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Tort Law-Interspousal Immunity-Action for Wrongful Death Against Surviving Spouse Held Maintainable When Such Act Terminates Marriage and Neither Child Nor Grandchild Survives Decedent

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The doctrine of interspousal immunity, established at early common law, considers husband and wife legally one. Under this view of unity, each spouse is precluded procedurally as well as substantively from suing the other in tort. To ameliorate the harshness of this view, the Married Women's Acts or Emancipation Acts were promulgated beginning in 1844. Although these statutes removed some of the disabilities of coverture from women in all of the fifty states, the majority of the statutes, including Virginia's, did not grant one spouse the right to sue the other for a personal tort. As early as 1888, the Virginia Supreme Court interpreted the Virginia

2. Norfolk & W.R.R. v. Prindle, 82 Va. 122 (1886); W. PROSSER, HANDBOOK OF THE LAW OF TORTS 859-60 (4th ed. 1971); McCurdy, Torts Between Persons in Domestic Relations, 43 HARV. L. REV. 1030 (1930) [hereinafter cited as McCurdy]. The common law view resulted as a matter of procedure since the husband would be both plaintiff and defendant. Sanford, Personal Torts Within the Family, 9 VAND. L. REV. 823 (1956) [hereinafter cited as Sanford]. Also, the woman had no substantive right of action. Id.
3. The statutes are collected in 3 C. VERNIER, AMERICAN FAMILY LAWS §§ 167, 179, 180 (1955).
6. In Thompson v. Thompson, 218 U.S. 611 (1910), the Supreme Court in its only decision addressing the rights of married women to maintain an action against their husbands for personal torts construed the Code of the District of Columbia not to permit such actions. The Court stated: "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." Id. at 618. Accord, Jones v. Pledger, 238 F. Supp. 638 (D.D.C. 1965); Vigilant Ins. Co. v. Bennett, 197 Va. 216, 89 S.E.2d 69 (1955) (dictum); Furey v. Furey, 193 Va. 727, 71 S.E.2d 191 (1952); Keister v. Keister, 123 Va. 157, 96 S.E. 315 (1918); Campbell v. Campbell, 145 W. Va. 245, 114 S.E.2d 406 (1960). This view is based on a variety of premises. See Sanford, supra note 2, at 826-27.

In addition to those courts adhering to the common law doctrine of unity of spousal identity, other courts have determined as a matter of public policy not to allow interspousal personal tort actions. See Ashdown, Intrafamily Immunity, Pure Compensation, and the Family Exclusion Clause, 60 IOWA L. REV. 239 (1974); McCurdy, supra note 2, at 1052-53; Sanford, supra note 2, at 828; Comment, Intrafamily Immunity—The Doctrine and Its Present Status, 20 BAYLOR L. REV. 27, 68 (1967); Note, Interspousal Immunity—A Policy Oriented Approach, 21 RUTGERS L. REV. 491; 493 (1967). This social policy is founded on a number of factors. Some courts wish to maintain marital harmony and peace in the home. See Thompson v. Thompson, 218 U.S. 611 (1910). Contra, Small v. Rockfeld, 66 N.J. 231, 330 A.2d 335 (1974). Others focus on preventing fraud or collusion between spouses against insurance companies. See Lubowitz v. Taines, 293 Mass. 39, 198 N.E. 320 (1935); Harvey v. Harvey, 239 Mich. 142, 214 N.W. 305 (1927); Smith v. Smith, 205 Ore. 286, 287 P.2d 572
Married Women’s Act as being supportive of personal tort immunity between husband and wife.\(^7\) Subsequent cases upheld this interpretation as not expressly, nor by implication, giving the wife the right to sue her husband for personal torts.\(^8\)

Recently, the Virginia Supreme Court was given the opportunity to reevaluate its position in *Korman v. Carpenter*.\(^9\) The case involved an action for wrongful death brought by the administrator of Katherine Houghton’s estate against her husband’s committee. The alleged cause of action arose from the fatal shooting of Mrs. Houghton by Mr. Houghton. The trial court sustained the defendant’s demurrer on the ground that no action could be maintained under Virginia’s Wrongful Death Act as the decedent would not have been able to maintain a personal injury action against her assailant had she lived.\(^11\) The Virginia Supreme Court, disregarding the common

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Although the majority of jurisdictions still favor interspousal immunity, there is an increasing number which have either refused to apply this doctrine in specific fact situations or which have discarded it totally. *See* Mosier v. Carney, 376 Mich. 532, 138 N.W.2d 343 (1965); Sanford, *supra* note 2, at 828 & n.7; *Comment, Intrafamily Immunity—The Doctrine and Its Present Status*, 20 BAYLOR L. REV. 27, 37 & n.44, 68-69 & n.149 (1967); 38 Mo. L. REV. 333, 334-35 & nn.15 & 16 (1973); 6 U. RICH. L. REV. 379, 380 & n.7 (1972). This minority finds support in Mr. Justice Harlan’s dissent in *Thompson v. Thompson*, 218 U.S. 611, 623-24 (1910):

> I cannot believe that [Congress] intended to permit the 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.

