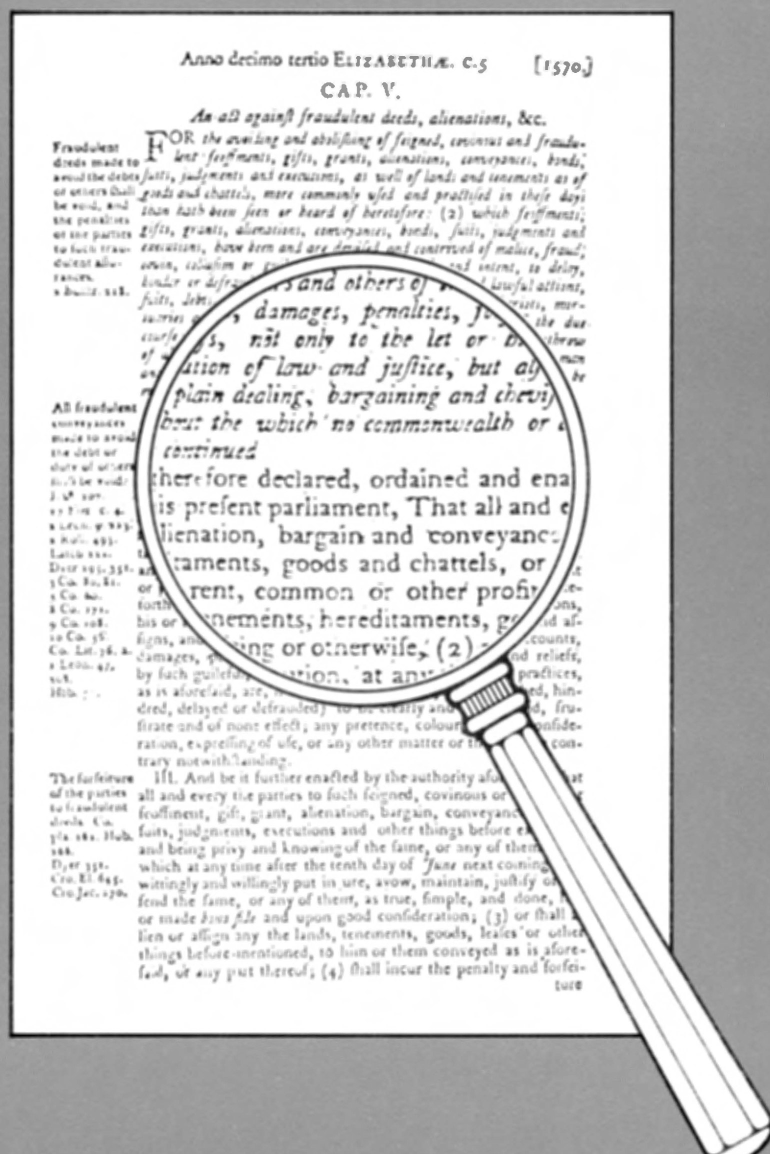
Law Reform Commission

Tentative Proposals for Reform of the Law Affecting Liability Between Husband and Wife and Related Insurance Contracts

Saskatchewan



TENTATIVE PROPOSALS FOR REFORM OF THE LAW AFFECTING LIABILITY BETWEEN HUSBAND AND WIFE AND RELATED INSURANCE CONTRACTS

Law Reform Commission of Saskatchewan
Saskatoon, Saskatchewan

March, 1979

The Law Reform Commission of Saskatchewan was established by *An Act to Establish a Law Reform Commission* proclaimed in November, 1973, and began functioning in February of 1974.

The Commissioners are:

PROFESSOR RONALD C.C. CUMING, B.A., LL.B., LL.M., CHAIRMAN

MR. GEORGE J.D. TAYLOR, Q.C.

MS MARJORIE A. GERWING, B.A., LL.B.

Kenneth P.R. Hodges is the Research Director.

