

For Better or Worse — 'Til Death Do Us Part

*Douglas Baek\**

INTRODUCTION

Is change really good? There comes a point in the path of judicial review when the process goes too far – far beyond the scope of what the judiciary is meant to reach. When this happens, there is a grave danger of unbalancing the fine equilibrium that exists between the coordinate branches of government. The Legislative branch makes the laws, the Executive branch enforces those, and the Judicial branch receives its validity by interpreting (as opposed to making) those laws. *Stare decisis*, the doctrine of following prior case precedent, is the best tool for the Judiciary to use in earning trust and establishing credibility for consistency in its rulings.

The doctrine of interspousal immunity was established through *stare decisis* as a ban on interspousal tort actions in marital relations. The marriage contract unites husband and wife as one legal entity. Bringing an action of interspousal tort, therefore, can arguably be viewed as an action against oneself (which is illogical) as well as a violation of the right to protect oneself from self-incrimination (granted by the Fifth Amendment of the United States Constitution). In the Maryland case of *Bozman v. Bozman*, a court went too far beyond its power and failed to take into consideration the very delicate factors of marriage. Consequently, the last strand of hope for legally honoring the institute of marriage was lost in its ruling.

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## BACKGROUND

The *Bozman* case opinion comes from the Maryland state court system. William Bozman, the plaintiff, was married to Nancie Bozman, the defendant, in the state of Maryland on August 16, 1968. William initiated a divorce on February 24, 2000 on the grounds of adultery. William and Nancie Bozman were divorced on March 12, 2001. However, the issue that brought William and Nancie to court was the course of events that took place during the actual divorce process.

On January 20, 2001, just months before the completion of the divorce, William filed a complaint in the Circuit Court for Baltimore County. William claimed that Nancie falsely accused him of “stalking, harassment and multiple counts of violation of a Protective Order.”<sup>1</sup> These allegedly fraudulent charges occurred in three separate instances. In all three occurrences, William was incarcerated and put on house arrest. William claimed the following:

The charges [by Nancie against William] were brought without probable cause, were deliberately fabricated to ensure that [William] would be arrested, and were in retaliation for [William’s] initiation of the divorce proceedings and his unwillingness to make concessions in those proceedings.<sup>2</sup>

Nancie moved to dismiss the complaint on the grounds of interspousal immunity. She argued that she had the right to claim interspousal immunity, thus prohibiting her spouse William from filing any tort claims against her. The trial court “granted the respondent’s Motion to Dismiss [on the grounds of interspousal immunity].”<sup>3</sup> William filed an amended complaint, and Nancie, again, moved to dismiss this claim, relying on interspousal immunity.

William contested Nancie’s interspousal immunity defense by citing the Maryland state court precedent found in *Lusby v. Lusby* (1978). The *Lusby* court had ruled that “[i]nterspousal immunity was not a defense to a tort action between spouses where the conduct constituting the tort was ‘outrageous [and] intentional.’”<sup>4</sup> William alleged that Nancie’s malicious prosecution, leading to

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<sup>1</sup> *Bozman v. Bozman*, 830 A.2d 450, 451 (Md. Ct. Appl. 2003).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Lusby v. Lusby*, 390 A. 2d 77, 77 (Md. Ct. Appl. 1978).

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his incarceration and subsequent house arrest where he was required to wear an ankle brace for eight months, was in fact an “outrageous and intentional” tort not protected under the interspousal immunity defense. The trial court ruled in Nancie’s favor and granted her motion to dismiss the case. This trial court based its ruling solely on the interspousal immunity doctrine.

William did not wait long to file an appeal. The Court of Special Appeals sympathized with William, claiming that the doctrine of interspousal immunity was an “antiquated doctrine [that] runs counter to present-day norms.”<sup>5</sup> However, the Court of Special Appeals ruled in favor of Nancie, the defendant, writing:

Without minimizing in any way the harsh consequences to [William] wrought by [Nancie’s] behavior in this case, we cannot say that it is of comparable character to that addressed by the [c]ourt in *Lusby*. Appellee’s actions in the instant case no doubt caused [William] to suffer significant humiliation and hardship. But they did not involve extreme violence of the most personal and invasive sort, the threat of death and a display of the means by which to carry out that threat, or the physical and psychic trauma that the victim in *Lusby* endured. We conclude, therefore, that the conduct that underlies [William’s] claim of malicious prosecution is not, in and of itself, indicative of the sort of outrageous conduct contemplated by the *Lusby* exception to interspousal immunity.<sup>6</sup>

This ruling by the Court of Special Appeals brings us to the appellate decision at hand. William appealed to the Maryland Court of Appeal, seeking a specific determination as to whether the interspousal immunity doctrine should continue to be applied in the state of Maryland.

