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Backgrounder

LRC 62—Report on Interspousal Immunity in Tort

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At common law, a husband and wife were regarded as one person, and the legal existence of the wife, during the marriage, was regarded as merged into that of the husband. Two rules arose from this. First, a tort committed by one spouse against the other could not be a source of liability, and, second, neither spouse could sue the other during marriage, regardless of when the suit was instituted, even if after the divorce.

In 1887, a *Married Women's Property Act* was enacted in British Columbia which modified the common law. The Act abolished the common law procedural rule requiring a husband to be joined in as a party to an action or other legal proceedings brought by or taken against the wife. A further key change in the Act gave a married woman the same remedies as an unmarried woman for the protection of her separate property. Significantly, however, the Act reaffirmed the common law position that no husband or wife could sue the other for a tort.

At the time of the report, the *Married Women's Property Act* was substantially the same as on its date of enactment.¹ It was anachronistic, complex, and riddled with anomalies. A wife could not sue her husband for false imprisonment, malicious prosecution, deceit, fraudulent conspiracy, libel, assault, or personal injuries caused by her husband's negligence. A wife could, however, during her marriage, sue her husband for injury caused to her by his negligence before marriage. A wife could also sue her husband in tort for the protection and security of her property, but no such exception is created in favour of married men.

Having concluded that the law was out of date, the report then moves on to look at the issue of reform. The question posed is whether to approach reform on the same basis as that adopted in other jurisdictions, namely outright abolition of the immunity rule, or whether reform should attempt to correct the more obvious difficulties and anomalies in the present law. In order to answer this question, the report examines a number of arguments that have been advanced in support of retention of the rule. These include the contention that

1. The Act was repealed in 1985: see *Charter of Rights Amendments Act, 1985*, S.B.C. 68, s. 84.

abolition of the rule would affect domestic harmony in the home, the suggestion that an insured spouse would benefit from their own wrong, the belief that the rule prevents collusion and fraud between spouses where there is insurance, and the fear that there would be a large increase in motor vehicle claims which might lead to an increase in premiums. The report concludes that none of these arguments are particularly persuasive and that outright abolition is the better option.

The final part of the report sets out the recommendations of the Project Committee. It also addresses a number of consequential reforms that would be required to the *Negligence Act* and insurance legislation.

Further Developments

The report's recommendations were implemented by *Charter of Rights Amendments Act, 1985*, S.B.C. 1985, c. 68, ss. 50–53, 79, 83, 98 [now see *Law and Equity Act*, R.S.B.C. 1996, c. 253, s. 60].