INTRAFAMILY TORT IMMUNITY: ALBERTA'S POSITION

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After reviewing the history of intrafamily tort immunity and finding that its juristic foundations have crumbled in an age when, however reluctantly, women have been conceded equal standing in the eyes of the law, the author, with lucidity and boldness, offers suggestions for reform.

I. INTRODUCTION

In Alberta, the Married Women's Act provides that no husband or wife shall sue the other for a tort, except for the protection and security of each spouse's separate property.[1] No similar statutory provision exists with respect to tort actions between parent and child and it will be argued therefore that, on the basis of case law, parent-child immunity is not the law in Alberta. The main focus of this paper will be on actions between husband and wife. The historical background of the interspousal tort immunity rule will first be examined, primarily to determine whether the reasons for the development of the rule are valid today. Then a survey of the current law in Alberta will be presented, followed by a discussion of the policy considerations which are usually advanced by the proponents of the interspousal immunity rule. Finally, the writer will make her recommendations as to husbands and wives in Alberta being able to sue each other for personal torts.

II. ACTIONS BETWEEN HUSBAND AND WIFE

A. Historical Background

At common law neither spouse could sue the other in tort.[2] The historical basis of this rule is obscure but it has been said to have several sources: a combination of the Bible and medieval metaphysics; the position which the *pater-familias* occupied in Roman law; the natural law conception of the family, that is, as an informal unit of government headed by the husband by reason of his physical strength and feudalism.[3] Two of the above sources, namely the Bible and feudalism, will be referred to here since they have given rise to two principles which have played an important role in the development of interspousal tort immunity at common law. These two principles are: legal unity of husband and wife and marriage as a profitable guardianship.

The principle that a husband and wife are one in the eyes of the law had its origin in the Bible.[4] There it is written that husband and wife "shall be one flesh." This theological metaphor is found in the earliest English law book and eventually became part of the stock-in-trade of lawyers.[5] The legal unity of spouses doctrine produced widespread effects in the law.[6] In tort law, since husband and wife were one, it was impossible for either to sue the other: "they were held to be one person

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1. R.S.A. 1970, c. 227, s. 3 as amended 1973.
2. *Laxton* v. *Ulrich* (1964), 41 D.L.R. (2d) 476 (Ont. C.A.).
3. McCurdy, *Torts Between Persons in Domestic Relations*, (1930) 43 Harv. L. Rev. at 1035.
4. Williams, *The Legal Unity of Husband and Wife*, (1947) 10 Mod. L. Rev. at 16.
5. *Id.* at 16-17.
6. Mendes da Costa, Husband and Wife in the Law of Torts, in Linden, *Studies in Canadian Tort Law* (1968) at 473.

between whom none of the ordinary rights or claims in law could arise."[7] As well as this substantive obstacle to a suit between spouses, the legal unity of spouses produced a procedural one. A married woman could be neither sole plaintiff nor sole defendant.[8] Therefore she could not sue her husband nor be sued by him. This procedural obstacle is best understood if one considers that, although the husband and wife were one in law, the husband was "*the one.*" As Blackstone expressed it, "the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband."[9]

The legal unity doctrine did not completely summarize the common law. On marriage, a woman's legal personality was not totally extinguished; or as Glanville Williams has so descriptively put it: "The wife was not reduced to the position in law of, say, a dog."[10] After all, she could continue to own freehold property, though subject to extensive rights of her husband.[11] Also, when a husband sued for a tort which a third party had committed against his wife or was sued for a tort which his wife had committed, the wife's legal existence was recognized in that she had to be joined as a party to the action.[12] This latter statement implies that a husband was personally liable for his wife's torts. In order to understand why he was so liable, it is necessary to consider the concept of marriage at that time.

At common law, marriage was regarded not as a partnership but as a guardianship profitable to the husband, a concept which seems to have developed in feudal times.[13] As of an early date in history, the husband acquired the right to control and receive the income from his wife's freehold land and by the thirteenth century he had absolute control over her personal chattels.[14] If his wife owned leasehold property he could sell it during the marriage and keep the proceeds; on her death he acquired such property by right of marriage.[15] Considering that on marriage a woman's property essentially became her husband's, it is not surprising that a husband was made personally liable for the torts which his wife committed during and after marriage.[16] Should suits have been allowed between spouses, the following incongruous situation would have resulted: where a wife injured her husband, he would have had to pay damages to himself since he was personally liable for his wife's torts.[17]

Having considered the basis of the common law interspousal tort immunity rule, its extent will now be briefly examined. Tortious liability between husbands and wives did not exist for any conduct which occurred while the marriage subsisted.[18] Therefore no suit would lie after a decree absolute of divorce for conduct which occurred anytime before the decree absolute. A divorce could not create a cause of action which did not exist before. As for antenuptial wrongs, the procedural disability which

7. *Minaker* v. *Minaker* [1949] 1 D.L.R. 801 (S.C.C.) at 804-5.
8. *Capel* v. *Powell* (1864) 17 C.B. (N.S.) 743 at 748.
9. Williams, *supra*, n. 4 at 17-18.
10. *Id.* at 18.
11. *Id.*
12. *Id.*
13. Graveson, *Status in the Common Law* (1953) at 21.
14. *Id.* at 22; Mendes da Costa, *supra*, n. 6 at 474.
15. Mendes da Costa, *supra*, n. 6 at 474.
16. *Id.*
17. *Id.* at 476.
18. *Phillips* v. *Barnet* [1876] 1 Q.B. 436.

precluded suits between husband and wife for torts committed during marriage also applied to these, that is, "the wife could be impleaded only with the husband."[19]

By the eighteenth century the doctrine of a married woman's separate estate had developed in equity[20] and with this development a small inroad was made into the rule of interspousal tort immunity. Under the separate estate doctrine, where a married woman acquired real or personal property by gift, will or settlement for her sole and separate use, equity would protect this property against the rights and claims or her husband and of his creditors.[21] Consequently, she could dispose of her separate property *inter vivos* or by will without her husband's consent.[22] It was with respect to these matters then that a husband and wife could sue each other in tort.[23] *Wassell* v. *Leggatt*,[24] a case in which a husband forcibly deprived his wife of a legacy given to her for her separate use [before the enactment of the English Married Women's Property Act of 1882], provides an example of equity departing from the rules of common law and giving relief to the married woman. As it is stated there:[25]

> She had no right to the money at common law. In equity he could be sued.

It was during the second half of the nineteenth century that the common law position of interspousal tort immunity was altered. In England, the Married Women's Property Act of 1882 recognized a married woman's capacity to acquire and dispose of property and protected this separate property by allowing her to sue her husband as well as others.[26] This legislation did not entirely abrogate the common law position, however, since it prohibited a husband and wife from suing each other in tort,[27] except of course in relation to property. Legislation similar to the English act was promptly adopted throughout Australia.[28]

In the United States, Married Women's Acts began appearing in many states from about 1850.[29] One reason for their early appearance is that:[30]

> . . . the married woman's separate estate in equity was not as widely and consistently used by American courts as by the English to avoid the hardships of the common law disabilities of married women.

Unlike the English Act and the Australian ones, the American statutes were vague as to interspousal tort actions.[31] Generally, however, they have been held to allow actions between spouses only where the wife's separate property was concerned.[32]

In Canada, legislation based on the English Married Womwn's Property Act of 1882 was first enacted in Ontario in 1884.[33] Other

19. *Minaker* v. *Minaker* [1949] 1 D.L.R. 801 (S.C.C.) at 805.
20. McCurdy, *supra*, n. 3 at 1035.
21. Megarry and Baker, *Snell's Principles of Equity* (27th ed. 1973) at 514.
22. *Fettiplace* v. *Gorges* (1789) 1 Ves. Jun. 46 (Chancery).
23. McCurdy, *supra*, n. 3 at 1035.
24. [1896] 1 Ch. 554.
25. *Id.* at 558.
26. Married Women's Property Act, 45 + 46 Vict. (U.K.) 1882, c. 75, s. 12.
27. Married Women's Property Act, 45 + 46 Vict. (U.K.) 1882, c. 75, s. 12.
28. Fleming, *Torts* (4th ed. 1971) at 591.
29. Akers and Drummond, *Tort Actions Between Members of the Family—Husband and Wife—Parent and Child*, (1961) 26 Missouri L. Rev. at 153.
30. Clark, *Law of Domestic Relations in the United States* (1968) at 222.
31. Peterson, *Husband and Wife Are Not One: The Marital Relationship in Tort Law*, (1975) 43 UMKC L. Rev. at 336.
32. *Id.*
33. Married Women's Property Act. S.O. 1884, c. 19, s. 11.

common law provinces passed similar legislation in the following years: Alberta and Saskatchewan in 1886 for real property,[34] and in 1889 for personal property,[35] British Columbia in 1887,[36] New Brunswick in 1896,[37] Prince Edward Island in 1896,[38] Nova Scotia in 1898,[39] Manitoba in 1900,[40] and Newfoundland prior to 1919.[41]

In Alberta today, it is the 1936 Married Women's Act which continues in force with but one amendment which was made in 1973. Like the statutes in other provinces, the 1936 Act expressly states that "no husband or wife shall be entitled to sue the other for a tort."[42] The 1973 amendment gives a married man the same rights as his wife gained many years hence. It provides that "A married man has the same civil remedies against his wife for the protection and security of his own separate property that he has against other persons."[43] Until 1973, then, one might well have argued that the Married Women's Act was discriminatory against men. Husbands, after all, could not sue their wives for any damage which the latter inflicted on the former's property. In such cases, Lord Sumner would have had little sympathy. In speaking about the English Act of 1882 he stated:[44]

> The whole effort was to free the married woman. It was not a campaign to assist the married man.

The 1936 Alberta Married Women's Act repealed a 1922 Act of the same title which included the following ambiguous section concerning a married woman's capacity to sue and be sued:[45]

> A married woman shall be capable of acquiring, holding and disposing of or otherwise dealing with all classes of real and personal property, and of contracting, suing and being sued in any form of action or prosecution as if she were an unmarried woman.

For anyone who might have thought that this section conferred upon a married woman the right to sue her husband in tort, *Hill* v. *Hill*[46] decided the question. In that case the wife was claiming, *inter alia*, damages from her husband for slander under section 2 of the 1922 Married Women's Act. The court held that the section was a procedural provision allowing a wife to sue and be sued without her husband being made a party to the action but the section did not create a new cause of action. Mrs. Hill, therefore, was unsuccessful. It is interesting to note that one judge dissented, stating that in his opinion the section enabled a married woman to maintain an action in tort against her husband. He felt that the legal unity of husband and wife which was the basis of the spousal immunity rule no longer existed.

