

*Williams v. Martin* will exert only a slight impact on the appointment of experts to assist indigent defendants. Certainly the decision sends a clear signal to state trial judges that, on a proper showing,<sup>53</sup> they must provide expert assistance at an indigent defendant's request. Thus *Williams* should persuade judges to provide experts in cases in which the due process argument is not sufficiently persuasive.<sup>54</sup> The *Williams* rule also will promote the interests of judicial economy and greater efficiency in the criminal process because it will eliminate the need for new trials for indigent defendants denied effective assistance of counsel by a trial court's refusal to provide an expert. Yet the overlap between the equal protection and due process claims at the remedial stage may, in practice, make the *Williams* equal protection analysis superfluous.<sup>55</sup>

TORTS—INTERSPOUSAL IMMUNITY—MAINE ALLOWS SUIT FOR PERSONAL INJURY BETWEEN HUSBAND AND WIFE. *MacDonald v. MacDonald*, 412 A.2d 71 (Me. 1980). In *MacDonald v. MacDonald*<sup>1</sup> a wife sought damages from her former husband alleging that his negligence

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provided an indigent defendant denied effective assistance of counsel, *see* notes 47-51 *supra* and accompanying text, at least one court has indicated that the *Williams* test might produce a broader remedy. In *Pedrero v. Wainwright*, 590 F.2d 1383 (5th Cir.), *cert. denied*, 444 U.S. 943 (1979), the court said that the "decisions in the circuit . . . strongly suggest that prejudice will be presumed if the petitioner shows that the matter on which he needed the assistance of experts was seriously in issue." *Id.* at 1391 n.9. The "seriously in issue" formulation resembles the first tail of the test used in *Williams*: The indigent must show that there is a substantial question which requires expert testimony for its resolution. *See* notes 28, 36 *supra* and accompanying text. If prejudice is presumed once the defendant satisfies the test, the defendant need not demonstrate prejudice independently on appeal absent evidence by the state which rebuts the presumption.

53. *See* notes 27-28 *supra* and accompanying text.

54. *See* notes 18-25 *supra* and accompanying text.

55. While the Fifth Circuit Court of Appeals has intimated that the standard might produce new results, *see* note 52 *supra*, it has not yet so held, and the Fourth Circuit Court of Appeals in *Williams v. Martin*, 618 F.2d 1021 (4th Cir. 1980), refused to extend the doctrine.

In addition, the proliferation of state statutes providing for expert assistance for indigent criminal defendants may diminish the present need to announce another constitutional right. Presently, at least 40 states—including all those within the Fourth Circuit—have provided for state funding of expert assistance for indigents. *See* note 18 *supra*. Because courts should not decide questions of constitutional law if there are other grounds on which a case may be decided, *see* *Ashwander v. TVA*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring), there should be no need for the announcement of another constitutional right absent state standards for invoking the statute that are more stringent than those required by the Constitution.

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1. 412 A.2d 71 (Me. 1980). *Prusinski v. Prusinski*, 412 A.2d 71 (Me. 1980), was decided at the same time on similar facts.

operation of an automobile during their marriage caused her bodily injury.<sup>2</sup> The trial court denied relief by relying on the rule of interspousal tort immunity. On appeal, the Maine Supreme Judicial Court *held*: A person injured by the tortious conduct of a spouse can recover from the tortfeasor in a civil action even though the tortious conduct occurred during the marriage.<sup>3</sup>

The interspousal tort immunity rule originated in the common law of England.<sup>4</sup> The common law considered a husband and wife as a single legal unit.<sup>5</sup> Because procedure compelled joinder of the husband in all legal actions involving his wife, suits between spouses were impossible.<sup>6</sup> In 1876, an English court in *Phillips v. Barnett*,<sup>7</sup> determined that even if the courts resolved the procedural question, the unity of married couples still would preclude suits between spouses.<sup>8</sup> Most American courts adopted the common-law rule of interspousal immunity.<sup>9</sup>

The decline of interspousal immunity began in the mid-1800's with

2. The couple's two unemancipated minor children were also seeking damages. The trial court rejected their claim based on the rule of parental immunity, which was later abrogated in *Black v. Solmitz*, 409 A.2d 634 (Me. 1979).

3. *MacDonald v. MacDonald*, 412 A.2d 71 (Me. 1980).

4. See W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* 859 (4th ed. 1971); McCurdy, *Torts Between Persons in Domestic Relations*, 43 HARV. L. REV. 1030, 1031 (1930) [hereinafter cited as McCurdy, *Torts*]; McCurdy, *Personal Injury Torts Between Spouses*, 4 VILL. L. REV. 303, 304 (1959) [hereinafter cited as McCurdy, *Personal Injury*].

