Intrafamily Tort Immunity in Virginia: A Doctrine in Decline

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Tort actions by one family member against another have not always been allowed by courts in the United States. Initial recognition of interspousal and parental immunity from suit was based on traditional concepts of family relations reflected in the common law. As the passage of time altered the popular view of these family relations, the common law bases for the immunities lost credibility. The immunities doctrine itself, however, retained vitality, with public policy considerations supplanting the traditional common law rationales.

Through the years, legislative and judicial action modified the family immunities doctrine such that tort actions between family members are permitted now in most instances. The extent to which particular jurisdictions are willing to entertain such suits varies. This Note will explore the history of interspousal and parental immunities in Virginia, the present status of those immunities doctrines, and the relation of the Virginia position on the doctrine to that of other states. Finally, this Note will offer recommendations for a strictly limited application of family immunity in Virginia and propose methods for dealing with the consequences of almost total abrogation of the doctrine.

**INTERSPOUSAL IMMUNITY**

_The Common Law Background_

At common law, the husband and wife were considered one;¹ their separate identities merged upon marriage. This legal identity of husband and wife presented both a substantive and a procedural bar to suits between the two. The wife was considered incapable of suing or being sued in her own name;² therefore, the law required that the husband be joined with her in any suit at law.³ Thus, in any action between husband and wife, a suit would be procedurally untenable because the husband would have to be both plaintiff and

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¹ W. Blackstone, Commentaries* 442. "At common law husband and wife were, for the most part, regarded as one, and that one was the husband." Keister's Adm'r. v. Keister's Ex'rs., 123 Va. 157, 176, 96 S.E. 315, 321 (1918) (Burks, J., concurring).
³ For a discussion of the married woman's separate estate in equity, see McCurdy, Torts Between Persons in Domestic Relation, 43 Harv. L. Rev. 1030, 1035-36 (1930),
defendant. Similarly, because one cannot assert a cause of action against himself in either tort or contract, the view of husband and wife as a single entity formed a substantive bar to suit during coverture.

The exact origin of common law immunity between husband and wife is uncertain, but several sources have been credited with influencing the development of the doctrine. The Bible, the belief in the position of the pater-families in Roman law, the natural law conception of the husband as head of the family, and the traditions of feudalism, all played a role in developing the common law view of the husband’s subsuming the wife’s identity in the marital relation. Whatever its source, the doctrine of interspousal immunity became firmly embedded in the common law, and remained unchallenged in the United States until the age of the emancipation of women. Indeed, the common law traditions presented a formidable obstacle to the struggle to expand the rights of married women. Slowly, however, those traditions began to give way.

The Married Woman’s Property Acts

In the mid-nineteenth century, state legislatures began to remedy the disabilities of married women. The Married Woman’s Property Acts were designed primarily to secure to a married woman a separate legal identity and a separate legal estate in her own property. Few of these statutes expressly dealt with the question of one spouse’s ability or right to sue another; therefore, the early attacks on interspousal immunity focused on statutory interpretation.

Despite the opportunity to construe the statutes as permitting ac-

7. See Phillips v. Barnet, 1 Q.B.D. 436 (1876) (holding that no action could be brought after divorce by a former wife against her former husband for alleged assaults and batteries committed during coverture).
8. For a detailed study of the disabilities affecting married women at common law, see McCurdy, supra note 3, at 1031-35.
10. For a collection of the statutes of the various jurisdictions, see 3 C. VERNIER, AMERICAN FAMILY LAWS §§ 167, 179, 180 (1935). For a classification of the various types of statutes, and their effects on procedure and available remedies, see McCurdy, supra note 3, at 1037.
tions by a wife against her husband, the early cases demonstrated an inclination to defer to the wisdom of the common law and to deny such actions. Consequently, the Married Woman's Property Acts, although freeing married women from the disabilities of the common law in many areas, did little to hasten the demise of the doctrine of interspousal immunity for personal torts.

In 1910, the United States Supreme Court addressed the scope of the emancipation acts in Thompson v. Thompson. Called upon to interpret the Married Woman's Act of the District of Columbia, the Court stated that "[t]he statute was not intended to give a right of action as against the husband, but to allow the wife, in her own name, to maintain actions of tort which at common law must be brought in the joint names of herself and her husband." Thus, the wife could not bring an action against her husband for injuries sustained from an assault and battery. The Court grounded its decision on such policy factors as the danger of false accusations by one spouse against the other, the undesirability of public notice of domestic quarrels, and the necessity of deferring to legislative intent. In addition, the Court noted that the wife had adequate remedies in the criminal and divorce courts. The Court's respect for tradition and its appreciation of the likely impact of permitting the action were implicit in the statement that "such radical and far-
reaching changes should only be wrought by language so clear and plain as to be unmistakable evidence of the legislative intention."\textsuperscript{19} The construction of the statute in \textit{Thompson} and the rationale upon which the decision was based were to become cited frequently as precedent for the denial of similar actions. The ringing dissent of Justice Harlan in \textit{Thompson} is noteworthy.\textsuperscript{20} Harlan felt that the statute destroyed "the unity of the marriage association as it had previously existed"\textsuperscript{21} and that the husband no longer should be exempted from liability for torts against his wife. In addition, Harlan underscored the contradiction inherent in allowing suits between spouses based on torts against property, but denying such actions when the tort was against the person.\textsuperscript{22} Harlan's dissent, in which Justices Holmes and Hughes joined, has become the foundation for arguments of courts and commentators advocating the abrogation of interspousal immunity for personal torts.\textsuperscript{23}

\textbf{Public Policy Supplants Common Law Traditional Grounds for Interspousal Immunity}

Although the Married Woman's Property Acts presented the first challenges to the tort defense of interspousal immunity, the passage of time further eroded the legal fiction of marital identity upon which the doctrine had been grounded. As equality between men and women became a concern of the law, the legal identity of husband and wife became a less satisfactory rationale for denying actions between spouses. Accordingly, the courts found new justifications for adhering to an old rule. Public policy became the rallying ground for supporters of the rule of interspousal immunity.\textsuperscript{24} Among the policy arguments used

\textsuperscript{19} \textit{Id.} at 618. This is an expression of the traditional view that statutes in derogation of the common law should be construed strictly; however, the court in \textit{Thompson} ignored the equally familiar maxim that remedial statutes should be liberally construed.

\textsuperscript{20} \textit{Id.} at 619 (Harlan, J., dissenting).

\textsuperscript{21} \textit{Id.} at 622 (Harlan, J., dissenting).

\textsuperscript{22} "I cannot believe that [Congress] intended to permit the wife to sue the husband separately, in tort, for the recovery . . . of her property, and at the same time deny her the right to sue him, separately, for a tort committed against her person." \textit{Id.} at 623 (Harlan, J., dissenting).

\textsuperscript{23} W. PROSSER, LAW OF TORTS § 122 (4th ed. 1971).

\textsuperscript{24} See, \textit{e.g.}, Corren v. Corren, 47 So. 2d 774 (Fla. 1950); Poling v. Poling, 116 W. Va. 187, 179 S.E. 604 (1935). \textit{But} see Meisel v. Little, 407 Pa. 546, 550, 180 A.2d 772, 774 (1962)
to support interspousal immunity were the fear of collusive suits against insurers, the danger of the destruction of domestic tranquility, the existence of adequate remedies in the divorce and criminal laws, and the judicial reluctance to encourage actions born of trivial marital disputes. Stare decisis and the desirability of deferring decisions in derogation of the common law to the legislature were additional bases for judicial resistance to abrogating the immunities doctrine. Relying on these policy arguments, the majority of jurisdictions continued to recognize interspousal immunity despite the decline of the legal fiction of marital identity.

Virginia's Position on Interspousal Immunity

The Supreme Court of Virginia was an early adherent to the common law rule that a married woman could not contract with her husband and that neither spouse could sue the other at law. Virginia thus aligned itself with the majority of jurisdictions upholding the immunity on the basis of the legal fiction of marital identity. Similarly, like most other states, Virginia reacted to the changing status of the American woman in the late nineteenth century by enacting a Married Woman's Act. Predictably, however, the Vir-

(Musmanno, J., dissenting). Alluding to denial of interspousal actions in which the defendant has liability insurance, Judge Musmanno stated: "I believe that there is really something against public policy in a doctrine which holds that the head of a family may protect the whole world against his negligence except those he loves most and are wholly dependent upon him for maintenance and substance." Id. at 550, 180 A.2d at 781 (Musmanno, J., dissenting).


27. For early criticism of the immunity doctrine, see McCurdy, supra note 9; Sanford, Personal Torts Within the Family, 9 VAND. L. REV. 823 (1956).


30. For a collection of cases following the majority rule, see Comment, Tort Actions Between Members of the Family—Husband & Wife—Parent & Child, 26 Mo. L. Rev. 152, 156 n.24 (1961).

31. "At common law husband and wife were, for the most part, regarded as one, and that one was the husband." Keister's Adm'r. v. Keister's Ex'rs., 123 Va. 157, 176, 96 S.E. 315, 321 (1918) (Burks, J., concurring).

