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## Interspousal Immunity-Automobile Negligence

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## Interspousal Immunity—AUTOMOBILE NEGLIGENCE—*Surratt v. Thompson*

At common law neither spouse could maintain an action against the other.<sup>1</sup> With the passage of the Married Woman's Acts in the mid-nineteenth century<sup>2</sup> it was agreed that a cause of action would then lie for property torts,<sup>3</sup> but there was confusion as to whether the statutes gave a new cause of action for personal torts between the spouses. It therefore became a question of statutory interpretation, with the terminology of most of the statutes being consistent with either conclusion.<sup>4</sup> The first courts to interpret the statutes held that no cause of action had been conferred<sup>5</sup> and thereby laid the foundation for what subsequently became the majority view—that immunity was still the rule as to personal torts between spouses. However, a forceful dissent to a United States Supreme Court decision<sup>6</sup> indicated that a

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<sup>1</sup> W. BLACKSTONE, COMMENTARIES \*442; 41 AM. JUR. 2d *Husband and Wife* § 522 (1968); 41 C.J.S. *Husband and Wife* § 396 (1944). See, e.g., *Alexander v. Alexander*, 85 Va. 353, 7 S.E. 335 (1888).

<sup>2</sup> The statutes are collected in 3 C. VERNIER, AMERICAN FAMILY LAWS §§ 167, 179, 180 (1935).

<sup>3</sup> See, e.g., *Vigilant Ins. Co. v. Bennett*, 197 Va. 216, 89 S.E.2d 69 (1955), wherein the court held:

. . . [T]hese sections [the Virginia Married Woman's Act] empower each spouse to maintain actions at law for wrongful invasions of their respective property rights as if they had never been married. *Id.* at 223, 89 S.E.2d at 74.

See also *McCurdy, Property Torts Between Spouses and Use During Marriage of the Matrimonial Home Owned by the Other*, 2 VILL. L. REV. 447 (1957).

<sup>4</sup> The statutes may be divided into seven general groups, the most common being those which permit suits by and against married women as though they were unmarried. See *McCurdy, Torts Between Persons in Domestic Relations*, 43 HARV. L. REV. 1030, 1037, 1050 (1930).

The applicable section of the Virginia Married Woman's Acts is typical of the common form:

A married woman may contract and be contracted with and sue and be sued in the same manner and with the same consequences as if she were unmarried . . . Va. Code Ann. § 55-36 (Cum. Supp. 1971).

<sup>5</sup> The leading case is *Thompson v. Thompson*, 218 U.S. 611 (1910) (assault and battery) wherein the Supreme Court said:

The [District of Columbia] 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. *Id.* at 617.

See also *Lubowitz v. Taines*, 293 Mass. 39, 198 N.E. 320 (1936) (negligence); *Keister v. Keister*, 123 Va. 157, 96 S.E. 315 (1918) (death by wrongful act); *Poling v. Poling*, 116 W. Va. 187, 179 S.E. 604 (1935) (negligence); *Sanford, Personal Torts Within the Family*, 9 VAND. L. REV. 823, 826 n.6 (1956).

<sup>6</sup> In his well-known dissent in *Thompson v. Thompson*, 218 U.S. 611 (1910) Justice Harlan said:

I cannot believe that [the District of Columbia statute] intended to permit the

new cause of action had arisen with the enactment of the statutes, and the minority view thus evolved.<sup>7</sup> The result is that today much confusion exists, with a majority of the courts still recognizing the interspousal immunity rule as to personal torts, but an ever-increasing minority allowing such action between the spouses.<sup>8</sup>

In the recent case of *Surratt v. Thompson*,<sup>9</sup> the Virginia Supreme Court joined the growing minority view, in part, by abrogating the interspousal immunity rule in automobile negligence cases.<sup>10</sup> In that case Cornelia Jane Surratt died as a result of a collision between an automobile driven by her husband, in which she was riding, and an automobile driven by a third person. Her administrator brought an action for wrongful death against her husband and the third person. In allowing the administrator to recover, the court held that the reasons for interspousal immunity are no longer applicable in cases of automobile negligence.

The historical grounds for denying the interspousal action<sup>11</sup> have been

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wife to sue the husband separately, in tort, for the recovery, including damages for the detention, of her property, and at the same time deny her the right to sue him, separately, for a tort committed against her person. *Id.* at 623.

