

Summer 1982

Interspousal Tort Immunity in Missouri

Jeffrey J. Brinker

Follow this and additional works at: <https://scholarship.law.missouri.edu/mlr>



Part of the [Law Commons](#)

Recommended Citation

Jeffrey J. Brinker, *Interspousal Tort Immunity in Missouri*, 47 MO. L. REV. (1982)
Available at: <https://scholarship.law.missouri.edu/mlr/vol47/iss3/5>

This Comment is brought to you for free and open access by the Law Journals at University of Missouri School of Law Scholarship Repository. It has been accepted for inclusion in Missouri Law Review by an authorized editor of University of Missouri School of Law Scholarship Repository. For more information, please contact bassettcw@missouri.edu.

INTERSPOUSAL TORT IMMUNITY IN MISSOURI

I.	Introduction	519
II.	Judicial History of Interspousal Tort Immunity in Missouri	522
III.	Analysis of the Major Influences on the Missouri Supreme Court	530
	A. Unity of Husband and Wife	531
	B. Derogation of the Common Law	534
	C. Presumed Legislative Intent	537
	D. Doctrine of Stare Decisis	539
IV.	Public Policy Considerations	540
V.	Conclusion	543

I. INTRODUCTION

Missouri adheres to the common law doctrine of interspousal tort immunity, which precludes spouses from suing one another in personal tort during coverture.¹ As a result, Missouri spouses have no tort remedy available when their spouses commit personal torts against them during marriage.

Interspousal tort immunity arose out of the legal nature of the husband-wife relationship at common law. At marriage, the wife's identity merged into that of her husband, and her legal existence was suspended for the duration of the marriage.² The wife had no independent rights; she could not contract, convey property, or sue or be sued in her own name unless her husband was joined as a plaintiff or defendant.³ As a result, no cause of action arose at common law when an interspousal tort was committed during marriage because the rights and duties a husband and wife owed to one another were united in the same person.⁴ Suing one's spouse also produced

1. Coverture describes the state of a married woman at common law whereby the civil existence of the wife was for many purposes incorporated into that of her husband during marriage. *Browner v. Browner*, 327 S.W.2d 808, 811 (Mo. En Banc 1959).

2. 1 W. BLACKSTONE, COMMENTARIES *442; 1 F. HARPER & F. JAMES, THE LAW OF TORTS § 8.10, at 643 (1956); W. PROSSER, THE LAW OF TORTS 859-61 (4th ed. 1971); McCurdy, *Personal Injury Torts Between Spouses*, 4 VILL. L. REV. 303, 303-05 (1959); Comment, *Tort Actions Between Members of the Family—Husband & Wife—Parent & Child*, 26 MO. L. REV. 152, 152-53 (1961). For a comprehensive study of the rights of the spouses during marriage at common law, see McCurdy, *Torts Between Persons in Domestic Relations*, 43 HARV. L. REV. 1030 (1930).

3. W. PROSSER, *supra* note 2, at 859-61.

4. McCurdy, 43 HARV. L. REV., *supra* note 2, at 1033.

the procedural impossibility of having the husband on both sides of the lawsuit.⁵

Beginning in the mid-nineteenth century, almost every state enacted Married Women's Property Acts, which purported to grant married women a separate legal identity.⁶ The statutes gave married women separate ownership and control of their own property and authorized them to sue and be sued as if they were unmarried.⁷ The Married Women's Acts typically did not specify, however, whether a wife could sue her husband for personal tort.⁸ Consequently, the impact of these statutes on interspousal tort immunity was uneven. Approximately sixteen states construed their acts as abrogating interspousal tort immunity.⁹ Other states, including Missouri in *Rogers v. Rogers*,¹⁰ interpreted the Married Women's Acts as procedural and not as creating any new substantive rights.¹¹ These jurisdictions argued that the statutes were intended to remove the common law limitation that the husband be joined in order for the wife to maintain a cause of action and not to authorize interspousal tort actions.¹² Because the Married Women's Acts generally were silent regarding interspousal liability, courts in these jurisdictions refused to construe the acts as abrogating interspousal immunity as to personal torts.¹³ Thus, in the states where the Married Women's Acts

5. *Id.* The unity doctrine applied only to the civil nature of the spouses. Criminal law regarded them as separate individuals. W. PROSSER, *supra* note 2, at 859.

6. McCurdy, 4 VILL. L. REV., *supra* note 2, at 308 n.40; Moore, *The Case for Retention of Interspousal Tort Immunity*, 7 OHIO N.U.L. REV. 943, 943 (1980); Annot., 92 A.L.R.3d 901, 905 (1979).

7. Authorities cited note 6 *supra*.

8. See Comment, *supra* note 2, at 153-54. See also Annot., *supra* note 6, at 907-08.

9. See Annot., *supra* note 6, at 927-32; *id.* (Supp. 1981), at 10. The wording of the statutes varied from state to state. Some statutes expressly permitted or prohibited interspousal personal injury suits. McCurdy, 4 VILL. L. REV., *supra* note 2, at 312, 319-22.

10. 265 Mo. 200, 177 S.W. 382 (1915).

11. See *Rogers v. Rogers*, 265 Mo. 200, 177 S.W. 382, 383 (1915); Annot., *supra* note 6, at 912-17; *id.* (Supp. 1981), at 10. See also *Thompson v. Thompson*, 218 U.S. 611 (1910) (Court upheld lower court's holding that District of Columbia statute authorizing women "to sue separately for the recovery, security, or protection of their property, and for torts committed against them, as fully and freely as if they were unmarried" did not so modify common law as to allow wife to sue husband for assault and battery). The *Thompson* Court stated, "The statute was not intended to give a right of action as against the husband, but to allow the wife, in her own name, to maintain actions of tort which at common law must be brought in the joint names of herself and husband." *Id.* at 617.

12. See Annot., *supra* note 6, at 927-32; *id.* (Supp. 1981), at 10.

13. Authorities cited note 12 *supra*.

were construed as procedural, a wife could sue anyone in law or equity except her husband for a personal tort.¹⁴

Although interspousal tort immunity is still recognized in a few states, it is a dying doctrine. Twenty-nine states have abrogated the doctrine, and eight others have modified it.¹⁵ These states have summarily rejected the

14. The wife was able to sue her husband in contract or for a property tort in these jurisdictions because of the specific statutory language. See note 89 and accompanying text *infra*. Thus, the unity fiction was abrogated, except for personal torts.

15. For cases and statutes abrogating interspousal tort immunity, see Penton v. Penton, 223 Ala. 282, 135 So. 481 (1931); Johnson v. Johnson, 201 Ala. 41, 77 So. 335 (1917); Cramer v. Cramer, 379 P.2d 95 (Alaska 1963); Leach v. Leach, 227 Ark. 599, 300 S.W.2d 15 (1957); Klein v. Klein, 58 Cal. 2d 692, 376 P.2d 70, 26 Cal. Rptr. 102 (1962); Self v. Self, 58 Cal. 2d 683, 376 P.2d 65, 26 Cal. Rptr. 97 (1962); Rains v. Rains, 97 Colo. 19, 46 P.2d 740 (1935); Bushnell v. Bushnell, 103 Conn. 583, 131 A. 432 (1925); Brown v. Brown, 88 Conn. 42, 89 A. 889 (1914); CONN. GEN. STAT. ANN. § 52-572d (West Cum. Supp. 1981); Rogers v. Yellowstone Park Co., 97 Idaho 14, 539 P.2d 566 (1974); Brooks v. Robinson, 259 Ind. 16, 284 N.E.2d 794 (1972); Shook v. Crabb, 281 N.W.2d 616 (Iowa 1979); Combs v. Combs, 262 S.W.2d 821 (Ky. 1953); Brown v. Gosser, 262 S.W.2d 480 (Ky. 1953); MacDonald v. MacDonald, 412 A.2d 71 (Me. 1980); Brown v. Brown, ___ Mass. ___, 409 N.E.2d 717 (1980); Lewis v. Lewis, 370 Mass. 619, 351 N.E.2d 526 (1976); Hosko v. Hosko, 385 Mich. 39, 187 N.W.2d 236 (1971); Beaudette v. Frana, 285 Minn. 366, 173 N.W.2d 416 (1969); Imig v. March, 203 Neb. 537, 279 N.W.2d 382 (1979); Thompson v. Thompson, 105 N.H. 86, 193 A.2d 439 (1963); Merenoff v. Merenoff, 76 N.J. 535, 388 A.2d 951 (1978); Immer v. Risko, 56 N.J. 482, 267 A.2d 481 (1970); Maestas v. Overton, 87 N.M. 213, 531 P.2d 947 (1975); Flores v. Flores, 84 N.M. 601, 506 P.2d 345 (Ct. App. 1973); N.Y. GEN. OBLIG. LAW § 3-313 (McKinney 1978); Roberts v. Roberts, 185 N.C. 566, 118 S.E. 9 (1923); Fitzmaurice v. Fitzmaurice, 62 N.D. 191, 242 N.W. 526 (1932); Courtney v. Courtney, 184 Okla. 395, 87 P.2d 660 (1938); Fiedler v. Fiedler, 42 Okla. 124, 140 P. 1022 (1914); Hack v. Hack, 495 Pa. 300, 433 A.2d 859 (1981); Pardue v. Pardue, 167 S.C. 129, 166 S.E. 101 (1932); Scotvold v. Scotvold, 68 S.D. 53, 298 N.W. 266 (1941); Richard v. Richard, 131 Vt. 98, 300 A.2d 637 (1973); Freehe v. Freehe, 81 Wash. 2d 183, 500 P.2d 771 (1972); Coffindaffer v. Coffindaffer, 244 S.E. 2d 338 (W. Va. 1978); Wait v. Pierce, 191 Wis. 202, 209 N.W. 475 (1926).