The Legal Research Officers are Harris Wineberg and Michael J. Finley. The secretaries are Sandra Hookway and Linda Mahl.

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The Law Reform Commission Act, 1971.

> 6. The commission shall take and keep under review all the law of the province, including statute law, common law and judicial decisions, with a view to its systematic development and reform, including the codification, elimination of anomalies, repeal of obsolete and unnecessary enactments, . . . and generally the simplification and modernization of the law, ...

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N O T E
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These proposals have been prepared by the research staff of the Commission and have been tentatively adopted by the Commissioners. It is the policy of the Commission to seek public response to its proposals before a final report is prepared for presentation to the Attorney General. Accordingly, the Commission welcomes comments and criticisms.

Submissions should be directed to

Law Reform Commission of Saskatchewan,
1003 - 201 21st Street East,
Saskatoon, Saskatchewan.
S7K 0B8

P R E F A C E

These proposals recommend abolition of two distinct, but related, aspects of the law of Saskatchewan: on the one hand, the common law rule of interspousal tort immunity; on the other, the insurance law provision that denies recovery of damages from an insurance company to a family member who is a passenger in an automobile negligently driven or owned by an insured family member and who thereby suffers personal injuries. While doctrinally distinct, these two laws are related in that to abolish the one without the other would be a very minor reform.

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PART ONE -- INTERSPOUSAL TORT IMMUNITY

I. INTRODUCTION

Interspousal tort immunity expresses a common law rule whereby in instances of civil wrongs,[1] in which one spouse suffers personal injuries as the result of the conduct of the other,[2] no civil proceeding may be taken.

While *The Shorter Oxford English Dictionary*[3] defines an "immunity" as a "privilege granted to an individual...conferring particular exemptions", Dean Prosser states that

> [A]n immunity differs from a privilege... although the difference is largely one of degree. A privilege avoids liability for tortious conduct only under particular circumstances...An immunity, on the other hand, avoids liability in tort under all circumstances, within the limits of the immunity itself. It is conferred, not because of the particular facts, but because of the status or position or relation of the favored defendant...[4]

The effect of the immunity is that spouses are denied adjudication in exactly those circumstances where strangers are given an opportunity of resolving their disputes. There is no longer any logical basis for

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1. "A tort is a species of civil injury or wrong...A civil wrong is one which gives rise to civil proceedings...", Salmond, *The Law of Torts*, 16th ed., 1973.
2. Immunity in tort between parent and child was never part of the common law. Fleming, *The Law of Torts*, 4th ed., 1971, at 596.
3. 1973, Oxford University Press, at 1027.
4. Prosser, Wade, Schwartz, *Torts: Cases and Materials*, 6th ed., 1976 at 638.

the proposition that in instances of tortious conduct the spousal relationship is sufficient reason for denying access to the courts. If, as Dean Wright stated,[5] "the purpose of the law of torts is to adjust...losses and to afford compensation for injuries sustained by one person as the result of the conduct of another", then inter-spousal tort immunity works at cross-purposes in that neither are losses adjusted nor compensation afforded for injuries sustained by one spouse as the result of the other's tortious conduct.

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5. Wright and Linden, *Canadian Tort Law, Cases, Notes and Materials*, 6th ed., 1975, at 1.

II. HISTORICAL BACKGROUND

The biblical counsel that "Therefore shall a man leave his father and his mother, and shall cleave unto his wife: and they shall be one flesh" (Genesis 2:24) found its legal clarion in the common law doctrine of unity of husband and wife:

> ...actions in tort between husband and wife were not possible at Common Law owing to the fiction that they were one flesh.[6]

The common law disabilities of a married woman in regard to property were legion:

> Marriage effected a gift of the wife's personal chattels to her husband. If his wife possessed leasehold properties a husband could, during the marriage, sell them and pocket the proceeds of sale, and if his wife predeceased him such property became his by right of marriage. Moreover by marriage a husband acquired the sole right to manage, and became entitled to the income of any freehold property owned by his wife...[7]

Her position was neatly summed up in the following manner:

> During marriage a woman could by the common law possess nothing, alienate nothing, nor bequeath anything.[8]

At common law, an unmarried woman was personally liable for torts committed by her and had a right of action for torts committed against her. However, when she married, since she could neither be a sole plaintiff nor a sole

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6. Winfield, "Recent Legislation on the English Law of Tort" (1936), 14 *Canadian Bar Review* 639 at 653.