32. 1876-77 Va. Acts, ch. 329. The current version of the Married Woman's Act in Virginia is at VA. CODE §§ 55-35 to 37. VA. CODE § 55-35 reads in pertinent part: A married woman shall have the right to acquire, hold, use, control and dispose of property as if she were unmarried . . . . But neither her husband's right to
Virginia Supreme Court's construction of this statute fell far short of total abrogation of interspousal immunity.33 Early decisions construing the Virginia Married Woman's Act held that the effect of the act was to allow the wife to hold property and to contract regarding that property,34 but not to permit the wife to sue her husband for personal torts.35

The first case squarely testing the effect of Virginia's Married Woman's Act on personal tort actions between spouses was Keister's Administrator v. Keister's Executors.36 Keister remains the benchmark decision for advocates of interspousal immunity in Virginia. In Keister, a wrongful death action was brought by the wife's administrator against the executors of the husband's estate. In deciding whether a wrongful death action was available, the court looked to the Married Woman's Act37 to determine whether the wife could have brought the action against her husband had she survived. The sole issue was whether the Married Woman’s Act abrogated the common law rule of immunity with respect to personal torts.38

33. "But when once this idea of legal unity has been so far severed that she may contract and be contracted with, as under this married woman's act she clearly may, we can perceive no valid reason why she may not as well sue her husband as another at law upon any contract made with him after the passage of the act." Alexander v. Alexander, 85 Va. 353, 366, 7 S.E. 335, 340 (1888) (citations omitted). See also Edmonds v. Edmonds, 139 Va. 652, 124 S.E. 415 (1924) (allowing a wife's action for unlawful detainer); Norfolk & W.R. Co. v. Dougherty, 92 Va. 372, 23 S.E. 777 (1895) (dismissing suit on basis that the husband was not a proper party because the wife's estate is separate by reason of the Married Woman's Act). But see Hirth v. Hirth, 98 Va. 121, 34 S.E 964 (1900) (holding that a married woman is, as at common law, incapable of making a contract unless she owns a separate estate at the time the contract is made).

34. See text accompanying notes 12 & 13 supra.


36. Id.

37. POLLARD'S CODE OF VIRGINIA § 2286a (1899-1900). The statute is very similar to the modern version. See note 32 supra.

38. The Legislature is presumed to have known and to have had the common law in mind in the enactment of the statute; and the statute will be construed to read as if the common law remained unchanged . . . unless the purpose of
Applying traditional rules of statutory construction, the court concluded that the statute had not conferred such a right of action upon the wife either expressly or by necessary implication. Rejecting the contention that a cause of action was created impliedly, the court found that if the legislature had intended to effect such a drastic change in the law, it would have expressed such an intent in the statute. The court noted that the legislature intended “merely to enlarge the remedies of married women with respect to other substantive rights of theirs existing at common law,” but that no right or cause of action was created where none had existed previously. Finding the Virginia Married Woman’s Act entirely consistent with the common law, the court left undisturbed the common law disability of one spouse to sue another.

In a concurring opinion in Keister, Justice Burks voiced many of the traditional concerns of the judiciary regarding the sanctity of marriage. He stated that “[u]pon the preservation of [marriage’s] integrity the health, morals and purity of the state is dependent.” Justice Burks also maintained that the obligations of marriage “forbid the idea that this ‘one flesh’ may so divide itself that either spouse may sue the other.” Expressing some of the policy reasons supporting immunity, such as the danger of opening the courts to the public airing of domestic differences and the existence of sufficient safeguards in the criminal and divorce courts, Justice Burks joined the majority of the court in refusing to expand

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39. 123 Va. at 162, 96 S.E. at 317.
39. Id. at 173, 96 S.E. at 321.
40. Id. at 163, 96 S.E. at 317.
41. Id. at 170, 96 S.E. at 318.
42. The court in Keister followed the reasoning of the California Supreme Court in the case of Peters v. Peters, 156 Cal. 32, 103 P. 219 (1909). In Peters, the wife maintained that her right to sue her husband in tort was her property and that the California Married Woman’s Act, very similar to Virginia’s act, gave married women complete property rights. The court concluded, however, that this argument merely begged the question, because the wife would have property only if the right to sue was held to exist.
Also, to hold that the Married Woman’s Act gave the wife the right to sue her husband in tort would create a problem because no corresponding legislation gave the husband the same right.
43. 123 Va. at 176, 96 S.E. at 321 (Burks, J., concurring).
44. Id. at 176, 96 S.E. at 322 (Burks, J., concurring).
45. Id. at 177, 96 S.E. at 322 (Burks, J., concurring).
46. Id.
The doctrine of interspousal immunity in Virginia received additional support in *Floyd v. Miller.* Floyd presented the issue of whether a husband could collect money from a damage recovery fund held by a committee for his mentally defective wife for expenses incurred by the husband for hospital and medical attention for his wife. Strictly adhering to the common law view of marital identity and the narrow construction of the Married Woman’s Act in *Keister,* the Supreme Court of Virginia held that the husband could not bring such an action against his wife. The court combined the common law rule that hospital and medical services were necessities for which the husband was liable and the portion of the Married Woman’s Act which provided that a married woman’s property should not be available to pay the debts of her husband. The court held that the latest amendment to Virginia’s Married Woman’s Act was “wholly devoid of implication or suggestion that any part of the damages recoverable by the wife is to be held by her for her husband’s benefit, nor is any substantive right to maintain an action against his wife therefor created therein for the husband through implication or otherwise.”

The next significant challenge to interspousal tort immunity in Virginia came in 1952 in *Furey v. Furey.* In Furey, a wife brought an action against her husband for injuries sustained in an automobile accident occurring before their marriage. Refusing to create an exception for torts committed before marriage, the court held that “the rule of the common law [was] that all liability for antenuptial torts is extinguished by marriage.” The court added that the same factors which prohibited a husband and wife from suing each other for torts occurring during marriage applied to torts committed before marriage. In so stating, the Supreme Court of Virginia ex-

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47. “[T]o warrant a holding that either spouse may sue the other for slander, libel or assault, the language of the statute should be so plain that there could be no room for difference of opinion on the subject.” *Id.*


49. *Id.* at 306, 57 S.E.2d at 115. The harshness of this decision is evidenced by the prompt action of the General Assembly in overturning the result. 1950 Va. Acts, ch. 281. The statute now allows expenses incurred from the wife’s injuries to be chargeable against any judgment she recovers.

50. 190 Va. at 309, 57 S.E.2d at 117.


52. *Id.* at 730, 71 S.E.2d at 192.

53. *Id.* at 733, 71 S.E.2d at 194-95.
tended its decision in *Keister* to torts committed before the marriage, justifying the upholding of immunity with a blend of common law fictions and public policy factors.

**Long-Recognized Exceptions to Interspousal Immunity in Virginia**

Despite the support for the immunity doctrine in *Furey* and previous cases, courts in Virginia uniformly recognized the right of one spouse to sue the other in particular fact situations. For example, a wife could recover death benefits as a partial dependent of her deceased son despite the fact that the son's employer was her husband.\(^5^4\) The courts also recognized the right of husband and wife to enter into an enforceable contract,\(^5^5\) and to sue each other for torts against property.\(^5^6\)

In Virginia, the keynote case allowing interspousal suits for torts against property is *Vigilant Insurance Co. v. Bennett*.\(^5^7\) In that case, the sole issue was whether an insurance company, as subrogee of the husband’s rights, could maintain an action against the policy holder’s wife. Although the court followed precedent by allowing the action to lie,\(^5^8\) the decision supplied a careful analysis of the common law principles supporting interspousal immunity and the effect of the Married Woman’s Act on these principles. The court listed

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\(^5^4\) Glassco v. Glassco, 195 Va. 239, 77 S.E.2d 843 (1953). The court emphasized, however, that this was not really an abrogation of the immunity because such an action was “not one to recover damage for a wrong, for the employer’s liability is not based upon tort.” *Id.* at 241, 77 S.E.2d at 844 (citations omitted). The court simply held that the Virginia Workmen’s Compensation Act makes no exception based on a family relationship between employer and employee. *Id.* at 245, 77 S.E.2d at 846.


\(^5^6\) Edmonds v. Edmonds, 139 Va. 652, 124 S.E. 415 (1924). The court stated that the Virginia Married Woman’s Act “has gone as far as the statute of any other state with respect to the rights of married women.” *Id.* at 657, 124 S.E. at 416. This contention seems doubtful, however, because some states construed their Emancipation Acts as creating a cause of action between the husband and wife for personal torts. See, e.g., Crowell v. Crowell, 180 N.C. 516, 105 S.E. 206 (1920) (action against husband for infecting his wife with venereal disease); Prosser v. Prosser, 114 S.C. 45, 102 S.E. 787 (1920) (action for willful tort). Although some of the variation among jurisdictions can be explained by the application of different statutes, the Virginia Supreme Court could have construed the Virginia Married Woman’s Act as allowing actions for personal torts between spouses.