For cases modifying interspousal tort immunity, see Windauer v. O'Connor, 107 Ariz. 267, 485 P.2d 1157 (1971) (after divorce, spouse may sue for intentional tort committed during coverture); Lusby v. Lusby, 283 Md. 334, 390 A.2d 77 (1978) (wife allowed to sue for intentional tort committed during marriage); Rupert v. Stienne, 90 Nev. 397, 528 P.2d 1013 (1974) (interspousal immunity abolished regarding claims arising out of motor vehicle accidents); Apitz v. Dames, 205 Or. 242, 287 P.2d 585 (1955) (wife allowed to sue husband for intentional tort committed during marriage); Digby v. Digby, ___ R.I. ___, 388 A.2d 1 (1978) (immunity abolished as to claims arising out of motor vehicle accidents); Bounds v. Caudle, 560 S.W.2d 925 (Tex. 1977) (interspousal immunity abolished with regard

unity of husband and wife fiction¹⁶ and have weighed public policy in favor of partial or total abrogation of interspousal immunity.¹⁷ Several states that have retained interspousal tort immunity have abandoned the unity fiction as the doctrine's basis in favor of public policy considerations, such as the preservation of domestic tranquility and the prevention of collusive claims.¹⁸

The judicial history of the doctrine in Missouri has been the reverse of the national trend. Despite the departure from interspousal tort immunity in the United States and the even more pronounced trend away from the common law unity fiction, Missouri courts have relied primarily on the unity notion in upholding interspousal immunity.¹⁹ This reliance has been unpredictable, however, as the Missouri Supreme Court has oscillated between substantive and procedural interpretations of the unity bar to suit.²⁰ The supreme court also has been influenced by the silence of the Missouri legislature concerning interspousal immunity.²¹ Because an understanding of the current state of interspousal tort immunity requires a knowledge of its history, this comment will first examine the judicial history of the doctrine in Missouri. It then will evaluate the factors which have been case-dispositive to the Missouri Supreme Court.

II. JUDICIAL HISTORY OF INTERSPOUSAL TORT IMMUNITY IN MISSOURI

The Missouri Supreme Court first pronounced the existence of interspousal tort immunity in *Rogers v. Rogers*,²² decided in 1915. In *Rogers*, the supreme court affirmed the dismissal of a wife's false imprisonment action against her husband. The husband had committed his wife to an insane asylum for several months while they were married. The court's holding was based on its construction of the Missouri Married Women's Act.²³ The

to willful and intentional torts); *Stoker v. Stoker*, 616 P.2d 590 (Utah 1980) (court refused to apply immunity to intentional infliction of injuries by husband on wife before divorce); *Surratt v. Thompson*, 212 Va. 191, 183 S.E.2d 200 (1971) (immunity abolished as to motor vehicle accidents).

16. See note 86 and accompanying text *infra*.

17. See Part IV. *infra*.

18. See, e.g., *Alfree v. Alfree*, 410 A.2d 161 (Del. 1979); *Raisen v. Raisen*, 379 So. 2d 352 (Fla. 1979); *Robeson v. International Indem. Co.*, 248 Ga. 306, 282 S.E.2d 896 (1981); *Guffy v. Guffy*, 230 Kan. 89, 631 P.2d 646 (1981); *Lyons v. Lyons*, 2 Ohio St. 2d 243, 208 N.E.2d 533 (1965).

19. See Part III.A. *infra*.

20. See Part II. *infra*.

21. See Part III.C. *infra*.

22. 265 Mo. 200, 177 S.W. 382 (1915).

23. 265 Mo. at 206-08, 177 S.W. at 383-84. The Missouri Married Women's Act allowed a wife to sue and transact business in her own name, independently of her husband. At the same time, the wife became accountable for her own liabilities and obligations. See Comment, *supra* note 2, at 154. The first such statute in Missouri appeared at MO. REV. STAT. ch. 128, § 7 (1855), and provided in part, "When a

court noted that at common law a husband could not sue his wife for a personal tort and ruled that in the absence of an express statute, the wife's right to sue her husband for a personal tort should be no greater.²⁴ The court held that whether construed as a substantive declaration of rights or as a rule of procedure, the Married Women's Act granted neither express nor implied authority to a wife to sue her husband for a personal tort.²⁵

The effect of the *Rogers* decision was to retain the common law unity fiction for personal torts despite the broad, general language of the Missouri Married Women's Act.²⁶ *Rogers* is pivotal in the Missouri case law not only

married woman is a party, her husband must be joined with her, except that: *First*, When the action concerns her separate property, she may sue and be sued alone; *Second*, When an action is between herself and her husband, she may sue and be sued alone." The statute was amended in *id.* ch. 59, § 3468 (1879), to read, "When a married woman is a party, her husband must be joined with her in all actions except those in which the husband is the sole plaintiff and the wife the sole defendant, or the wife a plaintiff and the husband a defendant"

By the time *Rogers* was decided, however, the express language about a wife suing her husband had been removed. The statute was amended in *id.* ch. 33, § 1996 (1889), to read, "A married woman may, in her own name, with or without joining her husband as a party, sue and be sued . . . with the same force and effect as if she was a *femme sole*" This was the language of *id.* ch. 21, § 1735 (1909), construed in *Rogers*.

Two other statutes comprised the remainder of the Missouri Married Women's Act. *Id.* ch. 77, § 8304 (1909), was also construed in *Rogers*. The statute, first enacted in *id.* ch. 109, § 6864 (1889), authorized married women to transact business, contract and sue on their own account, and declared that a wife may invoke the protection of the homestead and exemption laws equally with her husband when he has not exercised the right. The third section of the Missouri Married Women's Act, *id.* ch. 77, § 8309 (1909), is discussed in note 29 *infra*. This section dealt with the separate property rights of a married woman and was not considered by the court in *Rogers*. For a discussion of the current derivative sections of the Missouri Married Women's Act, see note 39 *infra*.

24. 265 Mo. at 206-07, 177 S.W. at 384. The court stated, "These sections do not attempt to confer greater rights of action upon a married woman than are possessed by her husband" *Id.*

25. *Id.* The court added that the wisdom or justice of such a statute was wholly within the purview of the legislature. *Id.* at 208, 177 S.W. at 384.

26. See note 23 *supra*. For other constructions of the Missouri Married Women's Act, see *Faris v. Hope*, 298 F. 727 (8th Cir. 1924) (wife may not sue husband for libel while married, citing *Rogers*); *Ex parte Badger*, 286 Mo. 139, 226 S.W. 936 (1920) (wife may sue husband for maintenance and child custody); *Planck v. Planck*, 199 S.W. 1183 (Mo. 1917) (mem.) (decision following *Rogers*; court dismissed wife's suit against husband for conspiring to incarcerate her in insane asylum); *Regal Realty & Inv. Co. v. Gallagher*, 188 S.W. 151 (Mo. 1916) (wife may sue husband in contract); *Grimes v. Reynolds*, 184 Mo. 679, 83 S.W. 1132 (1904) (right of wife to litigate concerning her separate estate, to become creditor or debtor of her husband, and authority of either spouse to enforce their rights in equity against other declared); *Rice, Stix & Co. v. Sally*, 176 Mo. 107, 75 S.W. 398 (1903) (wife

because it was the first judicial pronouncement of interspousal tort immunity in Missouri, but also because the statutes construed in *Rogers* were identical to or predecessors of statutes construed in subsequent Missouri Supreme Court decisions, and as a result, the *Rogers* construction has been followed consistently.²⁷

The court was asked to overrule *Rogers* in *Willott v. Willott*,²⁸ when a wife sued her husband for injuries sustained when he wrested the steering wheel from her and caused their automobile to turn over in a ditch. The court held that the wife could not sue her husband, citing the *Rogers* reasoning that the Married Women's Act did not expressly change the common law by giving a wife the right to sue her husband for a personal tort.²⁹ *Willott* differed from *Rogers*, however, by treating the bar as substantive: no cause of action arose for an interspousal personal tort.³⁰ *Rogers*, on the other hand, treated the unity bar as procedural: a cause of action may have arisen, but a husband and wife were legally disabled from suing each other in tort while married.³¹

The first judicial departure from strict application of the interspousal tort immunity doctrine occurred in *Mullally v. Langenberg Brothers Grain Co.*,³² in which the Missouri Supreme Court held that a wife could sue her husband's employer for personal injuries sustained as a result of her husband's negligence while acting in the course of his employment.³³ The court

could maintain action at law against husband in contract or in property tort); *Reed v. Painter*, 145 Mo. 341, 46 S.W. 1089 (1898) (wife may sue husband in equity during coverture to recover title to her property that he wrongfully took in his name); *Butterfield v. Butterfield*, 195 Mo. App. 37, 187 S.W. 295 (K.C. 1916) (wife may sue husband's joint tortfeasor, but may not sue husband); *Shewalter v. Wood*, 183 S.W. 1127 (Mo. App., K.C. 1916) (either spouse may sue other in replevin or conversion, or for willful and malicious destruction of spouse's separate property).

27. See, e.g., *Ebel v. Ferguson*, 478 S.W.2d 334, 335 (Mo. En Banc 1972); *Brawner v. Brawner*, 327 S.W.2d 808, 811 (Mo. En Banc 1959); *Willott v. Willott*, 333 Mo. 896, 898, 62 S.W.2d 1084, 1085 (1933).

28. 333 Mo. 896, 62 S.W.2d 1084 (1933).

29. *Id.* at 898-99, 62 S.W.2d at 1085. The court construed the same two sections of the Missouri Married Women's Act as in *Rogers*. MO. REV. STAT. ch. 5, § 704 (1929) & *id.* ch. 20, § 2998 were identical to *id.* ch. 21, § 1735 (1909) & *id.* ch. 77, § 8304, respectively, construed in *Rogers*. In *Willott*, the court said that a third section of the Missouri Married Women's Act, *id.* ch. 20, § 3003 (1929), was inapplicable to the issue at bar because it related solely to the separate property rights of a married woman. Ironically, the historical comments that accompanied the statute stated that since the statute had some of the same provisions as *id.* § 2998, the two sections were to be construed together. Nevertheless, the *Willott* court said that *id.* § 3003 was not applicable, even though the court did construe *id.* § 2998.

30. 333 Mo. at 898, 62 S.W.2d at 1085.

31. *Rogers v. Rogers*, 265 Mo. 200, 205, 177 S.W. 382, 383 (1915).

32. 339 Mo. 582, 98 S.W.2d 645 (1936).

