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Casenotes: Torts — Domestic Law — Maryland Abrogates Interspousal Immunity in Negligence Cases. *Boblitz v. Boblitz*, 296 Md. 242, 462 A.2d 506 (1983)

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TORTS — DOMESTIC LAW — MARYLAND ABROGATES INTERSPOUSAL IMMUNITY IN NEGLIGENCE CASES. *Boblitz v. Boblitz*, 296 Md. 242, 462 A.2d 506 (1983).

Mrs. Boblitz sued her estranged husband in the Superior Court of Baltimore City¹ to recover damages for injuries she suffered while riding in an automobile negligently driven by him.² The trial judge granted the husband's motion for summary judgment, noting that the wife had no cause of action to sue her husband in tort under Maryland law.³ On appeal,⁴ the Court of Appeals of Maryland reevaluated Maryland's interspousal immunity rule and abrogated it with respect to negligence cases.⁵

The interspousal immunity rule, a product of the common law presumption of the unity of husband and wife, precluded either spouse from bringing a tort action against the other.⁶ At common law, marriage merged the legal existence of the wife into her husband, and she became enveloped under his "cover," subject to the legal disability of coverture.⁷ A wife could make no contracts or be a party to litigation unless jointly with her husband.⁸ Suits between husband and wife were thus precluded since a husband would be both a joint and adverse party in any action.⁹ This judicial bar to a suit by a spouse was applied by a majority of American courts through the first half of the twentieth

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1. Effective January 1, 1983, The Superior Court of Baltimore City became the Circuit Court of Baltimore City.
 2. See *Boblitz v. Boblitz*, 296 Md. 242, 243, 462 A.2d 506, 506 (1983).
 3. *Id.* at 243-44, 462 A.2d at 506.
 4. The court of appeals granted the wife's petition for certiorari prior to consideration by the Court of Special Appeals of Maryland. *Boblitz v. Boblitz*, 296 Md. 242, 242 (1983).
 5. *Id.* at 275, 462 A.2d at 522; see *infra* notes 45 & 51 and accompanying text.
 6. See, e.g., *Thompson v. Thompson*, 218 U.S. 611, 614-15 (1910); *Furstenburg v. Furstenburg*, 152 Md. 247, 249, 136 A. 534, 535 (1927).
 7. See 1 W. BLACKSTONE, COMMENTARIES *442-43; 1 F. HARPER & F. JAMES, THE LAW OF TORTS § 8.10 (4th ed. 1974); W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 122 (4th ed. 1971).
 8. See sources cited *supra* note 7.
 9. W. PROSSER, *supra* note 7, § 122. Dean Prosser explained that:
If the man were the tort-feasor, the woman's right would be a chose in action which the husband would have the right to reduce to possession, and he must be joined as a plaintiff against himself and the proceeds recovered must be paid to him. . . . If the wife committed the tort, the husband would be liable to himself for it, and must be joined as a defendant in his own action.
Id.; see also F. HARPER & F. JAMES, *supra* note 7, § 8.10 (practical inability of spouse to sue spouse at common law). Early decisions also expressed the archaic notion that "it is better to draw the curtain, shut out the public gaze, and leave the parties to forget and forgive," rather than to allow an interspousal suit. *David v. David*, 161 Md. 532, 539, 157 A. 755, 758 (1932) (quoting *State v. Oliver*, 70 N.C. 60 (1873)). This view was supported with the argument that interspousal suits would adversely affect marital unity and harmony. See *infra* note 16. The doctrine of interspousal immunity extended to actions instituted after a divorce, and to those seeking redress for a wrong that occurred before marriage. *Hudson v. Hudson*, 226 Md. 521, 526-27, 174 A.2d 339, 341-42 (1961) (before marriage); *David v. David*, 161 Md. 532, 539, 157 A. 755, 757 (1932) (after divorce).

