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The Legislative Abrogation of Interspousal Immunity in Virginia

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THE LEGISLATIVE ABROGATION OF INTERSPOUSAL IMMUNITY IN VIRGINIA

I. INTRODUCTION

Is a wife who hires someone to murder her husband liable in tort for the injuries he sustains in the murder attempt? The Virginia Supreme Court faced just this question in 1980 in *Counts v. Counts*.[1] In light of the partial abrogation of the doctrine of interspousal immunity by the Virginia Supreme Court during the 1970's in wrongful death actions[2] and in actions for damages in motor vehicle accident cases,[3] a well reasoned prediction would have anticipated a further erosion of the doctrine.[4] In *Counts*, however, the court disallowed the interspousal suit for an intentional tort, signaling that it had no intention of making further judicial exceptions to the doctrine of interspousal immunity. The General Assembly then took the initiative and in its 1981 session completed the partial abrogation begun by the courts by abolishing the defense of interspousal immunity.[5] With this action the legislature brought Virginia into line with the growing trend toward abrogation. This article traces the doctrine of interspousal immunity from its orgins in English common law, through its partial abrogation by the Virginia court which ended with *Counts*, to its abolition as a defense by the Virginia General Assembly in 1981.

II. THE HISTORY OF INTERSPOUSAL IMMUNITY IN VIRGINIA

A. *The Common Law Origin*

The doctrine of interspousal immunity is a product of the English com-

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1. 221 Va. 151, 266 S.E.2d 895 (1980).

2. Korman v. Carpenter, 216 Va. 86, 216 S.E.2d 195 (1975).

3. Surratt v. Thompson, 212 Va. 191, 183 S.E.2d 200 (1971).

4. In fact the Roanoke County Circuit Court made an exception to interspousal immunity in an intentional tort action on May 22, 1980. The jury awarded a $65,000 damage award to a wife for injuries inflicted by her husband. The judge allowed this action to proceed on the ground that interspousal immunity did not apply since the parties were divorced at the time of the suit. This was reasonable in view of the trend in Virginia toward abrogation. After the Virginia Supreme Court decision in *Counts v. Counts*, the judge granted a defense motion to suspend the award. NAT'L L.J. June 30, 1980, at 5, col. 1.

5. The bill sponsored by Senator Wiley F. Mitchell, Jr., was introduced as Senate Bill No. 542. It was signed by Governor Dalton on March 21, 1981 and became effective July 1, 1981. VA. CODE ANN. § 8.01-220.1 (Cum. Supp. 1981) reads as follows: "The common-law defense of interspousal immunity in tort is abolished and shall not constitute a valid defense to any such cause of action arising on or after July one, nineteen hundred eighty-one."

mon law, which regarded the personal and property rights of the wife as merged with those of her husband.[6] As a result of this doctrine, a wife could not sue or be sued without the joinder of her husband.[7] Since the husband would be both plaintiff and defendant in interspousal suits, this unity theory constructed a procedural bar to such suits.[8] Substantively the wife was precluded from suing her husband in tort since she had no personal right of action.[9] Virginia followed this theory of legal unity early in its history and disallowed suits between husband and wife.[10]

B. *The Married Women's Act*

The legal status of women began to change in the mid-nineteenth century with the enactment in all jurisdictions of statutes known as Married Women's Acts. These statutes destroyed the unity of the husband and wife thereby allowing married women the separate control and ownership of their property, and the capacity to sue or be sued in their own right.[11] Virginia's Married Women's Act was enacted in 1877,[12] and the first at-

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6. "By marriage, the husband and wife are one person in law: that is, the very being or legal existence of the women is suspended during the marriage, or at least is incorporated and consolidated into that of the husband." 1 W. BLACKSTONE, COMMENTARIES 442.

7. W. PROSSER, THE LAW OF TORTS § 122 (4th ed. 1971).

8. McCurdy, *Torts Between Persons in Domestic Relation*, 43 HARV. L. REV. 1030, 1032-33 (1930) [hereinafter cited as McCurdy, *Torts*]; McCurdy, *Personal Injury Torts Between Spouses*, 4 VILL. L. REV. 303 (1959) [hereinafter cited as McCurdy, *Personal Injury Torts*]. In the latter article, the author states:

> [T]he combination of various incidents of marriage, some substantive, some procedural, some conceptual, made it impossible for one spouse ever to be held civilly liable as a tortfeasor, in any situation, and without exception, to the other for any act, antenuptial or during marriage, causing personal injury which would have been a tort but for the marriage.