33. One month after *Mullally*, the Kansas City Court of Appeals reached the same conclusion in *Rosenblum v. Rosenblum*, 231 Mo. App. 276, 96 S.W.2d 1082 (K.C. 1936), relying on the comments to REPEALMENT OF AGENCY § 217 (1933).

recognized that jurisdictions were split on the issue and that some states had denied the employer's liability on the basis of interspousal tort immunity. Nevertheless, the court chose not to apply the doctrine.³⁴ In *Mullally*, the employer argued that interspousal tort immunity precluded the wife's respondeat superior suit. The court maintained that the employer's argument implied that the husband's act, however negligent, was nonetheless lawful because committed by the plaintiff's husband. The court stated that this argument perverted the meaning and effect of the interspousal disability because others may not hide behind the skirts of the husband's immunity.³⁵ Anticipating the argument that its decision would have the same practical effect as allowing the wife to sue her husband directly because the employer could sue the husband for indemnification, the court noted that the employer who recovers from his employee does so on the basis of a breach of duty owed to the employer and not on a theory of subrogation to the tort victim's cause of action.³⁶

The interspousal tort immunity issue did not come before the Missouri Supreme Court again until the late 1950s, when the court made two significant modifications of the doctrine. In *Hamilton v. Fulkerson*,³⁷ the court held that a wife was entitled to sue her husband for an antenuptial personal tort when she sustained injuries before she was married due to her future husband's negligent operation of an automobile in which she was a passenger.³⁸ The court's holding was based on its interpretation of Missouri Revised Statutes section 451.250,³⁹ which provided that any personal property, in-

34. The court relied extensively on Judge Cardozo's opinion in *Schubert v. Schubert Wagon Co.*, 249 N.Y. 253, 164 N.E. 42 (1928), in which the New York court allowed the wife to sue her husband's employer.

35. 339 Mo. at 586, 98 S.W.2d at 646.

36. *Id.* at 586-87, 98 S.W.2d at 646.

37. 285 S.W.2d 642 (Mo. 1956).

38. The lawsuit in *Hamilton* was instituted two days before the marriage. *Id.* at 643. In *Berry v. Harmon*, 329 S.W.2d 784 (Mo. 1959), the Missouri Supreme Court extended its holding in *Hamilton* by ruling that a wife could sue her husband for an antenuptial tort, even though the suit was not instituted until after they were married. Relying on *Hamilton*, the court said it was immaterial that the suit was not instituted prior to the marriage. *Id.* at 791.

39. (1949). At the time *Hamilton* was decided, the sections of the Missouri Married Women's Act had been amended again. MO. REV. STAT. ch. 21, § 1735 (1909), construed in *Rogers*, and *id.* ch. 5, § 704 (1929), construed in *Willott*, were repealed in 1943. See 1943 Mo. Laws 353, § 11 (codified at MO. REV. STAT. § 507.010 (1949)). MO. REV. STAT. § 507.010 (1949) provided for the prosecution of actions in the name of the real party in interest. This new statute no longer made reference to married women. As a result the *Hamilton* court stated that it need not further concern itself with the *Rogers* and *Willott* construction of this section. 285 S.W.2d at 643.

The other section of the Married Women's Act construed in *Rogers* and *Willott*, MO. REV. STAT. ch. 77, § 8304 (1909), and *id.* ch. 20, § 2998 (1929), respectively, was without pertinent change. See *id.* § 451.290 (1949).

Pub. L. 451, 250 (1949) is the equivalent of Mo. Rev. Stat. § 3003 (1929), which the

cluding rights in action belonging to a woman when she married, remained her separate property and under her sole control. The statute authorized her to recover any such personal property, including rights in action, as if she were unmarried.⁴⁰ The court remarked that section 451.250 seemed to authorize a wife to sue her husband for an antenuptial personal tort.⁴¹ The statute was designed to remove the common law limitation that the husband became possessed of the wife's property, including choses in action, on marriage.⁴² Because the statute did not expressly grant a married woman the right to sue her husband for an antenuptial personal tort, however, the court was faced with the same argument presented in *Rogers* and *Willott*—that one spouse should not be given greater rights than the other possessed at common law and that as a result of the unity fiction at common law the antenuptial claims of both the husband and the wife were extinguished at marriage.⁴³ The court rejected the unity fiction, stating that no logical reason existed for maintaining the common law rule extinguishing all antenuptial claims between spouses.⁴⁴ The court also found no public policy considerations that warranted extending the *Rogers* holding to include antenuptial personal torts.⁴⁵ The court cautioned that its decision was limited to the specific facts of the case and did not contemplate whether *Rogers* and *Willott* should be overruled.⁴⁶

Less than a year later in *Ennis v. Truhitte*,⁴⁷ the court held that a wife could sue the administrator of her deceased husband's estate for the negligent acts of her husband during coverture. Relying on *Hamilton*, the court adopted the rationale that a tort arises at the time of injury and ruled that an interspousal tort cause of action survives the marriage.⁴⁸ The court reasoned that the unity fiction should not bar the wife's suit because the husband was dead and there was no longer a marital relation to disturb.⁴⁹ The court

Willott court said did not apply when a personal tort was committed during coverture, see note 29 *supra*. In *Hamilton*, however, since the case involved an antenuptial tort, the court found MO. REV. STAT. § 451.250 (1949) to be pertinent. 285 S.W.2d at 644.

40. MO. REV. STAT. § 451.250 (1949).

41. 285 S.W.2d at 645.

42. See Comment, *supra* note 2, at 152.

43. 285 S.W.2d at 645.

44. *Id.* See note 92 and accompanying text *infra*.

45. 285 S.W.2d at 647. See notes 162 & 163 and accompanying text *infra* (public policy arguments made by court against extending interspousal tort immunity to preclude antenuptial tort suits).

46. 285 S.W.2d at 647.

47. 306 S.W.2d 549 (Mo. En Banc 1957) (overruled in *Ebel v. Ferguson*, 478 S.W.2d 334, 336 (Mo. En Banc 1972) (plurality opinion)). In *Ennis*, the wife sued her husband's administrator for injuries sustained as a result of her husband's reckless driving. The husband was killed. 306 S.W.2d at 550.

48. 306 S.W.2d at 551.

49. *Id.* at 550. The majority reasoned that by permitting recovery for a tort

distinguished *Rogers* and *Willott* on the ground that those actions were instituted directly against the husbands during the marriages.⁵⁰

The judicial trend away from strict application of interspousal tort immunity suffered a setback in the next immunity case before the Missouri Supreme Court. In *Brawner v. Brawner*,⁵¹ a husband sued his wife for personal injuries sustained when he was struck by the car his wife had negligently parked on their driveway. The court was faced for the first time with the issue of whether a wife had the legal capacity to be sued by her husband in a negligence action.⁵² The court remarked that the husband's lawsuit was authorized by Missouri Revised Statutes section 537.040,⁵³ without resorting to the derivative sections of the Married Women's Act.⁵⁴ Section 537.040 provided that "[f]or all civil injuries committed by a married woman, damages may be recovered against her alone, and her husband shall not be responsible therefore."⁵⁵ Nevertheless, the court held that the husband could not maintain the suit.⁵⁶ The court noted that interspousal tort immunity was

inflicted before marriage, *Hamilton* bit further into the common law rule of interspousal tort immunity and its basic theory than did *Ennis*, where there was no longer a marital relation to disturb. *Id.* The dissenter agreed that it belied reality to argue that there was no tort when a husband negligently or intentionally injures his wife, but argued that the immunity was based on a sound public policy. The dissenter warned that once the disability was removed the courts would be flooded with litigation. With such far-reaching implications, the dissenter maintained that the legislature was the proper body to make such a change and not the court. *Id.* at 552 (Eager, J., dissenting).

50. *Id.* at 551.

51. 327 S.W.2d 808 (Mo. En Banc 1959).

52. *Id.* at 810. In *Rice v. Gray*, 225 Mo. App. 890, 34 S.W.2d 567 (K.C. 1930), the court held that a husband could not sue his wife for an intentional tort. In *Rice*, the husband sued his wife for conspiring to incarcerate him in an insane asylum under false pretenses. The case as to the wife was dismissed because she was the plaintiff's wife. *Id.* at 901, 34 S.W.2d at 573 (citing *Rogers*). The husband's capacity to sue his wife was a peripheral issue in the case. *Brawner* was the first Missouri case to consider whether a husband could sue his wife for a negligent personal tort.

53. (1949).

54. 327 S.W.2d at 811. The derivative sections of the Married Women's Act referred to by the court were MO. REV. STAT. §§ 451.250, .290; 507.010 (1949). See generally note 39 *supra*.

55. MO. REV. STAT. § 537.040 (1949). The court stated, "If this section does not create, it at least recognizes the liability of a married woman for her torts; it also absolves the husband of responsibility for the wife's torts based on the marriage relation alone." 327 S.W.2d at 811 (citation omitted).

56. A lengthy and vigorous dissent argued that the court had already found neither a statutory construction nor a public policy basis for preventing interspousal tort lawsuits. The dissent emphasized that Missouri had consistently construed the Married Women's Act as abrogating interspousal immunity by authorizing spouses to sue one another in equity and at law for contractual breach and property tort. Published by University of Missouri School of Law Scholarship Repository, 1982

still the law in Missouri despite *Hamilton* and *Ennis*, which involved special circumstances.⁵⁷ The court added that the Married Women's Act had been construed on several occasions to preclude personal tort actions and that it was not in a better position to interpret the legislative intent of these statutes than the *Rogers* court.⁵⁸ Finally, the court noted that the Missouri legislature had been very active in the area of marital relations, but had not changed the *Rogers* construction of the Married Women's Act.⁵⁹

More than a decade later, the Missouri Supreme Court, against the confusing backdrop of the *Hamilton*, *Ennis*, and *Brawner* cases, attempted to formalize the Missouri case law on interspousal tort immunity.⁶⁰ In *Ebel v. Ferguson*,⁶¹ an ex-wife filed suit seeking damages from her ex-husband as a result of his negligent operation of a car in which she was a passenger. The plaintiff argued that *Ennis* should control the court's disposition of the case because her marriage was as effectively terminated by divorce as the marriage in *Ennis* was terminated by death.⁶² In a plurality opinion, the court held that the wife could not recover from her former husband and overruled *Ennis* on the ground that it had mistakenly characterized tort immunity between spouses as procedural instead of substantive.⁶³

327 S.W.2d at 817 (Hollingsworth, C.J., dissenting). Furthermore, the dissenter noted that *Ennis* recognized that MO. REV. STAT. § 451.290 (1949) did not preclude one spouse from suing the other in tort, while *Hamilton* purported to dispose of the public policy barrier to suit. *Id.* at 820 (Hollingsworth, C.J., dissenting).

