georgia. Therefore, plaintiff has no constitutional right to sue her husband, neither is she being denied . . . the equal protection of the laws.

64. 200 So. 2d 171 (Fla. 1967).
cent case in which the Florida Supreme Court was squarely faced with a constitutional challenge to the immunity rule, the court perfunctorily glossed over the issue, stating, "We have carefully measured the line of decisions on . . . the constitutional guarantees invoked by appellant and find no conflict." With *Bencomo* being the only decision of any significance on the constitutionality of the immunity rule, and not an instructive one at that, the time is certainly ripe for a reappraisal of this issue.

In *Alexander v. Alexander*, an interspousal diversity action, a federal district court was confronted with the question of whether Florida's adherence to the interspousal immunity doctrine violated constitutional guarantees of equal protection of the law. After considering a number of decisions in which the Florida Supreme Court held that the state constitution modified the common law, the district court held that the immunity doctrine had been abrogated by both the Florida and United States Constitutions. Subsequently, in *Bencomo*, when addressing the constitutionality of the interspousal immunity rule, the supreme court acknowledged the district court's holding in *Alexander* but, without explanation, repudiated that decision, stating, "We have no way of knowing why [the *Alexander*] court elected to depart from the rule previously announced in this state, but nevertheless we still adhere to our former decisions and reject the construction adopted by the South Carolina Federal Court." Therefore, if nothing else, the

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65. *Id.* at 174.
67. *Id.* at 928-29.
68. *Id.*; see, e.g., Florida Citrus Exchange v. Grisham, 61 So. 123, 124 (Fla. 1913) (court held that the common law rule that the husband acquired complete control over his wife's property had been modified by Fla. Const. art. XI, § 1 (1985)).
69. *Alexander*, 140 F. Supp. at 929. Specifically, the court found that the interspousal immunity rule violated constitutional guarantees of equal protection of the laws, pursuant to U.S. Const. amend. 14, § 1, and also guarantees that every person would have a remedy for an injury done him, pursuant to Fla. Const. art. I, § 4 (Declaration of Rights) *Id.*
70. *Bencomo*, 200 So. 2d at 174. The district court in *Locklair* found, however, that the *Alexander* court did not determine the constitutionality of the immunity doctrine but rather found that such a defense was foreclosed on appeal if not raised at trial. *Locklair*, 256 F. Supp. at 532-33. Particularly relevant to an inquiry into the constitutionality of interspousal immunity is the fact that the *Bencomo* decision predated by one year the 1968 revision of the Florida Constitution. This is significant because several key provisions of the 1885 constitution pertaining to spousal equality were amended in the new constitution. Admittedly, the amendments to the 1885 constitution were not directly related to equal protection of the laws as this protection pertains to married and unmarried persons. However, certain linguistic shifts in the 1968 constitution do evince an intention on the part of the revision commission to achieve total equality between spouses and also to ensure that women would have equal access to the courts. Compare, e.g., the following provisions of the
Bencomo decision firmly demonstrates that the Florida Supreme Court is no different from most other courts in that it will be loath to cross the threshold of deciding cases on constitutional grounds.\textsuperscript{71}

In Moran v. Beyer,\textsuperscript{72} a United States court of appeals was bold enough to cross this threshold when it held that Illinois' interspousal tort immunity statute was unconstitutional where it was not rationally related to the purpose of maintaining marital accord.\textsuperscript{73} In Moran, the plaintiff wife alleged one count of assault and battery and one count of intentional infliction of emotional distress as the result of several altercations with her husband which often ended in physical injury to her.\textsuperscript{74} The husband counterclaimed, al-

old and new constitutions:

(1) Section 1 of the Declaration of Rights of the Florida Constitution of 1885 had provided:

"All men are equal before the law . . . ." (emphasis added).

As revised in 1968, this provision—now article I, section 2 provides:

"All natural persons are equal before the law . . . ." (emphasis added).