McCurdy, *Personal Injury Torts* at 307.

9. McCurdy, *Personal Injury Torts*, *supra* note 8, at 307.

10. *See* Paynes v. Coles, 15 Va. (1 Munf.) 373 (1810). *But see* DeBaun's Ex'r v. DeBaun, 119 Va. 85, 89 S.E. 239 (1916) (in a court of equity, suits were allowed between spouses).

11. W. PROSSER, *supra* note 7, at § 122.

12. 1876-77 Va. Acts, ch. 329. The current version of the Married Women's Act is at VA. CODE ANN. §§ 55-35 to -37 (Repl. Vol. 1974). Section 55-35 reads in 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 curtesy nor his marital rights shall entitle him to the possession or use, or to the rents, issues and profits of such real estate during the coverture; nor shall the property of the wife be subject to the debts or liabilities of the husband.

Section 55-36 provides in pertinent part: "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 . . . ." Section 55-37 provides: "A husband shall not be responsible for any contract, liability or tort of his wife, whether the contract or liability was incurred or the tort was committed before or after marriage."

tacks on the doctrine of interspousal immunity involved an interpretation of this Act.[13] In *Keister's Adm'r v. Keister's Ex'r*,[14] the Virginia Supreme Court faced for the first time the question of whether the statute had changed the common law to allow a married woman a cause of action against her husband for damages resulting from an assault committed during the marriage. The court concluded that the legislature must be presumed to have considered the existing common law when enacting the statute and held that the common law would remain in effect since the intent to change did not appear expressly or impliedly in the Act.[15]

Common law interspousal immunity remained intact with respect to personal torts,[16] but, as the Married Women's Acts undermined the common law unity theory, policy reasons became paramount in defending the immunity doctrine. In a concurring opinion in *Keister*, Justice Burks articulated these policy reasons for upholding interspousal immunity. Marriage is "the most sacred relation known to society . . . . Upon the preservation of its integrity the health, morals and purity of the State is [sic] dependent."[17] The justice also noted that there were sufficient alternative remedies such as divorce suits or criminal prosecutions.[18]

The view of interspousal immunity in *Keister* was extended in *Furey v. Furey*[19] to cover a case in which a wife brought an action to recover damages for a tort committed by her husband before their marriage. The court said that is was the common law rule that marriage extinguishes

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13. In Alexander v. Alexander, 85 Va. 353, 7 S.E. 335 (1888) the court said the Married Women's Act should not be construed to change the personal relations between spouses.

14. 123 Va. 157, 96 S.E. 315 (1918) (wrongful death action brought by the wife's administrator against the executors of the husband's estate).

15. *Id.*, at 162, 96 S.E. at 317. The court in *Keister* followed the reasoning of Thompson v. Thompson, 218 U.S. 611 (1910). In *Thompson*, the Court interpreted the Married Women's Act of the District of Columbia as allowing the wife to maintain actions of tort in her own name but not giving her a right of action against her husband. In determining the legislative intent, the Court said 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." 218 U.S. at 618. This expresses the traditional view that statutes in derogation of the common law should be construed strictly.

16. In *Keister*, the court found that the legislature intended to enlarge the remedies of married women only with respect to rights already existing at common law, not to create a new cause of action. 123 Va. at 163, 96 S.E. at 317.

17. *Id.* at 176, 96 S.E. at 322 (Burks, J., concurring). Justice Burks supported the common law unity of identity by maintaining that the duties of marriage "forbid the idea that this 'one flesh' may so divide itself that either spouse may sue the other." *Id.* at 177, 96 S.E. at 322. He also expressed concern that the court would become a forum for the public airing of domestic difficulties.

18. *Id.* at 177, 96 S.E. at 322 (Burks, J., concurring).