Hill v. *Hill* is a case which also decided the constitutionality of the Alberta Married Women's Act. Although the trial judge in this case had held that section 2 of the 1922 Act was *ultra vires* the provincial

34. The Territories Real Property Act, The North-West Territories Act 1886, c. 25, s. 13.
35. North-West Territories Ordinance 1889, No. 16.
36. Married Women's Property Act, S.B.C. 1888, c. 80, s. 13.
37. Married Women's Property Act, Consolidated Statutes of N.B. 1903, c. 78, s. 13.
38. Married Women's Property Act, S.P.E.I. 1896, c. 5.
39. Married Women's Property Act, S.N.S. 1898, c. 22, s. 12.
40. Married Women's Property Act, S.M. 68-69 Vict. 1900, c. 27, s. 10.
41. Property of Married Women, Consolidated Statutes of Newfd. 1919, c. 112.
42. S.A. 1936, c. 23, s. 3.
43. Attorney General Statutes Amendment Act (No. 2), S.A. 1973, c. 61.
44. *Edwards* v. *Porter* [1925] A.C. 1 (H.L.) at 38.
45. S.A. 1922, c. 214, s. 2.
46. [1929] 2 W.W.R. 41 (Alta. S.C.A.D.).

government, the Court of Appeal came to the opposite conclusion. Having pointed out that under the B.N.A. Act the subject of marriage was assigned to the Parliament of Canada while that of "property and civil rights" was assigned to the provinces, Mr. Justice Hyndman of the Appellate Division stated:[47]

> In my opinion the intent and meaning of the distribution of powers was to give the Federal Parliament the exclusive right to legislate as to who shall or shall not be capable of marrying; and the provincial what the individual rights of the parties shall be within the province after the marriage . . . Once it is conceded that the right to sue the husband is a civil right of the wife it must follow, as a result of the authorities, that the legislative power of the province is exclusive and complete.

Some thirty-three years earlier the Supreme Court of Canada had come to the same conclusion in *Conger* v. *Kennedy*[48] where it held that an ordinance of the North-West Territories which was similar in content to section 2 of the 1922 Alberta Married Women's Act was *intra vires* the territorial legislature, being legislation within the meaning of property and civil rights.

B. The Present Law

The present law in Alberta with respect to interspousal tort immunity will be considered under three headings: actions between spouses; effect on third parties; and motor vehicle accident actions. As already indicated, section 3 of the Alberta Married Women's Act precludes all actions in tort between a husband and wife, except those necessary for the protection and security of a wife's separate property as well as those necessary for the protection and security of a husband's separate property. Husband's and wives, therefore, cannot sue each other for such conduct as the following: false imprisonment and malicious prosecution,[49] deceit,[50] fraudulent conspiracy,[51] libel,[52] assault,[53] and negligence resulting in personal injuries.[54] To illustrate how unjust the interspousal tort immunity rule is to spouses, cases in which some of the above actions were taken will be examined.

Mrs. Tinkley was a woman who sued her husband for damages for false imprisonment and malicious prosecution but was unsuccessful because the action was held not to be one for the protection and security of her separate property but rather an ordinary action for a tort brought when the marriage was subsisting.[55] Mrs. Tinkley and her husband who were unhappy together agreed to separate and he allowed her to keep the home and promised to pay her £1 a week. Since she found it impossible to keep the home going, she stored the furniture and entered domestic service. Mr. Tinkley had her arrested and detained in cells for sealing the furniture; the charge was later dismissed. She alleged that as a result of the criminal proceedings she had lost her position. At the time of the incident she had obtained a decree nisi of divorce which had not yet been made absolute. It had been argued on her behalf that this was an action for the protection and security of her separate property under section 12 of

47. [1929] 2 W.W.R. 41 (Alta. S.C.) at 48.
48. (1897) 26 S.C.R. 397.
49. *Tinkley* v. *Tinkley* (1909) 25 T.L.R. 264 (C.A.).
50. *Hulton* v. *Hulton* [1917] 1 K.B. 813 (C.A.).
51. *Kennedy* v. *Tomlinson* (1960) 20 D.L.R. (2d) 273 (Ont. C.A.).
52. *Ralston* v. *Ralston* [1930] 2 K.B. 238.
53. *Phillips* v. *Barnet* [1876] 1 Q.B. 436.
54. *Goldman* v. *Goldman* [1928] 2 D.L.R. 152 (Ont. S.C.).
55. *Tinkley* v. *Tinkley* (1909) 25 T.L.R. 264 (C.A.).

the English Married Women's Property Act of 1882 because her earnings which were her separate property had been done away with as a result of her husband's actions.

Kennedy v. *Tomlinson*[56] provides an example of a husband suing his wife and a lawyer for fraudulent conspiracy. In this case, the husband conveyed his farm to himself and his wife as joint tenants on the agreement that his wife return to live with him. Subsequently the husband and wife both signed an agreement for sale. After bitter quarrels and threats by the husband to strangle her, Mrs. Kennedy left her husband. Shortly after, he was committed to a mental institution for four weeks, during which time a sale transaction for the farm was completed and half of the proceeds were handed over to the wife. The husband claimed that the sale was against his instructions. The Ontario Court of Appeal held that:[57]

> An action for damages for fraudulent conspiracy is an action for a tort and it is well settled that a husband and wife are not entitled to sue each other for a tort: Married Women's Property Act, R.S.O. 1950, c. 223, s. 7. It follows that the common law of unity of husband and wife is preserved so far as such causes of action are concerned.

Consequently the judgment against the wife and lawyer based on conspiracy to defraud could not stand.

In *Ralston* v. *Ralston*[58] the wife brought an action against her husband for damages for libel and, like Mrs. Tinkley and Mr. Kennedy, she was not successful because it was held that the action was for a tort and not for the protection and security of her personal property. In *Ralston* v. *Ralston*, the couple agreed to separate after six years of married life together. Under a deed of separation the husband covenanted to pay his wife an annuity. The deed also contained a covenant for further assurance. Following the separation the wife set up in business as a garage owner. She later converted this business into a provate limited company in which she owned the majority of the shares and held the positions of chairman and managing director. Some thirty years after the separation the wife noticed in a churchyard near her husband's residence a tombstone with the following inscription: "In loving memory of Jennie, the dearly beloved wife of W. R. Crawshay Ralston, of the Bungalow Valley. Died 20th May, 1916." The husband admitted he had the inscription made but refused to erase it and consequently his wife sued him for libel. It was argued on behalf of Mrs. Ralston that the alleged libel affected her credit and character as a trader and that therefore the action was one for the protection and security of her property. Mr. Justice Macnaghten was fortified by the decision in *Tinkley*: "A charge of dishonesty is surely much more injurious to a domestic servant than is the imputation of unchastity to a garage proprietor."[59]

Where a husband assaulted and beat his wife, permanently injuring her and putting her to expense for medical and other assistance, and she sued him after being divorced, she did not succeed in her action.[60] It was held that the reason a wife cannot sue her husband is not merely that a wife has no procedural legal existence (a situation which would no longer be true on divorce) but that husband and wife are one person in law. Since

56. (1960) 20 D.L.R. (2d) 273 (Ont. C.A.).
57. (1960) 20 D.L.R. (2d) 273 (Ont. C.A.) at 311.
58. [1930] 2 K.B. 238.
59. *Id.* at 245.
60. *Phillips* v. *Barnett* [1876] 1 Q.B. 436.

the divorce did not make the marriage *void ab initio*, it was subsisting when the assault occurred.

Mrs. Goldman[61] was a wife who was unsuccessful when she brought an action against her husband after being injured in a motor vehicle accident allegedly caused by his negligence. She was a passenger in the car in which he was driving. Since her action was clearly one for a tort and not for the protection and security of her separate property, it was dismissed as being merely "frivolous and vexatious."

Where the action cannot be regarded as one for the protection and security of the wife's or husband's separate property, that spouse will be unsuccessful. And as illustrated particularly by *Tinkley* and *Ralston*, the concept of separate property has been narrowly interpreted.

Laxton v. *Ulrich*[62] provides a clear example where one may recover for injury to property. There the wife was suing the husband. However, in Alberta, where the Married Women's Act provides a married man with civil remedies against his wife for the protection and security of his own separate property, the case could also be argued on the husband's behalf. In *Laxton* v. *Ulrich* there was a collision as a result of the husband's negligence between a motor vehicle owned by the wife amd one owned by the husband. Although it was argued on behalf of the husband that since the remedy was damages the action could not be brought for "the protection and security of her own separate property" (under section 7 of the Married Women's Property Act, R.S.O. 1960, c. 229), the wife succeeded in her action. According to the Ontario Court of Appeal:[63]

> Damages stands in 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. If the remedy here were refused the wife would be unable to protect or keep her separate property secure, either from the wilful or negligent acts of her husband.

A puzzling case is *Grove* v. *Lively*[64] where a husband sued his wife for conversion after the marriage was dissolved by a decree absolute of divorce. During the marriage he had given his wife $748 to be deposited in a joint bank account and she had deposited only $225. Although the statute in force at that time provided that a husband could sue his wife for the protection and security of his property, the Nova Scotia Supreme Court held that the section only appeared to mean that a husband and wife could contract with each other. The section did not disturb the doctrine of unity of husband and wife nor change the law with respect to tort actions between husband and wife. Thus the court came to a curious conclusion though not a troublesome one when other and more recent cases on the issue are considered.

To conclude this discussion on the type of conduct for which a spouse may or may not maintain an action in tort against the other spouse, the words of Mr. Justice Maxwell are most appropriate: "Her husband may break her leg with civil impunity but not her watch."[65] In Alberta the same can be said of either spouse.