57. 327 S.W.2d at 811.

58. *Id.*

59. *Id.* at 812. The court rejected the plaintiff's contention that due process prevents the state from imposing any restriction based on marital status on litigation between spouses. The court stated that matrimonial status was a matter of public concern and that a state in the reasonable exercise of its police power may regulate the effect of marriage on the property rights of the parties. *Id.* at 815. The court also rejected the plaintiff's equal protection argument stating, "Many statutory and common-law obligations and privileges not equally distributed between husband and wife, such as the obligation of family support imposed on the husband, are undoubtably valid." *Id.* Curiously, while the plaintiff's equal protection argument was couched in terms of an unconstitutional distinction drawn between married and unmarried individuals, the court addressed the plaintiff's contention in terms of a distinction drawn between husbands and wives.

60. In *Deatherage v. Deatherage*, 328 S.W.2d 624 (Mo. 1959), decided two months after *Brawner*, the Missouri Supreme Court held that a wife could not sue her husband for personal injuries sustained as a result of her husband's negligent operation of a car in which she was a passenger. The court relied exclusively on *Brawner*, stating that the only distinction between the cases was that the wife sought to sue the husband in *Deatherage*. *Id.* at 625.

61. 478 S.W.2d 334 (Mo. En Banc 1972) (plurality opinion).

62. *Id.* at 335 (plurality opinion).

63. *Id.* at 336 (plurality opinion). A strong dissent argued that it was a serious step backwards to retreat to the unity concept to decide the issues when the concept had been rejected as a sound basis for the determination of such issues on several

INTERSPOUSAL TORT IMMUNITY

The *Ebel* court began its analysis of the case by noting that the common law of England had been adopted by statute in Missouri.⁶⁴ The court then recited two principles of the common law unity doctrine: no act committed by one spouse against the other during marriage could be a tort, and neither spouse could sue the other during marriage or continue, during marriage, proceedings started before.⁶⁵ The plurality asserted that prior cases in Missouri were misleading for failing to recognize that at common law, as a result of the unity fiction, no cause of action came into existence when a spouse committed a wrongful act against the other.⁶⁶ The court said it was extremely reluctant to create a cause of action not recognized at common law and emphasized that the Missouri legislature was the proper body to change the law.⁶⁷ The court concluded that *Rogers*, *Willott*, and *Browner* were all correct in denying recovery to the plaintiff because the wrongful acts were committed during marriage and, thus, no cause of action came into existence.⁶⁸ *Hamilton* was also correct in permitting recovery: because the wrongful act was committed prior to marriage, a substantive cause of action existed prior to marriage, and a statute, Missouri Revised Statutes section 451.250,⁶⁹ furnished procedural authority to maintain the action. Finally, the court overruled *Ennis* because it permitted recovery where the wrongful act was committed during marriage.⁷⁰

Since *Ebel*, the Missouri courts of appeal have been asked to abrogate the doctrine on several occasions. In light of the Missouri Constitution provision that the decisions of the Missouri Supreme Court shall be controlling in all other Missouri courts,⁷¹ it is not surprising that the interspousal

occasions. *Id.* at 338 (Bardgett, J., dissenting). The dissenter further argued that the Missouri Married Women's Act was in derogation of the common law and should be recognized as such and that if the Missouri legislature had intended to except tort actions from the general provisions of the Married Women's Act, it could have done so. *Id.* (Bardgett, J., dissenting).

64. 478 S.W.2d at 335 (plurality opinion).

65. *Id.* (plurality opinion) (citing Kahn-Freund, *Inconsistencies and Injustices in the Law of Husband and Wife*, 15 MOD. L. REV. 133, 140 (1952)). Not surprisingly, the *Ebel* plurality did not mention the name of Professor Kahn-Freund's article. Ironically, Kahn-Freund, a Law Professor at the University of London, concluded in his article that, "It is time that . . . the whole question of the mutual liability between the spouses should be re-examined. . . . If and when this is done, the archaic and artificial remnants of the legal 'unity' rule should be removed . . ." *Id.* at 154. Not surprisingly, the *Ebel* plurality did not mention Kahn-Freund's conclusion either.

66. 478 S.W.2d at 336 (plurality opinion).

67. *Id.* (plurality opinion).

68. *Id.* (plurality opinion).

69. (1969).

70. 478 S.W.2d at 336 (plurality opinion).

71. MO. CONST. art. V, § 2.

tort immunity doctrine has been uniformly upheld in the courts of appeal.⁷² The courts, however, have voiced their dissatisfaction with the rule. In *Renfrow v. Gojohn*,⁷³ the interspousal tort immunity doctrine was held to bar a counterclaim for contribution against a husband who was a co-plaintiff with his wife. The court characterized interspousal immunity as a "dying doctrine," noting that the doctrine had been abolished or partially abrogated in a majority of states, but said it nevertheless was bound by *Ebel*.⁷⁴ In *Klein v. Abramson*,⁷⁵ where the doctrine was held to preclude a daughter's wrongful death suit against her stepfather for the death of her mother, the court was even more vociferous, remarking that interspousal immunity "has sorely vexed both bench and bar since *Rogers*."⁷⁶ The court stated, "We have no doubt that this doctrine of interspousal immunity will receive further judicial and legislative attention in the future. For the purposes of this case, however, the . . . [past Missouri Supreme Court] decisions are absolutely binding on us"⁷⁷

III. ANALYSIS OF THE MAJOR INFLUENCES ON THE MISSOURI SUPREME COURT

Although it has been a decade since the *Ebel* plurality attempted to consolidate the inconsistent case law by retreating to the strict confines of the unity fiction, this area of the law in Missouri remains unstable. The factors that have been case-dispositive to the Missouri Supreme Court have varied. That judicial doubt exists is indicated by the court's departures from the doctrine in *Mullally*, *Hamilton*, and *Ennis* and by the strong and well-reasoned dissents in *Brawner* and *Ebel*.⁷⁸ In the most recent cases, the Missouri courts of appeal have urged that the doctrine be given further judicial and legislative attention in the future.⁷⁹

Not only is there dissatisfaction within the state with the current status of the law, there are also external factors adding to the pressure to change the law. The Missouri Supreme Court often has examined the status of the interspousal tort immunity doctrine in other jurisdictions to justify a par-

72. See, e.g., *Martinez v. Lankster*, 595 S.W.2d 316, 317 (Mo. App., E.D. 1980); *Wyatt v. Bernhoester*, 585 S.W.2d 130, 131 (Mo. App., E.D. 1979).

73. 600 S.W.2d 77 (Mo. App., W.D. 1980). Three months earlier in *Martinez v. Lankster*, 595 S.W.2d 316 (Mo. App., E.D. 1980), the eastern district court of appeals held that the doctrine barred the joinder of the plaintiff's husband as a third party defendant for indemnity.

74. 600 S.W.2d at 78-79.

75. 513 S.W.2d 714 (Mo. App., K.C. 1974).

76. *Id.* at 717.

77. *Id.* at 717-18.

78. See generally *Klein v. Abramson*, 513 S.W.2d 714, 717 (Mo. App., K.C. 1974) (court outlined inconsistencies in Missouri interspousal tort immunity case law).

79. See notes 73-77 and accompanying text *supra*.

ticular holding.⁸⁰ The national trend today is overwhelmingly toward judicial abrogation of interspousal immunity.⁸¹ Given the internal and external pressures on the Missouri Supreme Court to re-examine and change the law, it would appear to be only a matter of time before the viability of the interspousal tort immunity doctrine will be contested again before the court. Four factors have most influenced the court: adherence to the unity fiction, reluctance to depart from the common law, presumed legislative intent, and the doctrine of stare decisis.

A. *Unity of Husband and Wife*

Perhaps the most puzzling aspect of the Missouri case law on interspousal tort immunity is the persistent adherence to the common law unity fiction in the area of personal torts, a concept based on antediluvian assumptions.⁸² The unity fiction at common law did not refer to the loving oneness achieved in the marriage of two free individuals.⁸³ Rather, this traditional premise referred to the wife's vassalage rendered by common law coverture.⁸⁴ Blackstone, describing the merger of the identities at common law, wrote that the wife's legal existence was consolidated into that of the husband "under whose wing, protection, and *cover*, she performs everything; . . . it is said to be *covert-baron*, or under the protection and influence of her husband, her *baron* or lord."⁸⁵

The jurisdictions that have abrogated interspousal tort immunity have maintained that the unity concept is not compatible with current societal conditions.⁸⁶ To argue today that the unity of the marital relationship ex-

80. See, e.g., *Brawner v. Brawner*, 327 S.W.2d 808, 813 (Mo. En Banc 1959); *Willott v. Willott*, 333 Mo. 869, 900, 62 S.W.2d 1084, 1086 (1933); *Rogers v. Rogers*, 265 Mo. 200, 208, 177 S.W. 382, 384 (1915). In *Ennis v. Truhitte*, 306 S.W.2d 549, 550 (Mo. En Banc 1957), where the wife was allowed to sue her husband's administrator, the court noted there was a trend against applying interspousal tort immunity. See also *Ebel v. Ferguson*, 478 S.W.2d 334, 336-37 (Mo. En Banc 1972) (plurality opinion).

81. See note 15 and accompanying text *supra*.

82. See generally *Lewis v. Lewis*, 370 Mass. 619, 621, 351 N.E.2d 526, 528 (1976).

83. *Freehe v. Freehe*, 81 Wash. 2d 183, 186, 500 P.2d 771, 773 (1972).

84. *Id.* See also *Hamilton v. Fulkerson*, 285 S.W.2d 642, 645 (Mo. 1956).

85. 1 W. BLACKSTONE, COMMENTARIES *442.