\(^5^7\) 197 Va. 216, 89 S.E.2d 69 (1955). In *Vigilant*, the insurance company, as subrogee under an automobile fire policy, paid the amount due under the policy and sued the policy holder’s wife for destruction of the automobile. The insurer’s only rights were those that the husband had against his wife. For a Comment on *Vigilant*, see 42 Va. L. Rev. 119 (1956).

\(^5^8\) See note 56 supra & accompanying text.
three reasons to explain why a wife could not sue her husband at common law: her identity was merged with her husband's; she was *non sui juris*; and damages for a tortious wrong committed against her constituted a chose in action which the husband was entitled to reduce to possession during coverture. The court held that the Virginia Married Woman's Act had abrogated the common law in respect to torts against property, but not as to personal torts, adding in dictum that even at common law the identity was one of personality but not property. In addition to listing the reasons supporting the wife's disability to sue her husband at common law, the court in *Vigilant* noted three reasons to explain why the husband could not sue his wife in tort: legal identity was created by marriage; the wife was rendered *non sui juris*; and the husband was liable for the torts of his wife. Thus, in any suit between husband and wife, the husband would be both plaintiff and defendant. The essence of the holding in *Vigilant*, therefore, was that "the development of legislation over the years has . . . wholly abolished all marital unity affecting property interest and has given to and imposed upon the spouses full rights and liabilities incident to their property."

The case analysis thus far demonstrates that interspousal immunity in Virginia was a complex blend of procedural and substantive barriers grounded in common law fictions and public policy factors. Against this background, the Supreme Court of Virginia, as had many other states, began to modify its disdain for the common law rule of interspousal immunity.

**Present Status of Interspousal Immunity in Virginia**

In *Surratt v. Thompson*, the Supreme Court of Virginia took a
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major step toward joining the growing number of jurisdictions that have abrogated interspousal tort immunity. In Surratt, the administrator of a deceased woman’s estate brought a wrongful death action against her husband. The court held that a wife could maintain an action against her husband for personal injuries sustained in an automobile accident, and thus an administrator of a deceased woman’s estate could maintain a wrongful death action against the decedent’s husband. Significantly, the court determined that Virginia’s wrongful death statute did not afford the personal representative of a deceased wife a right of action unless the right existed immediately before her death. By so construing the wrongful death statute, the court was forced to determine the validity of the common law immunity.

The court in Surratt stated that Smith v. Kauffman, a contemporaneous Virginia case abrogating parental immunity in automobile accident litigation, had disposed of all the policy factors supporting family immunities in automobile negligence actions. The court dismissed the arguments for the doctrine which had been based on the prevention of fraud and collusion, the preservation of domestic harmony, and the preservation of family finances. Thus, the common law disability to sue for personal torts remained the sole justification for applying interspousal immunity. In permitting the action, the court refused to employ a strained construction of Virginia’s Married Woman’s Act and instead took the more direct approach of modifying the common law. The court noted that “former rules should give way to rules of reason in the light of changed circumstances.” For support, the court cited a recently decided New Jersey case abrogating interspousal tort immunity in the area of automobile accident litigation. Emphasizing that the


66. VA. CODE § 8-633 (1957) (currently codified at VA. CODE § 8.01-51 et seq.).


69. Id. at 192, 183 S.E.2d at 201.

70. See note 42 supra.


common law must recognize changing needs and conditions in order to avoid becoming "an instrument of injustice," the court observed that "the metaphysical concept that husband and wife are one flesh, as the sole barrier to interspousal actions for injuries incurred in automobile accidents, 'cannot be seriously defended today.'" The court concluded that "today's high incidence of insurance covering automobile accidents" was a condition that warranted a change in the common law. Thus, in Surratt, the Virginia Supreme Court took a giant step toward abolishing the interspousal immunities doctrine despite its refusal to "decide whether a wife can maintain an action against her husband for personal injuries that do not result from a motor vehicle accident."

In Korman v. Carpenter, four years after Surratt, the Virginia Supreme Court had the opportunity to eliminate the interspousal immunity doctrine entirely. In Korman, the defendant had shot and killed his wife. At the time of the homicide, the husband and wife were living apart and had executed a separation and property settlement agreement. On behalf of decedent's parents and brothers, the administrator of decedent's estate brought a wrongful death action against the husband's committee. Defendant's demurrer, which the trial court had sustained relying on Keister, was based on the theory that no action could be maintained under Virginia's wrongful death act because the decedent would not have been able to sue her husband for assault had she lived. The trial court gave the Virginia

74. "The nature of the common law requires that each time a rule of law is applied it be carefully scrutinized to make sure that the conditions and needs of the times have not so changed as to make further application of it the instrument of injustice." 212 Va. at 193, 183 S.E.2d at 202, quoting State v. Culver, 23 N.J. 495, 505, 129 A.2d 715, 721 (1957).
76. 212 Va. at 194, 183 S.E.2d at 202.
77. Id. Two years after Surratt, the court held that this abrogation of interspousal immunity would not be given retroactive effect. Fountain v. Fountain, 214 Va. 347, 200 S.E.2d 513 (1973). The court cited as the basis for its decision the justifiable reliance by insurance carriers on earlier decisions. In so holding, the court followed the modern rule of allowing only prospective effect to decisions abrogating the common law. See generally Annot., 10 A.L.R.3d 1371 (1966). See also Currier, Time and Change in Judge-Made Law: Prospective Overruling, 51 Va. L. Rev. 201 (1965).
78. 216 Va. 86, 216 S.E.2d 195 (1975).
79. Id. at 87, 216 S.E.2d at 195.
80. See 10 U. Rich. L. Rev. 434 (1976). The student commentator suggests that the Virginia Supreme Court failed to distinguish between wrongful death statutes and survival statutes. Virginia has a wrongful death statute; therefore, the rights of the beneficiaries are indepen-
Married Woman's Act its traditional interpretation and denied such a right of action. The Supreme Court reversed the trial court and allowed the action to be maintained, reiterating, however, that automobile accident litigation was the sole exception to interspousal immunity and that the legislature had not broadened this exception.

In reaching its decision in Korman, the court noted that "[t]he reason for interspousal immunity is to foster a harmonious and conjugal relationship. Obviously the reason for the rule is lost upon the death of one of the parties for there is no longer a marriage to be saved or a union to be preserved." Carefully limiting the holding to the facts of the case, the Virginia Supreme Court thus carved out another narrow exception to the rule of interspousal immunity. Korman should be read as permitting an action only when the tortious act "results in the termination of the marriage by death, and when the deceased spouse is survived by no living child or grandchild." The court was "not persuaded that permitting a living spouse to sue for torts committed by one on the other, except in automobile accident litigation, would do otherwise than contribute to the destruction of their marriage," and thereby resisted complete abrogation of the interspousal immunity doctrine.

The decisions in Surratt and Korman paved the way for interspousal suits in Virginia in automobile negligence cases and in instances in which there is no threat to marital harmony. Unless such circumstances exist, actions between spouses usually will not be permitted. The rule is not inflexible, however, and Virginia courts have demonstrated a willingness to abrogate interspousal immunity on a limited case-by-case basis. The common law identity of husband and wife is no longer a barrier to suit; therefore, the sole

dent of the rights of the decedents and are thus untouched by the doctrine of interspousal tort immunity.

81. 216 Va. at 90, 216 S.E.2d at 198.
82. Id. at 91-92, 216 S.E.2d at 198. The court, however, did express concern with the effects of permitting a recovery from a surviving parent responsible for the support of those persons for whose benefit recovery is had, on family harmony.
83. 216 Va. at 92, 216 S.E.2d at 198. For an analysis of Korman, see 10 U. Rich. L. Rev. 434 (1976), which observes that Korman follows a logical progression in the Virginia Supreme Court's complete abrogation of interspousal tort immunity.
84. "We are not concerned with the outmoded fiction that husband and wife are of 'one flesh.' We are concerned, as we were in Keister, with a policy and with a rule of law that are designed to protect and encourage the preservation of marriages." Korman v. Carpenter, 216 Va. 86, 90, 216 S.E.2d 195, 197 (1975).
justification for the rule is the public policy of protecting family harmony. Thus, whenever the equities appear to be on the side of abrogation, the court often will allow the action, especially if the action would not threaten to disrupt the family or if the loss ultimately will fall on an insurer.

The case-by-case method of abrogating common law immunity has its detractors. In his dissent in Surratt, Justice Cochran stated the bases upon which the upholding of immunity has been predicated: decisions regarding immunity should be left to the legislature; adherence to the principle of stare decisis is a paramount consideration; and prevention of fraud and collusion requires retention of the doctrine. In a separate dissent, Justice Harman asserted that judicial abrogation of a common law rule was in violation of both the Virginia Constitution and Virginia statutory law. Despite these thoughtful dissents, the case-by-case analysis of interspousal torts continues.