7. In *Alexander v. Alexander*, 85 Va. 353, 367, 7 S.E. 335, 341 (1888), the court, interpreting the Married Women’s Act, stated:

> Being obviously an enabling act, it should not be construed strictly, as in derogation of the common law, nor technically, but fairly, so as to carry out the intention of the legislature, which is to secure to the *feme covert*, as separate estate, free from the debts, liabilities . . . and not in anywise to affect or change the personal relations of husband and wife which enter into the *status* of marriage.

8. *Furey v. Furey*, 193 Va. 727, 71 S.E.2d 191 (1952); *Keister v. Keister*, 123 Va. 157, 96 S.E. 315 (1918). The court noted in *Furey* that the Married Women’s Act had been thrice amended since *Keister*, and the legislature had not enacted any law permitting the wife to sue the husband for a tort. The doctrine was mentioned in *Hargrow v. Watson*, 200 Va. 30, 104 S.E.2d 37 (1958).


law doctrine of spouses’ legal unity as fiction, reversed the circuit court’s decision.

The court based its decision on the social policy of preservation of marriage and family harmony. Since one spouse willfully had taken the life of the other, and there was no longer a family harmony to maintain, there was no reason for sustaining the immunity. The court’s narrow holding was that an action for wrongful death may be maintained by beneficiaries against the surviving spouse when the wrongful act results in termination of the marriage by death and the deceased spouse was survived by no living child or grandchild. Justice Harman disagreed with the majority. In his dissenting opinion, he reiterated sentiments expressed in an earlier case by Justice Cochran indicating that the court was exercising power which rightfully belonged to the legislature.

Korman, by following a format established in earlier cases, appears to follow a logical progression in the Virginia Supreme Court’s complete abrogation of interspousal tort immunity. In Norfolk S.R.R. v. Gretakis, the doctrine of personal tort immunity between child and parent was adopted by the supreme court. Five years later the court paid lip service to the parental immunity doctrine yet allowed a girl to recover from injuries received on a bus owned by her father. This flexibility in viewing intrafamilial immunity cases was extended in a later case where the court struck down two policy arguments often used in support of parental and interspousal immunity, i.e., the possibility of fraud and the disruption of family harmony.

12. The court stated: “We are not concerned with the outmoded fiction that husband and wife are of ‘one flesh’.” 216 Va. at 90, 216 S.E.2d at 197.
13. Id. Other social policies such as fraud, collusion, or other remedies being available were discussed and dismissed as non-substantive in Smith v. Kauffman, 212 Va. 181, 182-83, 183 S.E.2d 190, 192 (1971).
14. The court reasoned that if a tort action against a spouse was permitted for wrongful death based on the wanton operation of an automobile, the use of a gun instead of an automobile was not a valid reason for denying beneficiaries redress. 216 Va. at 91, 216 S.E.2d at 198.
15. Id. at 91-92, 216 S.E.2d at 198.
17. 162 Va. 597, 174 S.E. 841 (1934). The court noted two exceptions to the parental immunity doctrine: where the child was emancipated and where a master-servant relationship existed between the two.
18. In Worrell v. Worrell, 174 Va. 11, 23, 4 S.E.2d 343, 348 (1939), the court considered family harmony and stated: “This disability [parental immunity from suit] is not absolute. It is imposed for the protection of family control and harmony, and exists only where a suit . . . might disturb the family relations.” quoting Dunlap v. Dunlap, 84 N.H. 352, 150 A. 905, 915 (1900) (emphasis added).
19. In Midkiff v. Midkiff, 201 Va. 829, 832, 113 S.E.2d 875, 878 (1960), involving a tort
The Virginia Supreme Court further recanted its adherence to the doctrine of intrafamilial immunity in two decisions in 1971. In *Smith v. Kauffman*, the court held a minor child could sue a parent for personal injury sustained in a motor vehicle accident caused by the parent’s negligence. On the same day, under a wrongful death action, a wife’s beneficiaries were allowed to recover from the husband in *Surratt v. Thompson*. In these cases prior decisions affirming intrafamilial immunity served as the rationale for abrogating the doctrine in specific factual situations. This pattern was repeated in *Korman*, i.e., an intrafamilial immunity was abrogated with the holding limited to the “narrow question presented by the facts.”