For anyone familiar with the area of family law there is no doubt that a man and a woman who are properly married have the status of married persons until a decree absolute of divorce or a declaration of nullity is

61. *Goldman* v. *Goldman* [1928] 2 D.L.R. 152 (Ont. S.C.).
62. (1964) 41 D.L.R. (2d) 476 (Ont. C.A.).
63. *Id.* at 479.
64. [1953] 3 D.L.R. 522 (N.S.S.C.).
65. *Waugh* v. *Waugh* (1950) 50 S.R. (N.S.W.) 210 at 213.

granted. Therefore a husband and wife who have separated whether it be by merely leaving, drawing up a separation agreement before leaving, or obtaining a judicial separation, are still legally married. Since section 3(2) of the Married Women's Act states: "no husband or wife is entitled to sue,"[66] a separated husband or wife cannot maintain an action against the other for personal injuries sustained during the separation, unless of course a statute provides otherwise. *Tinkley* v. *Tinkley*, *Kennedy* v. *Tomlinson,* and *Ralston* v. *Ralston* which were discussed above provide examples of spouses not being able to maintain actions because they were married, though living separate and apart. In the *Ralston* case there was a separation agreement, while in the other two cases one of the spouses had merely left.

A case which illustrates the effect of a judicial separation on the interspousal tort immunity rule is that of *Robinson* v. *Robinson.*[67] In that case Mrs. Robinson, after a judicial separation was obtained, went to live with her cousin whose hotel business she helped to manage. Her husband sent her three messages by telegraph which imputed sexual immorality to her. As a result of these messages, Mrs. Robinson was asked to leave her cousin's house. She was successful in her action for libel against her husband because the court held that the Summary Jurisdiction (Married Women) Act of 1895 under which the separation order was made gave the judicially-separated wife full power, as a *feme sole*, to protect herself by action against all wrongs and injuries.

When one examines section 11(b) of the Alberta Domestic Relations Act[68] the same argument as that in *Robinson* v. *Robinson* can be made to give a judicially-separated wife in Alberta the right to maintain an action against her husband for personal injuries. That section provides as follows:

> After a judgment of judicial separation has been granted the wife shall, during the continuance of the separation, be considered as a *feme sole* for the purposes of contracts and wrongs and injuries and suing and being sued in a civil proceeding, and for all other purposes. . . .

Therefore it can be argued that in Alberta a judicially-separated wife, though not a husband, can sue for a tort committed during the separation. This argument gains support when one considers that in New Brunswick there is no provision similar to section 11(b) of the Alberta Domestic Relations Act but that the New Brunswick Married Woman's Property Act[69] expressly provides that a husband or wife may sue the other while living apart under a decree or order of judicial separation for a tort committed during the separation, a provision which is not contained in the Alberta Married Women's Act. It can be said that the Alberta Act soes not need to contain a similar provision to that in the New Brunswick Act because the rights of the judicially-separated wife at least are set out in the Domestic Relations Act. Regarding the judicially-separated husband, it must be said that the drafters of the Attorney General Statutes Amendment Act (No. 2)[70] were not very successful in their attempt to achieve equality in provincial laws since they did not, by that statute, give him the same right to sue his wife for a personal injury tort

66. R.S.A. 1970, c. 227, as amended.
67. (1894) 13 T.L.R. 564.
68. R.S.A. 1970, c. 113.
69. R.S.N.B. 1973, c. M-4, s. 6(2)(b).
70. S.A. 1973, c. 61.

committed during separation as his judicially-separated wife has against him.

Although it is clear that spouses who have been divorced or whose marriage has been annulled can sue for conduct occurring after the divorce or annulment since they are no longer husband and wife, the question has arisen whether they can sue for conduct which occurred while the marriage subsisted. As already noted, in *Phillips* v. *Barnett* an English court referring to divorce said "no." However, in a relatively recent nullity case, the Ontario Court of Appeal has said "yes." In *Manning* v. *Howard,* the court held that:[71]

> on a proper interpretation of s. 7 of the Ontario Statute [which is similar to section 3(2) of the Alberta one], a former wife whose marriage is terminated by divorce or annulment may sue her former husband for damages sustained as a result of his tort committed during coverture.

In this case, the wife sustained injuries in a motor vehicle accident while a passenger in a car owned and operated by her husband. She brought the action three months after the marriage had been annulled, claiming damages for injuries and expense for hospital and medical attention and medicine. The court held in favour of the wife because it found that the immunity rule in section 7 of the Ontario Married Women's Property Act is merely one of procedure since the common law fiction of the unity of husband and wife was impliedly abrogated by section 7. By allowing suits for the protection and security of property, that section recognizes that torts can be committed between husband and wife. Since the rule is merely one of procedure, after the dissolution of the marriage the immunity is removed. As well, the court indicated that even if there may be public policy reasons for discouraging suits between married persons, these would no longer apply to persons no longer married. The reasoning in *Manning* v. *Howard* makes its principle equally applicable to cases where the husband whose marriage has been terminated by divorce or annulment is the plaintiff.

A final question which will be considered under the heading of actions between spouses is whether husbands and wives may sue each other during marriage for torts committed before marriage. In the province of Alberta, the answer appears to be "maybe" for both husbands and wives. An Ontario County Court has held that a husband is liable to his wife after marriage for ante-nuptial negligence.[72] In that case, the husband had been attempting to line up two vehicles in a position where he could back them into a farm laneway from a provincial highway. An eastbound car owned and driven by the defendant Whaley took to the shoulder of the road to avoid the two vehicles and struck the wife who, as a pedestrian, was assisting her husband-to-be. The court held that the wife could sue her husband for the following reason: section 1(b) of the Married Women's Property Act, R.S.O. 1960, c. 229, defines "property" as including a thing in action and a tort claim is a thing in action which becomes part of a wife's separate estate upon her marriage (section 2(2)) and can be reduced into possession by action after marriage for the protection and security of her own separate property. In coming to its decision the court followed *Curtis* v. *Wilcox*[73] which had held that *Gottliffe* v. *Edelston*[74] was wrongly

71. (1976) 8 O.R. (2d) 728 (Ont. C.A.) at 740.

72. *German* v. *Whaley* (1971) 16 D.L.R. (3d) 511.

73. [1948] 2 K.B. 474 (C.A.).

74. [1930] 2 K.B. 378.

decided. Both of those cases dealt with the English Married Women's Property Act of 1882 which like the Ontario Act defined "property" as including a thing in action. In *Gottliffe*, the court held in favour of the husband by limiting the meaning of the phrase "thing in action" so that it would not include a right of action for a pure tort such as negligence or assault. Rather it would cover cases where debts were owed or perhaps where the husband had destroyed or injured the goods of the wife before marriage. After all, stated the court: "the framers of the Act did not wish to encourage litigation between spouses."[75]

Considering this policy reason and the fact that the Alberta Married Women's Act does not expressly define "property" as including a thing in action, it can be argued that in Alberta a wife cannot sue her husband for an ante-nuprial tort. On the other hand, the following argument can be made: under section 6 of the Alberta Married Women's Act a married woman's separate property is comprised of all property that belonged to her at the time of marriage. All property would include things in action such as a tort claim. Therefore, under section 3 of the Act she would have the right to sue for the protection and security of this property.

As for the husband, the above argument could not as easily be made as there is no section for him which corresponds to section 6. However, if it can be implied that "his own separate property" includes all property that belonged to him at marriage, then it could be argued that he has the right to sue his wife for ante-nuptial torts.

The above discussion on actions between spouses has illustrated that the interspousal tort immunity rule is unjust to spouses in that it prevents recovery for damages which one spouse has inflicted either intentionally or negligently upon the other; moreover, it is also discriminatory towards male spouses who cannot sue for torts committed while they are judicially separated. Whether it also adversely affects third parties is the next question to be considered.

In determining the effect of the interspousal tort immunity rule on third parties, two areas will be considered: contribution and indemnity, and vicarious liability. The relevant Alberta statutes are the Contributory Negligence Act and the Tort-Feasors Act. Section 5 of the Contributory Negligence Act which was first enacted in 1951 deals with contribution where the plaintiff is the spouse of a person at fault. It states as follows:[76]

> In an action brought for damage or loss resulting from bodily injury to or the death of a married person, where one of the persons found to be at fault is the spouse of the married person, no damages, contribution or indemnity shall be recovered for the portion of damage or loss caused by the fault of the spouse, and the portion of the damage or loss so caused by the fault of the spouse shall be determined although the spouse is not a party to the action.

Since there are no cases dealing with this specific section of the statute, the following example will serve as an illustration of its effect. A wife, a passenger in a car owned and operated by her husband, suffers personal injuries in a motor vehicle accident. The third party is found to have been negligent, as was her husband, and both are found to have contributed to the accident in equal degrees. The wife may recover only 50 percent of the damages, that being the degree to which the third party is at fault. Should the wife be allowed to recover 50 percent from her husband as well, the

75. *Id.* at 391.

76. Contributory Negligence Act, R.S.A. 1970, c. 65, s. 5.

integrity of section 3(2) of the Married Women's Act would not be preserved.

Prior to the enactment of section 5 of the Contributory Negligence Act, it was the third party who paid the damages in full with no right to seek contribution from the spouse. The Supreme Court of Canada decided that issue in *Macklin* v. *Young*[77] where it was held that the defendant was not entitled to indemnity for any damages awarded against him because section 3 of the Ontario Negligence Act 1930, c. 27 (to which section 3 of the Alberta Contributory Negligence Act enacted in 1937 was similar) provided for contribution and indemnity only in the case of joint and several liability. Under section 7 of the Married Women's Property Act, R.S.O. 1927, c. 182 (similar to section 3 of the corresponding Alberta statute of 1936), however, the husband was not and could not be found liable jointly and severally with the defendant to the wife.

In 1952 the British Columbia Supreme Court distinguished *Macklin* v. *Young* with the result that a third party was entitled to recover 25 percent of the damages from the husband who was held to be negligent to that degree.[78] In coming to its decision, the court expressed the view that the Contributory Negligence Act prevailed over the Married Women's Property Act since the former was "clear unequivocal legislation inconsistent with antecedent legislation."[79] It was unnecessary to make this argument in Alberta at that time since section 5 of the Contributory Negligence Act had already been enacted. Since 1951, then, the third party in Alberta has been in the favourable and undoubtedly fair position of paying only that percentage of the damages which represents the degree to which he or she has been at fault and a married person has been denied total recovery of damages suffered.

As already mentioned, the Tort-Feasors Act is another statute which deals with contributory negligence. Section 4(1)(c) of this Act which was introduced in 1936 states that:[80]

> Where damage is suffered by any person as a result of a tort, whether a crime or not, any tort-feasor liable in respect of that damage may recover contribution from any other tort-feasor who is or would, if sued, have been liable in respect of the same damage, whether as a joint tort-feasor or otherwise, but no person is entitled to recover contribution under this section from any person entitled to be indemnified by him in respect of the liability regarding which the contribution is sought.