7. Ontario Law Reform Commission *Study on Family Law Project, Volume VI, Torts*, at 115.

8. De Montmorency, "The Changing Status of Married Women" (1897), 13 *L.Q.R.* 192 at 194.

defendant, her husband had to be joined:

> Seeing that all her property is vested in the husband, it would be idle to sue the wife alone; the action would be fruitless ...He is not liable for the wrong; but he is joined only by reason of the universal rule that a wife during coverture cannot be either a sole plaintiff or a sole defendant.[9]

The necessity of joining the husband as co-plaintiff or as a co-defendant was removed by the *Married Women's Property Act* of 1882.[10]

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9. Per Erle, C.J. in *Capell* v. *Powell* (1864), 17 C.B. (N.S.) 743 at 748, quoted in Campbell, "Status of Married Persons in Canada" (1929), 8 *Canadian Bar Review* 500 at 504.

10. 45 & 46 Vict. c.75, s.13.

III. THE LAW OF SASKATCHEWAN

Saskatchewan "received" the laws of England as they existed on July 15, 1870 insofar as such laws were applicable.[11] Since inter-spousal tort immunity was the law of England on that date, so it became the law of Saskatchewan.

Saskatchewan's first married woman's property legislation declared that:

> Every married woman...shall be capable of acquiring, holding and disposing of by will...without her husband's consent any real and personal property...as if she were a *feme sole*.[12]

The *Act*[13] provided that in respect of torts committed by her:

1. a married wo an was liable in the same respect as "she was at the time of her marriage";

2. she could be sued for damages arising out of any such wrong without her husband being joined as defendant; and

3. as between her and her husband, in the absence of a contract to the contrary, her property was deemed to be primarily liable for all "antenuptial...wrongs and for all damages and costs recovered in respect thereto".

However, notwithstanding the various freedoms and protections therein

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11. *The North-West Territories Act*, R.S.C. 1886, c.50, s.11 as continued by *The Saskatchewan Act*, 4-5 Edward VII, c.42, s.16.

12. *The Married Woman's Property Act*, S.S. 1907, c.18, s.3.

13. *Ibid.*, s.10.

being accorded married women, the *Act* declared that:

> no action of tort shall be commenced between husband and wife except an action in respect of rights in, to or out of real or personal property.[14]

The common law rule of interspousal tort immunity is still the law of Saskatchewan.[15]

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14. *Ibid.*, s.8(2).

15. *The Married Persons' Property Act*, R.S.S. 1965, c.340, s.8(2), as amended.

IV. INTERSPOUSAL TORT IMMUNITY REFORM

A. England

While successive legislation removed much of the common law disability of married women, interspousal tort immunity was debated until 1962 at which time it was finally abolished.

Professor Winfield considered the retention of interspousal tort immunity to be a debatable question although he answered in this way:

> It is true that the old reason for the rule --the fiction of the unity of husband and wife--is of very little weight at the present day; but a better and more modern argument in its favour is that such litigation is "admittedly unseemly, distressing and embittering". Yet this cannot be regarded as convincing, for not only has the rule got a fairly wide exception to it, but courts have a quasi-criminal summary jurisdiction to settle disputes between spouses as to the title to, or possession of property and in general to make separation orders; indeed a good deal of the time of magistrates is spent in hearing matrimonial disputes. Again, it is hard that neither spouse should be able to prevent the other from pure personal defamation of himself or herself. An action for defamation might be unseemly, distressing and embittering, but the slander or libel would never have occurred unless the parties were already on very bad terms. Upon the whole, however, I think the law is better left as it is. For it is improbable that one of a married couple would contemplate suing the other unless they had quarrelled violently, and a couple in that condition are likely to use actions in tort as they would any other weapon, corporeal or incorporeal, primarily to vindicate their spite.[16]

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16. Winfield, *supra*, note 6 at 655.