86. See, e.g., *Lewis v. Lewis*, 370 Mass. 619, 629, 351 N.E.2d 526, 532 (1976) ("the reasons offered in support of the common law immunity doctrine . . . whatever their vitality in the social context of generations past . . . [are] inadequate today to support a general rule of interspousal tort immunity."); *Rupert v. Stienne*, 90 Nev. 397, 401, 528 P.2d 1013, 1015 (1974) ("this artificial concept cannot be seriously defended today and is not compatible with our current conditions"); *Immer v. Risko*, 56 N.J. 482, 488, 267 A.2d 481, 484 (1970) ("this metaphysical concept cannot be seriously defended today"); *Hack v. Hack*, 495 Pa. 300, 311, 433 A.2d 859, 864-65 (1981) ("[M]odern conditions demand that courts no longer engage in the automatic and unsupported assumption that one's pecuniary or proprietary interest is identical to that of one's spouse.").

tends so far as to allow the husband to legally control his wife's actions ignores the current consensual nature of marriage.⁸⁷ While there may have been a time when a wife was so dependent on her husband's advice and protection in guarding her rights and interests that the couple was a single legal entity merged in the husband, most jurisdictions recognize today that both modern realities and the Married Women's Acts do not comport with the traditional unity notion.⁸⁸

Several states have held that the legal identity of the spouses has been abrogated by the Married Women's Acts.⁸⁹ Several states retaining interspousal tort immunity have recognized that with the passage of time and with the passage of the Married Women's Acts, the unity doctrine has eroded to the point where it is no longer a valid premise on which to base spousal immunity.⁹⁰

There is judicial precedent for modification of the unity concept in Missouri as well. In *Hamilton*, where the court construed section 451.250 to permit a wife to sue her husband for an antenuptial tort,⁹¹ the court, using by far the most forceful language seen in the Missouri interspousal immunity case law, stated, "Irrespective of statutes, any common-law rule based upon the fiction of the identity of husband and wife, long since contrary to the fact, should not be applied to any 'first impression' fact situation arising in this state."⁹² The same argument was made in the dissenting opinion in *Ebel*. The dissenting judge argued that on several occasions the unity concept had been rejected as a basis for determination of interspousal immunity issues.⁹³

87. See, e.g., *State v. Funk*, 490 S.W.2d 354, 363 (Mo. App., K.C. 1973) ("The day when a husband could be regarded as the unquestioned 'head of the house' has become part of a past which is no doubt nostalgic to some, but which is nonetheless gone."). Recent marital dissolution cases in Missouri have characterized the husband-wife relationship as a partnership. See *In re Marriage of Cornell*, 550 S.W.2d 823, 827 (Mo. App., Spr. 1977); *Corder v. Corder*, 546 S.W.2d 798, 804 (Mo. App., K.C. 1977).

88. See note 15 *supra*.

89. See, e.g., *Penton v. Penton*, 223 Ala. 282, 135 So. 481 (1931); *Cramer v. Cramer*, 379 P.2d 95 (Alaska 1963); *Leach v. Leach*, 227 Ark. 599, 300 S.W.2d 15 (1957); *Self v. Self*, 58 Cal. 2d 683, 376 P.2d 65, 26 Cal. Rptr. 97 (1962); *Rains v. Rains*, 97 Colo. 19, 46 P.2d 740 (1935); *Brown v. Brown*, 88 Conn. 42, 89 A. 889 (1914); *Hosko v. Hosko*, 385 Mich. 39, 187 N.W.2d 236 (1971); *Imig v. March*, 203 Neb. 537, 279 N.W.2d 382 (1979); *Roberts v. Roberts*, 185 N.C. 566, 118 S.E. 9 (1923); *Courtney v. Courtney*, 184 Okla. 395, 87 P.2d 660 (1938); *Scotvold v. Scotvold*, 68 S.D. 53, 298 N.W. 266 (1941); *Richard v. Richard*, 131 Vt. 98, 300 A.2d 637 (1973); *Coffindaffer v. Coffindaffer*, 244 S.E.2d 338 (W. Va. 1978).

90. See cases cited note 18 *supra*. See also W. PROSSER, *supra* note 2, at 862-63.

91. See notes 37-46 and accompanying text *supra*.

92. *Hamilton v. Fulkerson*, 285 S.W.2d 642, 645 (Mo. 1956).

93. *Ebel v. Ferguson*, 478 S.W.2d 334, 338 (Mo. En Banc 1972) (Bardgett, J., dissenting).

The dissenter noted that even in *Brawner*, where the husband's claim to sue his wife was denied, the court's holding was not based on the unity fiction but rather on what the court referred to as the public policy indicated by the legislature's failure to address the issue specifically and the public policy of stare decisis.⁹⁴ The concurring opinion in *Ebel* argued that the relief sought should be denied as a matter of public policy. The concurring judge stated that there was no "necessity or advantage to litigants or the courts which resolve their conflicts, in returning to the rigidity of the concept of 'unity of the spouses'."⁹⁵ Ironically, even though a majority of the judges in *Ebel* argued that the unity fiction should not be used as a basis of interspousal tort immunity,⁹⁶ this is precisely the current status of the law in Missouri.⁹⁷

There is also a statutory basis for abrogating the unity doctrine in Missouri. The Missouri Married Women's Act and its derivative sections derogate from the unity fiction by authorizing married women to transact business, convey property, contract, sue, and be sued in the same manner as a single woman.⁹⁸ The statutes also relieve the husband of liability for his wife's torts.⁹⁹ As a result, the spouses may contract with one another and sue each other for contractual breach. They may own property separately, convey property to one another, and sue each other to protect their property rights.¹⁰⁰ Subsequent legislation has further eroded the unity concept. For example, spouses now may sue and be sued for divorce merely on the grounds of irreconcilable differences.¹⁰¹

The unity fiction in Missouri currently is limited to personal tort actions between the spouses. Perhaps the court's unwillingness to abrogate the unity fiction for personal torts is based on the court's recognition of the intimate sharing of contact and mutual concessions within the marital relationship whereby conduct that might be tortious between two strangers is not tortious between spouses.¹⁰² Denial of tort liability on these grounds does not

94. *Id.* at 337 (Bardgett, J., dissenting).

95. *Id.* at 339 (Morgan, J., concurring).

96. *Id.* at 338 (Bardgett, J., dissenting); *id.* at 339 (Morgan, J., concurring).

97. Ten years later, it is difficult to justify the *Ebel* holding solely on a recitation of the unity doctrine. The *Ebel* plurality cited cases from six other states that based interspousal tort immunity on the unity fiction. Five of the six have since abrogated interspousal immunity. *See generally* 478 S.W.2d at 337 (plurality opinion); note 15 *supra*.

98. *See* notes 23, 29 & 39 *supra*. The derivative sections of the Missouri Married Women's Act are currently found at MO. REV. STAT. §§ 451.250, .290; 507.010 (1978).

99. MO. REV. STAT. § 537.040 (1978) (married woman liable for her own torts).

100. *Id.* § 442.025.

101. *Id.* § 452.305(1).

102. *See Brown v. Brown*, ___ Mass. ___, ___, 409 N.E.2d 717, 718 (1980); *Lewis v. Lewis*, 370 Mass. 619, 630, 351 N.E.2d 526, 532 (1976); *Beaudette v. Frana*, 285 Minn. 366, 372-73, 173 N.W.2d 416, 420 (1969); *Courtney v. Court-*

rest, however, on the unity fiction or interspousal tort immunity, but rather on the broader application of consent to physical contact within the marital relationship.¹⁰³ The court's persistence in adhering to the identity doctrine, and more generally to the interspousal tort immunity doctrine, is more likely a manifestation of the court's hesitancy to derogate from the common law, judicial precedent, and presumed legislative intent.

B. *Derogation of the Common Law*

Missouri Revised Statutes section 1.010¹⁰⁴ adopts the common law of England prior to 1607 as the law of Missouri, except where changed by statute. In Missouri, the common law is not abrogated by a statute that does not expressly repeal the common law, unless the statute is in exclusive or negative terms or is so clearly repugnant to the common law that it necessarily implies its revocation.¹⁰⁵ Statutes in derogation of the common law are strictly construed and do not operate as a repeal of the common law beyond their terms, unless they are clearly repugnant to it.¹⁰⁶ The law does not favor repeal of the common law by implication in a statute, and a legislative intent to do so is generally not presumed.¹⁰⁷

The Missouri Supreme Court's construction of the Missouri Married Women's Act has been narrow. In *Rogers*, the court did not give the Married Women's Act its facial interpretation because it "was of purely statutory origin and in derogation of the common law."¹⁰⁸ Since the statute did not expressly provide the wife with a cause of action for personal tort against her husband, *Rogers* held that the Married Women's Act had not abrogated

ney, 184 Okla. 395, 403-04, 87 P.2d 660, 669 (1938); *Digby v. Digby*, ___ R.I. ___, ___, 388 A.2d 1, 4 (1978).

103. See *Brown v. Brown*, ___ Mass. ___, ___, 409 N.E.2d 717, 718 (1980) (citing RESTATEMENT (SECOND) OF TORTS § 895F, comment h (1977)). Comment h provides in part:

The concept of consent to an intentional physical contact carries a much broader scope of application within the marital relationship than it does for other parties. Abrogation of the general immunity does not limit in any respect the defense of consent.

The intimacy of the family relationship may also involve some relaxation in the application of the concept of reasonable care, particularly in the confines of the home. . . . An analogy to the principle of assumption of risk is sometimes drawn.

104. (1978).

105. *Robertson v. Jones*, 345 Mo. 828, 831, 136 S.W.2d 278, 279 (1940); *State v. Dalton*, 134 Mo. App. 517, 525-26, 114 S.W. 1132, 1135 (St. L. 1908).

106. *Raper v. Lusk*, 192 Mo. App. 378, 381, 181 S.W. 1032, 1033 (Spr. 1916); *State v. Dalton*, 134 Mo. App. 517, 525-26, 114 S.W. 1132, 1135 (St. L. 1908).

107. *State v. Kollenborn*, 304 S.W.2d 855, 862 (Mo. 1957); *State v. Dalton*, 134 Mo. App. 517, 526, 114 S.W. 1132, 1135 (St. L. 1908).