19. 193 Va. 727, 71 S.E.2d 191 (1952).

liability for antenuptial torts.[20] Although the court would not allow an action for a purely personal tort, it later ruled in *Vigilant Insurance Co. v. Bennett*,[21] that a spouse is liable for tortious damage to the property of the other spouse. The issue in *Vigilant Insurance* was whether the insurance company, as subrogee of the husband, was entitled to maintain an action against his wife for the destruction of his automobile. The court construed sections 55-35 through -37 of the Virginia Code[22] as abolishing the marital unity in regard to property interests, and as imposing on the wife full liability for torts on property.[23]

III. The Partial Abrogation of the Doctrine of Interspousal Immunity in Virginia

Not until 1971 did the Virginia Supreme Court take the first step in abrogating the doctrine of interspousal immunity. In *Surratt v. Thompson*,[24] the administrator of a deceased woman's estate brought a wrongful death action against her husband for personal injuries sustained in an automobile accident.[25] In dismissing the common law unity theory, the court declared that "nothing 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."[26] The *Surratt* court cited and relied on *Smith v. Kauffman*,[27] an automobile accident case decided the same day involving the issue of parental immunity which rejected the policy justification that immunity was a preserver of family tranquility. The wide use of liability insurance was credited with eliminating the threat to family harmony.[28]

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

21. 197 Va. 216, 89 S.E.2d 69 (1955). The only rights which the insurance company had were those that the husband had against his wife. *See* 42 Va. L. Rev. 119 (1956).

22. Va. Code Ann. §§ 55-35 to -37 (Repl. Vol. 1974).

23. 197 Va. at 226, 89 S.E.2d at 76. *See* Edmonds v. Edmonds, 139 Va. 652, 124 S.E. 415 (1924) (wife had right to bring action of forcible entry and detainer against husband).

24. 212 Va. 191, 183 S.E.2d 200 (1971). *See* 6 U. Rich. L. Rev. 379 (1972).

25. 212 Va. at 192, 183 S.E.2d at 201.

26. *Id.* at 194, 183 S.E.2d at 202. The court construed the Virginia wrongful death statute as affording the deceased wife's personal representative no right of action unless the right existed immediately before her death. This interpretation forced the court to confront the common law squarely and modify it to allow the right to sue. Va. Code Ann. § 8-633 (1957) (currently codified at Va. Code Ann. § 8.01-50 to -56 (1977 Repl. Vol & Cum. Supp. 1980)).

27. 212 Va. 181, 183 S.E.2d 190 (1971). The court in *Smith* abrogated the parental immunity rule in motor vehicle accident cases. A seven-year-old child was allowed to sue the administrator of her stepfather's estate for injuries incurred through the stepfather's negligence.

28. *Id.* at 185, 183 S.E.2d at 194. "The very high incidence of liability insurance covering Virginia-based motor vehicles, together with the mandatory uninsured motorist endorse-

Since the recovery would be from the insurance company rather than from the defendant spouse, the disruption of the home would be minimized and the burden on the family finances eliminated.[29] The mere possibility of fraud and collusion between the spouses was held to be too flimsy a reason to deny redress for injury.[30] The court in *Surratt* also relied on *Worrell v. Worrell*,[31] an early intra-family immunity case which held that "former rules should give way to rules of reason in the light of changed circumstances."[32] The court's weakening of both the common law unity theory and the public policy reasoning for immunity thus allowed the abrogation of interspousal immunity for personal injuries resulting from motor vehicle accidents.[33]

Four years later the court made a second exception to the immunity doctrine in *Korman v. Carpenter*,[34] in which the administrator of an estate brought a wrongful death action on behalf of the deceased's parents and brothers against the husband's committee. In its decision, the court noted the modern trend of abrogation across the country and the evolving nature of the common law.[35] Although the old common law basis for the doctrine was dismissed, the policy of fostering a harmonious marital relationship was still regarded as viable.[36] However, the court found that the

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ments to insurance policies, has made our rule of parental immunity anachronistic when applied to automobile accident litigation." *Id.*

29. *Id.*

30. *Id.* at 182, 183 S.E.2d at 192.

31. 174 Va. 11, 4 S.E.2d 343 (1939). In *Worrell*, exception was created to the doctrine of parental immunity allowing an action by a twenty-year-old college student injured in a collision between a truck and a commercial bus owned by her father.

32. 212 Va. at 193, 183 S.E.2d at 202 (citing Worrell v. Worrell, 174 Va. at 20, 4 S.E.2d at 346-47). *See* 21 WM. & MARY L. REV. 273 (1979).

33. The *Surratt* court cited two New Jersey cases in support of abrogation in automobile accident cases: Immer v. Risko, 56 N.J. 482, 267 A.2d 481 (1970); State v. Culver, 23 N.J. 495, 129 A.2d 715 (1957).