While Winfield's view may have found favour in 1935, by 1952 scholars such as Professor Kahn-Freund were pointing out that the question of interspousal tort immunity was not simply one that had effects between husband and wife:

> ...third parties continue to be affected by the rule that there can be no tort between the spouses. This observation is not by any means confined to the insurer...Consider, for example, the position of a person who is alleged to have committed a tort against a married woman and who claims that the woman's husband was a joint tortfeasor, e.g., in the event of an accident caused by the combined negligence of the husband and the third party, as a result of which the wife has suffered injuries...The point to be noticed here is the great injustice which results from the ramifications of the substantive rule against tortious liability between the spouses: why should a third party be made to suffer as a result of the chance fact that the joint tortfeasor happened to be the victim's husband?[17]

Dr. Glanville Williams considered interspousal tort immunity to be "[T]he outstanding anomaly in the law [of torts]".[18]

As a result of the Law Reform Committee's report,[19] interspousal tort immunity was abolished.[20] The *Act* declares that each of the parties to a marriage has a right of action in tort against the other as if

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17. Kahn-Freund, "Inconsistencies and Injustices in the Law of Husband and Wife" (1952), 15 *Modern Law Review* 140 at 146-147.

18. Williams, "Some Reforms in the Law of Tort" (1961), 24 *Modern Law Review* 101.

19. 9th Report, "Liability in Tort Between Husband and Wife", 1961, Cmnd., 1268.

20. *The Law Reform (Husband and Wife) Act, 1962*, 10 & 11 Eliz. II c.48, s.1.

they were not married, subject to two qualifications; namely,

> (1) that where an action is brought during the subsistence of the marriage, a court can order a stay if it appears that no substantial benefit will accrue to either party from the continuance of the proceedings, and
>
> (2) that the action may also be stayed if it appears that the dispute can more conveniently be disposed of under the provisions of *The Married Women's Property Act*.

In commenting upon the power of the court to stay proceedings, Professor Olive Stone stated that this power

> seems reasonable, as family quarrels are pre-eminently suitable for the exercise of discretion, but only so long as the principles on which this discretion is exercised are made public and are reasonably in accord with enlightened public opinion.[21]

B. Canada

In Ontario, *The Family Law Reform Act, 1978*[22] carried out the recommendations of the Ontario Law Reform Commission by abolishing the fiction that husband and wife are one[23] and by abolishing interspousal tort immunity.[24]

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21. Stone (1961), 24 *Modern Law Review* 481 at 482.

22. S.O. 1978, c.2.

23. *Ibid.*, s.65: (1) For all purposes of the law of Ontario, a married man has a legal personality that is independent, separate and distinct from that of his wife and a married woman has a legal personality that is independent, separate and distinct from that of her husband.
(2) A married person has and shall be accorded legal capacity for all purposes and in all respects as if such person were an unmarried person.

24. *Ibid.*, s.65: (3)(a) each of the parties to a marriage has the like right of action in tort against the other as if they were not married.

In Manitoba, the Manitoba Law Reform Commission's[25] recommendation that interspousal tort immunity should be abolished formed the basis for the immunity's legislative abolition.[26]

C. United States

The courts in the United States preserved the common law rule of interspousal tort immunity, although by June 1977, at least 29 states had either legislatively or judicially abolished it.[27] Some jurisdictions, however, have abrogated the rule only insofar as it applies to intentional or wilful conduct, retaining it in negligence actions.[28] In a recent case in which a husband sued his wife for injuries sustained while driving her allegedly unsafe tractor, the Supreme Court of Washington stated that:

> We are cognizant of the long standing nature of the common law rule of interspousal tort immunity. But we find more impelling the fundamental precept that, absent express statutory provision, or compelling public policy, the law should not immunize tortfeasors or deny remedy to their victims.