(2) Section 4 of the Declaration of Rights of the Florida Constitution of 1885 had provided:

All courts in this state shall be open, so that every person for any injury done him in his lands, goods, person or reputation shall have remedy, by due course of law, and right and justice shall be administered without sale, denial or delay.

(Emphasis added).

As revised in 1968, this provision—now article I, section 21 provides:

The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay.

(Emphasis added).

(3) Article XI, section 1 of the Florida Constitution of 1885 had provided:

All property, real and personal, of a wife owned by her before marriage, or lawfully acquired afterward by gift, devise, bequest, descent, or purchase, shall be her separate property, and the same shall not be liable for the debts of her husband without her consent given by some instrument in writing executed according to the law respecting conveyances by married women.

(Emphasis added).

As revised in 1968, this provision—now article X, section 5 provides:

There shall be no distinction between married women and married men in the holding, control, disposition, or encumbering of their property, both real and personal; except that dower or curtesy may be established and regulated by law.

(Emphasis added).

Thus, article X, section 5 of the new constitution established curtesy rights for the husband, which were analogous to a wife's dower rights. But see Fla. Stat. § 732.111 (1983) where dower and curtesy are abolished.

71. In a telephone interview with Sen. Roberta Fox, the sponsor of SB 196, the senator expressed similar sentiments when asked why she felt the supreme court had not addressed the constitutionality of the interspousal immunity doctrine. Telephone conversation with Sen. Roberta Fox (June 20, 1985).

72. 734 F.2d 1245 (7th Cir. 1984).

73. Id. at 1247.

74. Id. at 1245.
leging the same. He also moved for summary judgment on the ground that the wife's action was barred by the following Illinois statute which was controlling at the time, and which charged 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; provided, that neither husband nor wife may sue the other for a tort committed to the person during coverture.

Based upon the foregoing statute, the district court granted the husband's motion for summary judgment. On appeal, the wife alleged that the Illinois statute was unconstitutional because it violated her fourteenth amendment right to equal protection of the laws as it “prohibit[ed] a married person from pursuing the same remedy for the same kind of injuries which an unmarried person [was] free to pursue.”

Because interspousal immunity creates classifications based upon marriage, the court of appeals’ first task was to ascertain which burden of justification the classification had to meet—the “strict judicial scrutiny standard” or the less rigorous “rational relationship test.” After determining that the interests impinged

75. Id.

76. Id. at 1246 (citing ILL. REV. STAT. ch. 40, § 1001 (1980) (footnote omitted)). The statute has since been amended to abrogate interspousal immunity in cases where a spouse has been physically harmed. In 1981, the Illinois Domestic Violence Act, Pub. Act 82-621, 1981 Ill. Legis. Serv. 2839, 2852 (West) (codified at ILL. ANN. STAT., ch. 40, § 1001 (Smith-Hurd Supp. 1985) amended the statute to read:

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; provided, that neither husband nor wife may sue the other for a tort committed during coverture, except for an intentional tort where the spouse inflicted physical harm.

(Emphasis added).

As discussed previously, the promulgation of Fla. STAT. § 768.35 will abrogate the doctrine of interspousal immunity for the intentional tort of battery. Therefore, reference to the Moran decision might seem superfluous at this point inasmuch as § 768.35, for all practical purposes, embodies the essence of the Illinois statute, as amended. The author cites the Moran decision primarily because of the well-reasoned and ingenious manner in which the court of appeals scrutinized the Illinois statute and found it constitutionally wanting. Perhaps, if the Florida Supreme Court were to, likewise, reconsider Florida's adherence to the interspousal immunity doctrine in light of § 21 of the Declaration of Rights or the equal protection clause of the fourteenth amendment to the United States Constitution, it too might find that the doctrine is violative of constitutional guarantees that the courts shall be accessible to every person for redress of any injury.