PARENTAL IMMUNITY

The Origins of the Doctrine

Parental immunity from suit for personal torts is a uniquely American doctrine. Unlike the basis for interspousal immunity, however, no common law underpinning exists for parental immunity for personal torts. The common law did not recognize parental immunity for several reasons. Although the marital relationship is entered into by consent, the parent-child relationship is usually

85. For example, the high incidence of household liability insurance could well dictate a decision that one spouse be allowed to sue the other for a negligent tort committed in the home. The danger of fraudulent, collusive suits, enriching the family at the expense of the insurer, counters this argument.

86. "As did the knights of yore, my Brothers of the majority sally forth across the drawbridge and on to the legislative plain, to strike another, yet nonfatal, blow at that terrible dragon, the common law doctrine of interspousal immunity." 216 Va. at 92, 216 S.E.2d at 199 (Harman, J., dissenting).

87. 212 Va. at 195, 183 S.E.2d at 203 (Cochran, J., dissenting).

88. Id. at 196, 183 S.E.2d at 203 (Harman, J., dissenting). For criticism of this trend away from intrafamily immunities, see Casey, The Trend of Interspousal and Parental Immunity—Cakewalk Liability, 45 INS. COUNSEL J. 321 (1978).

89. McCurdy, Torts Between Parent and Child, 5 VILL. L. REV. 521 (1950). The author notes that "no case has been found prior to 1891, either in England or in the United States, which even presented the question of a civil cause of action in tort for personal injuries." Id. at 527.
based upon blood. Thus, the act of marriage reasonably may require some loss of autonomy, while mere chance of birth should not require a similar sacrifice; therefore, the common law judges refused to deny a cause of action simply because of the accident of birth. Additionally, no identity of parent and child like that between husband and wife existed at common law. This distinction is based in part on the difference in the nature of the relationships. Central to the parental relation is the rearing of the minor child; when a child reaches majority, however, that relation loses its legal significance. The marital relation is contractual in nature, and the duties and disabilities assumed by each spouse attend through the duration of the marital contract.

Accordingly, the child remained a separate legal person, entitled to the benefits of his own property and the enforcement of his own choses in action both in tort and in property. The parent's custody of the child did not alter this legal relation. Although the common law in this area is sparse, the authorities indicate that the common law did allow actions for personal torts between parent and child.

No common law roots supported parental immunity; this doctrine developed through case law. In 1891, the Mississippi Supreme Court decided in the case of Hewellette v. George, an action for false imprisonment, that no suit would be allowed between a parent and a minor child for personal torts. Significantly, the Mississippi court cited no authorities in support of this decision. The only rationale offered was that allowing such an action would disturb domestic harmony and interfere with parental control.

Despite its lack of precedential support, the decision in

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90. Adoption was unknown at common law. See Woodward's Appeal, 81 Conn. 152, 70 A. 453 (1908); Chehak v. Battles, 133 Iowa 107, 110 N.W. 330 (1907).
92. For a detailed analysis of the distinction between the relationship of husband and wife and that of parent and child, see McCurdy, supra note 89, at 522-27.
94. Apparently, a cause of action always was recognized in matters affecting property. McKern v. Beck, 73 Ind. App. 92, 126 N.E. 641 (1920) (action by parent); Lamb v. Lamb, 146 N.Y. 317, 41 N.E. 26 (1895) (action by child).
95. See note 89 supra & accompanying text.
97. 68 Miss. 703, 9 So. 885 (1891).
98. The court did not explain how domestic harmony could survive after one family member had falsely imprisoned another.
Hewellette became the general American rule. In 1903 it was applied by a Tennessee court in McKelvey v. McKelvey, and two years later in Roller v. Roller, a Washington court gave it further credence. The doubtful nature of these opinions was evident because Hewellette was cited as stating a "well-settled rule" and husband-wife cases were cited for support.

The first case to challenge the holding was Dunlap v. Dunlap, a 1930 case decided in New Hampshire. The court stated that Hewellette had "establish[ed] a new rule of exceptional character rather than enforc[ing] a rule already established." The court recognized the need to maintain parental authority, but questioned the soundness of the rule, especially in the area of intentional injuries inflicted by the parent.

Support for the parental immunity rule has been grounded on a variety of rationales: the protection of domestic tranquility and parental authority; reluctance to deny other family members their share of the family resources; and the desirability of preventing fraudulent or collusive suits or those in which the parents will succeed to the judgment award. Advocates of the rule have analogized suits between parent and child to those between spouses and even those against the state, in which immunity traditionally has prevented the action. All of these rationales have been rigorously criticized and only dogged adherence to stare decisis can account for the continued vitality of the rule.

99. For decisions following Hewellette, see McCurdy, supra note 89, at 528 nn.42-43.
100. 111 Tenn. 388, 77 S.W. 664 (1903).
101. 37 Wash. 242, 79 P. 788 (1905).
102. Parent-child immunity was grouped with husband-wife immunity into a general family disability to bring suit. This appears logical, considering the rationales of disruption of family harmony and fear of collusive suits. Nonetheless, these policy reasons also apply to suits between siblings and no immunity has been recognized in that context. See note 132 infra.
103. 84 N.H. 352, 150 A. 905 (1930).
104. Id. at ___, 150 A. at 908 (citations omitted).
105. 84 N.H. at ___, 150 A. at 909-10. For criticism of the parental immunity rule, see McCurdy, supra note 3, at 1072-77; Sanford, supra note 27; Personal Torts Within the Family, 9 Vand. L. Rev. 823 (1956); 12 Tulsa L.J. 545 (1976-77); 44 N.C. L. Rev. 1169 (1966); 26 Tenn. L. Rev. 561 (1959). But see Cooperrider, Child v. Parent in Tort: A Case for the Jury, 43 Minn. L. Rev. 73 (1958).
106. 1964 Wis. L. Rev. 714. This article discusses Goller v. White, 20 Wis. 2d 402, 122 N.W.2d 193 (1963), the first decision in which the rule of parental immunity was completely abrogated.
107. See note 105 supra.
108. See note 106 supra. Goller urged retention of the immunity when the alleged negligent
**Parental Immunity in Virginia**

Virginia adopted the doctrine of parental immunity in 1934 in *Norfolk Southern Railway v. Gretakis*.\(^{110}\) In *Gretakis*, an infant daughter was injured in a collision between a railroad car and an automobile driven by her father. In an action between the daughter and the railroad, the trial court determined that ninety percent of the negligence was chargeable to the father and only ten percent to the defendant railroad. After paying damages to the daughter, the railroad company sought contribution from the father. The court held that the railroad could not enforce contribution from the father because the injured party was his child. Thus, the supreme court placed the entire fiscal responsibility on a defendant responsible for only ten percent of the negligence, applying the rule of parental immunity to frustrate the purposes of the doctrine of contribution.\(^{111}\) The court was not influenced by the fact that the father was insured fully, stating that the existence of liability insurance "does not create any liability against the father, which would not exist were he uninsured."\(^{112}\)

In seeking contribution from the father, the railroad company relied upon the Virginia contribution statute.\(^{113}\) The statute provided for a right of contribution only where the injured party had a "right of action" against two persons for the same injury. In denying the action, the court held that "[a]ccording to the great weight of authority an unemancipated minor child cannot sue his or her parent to recover for personal injuries resulting from an ordinary act of

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\(^{109}\) Because no case recorded in Virginia involves an action by a parent against his child, the rule is considered one of parental immunity.

\(^{110}\) 162 Va. 597, 174 S.E. 841 (1934).

\(^{111}\) The defendant-father in *Gretakis* was covered fully by liability insurance. Thus, by denying contribution to the railroad company, the court was not preventing depletion of the family funds or disruption of the family harmony. The actual beneficiary of the immunity was the insurer of the father, and the actual party absorbing the loss was the railroad company. The railroad company brought suit against the father; it is difficult to perceive, therefore, how the denial of the action in *Gretakis* could not serve the policy of preventing collusive suits. Thus none of the three main policy factors supporting the immunity, prevention of depletion of family funds, maintenance of family harmony, and prevention of collusive suits, were at work in *Gretakis*.

\(^{112}\) 162 Va. at 600, 174 S.E. at 842 (citations omitted).

\(^{113}\) VA. CODE § 5779 (1919).
negligence." Thus, because the injured daughter did not have a cause of action against two persons for the same injury, no right of contribution existed. The court, however, distinguished its decision from situations in which the injured child is emancipated or those in which a master-servant relationship exists between the parent and child.

In 1939, the Virginia Supreme Court encountered its first direct suit by an unemancipated child against a parent in Worrell v. Worrell. In Worrell, the plaintiff, a twenty-year-old college student, was injured in a collision between a truck and a commercial bus on which she was a passenger. The bus line was owned and operated by her father, who paid her college expenses and provided a home when she was not at school. Parental immunity became the principal ground of defense. The court admitted that it could find no English decisions under the common law forbidding a child to sue his or her parent for a personal tort but listed the early cases establishing the rule of parental immunity. The court pointed to the parents' need to maintain authority and the desire to maintain peace and tranquility within the family as policy reasons for the rule. Nonetheless, the court created an apparent exception to the immunity by allowing the action to lie in the fact situation presented. The court emphasized that the daughter's being injured on a bus owned by a parent was a very different situation from that in which a minor child is injured in a family automobile driven by the parent.