108. *Rogers v. Rogers*, 265 Mo. 200, 206, 177 S.W. 382, 384 (1915).

interspousal immunity for personal torts.¹⁰⁹ The plurality in *Ebel* expressed the same hesitancy to judicially derogate from the common law stating, "We are extremely reluctant to create a cause of action not recognized at common law . . . [Section] 1.010, by adopting the common law, implants in Missouri the common law concept that a wrongful act between spouses does not give rise to a cause of action."¹¹⁰

The jurisdictions that have abrogated or modified interspousal tort immunity have uniformly held that a statute adopting the English common law does not require a court to follow the doctrine of interspousal immunity where it is not applicable to current local conditions.¹¹¹ The argument is that a state supreme court cannot close its eyes to the legal and social needs of society, and it should not hesitate to alter, amend, or abrogate the common law when society's needs so dictate.¹¹² Missouri also has recognized that the common law is "continually expanding with the progress of society, adapting to the gradual changes . . . of the country."¹¹³

Some states that have abrogated interspousal immunity have done so on the basis of a statute allowing married women to sue and be sued.¹¹⁴ There is judicial precedent in Missouri for derogating from the common law based on the Married Women's Act. In *Novak v. Kansas City Transit, Inc.*,¹¹⁵ the Missouri Supreme Court held that a wife could maintain an action for loss of consortium, even though the wife had no such cause of action at common law. The court rejected the argument that because the Married Women's Act did not create or confer on the wife any new rights, but only removed former disabilities, the wife did not accede to a right of action by reason of the act.¹¹⁶ The court asserted that the wife could sue for loss of

109. *Id.* See also *Willott v. Willott*, 333 Mo. 896, 898, 62 S.W.2d 1084, 1085 (1933).

110. *Ebel v. Ferguson*, 478 S.W.2d 334, 336 (Mo. En Banc 1972) (plurality opinion). In *Brawner v. Brawner*, 327 S.W.2d 808 (Mo. En Banc 1959), the Missouri Supreme Court refused to give MO. REV. STAT. §537.040 (1949) its facial interpretation on the basis of stare decisis and presumed legislative intent to the contrary.

111. See *Lewis v. Lewis*, 370 Mass. 619, 629, 351 N.E.2d 526, 531-32 (1976); *Rupert v. Stienne*, 90 Nev. 397, 399, 528 P.2d 1013, 1014 (1974); *Flores v. Flores*, 84 N.M. 601, 603, 506 P.2d 345, 347 (Ct. App. 1973).

112. See *Brooks v. Robinson*, 259 Ind. 16, 23, 284 N.E.2d 794, 797 (1972).

113. *La Plant v. E.I. Du Pont de Nemours & Co.*, 346 S.W.2d 231, 245 (Mo. App., Spr. 1961). See also *Yerger v. Smith*, 338 Mo. 140, 154, 89 S.W.2d 66, 74 (1935).

114. See cases cited note 89 *supra*.

115. 365 S.W.2d 539 (Mo. En Banc 1963).

116. *Id.* at 542. The court relied on its earlier decision in *Clow v. Chapman*, 125 Mo. 101, 28 S.W. 328 (1894), wherein the court allowed a wife to sue for alienation of her husband's affections, based on the Missouri Married Women's Act.

consortium because of the comprehensive scope and purpose of the Married Women's Act.¹¹⁷

The dissenting judge in *Brawner* also argued that the language of Missouri Revised Statutes section 451.290,¹¹⁸ which allowed a married woman to sue and be sued, was too broad to interpret it as authorizing a married woman to sue her husband and be sued by him for breach of a contract and for a property tort, but not for a personal tort.¹¹⁹ The same argument was made in the *Ebel* dissent: "Nowhere in our statute . . . does there appear any provisions that maintain in existence intra-spousal immunity from suit in tort. . . . Had the Missouri legislature intended to except tort actions from the otherwise general provisions of . . . [the statute], it could have done so."¹²⁰ The dissenter pointed to the concluding language of section 1.010, which, in adopting the English common law, states that "all acts of the general assembly . . . shall be liberally construed, so as to effectuate the true intent and meaning thereof," and argued that the Missouri Married Women's Act was in derogation of the common law and should be recognized as such.¹²¹

Since *Ebel* was decided, the Missouri Supreme Court has abrogated the doctrine of sovereign immunity in *Jones v. State Highway Commission*.¹²² With regard to what effect the common law would have on the court's ability to abrogate the doctrine, the court said:

We are led to the conclusion that our § 1.010, RSMo 1969, which adopted the common law of England prior to 1607, the fourth year of the reign of James I, *did not adopt the English common law as a substantive statute, but rather as decisional law*. Therefore, assuming *arguendo* that the doctrine of sovereign immunity appeared in English jurisprudence prior to the fourth year of the reign of James I, we nevertheless have the authority to alter or abrogate the doctrine.¹²³

117. 365 S.W.2d at 542. The issue before the court in *Novak* is distinguishable from the interspousal immunity issue in that a husband did have a cause of action at common law for loss of consortium, but had no cause of action for personal tort against his wife because of the unity fiction. Nevertheless, *Novak* is precedent for the argument that the Missouri Married Women's Act is so broad as to derogate the unity fiction and create causes of action not found at common law.

118. (1949).

119. *Brawner v. Brawner*, 327 S.W.2d 808, 821 (Mo. En Banc 1959) (Hollingsworth, C.J., dissenting).

120. *Ebel v. Ferguson*, 478 S.W.2d 334, 338 (Mo. En Banc 1972) (Bardgett, J., dissenting).

121. *Id.* (Bardgett, J., dissenting) (quoting MO. REV. STAT. § 1.010 (1969)).

122. 557 S.W.2d 225 (Mo. En Banc 1977).

123. *Id.* at 228 (emphasis added). In 1978 Mo. Laws 983, § 1, the Missouri legislature re-established by statute sovereign or governmental tort immunity "as existed at common law in this state prior to Sept. 12, 1977" (the date of the *Jones* decision). MO. REV. STAT. § 537.600 (1978). Although *Jones* is no longer good law due to the subsequent legislative enactment, the court's ruling that MO. REV.

There are several rationales for the Missouri Supreme Court to alter or amend the common law doctrine of interspousal tort immunity. The court could do so on the basis that this common law rule does not comport with current societal conditions or by interpreting the Missouri Married Women's Act on its face as having derogated from the common law rule. Finally, the court arguably could use the *Jones* rationale to hold that interspousal tort immunity is decisional law and, therefore, can be judicially abrogated.¹²⁴

C. Presumed Legislative Intent

The Missouri Supreme Court in upholding interspousal tort immunity has consistently deferred to the legislature's lawmaking power and what the court presumed to be legislative intent. For example, in *Rogers*, the court noted that Missouri Revised Statutes chapter 21, section 1735,¹²⁵ of the Married Women's Act appeared in the "General Civil Code" chapter and concluded that "it may be regarded more as a statute of procedure than otherwise, in so far as the purpose of the Legislature may be determined from the arrangement or the setting of the act."¹²⁶ In *Willott*, the court justified its holding by remarking that during the eighteen years since *Rogers*, suc-

STAT. § 1.010 (1969) adopted decisional law would still appear to be applicable to interspousal tort immunity as well.

It is possible that the Missouri Supreme Court, in light of the legislature's immediate statutory reversal of *Jones*, is wary of the same result if it abrogates interspousal tort immunity. The *Ebel* dissent noted that this happened in Illinois. In *Brandt v. Keller*, 413 Ill. 503, 109 N.E.2d 729 (1953), the Illinois Supreme Court held that the Illinois Married Women's Act did not exclude tort actions between spouses from its general provisions. Within six months of the decision, the Illinois legislature amended the act to provide that neither spouse could sue the other for a personal tort committed during coverture. *Ebel v. Ferguson*, 478 S.W.2d 334, 339 (Bardgett, J., dissenting). See ILL. ANN. STAT. ch. 40, § 1001 (Smith-Hurd 1980). The dissent argued that because MO. REV. STAT. § 451.290 (1969) did not except from its provisions tort actions between spouses, it should be given its facial interpretation, and if the Missouri general assembly desired to amend the present law so to except from its provisions actions in tort between spouses, it could do so by legislative enactment, as the Illinois legislature had done. 478 S.W.2d at 339 (Bardgett, J., dissenting).

124. It is also arguable that interspousal immunity in Missouri is a judicial doctrine in the first place. See notes 131-34 and accompanying text *infra*.

125. (1909). See note 23 *supra*.

126. *Rogers v. Rogers*, 265 Mo. 200, 206, 177 S.W. 382, 383 (1915). Regarding its determination of legislative purpose based on the placement of the statute, the court added, "[W]e admit . . . [this] is not always a safe interpretation of a statute" *Id.* The court's admission that its interpretation of the statute may not be a safe interpretation makes the reliance in subsequent cases on the *Rogers* construction all the more puzzling. The court in *Rogers* did not mention that express language to the effect that a wife could sue her husband had been deleted from MO. REV. STAT. ch. 21, § 1735 (1909) by the General Assembly in 1868. See note 23 *supra*.
Published by University of Missouri School of Law Scholarship Repository, 1982

cessive Missouri general assemblies had not enacted contrary legislation.¹²⁷ In *Brawner*, after admitting that persuasive arguments could be made against retaining interspousal immunity, the majority declined to abrogate the doctrine, arguing inter alia, that if the public interest demanded such change, it should be made by the general assembly.¹²⁸ Finally, the plurality in *Ebel* deferred to the general assembly's authority to create a cause of action.¹²⁹

Given the court's subsequent holding in *Jones v. State Highway Commission*¹³⁰ that Missouri Revised Statutes section 1.010¹³¹ adopts the common law of England as decisional law, exclusive reliance on the legislature to initiate any change is unnecessary. Furthermore, it is arguable that interspousal tort immunity in Missouri is a judicial doctrine.¹³² While it is true that the legislature has been active in the field of marital relations, the roots of Missouri's adherence to the doctrine lie in the initial narrow constructions of the Married Women's Acts in *Rogers* and *Willott*, not in the legislature's failure to legislate otherwise. The Missouri Supreme Court has recognized that the terminology of the Married Women's Act is broad enough to include personal tort suits.¹³³ Thus, the legislature's silence since *Rogers* and *Willott* may not reflect legislative intent that the Married Women's Act be so narrowly construed, but rather that the legislature prefers the court to resolve the issue. The same argument has been made in several of the abrogating states to circumvent a state legislature's silence following a judicial declaration upholding interspousal tort immunity.¹³⁴ What the Missouri Supreme Court said in *Abernathy v. Sisters of St. Mary's*,¹³⁵ in which charitable immunity was abolished, may be applicable here:

127. *Willott v. Willott*, 333 Mo. 896, 899, 62 S.W.2d 1084, 1085-86 (1933).