century.¹⁰

With the passage at the turn of the century of "Married Women's Acts," which generally granted the wife a right to sue or be sued as if she were a "feme sole,"¹¹ a minority of courts found a justification to abrogate interspousal immunity.¹² Most courts, however, held that the acts were not intended to grant a wife the right to sue her husband in tort.¹³ The Supreme Court's decision in *Thompson v. Thompson*,¹⁴ representative of the predominant view, reasoned that if the legislative authors of the Married Women's Act had intended to abrogate the rule, they would have expressly done so.¹⁵ The *Thompson* Court also stated that construing the statute to grant the wife a cause of action would encourage trivial suits and disturb domestic harmony.¹⁶ Further, the Court noted that the wife had sufficient recourse in criminal, divorce, and chancery courts.¹⁷ Courts since *Thompson* have also reasoned that abrogation of the immunity would provide a source for fraudulent claims against insurance companies.¹⁸

After 1970, however, state courts began to abolish interspousal tort immunity despite earlier decisions holding that Married Women's Acts

10. See *Boblitz v. Boblitz*, 296 Md. 242, 276-81, 462 A.2d 506, 522-24 (1983) (listing jurisdictions and status of immunity).

11. These acts were passed in each jurisdiction. F. HARPER & F. JAMES, *supra* note 7, § 8.10; W. PROSSER, *supra* note 7, § 122.

12. *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); *Rains v. Rains*, 97 Colo. 19, 46 P.2d 740 (1935); *Brown v. Brown*, 88 Conn. 42, 89 A. 889 (1914); *Brown v. Gosser*, 262 S.W.2d 480 (Ky. 1953); *Hosko v. Hosko*, 385 Mich. 39, 187 N.W.2d 236 (1971) (court construed a revised statute); *Gilman v. Gilman*, 78 N.H. 4, 95 A. 657 (1915); *Crowell v. Crowell*, 180 N.C. 516, 105 S.E. 206 (1920); *Fitzmaurice v. Fitzmaurice*, 62 N.D. 191, 242 N.W. 526 (1932); *Courtney v. Courtney*, 184 Okla. 395, 87 P.2d 660 (1938); *Pardue v. Pardue*, 167 S.C. 129, 166 S.E. 101 (1932); *Scotvold v. Scotvold*, 68 S.D. 53, 298 N.W. 266 (1941); *Taylor v. Patten*, 2 Utah 2d 404, 275 P.2d 696 (1954); *Richard v. Richard*, 131 Vt. 98, 300 A.2d 637 (1973); *Coffindaffer v. Coffindaffer*, 244 S.E.2d 338 (W. Va. 1978); *Wait v. Pierce*, 191 Wis. 202, 209 N.W. 475 (1926); *cf. Thompson v. Thompson*, 218 U.S. 611, 619-24 (1910) (Harlan, Hughes & Holmes, JJ., dissenting).

13. See *Hudson v. Hudson*, 226 Md. 521, 526, 174 A.2d 339, 341 (1961) (listing authority).

14. 218 U.S. 611 (1910).

15. *Id.* at 618. The *Thompson* Court explained that the District of Columbia Married Women's Act, D.C. CODE ANN. § 1155 (1901), did not allow interspousal suits, but merely allowed a wife to bring tort actions in her own name that at common law could have been brought only jointly with her husband. *Thompson*, 218 U.S. at 617; *see also Furstenburg v. Furstenburg*, 152 Md. 247, 252-53, 136 A. 534, 536 (1927) (adopting *Thompson's* reasoning). The *Thompson* Court's logic is questionable, however, since if the act removed the requirement that the husband be named as joint party, then the practical barrier to interspousal suits disappeared as well. Interspousal suits would no longer force the husband to be both a joint and an adverse party. *See supra* note 9 and accompanying text.

16. See *Thompson*, 218 U.S. at 617-18.

17. *Id.* at 619.

18. See, e.g., *Alfree v. Alfree*, 410 A.2d 161, 163 (Del. 1979); *Raisen v. Raisen*, 379 So. 2d 352, 355 (Fla. 1979).

did not authorize interspousal suits.¹⁹ These later decisions reasoned that the interspousal immunity rule is obsolete and that modern society will not tolerate this remnant of coverture.²⁰ Although two states since 1970 have sustained interspousal immunity,²¹ most states analyzing the issue have abolished the rule. Thus, the minority has become a majority; thirty-six states have abrogated interspousal immunity at least in part.²²