In Worrell, the court found that the action was brought against the father in his capacity as the owner and operator of a common carrier. The court noted that the policy of the commonwealth was to provide for the protection of the passengers of common carriers, as evidenced by the Virginia statute requiring common carriers to carry liability insurance. In this manner, the court reconciled Worrell with Gretakis, in which no corresponding policy existed, as evidenced by the lack of a statute requiring an individual motorist

114. 162 Va. at 600, 174 S.E. at 842 (citations omitted).
115. "The statute allowing contribution does not create any greater liability than existed before its enactment." Id.
116. 174 Va. 11, 4 S.E.2d 343 (1939).
117. Id. at 18-19, 4 S.E.2d at 346.
118. Id. at 19, 4 S.E.2d at 346.
to carry liability insurance.\textsuperscript{119}

The statute requiring all common carriers to carry liability insurance was the critical factor in Worrell; therefore, the decision is more an expression of public policy regarding common carriers than support for an exception to parental immunity.\textsuperscript{120} The real significance of Worrell lies in its demonstration of the willingness of the Virginia Supreme Court to weigh the policies behind the family immunity doctrine against competing public policy considerations. Additionally, the court's recognition of the difference in status between the husband-wife relation and that of parent and child\textsuperscript{121} as well as the importance of the presence of liability insurance\textsuperscript{122} were significant aspects of the decision. Thus, although Worrell created only a narrow exception to the general rule of parental immunity established in Gretakis, it foreshadowed a change in the perspective of Virginia courts regarding the family immunity doctrine.

Despite the move away from parental immunity augured by Worrell, in 1953 the Virginia Supreme Court rejected an opportunity to create another narrow exception to the rule. In Brumfield \emph{v.} Brumfield,\textsuperscript{123} an infant daughter attempted to recover damages for injuries sustained in an automobile accident in which her father was the driver. The plaintiff had lived with her grandmother for several years since the death of her mother, and during this time the father had neither participated in the child's upbringing nor contributed to her support. Nevertheless, the supreme court upheld the jury's determination that the child was not emancipated, and therefore, the suit could not be maintained. The court held that the question of emancipation was for the jury\textsuperscript{124} and that the father's carrying

\begin{footnotesize}
\begin{enumerate}
\item[119.\textit{But see} Smith \emph{v.} Kauffman, 212 Va. 181, 183 S.E.2d 190 (1971). \textit{See text accompanying notes 130-36 infra.}}
\item[120. For the traditionally strict standards of care imposed upon common carriers, \textit{see} W. Prosser, \textit{Law of Torts} § 34 (4th ed. 1971).}
\item[121. "The relation of husband and wife is created by law, that of parent and child by nature." 174 Va. at 20, 4 S.E.2d at 346.]
\item[122. "This action is not unfriendly as between the daughter and the father." 174 Va. at 22, 4 S.E.2d at 347, \textit{quoting} Dunlap \emph{v.} Dunlap, 84 N.H. 352, ---, 150 A. 905, 910 (1930). Any action between child and parent in \textit{Gretakis} would not have been "unfriendly" either, because the father was fully covered by liability insurance. The distinction between the two cases must have been the presence of the statute in Worrell, which the court felt expressed a state policy of providing for the protection of all passengers of common carriers, regardless of family relations.]
\item[123. 194 Va. 577, 74 S.E.2d 170 (1953).]
\item[124. \textit{Id.} at 580, 74 S.E.2d at 172.]
\end{enumerate}
\end{footnotesize}
health insurance on the child and claiming her as a dependent for income tax purposes supported the jury's finding of nonemancipation. Considering the serious consequences of total severance of the family relation, the court stated that complete emancipation "ought not lightly to be inferred."

The decision in *Brumfield* demonstrates that, as of 1953, the Virginia Supreme Court had little willingness to mitigate the harshness of the parental immunity rule. The court in *Brumfield* cited *Gretakis* as authority for denying the suit, stating that "the fact that the father carried liability insurance created no liability or cause of action where none otherwise existed." By applying a less stringent definition of emancipation, the court could have created another narrow exception to the immunity rule and permitted the action in that factual context. The court, however, did not employ this alternative, and refused to express an opinion as to whether a child could maintain an action against his or her parent for a willful or malicious tort. Thus, the decision in *Brumfield* offered little hope to those advocating a more flexible application of the parental immunity doctrine.

**Present Status of Parental Immunity in Virginia**

Eighteen years after its unyielding decision in *Brumfield*, the Virginia Supreme Court took a major step toward abrogation of traditional parental immunity. In *Smith v. Kauffman*, the court allowed a seven-year-old child to sue the administrator of her stepfather’s estate for injuries suffered in an automobile accident allegedly caused by the stepfather’s negligence. The trial court, relying on *Gretakis*, applied the defense of parental immunity, and

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125. "Complete emancipation means the freeing of the child for all the period of its minority from the care, custody, control and service of its parents, conferring on the child the right to its own earnings and terminating the parents' legal obligation to support it." *Id.* at 580-81, 74 S.E.2d at 173.
126. *Id.* at 581, 74 S.E.2d at 173.
127. *Id.* at 583, 74 S.E.2d at 174.
128. See note 125 supra.
129. 194 Va. at 583, 74 S.E.2d at 174.
130. 212 Va. 181, 183 S.E.2d 190 (1971).
131. The plaintiff failed to argue that the intrafamily tort immunity rule should be held inapplicable because the stepfather had not adopted the plaintiff. The trial court found that the defendant stood *in loco parentis* to the plaintiff and therefore was immune from suit. *Id.* at 182, 183 S.E.2d at 191.
dismissed the suit. The supreme court reversed, citing Midkiff v. Midkiff, a case in which the court had refused to extend family immunity to suits between siblings. In Midkiff, the court had rejected policy arguments based on the danger of fraud and collusion as grounds for maintaining immunity. The court noted in Kauffman that parental immunity in Virginia was "grounded solely on the theory that a suit by a child against his parent 'tends to disturb the peace and tranquility of the home, or disrupt the voluntary and natural course of disposal of the parents' exchequer.'"

In Kauffman, the court recognized that the "high incidence" of automobile liability insurance obviated the need to use the family immunity doctrine in automobile accident litigation to protect family harmony. Just as the court in Worrell had created an exception to parental immunity on the basis of the Virginia statute providing for compulsory insurance indemnity to passengers of common carriers, the court in Kauffman created an exception on the basis of the Virginia Uninsured Motorist Act, which required liability insurance to attach to each uninsured motor vehicle endorsement. The court quoted a New Jersey decision which had abrogated interspousal immunity in automobile accident litigation: "'Domestic harmony may be more threatened by denying a cause of action than by permitting one where there is insurance coverage.'"

132. 201 Va. 829, 113 S.E.2d 875 (1960). In Midkiff, the court held that an unemancipated infant may maintain a tort action against his unemancipated infant brother. In this question of first impression in Virginia, the court followed the reasoning of other jurisdictions and thus rejected the defendant's argument that the cases in Virginia prohibiting actions for personal injuries between husband and wife and between parent and unemancipated child were applicable. See Emery v. Emery, 45 Cal. 2d 421, 289 P.2d 218 (1955); Rozell v. Rozell, 281 N.Y. 106, 22 N.E.2d 254 (1939). The court noted in Midkiff that "'[p]ublic policy, predicted disruption of domestic peace and amicable family relationships, and the possibility of collusion and fraud provide no immunity to the tort-feasor in such cases.'" 201 Va. at 830, 113 S.E.2d at 876. Such reasoning appears equally sound when applied to husband-wife and parent-child suits. Midkiff makes clear that the family immunity doctrine will not be extended beyond interspousal and child-parent relationships.

133. 212 Va. at 183, 183 S.E.2d at 192, quoting Worrell v. Worrell, 174 Va. 11, 19, 4 S.E.2d 343, 346 (1939).

134. "The very high incidence of liability insurance covering Virginia-based motor vehicles, together with the mandatory uninsured motorist endorsements to insurance policies, has made our rule of parental immunity anachronistic when applied to automobile accident litigation." 212 Va. at 185, 183 S.E.2d at 194.

135. See id. at 184, 183 S.E.2d at 193.

In abrogating the rule of parental immunity in actions by a child against a parent to recover for injuries sustained in a motor vehicle accident, the court in *Kauffman* cited other exceptions to the rule. *Brumfield*, the court noted, stood for the proposition that an emancipated child could maintain a personal injury action against his parent. *Gretakis* established the principle that even an unemancipated child could bring a personal injury action against his parent if they stood in the relation of servant and master. *Worrell* was recognized as the basis for the principle that an unemancipated child can maintain an action against his or her parent for personal injuries incurred while riding as a passenger on a common carrier.\(^\text{137}\) Thus, the effect of *Kauffman* was to render parental immunity a valid defense only in suits by unemancipated infants against their parents for intentionally inflicted or negligently caused injuries in which the negligence does not involve automobiles.\(^\text{138}\) The exceptions appeared to swallow the rule.