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<sup>5</sup> *Bozman*, 830 A.2d at 452.

<sup>6</sup> See *id.* at 452-53.

## LEGAL STANDARD

### *General Legal Standard*

In the state of Maryland, the common law doctrine of “interspousal immunity” allows the defendant spouse in an interspousal tort action to dismiss all claims. This means that even if a defendant is absolutely guilty of tort against the plaintiff (his or her spouse), the defendant is immune from any civil liability. A narrow exception to the doctrine was created by the Maryland court in the *Lusby* case, providing that interspousal tort actions identified as being “outrageous” or “intentional” could not be dismissed on interspousal immunity grounds.<sup>7</sup>

### *Application to Bozman Case*

The issue presented in *Bozman* was whether or not the common law doctrine of interspousal immunity in Maryland should continue as a viable defense to interspousal tort actions. Interspousal immunity is a part of the common law in Maryland that had never been codified by the state legislature. However, due to the court’s consistency of allowing interspousal immunity in judicial rulings, this common law doctrine carried as much weight as any other law in the state of Maryland. This all changed suddenly, when the *Bozman* Court felt the need to abrogate this “antiquated doctrine” of interspousal immunity, claiming it to be unfit for the present-day social norms of Maryland.<sup>8</sup> The *Bozman* Court gave three principle reasons for the abrogation of interspousal immunity.

First, the *Bozman* Court ruled that allowing the use of interspousal immunity infringes on the civil rights of all men and women to “redress and [be compensated] for personal injuries.”<sup>9</sup> While marriage is indeed important, the *Bozman* Court felt that the importance of marriage is an insufficient reason to deny a person of their his or her civil rights. The *Bozman* Court felt that one’s civil rights should be preserved even during marriage. However, the

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<sup>7</sup> *Lusby*, 390 A.2d at 77.

<sup>8</sup> *Bozman*, 830 A.2d at 452.

<sup>9</sup> *Id.* at 463.

Court saw that the interspousal immunity doctrine of Maryland was denying all men and women of this privilege.

This brought the *Bozman* Court to the second reason in support for the abrogation of interspousal immunity. Interspousal immunity was a doctrine that existed under common law in Maryland. By definition, a “common law” is a latent rule that becomes law due to long-standing practice as the accepted model of behavior of the society. Most of the common law doctrines found throughout the United States are of British origin and predate even the U.S. Constitution. In this case, however, the *Bozman* Court took the duty upon itself to reexamine and “determine the common law as it exists in this state.”<sup>10</sup> In other words, the *Bozman* Court now viewed the doctrine of interspousal immunity in Maryland, which had survived decades of judicial scrutiny, as having outlived its usefulness. The *Bozman* Court determined that the modern social norm of Maryland revealed that the people of Maryland desired the abrogation of the interspousal immunity doctrine.

Lastly, the *Bozman* Court used persuasive authority a form of support its decision to abrogate interspousal immunity. Although persuasive authority is not binding in any manner, courts often use the persuasive authority of sister courts to support their judgment when no contrary binding authority can be found; this was the case in *Bozman*. By this time, all 49 states other than Maryland had fully or partially abrogated the doctrine of interspousal immunity. It is not a mere coincidence that courts in other states had already nullified the interspousal immunity doctrine. When direct case precedent is lacking, persuasive authority in can serve as a great support of a given court (in this case *Bozman* Court) ruling.

The *Bozman* Court made its final verdict in favor of the plaintiff, William Bozman. Justice Bell, writing the opinion of the Court, wrote the following:

The overwhelming weight of authority supports the petitioner’s argument that the interspousal immunity doctrine should be abrogated. Joining the many of our sister States that have already done so, we abrogate the interspousal immunity rule, a

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<sup>10</sup> *Id.* at 454.

vestige of the past, whose time has come and gone, as to all cases alleging an intentional tort.<sup>11</sup>

Going strictly on the wording of the Court's ruling, one may argue that there is room for interspousal immunity in cases where the tort was *unintentional*. However, the Court was clear in setting a guideline for future courts of Maryland to follow. From this point on, the use of interspousal immunity has been abrogated in the state of Maryland.