5. See 1 BLACKSTONE, *COMMENTARIES* 442 (1769) which summarizes the common-law view: "By marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband." Cf. W. PROSSER, *supra* note 4, at 859 (arguing that unity was only important in a limited context).

6. See McCurdy, *Torts, supra* note 4, at 1033. The husband had the right to reduce all of the wife's choses in action to possession. If he committed a tort against his wife, he could reduce the chose in action to possession. The union of the right and the duty in the husband would discharge the duty. If the woman committed the tort, the wife's duty would become a derivative duty of the husband's which would be discharged by the union of the right and the duty in the same person.

7. 1 Q.B.D. 436 (1876). In *Phillips* a husband assaulted his wife. After they were divorced, the wife brought a suit for personal injuries. Justice Blackburn wrote:

I was at first inclined to think, having regard to the old procedure and the form of pleas in abatement, that the reason why a wife could not sue her husband was a difficulty as to parties; but I think that when one looks at the matter more closely, the objection to the action is not merely with regard to the parties, but a requirement of the law founded on the principle that husband and wife are one person.

*Id.* at 438.

8. *Id.* at 438.

9. See Comment, *Tort Actions Between Members of the Family—Husband and Wife—Parent and Child*, 26 MO. L. REV. 152, 153 (1961).

the passage of Married Woman's Emancipation Acts in many jurisdictions.<sup>10</sup> By the early 1900's all states had adopted these statutes.<sup>11</sup> The state legislatures intended these acts to allow women to own property.<sup>12</sup> Few statutes expressly addressed the issue of interspousal tort immunity.<sup>13</sup> Some courts, without specific guidance from the legislature, interpreted the statutes to abrogate interspousal immunity.<sup>14</sup> Other courts, however, contended that the statutes did not deal with the immunity rule.<sup>15</sup>

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10. W. PROSSER, *supra* note 4, at 861. McCurdy, *Personal Injury, supra* note 4, summarizes the content of typical statutes:

In most states it is provided that a married woman may (or can or shall) sue (or be sued) as if (or in the same manner as if) single (or unmarried). In some of these states she may sue, or be sued, "separately" or "without joinder of her husband." In some [states] she may sue or be sued in her own name, or alone. . . . Torts may or may not be mentioned. Some statutes expressly include them in general terms; some mention injuries to person and character.

*Id.* at 311.

11. *See* W. PROSSER, *supra* note 4, at 861.

12. *Id.*; Comment, *supra* note 9, at 154.

13. *See, e.g.*, ILL. ANN. STAT. ch. 68, § 1 (Smith-Hurd 1959); N.Y. GEN. OBLIG. LAW § 3-313 (McKinney 1978); N.C. GEN. STAT. § 52-55 (1976); WIS. STAT. § 246.075 (1971). *See also* FLA. STAT. § 708.08 (Supp. 1980); N.H. REV. STAT. ANN. § 460:2 (1968); VA. CODE § 55-36 (1950).

14. *See, e.g.*, Johnson v. Johnson, 201 Ala. 41, 77 So. 335 (1917) (assault and battery); Cramer v. Cramer, 379 P.2d 95 (Alaska 1963) (automobile negligence); Katzenberg v. Katzenberg, 183 Ark. 626, 37 S.W.2d 696 (1931) (automobile negligence); Self v. Self, 58 Cal. 2d 683, 376 P.2d 65, 26 Cal. Rptr. 97 (1962) (assault and battery); Rains v. Rains, 97 Colo. 19, 46 P.2d 740 (1935) (automobile negligence); Brown v. Brown, 88 Conn. 42, 89 A. 889 (1914) (assault and battery); Loranz v. Hays, 69 Idaho 440, 209 P.2d 733 (1949) (false arrest and false imprisonment); Brown v. Gosser, 262 S.W.2d 480 (Ky. 1953) (automobile negligence); Hosko v. Hosko, 385 Mich. 39, 187 N.W.2d 236 (1971) (automobile negligence); Gilman v. Gilman, 78 N.H. 4, 95 A. 657 (1915) (assault); Crowell v. Crowell, 180 N.C. 516, 105 S.E. 206 (1920) (infection with venereal disease); Fitzmaurice v. Fitzmaurice, 62 N.D. 191, 242 N.W. 526 (1932) (automobile negligence); Fiedeer v. Fiedeer, 42 Okla. 124, 140 P. 1022 (1914) (assault with a shotgun); Prosser v. Prosser, 114 S.C. 45, 102 S.E. 787 (1920) (willful beating); Scotvold v. Scotvold, 68 S.D. 53, 298 N.W. 266 (1941) (automobile negligence); Freehe v. Freehe, 81 Wash. 2d 183, 500 P.2d 771 (1972) (negligent maintenance of a tractor); Wait v. Pierce, 191 Wis. 202, 209 N.W. 475 (1926) (automobile negligence).