34. 216 Va. 86, 216 S.E.2d 195 (1975). *See also* 10 U. RICH. L. REV. 434 (1976).

35. The court observed:

> 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 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.

216 Va. at 90, 216 S.E.2d at 197-98 (quoting State v. Culver, 23 N.J. 495, 505, 129 A.2d 715, 721 (1957)).

36. 216 Va. at 90, 216 S.E.2d at 197.

policy was not applicable in this case since the marriage was terminated by the intentional killing of one spouse by the other. The court thus carved another exception to the doctrine, carefully limited to situations in which 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."[37]

Surratt and *Korman* established a somewhat limited trend toward abrogation of interspousal immunity on a case by case basis. The only vestige of justification for immunity remaining following *Surratt* and *Korman* was the policy of protecting family harmony. The time was ripe for further abrogation of the doctrine in cases where the threat to marital relations was minimal. The Virginia Supreme Court was presented with this opportunity in *Counts v. Counts*.[38]

IV. The Effect of *Counts v. Counts* on the Status of the Doctrine of Interspousal Immunity in Virginia

A. *Facts*

Mr. Counts sued his former wife for compensatory and punitive damages, alleging injuries intentionally inflicted upon him by his wife's co-conspirator in an unsuccessful murder-for-hire plot. While still married to and living with her husband, Mrs. Counts had solicited Miles Turner to kill Mr. Counts for $5,000. Turner attempted to carry out the conspiracy to murder, but succeeded only in inflicting severe mental and physical injuries on Mr. Counts.[39] The couple was subsequently divorced and Mr. Counts commenced this tort action two weeks later. Mrs. Counts filed a demurrer stating that the action was barred by the doctrine of interspousal immunity. The trial court sustained the demurrer and dismissed the action on the ground that "interspousal immunity was still the law in Virginia."[40] The Virginia Supreme Court upheld this dismissal.

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37. *Id.* at 92, 216 S.E.2d at 198. The court narrowed this exception because of its concern about the divisive effect on the family and the economic ramifications of allowing a recovery on a wrongful death action from a surviving parent who is responsible for the care and maintenance of persons for whose benefit the recovery is received.

38. 221 Va. 151, 266 S.E.2d 895 (1980).

39. *Id.* at 151, 266 S.E.2d at 895-96. Mrs. Counts was convicted of conspiring to maliciously wound her husband. She was fined and sentenced to jail.

40. *Id.* at 153, 266 S.E.2d at 896. The trial judge recognized the exceptions in automobile accident cases and the *Korman* exception, but held that any further exception must be made by the Supreme Court of Virginia or the General Assembly. *Id.*

B. *Analysis*

The Virginia Supreme Court was faced with the question of whether one spouse, who directs the intentional infliction of harm on the other is immune from tortious liability if the parties are divorced at the time the action is brought. The plaintiff, in urging that the doctrine be abolished or further modified, used *Korman* to illustrate the demise of both the common law and the public policy justifications for immunity.[41] In *Korman* the policy of preservation of the marriage was found to be irrelevant when one spouse murdered the other since there was no marriage to be saved.[42] Thus, Mr. Counts argued, since this action was brought after the parties were divorced, there was similarly no marriage to be preserved.[43]

The court responded to this contention by emphasizing that the precedential scope of *Korman* was restricted to the actual facts of that case.[44] Despite the exception made in *Korman,* the court distinguished that case and reaffirmed the immunity doctrine as a rule which protects and encourages the preservation of marriages.[45] In *Korman,* the tortious act which resulted in death actually terminated the marriage. The marriage in *Counts,* however, remained intact after the tort and it was not until the further act of divorce that the marriage was dissolved. The court reasoned that if they authorized these damage suits "the availability of such a remedy and the accompanying prospect of a monetary award would contribute to the disruption of many marriages."[46] The majority reiter-

41. *Id.* (citing Korman v. Carpenter, 216 Va. at 90, 216 S.E.2d at 198).

42. 216 Va. at 90, 216 S.E.2d at 198.

43. 221 Va. at 153-54, 266 S.E.2d at 896.

44. In *Korman* the court stated it 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." 216 Va. at 92, 216 S.E.2d at 198.

45. The *Counts* court characterized the immunity doctrine as a "concept which is ingrained in the body of law of this State and which is an integral part of the public policy of the Commonwealth to preserve the family unit." 221 Va. at 155, 266 S.E.2d at 897.