In the first Court of Appeals of Maryland decision to examine interspousal tort immunity,²³ *Furstenburg v. Furstenburg*,²⁴ the court applied the *Thompson* analysis and held that Maryland's Married Women's Act²⁵ could not be construed to allow interspousal tort suits.²⁶ Subsequent decisions by the court of appeals steadfastly followed *Furstenburg* and refused to abrogate interspousal immunity when no express legislative mandate granted the right to interspousal suits.²⁷

19. *Imig v. March*, 203 Neb. 537, 538-39, 279 N.W.2d 382, 383 (1979); *Merenoff v. Merenoff*, 76 N.J. 535, 543, 388 A.2d 951, 955 (1978); *Digby v. Digby*, 388 A.2d 1, 2 (R.I. 1978); *Davis v. Davis*, 657 S.W.2d 753, 756 (Tenn. 1983); *Surratt v. Thompson*, 212 Va. 191, 192, 183 S.E.2d 200, 201 (1971). Maryland joined these states in *Boblitz* by abrogating interspousal immunity despite the court's earlier holding in *Furstenburg v. Furstenburg*, 152 Md. 247, 249, 136 A. 534, 535 (1927), that Maryland's Married Women's Act did not provide for interspousal actions. See *infra* note 26 and accompanying text.

In addition, some states have abolished the rule, at least partially, without analyzing their Married Women's Acts. See *Fernandez v. Romo*, 132 Ariz. 447, 646 P.2d 878 (1982); *Brooks v. Robinson*, 259 Ind. 16, 284 N.E.2d 794 (1972); *Shook v. Crabb*, 281 N.W.2d 616 (Iowa 1979); *MacDonald v. MacDonald*, 412 A.2d 71 (Me. 1980); *Rupert v. Stienne*, 90 Nev. 397, 528 P.2d 1013 (1974); *Maestas v. Overton*, 87 N.M. 213, 531 P.2d 947 (1975); *Bounds v. Caudle*, 560 S.W.2d 925 (Tex. 1977).

20. See *supra* note 19.

21. *Raisen v. Raisen*, 379 So. 2d 352 (Fla. 1979); *Peters v. Peters*, 63 Hawaii 653, 634 P.2d 586 (1981).

22. See *Boblitz v. Boblitz*, 296 Md. 242, 276-81, 462 A.2d 506, 522-24 (1983) (listing states); *Davis v. Davis*, 657 S.W.2d 753 (Tenn. 1983) (decided after *Boblitz*).

23. Interspousal immunity was not limited to tort actions between husband and wife, but extended to actions by a wife against her husband's partnership, *David v. David*, 161 Md. 532, 157 A. 755 (1932), her husband's employer, *Riegger v. Burton Brewing Co.*, 178 Md. 518, 16 A.2d 99 (1940), actions in implied contract, *Gregg v. Gregg*, 199 Md. 662, 87 A.2d 581 (1952), and actions in tortious replevin, *Fernandez v. Fernandez*, 214 Md. 519, 135 A.2d 886 (1957).

24. 152 Md. 247, 136 A. 534 (1927).

25. MD. ANN. CODE art. 45, § 5 (1898) (current version at MD. ANN. CODE art. 45, § 5 (1957 & Supp. 1983)).

26. *Furstenburg*, 152 Md. at 252-53, 136 A. at 535. The *Furstenburg* court stressed that the General Assembly had shown an even stronger intent to preclude interspousal suits than did Congress in enacting the District of Columbia statute. Two years after the enactment of Maryland's first Married Women's Act, the General Assembly passed a second statute that granted to the wife the right to contract and to form a copartnership with her husband, and to sue and be sued upon those contracts and copartnerships. MD. ANN. CODE art. 45, § 20 (1957) (current version). The court reasoned that the second statute would have been superfluous if the General Assembly had intended to allow a wife to sue her husband under the original provisions. *Furstenburg*, 152 Md. at 252, 136 A. at 535-36.