15. *See, e.g.*, Thompson v. Thompson, 218 U.S. 611 (1910) (assault and battery); Plotkin v. Plotkin, 32 Del. 455, 125 A. 455 (1924) (conversion); Corren v. Corren, 47 So. 2d 774 (Fla. 1950) (automobile negligence); Taylor v. Vezzani, 109 Ga. App. 167, 135 S.E.2d 522 (1964) (personal injuries); Sink v. Sink, 172 Kan. 217, 239 P.2d 933 (1952) (automobile negligence); Austin v. Austin, 136 Miss. 61, 100 So. 591 (1924) (automobile negligence); Rogers v. Rogers, 265 Mo. 200, 177 S.W. 382 (1915) (false imprisonment); State Farm Mut. Auto. Ins. Co. v. Leary, 168 Mont. 482, 544 P.2d 444 (1975) (automobile negligence); Conley v. Conley, 92 Mont. 425, 15 P.2d 922 (1932) (automobile negligence); Emerson v. Western Seed & Irrigation Co., 116 Neb. 180, 216 N.W. 297 (1927) (automobile negligence); Smith v. Smith, 205 Or. 286, 287 P.2d 572 (1955); Lillienkamp v. Rippetoe, 133 Tenn. 57, 179 S.W. 628 (1915) (assault and battery); Rubalcava v. Gisseman, 14 Utah 2d 344, 384 P.2d 389 (1963) (automobile negligence); McKinney v. McKinney, 59 Wyo. 204, 135 P.2d 940 (1943) (automobile negligence).

Most jurisdictions originally refused to allow interspousal suits, but now only sixteen retain the restriction.<sup>16</sup> In those jurisdictions that maintain interspousal immunity, the common-law unity of husband and wife is no longer the primary justification for the rule. Current supporters of the rule contend that it promotes family harmony<sup>17</sup> and prevents the maintenance of frivolous<sup>18</sup> or fraudulent suits.<sup>19</sup> A few

16. See 412 A.2d at 73 n.3. State court decisions that have not abrogated the immunity rule include: *Burns v. Burns*, 111 Ariz. 178, 526 P.2d 717 (1974) (automobile negligence); *Alfree v. Alfree*, 410 A.2d 161 (Del. 1979) (automobile negligence); *Raisen v. Raisen*, 379 So. 2d 352 (Fla. 1979) (automobile negligence); *Taylor v. Vezzani*, 109 Ga. App. 167, 135 S.E.2d 522 (1964) (personal injury); *Tugaeff v. Tugaeff*, 42 Hawaii 455 (1958) (suit between husband and wife not authorized); *Steffa v. Stancey*, 39 Ill. App. 3d 915, 350 N.E.2d 886 (1976) (automobile negligence); *Sink v. Sink*, 172 Kan. 217, 239 P.2d 933 (1952) (personal injury); *Smith v. Farm Bureau Cas. Ins. Co.*, 247 La. 695, 174 So. 2d 122 (1965) (automobile negligence); *McNeal v. Estate of McNeal*, 254 So. 2d 521 (Miss. 1971) (automobile negligence); *Klein v. Aramson*, 513 S.W.2d 714 (Mo. App. 1974) (failure to obtain prompt medical assistance); *Conley v. Conley*, 92 Mont. 425, 15 P.2d 922 (1932) (automobile negligence); *Thomas v. Herron*, 20 Ohio St. 2d 62, 253 N.E.2d 772 (1969) (automobile negligence); *Chaffin v. Chaffin*, 239 Or. 374, 397 P.2d 771 (1964) (automobile negligence); *Wooley v. Parker*, 222 Tenn. 104, 432 S.W.2d 882 (1968) (automobile negligence); *Rubalcava v. Gisseman*, 14 Utah 2d 344, 384 P.2d 389 (1963) (automobile negligence); *McKinney v. McKinney*, 59 Wyo. 204, 135 P.2d 940 (1943) (automobile negligence).