Virtually every minority jurisdiction that abrogates the interspousal immunity rule on the basis that the statute allows personal tort actions between spouses does so in reliance on the *Thompson* dissent.

<sup>7</sup> See, e.g., *Klein v. Klein*, 58 Cal. 2d 692, 376 P.2d 70, 26 Cal. Rptr. 102 (1962) (negligence); *Bushnell v. Bushnell*, 103 Conn. 583, 131 A. 432 (1925) (negligence); *Brown v. Brown*, 88 Conn. 42, 89 A. 889 (1914) (assault and battery); *Brown v. Gosser*, 262 S.W.2d 480 (Ky. 1953); (tort action filed prior to marriage); *Apitz v. Dames*, 205 Ore. 242, 287 P.2d 585 (1955) (intentional tort action with decision providing an excellent discussion of other leading cases). See also Sanford, *Personal Torts Within the Family*, 9 VAND. L. REV. 823, 826 n.7 (1956) for a list of other cases following the *Thompson* dissent.

<sup>8</sup> See H. CLARK, *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* 254-55 (1968); W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* 863-64 (4th ed. 1971); Annot., 43 A.L.R.2d 632, 647-51, 664-70 (1955).

<sup>9</sup> 212 Va. 191, 183 S.E.2d 200 (1971).

<sup>10</sup> In *Smith v. Kauffman*, 212 Va. 181, 183 S.E.2d 190 (1971), a case decided earlier the same day, the court abrogated the rule of parental immunity in automobile negligence litigation. Because the arguments and policy reasons are similar in both issues and the *Smith* decision was rendered first, it is necessary to refer to the *Smith* decision when the court so indicates in the *Surratt* opinion.

<sup>11</sup> Generally, the historical arguments were that the husband and wife were one and therefore it was impossible for one to sue the other; that the husband was liable for the wife's tort actions, which meant he would be placed in the position of suing himself were he to bring suit; and that the wife could sue only by joining the husband as plaintiff which would place the husband on both sides of the litigation. Cf. *Norfolk & W.R.R. v. Prindle*, 82 Va. 122 (1886). See generally W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* 859-61 (4th ed. 1971); McCurdy, *Torts Between Persons in Domestic Relations*, 43 HARV. L. REV. 1030, 1031-35 (1930).

replaced by public policy arguments. Chief among these has been the argument that such suits would disrupt the domestic peace and tranquility of the home.<sup>12</sup> It has also been said that abrogation of the rule would have an adverse effect upon the family exchequer.<sup>13</sup> These arguments were summarily disposed of by the Virginia Supreme Court by reference to the widespread existence of liability insurance in automobile negligence cases.<sup>14</sup> When liability insurance is introduced, the primary danger is that fraud and collusion between the spouses will be encouraged.<sup>15</sup> Citing a previous decision of its own,<sup>16</sup> the Virginia court expressed its belief that the courts are capable of detecting fictitious claims and that parties who are entitled to relief in the courts should not be denied access thereto simply because others might

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<sup>12</sup> See, e.g., *Thompson v. Thompson*, 218 U.S. 611 (1910); *Corren v. Corren*, 47 So. 2d 774 (Fla. 1950); *Reingold v. Reingold*, 115 N.J.L. 532, 181 A. 153 (Ct. Err. & App. 1935) (parental immunity); *Lillienkamp v. Rippetoe*, 133 Tenn. 57, 179 S.W. 628 (1915); see Annot., 43 A.L.R.2d 632, 661 (1955). But see *Apitz v. Dames*, 205 Ore. 242, 287 P.2d 585 (1955) where the court stated:

We hold that when a husband inflicts intentional harm upon the person of his wife, the peace and harmony of the home has been so damaged that there is no danger that it will be further impaired by the maintenance of an action for damages and she may therefore maintain an action. *Id.* at 252, 287 P.2d at 598.

See also note 33 *infra*.

<sup>13</sup> *Worrell v. Worrell*, 174 Va. 11, 4 S.E.2d 343 (1939) (parental immunity); *Roller v. Roller*, 37 Wash. 242, 79 P. 788 (1905) (parental immunity).