46. The court constructed the following scenario to illustrate the potential disruptive effect of such a remedy on marriage:

> The formerly stable marriage of Husband and Wife begins to deteriorate. Finally, in a particularly heated exchange, Husband intentionally strikes Wife causing an injury. Wife then leaves the marital abode and retains an attorney. During the initial consultation, the attorney concludes that Wife is entitled to a divorce on the ground of cruelty and constructive desertion, but nevertheless properly explores the possibility of a reconciliation. Having learned of the injury, the attorney also advises Wife that now in Virginia she may sue Husband and recover damages for her personal injuries, provided she waits to sue until after the divorce is final. Wife, who would otherwise be inclined to seek a reconciliation leading to ultimate preservation of the marriage, is influenced by the prospect of a damage award and decides to quickly sue

ated prior policy, stating that existing criminal and divorce remedies were sufficient and that the availability of an interspousal action would introduce just one more "abrasive and unnecessary ingredient" in the marital relationship.[47] Another reason the court expressed for not abrogating the doctrine was the fear that the court would open itself to a deluge of trivial suits.[48] The court referred to the scenario of the "uninvited kiss" which, as an assault and battery, would be the basis of recovery by an overkissed husband or wife.[49]

The dissent stated that a tort action should be allowed where, as here, "a spouse has been injured by a tort committed by the other spouse with intent to kill, maim, disfigure, or disable and divorce follows the tort without intervening condonation . . . ."[50] The dissent did not advocate an interspousal right of action for every intentional tort, but he felt that malicious, intentional conduct should be considered an immediate "repudiation of the marital contract" since the victim of such a tort would typically end the marital relationship regardless of the existence of a right of action.[51]

As noted in the dissent, by 1980 the Virginia Supreme Court had progressed in its rejection of the common law justification of immunity by recognizing that the fiction of husband and wife as "one flesh" was outmoded.[52] Nevertheless, the court in *Counts* clung to the illusion of interspousal immunity as the preserver of family harmony. The *Counts* decision was a clear indication of the Supreme Court's unwillingness to make any further exceptions to the doctrine. If further exceptions were to be made, the change would have to be instituted by the General Assembly.

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for divorce so it can become final before the statute of limitations runs on the personal injury claim.

Id. at 155-56, 266 S.E.2d at 897-98.

47. *Id.* at 156, 266 S.E.2d at 898. The court stated that a tort remedy would create a threat such as, "I will not only report your abuse to the criminal prosecutor and seek spousal support in the course of divorcing you but I will also sue you for damages." *Id.*

48. *See, e.g.*, Corren v. Corren, 47 So. 2d 774 (Fla. 1950) (allowing suits for insignificant spousal disputes would destroy family harmony); Drake v. Drake, 145 Minn. 388, 177 N.W. 624 (1920) (husband could enjoin wife's nagging).

49. 221 Va. at 156 n.4, 266 S.E.2d at 898 n.4 (citing Furey v. Furey, 193 Va. 727, 733 n.5, 71 S.E.2d 191, 194 n.5 (1952)).

50. 221 Va. at 157, 266 S.E.2d at 898-99 (Poff, J., dissenting).

51. *Id.* at 157, 266 S.E.2d at 898 (Poff, J., dissenting).

52. 221 Va. at 157, 266 S.E.2d at 898 (Poff, J., dissenting) (citing Korman v. Carpenter, 216 Va. 86, 90, 216 S.E.2d 195, 197 (1975)).

V. The Legislative Abolition of Interspousal Immunity

The doctrine of interspousal immunity which the Virginia legislature abolished in its 1981 session was far from the powerful monolith it had been at common law. The sharp trend across the United States toward abolition of the doctrine had already weakened its validity as a defense. Before the General Assembly took its action twenty-five states had totally abrogated the doctrine.[53] Other states had made exceptions to immunity with respect to motor vehicle negligence cases,[54] wrongful death actions,[55] and intentional tort cases.[56] Several state legislatures had reacted to judicial decisions and had passed acts addressing the defense of interspousal immunity. Both the North Carolina and Wisconsin legislatures authorized interspousal suits by both spouses, overruling case law interpreting the Married Women's Acts as authorizing suits by wives against husbands but not by husbands against wives.[57] The New York legislature superseded a case disallowing tort suits between spouses by passing legislation which granted either spouse a right of action against the other for tortious injury to person or property.[58]