Assuming that a spouse received total recovery from a third party even though the other spouse was negligent as well, it could be argued successfully, as it was in *Chant* v. *Read*,[81] that under section 4(1)(c) of the Tort-Feasors Act, a third party who is successfully sued for negligence by a spouse cannot claim contribution from the other spouse who was negligent as well because that spouse was not a tort-feasor who was liable or would if sued have been liable (by reason of section 3(2) of the Married Women's Act). However, it seems unlikely that a spouse would receive total recovery from a third party where the other spouse was also negligent, unless of course counsel for the third party is not aware of section 5 of the Contributory Negligence Act.

A third party does not fare badly then under section 5 of the

77. [1933] 4 D.L.R. 209.

78. *Dube* v. *Saville* [1952] 2 D.L.R. 382.

79. *Id.* at 384.

80. Tort-Feasors Act, R.S.A. 1970, c. 365.

81. [1939] 2 K.B. 346.

Contributory Negligence Act which would undoubtedly be invoked over section 4(1)(c) of the Tort-Feasors Act. The question which will now be considered is whether the same can be said where the third party is in a position of being held vicariously liable. To deal with vicarious liability in non-motor vehicle situations first, it has been held in *Broom* v. *Morgan* that, where a wife was injured by her husband's negligence in the course of his employment, the husband's employer was liable.[82] The facts of that case were as follows. The husband and wife were both in the employment of the defendant, the husband as manager of the beer and wine house. The wife suffered personal injuries when she fell through a trap-door negligently left open by her husband. The defendant argued that since the wife could not sue her husband by reason of section 12 of the Married Women's Property Act of 1882, the defendant as employer could not be held vicariously liable. However, Lord Justice Singleton of the Court of Appeal stated that:[83]

> the fact that a wife has no right of action against her husband in respect of his tortious act, and negligence, does not mean in law that she has no right of action against her husband's employers if he, when he did that negligent act, or made that negligent omission, was acting within the scope of his employment. They remain liable, and there is no reason, either in law or in common sense, why they should be given an immunity which springs in the case of husband and wife from the fiction that they are one, and from the desire that litigation between husband and wife should not be encouraged.

In order to determine whether *Broom* v. *Morgan* represents the law in Alberta, the effect of section 5 of the Contributory Negligence Act must be considered. That section states that no damages, contribution or indemnity are to be recovered for the portion of damage caused by the fault of one spouse to the other. The first question which must be answered is whether section 5 is in fact applicable to a situation of vicarious liability. It could be argued that it is not applicable since it seems to contemplate a situation where injury is caused to a spouse through the activity of the other spouse *and* a third party.[84] On the other hand, the section can be said to be applicable because the employer and employee are joint tort-feasors, there being one tortious act, omission or course of conduct for which both are responsible.[85] Assuming that section 5 is applicable, can it be argued, as suggested by one writer,[86] that the employer would not be answerable for the damage suffered because no damages shall be recovered for the portion of damage caused by the fault of the spouse and the spouse arguably caused all the damage? This interpretation of section 5 exhibits a lack of understanding of the basis of vicarious liability. An employer is vicariously liable because the employee's tort is imputed to him or her.[87] There is no qquestion that the employer did not personally cause the damage.

The real problem in applying section 5 of the Contributory Negligence Act to situations of vicarious liability is determining how the portion of damage or loss caused by the fault of the spouse is to be assessed.[88] That problem has not been considered by the courts and will not be considered

82. [1953] 1 Q.B. 597 (C.A.).

83. *Id.* at 607.

84. Ontario Law Reform Commission, *Report on Family Law: Torts* (1969) at 44.

85. Alberta Institute of Law Research and Reform, *Contributory Negligence and Concurrent Tortfeasors* (1975) at 2.

86. *Agency—Master and Servant—Negligence of Servant Causing Injury to His Wife—Liability of Master,* (1940) 18 Can. Bar Rev., n. 13 at 232.

87. Fleming, *supra*, n. 28 at 314.

88. Ontario Law Reform Commission, *supra*, n. 84 at 44.

here for the reason that, later in this paper, the recommendation will be made that section 5 of the Contributory Negligence Act be repealed.

It is worthwhile to note that in two motor vehicle cases,[89, 90] recovery by a passenger was allowed against the vicariously liable employer notwithstanding a section of the Ontario Negligence Act which, in its material terms, is similar to section 5 of the Alberta Contributory Negligence Act. Considering that effect was not given to this section of the Act and that the concept of vicarious liability does not lend itself to apportioning damages on the basis of fault, the better view is that *Broom* v. *Morgan* is the law in Alberta. That is to say, in non-motor vehicle situations the rule of interspousal tort immunity does not operate so as to relieve an employer of vicarious liability to a married person where the employee is the spouse of the married person.

As to the question of indemnification, it could be argued that, should the employer be held to have a right of indemnity against the negligent spouse, the courts would be allowing what the Married Women's Act precludes. However, this argument can be rebutted by citing the decision of the British Columbia Court of Appeal in *Allen* v. *Nolet and Nolet*[91] where it was held that a wife who was vicariously liable for her husband's negligence as owner of the car could claim indemnity from her husband. In so holding, the court was in fact allowing what the British Columbia Married Women's Property Act does not allow. The reasons for the court's decision were as follows: 1. a claim for indemnification is not a claim in tort; 2. even if the claim were one in tort, it would fall within the exception "for the protection and security of her own separate property." Notwithstanding the rebuttal provided by *Allen* v. *Nolet*, it should be noted that the language of section 5 of the Alberta Contributory Negligence Act seems to make it clear that indemnity could not be recovered: "no damages, contribution or indemnity shall be recovered for the portion of damage or loss caused by the fault of the spouse."

Turning now to a discussion of vicarious liability in motor vehicle situations, it is important to distinguish between statutory liability imposed on owners of cars and common law liability imposed on employers. As will be seen, the distinction is important because the type of liability determines the degree of negligence which must be proved before an injured spouse can recover. To consider statutory liability first, the two sections of the Highway Traffic Act[92] which are relevant to this discussion are sections 159 and 160. The corresponding sections in the Motor Vehicle Administration Act[93] are sections 76 and 77. For the purposes of this paper, reference will be made only to the sections of the Highway Traffic Act and not to the identical sections in the Motor Vehicle Administration Act.

Section 159 of the Highway Traffic Act provides as follows:[94]

> in an action for the recovery of loss or damage sustained by a person by reason of a motor vehicle upon a highway, (a) a person driving the motor vehicle and living with and as a member of the family of the owner thereof, and (b) a person who is driving the motor vehicle and who is in possession of it with the consent, express or implied, of the owner thereof, shall be deemed to be the agent or servant of the owner of the motor

89. *Harrison* v. *Toronto Motor Car Ltd. and Krug* [1945] 1 D.L.R. 286 (Ont. C.A.).

90. *Co-operators Insurance Association* v. *Kearney* [1965] S.C.R. 106.

91. (1967) 61 D.L.R. (2d) 743 (B.C.C.A.).

92. S.A. 1975, c. 56.

93. S.A. 1975, c. 68.

94. S.A. 1975, c. 56.

> vehicle and to be employed as such, and shall be deemed to be driving the motor vehicle in the course of his employment, but nothing in this section relieves any person deemed to be the agent or servant of the owner and to be driving the motor vehicle in the course of his employment from the liability for the damages.

To see the effect of this section on actions involving spouses, reference is made to the decision of the Ontario Court of Appeal in *White* v. *Proctor*.[95] In this case the court relied on a section of the Ontario Highway Traffic Act similar to section 159 and held in favour of the wife who suffered personal injuries in a motor vehicle collision while a passenger in a car driven by her husband. The car was owned by her husband's employer who was held to be liable to the wife for the 30 percent of the damages caused by the husband. The employer was found liable because the Highway Traffic Act imposed on the owner of a motor vehicle a statutory liability:[96]

> which brings the appellant Supertest Petroleum Corporation Limited within its purview, and renders that corporation liable to the plaintiff since, on the occasion in question, its motor vehicle was in the possession of its servant in the course of his employment, and the plaintiff's damages were partly sustained by reason of the negligence of that servant.

As in *Broom* v. *Morgan* the husband's employer had argued that since the husband could not be liable by virtue of section 7 of the Married Women's Property Act, neither could he be liable.

White v. *Proctor* was decided, however, before the enactment of gratuitious passenger legislation which in Alberta appears as section 160 of the Highway Traffic Act.[97] This section states that:

> No person transported by the owner or driver of a motor vehicle as his guest without payment for the transportation has any cause of action for damages against the owner or driver for injury, death or loss, in case of accident, unless (a) the accident was caused by the gross negligence or wilful and wanton misconduct of the owner or operator of the motor vehicle, and (b) the gross negligence or wilful and wanton misconduct contributed to the injury, death or loss for which the action is brought.

The effect of section 160 on a *White* v. *Proctor* situation in Alberta today would be that the injured spouse would have to prove gross negligence on the part of the spouse driver in order to recover damages from the owner of the motor vehicle. If gross negligence were not established the injured spouse would be limited to recovering the percentage of damages caused by the other negligent driver, which in *White* v. *Proctor* amounted to 70 percent. Section 4 of the Contributory Negligence Act[98] ensures that the other driver shall pay only his or her share of the damage.

In the *White* v. *Proctor* situation the same problem as to the applicability of section 5 of the Contributory Negligence Act would arise as it did in the *Broom* v. *Morgan* situation and the same arguments would be considered with the following result: it would seem that an injured spouse in Alberta would have an action against an owner of a motor vehicle where gross negligence on the part of the spouse driver is established. It will be seen that in an employer-employee situation where vicarious liability is imposed by common law, ordinary negligence is enough. The problems as to the effect of section 5 of the Contributory Negligence Act on indemnification have already been discussed and will not be repeated here.

95. [1937] O.R. 647.
96. *Id.* at 652.
97. S.A. 1975, c. 56.
98. R.S.A. 1970, c. 65.