17. Several jurisdictions maintain that the rule promotes family harmony. See, e.g., *Burns v. Burns*, 111 Ariz. 178, 526 P.2d 717 (1974); *Corren v. Corren*, 47 So. 2d 774 (Fla. 1950); *Holman v. Holman*, 73 Ga. App. 205, 35 S.E.2d 923 (1945); *Smith v. Southern Farm Bureau Cas. Ins. Co.*, 247 La. 695, 174 So. 2d 122 (1965); *Lyons v. Lyons*, 2 Ohio St. 2d 243, 208 N.E.2d 533 (1965); *Smith v. Smith*, 240 Pa. Super. Ct. 97, 361 A.2d 756 (1976); *Lillienkamp v. Rippetoe*, 133 Tenn. 57, 179 S.W. 628 (1915); *Rubalcava v. Gisseman*, 14 Utah 2d 344, 384 P.2d 389 (1963).

Critics of the family harmony argument have pointed out the inconsistency of allowing property, divorce, and criminal actions, but denying personal injury actions. See, e.g., *Cramer v. Cramer*, 379 P.2d 95 (Alaska 1963); *Self v. Self*, 58 Cal. 2d 683, 376 P.2d 65, 26 Cal. Rptr. 97 (1962); *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); *Brown v. Gosser*, 262 S.W.2d 480 (Ky. 1953); *Courtney v. Courtney*, 184 Okla. 395, 87 P.2d 660 (1938); *Richard v. Richard*, 131 Vt. 98, 300 A.2d 637 (1973); *Coffindaffer v. Coffindaffer*, \_\_\_ W. Va. \_\_\_, 244 S.E.2d 338 (1978).

Critics also have observed that in most cases family harmony was destroyed before the action was commenced. See, e.g., *Brown v. Brown*, 88 Conn. 42, 89 A. 889 (1914); *Rogers v. Yellowstone Park Co.*, 97 Idaho 14, 539 P.2d 566 (1974); *Merenoff v. Merenoff*, 76 N.J. 535, 388 A.2d 951 (1978); *Freehe v. Freehe*, 81 Wash. 2d 183, 500 P.2d 771 (1972). See generally 1 F. HARPER & F. JAMES, *THE LAW OF TORTS* 646 (1956); W. PROSSER, *supra* note 4, at 863; *McCurdy, Personal Injury, supra* note 4, at 336; *Comment, supra* note 9, at 160; *Comment, Lewis v. Lewis: Dissolving the "Metaphysical" Merger in Interspousal Torts*, 12 NEW ENG. L. REV. 333, 355 (1977); 19 DEPAUL L. REV. 590, 597 (1970).

18. See, e.g., *Thompson v. Thompson*, 218 U.S. 611 (1910); *Corren v. Corren*, 47 So. 2d 774 (Fla. 1950) (en banc); *Immer v. Risko*, 56 N.J. 482, 267 A.2d 481 (1970) (Francis, J., dissenting). But see *Klein v. Klein*, 58 Cal. 2d 692, 376 P.2d 70, 26 Cal. Rptr. 102 (1962); *Mosier v. Carney*, 376 Mich. 532, 138 N.W.2d 343 (1965); *Flores v. Flores*, 84 N.M. 601, 506 P.2d 345 (Ct. App. 1973). See generally *Ashdown, Intrafamily Immunity, Pure Compensation, and the Family Exclusion Clause*, 60 IOWA L. REV. 239, 247 (1974); *McCurdy, Torts, supra* note 4, at 1053.

19. Courts supporting the rule often assert that it prevents fraud. See, e.g., *Thompson v.*

courts assert that alternative remedies, such as criminal or divorce proceedings, are adequate to deal with interspousal torts.<sup>20</sup> Other courts argue that judicial intervention would intrude on the legislature's province if the courts alter the longstanding public policy against interspousal tort suits.<sup>21</sup>

Many jurisdictions, responding to the harshness of a denial of compensation to an injured party, have abolished or developed exceptions

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Thompson, 218 U.S. 611 (1910); *Burns v. Burns*, 111 Ariz. 178, 526 P.2d 717 (1974); *Raisen v. Raisen*, 379 So. 2d 352 (Fla. 1979); *Lyons v. Lyons*, 2 Ohio St. 2d 243, 208 N.E.2d 533 (1965); *Smith v. Smith*, 205 Or. 286, 287 P.2d 572 (1955); *Rubalcava v. Gisseman*, 14 Utah 2d 344, 384 P.2d 389 (1963).

Critics of the fraud argument contend that the judicial system is adequate to detect fraud. *See, e.g., 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); *Brown v. Gosser*, 262 S.W.2d 480 (Ky. 1953); *Beaudette v. Frana*, 285 Minn. 366, 173 N.W.2d 416 (1969); *Rupert v. Stienne*, 90 Nev. 397, 528 P.2d 1013 (1974); *Flores v. Flores*, 84 N.M. 601, 506 P.2d 345 (Ct. App. 1973); *Digby v. Digby*, \_\_\_ R.I. \_\_\_, 388 A.2d 1 (1978); *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*, \_\_\_ W. Va. \_\_\_, 244 S.E.2d 338 (1978).