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25. Manitoba Law Reform Commission, *Report on the Abolition of Interspousal Immunity in Tort*, 1972.

26. *An Act to Amend The Married Women's Property Act*, S.M. 1973, c.12, s.1: A husband and wife have the same right to sue the other for tort as if they were not married.

27. Reynolds, "A Look at the Interspousal Tort Immunity Doctrine in Texas", *Texas Bar Journal*, February 1978, 153 at fn. 17, p. 157.

28. *Bounds* v. *Caudle*, 21 Tex. Sup. Ct. J. 92 (Dec. 31, 1977) discussed in Reynolds, *supra*.

> With this in mind, we have reviewed the stated reasons for the common law rule, and have found all of them to be insufficient. Therefore, the rule of interspousal disability in personal injury cases is hereby abandoned.[29]

D. Other Jurisdictions

Interspousal tort immunity has been abolished in New Zealand, Tasmania, Queensland, Victoria and the Australian Capital Territory.[30]

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29. *Freehe* v. *Freehe*, Sup. Ct. of Wash., 1972, 81 Wash. 2d 183, 500 P. 2d 771 per Neill, Associate Justice.

30. Fleming, *supra*, n.2 at 593.

V. CONTRIBUTORY NEGLIGENCE

Every Canadian common law jurisdiction has contributory negligence legislation. Where a married person is injured as the result of the negligent conduct of the spouse and another, the legislation allows the injured person to recover only those losses attributable to the negligence of the other tortfeasor, even though the negligent spouse has insurance covering the liability:

> In an action founded upon negligence and 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 negligent is the spouse of the married person, no damages, contribution or indemnity shall be recoverable for the portion of damage or loss caused by the negligence of the spouse, and the portion of the loss or damage so caused by the negligence of the spouse shall be determined although the spouse is not a party to the action.[31]

The Manitoba Law Reform Commission explained its analogous provision in this manner:

> The purpose of this exception is to ensure that the rule of spousal immunity cannot be circumvented where a second tortfeasor is involved by having the injured spouse sue the other party for the full claim, and then having the other party seek contribution from the wrong-doing spouse.[32]

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31. *The Contributory Negligence Act*, R.S.S. 1965, c.91, s.9.

32. *Supra*, n.25 at 11.

The Alberta Institute explained its provision as prohibiting

> recovery for the portion of the damage or loss caused by the negligence of the plaintiff's spouse against whom no cause of action exists because of interspousal tort immunity.[33]

With the abolition of interspousal tort immunity, this section is unnecessary and should be repealed.

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

VI. CONCLUSIONS

One reservation that has been expressed is that the abolition of interspousal tort immunity would inevitably lead to burdensome amounts of trivial litigation. While it is impossible to forecast with any precision the amount of interspousal tort litigation that will ensue as a result of the immunity's abolition, the experience of jurisdictions which have to date done so does not indicate any appreciable increase. The relationship between plaintiff and defendant is a factor that the court must always take into account in assessing the evidence in any litigation. In the law of torts such safeguards are already available. Assault and false imprisonment are but two instances of "intentional" torts, that is, conduct which is actionable based on an intention to invade another's person, property or chattels. As long ago as 1705 it was recognized that not every touching involved an assault or battery:

> ...if two or more meet in a narrow passage, and without any violence or design of harm, the one touches the other gently, it will be no battery.[34]

Similarly, in explaining that imprisonment was something more than mere loss of freedom, the court in *Bird* v. *Jones* stated that:

> It is one part of the definition of freedom to be able to go whithersoever one pleases;

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34. *Nisi Prius* (1705), 6 *Mod.* 149; 87 *E.R.* 907, per Holt, C.J.