In considering the proposed bill to abolish interspousal immunity as a defense, the Virginia General Assembly confronted a doctrine whose efficacy as a legal principle and utility as an instrument of justice had been questioned by courts and legislatures. The common law foundation for interspousal immunity has been thoroughly eroded. The only rationale which sustained the doctrine was the policy justification for immunity as

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53. These states include: Alabama, Alaska, Arkansas, California, Colorado, Connecticut, Idaho, Indiana, Iowa, Kentucky, Michigan, Minnesota, Nebraska, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Oklahoma, South Carolina, South Dakota, Washington, West Virginia, and Wisconsin. *See generally* Annot., 92 A.L.R. 3d 901 (1979).

54. MacDonald v. MacDonald, 412 A.2d 71 (Me. 1980); Lewis v. Lewis, 370 Mass. 619, 351 N.E.2d 526 (1976); Ruper v. Stienne, 90 Nev. 397, 528 P.2d 1013 (1974); Digby v. Digby, _ R.I. _, 388 A.2d 1 (1978); Richard v. Richard, 131 Vt. 98, 300 A.2d 637 (1973).

55. Shiver v. Session, 80 So. 2d 905 (Fla. 1955); Welch v. Davis, 410 Ill. 130, 101 N.E.2d 547 (1951); Deposit Guaranty Bank & Trust Co. v. Nelson, 212 Miss. 335, 54 So. 2d 476 (1951); Kaczorowski v. Kalkosinski, 321 Pa. 438, 184 A. 663 (1936); Asplin v. Amica Mut. Ins. Co., _ R.I. _, 394 A.2d 1353 (1978); Hull v. Silver, 577 P.2d 103 (Utah 1978).

56. Windauer v. O'Connor, 107 Ariz. 267, 485 P.2d 1157 (1971); Lusby v. Lusby, 283 Md. 334, 390 A.2d 77 (1978); Apitz v. Dames, 205 Or. 242, 287 P.2d 585 (1955); Bounds v. Caudle, 560 S.W.2d 925 (Tex. 1977); Taylor v. Patten, 2 Utah 2d 404, 275 P.2d 696 (1954).

57. N.C. Gen. Stat. § 52-5 (Repl. Vol. 1976) and Wis. Stat. Ann. § 246.075 (West 1957) overruling respectively Scholtens v. Scholtens, 230 N.C. 149, 52 S.E.2d 350 (1949) and Fehr v. General Accident Fire & Life Assurance Corp., 246 Wis. 228, 16 N.W.2d 787 (1944).

58. N.Y. Gen. Oblig. Law § 3-313 (McKinney 1978) superseding Allen v. Allen, 246 N.Y. 571, 159 N.E. 656 (1927). Illinois also disallows interspousal actions. Ill. Ann. Stat. Ch. 68, § 1 (Smith-Hurd 1959).

a preserver of family harmony. This rationale was advanced by the bill's opponents.[59] The sponsor of the bill, Senator Wiley F. Mitchell, Jr., offered comparative divorce statistics from several states surrounding Virginia[60] indicating that the states which had abolished the doctrine had lower divorce rates than the states which had retained it.[61]

What prompted the legislature to abrogate the doctrine is difficult to ascertain. The comparative divorce statistics may have undermined the policy justification for immunity as the preserver of family harmony. The legislators could have been influenced also by the less paternalistic view that the choice to sue should be that of the parties to the marriage who can best make decisions as to their own happiness. The court is not an institution suited to policing marital harmony. The courts claim no insight by which to predict the impact of an interspousal law suit on the strength of a marriage. Possibly the harmony of a marriage may be jeopardized as much by barring a suit as by allowing it. The courts have permitted spouses to maintain suits in equity and property, and contract actions against each other.[62] Personal injury action need not disrupt tranquillity any more than these other actions.[63]

By abolishing the defense of interspousal immunity the legislature has opened the way not only for suits based on intentional, malicious torts but also for simple negligence actions between spouses. In these actions the courts had seen the threat of frivolous or inflated claims of personal injury between spouses.[64] This danger can be met most effectively by defining and delineating marital conduct which cannot be the basis for tort litigation. Not every tort action which might be maintained if the parties were strangers should be allowed between spouses.[65] In some situations, the existence of the marital relationship might warrant the application of

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59. Mitchell, *Interspousal Immunity,* I LEX CLAUDIA No. 1 (June 1981).