*Application of Legal Standard in Other Cases*

The *Bozman* Court believed it was justified in ruling to abrogate interspousal immunity in Maryland. However, some courts would disagree, and give support for the continual acknowledgement of the doctrine. In *Lyons v. Lyons* (1965), Justice O'Neill of the Ohio Supreme Court stressed the value of marriage, and ruled in favor of allowing interspousal immunity as a defense for the defending spouse in an interspousal tort action. In his opinion, Justice O'Neill wrote:

The public policy of this state is to promote marital harmony. Encouraging litigious spouses tends to foster marital disharmony. If a husband and wife are free to sue each other for real or fancied wrongs, this will place an additional burden upon the marriage relationship, and the home may well be split apart by the adversary roles which the spouses will be required to assume.<sup>12</sup>

Justice O'Neill was primarily concerned with the disruption of harmony in the marriage if one spouse was legally permitted to sue the other. After all, marriage is an institution initiated by both the husband and wife. If there is a lack of harmony between the two parties, it would be implausible to have a marriage altogether.

Justice O'Neill was also adamant about the "danger of fraud or collusion between the spouses in such suits against each other, where insurance

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<sup>11</sup> *Id.* at 471. It can be noted that the Court specifically refers to "intentional" tort claims here; intentional torts can often be distinguished from tort claims based on negligence.

<sup>12</sup> *Lyons v. Lyons*, 208 N.E. 2d 533, 535 (Sup. Ct. OH. 1965).

is involved.”<sup>13</sup> In *Lyons*, the husband had been injured in an automobile accident where his wife was the driver of the vehicle. The husband sued the wife’s insurance company for his injuries, which thereby made the wife the defendant in the resulting civil lawsuit. Justice O’Neill argues that when a victory for the plaintiff benefits the defendant, it serves as ‘a strong inducement [for the defendant] to trump up claims and conceal possible defenses [because] the risk of loss is removed, and both spouses stand to gain [economically] from a decision adverse to the defendant.’<sup>14</sup> It comes as no surprise that such a scenario is likely to occur when a lawsuit benefits both the husband and wife and a judgment for the plaintiff would lead to a monetary benefit for both.

The judgment was in favor of the defendant in the *Lyons* case, using interspousal immunity. In ruling on this case, Justice O’Neill wrote:

This court is not convinced that a useful purpose would be served in overthrowing the rule of interspousal immunity from suit so well established in a majority of jurisdictions in this country. If there is to be a change in the public policy of the state in this regard, it should come from the General Assembly.<sup>15</sup>

Justice O’Neill felt that even if interspousal immunity were to be abrogated, the *Court* did not have the jurisdiction to do so. The *Lyons* Court did not pursue this separation of powers argument much further, but rather accepted the doctrine of interspousal immunity.

Fast-forward almost fifteen years and we come to the Florida Supreme Court decision in *Raisen v. Raisen and Insurance Company of North America* (1979). Mrs. Raisen sued Mr. Raisen’s insurance company for injuries caused by Mr. Raisen’s negligent driving. The *Raisen* Court was asked to determine the following:

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<sup>13</sup> *Id.*

<sup>14</sup> See *id.* at 535-36.

<sup>15</sup> See *id.* at 536-37.

Does the doctrine of interspousal immunity preclude a tort action between husband and wife in all cases or will such an action lie if it is alleged and proven that none of the traditional reasons supporting interspousal immunity are applicable?<sup>16</sup>

The *Raisen* Court's opinion by Justice Alderman also upheld the doctrine of interspousal immunity in favor of Mr. Raisen.

The *Raisen* Court was primarily concerned with dangers similar to those mentioned by the *Lyons* Court. Justice Alderman acknowledged the fact that "with widespread insurance coverage, the probability of collusion and fraud is increased [and] unquestionably, an adversary tort contest between spouses will have an upsetting effect on domestic tranquillity."<sup>17</sup> Much like the *Lyons* court, the *Raisen* court valued the tranquillity and harmony of marriage above all else, and also took a precautionary measure to protect insurance companies from being fraudulently sued.

The second issue that faced the *Raisen* Court was the idea that the Married Women's Property Act prevented defending spouses from using interspousal immunity as their defense. Justice Alderman eloquently rejected this claim and wrote:

The so-called emancipation act did not so affect the marriage relation that the husband and wife were thenceforward permitted to go their separate ways, but instead were still mates residing in a common home, each making in his own way a contribution to the marriage venture.<sup>18</sup>

Justice Alderman stressed the idea that husband and wife are joined in marriage; even if their assets are viewed as separate, it does not mean that they are not still considered united through marriage. After all, that unity of marriage is what the law recognizes in terminology such as *Mr.* and *Mrs.* Raisen.