> but imprisonment is something more than the mere loss of this power; it includes the notion of restraint within some limits defined by a will or power exterior to our own...[35]

A more ubiquitous area of tort liability is negligence. Here a person is compensated when injured as a result of conduct which falls below a reasonable standard in the community. In this type of litigation, the conduct of the defendant is measured against that of the mythical "reasonable man". This safety valve, the "reasonable man", allows the court to dismiss those claims with little or no merit; it is not every accident that amounts to negligence. In interspousal negligence litigation, the conduct of the defendant would have to be measured against that of the reasonable person in the capacity of spouse.

Lord Atkin's admonition in *Donoghue* v. *Stevenson*[36] that

> you must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbor

is of even more force in a marital relationship. That a stranger, albeit one's neighbor, should be in a better position than one's spouse is untenable. By the same token, there is little hesitancy in saying that one's spouse assumes greater risk of injury than one's neighbor

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35. (1845), 7 Q.B. 742; 115 *E.R.* 668, per Coleridge, J.

36. House of Lords. [1932] A.C. 562.

and, to that extent, one's spouse may have a more difficult time recovering compensation:

> ...should the courts find this possibility [of a burdensome amount of trivial matrimonial disputes] to be materializing, there is nothing to prevent application of established notions of "consent" or "assumption of risk" to minor annoyances associated with the ordinary frictions of wedlock.[37]

With the abolition of interspousal tort immunity, one's spouse becomes a foreseeable plaintiff and it is no more likely that this fact should lead to marital discord than that it should encourage greater interspousal awareness.

Another argument put forward for retaining the interspousal tort immunity is that to permit such litigation would be to destroy the harmony inherent in the conjugal bond. Certainly in the case of intentional torts such as assault and false imprisonment this argument is absurd. In the case of negligence which is insured, the only beneficiary of the interspousal immunity is the insurance company:

> The rule operates no longer to preserve domestic amity, but only for the benefit of insurance companies...[38]

This was never the intent of the common law rule of interspousal tort immunity.

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37. *Freehe* v. *Freehe*, *supra*, n.29.

38. Williams, *supra*, n.18.

A further argument advanced for the immunity's retention is that to allow recovery is only to increase the family's funds. However, where the loss is covered by insurance, again the only beneficiary of this position is the insurer:

> Why should the insurance company benefit in this way at the expense of the wife? In such circumstances it is of course possible to contend that damages paid to a wife form, in general, part of the family funds; and that, therefore, if suit were permitted the result would be to allow a husband to benefit as a result of his own tort. But this reasoning may have equal application to damage awards made, in analogous situations, to other members of the family. In any event to so argue is to lose sight of the fact that damages are awarded to compensate the injured wife; and compensation should not be denied merely on the basis that as a fact of family life, an accretion to the family funds may benefit both spouses.[39]

Where the loss is uninsurable, then presumably the parties will make a reasoned decision whether or not to pursue their remedies by way of litigation. The problem with interspousal tort immunity is that it takes this decision away from the parties, obviously at the expense of, at least some, otherwise valid claims.

Finally, it is said that to permit interspousal tort litigation is to encourage collusion and fraud. We will deal with this argument in the next Part on insurance.

Thus, it can only be concluded that interspousal tort immunity is a relic of days gone by, with no modern justification for its retention, and it must therefore be abolished.

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39. Mendes da Costa, "Husband and Wife in the Law of Torts", in Linden, *Studies in Canadian Tort Law* (1968), 470 at 473.

VII. RECOMMENDATIONS

The Commission recommends that interspousal tort immunity should be abolished. To achieve this:

(1) Section 8(2) of *The Married Persons' Property Act*, R.S.S. 1965, chapter 340 as amended should be repealed;

(2) *The Married Persons' Property Act*, R.S.S. 1965, chapter 340 as amended should state that husbands and wives shall have an equal right of action in tort against each other as if they were not married; and

(3) Section 9 of *The Contributory Negligence Act*, R.S.S. 1965, chapter 91 should be repealed.