Justices Harman and Cochran filed dissents in *Kauffman*, just as they had in *Surratt*.\(^\text{139}\) Justice Cochran characterized the majority opinion as "an invasion of an area of responsibility more appropriately entrusted to the legislature."\(^\text{140}\) He noted that parent-child

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\(^{137}\) 212 Va. at 183, 183 S.E.2d at 192.

\(^{138}\) Perhaps the immunity retains vitality in these areas only by historical accident. The court has not confronted either issue in recent years.

*Kauffman* is also noteworthy in establishing the rule that "a child under the age of fourteen years is incapable of knowingly and voluntarily accepting an invitation to become a guest in an automobile so as to subject himself to the gross negligence rule [of the Virginia automobile guest statute]." *Id.* at 187, 183 S.E.2d at 195. The court was construing the Virginia automobile guest statute, which required a showing of gross negligence before the passenger could recover from the driver. VA. CODE § 8-646.1 (1957). Since the decision in *Kauffman*, the Virginia General Assembly has amended its guest statute to eliminate the former provision barring recovery against the host absent a showing of gross negligence. VA. CODE § 8.01-63. The standard is now one of ordinary negligence. By amending the statute, Virginia has avoided the problem of allowing spouses and children to sue within the family, while burdening them with a showing of gross negligence. This amendment to the guest statute came after the decisions in *Surratt* and *Kauffman*; therefore, the Virginia General Assembly did not seem concerned with the problem of collusive suits. If the legislature had wanted to retard the court's movement towards abrogation of the family immunities, it could have retained the high standard of negligence required to be shown by the passenger before recovering from the driver. Instead, the General Assembly seems to have codified the supreme court's philosophy that the fear of fraudulent suits is not sufficient justification for eliminating a whole class of litigants.

\(^{139}\) See text accompanying notes 86-88 supra.

\(^{140}\) 212 Va. at 189, 183 S.E.2d at 196 (Cochran, J., concurring in part and dissenting in part); *id.* at 189-90, 183 S.E.2d at 196-97 (Harman, J., concurring in part and dissenting in part).
INTRAFAMILY TORT IMMUNITY

suits could lead to the destruction of the “moral fibre” of the child by encouraging collusion and family disruption.141 Similarly, Justice Harman considered the majority’s decision as “judicial legislation in the sensitive area of the legal relationship between parent and child.”142 Harman decried the disruptive and inequitable effect that the decision would have on insurers, whose rates were based on existing legal responsibilities and duties.143 The decision of the majority to limit application of the immunity rule but not to abolish it signified to Harman that the court still upheld parental immunity in certain situations.144

Post-Kauffman Decisions in Virginia

Although Surratt and Kauffman placed Virginia in the mainstream of legal thought by moving toward an abrogation of both interspousal and parental immunities,145 the most recent decisions of the supreme court have not fulfilled the promise of further abrogation of the immunities rules. In Wright v. Wright,146 decided one year after Surratt and Kauffman, the court allowed the defense of parental immunity to defeat an action brought by a minor child. Plaintiff brought an action against her father for injuries sustained when the child fell in the family’s backyard and was cut by a jagged edge on a damaged metal awning. The girl’s father, a general contractor, maintained a storage shed for business purposes in his backyard, and the metal awning was part of his business equipment. The

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141. Id. at 189, 183 S.E.2d at 196 (Cochran, J., concurring in part and dissenting in part). Obviously both collusion and family disruption will not be present in the same case. Either the parent and child will collude to defraud the insurer, or they will be adversaries in the suit. Only in the latter context is family disruption a concern.

142. Id. at 190, 183 S.E.2d at 197 (Harman, J., concurring in part and dissenting in part).

143. The majority’s decision has “the effect of rewriting existing insurance contracts to extend coverage for injury to persons not contemplated by the contracting parties when coverage was written.” Id. at 189, 183 S.E.2d at 196-97 (Harman, J., concurring in part and dissenting in part).

144. The failure of my brethren of the majority to abrogate the rule in its entirety is particularly significant. To me it indicates that they must be convinced that the underlying reasons for the rule, namely, to avoid disruption of the peace and tranquility of the home and to avoid disruption of the voluntary and natural course of the parents’ exchequer, are still valid.

145. See, e.g., Casey, supra note 88, in which the author criticizes the trend towards abrogation of the family immunities. For a list of states which had fully or partially abrogated the family immunities as of 1971, see United States v. Moore, 469 F.2d 788 (3d Cir. 1971).

146. 213 Va. 177, 191 S.E.2d 223 (1972).
court denied the negligence action, citing *Gretakis* and distinguishing *Worrell* by finding that the father’s negligence was “only his failure to discharge the normal parental duty of supervising and providing a safe place for the child to play.”

In so finding, the court applied the general rule of parental immunity rather than the business exception of *Worrell*. Had the court intended to endorse further abrogation of the immunity doctrine it would have found that the facts in *Wright* fell within the purview of the *Worrell* exception or that the exception itself should be broadened. In refusing to adopt either of these approaches, the court limited the business function exception to cases involving common carriers.

Thus, the effect of *Wright* was to impede the movement toward total abrogation of parental immunity in Virginia.

Another obstacle to the abrogation of parental immunity was presented by the 1976 case of *Lyles v. Jackson*. Although the decision ostensibly merely refused to give retroactive effect to the decision in *Kauffman*, the real significance of *Lyles* lies in the court’s refusal to allow an action by a child against his parent despite the availability of a basis for an exception to the general rule. *Lyles* involved a suit by four infant step-children against their former step-father for injuries sustained in an automobile accident. The defendant had never adopted the step-children and the defendant and the children’s mother were divorced before the action was commenced. Therefore, *Lyles* provided an excellent opportunity for a narrow exception to immunity as established in *Korman v. Carpenter*. Finding that the defendant stood *in loco parentis* to his former step-children, the court relied instead on the general rule of

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147. *Id.* at 179, 191 S.E.2d at 225.

148. “Thus the alleged negligence was incident to the parental relationship of the father with his unemancipated child, and not to a business or vocational relationship.” *Id.*

149. Perhaps the high incidence of business liability insurance in Virginia present in the automobile liability insurance context of *Kauffman* explains the result in *Wright*. The plaintiff in *Wright* urged that her suit was not an unfriendly one and that she should be allowed to recover because of the presence of liability insurance. The court rejected these arguments, finding no indication of a state policy favoring actions such as the one brought by the plaintiff. *Id.* at 179, 191 S.E.2d at 225. Thus the effect of *Wright* was to slow any trend toward total abrogation of parental immunity in Virginia.


151. *See* note 77 *supra*.

152. Perhaps this suit was disallowed because the court feared that the divorce was obtained out of a desire to avoid the rule of parental immunity.

153. *See* text accompanying notes 78-83 *supra*. 

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parental immunity established in *Gretakis* and supported its decision with the traditional arguments for immunity. The court stated that as the injury occurred before its decision in *Kauffman*, the former rule of total parental immunity would be applicable, and that this rule applied to "one standing in loco parentis." Thus, in a situation in which preservation of family harmony was impossible and in which greater financial hardship would result from denying the action than from permitting it, the court used a technicality to support a finding of immunity.

*Surratt* and *Kauffman* appeared to signal Virginia's endorsement of the national trend toward abrogation of the family immunities. The more recent cases of *Wright* and *Lyles*, however, which refused to create additional exceptions to the general rule of immunity, demonstrate Virginia's resistance to abrogation. At the very least, because of these two recent cases, the position a Virginia court will take when faced with a suit between family members is impossible to predict.

Virginia should adopt a firm, definable position on the family immunity doctrine. The remainder of this Note will demonstrate why a general rule of family immunity, even with exceptions, is no longer a viable doctrine. Further, a proposal will be made for a limited family immunity approach and the adjustments necessary to accommodate such a change in law will be detailed.

**The Untenability of a General Rule of Family Immunity**

Little support for the common law family immunities remains. The three policy factors cited most often in support of the immunities — preservation of family harmony, prevention of dissipation of the family finances, and avoidance of collusive suits — have been criticized effectively. Courts have recognized that forbidding an injured person to sue an offending family member is not a viable approach to preserving family harmony. Not only may family harmony be impossible to preserve if the tort has been intentional or

154. 216 Va. at 799, 223 S.E.2d at 874.
157. See note 105 supra.
158. "If [family harmony] were a valid sociological consideration, the Legislature could orchestrate even greater harmony by abolishing the statute giving the right to divorce." *Coffindaffer v. Coffindaffer*, W. Va., 244 S.E.2d 338, 342 (1978).
malicious, but, as the court stated in *Kauffman*: "Domestic harmony may be more threatened by denying a cause of action than by permitting one where there is insurance coverage." The unreasonableness of maintaining family immunities in personal torts is demonstrated further by the courts' traditional approval of actions between family members for torts against property. If actions need not be prevented in the interest of family harmony in a property context, it is illogical to prohibit them merely because the tort is against the person.