Critics also have argued that the problem of fraud is not unique to interspousal suits. *See, e.g., Klein v. Klein*, 58 Cal. 2d 692, 376 P.2d 701, 26 Cal. Rptr. 102 (1962); *Brown v. Gosser*, 262 S.W.2d 480 (Ky. 1953); *Rupert v. Stienne*, 90 Nev. 397, 528 P.2d 1013 (1974); *Immer v. Risko*, 56 N.J. 482, 267 A.2d 481 (1970); *Flores v. Flores*, 84 N.M. 601, 506 P.2d 345 (Ct. App. 1973); *Courtney v. Courtney*, 184 Okla. 395, 87 P.2d 660 (1938); *Digby v. Digby*, \_\_\_ R.I. \_\_\_, 388 A.2d 1 (1978); *Freehe v. Freehe*, 81 Wash. 2d 183, 500 P.2d 771 (1972). *See generally* W. PROSSER, *supra* note 4, at 337; Comment, *supra* note 9, at 161; Comment, *supra* note 17, at 341; 19 DEPAUL L. REV. 50, 597 (1970).

20. *See, e.g., Thompson v. Thompson*, 218 U.S. 611 (1910) (divorce and alimony); *Mims v. Mims*, 305 So. 2d 787 (Fla. App. 1974) (divorce); *Austin v. Austin*, 136 Miss. 61, 100 So. 591 (1924) (divorce and criminal actions). *Contra, Johnson v. Johnson*, 201 Ala. 41, 77 So. 335 (1917) (divorce, alimony, and criminal not sufficient); *Mosier v. Carney*, 376 Mich. 532, 138 N.W.2d 343 (1965) (divorce and alimony not sufficient); *Merenoff v. Merenoff*, 76 N.J. 535, 388 A.2d 951 (1978) (criminal, divorce, and private sanctions not sufficient); *Flores v. Flores*, 84 N.M. 601, 506 P.2d 345 (Ct. App. 1973) (divorce and criminal not sufficient); *Crowell v. Crowell*, 180 N.C. 516, 105 S.E. 206 (1920) (criminal not sufficient); *Freehe v. Freehe*, 81 Wash. 2d 183, 500 P.2d 771 (1972) (divorce and criminal not sufficient); *Coffindaffer v. Coffindaffer*, \_\_\_ W. Va. \_\_\_, 244 S.E.2d 338 (1978) (divorce and criminal not sufficient).

21. *See, e.g., Burns v. Burns*, 111 Ariz. 178, 526 P.2d 717 (1974); *Saunders v. Hill*, 57 Del. 519, 202 A.2d 807 (1964); *Fisher v. Toler*, 194 Kan. 701, 401 P.2d 1012 (1965); *McNeal v. McNeal*, 254 So. 2d 521 (Miss. 1971); *Brauner v. Brauner*, 327 S.W.2d 808 (Mo. 1959); *Lyons v. Lyons*, 2 Ohio St. 2d 243, 208 N.E.2d 533 (1965); *Rubalcava v. Gisseman*, 14 Utah 2d 344, 384 P.2d 389 (1963). Modern courts are generally willing to change the rule. *See, e.g., Brooks v. Robinson*, 259 Ind. 16, 284 N.E.2d 794 (1972); *Beaudette v. Frana*, 285 Minn. 366, 173 N.W.2d 416 (1969); *Rupert v. Stienne*, 90 Nev. 397, 528 P.2d 1013 (1974); *Flores v. Flores*, 84 N.M. 601, 506 P.2d 345 (Ct. App. 1973); *Digby v. Digby*, \_\_\_ R.I. \_\_\_, 388 A.2d 1 (1978); *Freehe v. Freehe*, 81 Wash. 2d 183, 500 P.2d 771 (1972).

to the interspousal tort immunity rule.<sup>22</sup> Courts have refused to apply the rule to torts that occurred prior to marriage,<sup>23</sup> suits begun after divorce,<sup>24</sup> cases involving motor vehicle negligence,<sup>25</sup> or intentional torts.<sup>26</sup>

A Maine court first addressed interspousal tort immunity for personal injury in *Abbott v. Abbott*.<sup>27</sup> In *Abbott* a husband assaulted and falsely imprisoned his wife. She brought suit after the couple's divorce. The court, citing common-law unity and public policy considerations, adopted the English common-law rule of interspousal tort immunity.<sup>28</sup> The court reasoned that the wife had an adequate alternative remedy in either a criminal or divorce action.<sup>29</sup> The court found that interspousal