Notwithstanding the emotionally desirable result reached by the court in *Korman*, its analyses of both law and fact are subject to criticism. The questionable analysis of law occurred in the court’s treatment of Virginia’s wrongful death statute. There are basically two types of wrongful death statutes: survival and death. A survival statute creates a right in the decedent’s personal representative, allowing the personal representative to sue the tortfeasor for injury sustained by the decedent prior to his death. The right to recover is thought to be a continuance of that which the decedent could have asserted if he had lived; therefore, the cause of action is said to survive the decedent. The second type, a death statute, creates a new right of action in the beneficiaries. It is brought to compensate the survivors for loss occasioned by the death, and recovery is not predicated on the decedent’s personal injuries.

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action between unemancipated brothers, the court upheld the action stating that the prediction of a disruption of family harmony is “no more than a speculative assumption.” In addressing the possibility of fraud, the court said: “Fraud is never presumed . . . . Courts should not immunize tortfeasors because of the possibility of fraud or collusion . . . . 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. The court also cast doubt on the common law policy by noting 15 C.J.S. *Common Law* § 2, at 613. *Id.* at 832, 113 S.E.2d at 877. *See* 22 CATH. U.L. REV. 167 (1972).

20. 212 Va. 181, 183 S.E.2d 190 (1971). Here the court addressed and struck down several policy arguments in favor of intrafamilial immunity: possibility of collusion or fraud and promotion of peace in the home.

21. 212 Va. 191, 183 S.E.2d 200 (1971). The court held that a wife may maintain an action against her husband for personal injuries sustained in an automobile accident; therefore, the decedent wife’s beneficiaries may recover under a wrongful death action. Here the court addressed and struck down the common law barrier to interspousal suits citing two New Jersey cases: *State v. Culver*, 23 N.J. 495, 129 A.2d 715 (1957), and *Immer v. Risko*, 56 N.J. 482, 267 A.2d 481 (1970), which advocated a change in the common law to meet changing times.

22. 216 Va. at 92, 216 S.E.2d at 198.

In *Korman*, the court did not examine Virginia’s Wrongful Death Act in order to determine in which classification it belonged. If the legislative history and subsequent case law interpreting the statute had been examined, the court would have found it to be a death statute with a new right of action in the beneficiaries being derived from the tortious act rather than from the person of the deceased. Thus, the beneficiaries should not have had to address the interspousal immunity issue ab initio. Clearly the rights of the beneficiaries are independent of the decedents and thus untouched by the doctrine. Numerous cases have dealt with and rejected the idea that personal immunity can block the right of recovery in a wrongful death action.

The court’s analysis of the factual situation is also suspect. The court, in basing its decision on the maintenance of family harmony, is clinging to an illusion. When one spouse murders the other, any semblance of unity is shattered whether or not children survive the decedent. If there are no living children, there is no family unit to maintain. If children do survive the decedent, the convicted spouse will probably be incarcerated for his crime thereby destroying the family unit.

Although legal scholars view the abrogation of interspousal immunity as eminently desirable, it is submitted that Virginia will not totally reject the doctrine. Whenever family peace or harmony is endangered, the Su-

25. In 1871, the General Assembly of Virginia passed a wrongful death act modeled after Lord Campbell’s Act. Va. Acts of Assembly 1871, ch. 29, at 27. Lord Campbell’s Act was enacted by English Parliament in 1846, 9 & 10 Vict. c. 93 (1846). It provided:
1. That an action may be maintained whenever death is caused by a wrongful act, neglect, or default which would have entitled the person injured to maintain an action if death had not ensued.
2. That such action is for the benefit of certain designated members of a deceased’s family or close of kin.
3. That damages recoverable in such action are those suffered by such beneficiaries by reason of the death. 25A C.J.S. Death § 15, at 592 (1966) (emphasis added).


26. In *Deposit Guar. Bank & Trust Co. v. Nelson*, 212 Miss. 335, 54 So.2d 476 (1951), the court stated that even though the wife was under personal disability to sue, the suit was a new cause of action derived from the tortious act and not from the decedent. *See, e.g.*, Welch v. Davis, 410 Ill. 130, 101 N.E.2d 547 (1951); Rodney v. Staman, 371 Pa. 1, 89 A.2d 313 (1952).


preme Court of Virginia sees its duty as protector of "the most sacred relation known to society." As long as this policy is followed Virginia will continue to reject interspousal immunity only in specific factual situations. In his dissenting opinion, Justice Harman may have focused upon a resolution to the interspousal immunity issue by suggesting the decision be left to the legislature. However, since there was no legislative action following the intrafamilial immunity cases in 1971, the outlook for legislative abrogation of interspousal immunity in 1976 remains dim.

L.H.S.