<sup>14</sup> The court referred to *Smith v. Kauffman*, 212 Va. 181, 183 S.E.2d 190 (1971) wherein it said:

The enactment of Virginia uninsured motorist laws in 1958 has effected a further and major change of circumstances. One of these laws requires an uninsured motor vehicle endorsement to each policy of automobile liability insurance issued or delivered by an insurer licensed in this State covering a motor vehicle principally garaged or used in this State. VA. CODE ANN. § 38.1-381 (1970) . . . .

. . . .  
 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. In such litigation, the rule can be no longer supported as generally calculated to promote the peace and tranquility of the home and the advantageous disposal of the parents' exchequer. A rule adopted for the common good now prejudices the great majority. *Id.* at 184-85, 183 S.E.2d at 193-94.

<sup>15</sup> *Lubowitz v. Taines*, 293 Mass. 39, 198 N.E. 320 (1936) (by implication); *Harvey v. Harvey*, 239 Mich. 142, 214 N.W. 305 (1927); *Hastings v. Hastings*, 33 N.J. 247, 163 A.2d 147 (1960) (parental immunity); *Lyons v. Lyons*, 2 Ohio St. 2d 243, 208 N.E.2d 533 (1965); *Smith v. Smith*, 205 Ore. 286, 287 P.2d 572 (1955).

<sup>16</sup> Once again the court referred to *Smith v. Kauffman*, 212 Va. 181, 183 S.E.2d 190 (1971) wherein it cited *Midkiff v. Midkiff*, 201 Va. 829, 113 S.E.2d 875 (1960): "If actions were barred because of the possibility of fraud many wrongs would be permitted to go without redress." *Id.* at 833, 113 S.E.2d at 878.

abuse the privilege.<sup>17</sup> Thus the *Surratt* court was left with the disability of a wife to sue her husband for a personal tort under the common law as the "sole existing reason"<sup>18</sup> for continuing the interspousal immunity rule. Rather than overrule a previous holding that the Married Woman's Act does not give a new cause of action for a personal tort between the spouses,<sup>19</sup> the court shunned the usual minority reasoning<sup>20</sup> and based its decision upon a theory that the common law is viable and capable of adapting to changed circumstances.<sup>21</sup>

<sup>17</sup> When the issue of fraud and collusion where insurance exists is introduced this reasoning is followed in all minority jurisdictions. In *Smith v. Kauffman*, 212 Va. 181, 183 S.E.2d 190 (1971) the court quoted from the New Jersey decision of *France v. A.P.A. Transport Corp.*, 56 N.J. 500, 267 A.2d 490 (1970), noted in 5 U. RICH. L. REV. 410 (1971), which had likewise abrogated parental immunity in automobile negligence cases: "We do not believe that the judiciary should continue to refuse to hear an entire class of actions simply because some of these claims may be the product of venality." *Id.* at 505, 267, A.2d at 493.

For an extensive discussion of the aspects of fraud and collusion in these cases see *Immer v. Risko*, 56 N.J. 482, 267 A.2d 481 (1970) (abrogating interspousal immunity).

<sup>18</sup> 212 Va. 191, 192, 183 S.E.2d 200, 201 (1971). The court restricted itself to the arguments of disruption of domestic peace and tranquility, the adverse effect upon the family exchequer, fraud and collusion, and the common law disability of the wife to sue her husband for a personal tort. The other arguments of those jurisdictions favoring the interspousal immunity rule were ignored in the majority opinion, although in the dissents of Justices Cochran and Harman an additional argument was noted (change in the rule as one for the legislature).

<sup>19</sup> In the leading case of *Keister v. Keister*, 123 Va. 157, 96 S.E. 315 (1918) the court said:

The substantive civil right in question is a legal existence—a legal personality—of a married woman, separate and apart from the legal personality of her husband, during coverture. Such a right a married woman had not and has not at common law. *Id.* at 161, 96 S.E. at 316.

The Married Woman's Acts had failed to bestow upon the wife a legal personality necessary to create a substantive right of action in her against her husband for personal injury. Her remedy to sue had been given by the statute but the statute had failed to so separate her from her husband's flesh as to make it possible for him to inflict a purely personal tort on her. See *Furey v. Furey*, 193 Va. 727, 71 S.E.2d 91 (1952) for an application of this reasoning as applied to an action for personal injuries incurred before the marriage.