128. *Brawner v. Brawner*, 327 S.W.2d 808, 814 (Mo. En Banc 1959).

129. *Ebel v. Ferguson*, 478 S.W.2d 334, 336 (Mo. En Banc 1972) (plurality opinion).

130. 557 S.W.2d 225 (Mo. En Banc 1977). See notes 122 & 123 and accompanying text *supra*.

131. (1969). Currently found at MO. REV. STAT. § 1.010 (1978).

132. See *Klein v. Abramson*, 513 S.W.2d 714, 717 (Mo. App., K.C. 1974) (court referred to doctrine of interspousal tort immunity in Missouri as judicial doctrine).

133. *Ennis v. Truhitte*, 306 S.W.2d 549, 551 (Mo. En Banc 1957) (overruled in *Ebel v. Ferguson*, 478 S.W.2d 334, 336 (Mo. En Banc 1972) (plurality opinion)); *Hamilton v. Fulkerson*, 285 S.W.2d 642, 647 (Mo. 1956). See also *Ebel v. Ferguson*, 478 S.W.2d 334, 339 (Mo. En Banc 1972) (Bardgett, J., dissenting); *Brawner v. Brawner*, 327 S.W.2d 808, 821 (Mo. En Banc 1959) (Hollingsworth, C.J., dissenting).

134. See, e.g., *Brooks v. Robinson*, 259 Ind. 16, 22-23, 284 N.E.2d 794, 797-98 (1972); *Lewis v. Lewis*, 370 Mass. 619, 628-29, 351 N.E.2d 526, 531 (1976); *Beaudette v. Frana*, 285 Minn. 366, 370-71, 173 N.W.2d 416, 418-19 (1969); *Rupert v. Stienne*, 90 Nev. 397, 399, 528 P.2d 1013, 1014 (1974); *Flores v. Flores*, 84 N.M. 601, 603-04, 506 P.2d 345, 347-48 (Ct. App. 1973); *Digby v. Digby*, ____ R.I. ____, ____, 388 A.2d 1, 2-3 (1978).

135. 446 S.W.2d 599 (Mo. En Banc 1969).

It is neither realistic nor consistent with the common law tradition to wait upon the legislature to correct an outmoded rule of case law. Nor is legislative silence . . . [so] instructive or persuasive Who can say with absolute certitude that the General Assembly's failure to abolish the doctrine was not the result of a legislative position that, since the doctrine is courtmade law, it is the court's function and responsibility to change it when change is required?¹³⁶

D. *Doctrine of Stare Decisis*

The doctrine of stare decisis generally is a policy of the courts to stand by precedent.¹³⁷ The doctrine assumes that security and certainty require that accepted and established legal principles, under which rights may accrue, be recognized and followed.¹³⁸ The doctrine is a salutary one and is not ordinarily departed from if a decision is long-standing and rights have been acquired under it.¹³⁹

The influence of the doctrine of stare decisis on the judicial history of interspousal tort immunity in Missouri is evident. The best example is *Brawner*, where the court found the authority in Missouri Revised Statutes section 537.040¹⁴⁰ for a husband to sue his wife for a personal tort committed during coverture, yet denied the husband's claim on the grounds that the common law rule of interspousal immunity, as espoused by the court in *Rogers* and *Willott*, was still the law in Missouri.¹⁴¹ The court admitted that if it were construing similar statutes in a modern day setting, it might well reach a different conclusion than *Rogers*, but stated, "[W]e are not at liberty to say that these prior decisions do not correctly interpret the legislative intent of 1889."¹⁴²

Whether prior cases correctly interpret the legislative intent of 1889 is irrelevant if the application of the law does not comport with the needs of the time. The recognized exception to the application of stare decisis is where considerations of public policy demand change.¹⁴³ The states that have abrogated the doctrine of interspousal tort immunity make the common sense argument that the doctrine of stare decisis must not be so narrowly pursued

136. *Id.* at 605.

137. *Neff v. George*, 364 Ill. 306, 308-09, 4 N.E.2d 388, 390-91 (1936); *Globe Indem. Co. v. First Nat'l Bank*, 133 S.W.2d 1066, 1069 (Mo. App., St. L. 1940).

138. *Otter Tail Power Co. v. Von Bank*, 72 N.D. 497, 513, 8 N.W.2d 599, 607 (1943).

139. *Colonial Trust Co. v. Flanagan*, 344 Pa. 556, 561, 25 A.2d 728, 729 (1942).

140. (1949).

141. *Brawner v. Brawner*, 327 S.W.2d 808, 811 (Mo. En Banc 1959). *See* notes 51-59 and accompanying text *supra*.

142. 327 S.W.2d at 811.

143. *Colonial Trust Co. v. Flanagan*, 344 Pa. 556, 561, 25 A.2d 728, 729 (1942).

that the body of the common law is forever encased in a straitjacket.¹⁴⁴ The nature of the common law requires that each time a rule of law is applied, it be carefully scrutinized to ensure that the conditions and needs of the times have not changed so as to make further application of the rule an instrument of injustice.¹⁴⁵

In the context of interspousal tort immunity, a court must weigh the policies underlying stare decisis against the desirability of a judicial, rather than a legislative, declaration that public policy is not served by interspousal tort immunity.¹⁴⁶ The Missouri Supreme Court has not done so when basing its decisions on stare decisis. In *Brawner*, the court deferred to the legislature's expertise to determine whether public policy demonstrated the need for abrogation of interspousal immunity.¹⁴⁷ Later in *Ebel*, the plurality recited the holdings in *Rogers* and *Willott* with no discussion of whether the policies behind stare decisis outweighed other policy considerations.¹⁴⁸ The doctrine of stare decisis is justifiable, but it cannot be so strictly pursued that reality is disregarded.¹⁴⁹ If, as the *Ebel* case indicates, interspousal tort immunity is currently based in Missouri on the unity fiction as expressed in *Rogers* and *Willott*, it is possible that the court is perpetuating precedent to the extent that it belies reality.¹⁵⁰

IV. PUBLIC POLICY CONSIDERATIONS

Once the common law underpinnings and the legislative and precedential barriers are removed, interspousal tort immunity can only be based on the compelling dictates of public policy. One of the most striking characteristics of the Missouri interspousal immunity case law is the lack of policy discussion.

The two basic policy arguments for maintaining interspousal tort immunity are that immunity promotes marital harmony and prevents collusive claims.¹⁵¹ The former argument was enunciated in *Rogers*, where the court implied that the Missouri Married Women's Act should not be construed

144. See, e.g., *Brooks v. Robinson*, 259 Ind. 16, 22, 284 N.E.2d 794, 797 (1972); *Novak v. Kansas City Transit, Inc.*, 365 S.W.2d 539, 546 (Mo. En Banc 1963); *Rupert v. Stienne*, 90 Nev. 397, 400, 528 P.2d 1013, 1015 (1974).

145. Authorities cited note 144 *supra*. See also *Hack v. Hack*, 495 Pa. 300, 316, 433 A.2d 859, 867 (1981).

146. *Hamilton v. Fulkerson*, 285 S.W.2d 642, 647-48 (Mo. 1955).

147. *Brawner v. Brawner*, 327 S.W.2d 808, 811-13 (Mo. En Banc 1959). The court stated that the general assembly was better equipped and had greater authority to deal with the particular problem and, at the same time, the related ones. *Id.* at 813. The court said the related problems included privileged communications of married persons, a husband's liability for his wife's support, children's rights of inheritance, and insurance regulation. *Id.*

148. *Ebel v. Ferguson*, 478 S.W.2d 334, 335 (Mo. En Banc 1972) (plurality opinion).

149. *Brooks v. Robinson*, 259 Ind. 16, 22, 284 N.E.2d 794, 797 (1972).

150. See Part III.A. *supra*.

151. See generally *Moore*, *supra* note 6.

so as to cause domestic strife.¹⁵² The reasoning behind this argument is that if one spouse intentionally or negligently injures the other, a lawsuit based on the wrongful act only serves to aggravate any ill feelings the spouses may already have for one another.¹⁵³ The policy argument for preventing collusive claims is based on the reasoning that it is unrealistic to expect the defendant-spouse to do everything within his power to defeat the claim of the plaintiff-spouse.¹⁵⁴ The problem is magnified when the defendant-spouse is insured and the couple will collect a windfall.¹⁵⁵

The courts that have abrogated or modified interspousal immunity have uniformly rejected both of these policy arguments. The most common argument is that conjugal harmony is no more threatened by personal tort actions than by property, contract, or other actions that are permitted between spouses.¹⁵⁶ Some courts have argued that if a state of peace exists between the spouses, either no action will be commenced or the spouses will allow the action to continue only as long as their personal harmony is not jeopardized.¹⁵⁷ Other courts have noted that in the case of intentional torts, it is doubtful that there is any marital harmony left to disturb.¹⁵⁸

152. *Rogers v. Rogers*, 265 Mo. 200, 207, 177 S.W. 382, 384 (1915). The court stated,

Whether the absence of the husband's authority to sue his wife for a personal tort is due to the doctrine of the unity created by the marriage relation, or to an effort on the part of the legislatures and courts to promote harmony or at least lessen the cause of controversy between husband and wife, the nonexistence of the husband's right in this regard uniformly prevails. If nonexistent in the husband, there are stronger reasons, in the absence of an express statute, why it should be held not to be possessed by the wife.

Id.

153. *Id.* See also *Corren v. Corren*, 47 So. 2d 774, 776 (Fla. 1950); *Lyons v. Lyons*, 2 Ohio St. 2d 243, 244, 208 N.E.2d 533, 535 (1965).

154. *Raisen v. Raisen*, 379 So. 2d 352, 355 (Fla. 1979); *Robeson v. International Indem. Co.*, 248 Ga. 306, ____, 282 S.E.2d 896, 899 (1981); *Varholla v. Varholla*, 56 Ohio St. 2d 269, 270, 383 N.E.2d 888, 889-90 (1978).