27. See *Stokes v. Association of Indep. Taxi Operators*, 248 Md. 690, 692, 237 A.2d

These decisions reasoned that interspousal tort suits would unnecessarily disrupt home life;²⁸ that the wife had a sufficient remedy;²⁹ that litigation would increase;³⁰ and that abrogation would encourage a surviving spouse to plunder the decedent's estate.³¹

In *Boblitz v. Boblitz*,³² the court of appeals departed from its fifty-six year adherence to *Furstenburg* and abolished interspousal immunity with respect to negligence cases.³³ The *Boblitz* court noted that the use of "interspousal immunity" to describe the ancient bar to suits between husband and wife "border[ed] on mockery."³⁴ The court observed that other courts that had initially supported the doctrine were troubled by their earlier decisions,³⁵ and at least two decisions of the court of appeals expressed misgivings about the rule.³⁶ After examining the decisional law from each jurisdiction,³⁷ the court concluded that interspousal immunity was a "vestige of the past."³⁸ The court found further support for its decision in Maryland's Equal Rights Amendment.³⁹

Boblitz removes the artificial barrier that had prevented married persons from recovering against each other in negligence. The bases for the doctrine of interspousal immunity have long ceased to be via-

762, 763 (1968); *Hudson v. Hudson*, 226 Md. 521, 524-26, 174 A.2d 339, 340-41 (1961); *Ennis v. Donovan*, 222 Md. 536, 543, 161 A.2d 698, 702 (1960); *Fernandez v. Fernandez*, 214 Md. 519, 524, 135 A.2d 886, 888-89 (1957); *Gregg v. Gregg*, 199 Md. 662, 667-68, 87 A.2d 581, 583 (1952); *Riegger v. Burton Brewing Co.*, 178 Md. 518, 521-23, 16 A.2d 99, 100-01 (1940); *David v. David*, 161 Md. 532, 535, 157 A. 755, 756 (1932).

28. Such a suit "would introduce into the home, the basic unit of organized society[,] discord, suspicion and distrust, and would be inconsistent with the common welfare." *David v. David*, 161 Md. 532, 535, 157 A. 755, 756 (1932); *see also* *Riegger v. Burton Brewing Co.*, 178 Md. 518, 522, 16 A.2d 99, 101 (1940) (citing *David*).

29. *David v. David*, 161 Md. 532, 539, 157 A. 755, 758 (1932).

30. *Id.* at 539-40, 157 A. at 758.

31. *Id.* at 540, 157 A. at 758.

32. 296 Md. 242, 462 A.2d 506 (1983).

33. *Id.* at 275, 462 A.2d at 522.

34. *Id.* at 245, 462 A.2d at 507 (emphasis in original).

35. *Id.* at 251, 462 A.2d at 510.

36. *Id.* (citing *Fernandez v. Fernandez*, 214 Md. 519, 135 A.2d 886 (1957); *Gregg v. Gregg*, 199 Md. 662, 666-67, 87 A.2d 581, 582-83 (1952)); *cf.* *Lusby v. Lusby*, 283 Md. 334, 390 A.2d 77 *passim* (1978) (also expressing misgivings about rule).

37. *Boblitz v. Boblitz*, 296 Md. 242, 252-69, 462 A.2d 506, 511-19 (1983). The court grouped the states into three categories: (1) those continuing to recognize interspousal immunity; (2) those abrogating the immunity with respect only to motor torts, all personal injury actions, or intentional torts, and; (3) those fully abrogating immunity. The *Boblitz* court discussed illustrative cases in each group. The court appended to its opinion a list of the principal cases and, in addition, indicated the status of interspousal immunity in 49 states, the District of Columbia, and in admiralty. *Id.* at 276-81, 462 A.2d at 522-24.

38. *Id.* at 273, 462 A.2d at 521.

39. MD. CONST. DECLARATION OF RIGHTS art. 46. "[A]ny ancient deprivation of rights based upon sex would contravene the basic law of this State." *Boblitz*, 296 Md. at 274-75, 462 A.2d at 522.

ble.⁴⁰ Husband and wife are no longer considered by courts to be one entity;⁴¹ the incidents of coverture that gave rise to the doctrine no longer exist. Under modern law, the husband is not forced by an interspousal suit to assume the role of both defendant and joint plaintiff.⁴²

Marital harmony will be left unaffected by the *Boblitz* decision. In Maryland, liability insurance is required for all automobile drivers.⁴³ Interspousal actions involving negligent driving will leave intact the marital harmony existing before the accident, since no animosity between the spouses will result from suits aimed at insurance companies. The *Boblitz* decision is not, however, limited to automobile cases.⁴⁴ Indeed, the decision extends to any instance of negligent conduct between spouses that is not precluded by the "mutual concessions implied in the marital relationship."⁴⁵ Still, medical or homeowner's insurance will provide an additional buffer to preserve marital harmony in cases not involving automobiles.