Proceeding now with the discussion of common law liability, *Co-operators Insurance Association* v. *Kearney*[99] provides an example of a case where vicarious liability was imposed on an employer by common law and consequently was not removed by a statutory provision which deprived a gratuitous passenger of any remedy against an owner or driver of a motor vehicle. In *Co-operators Insurance,* a servant claimed for personal injuries sustained while he was a passenger in a car driven by a fellow servant who was in common employment with him. The car was owned by their employer and the two were in the course of employment when the collision with the train, caused solely by the negligence of the fellow servant, occurred. The Supreme Court of Canada affirmed the judgment of the Ontario Court of Appeal against the employer who was held to be vicariously liable because there was a duty to the injured employee to take reasonable care to provide for his safety when he was engaged in the course of his employment. In holding in favour of the injured passenger, Mr. Justice Spence agreed with Mr. Justice Aylesworth of the Court of Appeal who stated that:[100]

> the legislature, in our view, is quite free to do what it has done in a case such as this, namely, to bar a certain cause of action against a wrong-doer without in any way affecting the legal result of the wrongful act with respect to someone else liable for that wrongful act upon some principle of the common law.

In *Co-operators Insurance Association* v. *Kearney* it is important to note that the passenger and driver were both employees of the same company. Whether the company would have been liable at common law to a passenger who was not its servant for a tort that its employee-driver committed in the course of employment "has been the subject of considerable juristic debate."[101] However, it is a question on which the Supreme Court of Canada did not express an opinion. That the employer, as owner of a motor vehicle, would have been liable in such a situation under section 159 of the Highway Traffic Act does not present a problem, provided that gross negligence on the part of the driver was established.

Does the principle in *Co-operators Insurance Association* v. *Kearney* apply where the driver and passenger are husband and wife? As Mendes da Costa points out,[102] Mr. Justice Spence's treatment in that case of two British cases which involve husband and wife seems to indicate that the fact that the employees are married would not be considered material. Therefore it would seem that where a husband and wife are in common employment to the owner of the motor vehicle, the injured spouse could sue the owner in his or her capacity as employer where the driver-spouse has been negligent.

Although the degree of negligence was not an issue in *Co-operators Insurance,* the principle of that case can be used to impose liability where the driver was only ordinarily negligent. *Causey* v. *McCarron,*[103] which specifically considered a section of the British Columbia Motor-vehicle Act (section 71) which is similar to section 160 of the Alberta Highway Traffic Act, also supports the view that ordinary negligence is sufficient where liability is imposed by common law. In *Causey* v. *McCarron* the parents, owners of a car, had entrusted it to their son who was involved in

99. [1965] S.C.R. 106.
100. *Id.* at 122.
101. Mendes da Costa, *supra*, n. 6 at 529.
102. *Id.* at 532.
103. (1968) 67 D.L.R. (2d) 707 (B.C.C.A.).

an accident in which his gratuitous passengers were injured. Since there was no finding of gross negligence on the part of the son, he was relieved from liability. The issue was whether his parents, as owners, were relieved of liability as well. The British Columbia Court of Appeal held that section 71 is only intended to relieve the owner que owner and is not a bar to a cause of action based on some other relationship or status such as parent-child.

In a *Co-operators Insurance Association* v. *Kearney* situation in Alberta, where the husband and wife are the employees, the applicability of section 5 of the Contributory Negligence Act would present the same problems as discussed above in reference to *Broom* v. *Morgan* and *White* v. *Proctor*. For the reasons given then, it is submitted that the principle of *Co-operators Insurance Association* v. *Kearney* is the law in Alberta.

To conclude this section on vicarious liability, the effect of interspousal tort liability on a third party who is held vicariously liable will be briefly stated. Arguably section 5 of the Contributory Negligence Act would not apply to limit an injured spouse's recovery against an employer or owner of a motor vehicle. Therefore the employer or owner would be liable for the full damages caused by the negligence of his or her employee, remembering that in a *White* v. *Proctor* situation gross negligence would have to be established and that in a *Co-operators Insurance* situation the husband and wife would have to be employed by the same employer. As to the question of indemnification, the third party may suffer a hardship because his or her employee and the injured person are married, if indemnification by the negligent spouse is not allowed by virtue of section 5 of the Contributory Negligence Act. Without delineating the arguments by reason of limited space, it will be said that perhaps Fleming is to be agreed with when he says that allowing indemnification where a servant has been merely negligent is "of doubtful legal and social merit."[104]

"The most common inter-spousal tort is that of a wife-passenger being injured in her husband's car"[105] and for that reason the position of a spouse injured in this way will be summarized here. Following that summary, the relevant provisions of the Insurance Act will be considered since one cannot realistically discuss liability in motor vehicle accident actions without discussing automobile insurance contracts.

Where the negligent spouse is the owner and driver of the car, the injured spouse is denied recovery against the negligent spouse even in a case of gross negligence, not by section 160 of the Highway Traffic Act but by section 3(2) of the Married Women's Property Act. As was stated by Mr. Justice Herring and Mr. Justice Dean in *McKinnon* v. *McKinnon*: "In these days when third-party insurance is compulsory, only insurance companies benefit from this extraordinary situation."[106] It has been suggested[107] that the injured spouse might be successful if she or he proceeds under section 159 of the Highway Traffic Act, contending that her husband or his wife is liable as owner or that he or she is liable in an action upon the statute. However, liability under section 159 is doubtful in a situation where the husband or wife is owner and driver since section 159 applies where the driver is a member of the family of the owner and

104. Fleming, *supra*, n. 28 at 641-2.
105. *Id.* at 593.
106. [1955] V.L.R. 81 (S.C.) at 85.
107. Mendes da Costa, *supra*, n. 6 at 532.

living with him or her or has possession of the motor vehicle with the owner's consent.

In a two-car collision, where there is negligence on the part of the driver-spouse who is also the owner and on the part of the other driver, the injured spouse is limited to recovering the portion of damage caused by the fault of the other driver by section 5 of the Contributory Negligence Act.

Where the negligent spouse is the driver of the car but not the owner, the injured spouse, in a case of gross negligence, can maintain an action against the owner under section 159 of the Highway Traffic Act.

Where the husband and wife are in common employment to the owner of the motor vehicle, the injured spouse can sue the owner as employer where the driver spouse has been ordinarily negligent.

Now to consider the provisions of the Alberta Insurance Act,[108] sections 290 and 291 provide for policy coverage of liability resulting from bodily injury or death and damage to property. One exception to this liability of the insurer is section 296(b)(i) which provides as follows:

> The insurer is not liable under a contract evidenced by a motor vehicle liability policy for any liability resulting from bodily injury to or the death of, (i) the daughter, son, wife or husband of any person insured by the contract while being carried in or upon or entering or getting on to or alighting from the automobile.

Limiting comments on this section to the case of married persons, it can be seen that under a motor vehicle liability policy the insurer of one spouse is not liable under that policy for bodily injury suffered by the other spouse. Since under section 290 both the named insured and persons personally driving with the insured's consent are covered by the policy, section 296(b)(i) will apply as well where it is not the insured spouse who is driving.

If section 3 of the Married Women's Act were repealed then, an injured spouse would not be able to recover from the insurer of the negligent spouse by virtue of section 296(b)(i) of the Insurance Act. If that section of the Insurance Act were repealed as well as section 3 of the Married Women's Act, section 298 of the Insurance Act would still present a problem. That section states that an insurer may provide by endorsement to a policy that it shall not be liable for loss or damage resulting from bodily injury to or death of a passenger.

Optional additional coverage may be obtained under sections 312 and 313 of the Insurance Act for the reasonable medical and funeral expenses of and for payment of accident benefits to: injured drivers or passengers in the insured motor vehicle or pedestrians struck by it and the named insured and his or her spouse and "any dependent relative residing in the same dwelling premises as the insured" who are injured as drivers of, passengers in, or by being struck by any other car defined in the policy. Therefore, where the spouse has taken this additional coverage which is not based on fault, an injured spouse may recover reasonable medical expenses and accident benefits. The accident benefits are not related to the general damages that would be recoverable if there were liability.[109]

This discussion on insurance provisions concludes the survey of the present law in Alberta with respect to interspousal tort immunity. This survey is one which has revealed both injustices and inequalities in the

108. R.S.A. 1970, c. 187.

109. Ontario Law Reform Commission, *supra*, n. 84 at 49.

law. The question which must now be considered is whether the reasons for the law outweigh its defects.

C. Why Retain Interspousal Immunity?

Neither spouse could sue the other in tort at common law. The basis for this rule was twofold: a husband and wife were one in law; marriage was a guardianship profitable to the husband. In the late 1800's, however, the concept of marriage was altered with the enactment of Married Women's Property Acts which established a separate estate in the married woman. At that time as well, conjugal unity was arguably abolished since a wife was given the right to sue her husband for the protection and security of her own separate property. Why then is there a law prohibiting husbands and wives from suing each other in tort for personal injuries when the basis for the law no longer exists? Five policy considerations are usually advanced for denying husbands and wives the legal relief which would be given to them if they were strangers.

One policy reason for denying relief is that interspousal tort liability would disrupt domestic tranquility:[110]

> The flames which litigation would kindle on the domestic hearth would consume in an instant the conjugal bond, and bring on a new era indeed—an era of universal discord, of unchastity, of bastardy, of dissoluteness, of violence, cruelty, and murders.

Assuming that judicial action would in fact promote disharmony, should it matter?[111] After all, tort actions between parties who are not married to each other might embitter relationships and yet that is not a ground for denying them recovery.[112] Or, assuming that liability would endanger domestic harmony, one might "challenge the fundamental premise that organization into stable families is best for society."[113] (The above line of argument is not one favoured by the writer however.) To those individuals who fear a higher divorce rate with the introduction of interspousal tort liability, the following must be said: Consider (a) what the most common interspousal tort is and (b) when interspousal torts, other than negligence, are usually committed.

As already indicated, the most common interspousal tort occurs in motor vehicle accidents with the wife-passenger being injured in her husband's car. In those cases, assuming the amendment of insurance laws, it is the insurance company which is the real adversary and will bear the loss and not the negligent spouse. How can it be argued then that motor vehicle accident actions would destroy the peace and tranquility of the home? As Fleming states:[114]

> The immunity, under modern conditions, assures not freedom from harassing litigation to a spouse, but a windfall to his insurance company which may arrogate to itself all his personal privilege in order to duck its proper function of compensating casualties within the risk it assumed and foiling effective distribution of such losses.