22. See, e.g., *Johnson v. Johnson*, 201 Ala. 41, 77 So. 335 (1917) (assault and battery); *Cramer v. Cramer*, 379 P.2d 95 (Alaska 1963) (automobile negligence); *Katzenbach v. Katzenbach*, 183 Ark. 626, 37 S.W.2d 696 (1931) (automobile negligence); *Klein v. Klein*, 58 Cal. 2d 692, 376 P.2d 70, 26 Cal. Rptr. 102 (1962) (negligent maintenance of boat deck); *Rains v. Rains*, 97 Colo. 19, 46 P.2d 740 (1935) (automobile negligence); *Brown v. Brown*, 88 Conn. 42, 89 A. 889 (1914) (assault and battery); *Lorang v. Hays*, 69 Idaho 440, 209 P.2d 733 (1949) (false arrest and false imprisonment); *Brooks v. Robinson*, 259 Ind. 16, 284 N.E.2d 794 (1972) (automobile negligence); *Brown v. Gosser*, 262 S.W.2d 480 (Ky. 1953) (automobile negligence); *Hosko v. Hosko*, 385 Mich. 39, 187 N.W.2d 236 (1971) (automobile negligence); *Beaudette v. Frana*, 285 Minn. 366, 173 N.W.2d 416 (1969) (automobile negligence); *Gilman v. Gilman*, 78 N.H. 4, 95 A. 657 (1915) (assault); *Merenoff v. Merenoff*, 76 N.J. 535, 388 A.2d 951 (1978) (negligent use of hedge trimmer); *Maestas v. Overton*, 87 N.M. 213, 531 P.2d 947 (1975) (aircraft negligence); *State Farm Mut. Auto. Ins. Co. v. Westlake*, 35 N.Y.2d 587, 324 N.E.2d 137, 365 N.Y.S.2d 482 (1974) (automobile negligence); *Crowell v. Crowell*, 180 N.C. 516, 105 S.E. 206 (1920) (infection with venereal disease); *Fitzmaurice v. Fitzmaurice*, 62 N.D. 191, 242 N.W. 526 (1932) (automobile negligence); *Courtney v. Courtney*, 184 Okla. 395, 87 P.2d 660 (1938) (automobile negligence); *Prosser v. Prosser*, 114 S.C. 45, 102 S.E. 787 (1920) (willful beating); *Scotvold v. Scotvold*, 68 S.D. 53, 298 N.W. 266 (1941) (automobile negligence); *Freehe v. Freehe*, 81 Wash. 2d 183, 500 P.2d 771 (1972) (negligent maintenance of a tractor); *Coffindaffer v. Coffindaffer*, \_\_\_ W. Va. \_\_\_, 244 S.E.2d 338 (1978) (automobile negligence); *Zelinger v. State Sand & Gravel Co.*, 38 Wis. 2d 98, 156 N.W.2d 466 (1968) (automobile negligence).

23. See, e.g., *Gaston v. Pittman*, 224 So. 2d 326 (Fla. 1969); *Packenhams v. Miltmore*, 89 Ill. App. 2d 452, 232 N.E.2d 42 (1967); *O'Grady v. Potts*, 193 Kan. 644, 396 P.2d 285 (1964); *Hamilton v. Fulkerson*, 285 S.W.2d 642 (Mo. 1955); *Childress v. Childress*, 569 S.W.2d 816 (Tenn. 1978).

24. See, e.g., *Windauer v. O'Conner*, 107 Ariz. 267, 485 P.2d 1157 (1971); *Grenmillon v. Caffey*, 71 So. 2d 670 (La. App. 1954); *Turner v. Turner*, 487 Pa. 403, 409 A.2d 412 (1979).

25. See, e.g., *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*, \_\_\_ R.I. \_\_\_, 388 A.2d 1 (1978); *Richard v. Richard*, 131 Vt. 98, 300 A.2d 637 (1973).

26. See, e.g., *Lusby v. Lusby*, 283 Md. 334, 390 A.2d 77 (1978); *Apitz v. Dames*, 205 Or. 242, 287 P.2d 585 (1955); *Bounds v. Caudle*, 560 S.W.2d 925 (Tex. 1977).

27. 67 Me. 304 (1877).

28. *Id.* at 307.