<sup>20</sup> The traditional minority reasoning has been to construe the Married Woman's Acts as conferring upon the spouse a cause of action which did not exist at common law. See, e.g., *Thompson v. Thompson*, 218 U.S. 611, 619 (1910) (dissenting opinion). See Annot., 43 A.L.R.2d 632, 664-70 (1955).

<sup>21</sup> The court again quoted the New Jersey Supreme Court, this time the decision of *State v. Culver*, 23 N.J. 495, 129 A.2d 715 (1957):

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. There is not a rule of the common law in force today that has not evolved from some earlier rule of common law, gradually in some instances, more suddenly in others, leaving the common law of today when compared with the common

Other arguments espoused by those jurisdictions upholding interspousal immunity have been that the abrogation of the rule will burden the courts with litigation arising from trivial disputes between the spouses;<sup>22</sup> that there is an adequate remedy offered the damaged spouse in other courts;<sup>23</sup> and that the change is one for the legislature rather than the courts.<sup>24</sup> Finding these arguments less than compelling,<sup>25</sup> a growing number of jurisdictions have abrogated the interspousal immunity rule in all actions, either by case decision<sup>26</sup> or by statute.<sup>27</sup>

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law of centuries ago as different as day is from night. 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. Dean Pound posed the problem admirably in his *Interpretations of Legal History* (1922) when he stated, "Law must be stable, and yet it cannot stand still." *Id.* at 505, 129 A.2d at 721.

Thus the Virginia Supreme Court concluded:

. . . [N]othing in the nature of the common law requires us to adhere to an outmoded concept that a wife cannot so separate herself from her husband's flesh as to be capable of maintaining an action against him. 212 Va. at 194, 182 S.E.2d at 202.

<sup>22</sup> See, e.g., *Thompson v. Thompson*, 218 U.S. 611 (1910); *Keister v. Keister*, 123 Va. 157, 96 S.E. 315 (1918); see *Annot.*, 43 A.L.R.2d 632, 663 (1955).

<sup>23</sup> See, e.g., *Drake v. Drake*, 145 Minn. 388, 177 N.W. 624 (1920); *Austin v. Austin*, 136 Miss. 61, 100 So. 591 (1924); see *Annot.*, 43 A.L.R.2d 632, 663-64 (1955).

<sup>24</sup> See, e.g., *Flogel v. Flogel*, 257 Iowa 547, 133 N.W.2d 907 (1965); *Morrissett v. Morrissett*, 80 Nev. 566, 397 P.2d 184 (1964); see *Annot.*, 43 A.L.R.2d 632, 662-63 (1955).

<sup>25</sup> The argument that the abrogation of the interspousal immunity rule in personal torts would encourage litigation has been declared untenable by many minority courts. See, e.g., *Brown v. Brown*, 88 Conn. 42, 89 A. 889 (1914); *Brown v. Gosser*, 262 S.W.2d 480 (Ky. 1953).

The argument that adequate remedies are available in other courts is clearly fallacious. The remedies through divorce and criminal procedure do not offer adequate remedies since neither compensates for the damage done nor covers all torts which may be committed. See *Johnson v. Johnson*, 201 Ala. 41, 77 So. 335 (1917); W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* 862 (4th ed. 1971).

The argument that the change in the interspousal immunity rule is one which should be made by the legislature is seldom challenged by the courts which follow the minority view for the reason that the traditional minority view arose on the basis of the dissent in *Thompson v. Thompson*, 218 U.S. 611, 619 (1910) which indicated that the Married Woman's Acts gave a cause of action for personal torts. In other words, most of the minority view courts feel that the legislature has already made the change. However, in Virginia the court has held that the Married Woman's Acts did not give rise to a new cause of action and yet it gave relief in the *Surratt* case. It was implied in the dissents of Justices Cochran and Harman that the change in the rule should be made by the legislature, but the majority ignored this argument. See note 18 *supra*.

<sup>26</sup> See generally W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* 884 and n.61 (4th ed. 1971); *Annot.*, 43 A.L.R.2d 632, 647-57, 664-71 (1955).

<sup>27</sup> See, e.g., N.Y. GEN. OBLIGATIONS LAW § 3-313 (McKinney 1964) (originally enacted as N.Y. DOM. REL. LAW § 57 (McKinney 1937)). When New York amended the

It is noteworthy that *Surratt* confines its rejection of the immunity rule to automobile negligence cases and that the court chose a forthright approach to changing the law rather than reading into the Married Woman's Act a cause of action for personal torts.<sup>28</sup> This case places Virginia between the extremes of allowing no personal tort actions whatsoever and allowing all such actions.