In non-motor vehicle accident actions, it is unlikely that a spouse will bring tort action against the other spouse where the couple is living togeather in conjugal bliss. In fact, in the case of intentional torts and other non-negligence actions, it is unlikely that the tort will be committed where the husband and wife are living together happily. The cases

110. *Ritter* v. *Ritter* (1858) 31 Pa. 396 (S.C. Pa.) at 398.

111. *Litigation Between Husband and Wife*, (1966) 79 Harv. L. Rev. at 1651.

112. *Id.*

113. *Id.* at 1652.

114. Fleming, *supra*, n. 28 at 593.

surveyed above to illustrate the types of actions which cannot be brought (*e.g.*, for false imprisonment and malicious prosecution, fraudulent conspiracy, libel, assault) support this view in that the parties involved were married persons who had separated prior to the tortious act and in some cases later obtained a divorce.

It might also be pointed out in this discussion of the domestic harmony policy consideration that actions between husband and wife are allowed for the protection and security of property, as are actions in contract. Husbands and wives may arguably sue for pre-nuptial torts and may institute criminal proceedings against each other. As will be seen later, parents and children can arguably sue each other in tort. Obviously, the menace to harmony argument was never given enough weight to proscribe the above actions.

That criminal law provides an adequate remedy is another argument proposed in favour of retaining the interspousal tort immunity rule.[115] However, criminal laws do not always offer a remedy to the injured spouse. Where one spouse maliciously prosecutes or negligently injures the other, the injured spouse cannot institute criminal proceedings. Even where the tort is a crime under the Criminal Code, a spouse may not be successful in taking criminal action. In *R.* v. *Reinke*[116] an Ontario County Court held that an indictment charging a wife (who was living apart from her husband) with defamatory libel against her husband under section 265 of the Criminal Code should be quashed because at common law no action whether civil or criminal was possible between a husband and wife except one taken by the wife for the protection and security of her own separate property and libel does not fit within the latter category. The implications of this decision seem frightening until one realizes that, in cases involving personal violence, it has been held that a spouse is competent and compellable to testify at the instance of the Crown against the accused spouse.[117] Consequently, it can be said that at least in cases of personal violence the common law defence of unity of husband and wife cannot be successfully argued to quash an indictment.

Where the tort is also a crime, the injured spouse may not wish to proceed criminally. A woman who is separated from her husband may not want to see her husband imprisoned for assault, for example, because he will be unable to make his alimony and maintenance payments while he is in prison.[118] Being physically injured, she may be unable to work. Even if criminal law does provide a remedy, it does little to compensate the injured spouse. Under the Criminal Injuries Compensation Act, an injured spouse may be awarded expenses actually and reasonably incurred as a result of the injury and pecuniary loss resulting from incapacity to work.[119] However, should damages for physical disability or disfigurement and pain and suffering be awarded, the amount will not exceed $10,000.[120]

A third policy argument in favour of retaining interspousal immunity is that by doing so, "a deluge of spurious litigation" is prevented.[121] In

115. Clark, *supra*, n. 30 at 253.
116. (1972) 7 C.C.C. (2d) 410 (Ont. Cty. C.).
117. *R.* v. *Lonsdale* (1974) 15 C.C.C. (2d) 201 (Alta. S.C.).
118. Bennett, *Interspousal Tort Immunity—California Follows the Trend*, (1963) 36 S. Calif. L. Rev. at 466.
119. R.S.A. 1970, c. 75, s. 13.
120. *Id.*
121. Peterson, *supra*, n. 31 at 337.

Thompson v. *Thompson* it was stated that permitting a tort action between spouses "would at the same time open the doors of the courts to accusations of all sorts of one spouse against the other, and bring into public notice complaints for assault, slander and libel . . . by husband against wife or wife against husband."[122] However, in actual practice, in those American states where interspousal tort suits have been allowed there has been no report of a deluge of litigation for real or fancied wrongs.[123] In Britain when spousal immunity was abolished in 1962, a provision was included in the British statute allowing a court to stay an interspousal action if it were satisfied that "no substantial benefit would accrue to either party, from the continuation of the proceedings."[124] In this way frivolous litigation would be discouraged. From 1962 to 1967 only six actions were stayed out of a total of seventy-four.[125] It can be ssid therefore that the floodgates argument has little substance.

The last two policy arguments which will be considered deal with the situation where the conduct constituting the tort is covered by insurance. Here, once again, it is assumed that the insurance laws do allow recovery from an insurer for a spouse's conduct. One argument is that interspousal tort actions would encourage collusion and insurance fraud.[126] To this argument it can be said that:[127]

> It is for the courts to deal with fraud and collusion and the danger that some members of a class may engage in it is not a sufficient reason to treat other members unfairly.

Moreover, there are many other potential collusion situations (*e.g.*, actions by fiance(e)s and close friends, actions by spouses where property is involved) in which there is no similar immunity.[128] Obviously in these situations the principle of compensation far outweighs the possibility of collusion. It should also be noted that the Ontario Law Reform Commission made enquiries in Australia in those states where spouses are allowed to sue each other for injuries sustained in motor vehicle accidents and learned that collusion and fraud between husband and wife are not problems.[129]

The other argument concerning insurance is that, if immunity did not exist, a spouse would benefit from his or her own wrong since the insurance monies would form part of the family funds.[130] But this argument could apply as well to awards made to other members of the family between whom there is no tort immunity.[131] The proponents of the above argument seem to forget that the purpose of awarding damages is compensation, which should not be denied on the ground that "as a fact of family life, an accretion to the family funds may benefit both spouses."[132] As one writer has put it: "this policy argument lacks any foundation in logic and . . . is inconsistent with the practical reality of the husband's benefit from his wife's damage recovery."[133]

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122. (1910) 218 U.S. 611 (Dist. of Columbia C.A.) at 617.
123. Bennett, *supra*, n. 118 at 465.
124. Manitoba Law Reform Commission, *Report on the Abolition of Inter-spousal Immunity in Tort* (1972) at 8.
125. *Id.*
126. Wallace, *Intrafamily Tort Liability—A Situation of Confused Disparity*, (1974) 5 Cumber-Sam L. Rev. at 276.
127. Alberta Institute of Law Research and Reform, *supra*, n. 85 at 7.
128. Manitoba Law Reform Commission, *supra*, n. 124 at 4.
129. Ontario Law Reform Commission, *supra*, n. 84 at 68-9.
130. Mendes da Costa, *supra*, n. 6 at 473.
131. *Id.*
132. *Id.*
133. Peterson, *supra*, n. 31 at 338.

Yet another argument against the abolition of the immunity law is that insurance companies would inevitably increase their rates. However, in 1972 when the Manitoba Law Reform Commission made enquiries in Canada and the United Kingdom, it concluded that the cost of abolishing interspousal tort immunity would not be great.[134] The Insurance Bureau of Canada to whom the Law Reform Commission of Ontario had also directed enquiries stated in its letter to the Manitoba Law Reform Commission that the elimination of interspousal immunity "would have little, if any, effect on the cost of any form of liability insurance."[135] Consequently, this last argument can be dismissed as well.

As the preceding discussion has illustrated, the policy considerations which have been urged for retaining of interspousal tort immunity can be relatively easily rebutted. Why, then, may a husband separated by an agreement from his wife visit her and in the course of a heated discussion "beat her up" and not be liable for the damage which he has caused? Why may a wife who has been deserted by her husband slander him without fear of a civil action? Why may a spouse who has been injured in a motor vehicle accident through the negligence of the other spouse not recover damages when his or her sister, brother, mother or father can? The above discussion of policy considerations indicates that there is no acceptable reason why the injured spouse in the above examples should not have an action against the other spouse. Since that is the case, it logically follows that interspousal tort immunity should be abolished. The next consideration is: what reforms must be enacted?

D. Recommendations for Reform

Half-hearted reforms in the area of interspousal tort immunity will not be satisfactory. It will not be sufficient that suits are allowed between husband and wife for personal injuries arising out of motor vehicle accidents. This conservative course which was adopted in three Australian jurisdictions (New South Wales, South Australia, West Australia)[136] and several American ones (including New Jersey, Vermont, Virginia,[137] Nevada[138]) is unacceptable for the obvious reason that it totally ignores torts committed in non-motor vehicle situations. Neither will it be adequate that interspousal suits are allowed with the court having the power to stay proceedings in cases of petty grievances, as is the law in the United Kingdom, New Zealand, Tasmania and Queensland.[139] This type of discretionary provision has not been found necessary for interspousal tort actions involving property. Why then should it be necessary in personal injury claims? A discretionary provision "would only result in additional work for the court and increased expense for the litigants"[140] since it would involve the following procedure: an application to stay proceedings would first be heard and then if the stay were refused, the court would have to hear the case again to determine the extent of the claim.[141] Another argument against a discretionary provision is that experience in Britain has indicated that

134. Manitoba Law Reform Commission, *supra*, n. 124 at 5-7.

135. *Id.* at 5.

136. Fleming, *supra*, n. 28 at 593.

137. Wallace, *supra*, n. 126 at 285.

138. *Interspousal and Parental Immunity*, (1975) 14 J. Family Law at 331-2.

139. Ontario Law Reform Commission, *supra*, n. 84 at 56.

140. *Id.* at 58.

141. *Id.* at 57.

this protection is unnecessary for personal injury actions.[142] Both the restriction of liability to motor vehicle accident actions and the judicial power to stay are based on the faulty premise that unrestricted tort liability would adversely affect marital harmony.

Since there is no justification for the interspousal tort immunity rule, except perhaps "that of historical survival" as Prosser states,[143] and since there is no reason for restricting tort liability between spouses either to motor vehicle accident actions or by a judicial power to stay, it is recommended that section 3 of the Alberta Married Women's Act be repealed and that a provision be enacted which stipulates that spouses are entitled to sue each other in tort. This unrestricted right of action is the law in two Canadian provinces, Manitoba[144] and Ontario,[145] in two Australian jurisdictions (State of Victoria and the Australian Capital Territory)[146] and in several American states including New York and Wisconsin.[147]

The abolition of interspousal tort immunity would necessitate the repeal of sections of other statutes, specifically the Contributory Negligence Act and the Insurance Act. Since there would be no justification for retaining section 5 of the Contributory Negligence Act which states that no damages, contribution or indemnity shall be recovered for the damage caused by the negligent spouse, it is recommended that this section should be repealed. The repeal of this section would result in an injured spouse being able to recover full damages as against all tortfeasors. Also a tortfeasor spouse would be liable to the other tortfeasors for contribution and indemnity for the portion of damage or loss which he or she caused. The repeal of section 5 of the Contributory Negligence Act would also clear up the problems discussed above as to the applicability of this section to vicarious liability situations, namely, if the section does apply, how is the portion of damage caused by the fault of the spouse to be assessed? And could indemnity be obtained by the vicariously liable employer? The result would be that an injured spouse could recover the full damages caused by the negligent spouse from a vicariously liable employer or motor vehicle owner who could in turn claim indemnity from the spouse who caused the injury. Should gratuitous passenger legislation be retained, it must be remembered that where statutory liability is imposed on the owner of the motor vehicle, gross negligence would have to be established before damages could be recovered for the injuries caused by the negligent spouse-driver; while in a situation of common law liability where both spouses are employed by the same employer, ordinary negligence would be sufficient.