29. *Id.*

tort suits might impair family harmony,<sup>30</sup> create a flood of litigation,<sup>31</sup> and destroy the finality of divorce actions.<sup>32</sup> The Maine courts also have refused to allow suits between husband and wife on promissory notes,<sup>33</sup> misuse of trust funds,<sup>34</sup> costs in defending a suit,<sup>35</sup> personal services,<sup>36</sup> and negligent use of an automobile.<sup>37</sup>

In 1963 the Maine courts began to move away slowly from the interspousal tort immunity rule. In *Bedall v. Reagan*<sup>38</sup> the court held that a third party could implead a husband in a suit instituted by his wife. The court reasoned that the public policy of compensating those harmed by others outweighed policy considerations inherent in the interspousal tort immunity rule.<sup>39</sup>

Ten years later, a Maine court created a second exception to the interspousal tort immunity rule. In *Moulton v. Moulton*<sup>40</sup> the court allowed a wife to sue her husband for a tort, which occurred before their marriage. The court reasoned that the parties' knowledge of the existence of the tort at marriage ameliorated the danger to family harmony.<sup>41</sup> *Moulton* also rejected the risk of fraudulent suits as a serious countervailing policy factor.<sup>42</sup>

In *MacDonald v. MacDonald*<sup>43</sup> the court decided that changes in social conditions since *Abbott*<sup>44</sup> rendered the common-law doctrine of interspousal tort immunity obsolete.<sup>45</sup> The court reaffirmed the *Bedall*<sup>46</sup> and *Moulton*<sup>47</sup> reasoning that the harm of leaving a wrong uncompensated outweighed the possibility of domestic discord.<sup>48</sup> The court re-

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30. *Id.* at 308.

31. *Id.*

32. *Id.*

33. *Perkins v. Blether*, 107 Me. 473, 78 A. 574 (1911) (husband immune to suit from third party assignee of wife's note); *Crowther v. Crowther*, 55 Me. 358 (1868).

34. *Anthony v. Anthony*, 135 Me. 54, 188 A. 724 (1937).

35. *Smith v. Gorman*, 41 Me. 405 (1856).

36. *Copp v. Copp*, 103 Me. 51, 68 A. 458 (1907).

37. *Sacknoff v. Sacknoff*, 131 Me. 280, 161 A. 669 (1932) (reaffirming unity doctrine).

38. 159 Me. 292, 192 A.2d 24 (1963).

39. *Id.* at 297, 192 A.2d at 26.

40. 309 A.2d 224 (Me. 1973).

41. *Id.* at 229.

42. *Id.*

43. 412 A.2d 71 (Me. 1980).

44. 67 Me. 304 (1877).

45. 412 A.2d at 72.

46. 159 Me. 292, 192 A.2d 224 (1963).

47. 309 A.2d 224 (Me. 1973).

48. 412 A.2d at 73 (citing *Bedall v. Reagan*, 159 Me. 292, 192 A.2d 24 (1963)).

jected the risk of fraudulent suits as a rationale for retaining the rule by finding that the judicial system can detect most fraudulent suits.<sup>49</sup> The *MacDonald* court also contended, as in *Bedall* and *Moulton*, that the courts have an affirmative duty to update prior holdings.<sup>50</sup>

*MacDonald* justifiably rejects the public policy arguments traditionally advanced to support the interspousal tort immunity rule. The policies of protecting family harmony,<sup>51</sup> and limiting frivolous<sup>52</sup> or fraudulent<sup>53</sup> suits are not adequate to justify its retention.

Allowance of interspousal tort suits will not seriously harm family harmony. In many cases family harmony already has been destroyed by the date that suit is filed.<sup>54</sup> All states allow actions between spouses on property-related torts with no apparent adverse effect on spousal relations.<sup>55</sup> In addition, most interspousal tort suits arise out of the negligent use of an automobile. The almost universal existence of automobile liability insurance assures that most interspousal suits actually will be maintained between a spouse and an insurance company, thus limiting the risk of disturbing family harmony.<sup>56</sup>

Allowing interspousal tort suits will not increase the number of frivolous suits, although spouses may bring suit on common and unimportant occurrences.<sup>57</sup> Courts, however, can detect frivolous suits regardless of the relationship between the parties.<sup>58</sup> Furthermore, in those states that have abrogated the interspousal immunity rule, frivo-

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49. *Id.* (citing *Moulton v. Moulton*, 309 A.2d 224 (Me. 1973)).

50. 412 A.2d at 74 (citing *Lewis v. Lewis*, 370 Mass. 619, 351 N.E.2d 526 (1976)).