Even when a defendant/spouse carries no insurance, however, marital harmony will remain unaffected. In the absence of insurance, couples will usually pool their resources to rehabilitate the injured spouse. When a person negligently injures his spouse and refuses to offer financial assistance, there is little harmony in the marriage to preserve.⁴⁶ Any further disruption to the marriage is far outweighed by the need to make the injured person whole.

The abrogation of interspousal immunity is not likely to increase the incidence of fraud. Although the confidential relationship of husband and wife provides a basis for collusion against insurance companies, the adversary system is capable of ferreting out possible fraud cases.⁴⁷ The *Boblitz* court further limits situations in which fraud may occur by requiring that causes of action be judged on a case-by-case

40. See *Davis v. Davis*, 657 S.W.2d 753 *passim* (Tenn. 1983).

41. See, e.g., *Trammel v. United States*, 445 U.S. 40, 44 (1980); *MacDonald v. MacDonald*, 412 A.2d 71, 74 (Me. 1980).

42. See *supra* note 9 and accompanying text.

43. MD. TRANSP. CODE ANN. § 17-103 (1977 & Supp. 1983).

44. Many jurisdictions limit abrogation to motor vehicle torts only. *Rogers v. Yellowstone Park Co.*, 97 Idaho 14, 539 P.2d 566 (1975); *Lewis v. Lewis*, 370 Mass. 619, 351 N.E.2d 526 (1976); *Rupert v. Stienne*, 90 Nev. 397, 528 P.2d 1013 (1974); *Digby v. Digby*, 388 A.2d 1 (R.I. 1978); *Richard v. Richard*, 131 Vt. 98, 300 A.2d 637 (1973); *Surratt v. Thompson*, 212 Va. 191, 183 S.E.2d 200 (1971).

45. *Boblitz*, 296 Md. at 275, 462 A.2d at 522. The court indicated that a case-by-case approach would be taken to determine which actions fall within the "mutual concessions implied in the marital relationship." *Id.* *Boblitz* provides no guidance, however, as to the standards to be employed in determining what mutual concessions are implied in this relationship.

46. Cf. W. PROSSER, *supra* note 7, § 122, at 863 (with respect to intentional torts between spouses, there is no "state of peace and harmony left to be disturbed").

47. See, e.g., *Fernandez v. Romo*, 132 Ariz. 447, 646 P.2d 878 (1982); *Klein v. Klein*, 58 Cal. 2d 692, 376 P.2d 70, 26 Cal. Rptr. 102 (1962); *Brown v. Gosser*, 262 S.W.2d 480 (Ky. 1953); *Merenoff v. Merenoff*, 76 N.J. 535, 388 A.2d 951 (1978); *Immer v. Risko*, 56 N.J. 482, 267 A.2d 481 (1970). When an insurer fears collusion, it may reveal its status in an interspousal suit and treat both spouses as hos-

basis because of the nature of marriage and the mutual concessions it implies.⁴⁸ In addition, insurers may guard against fraud by inserting exculpatory clauses in insurance contracts. Although these clauses may later be held ineffective as a violation of public policy or as unconscionable,⁴⁹ courts have generally upheld these clauses.⁵⁰ Indeed, in applying its holding prospectively,⁵¹ the *Boblitz* court suggests an intention to warn insurers to prepare for the increased litigation that will result from the abrogation of the spousal immunity rule.⁵²

The obsolescence of the interspousal immunity rule serves to defeat the argument of the dissent in *Boblitz*, which asserted that the abrogation of the rule is a legislative function.⁵³ The Court of Appeals of Maryland, which stringently adheres to stare decisis,⁵⁴ has consistently shown its wariness to change a time weathered, judicially created rule when the change has broad public policy implications.⁵⁵ Despite this

tile witnesses so as to use impeachment devices to unearth any fraud. See *Merenoff v. Merenoff*, 76 N.J. 535, 388 A.2d 951 (1978).