With the abolition of tort immunity between spouses, the possibility of working an injustice to a third party under section 4(1)(c) of the Tort-Feasors Act would no longer exist. A third party who paid full damages to an injured spouse could claim contribution from the tortfeasor spouse because the latter is one "who is or would, if sued, have been liable in respect of the same damage."

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142. Manitoba Law Reform Commission, *supra*, n. 124 at 8.

143. *Prosser on Torts* (4th ed. 1971) at 864.

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

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

146. Fleming, *supra*, n. 28 at 593.

147. Ontario Law Reform Commission, *supra*, n. 84 at 59.

Before considering the repeal of provisions of the Insurance Act, a few comments will be made about section 160 of the Highway Traffic Act. By this section, a guest passenger may sue for injury only if the accident in which he or she was injured was caused by the gross negligence of the driver or owner of the motor vehicle. This rule operates unfairly against spouses because they are usually guest passengers. The arguments in favour of guest passenger legislation can be rebutted just as easily as those in favour of the interspousal tort immunity rule.[148] For this reason, even though guest passenger legislation is not directly related to interspousal tort immunity it is recommended that section 160 of the Highway Traffic Act and the corresponding section in the Motor Vehicle Administration Act (section 77) as well as section 4 of the Contributory Negligence Act be repealed.

With the enactment of interspousal tort liability for personal injuries, it is recommended that section 296(b)(i) of the Insurance Act which exempts insurers from liability for injuries or death of a spouse or child of the insured be repealed. If this section is not repealed, there is no point in reforming the law of interspousal tort immunity in motor vehicle accident cases. After all, the following situations would result. Where the driver-spouse was solely at fault, the injured spouse who obtained judgment against the negligent spouse would not recover from the latter's insurer. Or, where a third party was contributorily negligent and paid the injured spouse in full, assuming the repeal of section 5 of the Contributory Negligence Act, the third party could obtain judgment for contribution and indemnity against the tortfeasor spouse but the latter's insurer would not be liable.[149]

As already mentioned above, the repeal of section 296(b)(i) of the Insurance Act would not be adequate if insurers could exempt themselves from liability by endorsement to a policy as they can by section 298 of the Act with respect to passengers. It is recommended therefore that a provision be enacted which prohibits insurers, by endorsement to a policy, from exempting themselves from liability for personal injuries to members of the insured's family.

To summarize the above, it is recommended that:

1. Section 3 of the Married Women's Act be repealed.
2. A provision be enacted which allows spouses to sue each other in tort.
3. Section 5 of the Contributory Negligence Act be repealed.
4. Section 160 of the Highway Traffic Act be repealed as well as section 77 of the Motor Vehicle Administration Act and section 4 of the Contributory Negligence Act.
5. Section 296(b)(i) of the Insurance Act be repealed.
6. A provision be enacted prohibiting insurers from exempting themselves from liability for personal injury to members of the insured's family.

With the above reforms both the anomalies and the injustices which exist in the current law would be removed. Consequently, the law would no longer discriminate against judicially-separated husbands who, unlike their judicially-separated wives, cannot sue their spouses for a tort

148. *See* Alberta Institute of Law Research and Reform, *supra*, n. 85 at 7.

149. Ontario Law Reform Commission, *supra*, n. 84 at 66.

committed during separation. No longer would husbands and wives be prohibited from receiving compensation from each other for personal injuries which have been inflicted either intentionally or negligently. Third parties too would no longer suffer the possible injustice of not being indemnified by reason of section 5 of the Contributory Negligence Act or that of not being able to claim contribution from the tortfeasor spouse under section 4(1)(c) of the Tort-Feasors Act. With the above reforms, equality and justice would be achieved and Glanville Williams could less readily say "Perfection, said Arnold Bennett, is a form of death. If this is so, the law of tort is a lusty infant."[150]

III. ACTIONS BETWEEN PARENT AND CHILD

A. The Present Law

In Alberta, there appears to be no tort immunity between parent and child similar to that existing between husband and wife. This inference is based on an examination of the five cases which have been decided in Canada and England involving such suits. In addition, there have been similar decisions in Scotland, Australia and New Zealand.[151] The Commonwealth courts share the same view as to parent-child liability, a view which has not been accepted by many courts in the United States where parent-child immunity has been entrenched since 1891.[152] In the U.S.A. it was not until 1963 that parent-child immunity was abrogated and then in only one jurisdiction, that of Wisconsin.[153] Although several states quickly followed Wisconsin's lead,[154] as of 1972, the law in thirty-three states has been that "an unemancipated minor child cannot sue his parents for damages for bodily injury caused by the negligence of the parent, where both are still living."[155] The same rule applies to parents suing their children.[156] As to intentional torts, where the act involves parental discipline, the immunity remains even though the disciplinary action may be excessive.[157]

Of the cases which have been decided in the Commonwealth, in only one has an intentional tort given rise to an action between parent and child. In the remaining cases, it is negligence on the part of either the parent or child who causes the action to be brought. The intentional tort case is that of *Ash* v. *Ash*[158] which, contrary to the belief of some writers who state that there are no English decisions dealing with parent-child liability,[159] is an English one, though admittedly the only one reported. *Ash* v. *Ash* was decided in 1696. The mother, Lady Ash, pretending that her daughter was troubled in mind, sent for an apothecary to administer "physick." They bound her and would have forced her to take "physick." The daughter was confined for two to three hours. She subsequently sued her mother for assault, battery and false imprisonment and was awarded damages. The reasons for the jury's decision are not revealed in the law report.

150. *Some Reforms in the Law of Tort*, (1961) 24 Mod. L. Rev. at 101.

151. *Dolbel* v. *Dolbel* (1963) 63 S.R. (N.S.W.) 758; *McCallion* v. *Dodd* [1966] N.Z.L.R. 710 (S.C.); *Rogers* v. *Rawlings* [1969] Qd. R. 262 (F.C.).

152. Prosser, *supra*, n. 143 at 865.

153. *Id.* at 867.

154. *Id.* at 867-8.

155. Hume, *Intra-Familial Immunity Revisited*, (1972) 23 Federation of Insurance Counsel at 50.

156. *Id.* at 54.

157. *Id.* at 59.

158. 90 E.R. 526 (K.B.).

159. Prosser, *supra*, n. 143 at 865; Ontario Law Reform Commission, *supra*, n. 84 at 61.

Recognizing that a parent has the privilege of meting out reasonable punishment to a child,[160] it can be argued that in Alberta where there is use of excessive force, such as that in *Ash* v. *Ash*, the child can maintain an action in tort against the parent. This proposition is supported by Canadian cases which have indicated that there is no tort immunity between parent and child. As for a parent maintaining an action against his or her child where an intentional tort has been committed, one could support such an argument by citing the words of Mr. Justice Chase-Casgrain in *Williams* v. *Springle*.[161] Therein he stated:[162]

> Nor can it be said that it is, speaking generally, against public policy to recognize the parent's right to recover damages from his own minor child; otherwise, it should have to be held that if such a child, who had been brought up properly by his parents, assaulted his father and caused him body injuries, the father could not recover the damages suffered. This, it seems, would be much more against public policy than the converse proposition.

In negligence actions, the leading Canadian case in the area of parent-child liability is *Fidelity and Casualty Co.* v. *Marchand*,[163] a 1924 decision of the Supreme Court of Canada. In that case the father had negligently backed over his 5½ year old son with his car, seriously injuring him. The issue in the case was whether the father's insurance company should indemnify him for the $5,000 which the lower court had awarded as damages to be paid and which he had paid to the tutor who represented his injured son. Since the payment was without the company's consent and contrary to conditions of the policy, the court held in favour of the insurance company. Whether a child had a right of action in tort against his parent was not an issue in this case. However, three of the five judges indicated that such an action could be maintained and, as pointed out by the Ontario Law Reform Commission, the dissenting judge who would have held the insurer liable must also have considered that such a suit was possible.[164]

Since the comments of the three judges were similar, the words of only Mr. Justice Mignault will be cited here:[165]

> Before this case was submitted, I may frankly say that I had never heard of a civil action by or on behalf of a minor child against his father or mother, claiming damages for injuries caused by the negligence of the latter. In its *factum*, the appellant refers to a very recent decision by a North Carolina court in which, on grounds of public policy, it was held that such an action does not lie, and the judgment mentions some American cases apparently to the same effect. Such decisions, however, are not authorities before our courts. In the absence of authority to the contrary, the question really is whether an exception founded on family relationship can be admitted in view of the very general rule of liability contained in C.C. (Que.), Art. 1053. This rule is in as wide terms as possible and renders every person capable of distinguishing right from wrong responsible for damage caused by his fault to another. There is here no limitation, no exception of persons, and the class of those to whom compensation is due is as wide as that of the persons on whom liability is imposed. It seems therefore sufficient to say *lex non distinguit*, however repugnant it may seem that a minor child should sue his own father, although it would probably be equally repugnant that a child injured by his father's negligent act, perhaps maimed for life, should have no redress for the damages he has suffered.

It is obvious from Mr. Justice Mignault's statement that the decision of the court was based on the interpretation of the Quebec Civil Code.

160. Fleming, *supra*, n. 28 at 95.

161. (1940) 78 Que. Official L.R. (S.C.) 507.

162. *Id.* at 509.

163. [1924] 4 D.L.R. 157.

164. Ontario Law Reform Commission, *supra*, n. 84 at 63.

165. *Fidelity and Casualty Co.* v. *Marchand* [1924] 4 D.L.R. 157 at 165-6.