PART TWO -- BARS TO DAMAGE RECOVERY IN INTRAFAMILY TORTS

I. INTRODUCTION

A family member (daughter, son, husband or wife) who is injured, or dies, while a passenger in an insured family member's automobile and as a result of the insured's negligence, is barred by statute from recovering damages from the insured's insurer. Since the greatest number of interspousal tort actions will no doubt arise as a result of automobile mishaps,[40] the abolition of interspousal tort immunity, if it is to be of any practical significance and not cosmetic only, must apply to automobile passengers.

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40. Fleming, *supra*, n.2 at 593, fn.12 states that: "The most common inter-spousal tort is that of a wife-passenger being injured in her husband's car".

II. THE LAW IN SASKATCHEWAN

Saskatchewan has established a compulsory partial no-fault insurance scheme underwritten by a public agency.[41] This type of insurance coverage is not dependent upon a judicial finding of tort liability so that the abolition of interspousal tort immunity will be of no effect. The *Act* does not extend general insurance coverage to passengers,[42] although any gratuitous passenger, including a spouse, injured in a single-car accident has rights of recovery restricted to no-fault benefits under the *Act*.[43]

However, the situation is different under a "passenger hazard" policy whose terms are regulated by *The Saskatchewan Insurance Act*.[44] Section 200(b)(i) of the *Act* contains a blanket exclusion to which all policies are subject:

> The insurer is not liable under a contract evidenced by a motor vehicle liability policy for any liability:
>
> (b) resulting from bodily injury to or the death of:
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> (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.[45]

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41. *The Automobile Accident Insurance Act*, R.S.S. 1965, c.409, as amended.
42. *Ibid.*, s.39(1)(d).
43. *Ibid.*, Part II.
44. R.S.S. 1965, c.143, as amended.
45. *Ibid.*, as amended by S.S. 1968, c.64, s.9.

This clause has been common to all Canadian insurance contracts and its effect is that an insurer is not liable under a motor vehicle liability policy to the owner or driver for any liability incurred as a result of injuries or death to the spouse of the owner or driver.

There are two problems with the section's application that make it grossly unfair:

1. There is no bar to recovery if the passenger and the owner/driver insured are not related; thus a wife or child who suffers injury or death cannot recover from the husband or father's insurer but can from that of a neighbour; and

2. There is no bar to recovery if the maimed or dead family member is a pedestrian[46] and not a passenger.

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46. This is based on the assumption that interspousal tort immunity is abolished.

III. LAW REFORM IN CANADA

The Ontario Law Reform Commission recommended that at the same time as interspousal tort immunity was abolished, section 214(b)(i) of *The Insurance Act*[47] should be repealed. *The Family Law Reform Act, 1975* followed that recommendation.[48]

The Manitoba Law Reform Commission stated that to leave section 245(b)(i)[49]

> intact after abolishing spousal immunity would leave one of the most significant sources of spousal litigation unaltered in a practical sense. There is no point reforming the law of spousal immunity in automobile accident cases if the effect of the change is nullified by

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47. R.S.O. 1970, c.224, s.214(b)(i):

> The insurer is not liable under a contract evidenced by a motor vehicle liability policy for any liability...
> (b) 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...

48. S.O. 1975, c.41, s.5.

49. *The Automobile Insurance Act*, S.M. 1970, c.140, s.245(b)(i):

> The insurer is not liable under a contract evidenced by a motor vehicle liability policy for any liability...
> (b) 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...

> *"The Insurance Act"*...Such a change would go somewhat beyond the realm of spousal immunity, since it would also wipe out the exclusion of children from coverage, but there seems no reason to treat children differently from spouses.[50]

The Commission went on to recommend repeal of that section. Interestingly enough, while the Manitoba Legislature abolished interspousal tort immunity, it did not repeal section 245(b)(i).

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50. *Report on the Abolition of Interspousal Immunity in Tort*, *supra*, note 25 at 11.