77. Moran, 734 F.2d at 1245.

78. Id. at 1246.

79. Id. In San Antonio School Dist. v. Rodriguez, 411 U.S. 1 (1973), the Supreme Court elucidated the strict judicial scrutiny standard when it said:
upon were not so fundamental that they merited protection under the strict scrutiny standard, the court then applied the rational relationship test, noting that in order for a classification to pass this test, it must “[advance] some reasonable and identifiable governmental objective.” Accordingly, two questions were essential to the court’s inquiry, namely: “(1) whether the statute’s purpose was reasonable, and (2) whether the statute rationally advance[d] that purpose.” After concluding that the purpose of interspousal immunity was reasonable insofar as the preservation of marital harmony was a laudable goal, the court then found that the statute did not rationally advance that goal. As the court emphatically stated, “It truly would take ‘something more than the exercise of strained imagination’ . . . to find some objective basis for believing that depriving a physically battered spouse of a civil remedy for her injuries will advance some sense of ‘harmony’ with the person who inflicted the injury.” Indeed, as the court continued, “for a knowledgeable couple leery of marriage, the statute may do more to retard the institution [of marriage] than further it: unmarried persons living together can still resort to the courts for protection from a ‘partner,’ while a married person has no such protection against his or her spouse.”

[S]trict scrutiny means that the State’s system is not entitled to the usual presumption of validity, that the State rather than the complainants must carry a “heavy burden of justification,” that the State must demonstrate that its . . . system has been structured with “precision,” and is “tailored” narrowly to serve legitimate objectives and that it has selected the “less drastic means” for effectuating its objectives . . . .”

_Id._ at 16-17 (footnotes omitted).

80. Moran, 734 F.2d at 1246. The court did allude, however, to several instances in which the United States Supreme Court had conferred protection under the strict judicial scrutiny standard to certain personal decisions relating to marriage. _Id._ See, _e.g._, _Eisenstadt v. Baird_, 405 U.S. 453-54 (1972) (contraception); _Boddie v. Connecticut_, 401 U.S. 371, 376-77 (1971) (right to divorce); _Loving v. Virginia_, 388 U.S. 1, 12 (1967) (right to marry); _Skinner v. Oklahoma ex. rel. Williamson_, 316 U.S. 535, 541-42 (1942) (procreation); see _also_ Brief of Amicus Curiae at 30-37, _Hill v. Hill_, 415 So. 2d 20 (Fla. 1982); _West v. West_, 414 So. 2d 189 (Fla. 1982).

81. 734 F.2d at 1247 (quoting _Schweiker v. Wilson_, 450 U.S. 221, 235 (1981)).

82. _Id._

83. _Id._

84. _Id._ (quoting _Logan v. Zimmerman Brush Co._, 455 U.S. 422, 442 (1982)) (Blackmun, J., concurring) (citation omitted).

85. _Id._ Although the constitutionality of interspousal tort immunity was never at issue during the recent legislative session, Rep. Art Simon did intimate that the immunity doctrine was constitutionally suspect when he made the following comments, which were peculiarly akin to an equal protection argument:

The fundamental question here is one of basic equity [and] fundamental fairness. . . . If you believe we should be governed by the rule of law rather than by
IV. Conclusion

Not since the era of the contributory negligence doctrine has a concept as antiquated as the interspousal immunity rule managed to withstand such heavy protest and yet be applied in so blind and mechanical a fashion. With the passage of Senate Bill 196, the Florida Legislature has finally tolled the death knell on this vestige of the common law by promulgating section 768.35, Florida Statutes, which abrogates the doctrine of interspousal immunity for the intentional tort of battery. While the legislature deserves commendation for finally “assum[ing] the grave responsibility”86 of modifying the interspousal immunity rule, this adulation should be tempered with the knowledge that in several jurisdictions, the rule has been entirely abolished. Therefore, while passage of the Senate bill represents a high watermark for the Florida Legislature, the fact remains that, even with the creation of section 768.35, the interspousal immunity rule is a creature of medieval thought whose vestigial existence should no longer be accommodated.

None of the traditional reasons advanced to justify the immunity rule have proven cogent when closely scrutinized. Moreover, the common law unity fiction has long since been discarded by Florida courts and dismissed as being totally repugnant to current ideologies which no longer regard the wife as being the chattel of her husband.