In many situations in which the family immunity doctrine has been applied, the preservation of family harmony is not a plausible justification. Often domestic tranquility has been disturbed before the action is brought. Additionally, the real defendant in interest is frequently the insurer and judgment against the defendant will not result in any actual loss to the family defendant. Instead of supporting a general rule disallowing suits between family members, preservation of family harmony is a more reasonable basis for a narrow exception to a general rule which would permit such actions. By using this limited immunity approach, courts would allow suits between family members unless the facts indicated a genuine threat to family peace.

The second policy argument used to justify immunity, the danger of depletion of family finances, is equally unpersuasive. The Virginia Supreme Court has recognized the inapplicability of this argument in automobile accident litigation in which the real party in interest is the insurer. Most automobile owners carry liability insurance; therefore, family suits rarely result in the depletion of family funds. Assuming no disturbance of the family unit has resulted, suit will not be brought if the only result of such an action would be to transfer funds from one family member to another. Thus, whether the suit is brought merely to recover against an insurer or to gain a judgment against a family member already divided from the family unit, depletion of family funds will not result. In the first

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159. "And if the domestic tranquility is to be disturbed, such is accomplished by the desire to recover as fully as by recovery." Hamilton v. Fulkerson, Mo., 285 S.W.2d 642, 647 (1955).


162. See notes 68-76 supra.
instance, the family will not sustain any loss from judgment, and in the second, because the family is no longer intact, the individual defendant's loss will not affect the family unit.

The third argument for preservation of the family immunities is the fear that collusive suits between family members will result in the defrauding of insurance carriers. Although this argument generally has been rejected as an insufficient justification for denying actions between family members, the danger of defrauding insurance carriers merits some attention. Nevertheless, the Virginia Supreme Court has stated: "If actions were barred because of the possibility of fraud, many wrongs would be permitted to go without redress." Many commentators and jurists contend that the "fear of collusion" argument insults the intelligence of jurors and judges and that part of the judicial function involves distinguishing valid claims from fraudulent ones. In addition to these jurisprudential objections some commentators have suggested that judicial or legislative enforcement of family immunities may be a denial of equal protection.

Total Abrogation: The New Jersey Approach

In its decisions in Kauffman and Surratt, which abrogated parental and interspousal immunities in automobile accident litigation, the Virginia Supreme Court relied upon the reasoning of the New Jersey Supreme Court in Immer v. Risko. Additionally, in Surratt,

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164. Id.

165. "We do an injustice not only to the intelligence of jurors, but to the efficacy of the adversary system, when we express undue concern over the quantum of collusive or meritless law suits." Coffindaffer v. Coffindaffer, __ W. Va. ___, 244 S.E.2d 338, 343 (1978).

166. See, e.g., Comment, Interspousal Tort Immunity: An Analysis of the Law in Washington and Oregon, 8 WILAMETTE L.J. 427 (1972). The commentator suggests that "a classification of individuals on the basis of a marital status, the result of which is to deny members of that group a right to a legal remedy for personal injuries, might well be denying them that equal protection which the fourteenth amendment requires." Id. at 445, citing Eisenstadt v. Baird, 405 U.S. 438 (1972). If a court is dealing with a legislative enactment of family immunity, however, it will defer to legislative judgment since marital status does not involve a suspect category. Conceivably a plaintiff could construct an equal protection argument based on marriage as a fundamental interest with which the courts and legislatures cannot interfere without being subject to strict scrutiny. See McCurdy, supra note 9, at 322, which suggests the danger of encouraging divorce when the potential recovery is large and the negligent spouse is insured against liability.

167. 56 N.J. 482, 267 A.2d 481 (1970). See text accompanying note 73 supra. See also
the Virginia court gave credence to *State v. Culver*, another New Jersey case in which the court had given its approval to approaching the common law doctrine of family immunities with flexibility. Because of its previous reliance on New Jersey decisions, Virginia should follow the lead of the New Jersey court, which has now taken the final step and, except in a few limited instances, eliminated the doctrine of interspousal tort immunity.

In the 1978 case of *Merenoff v. Merenoff*, the Supreme Court of New Jersey held that with certain exceptions "there presently exists no cogent or logical reason why the doctrine of interspousal tort immunity should be continued." The court also noted that interspousal immunity was no longer a majority position, in fact, "if any one dominant position can be said to have emerged from this variegated experience, it is that expressed by a plurality of at least twenty jurisdictions which have completely abrogated interspousal immunity." The New Jersey Supreme Court discredited the domestic harmony rationale maintaining that: "Courts can claim no penetrating insight by which to fathom the impact of an interspousal law suit or gauge its effect upon the strength or fragility of a marriage."

The court in *Merenoff* did not dismiss the "fear of collusion" rationale without qualification, however. In order to lessen the chances of fraud, the court suggested fashioning a high standard of care, adjusting the burden of proof, and even allowing the insurer to enter the suit and treat the insured as a hostile witness. Ad-

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169. "One of the great virtues of the common law is its dynamic nature that makes it adaptable to the requirements of society at the time of its application in court." *Id.* at —, 129 A.2d at 721.

170. *Merenoff v. Merenoff*, 76 N.J. 535, 388 A.2d 951 (1978) (the excepted areas are "best left to be defined and developed on a case-by-case basis").

171. *Id.*

172. *Id.* at —, 388 A.2d at 962. *Merenoff* involved a household accident in which the husband cut off his wife's index finger while trimming a hedge. The Merenoffs were covered under a homeowner's policy which provided for personal liability coverage.

173. *Id.* at —, 388 A.2d at 954.

174. *Id.* at —, 388 A.2d at 955 (citations omitted).

175. *Id.* at —, 388 A.2d at 959.


177. 176 N.J. at —, 388 A.2d at 961.
dressing the danger of frivolous suits as a rationale for retaining interspousal immunity, the court suggested that there is "a range of activity arising in the case of a marriage relationship beyond the reach of the law of torts." The court included in this loosely defined exception an area it called "domestic carelessness," a concept to be elucidated by case-by-case consideration. Dismissing the final traditional justifications for the immunities, the court rejected the argument that civil damage actions between spouses were unnecessary because resort to the criminal and divorce courts would give compensation to the victim of an interspousal tort. Thus, the effect of Merenoff essentially was to abolish interspousal immunity in New Jersey.

This Note proposes that Virginia adopt the rule of Merenoff, because the pragmatic considerations which dictated the partial abrogation in both Immer and Surratt now require the total abrogation announced in Merenoff. Virginia also should extend this abrogation to parental immunity, because the policies supporting parental immunity are essentially the same as those upon which interspousal immunities are based and thus are similarly unpersuasive. In addition, Virginia should adopt the same exceptions of total abrogation that were established in Merenoff. In so doing, Virginia would permit the defense of family immunity in cases involving "domestic carelessness" and other areas of family activity in which judicial involvement would be inappropriate. As suggested in Merenoff, the scope of these exceptions must be developed on a case-by-case basis.

Virginia should permit suits between family members unless the suit would pose a genuine threat to the preservation of family unity. Such a position would be consistent with the traditional tort maxim that every injury should be remedied, while maintaining the respect and hands-off attitude that has characterized the American judiciary's reluctance to intrude into the family unit.

178. Id. at ___, 388 A.2d at 961. "Special matters of privacy and familiarity may be encompassed by a marital or nuptial privilege and fall outside the bounds of a definable and enforceable duty of care." Id.

MAINTENANCE OF ABROGATION OF FAMILY IMMUNITIES AGAINST INSURER’S EXCLUSION CLAUSES

If Virginia abrogates family immunities as suggested, it is likely that insurance lobbyists will urge that the State Corporation Commission adopt family exclusion clauses in liability insurance contracts. Abrogation of the doctrine by the courts and acquiescence by the General Assembly would indicate a state policy favoring compensation for personal torts between family members; therefore, attempts by insurers to exclude such recoveries must be deemed contrary to public policy. Thus, to implement the policy of allowing suits between family members, insurance carriers must be prevented from excluding family members from liability coverage.

An increase in insurance rates is a foreseeable consequence of abrogating the family immunities. Raising premiums will serve to distribute to subscribers the losses sustained by insurance companies in newly allowed suits between family members. This sharing of loss is a more desirable result than excluding a whole class of injury victims merely because they were injured by one in a family relation. Such a shifting and diluting of loss actually comports with basic insurance principles.

180. For a typical family or household exclusion clause, see Casey, supra note 88, at 331.

181. 22 CATH. U.L. REV. 167 (1972). The author argues that if family exclusion clauses were allowed in Virginia, the right to sue would be offset by the insurer's option to exclude.

182. Virginia must construe Va. Code § 38.1-381 (Cum. Supp. 1978) so as to prohibit the family exclusion clause. This statute reads in pertinent part:
- (a1) Nor shall any such policy or contract . . . be so issued or delivered unless it contains an endorsement or provision insuring the named insured, against liability . . . as a result of negligence . . . .
- (a2) Any endorsement, provision or rider attached to, or included in, any such policy of insurance which purports or seeks in any way to limit or reduce in any respect the coverage afforded by the provisions required therein by this section shall be wholly void.