51. See note 17 *supra* and accompanying text.

52. See note 18 *supra* and accompanying text.

53. See note 19 *supra* and accompanying text.

54. See *Brown v. Brown*, 88 Conn. 42, 89 A. 889 (1914); *Roger v. Yellowstone Park Co.*, 97 Idaho 14, 593 P.2d 566 (1974).

55. See *Richard v. Richard*, 131 Vt. 98, 300 A.2d 637 (1973).

56. See *id.* Some courts and scholars have expressed a concern that any decrease in the risk of disturbing family harmony created by insurance is accompanied by an increase in the risk of fraud. See, e.g., *Raisen v. Raisen*, 379 So. 2d 352 (Fla. 1979); *Smith v. Smith*, 205 Or. 286, 287 P.2d 572 (1955); *Ashdown*, *supra* note 18, at 249.

Courts that have abrogated the interspousal immunity rule contend that fraud is not unique to interspousal suits and that the judicial system can detect fraud. See note 19 *supra* and accompanying text. On the effects of insurance, see generally *Ashdown*, *supra* note 18; James, *Accident Liability Reconsidered: The Impact of Liability Insurance*, 57 YALE L.J. 549 (1948).

57. See *Corren v. Corren*, 47 So. 2d 774 (Fla. 1950) (en banc) (indicating relationship between frivolous suits and family harmony).

58. See *Ashdown*, *supra* note 18. *Ashdown* states that "the frivolous suit argument presents no substantial difficulties since behavior which might otherwise be deemed to provide adequate grounds for imposing liability is often simply not 'unreasonable' when viewed in the context of a



lous suits have not posed a significant problem to the courts.<sup>59</sup>

Although abrogation of interspousal tort immunity may increase the risk of fraudulent suits, courts regularly must discern the fraudulent nature of many types of suits.<sup>60</sup> The risk of fraud, therefore, does not justify denying compensation to an entire class of litigants.<sup>61</sup>

Alternative remedies are inadequate forms of compensation for an injured spouse.<sup>62</sup> Alimony is intended only to discharge a duty of support, not to compensate tort victims.<sup>63</sup> Criminal sanctions deal solely with a public wrong,<sup>64</sup> providing no compensation for the victim.

Judicial abrogation of interspousal tort immunity rules will not conflict with legislative preeminence in public policymaking.<sup>65</sup> Because courts promulgated most interspousal tort immunity rules,<sup>66</sup> they clearly enjoy the power and the duty to change these outmoded rules.<sup>67</sup>

The *MacDonald* decision is a step forward in modernizing the tort law field. Interspousal tort immunity is no longer appropriate because it frustrates the societal goal of compensating those harmed by others while contributing only slightly to the goals of protecting family harmony and limiting frivolous or fraudulent suits.

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family relationship." *Id.* at 247. See also W. PROSSER, *supra* note 4, at 863; McCurdy, *Torts*, *supra* note 4, at 1035.

59. See *Klein v. Klein*, 58 Cal. 2d 692, 694, 376 P.2d 70, 72, 26 Cal. Rptr. 102, 104 (1962).

60. *Id.*

61. *Id.*

62. See, e.g., *Mosier v. Carney*, 376 Mich. 532, 138 N.W.2d 343 (1965); *Flores v. Flores*, 84 N.M. 601, 506 P.2d 345 (Ct. App. 1973).

63. 376 Mich. at 547, 138 N.W.2d at 346.

64. 84 N.M. at 603, 506 P.2d at 347.

65. See, e.g., *Digby v. Digby*, \_\_\_ R.I. \_\_\_, 388 A.2d 1 (1978).

66. See, e.g., *Brauner v. Brauner*, 327 S.W.2d 808 (Mo. 1959).

67. In *Digby v. Digby* the Rhode Island Supreme Court stated, "[W]e abdicate our own function, in a field peculiarly nonstatutory, when we refuse to consider a court-made rule." \_\_\_ R.I. at \_\_\_, 388 A.2d at 2. *Accord*, *Brooks v. Robinson*, 259 Ind. 16, 23, 284 N.E.2d 794, 796 (1972) ("[c]ourt should not hesitate to alter, amend or abrogate the common law"); *Lewis v. Lewis*, 370 Mass. 619, 628, 351 N.E.2d 526, 531 (1976) ("a court not only has the authority but also the duty to reexamine its precedents"); *Mosier v. Carney*, 376 Mich. 532, 543, 138 N.W.2d 343, 344 (1965) ("it is our duty to reexamine it and, if necessary to avoid continuing injustice, to change it"); *Rubert v. Stienne*, 90 Nev. 397, 399, 528 P.2d 1013, 1014 (1974) ("the doctrine is subject to amendment, modification, and abrogation if current conditions so dictate").