155. See, e.g., *Raisen v. Raisen*, 379 So. 2d 352, 355 (Fla. 1979). Some courts have noted the reciprocal and often antagonistic relationship between the policies of promotion of marital harmony and avoidance of collusive claims. A true adversary proceeding between the husband and wife would have an upsetting and embittering effect on domestic tranquility. On the other hand, if the lawsuit is not adversary and there is no real conflict of interest between spouses, domestic tranquility is not threatened, but there is a great probability of fraudulent or collusive claims, especially if the defendant spouse is insured. See *Raisen v. Raisen*, 379 So. 2d 352, 355 (Fla. 1979); *Robeson v. International Indem. Co.*, 248 Ga. 306, ____, 282 S.E.2d 896, 899 (1981).

156. *Brooks v. Robinson*, 259 Ind. 16, 20-21, 284 N.E.2d 794, 796 (1972); *Imig v. March*, 203 Nev. 537, 541, 279 N.W.2d 382, 384-85 (1979); *Rupert v. Stienne*, 90 Nev. 397, 402, 528 P.2d 1013, 1016 (1974); *Flores v. Flores*, 84 N.M. 601, 603, 506 P.2d 345, 347 (Ct. App. 1973).

157. *Freche v. Freche*, 81 Wash. 2d 183, 187, 500 P.2d 771, 774 (1972).
 158. *Windauer v. O'Connor*, 107 Ariz. 267, 268, 485 P.2d 1157, 1158 (1971);

The courts in abrogating jurisdictions have also discounted the danger of collusive claims. They argue that the adversary system is sophisticated enough to ferret out the nonmeritorious claims and dismiss those parties who would practice fraud on the courts.¹⁵⁹ To deny one spouse the opportunity to recover for the tortious conduct of the other belies the centuries-old trust in the jury system.¹⁶⁰ An interspousal tort claim should not be saddled with the presumption of fraud *ab initio*.¹⁶¹

The *Hamilton* court addressed these two policy arguments with respect to permitting antenuptial tort actions. The arguments made by the *Hamilton* court are identical to those propounded by the courts that have abrogated the doctrine. The *Hamilton* court reasoned that allowing interspousal suits for antenuptial personal torts would not disrupt domestic tranquility more than those actions already permitted between spouses.¹⁶² The court pointed out that marital harmony is disturbed as much by the desire to recover as by the recovery itself.¹⁶³ The *Hamilton* court also reasoned that the danger of fraudulent claims was no greater between spouses than between strangers.¹⁶⁴ The court stated that courts and juries are as able to deal with trivial, fraudulent, and fictitious claims between spouses as between other litigants.¹⁶⁵

The primary policy argument in favor of abrogating interspousal tort immunity is compensation of tort victims.¹⁶⁶ The general rule is that a person proximately injured by the act of another, whether willfully or negligently, should be compensated, in the absence of a statute or compelling reason of public policy to the contrary.¹⁶⁷ The state of matrimony alone

Lusby v. Lusby, 283 Md. 334, 357, 390 A.2d 77, 88 (1978); Imig v. March, 203 Neb. 537, 541, 279 N.W.2d 382, 384 (1979); Apitz v. Dames, 205 Or. 242, 271, 287 P.2d 585, 598 (1955).

159. Klein v. Klein, 58 Cal. 2d 692, 695, 376 P.2d 70, 72, 26 Cal. Rptr. 102, 104 (1962); Brooks v. Robinson, 259 Ind. 16, 21-22, 284 N.E.2d 794, 797 (1972); Beaudette v. Frana, 285 Minn. 366, 372, 173 N.W.2d 416, 420 (1969); Imig v. March, 203 Neb. 537, 541-42, 279 N.W.2d 382, 385 (1979).

160. Authorities cited noted 159 *supra*. The same argument has been made in response to the claim that abolishing interspousal tort immunity will lead to an avalanche of trivial lawsuits. See *Hamilton v. Fulkerson*, 285 S.W.2d 642, 647 (Mo. 1956).

161. *Rupert v. Stienne*, 90 Nev. 397, 401, 528 P.2d 1013, 1015 (1974).

162. *Hamilton v. Fulkerson*, 285 S.W.2d 642, 647 (Mo. 1956).

163. *Id.*

164. *Id.*

165. *Id.* The court also stated that the cost of liability insurance should not determine the presence or absence of a legal right anymore than should the existence of liability insurance in a given case cause liability when it does not exist. *Id.* See generally Casey, *The Trend of Interspousal and Parental Immunity—Cakewalk Liability*, 45 INS. COUNS. J. 321 (1978).

166. See *Klein v. Klein*, 58 Cal. 2d 692, 694-95, 376 P.2d 70, 72, 26 Cal. Rptr. 102, 104 (1962); *Rupert v. Stienne*, 90 Nev. 397, 402, 528 P.2d 1013, 1016 (1974); *Freehe v. Freehe*, 81 Wash. 2d 183, 187, 500 P.2d 771, 774 (1972).

arguably is not sufficient justification for preventing suit on an actionable wrong.¹⁶⁸

What sparse discussion there is in Missouri regarding policy reasons for and against maintaining the doctrine of interspousal tort immunity leans in favor of abrogating the doctrine. The policy arguments invoked by the court in *Hamilton* can be applied as easily to torts committed during coverture.¹⁶⁹ The disruption to domestic tranquility would appear to be no greater in allowing a suit for an antenuptial tort. Likewise, the threat of collusive or fraudulent suits seems no greater for torts committed during coverture than for premarital torts.

V. CONCLUSION

Whether or not interspousal tort immunity is retained in Missouri, the unity fiction is no longer a justifiable basis for the doctrine.¹⁷⁰ Courts in both retaining and abrogating jurisdictions overwhelmingly have disapproved of the unity fiction.¹⁷¹ Even a majority of the judges in *Ebel* agreed that the case should not be decided on the basis of the unity of the spouses.¹⁷²

In the absence of an express statute, it is reasonable to argue that interspousal immunity today must be based on the dictates of public policy. The language of the pertinent Missouri statutes is not compelling enough to bypass an examination of public policy.¹⁷³ When the interspousal immunity issue comes before the Missouri Supreme Court again, it should evaluate the policy reasons for and against retaining the doctrine and determine whether the needs of society dictate a change in the law. The primary public policy argument in favor of abrogating the immunity is that a remedy should be afforded to a tort victim. This general rule that the courts of justice are open to all persons is in the Missouri Constitution.¹⁷⁴ If the policy reasons

101 (1962).

168. See *Rupert v. Stienne*, 90 Nev. 397, 402, 528 P.2d 1013, 1016 (1974). Some states retaining interspousal immunity have argued that there is adequate relief available for an injured spouse in the criminal and divorce courts. See *Mims v. Mims*, 305 So. 2d 787, 789 (Fla. Dist. Ct. App. 1974); *Rogers v. Rogers*, 265 Mo. 200, 208, 177 S.W. 382, 384 (1915). In *Hamilton v. Fulkerson*, 285 S.W.2d 642, 647 (Mo. 1956), the Missouri Supreme Court rejected this argument in the case of an antenuptial tort. The *Hamilton* argument is the same as that adopted by the courts that have abrogated interspousal immunity: the criminal and divorce courts do not purport to compensate the victim for personal injuries. See, e.g., *Flores v. Flores*, 84 N.M. 601, 603, 506 P.2d 345, 347 (Ct. App. 1973); *Freehe v. Freehe*, 81 Wash. 2d 183, 187-88, 500 P.2d 771, 774-75 (1972).

169. See *Brawner v. Brawner*, 327 S.W.2d 808, 822 (Mo. En Banc 1959) (Hollingsworth, C.J., dissenting).

170. See Part III.A. *supra*.

171. See notes 18 & 86 and accompanying text *supra*.

172. See note 96 and accompanying text *supra*.

173. See notes 114-21 and accompanying text *supra*.

174. MO. CONST. art I, § 14 provides, "That the courts of justice shall be open to every person, and certain remedy afforded for every injury to person, property

for maintaining interspousal immunity are no longer viable, then the policy of compensating tort victims demands the abrogation of interspousal immunity.

The policy arguments for and against retaining interspousal immunity are logical. These arguments, however, do not seem applicable to intentional torts.¹⁷⁵ For example, when one spouse intends to harm the other, there is little or no domestic harmony to preserve by precluding the injured spouse from suing.¹⁷⁶ Even the common law unity of the spouses did not bestow on the husband the right to harm his wife as he saw fit.¹⁷⁷ Likewise, the danger of collusive claims in the intentional tort context seems relatively insignificant.

There are other safeguards available to effectuate the policy arguments in favor of retaining interspousal immunity should the immunity be abolished. For example, the broader application of consent to physical contact in the marital relationship decreases the number of actions that would be tortious as between spouses.¹⁷⁸ The risks of intentional contact in marriage are such that one spouse should not recover damages from the other without substantial evidence that the injurious contact was plainly excessive or a gross abuse of normal privilege.¹⁷⁹ The risk of negligent conduct is likewise so usual that the trial court could instruct the jury about the injured spouse's peculiar assumption of the risk.¹⁸⁰

It belies reality and fact to say that when a spouse intentionally or negligently injures the other there is no tort or there is no harm to the injured spouse. To abrogate the doctrine of interspousal tort immunity is arguably not to create a cause of action as suggested by the *Ebel* plurality, but rather to cease refusing to recognize a cause of action where the reasons for so refusing have themselves ceased to exist.¹⁸¹

JEFFREY J. BRINKER

or character." The Missouri Supreme Court has not addressed whether marital immunity violates this section.

175. See Moore, *supra* note 6, at 943.

176. See note 158 and accompanying text *supra*.

177. See Windauer v. O'Connor, 107 Ariz. 267, 268, 485 P.2d 1157, 1158 (1971).

178. See authorities cited note 103 *supra*.

179. Beaudette v. Frana, 285 Minn. 366, 373, 173 N.W.2d 416, 420 (1969).

180. *Id.*

181. In MacDonald v. MacDonald, 412 A.2d 71 (Me. 1980), the Maine Supreme Court said:

Since the early days of the common law a cause of action in tort has been recognized to exist when the negligence of one person is the proximate cause of damage to another person. It does not 'create a new cause of action' to abandon 'the arcane transmutation of two human beings, once they have become husband and wife, into a single legal personality,' and thereby allow an already existing cause of action to be in play.