Ultimately, the *Raisen* court ruled that upholding interspousal immunity in marriage is the only way to insure harmony in marriage and prevent possible fraudulent claims that may arise from a spouse suing the

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<sup>16</sup> *Raisen v. Raisen and Insurance Company of North America*, 379 So. 2d 352, 353 (Sup. Ct. FL. 1979).

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 354.



other's insurance company for monetary gain both spouses will enjoy. Justice Alderman expressed this point best when he wrote:

We expect too much of human nature if we believe that a husband and wife who sleep in the same bed, eat at the same table, and spend money from the same purse can be truly adversary to each other in a lawsuit when any judgment obtained by the plaintiff spouse will be paid by an insurance company and will ultimately benefit both spouses ... [so] Florida's solution to this dilemma since 1829 has been interspousal tort immunity. This is still a viable solution.<sup>19</sup>

This statement by Justice Alderman assumes that human nature defines a person to be self-seeking. It is a bold statement, but not a false one. Justice Alderman was right to assume that human nature causes the great danger of fraudulent monetary gain if such fraud is legally permitted.

## ANALYSIS

### *Marital Relations*

The *Bozman* Court erred in abrogating the doctrine of interspousal immunity from the common law of Maryland. The Court boldly claimed that the use of interspousal immunity somehow infringes on the civil rights of all men and women to "redress and [be compensated] for personal injuries."<sup>20</sup> This is a valid point. However, the *Bozman* Court overlooked one crucial fact: marriage, by definition, is a contract that binds man and wife as one legal entity. This means that from the point the man and the woman say "I do" at the altar, they are no longer considered two completely separate entities. Arguably, this could be viewed as one of the reasons why spouses have special legal privileges that even a father and son may lose once the son reaches adulthood.

Viewed as one entity under the law, it can be argued that a married couple receives a special privilege under the Fifth Amendment of the

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<sup>19</sup> *Id.* at 355

<sup>20</sup> *Bozman*, 830 A.2d at 463.

Constitution. Under this amendment, one is protected from self-incrimination, which means that one is not required to testify or admit to guilt in a manner that might legally incriminate him or her. Therefore, an action of interspousal tort is nothing more than an action against oneself. Not only does it not make any sense to bring an action of tort against oneself, but also it is protected against by the 5<sup>th</sup> Amendment.

Abrogating interspousal immunity also equates to the courts nullifying of the term “interspousal” altogether. An interspousal relationship is a special and delicate coexistence that cannot be interrupted by interspousal tort actions. A spouse filing a tort action against the other spouse would surely disrupt any harmony that uniquely exists in every interspousal relation. This argument of preserving harmony in a marriage was well expressed in both the *Lyons* and *Raisen* opinions.

The *Bozman* Court criticized this point by stating that the inability to bring an action of interspousal tort would, in fact, disrupt the “harmony even more”.<sup>21</sup> However, the *Bozman* Court erred in making this hasty observation. A legal claim in tort is no place to turn to when resolving an interspousal dispute. Just having the option of filing legal action against the other spouse creates the possibility of inflating a small problem into an unnecessary catastrophe. When it is impossible to preserve the marriage by working out the dispute internally, the parties may first need to admit that they need to consider divorce, thereby involving the courts in a different manner. However, filing an action for interspousal tort while hanging on to hopes of preserving the marriage is not realistic. Both of these events cannot occur together without upsetting the delicate harmony of interspousal relations.

#### *Limits on Judicial Power*

These are some of the reasons why courts in Maryland upheld the common law doctrine of interspousal immunity over the years. Every court will agree that *stare decisis* (i.e. respect for the rules laid down in past judicial decisions) is a vital component of the American legal system. Not only does *stare decisis* promote an “evenhanded, predictable, and consistent development of legal principles, [it also fosters] reliance on judicial decisions.”<sup>22</sup> It is of

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<sup>21</sup> *Id.* at 462.

<sup>22</sup> *Bozman*, 830 A.2d at 469.

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utmost importance for the general public to have a sense of trust and reliability on the judiciary. Without the courts' regular exercise of *stare decisis*, citizens would be left to guess as to what is accepted behavior under the common law.<sup>23</sup>

This is an important reason to respect *stare decisis* and maintain the common law doctrine of interspousal immunity unless the doctrine is abrogated legislatively. It is not appropriate for the *Bozman* Court to make such a ruling and abrogate the doctrine. Interspousal immunity was an element of the common law that had been accepted by the people of Maryland for generations. Cases were determined by this doctrine; therefore, in order for such an abrogation of interspousal immunity to occur, the legislature must step in to make that change. This is the duty of the legislature, not the judiciary. Maryland's Chief Justice Murphy in *Harrison v. Montgomery County Board of Education* (1983) explained this point best when he wrote:

When called upon, as here, to overrule our own decisions, consideration must be given to the doctrine of stare decisis – the policy which entails the reaffirmation of a decisional doctrine of an appellate conclusion. Under the policy of stare decisis, ordinarily... changes in decisional doctrine are left to the Legislature.<sup>24</sup>

It is very clear where Chief Justice Murphy stood as far as the jurisdiction of the court is concerned. Justice Murphy continued:

Legislative history demonstrates that since 1959 the legislature has considered the matter [of interspousal immunity] seven times without enacting any abrogation legislation. This history suggests to me that this is not simply a circumstance of non-action by the legislature but, indeed, one of positive action, i.e., rejection, for whatever reason, of efforts to abrogate the immunity rule.<sup>25</sup>

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<sup>23</sup> The same argument might hold true under statutory law as well, to the extent that citizens are aware of changes in the law by hearing about court decisions rather than by reading specific statutes.

<sup>24</sup> *Harrison v. Montgomery County Board of Education*, 456 A.2d 894, 902-03 (Md. Ct. Appl. 1983).

<sup>25</sup> *Id.* at 904.

The fact that the Maryland Legislature did not dissolve interspousal immunity the seven times it was previously suggested proves that the Legislature does not want to remove it. Thus, it would be erroneous for the *Bozman* Court, as a judicial body, to “speak on behalf of the people of Maryland” and say otherwise.

This separation of legislative and judicial powers was set up by the framers of the federal and state constitutions to ensure the checks and balances government. If the *Bozman* Court oversteps its boundaries and begins changing laws at its own discretion, the state runs the danger of creating a breeding ground for Judicial Supremacy. When this occurs, there will not be a branch of government capable of monitoring the actions of the Judiciary.

*Suggested Reform*

Interspousal immunity must be preserved. However, in order to eliminate the grounds for challenging the constitutionality and usefulness of this doctrine, a slight modification may be necessary. Undeniably, the civil courts should not entertain any forms of interspousal tort; however, the involvement of the courts may be valuable in another way. It is not suggested that tort actions between spouses will not be allowed, rather the tort action could not be filed so as long as the plaintiff and defendant are still married. A party should utilize the same allegations of tortious behavior as the grounds to file for divorce and receive a divorce instead. Courts should give special priority to such divorce cases that are based on otherwise tortious behavior.

A successful divorce does not have to stop there. In addition to having the interspousal tortious behavior serve as the grounds for divorce, a divorcee should then have the legal ability to sue the ex-spouse on the same tort claim once the marriage has been dissolved. The appropriate limitation period for filing the tort action can be tolled for the duration of the divorce proceedings. Afterward, without a contract of marriage and if the complaining spouse still seeks legal redress, the respondent would be held liable under the applicable personal injury laws.

This proposal provides several benefits in response to the concerns raised by the courts. The risk of having fraudulent claims of personal injury filed by a bitter ex-spouse will be deterred through the strict and severe repercussion given to false claims. Legitimate tort claims can be addressed by

the legal system. In fact, serious torts can be addressed by the courts and less-than-serious torts (in other words, torts that the complaining spouse does not view as significant grounds for divorce) would be left for informal resolution between the spouses. Finally, this proposal truly respects the civil rights and the marital privacy of the parties involved since the determination as to the “seriousness” of the dispute and the propriety of allowing for judicial intervention rests with the complaining spouse rather than the *Bozman* Court.<sup>26</sup>

## CONCLUSION

Change may bring about benefits to society, but consistency is a preferred choice for the judiciary. Times have changed viewpoints and the law has certainly changed as well. However, the U.S. Constitution that has been functioning for over 200 years has never been abrogated. Only twenty-seven amendments have been made to fit the modern-day social norms and views of the people that live by it. Judicial abrogation of long-standing legal doctrine, based on nothing more than the views of a handful of judges as to the “changing norms” of society, and – in this case – even running counter to the decisions of the legislature, is a very dangerous proposition.

The doctrine of interspousal immunity should not have come to such an abrupt end in the judicial system. It is this doctrine that allows the heart of marriage to survive in our modern day world. With few modifications and omissions, the harmony in marriage can be best preserved by allowing spouses to choose between marriage and divorce, rather than by allowing an over-reaching court to suddenly change the rules of marriage altogether.

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<sup>26</sup> Recall that the *Bozman* Court somehow felt comfortable speaking on behalf of the normative expectations of modern Maryland citizens, even though its conclusions were at odds with the decisions of Maryland’s elected legislative representatives. The danger in such an outcome cannot be overlooked.