While abrogation of interspousal tort immunity may increase the risk of fraudulent and collusive suits, it certainly will not result in a deluge of such suits as proponents of the rule have charged. In any event, the process of ferreting out fraudulent claims is not unique to interspousal suits as courts routinely engage in this task.

Existing in close tandem with the fraud argument has been a foreboding that without the immunity rule, the judicial system would be inundated by a flood of trivial marital claims. However, like the fraud argument, the inundation claim falls under the weight of its own premise. If, as argued, the majority of inter-

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the law of force, then we should allow [interspousal] disputes to be resolved, like any other disputes are resolved, in a court of law. That’s where we want to resolve them in criminal cases, and I don’t see why we can’t do the same for civil cases. It’s a matter of fundamental fairness to victims. We’ve created a class of victims that are not given a right of action unless we abrogate this medieval concept of interspousal tort immunity.


86. Corren v. Corren, 47 So. 2d 774, 776 (Fla. 1950) (en banc).
spousal claims are nothing more than the fruit of inconsequential domestic squabbles, the likelihood that they will ever survive the pleading stage and actually become the subject of litigation is at best remote.

Furthermore, allowance of interspousal suits will not have a deleterious effect upon marital harmony. The fallacy of the marital harmony argument is threefold. First, in the case of intentional torts, more often than not, marital accord will have already been destroyed by the time an action is commenced. Second, the tranquility of a relationship may be jeopardized as much by barring an interspousal suit as by allowing one. If a spouse is sufficiently angered to the point that she feels compelled to swear out a civil complaint against her husband, reason follows that she will not become suddenly mollified upon learning that she has been stripped of her sole remedy. Quite possibly, she might become even more infuriated because she has been denied judicial relief and decide she would be better served by taking matters into her own hands. Third, and perhaps most compelling, is the realization that the abrogation of interspousal tort immunity would do more to foster domestic tranquility than to disturb it insofar as a spouse would be more reluctant to commit a tort against his partner if he knew that he would be liable in tort for any damages he might cause.

It has also been claimed that alternative remedies such as divorce and criminal proceedings are available to an injured spouse. Besides the fact that criminal and divorce proceedings do not provide compensation to victims of tort, the institution of criminal proceedings necessarily vitiates the cogency of the marital harmony argument. The doctrinal flaw of the marital harmony argument is nowhere more manifest than when juxtaposed with the supposed availability of alternative remedies. How it can be that we will bar spouses from bringing civil actions in the name of preserving marital harmony, yet, encourage them to seek redress in criminal courts is beyond the most rudimentary sense of logic.

Finally, judicial abrogation of the immunity rule will not encroach upon the legislative duty of public policymaking. Inasmuch as the interspousal tort immunity doctrine is a judge-made rule, it seems only fitting that any change in the doctrine should originate within the judiciary.87

87. The author does not wish to foreclose the possibility that abrogation of the interspousal immunity rule might initiate within the legislature. Indeed, such was the case with the passage of S.B. 196. At the very least, the judiciary should share concurrent power with the legislature to modify the immunity rule, but to impose a self-engineered restraint on
With a marked evasiveness, the Florida Supreme Court has managed to gloss over the constitutional queries raised by the immunity rule. Clearly, the most apparent challenge to the immunity rule is that it invidiously discriminates against married persons because of its innate quality of denying equal protection of the laws to married persons. Notwithstanding passage of the Senate Bill, spouses in Florida are still at liberty to prey upon one another, comforted by their knowledge that unless they batter one another, they are safely immune from civil liability for their malfeasance. Perhaps the greatest irony of all is that had the paths of the two individuals crossed under any circumstances other than marriage, their causes would have been adjudicated upon the merits and appropriate relief given. But, because they bear the dubious distinction of being married to one another, we deny them access to the courts, secure in our conviction that total strangers are more worthy of judicial protection.