Therefore, it could be argued by counsel for an insurer in a common law province that *Fidelity and Casualty Co.* v. *Marchand* is distinguishable on that fact. On the other hand, the case could be used to support a parent-child liability argument in Alberta and other common law provinces by submitting that article 1053 merely codifies who might be held negligent under common law and that, since the Supreme Court of Canada did not hold the parent-child relationship to be an exception to liability imposed by article 1053, similarly the relationship could not be held to be an exception to liability for negligence under common law.

Another parent-child case which interpreted article 1053 of the Civil Code was *Williams* v. *Springle*[166] where a parent sued a child. The court held that a mother was entitled to a claim against her 19 year old daughter for injuries the mother suffered when the daughter, driving her automobile at an excessive rate of speed, struck a telephone pole and ran off the road. The daughter, although being under her mother's legal control at the time of the accident, was held to be of an age that she could discern right from wrong, as was required by article 1053 of the Civil Code. As already noted, the court also stated that it was not against public policy that a parent should have the right to recover damages from his or her minor child. Should an attempt be made to restrict the decision in this case to the fact that it was based on the Quebec statute, the same argument as presented above with respect to *Fidelity and Casualty Co.* v. *Marchand* can be made.

Neither of the two Canadian cases discussed above were considered by two Ontario courts which recognized a child's right of action against a parent. Rather, these courts followed *Young* v. *Rankin*,[167] a Scottish case, which allowed a suit by a 16 year old boy against his father because there was no rule or doctrine in the law of Scotland to prevent a son from maintaining such an action. The boy was suing his father and a third party for personal injuries which he suffered while a passenger in his father's car which collided with the car of the third party. The court was unconvinced by the public policy argument that:[168]

> it was unnatural for the son to sue the father, that actions of this kind would make for family dispeace, and that they are contrary to some precept of social morality or some rule of public interest.

It also thought that risks of abuse of this type of action are exaggerated. As for the analogy between the case of parent and child and the case of husband and wife, the court stated that it failed for the reason that parent and child have never been deemed to be one person.

With the facts and reasoning of *Young* v. *Rankin* in mind, the Ontario decisions will now be discussed. In *Deziel* v. *Deziel*,[169] a case considered by the Ontario High Court, an 11 year old boy was riding as a gratuitous passenger in a chairplane machine at a carnival when he was struck by part of a neighbouring machine. Both machines were owned by his father. The court awarded the boy $3,000 in damages. Noting that a suit between child and parent would only arise where insurance was involved, Mr. Justice Lebel subscribed to the following view presented by Lord Fleming in *Young* v. *Rankin*: "I do not think that a wrong-doer should be

166. (1940) 78 Que. Official L.R. (S.C.) 507.
167. [1934] S.C. 499 (Second Division).
168. *Id.* at 508.
169. [1953] 1 D.L.R. 651.

relieved of responsibility for the consequences of his negligence merely because the injured party happens to be his own child."[170]

In *Cowle and Cowle* v. *Filion,*[171] a decision of an Ontario County Court, the action arose when a three year old child on a tricycle was struck by the defendant's motor vehicle while the child was on the shoulder of the street. Since the father was found not to have intentionally permitted his child to play on the street, he had not breached his duty to his child and therefore was not found to be contributorily negligent. In coming to its decision, the court, referring to *Deziel* v. *Deziel* and *Young* v. *Rankin*, recognized that an infant has a right of action against his or her parent.

The decision in *Cowle and Cowle* v. *Filion* indicates that a parent is not liable to a third party simply because he or she is a parent but that the parent is liable if he or she assumes responsibility for the child in a specific instance. An example of a parent being found liable in such a situation is *McCallion* v. *Dodd.*[172] There the father breached his duty to the child by failing to take adequate care of him while walking with the child along the highway. As a result, the child was struck by a car by a negligent motorist who was held to be entitled to contribution from the father.

It has been suggested that the Ontario cases, *Deziel* v. *Deziel* and *Cowle and Cowle* v. *Filion,* could be distinguished on the basis that they followed *Young* v. *Rankin* which was from a civil law jurisdiction.[173] Therefore they could not be used to support a parent-child liability argument in Alberta nor in any other common law province. However, as in *Young* v. *Rankin*, it could be argued that not only is there no rule in Alberta prohibiting such action but also that there is no reason for a court to prevent such suits between parent and child. As indicated in *Young* v. *Rankin*, parents and children have never been considered one in the eyes of the law, as husbands and wives have been. Therefore, although the child was in the custody of the parent at common law, the child retained a separate legal identity.[174] Consequently, he or she was:[175]

> entitled to the benefits of his [or her] own separate property and to the enforcement of his [or her] own choses in action, including those in tort, and was liable in turn as an individual for his [or her] own torts.

Historically, then, there were no obstacles to actions between parent and child as there were to actions between husband and wife. That being so, the next question is whether there are any policy considerations which would justifiably prohibit suits between parent and child.

American writers cite eight policy arguments which are put forward by the proponents of the parent-child immunity rule. These arguments, which will be briefly considered, are as follows: 1. preservation of family harmony, 2. undermining of parental control and discipline, 3. depletion of the family exchequer, 4. availability of remedy in criminal proceedings, 5. possibility of fraud and collusion, 6. flood of frivolous suits, 7. inheritance by parent of money recovered by child, and 8. violation of

170. *Id.* at 654.
171. [1956] O.W.N. 881.
172. [1966] N.Z.L.R. 710 (S.C.).
173. Ontario Law Reform Commission, *supra*, n. 84 at 64.
174. Prosser, *supra*, n. 143 at 864.
175. *Id.*

policy that the parent is head of the household.[176] With respect to the domestic harmony argument, which was not accepted by the court in *Young* v. *Rankin*, two comments will simply be made. First, as illustrated by the survey of Canadian cases above, most of the actions between parent and child arise from negligent behaviour where insurance is usually involved. How can it be said that family harmony would be disrupted in those cases? Second, suits are allowed between parents and children in contract and property matters and between other members of the family,[177] brothers and sisters, for example, and spouses in the specific instances noted above. If the preservation of family harmony were a real concern, then these actions would be prohibited.

To consider the second argument listed above, can it be said that, by allowing suits between parent and child, the ability of the parent to discipline and control the child is impaired? The answer to this question is "no" since, as already indicated, a parent has a common law right to administer reasonable punishment to his or her child. In the case where the punishment administered is not reasonable, the writer agrees with the Ontario Law Reform Commission that "If a parent goes beyond that right and excessively punishes a child" there is "no reason why the parent should not be subject to a civil suit."[178]

By the family exchequer argument which is the third one mentioned, it is meant that forcing one member of the family to compensate another, especially where the parent is the one compensating, would inequitably reduce the funds available for maintaining the rest of the family.[179] However, with the prevalence of liability insurance, the family assets will usually not be diminished.[180]

As for the policy arguments regarding the availability of a remedy in criminal proceedings, the possibility of fraud and collusion, the flood of frivolous suits and inheritance by the parent of money recovered by the child, these or similar arguments were considered and rebutted during the discussion on interspousal tort immunity. Hence they will not be reconsidered here.

The final policy argument usually advanced is that allowing tort actions between parent and child would "violate general social policy that the parent is the head of the household and as such should have immunity similar to that of a sovereign."[181] The writer finds this argument too ridulous for comment.

It has been argued in this section of the paper that personal tort liability exists between parents and children in Alberta. However, since the cases presented can arguably be distinguished, it has been necessary to demonstrate that there are no reasons for having a parent-child immunity rule. Unfortunately, however, showing that there is no reason for the rule does not guarantee that in the future a court will hold that a child or parent does have the right to sue the other for a personal tort. It is imperative, therefore, that legislation be enacted to ensure that such a decision will not be made. This recommendation and one other will be

176. Akers and Drummond, *supra*, n. 29 at 187-93; Wallace, *supra*, n. 126 at 287; Ashdown, *Intrafamily Immunity, Pure Compensation, and the Family Exclusion Clause*, (1974) 60 Iowa L. Rev. at 244-51.

177. Akers and Drummond, *supra*, n. 29 at 188.

178. Ontario Law Reform Commission, *supra*, n. 84 at 65.

179. Ashdown, *supra*, n. 176 at 247.

180. *Id.* at 248.

181. Wallace, *supra*, n. 126 at 287.

presented below to conclude this discussion on actions between parent and child.

B. Recommendations

Since fairness and justice require that children and parents should be allowed to sue each other in tort, it is recommended that their capacity to sue which is now based on case law be reinforced by statute. Legislation similar to that in Ontario should be enacted to prevent the parent-child relationship from being a bar to the bringing of proceedings. The Ontario statute states as follows: "No person shall be disentitled from bringing an action or other proceeding against another for the reason only that they stand in the relationship of parent and child."[182] A practical problem in Alberta might be locating the appropriate statute for such a provision. The writer suggests that Alberta follow Ontario's lead and enact a Family Law Reform Act which would also resolve some of the other inequities which exist in marital and family law.

Recommendations have already been made in this paper with respect to certain provisions of the Insurance Act. These will be repeated here. First, it is necessary that section 296(b)(i) which exempts insurers from liability under motor vehicle liability policies in respect of bodily injury or death of a son or daughter (or spouse) of the insured be repealed. It has been argued above that parent-child liability exists in Alberta. However, this liability has little meaning since the injured child may not recover from the insurer of the tortfeasor parent. Another recommendation is that insurers be prohibited from exempting themselves, by endorsement to a policy, from liability for personal injuries to the insured's children (or spouse).

IV. CONCLUSION

The primary purpose of the law of torts is "to compensate the person injured by compelling the wrongdoer to pay for the damage he [or she] has done."[183] In this paper, which has dealt with the law in Alberta, it has been demonstrated that where the parties to the action are parent and child, this purpose is achieved. However, the same cannot be said where the parties are husband and wife since tort law provides no remedy to a spouse who has been injured by the other spouse. Recognizing the unjustness of this situation, Mendes da Costa expressed the hope eight years ago that "the path blazed by the English Act of 1962 [which abolished interspousal tort immunity] will . . . be followed in Canadian jurisdictions."[184] Since then, however, only the provinces of Manitoba and Ontario have followed England's lead. It is high time that Alberta did the same.

182. Family Law Reform Act, S.O. 1975, c. 41, s. 3.

183. Fleming, *supra*, n. 28 at 2.

184. Mendes da Costa, *supra*, n. 6 at 537.