IV. JUSTIFICATION FOR THE EXCLUSION OF FAMILY MEMBERS AS PASSENGERS

The only apparent rationale for the exclusion of family members from benefits as passengers is the fear that they will collude in order to defraud the insurer. However, for any number of reasons, not only is this fear unwarranted but, in any event, to deal with it as a blanket exclusion from coverage is an example of legislative "overkill". It overcomes any problems of collusion at too great a price, namely, by barring insurance recovery in those cases where there is negligence and no collusion.

If the fear arises because of the ever-increasing claims of "whiplash" which depend for their proof on "subjective" elements, then the real problem that must be addressed is the adequacy of the medical evidence required for this type of injury. "Whiplash" does not become any more "subjective" just because it happens to be a member of the insured's family who is complaining. In any event, not all injuries suffered by family member passengers are of so specious a nature; broken bones, serious paralysis and death, to name but a few, are quite capable of independent medical proof. If insurance companies want to exclude coverage for "whiplash", then they should so specifically state.

Our courts are faced with the problems of possible collusion in many areas of litigation. Our divorce law has always been sensitive to the problem of collusion between husband and wife. The

solution, however, has been not to deny all divorces but only those where collusion in fact exists:

> On a petition for divorce it is the duty of the court...to satisfy itself that there has been no collusion in relation to the petition and to dismiss the petition if it finds that there was collusion in presenting or prosecuting it...[51]

As the Manitoba Law Reform Commission stated:

> Why should interspousal tortious injury cases be singled out for special immunity? In all other areas of law the normal techniques for detecting and punishing fraudulent litigation practices have proved to be effective, and there is no logical reason why personal injury claims arising from interspousal litigation require special additional safeguards, particularly when the safeguards frustrate so many meritorious claims.[52]

An American court stated:

> The courts may and should take cognizance of fraud and collusion when found to exist in a particular case. However, the fact that there may be greater opportunity for fraud or collusion in one class of cases than another does not warrant courts of law in closing the door to all cases of that class. Courts must depend upon the efficacy of the judicial processes to ferret out the meritorious from the fraudulent in particular cases. If those processes prove inadequate, the problem becomes one for the legislature. Courts will not immunize tort feasors from liability in a whole class of cases because of the possibility of fraud, but will depend upon the legislature to deal with the problem as a question of public policy.[53]

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51. The *Divorce Act*, R.S.C. 1970, c.D-8, s.9(1)(b).

52. *Supra*, n.25 at 4.

53. *Borst* v. *Borst*, 41 Wash. 2d 653.

Collusion, then, is properly a matter of evidence, not one of exclusion.

> 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.[54]

In any event, with the abolition of interspousal tort immunity, insurance companies will then be liable for personal injuries or death suffered by one spouse as a result of the other insured spouse's negligence in all instances other than as a passenger. Certainly, there is no merit in the argument that there is more likelihood of collusion between spouses as passengers than between them as driver and pedestrian or as drivers in separate automobiles.

A final argument to be laid to rest is that to extend insurance recovery to family members as passengers would inevitably lead to an increase in insurance rates. Surely the principle of insurance is to spread the costs of loss and to minimize the damage done to individuals who suffer injury. There can be no social justification for laws which deny insurance recovery to persons merely because they are spouses or children of a negligent insured. In any event, the Manitoba Law Reform Commission made enquiries in England and Ontario and concluded that the cost of abolishing their analogous section

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54. Alberta Institute of Law Research and Reform, *supra*, note 33 at 57.

would not be great.[55]

Thus, with no other justification than the fear of possible collusion, it can only be concluded that the exclusion from coverage of family members as passengers must be repealed.

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55. *Supra*, note 25 at 5-7.

V. RECOMMENDATION

The Commission recommends that

> Section 200(b)(i) of *The Saskatchewan Insurance Act*, R.S.S. 1965, c.143, as amended, should be repealed.