48. *Boblitz*, 296 Md. at 275, 462 A.2d at 522.

49. Note, *Interspousal Immunity in Maryland*, 41 MD. L. REV. 181, 189-90 (1981); Note, *Intrafamilial Immunity in New Jersey: Dismantling the Barrier to Personal Injury Litigation*, 10 RUT.-CAM. L.J. 661, 681-83 (1979). For an especially instructive article on exclusion clauses and intrafamilial immunity, see Ashdown, *Intrafamily Immunity, Pure Compensation, and the Family Exclusion Clause*, 60 IOWA L. REV. 239, 254-59 (1974). See generally Annot., 46 A.L.R.3d 1024 (1972) (discussing intrafamilial exclusion clause cases).

50. In *Mutual of Enumclaw Ins. Co. v. Wiscomb*, 25 Wash. App. 841, 611 P.2d 1304 (1980), however, a family exclusion clause in an automobile insurance contract was held invalid as contrary to public policy. The Supreme Court of Idaho, in *Porter v. Farmer's Inc. Co. of Idaho*, 102 Idaho 132, 627 P.2d 311 (1981), rejected *Wiscomb*, reasoning that:

the right to sue a spouse for injuries caused by that spouse is an entirely separate matter from the contractual obligation of an insurance company to pay for those injuries. The fact that there is or is not an insurance policy in force covering an accident does not affect the right of one spouse to sue and obtain a judgment against the other spouse.

Id. at 136, 627 P.2d at 315. Thus, the *Porter* court held that the validity of a contractual exclusion of spousal coverage in an insurance policy was unaffected by the abrogation of interspousal immunity.

51. *Boblitz*, 296 Md. at 275, 462 A.2d at 522. The court stated that the cause of action accrues when the plaintiff discovers that a negligent tort has been committed against him; it excludes actions for torts known to have been committed before the opinion but previously barred by interspousal immunity. *Id.* at 275 n.19, 462 A.2d at 522 n.19.

52. Support for the proposition that the prospective holding is meant as a warning to insurers is found in Greenstone, *Abolition of Intra-Family Immunity*, 7 THE FORUM 82, 87-88 (1972), which the *Boblitz* court referred to in footnote 14. Greenstone notes that the purpose of prospective holdings is to "enable interested parties such as insurance carriers or the insured to be forewarned and be guided accordingly." *Id.* at 88.

53. See *Boblitz*, 296 Md. at 282-88, 462 A.2d at 524-27 (Couch & Rodowsky, JJ., dissenting).

54. See, e.g., *Hauch v. Connor*, 295 Md. 120, 453 A.2d 1207 (1983); *Deems v. Western Md. Ry.*, 247 Md. 95, 231 A.2d 514 (1967); *DeMuth v. Old Town Bank*, 85 Md. 315, 37 A. 266 (1897).

55. See *Harrison v. Montgomery County Bd. of Educ.*, 295 Md. 442, 458-60, 456 A.2d

wariness, the court has been equally adamant in recognizing that "the common law is subject to modification in light of changing conditions or increased knowledge."⁵⁶ Although the General Assembly had failed to act to abolish interspousal immunity, this inaction was by no means conclusive as to the legislative intent to keep the rule intact.⁵⁷ The *Boblitz* majority aptly recognized that it should not defer to the legislature on the issue, one of judicial origin, merely because the General Assembly had addressed the spousal immunity question but had failed to take action.

Although *Boblitz* noted that the interspousal immunity rule is a "rule in derogation of women,"⁵⁸ it is actually twice as harsh as this description. By precluding all suits in tort between spouses, the rule affected married men and women equally.⁵⁹ Thus, although the immunity originated from discrimination against women—the laws of coverture—today the rule discriminates against the class of married persons.⁶⁰ The rule created situations where a married person would

894, 903 (1983) (listing Maryland cases that declined to alter a common law rule because change involved public policy).

