



**THE LAW REFORM COMMISSION
OF WESTERN AUSTRALIA**

Project No 32

**The Immunity of Suit Between
Husband and Wife**

REPORT

SEPTEMBER 1973

TO: THE HON. T. D. EVANS, M.L.A.
ATTORNEY GENERAL.

TERMS OF REFERENCE -

1. The Commission was asked to consider and report on the law as to the immunity of suit between husband and wife.

PRESENT LAW IN WESTERN AUSTRALIA

2. The only area where the right of one spouse to sue the other is restricted is in tort. The law in this respect is that, subject to the exceptions listed in the next paragraph, no husband or wife is entitled to sue the other for a tort (s.12 of the *Married Women's Property Act 1892*). Immunity from suit for a tort committed during marriage remains after the marriage has been terminated (*Salaman v. Salaman* [1923] N.Z.L.R. 300).

3. There are three statutory exceptions to this immunity -

- (a) section 12 of the *Married Women's Property Act 1892* gives the wife a remedy in tort against her husband for the protection and security of her property;
- (b) section 6A of the *Motor Vehicle (Third Party Insurance) Act 1943*, inserted in 1966, provides in substance that, where a person causes or contributes to bodily injury to his or her spouse by negligence in the use of a motor vehicle and that person is insured under the Act, the injured spouse has the same right of action in respect of that injury as if they were not husband and wife;
- (c) section 55(1) of the Commonwealth *Matrimonial Causes Act 1959* enables either party to sue the other in tort while a decree of judicial separation is in operation.

THE LAW AND PROPOSALS FOR REFORM ELSEWHERE

4. Immunity of suit in tort between husband and wife has been abolished in -

England: *Law Reform (Husband and Wife) Act 1962*

New Zealand: *Matrimonial Property Act 1963*, s.4

Tasmania: *Married Women's Property Act 1965*, s. 4

Queensland: *The Law Reform (Husband and Wife) Act of 1968*

Victoria: *Marriage (Liability in Tort) Act 1968*

Australian Capital Territory: *Married Persons (Torts) Ordinance 1968*

Northern Territory: *Married Persons (Torts) Ordinance 1969*

South Australia: *Statutes Amendment (Law of Property and Wrongs) Act 1972*, s.13.

5. In all the above jurisdictions, except Victoria, the Australian Capital Territory and the Northern Territory, the court has been given a discretion to stay an action in tort between a husband and wife if no substantial benefit would accrue to either party from continuation of the proceedings or if the issue could more conveniently be dealt with on an application under statutory provisions which are similar to s.17 of the *Married Women's Property Act 1892* of this State. Under this section, the court is empowered to decide any question between husband and wife as to ownership or possession of property.

6. The Ontario Law Reform Commission in its *Report on Family Law, Part I, Torts* (Department of Justice, 1969, Ch. III) has recommended the abolition of immunity in tort between husband and wife, without the inclusion of a stay of proceedings provision. A similar recommendation has also been made by the Manitoba Law Reform Commission in its *Report on the Abolition of Inter-Spousal Immunity in Tort* (Report No.10, 1972).

WORKING PAPER AND COMMENTS THEREON

7. The Commission issued a working paper on 29 June 1973.

8. The Commission expressed the view in the working paper that immunity of action between spouses in tort should be abolished, and that it was not necessary to empower the court to stay any such action, as had been done in some jurisdictions (see paragraph 5 above).

9. The following is an extract from the working paper setting out the arguments in favour of abolition -

"7. Historically, immunity of suit in tort was based on the legal concept that husband and wife are one person. This concept has long since disappeared from the law. Reasons which may be advanced nowadays for retaining immunity are -

- (a) that giving the spouses a right to sue each other in tort could harm domestic relations;
- (b) that, where insurance is involved, collusion between the spouses could occur, resulting in fraudulent claims.

8. Neither reason is convincing. The fact that one spouse wants to sue the other is evidence that, except where insurance is involved, there is little domestic harmony to preserve. In any case, as Fleming in *The Law of Torts* (4th ed., 1971, p. 592) points out, this reason was never credited with sufficient weight for the law to prohibit actions between parent and child. In regard to the fear of collusion in insurance claims, it should be noted that the Legislature has already given a spouse a right to sue the other for an injury arising out of a motor vehicle accident, where the real object of the spouse is to claim against the Insurance Fund. [see paragraph 3(b) of this report].

9. The present law discriminates against husbands. Under s.12 of the *Married Women's Property Act* a wife can sue her husband in respect of her own property but a husband has no similar right in respect of his. Furthermore, since a right to sue for a tort has been held to be "property" (*Curtis v. Wilcox* [1948] 2 K.B. 474; [1948] 2 All E.R. 573), a wife is also entitled to sue her husband for a tort committed before marriage. A husband has no similar right.

10. Immunity of suit in tort can also be unjust to third parties. This is because under s.7 of the *Law Reform (Contributory Negligence and Tortfeasors' Contribution) Act 1947*, one tortfeasor can claim contribution from another only if the latter is capable of being sued by the person to whom the wrong has been done (and see *Chant v. Read* [1939] 2 K.B. 346; [1939] 2 All E.R. 286). Thus, except in the situations referred to in

paragraph 3 [of the working paper, which is the same as paragraph 3 of this report] , a third party jointly responsible with the husband for injury to the wife can be sued by the wife for the full amount of her loss, but will not be able to claim contribution from the husband".

10. In suggesting that it was unnecessary to empower the court to stay proceedings, the Commission pointed out that under the present law the court cannot restrain proceedings by the wife for the protection of her own property nor proceedings in an action between spouses for breach of contract, and there seems no reason to treat actions in tort differently.

11. Copies of the paper were sent to the -

Chief Justice and Judges of the Supreme Court
Judges of the District Court
Law Society of Western Australia
Magistrates' Institute
Law School of the University of Western Australia
Solicitor General
Under Secretary for Law
Motor Vehicle Insurance Trust
Citizens Advice Bureau of W.A.
Community Welfare Department
other law reform Commissions and Committees.

A notice was placed in *The West Australian* inviting anyone interested to obtain a copy of the paper, and to submit comments to the Commission.

12. Comments on the working paper were received from the Director of the Citizens Advice Bureau of W.A., the Council of the Law Society and the Director of the Community Welfare Department. All agreed with the Commission's proposal.

RECOMMENDATION

13. The Commission recommends that immunity of action between spouses in tort should be completely abolished. *

14. The Commission noted in the working paper that complete abolition of the immunity would indirectly add to the rights of a spouse to claim against the Insurance Fund under the *Motor Vehicle (Third Party Insurance) Act*. Recovery from the Fund is dependant on the claimant having the right to sue the person responsible for the accident, and s.6A of that Act (see paragraph 3(b) above) falls short of giving a spouse a right to sue the other spouse in two circumstances. No right of action is given if the passenger-spouse died as a result of the accident, nor if the driver-spouse was uninsured. If the Commission's recommendation in the previous paragraph is adopted, these limitations would no longer exist.

ACTING CHAIRMAN:

MEMBER:

20 September 1973.

* The Chairman of the Commission, Mr Rowland, was present during the discussion and agreed with the conclusion reached, but was absent when this report was signed.