The textwriters clearly favor a rule which allows all tort actions between the spouses and draws no distinction between intentional and negligent conduct.<sup>29</sup> It is submitted that that is the most logical approach and that Virginia should now totally abrogate the interspousal immunity rule. If the spouse can sue in contract,<sup>30</sup> for a property tort,<sup>31</sup> and for negligence in the operation of an automobile,<sup>32</sup> why deny an action for an intentional tort<sup>33</sup> or one involving negligence not arising from the operation of an automobile? The question should be whether there has been unprivileged conduct

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Domestic Relations Law, it also amended the Insurance Law to provide that no liability insurance policy insured against liability for injuries to person or property of the insured's spouse unless express provision included such in the policy. N.Y. INS. LAW § 167(3) (McKinney 1937); N.C. GEN. STAT. §§ 52-5 (1966) and 52-5.1 (Supp. 1970).

<sup>28</sup> The statute is in derogation of the common law and should be strictly construed. Only by a strained construction of a statute such as Virginia's (VA. CODE ANN. § 55-36 (Cum. Supp. 1971)) could a court conclude that the statute conferred a cause of action for a personal tort between the spouses. By deciding the issue on the basis of a viable common law rather than in giving the statute a strained interpretation, the court rendered a more forceful opinion.

<sup>29</sup> H. CLARK, *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* 252-56 (1968); W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* 861-64 (4th ed. 1971); Albertsworth, *Recognition of New Interests in the Law of Torts*, 10 CAL. L. REV. 461, 471-80 (1922); Farage, *Recovery For Torts Between Spouses*, 10 IND. L.J. 290 (1934); McCurdy, *Personal Injury Torts Between Spouses*, 4 VILL. L. REV. 303 (1959); McCurdy, *Torts Between Persons in Domestic Relation*, 43 HARV. L. REV. 1030 (1930); Sanford, *Personal Torts Within the Family*, 9 VAND. L. REV. 823 (1956).

<sup>30</sup> See, e.g., *Klotz v. Klotz*, 202 Va. 393, 117 S.E.2d 650 (1961); *Harlan v. Weatherly*, 183 Va. 49, 31 S.E.2d 263 (1944); *Alexander v. Alexander*, 85 Va. 353, 7 S.E. 335 (1888).

<sup>31</sup> See, e.g., *Vigilant Ins. Co. v. Bennett*, 197 Va. 216, 89 S.E.2d 69 (1955).

<sup>32</sup> *Surratt v. Thompson*, 212 Va. 191, 183 S.E.2d 200 (1971).

<sup>33</sup> Dean Prosser has aptly stated the reasoning of the minority view jurisdictions regarding the maintenance of an action for an intentional tort between the spouses:

The chief reason relied upon by all these majority view courts, however, is that personal tort actions between husband and wife would disrupt and destroy the peace and harmony of the home, which is against the policy of the law. This is on the bald theory that after a husband has beaten his wife, there is a state of peace and harmony left to be disturbed; and that if she is sufficiently injured or angry to sue him for it, she will be soothed and deterred from reprisals by denying her the legal remedy . . . and although the same courts refuse to find any disruption of domestic tranquility if she sues him for a tort to her property, or brings a criminal prosecution against him. If this reasoning appeals to the reader, let him by all means adopt it.

W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* 863 (4th ed. 1971).

which is tortious. If so, the potential liability should be the same as if the partners were strangers; that is, the relationship per se should not bar any action. However, the relationship may militate against some actions which would be proper were the conduct between strangers. In negligent torts the relationship should be treated as a circumstance in the consideration of what is "reasonable under the circumstances" and in intentional torts the existence of the relationship might give rise in a proper situation to implied consent.<sup>34</sup>

The *Surratt* case represents a realistic approach to today's interspousal relations in its partial abandonment of the outmoded common law rule of interspousal immunity. Hopefully, in the near future, Virginia will take another realistic step and completely abandon all forms of interspousal immunity.

*R.F.P.*

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<sup>34</sup> The privileged conduct would only cover a small area of the marital relation but at the same time would be broad enough to bar trivial actions. Outside of this small area of privileged conduct, all actions should be maintainable.