Id.


Direct Action Against the Insurance Carrier

Direct action against the insurance carrier was suggested by a concurring opinion in Lee v. Comer, a West Virginia decision abrogating parental immunity. The court advocated abrogation only in those situations where the real party in interest is an insurance carrier. In so deciding, the court recognized that one strong impetus to abrogation is the presence of insurance. This acknowledgment was a departure from the traditional reluctance of courts to allow insurance to create liability where otherwise none would exist.

Justice Neely, concurring in Lee, stated that insurers should not be "handicapped in their defense by the continuing myth that insurance has no effect upon the rules of procedure, a rule originally made for the [insurers'] benefit." He advocated creating "logical procedures" to deal with the "minimum cooperation" of the insured and to protect the interests of the insurer. In intrafamily litigation, one "logical procedure" would give the insurer "the option of defending the suit either in the name of the insured or in its own name as the real party in interest." In addition, the insurer need not be bound by any statement of the insured. Adoption of this proposal would enable the insurer to combat the dangers of collusion and lack of cooperation by the insured. Courts could offer the insurer further protection by allowing the mention of insurance during the course of the trial. Upon request, the insurer would be permitted to tell the jury that the insurer is the real adverse party, and that the insured


185. For a similar view, see Ashdown, Intrafamily Immunity, Pure Compensation, and the Family Exclusion Clause, 60 Iowa L. Rev. 239 (1974). The author suggests that the lack of insurance coverage merely causes "a reallocation of family assets to provide for the injured family member with no actual depletion of family funds." Id. at 248. Additionally, abrogation of family immunities may be the "judicial creation of a limited no-fault compensation system." Id. at 251.

186. "If the Court implicitly recognizes that the operative fact which mandates a rule with regard to automobiles different from the rule in other situations is the existence of insurance, then the Court should say so and proceed to develop logical procedures to protect all concerned." ___ W. Va. at ___, 224 S.E.2d at 725-26 (Neely, J., concurring).

187. Id. at ___, 224 S.E.2d at 726 (Neely, J., concurring).

188. Id. at ___, 224 S.E.2d at 726 (Neely, J., concurring). But see Casey, supra note 88, at 331. The author applauds Justice Neely's position, but expresses some reservations: "To candidly express to the jury in effect that the issue is really insurance destroys the last vestige of uncertainty that might exist as to who is going to pay any award granted." Id.
and the injured party have a common interest.\textsuperscript{189} Although Virginia adheres to the rule that insurance should not be mentioned during trial,\textsuperscript{190} the rule is deemed to operate for the benefit of the insurer and can be waived.\textsuperscript{191}\textsuperscript{9} The courts of Virginia should continue to allow the insurer to waive this rule and should recognize this waiver as a legitimate trial tactic.

A third method for establishing procedures to deal with the interests of the insurer in intrafamily tort litigation involves the use of "an instruction that testimony by the insured with regard to the circumstances surrounding the accident should be received with great caution."\textsuperscript{192} The concurring opinion in Lee suggests "an instruction similar to the one mandated in criminal cases with regard to the uncorroborated testimony of a co-conspirator."\textsuperscript{193} Virginia should adopt such a rule and even allow the insurer to treat the insured as a hostile witness.\textsuperscript{194} This procedure would mitigate the dangers of fraud and collusion among family members in a tort action.

Adoption of Justice Neely's suggestions would constitute the best approach to intrafamily tort litigation, and would safeguard the adversary nature of the judicial process. Juries frequently are aware that a defendant carries liability insurance; therefore, acknowledgment of such coverage will have only minimal impact on their consideration of a case.\textsuperscript{195} The insurer should be allowed the option of taking the steps necessary to present an effective defense to an

\textsuperscript{189} W. Va. at \_, 224 S.E.2d at 726 (Neely, J., concurring).
\textsuperscript{190} Travelers Ins. Co. v. Lobello, 212 Va. 534, 535, 186 S.E.2d 80, 82 (1972) (the mention of insurance at trial can constitute reversible error); Hope Windows, Inc. v. Snyder, 208 Va. 489, 493, 158 S.E.2d 722, 725 (1968). The rule is based on the belief that the mention of insurance "tends to unduly influence the jury in behalf of the plaintiff." Highway Express Lines, Inc. v. Fleming, 185 Va. 668, 672, 40 S.E.2d 294, 297 (1946). The rule, however, is not rigidly applied. The "mention of insurance may not be reversible error where there is an otherwise fair trial and substantial justice is done." Willard v. Aetna Cas. & Sur. Co., 213 Va. 481, 483, 193 S.E.2d 776, 778 (1973), citing Simmons v. Boyd, 199 Va. 806, 812, 158 S.E.2d 722, 726 (1968).
\textsuperscript{192} W. Va. at \_, 224 S.E.2d at 726 (Neely, J., concurring).
\textsuperscript{194} See 13 Duq. L. Rev. 156 (1974).
\textsuperscript{195} When the husband and wife or parent and child are seen leaving the courtroom hand-in-hand, there will be little uncertainty left as to who is going to pay any judgment.
action in damages which might result in a finding of liability which it will have to pay.\textsuperscript{196}

\textbf{Conclusion}

Virginia should abrogate its family immunities in all areas of tort liability except those within a narrowly defined zone of family activity. In the area of “domestic carelessness,” the desirability of allowing actions against family members must give way to the preservation of family harmony. Additionally, the Virginia State Corporation Commission should prevent insurance companies from circum-

\textsuperscript{196} One consequence of the abrogation of any immunity is the conflict of laws problem that arises when a party domiciled in a state that has abrogated the immunity is injured in a state that has maintained the immunity, or vice versa. The Virginia Supreme Court recently reaffirmed its adherence to traditional choice of law rules in a case involving the application of interspousal immunity. In McMillan v. McMillan, \textit{____ Va. \textemdash}, 253 S.E.2d 662 (1979), the court applied Tennessee law, which does not allow interspousal tort suits, in an action brought by a passenger-wife against her driver-husband for an automobile accident occurring in Tennessee, despite the fact that the couple was domiciled in Virginia. This represented an application of the traditional principle of the \textit{lex loci delicti}, or “place of the wrong” rule.

Despite acknowledgment of the increasing number of jurisdictions applying a “most significant relationship” test in similar actions, Virginia’s highest court opted for the “uniformity, predictability, and ease of application of the Virginia rule.” \textit{____ Va. at \textemdash}, 253 S.E.2d at 684. For a statement of the “most significant relationship” test, \textit{see Restatement (Second) of Conflict of Laws §§ 145, 169 (1971). This test, to determine which state’s law shall govern the substantive rights of the parties in an interstate tort suit, considers such factors as the place where the injury occurred, the domicile of the parties, and the place where any relationship between the parties is centered. Virginia should adopt such a framework of analysis, as a rule of \textit{lex domicilii} is more consonant with the expressed state policy of allowing recovery in interspousal suits involving personal injuries sustained in automobile accidents. The rule stated in \textit{McMillan} denies compensation to a Virginia resident because of the chance occurrence of his injury in a state that maintains total interspousal immunity. This was not the intended result of Virginia’s partial abrogation of the family immunities.

The Virginia Supreme Court’s reluctance to effect wholesale changes in its choice of law rules is understandable; therefore, the Virginia General Assembly should establish the needed consistency between Virginia’s choice of law rules and the policy of allowing intrafamily suits in some instances. Thus, the legislature should adopt a statute similar to North Carolina General Statute § 52-5.1 which states:

\textit{A husband and wife shall have a cause of action against each other to recover damages for personal injury, property damage or wrongful death arising out of acts occurring outside of North Carolina, and such action may be brought in this State when both were domiciled in North Carolina at the time of such acts. N.C. Gen. Stat. § 52-5.1, \textit{construed in Henry v. Henry, 291 N.C. 156, 229 S.E.2d 158 (1976). Such a narrowly drawn statute, confined to tort actions that the legislature deems allowable between family members, would be an appropriate means by which to recognize the fact that the state where the family is domiciled normally has the greatest interest in establishing policies affecting the familial relationship.}
venting the effects of abrogation by denying carriers the opportunity to insert family exclusion clauses in the standard liability contract. Because the insurance company is the real party in interest, insurance companies should be permitted the option of defending directly all suits between members of the same family. Similarly, mention at trial of the existence of insurance coverage should be allowed.

The doctrines of interspousal and parental immunity were based initially on procedural disabilities based on conceptions peculiar to the era of their inception. As the persuasiveness of common law rationales declined, public policy considerations supplanted them. Today these policy rationales also have lost their credibility and the doctrine of family immunities retains vitality only because the law changes slowly. Virginia has taken a step-by-step approach to abolishing the traditional rules of family immunity, carefully limiting the effect of each decision to the particular facts of each case. More recently, the Virginia Supreme Court has manifested an unwillingness to continue the abrogation process despite the popularity of this position throughout the country. Virginia now should abolish the family immunity doctrine, except in those limited situations in which prohibition of the action might preserve family harmony. Effective jurisprudence and public policy demand no less.

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