60. A copy of the statistics is available in the *University of Richmond Law Review* Office.

61. *Id.*

62. *See* note 21 *supra* and accompanying text.

63. See for example, Brown v. Gosser, 262 S.W.2d 480, 484 (Ky. 1953), where a wife brought suit against her husband for injuries sustained in an automobile accident because of the alleged negligence of her husband. The court noted that, under the Married Women's Act, the wife could now sue for conversion, detention of chattels, fraud, trespass to land, waste, and in actions of ejectment or unlawful detainer. The court found it difficult to see how an action for personal injuries would disrupt domestic tranquility more than an action for damage to property. Thus, the court held that the wife could maintain an action against her husband.

64. *See* notes 47 & 48 *supra* and accompanying text.

65. *See* Lewis v. Lewis, 351 N.E.2d 526, 532 (Mass. 1976); Bushnell v. Bushnell, 131 A. 432, 433 (Conn. 1925).

implied consent or assumption of the risk.[66] There should be a carefully delineated area of privileged conduct existing because of the mutual obligations created by the marriage, which would curtail frivolous litigation.[67] The court has the power to protect itself by demanding proof that the injury was the result of a clear breach of some marital privilege.

Another objection often made to eliminating interspousal immunity in these negligence actions is the risk of fraudulent and collusive actions against insurance companies. Because of the relationship of the parties and the usual presence of liability insurance, there is a real threat of fraud on the insurance carrier in domestic negligence cases. Courts have expressed confidence that the judicial system is well-equipped to screen out fraudulent claims.[68] The adversary system provides the insurance defense counsel adequate tools to uncover a collusive law suit. In *Merenoff v. Merenoff*,[69] the Supreme Court of New Jersey suggested that courts could, if necessary, fashion a higher standard of care to compensate for the risk of fraud between married parties.[70] The New Jersey court also proposed an altered burden of proof which could be applied commensurate with the dimensions of collusion perceived in the particular action.[71]

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66. *See generally* McCurdy, *Torts*, *supra* note 8; McCurdy, *Personal Injury Torts*, *supra* note 8.

67. *See* Beaudette v. Frona, 173 N.W.2d 416, 420 (Minn. 1969) in which the Supreme Court of Minnesota commented:

> There is an intimate sharing of contact within the marriage relationship, both intentional and unintentional, that is uniquely unlike the exposure among strangers. The risks of intentional contact in marriage are such that one should not recover damages from the other without . . . [proof] that the injurious contact was . . . a gross abuse of normal privilege.

68. *See* Coffindaffer v. Coffindaffer, _ W. Va. _, _, 244 S.E.2d 338, 343 (1978) in which the Supreme Court of West Virginia commented:

> Anyone who has confronted insurance defense counsel in personal injury cases knows that it is a rare occasion when the false or collusive claim escapes their searching examination. 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 question of collusive or meritless law suits.

69. 76 N.J. 535, 388 A.2d 951 (1978). The Supreme Court of New Jersey was presented with the issue of extending their limited abrogation in cases of automobile negligence to cases of negligence in the home. The husband had cut off the wife's finger while carelessly handling a hedge clipper.

70. *Id.* at _, 388 A.2d at 963. The court did not characterize this injury as a result of simple domestic negligence. The activity in this case was unusually dangerous and carried with it a great risk of injury if not performed with reasonable care. Since there was no privilege, consent, or shared risks between the spouses, the defendant spouse could not avoid liability in tort. The court found only a small risk of a fraudulent scheme and so felt no need to adopt a higher standard of care or an altered burden of proof.

71. *Id.*

The fear that trivial or fraudulent claims for personal injury will be brought by married persons is best countered by the realization that such claims will not be recognized by the courts or rewarded by juries.

VI. Conclusion

In abolishing interspousal immunity the legislature upheld the fundamental principle of providing redress for wrongful injury. The common law doctrine and its modern justifications had stood as an outdated and inequitable exception to the general tort principle of giving reparation for injury. The recognition of the right of an injured spouse to seek remedy against the offending spouse constitutes legislative neutrality toward married persons. By eliminating the defense of interspousal immunity, the Virginia General Assembly removed the judiciary from its role as arbitrers of marital harmony, leaving spouses as the guardians of their own well-being. The right to bring a lawsuit for compensation is the decision of the individual and should not be denied solely because of marital status.

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