56. *Williams v. State*, 292 Md. 201, 438 A.2d 1301 (1981) (modifying common law rule prohibiting defense counsel to waive defendant's right to be present at all stages of trial); *Adler v. American Standard Corp.*, 291 Md. 31, 432 A.2d 464 (1981) (modifying common law "terminable at will" doctrine); *Condore v. Prince George's County*, 289 Md. 516, 425 A.2d 1011 (1981) (abrogating doctrine of necessities); *Pope v. State*, 284 Md. 309, 396 A.2d 1054 (1979) (abolishing crime of misprision of felony).
57. By contrast, the court of appeals recently refused to replace contributory negligence with a comparative negligence doctrine. *Harrison v. Montgomery County Bd. of Educ.*, 295 Md. 442, 456 A.2d 894 (1983). The *Harrison* court deferred to the General Assembly, reasoning that comparative negligence "is not a unitary doctrine, but one which has been adopted in pure or modified form. . . . Whether to adopt either pure or modified comparative fault plainly involves major policy considerations." *Id.* at 462, 456 A.2d at 904.

While the *Boblitz* majority distinguished *Harrison*, the two decisions are difficult to reconcile. States abrogating interspousal immunity have not employed a unitary method. *See supra* note 37. Further, as the dissent noted, the legislature has considered both contributory negligence and interspousal immunity without acting on either. *Boblitz*, 296 Md. at 287, 462 A.2d at 527 (Couch & Rodowsky, JJ., dissenting). Perhaps the discrepancy can be explained by the court of appeals' attitude toward the respective issues. While the court deemed contributory negligence to be viable, *Harrison*, 295 Md. at 463, 456 A.2d at 905, it recognized that interspousal immunity was dated. *Boblitz*, 296 Md. at 273, 462 A.2d at 521.

58. *Boblitz*, 296 Md. at 245, 462 A.2d at 507.
59. This was not so at common law. At common law, the rule operated more harshly against a wife than a husband. Because the husband was likely to control the family funds—only he could contract—interspousal suits were usually attempted only by the wife. *Cf.* W. BLACKSTONE, *supra* note 7, at *442 (explaining husband and wife relationship during coverture). At present, however, since both spouses carry liability insurance or have income, either may attempt to bring suit.
60. Thus the *Boblitz* court's reliance upon article 46 of the Declaration of Rights as support for its decision, *see infra* text at note 39, may be misplaced. An equal protection analysis may perhaps be more appropriate. *But see Palewonsky v. Palewonsky*, 446 F.2d 178, 181-82 (1971) (no equal protection violation since doctrine bore reasonable relation to purpose), *cert. denied*, 405 U.S. 919 (1972); Al-

be injured by the negligence of another and left without remedy, a result that contravenes the very core of the judicial system.

Boblitz has taken a significant step in removing the ancient bar in negligence cases, but the opinion leaves unanswered whether the immunity remains with respect to intentional torts. The court's decision in *Lusby v. Lusby*⁶¹ does not expressly abrogate the rule as to intentional torts, but only as to "outrageous" intentional torts. Although a recent decision by the Court of Special Appeals of Maryland⁶² has construed *Lusby* as sanctioning interspousal claims for all intentional torts,⁶³ there is authority that *Lusby* only permits interspousal suits for *extreme* intentional conduct.⁶⁴ The interspousal immunity is equally outmoded in the context of intentional torts as in negligent torts, and the court of appeals must now clearly establish that interspousal immunity is completely abolished in Maryland.

Brian Seth Jablon

free v. Alfree, 410 A.2d 161, 163 (Del. 1979) (interspousal immunity does not violate equal protection).

61. 283 Md. 334, 390 A.2d 77 (1978).

62. *Bender v. Bender*, 57 Md. App. 593, 471 A.2d 335 (1984).

63. *Id.* at 599-602, 471 A.2d at 338-39.

64. *Harrison v. Montgomery County Bd. of Educ.*, 295 Md. 442, 461 n.12, 456 A.2d 894, 904 n.12 (1982) (*Lusby* modified "the common law rule of interspousal immunity in cases involving extremely outrageous tortious conduct"); Note, *Torts—Interspousal Immunity—Maryland Abrogates Interspousal Immunity in Cases of Outrageous Intentional Torts*, 8 U. BALT. L. REV. 584, 593 (1979) ("The court of appeals in *Lusby* carved out a narrow exception to the doctrine of interspousal immunity in cases of outrageous intentional torts.").