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And, fourth, even if the above difficulties could somehow be resolved, one must wonder whether the courts would look with disfavor on such a case because of the impact it would have on an already critical overcrowding crisis in our court system.<sup>57</sup>

### Conclusion

Clearly the *Hawaii* case did not ask the Court to go so far as to create such a procedural hybrid. The significance of the case is that it typifies the difficulty in the mass consumer area where procedural rules greatly complicate successful suits. Hawaii's novel assertion of damage to its general economy was one attempt to make inroads into an area shielded from consumer suits by these rules. The Court's decision in *Hawaii* has narrowed the area in which recovery can be had, while endorsing the use of class action suits to remedy antitrust offenses. The result is that, barring legislative action, the victim is no better off than he was before, and must depend upon the unpredictable class action device in seeking relief.

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## Virginia's Intrafamily Immunity Decisions: What Public Policy Giveth, Will the Insurance Policy Taketh Away?

In two short opinions, the Virginia Supreme Court has effortlessly overturned several aspects of personal injury law in that state. If the court's philosophy is allowed to stand, the changes promise considerable impact on her citizens, including those who will never be involved in tort litigation.

The court in *Smith v. Kauffman*<sup>1</sup> and *Surratt v. Thompson*<sup>2</sup> declared that conditions in the state had developed to the point where intrafamily im-

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ficient expertise to undertake the management of antitrust cases, in addition to fulfilling all other public functions that are required of them.

57. One reference to the burdens imposed on the courts by consumer class actions was made by Chief Justice Warren Burger in his 1970 "State of the Judiciary" address to the American Bar Association. 56 A.B.A.J. 929, 932 (1970).

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1. 212 Va. 181, 183 S.E.2d 190 (1971).
  2. 212 Va. 191, 183 S.E.2d 200 (1971).

munity to tort liability no longer served the needs of the people, and thus public policy dictated that Virginia join a growing minority of states which had also removed the last remnants of crumbling, once impenetrable doctrines.

Intrafamily tort immunity in Virginia had two distinct aspects: it provided parents with a defense against suits brought by their children, and it provided husbands with the same immunity against suits brought by their wives. These are the two aspects of the intrafamily barrier still recognized by most states; however, cracks in the wall prior to these two decisions had already appeared in Virginia, and other aspects had disappeared altogether, as will be discussed below.

*Smith* did away—at least for the moment—with parental immunity; and *Surratt* accomplished the same for spousal immunity. This note will try to predict the effect of these decisions and the durability of the policies lying behind them.

#### *Parental Immunity and the Smith Case*

The origin and development of the doctrine of parental immunity have been ably discussed in numerous publications<sup>3</sup> and it would serve no useful purpose to trace it in detail again. Briefly, the doctrine originated<sup>4</sup> in Mississippi with *Hewlett v. George*.<sup>5</sup> An unemancipated minor, confined to an insane asylum, attempted to bring an action against her mother for false imprisonment. Without precedent, the court denied the action for policy reasons: it would be disruptive of family peace and the peace of society. The court asserted that a complete remedy lay through the criminal laws and thus a resort to civil courts was both unnecessary and unwise.

As other courts quickly followed *Hewlett's* lead,<sup>6</sup> citing it as authority and adopting its policy, additional bases for the doctrine appeared: the danger of eroding parental control and authority, the possibility of collusion and fraud, and depletion of family funds were the most important.<sup>7</sup>

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3. E.g., McCurdy, *Torts Between Persons in Domestic Relation*, 43 HARV. L. REV. 1030 (1930); McCurdy, *Torts Between Parent and Child*, 5 VILL. L. REV. 521 (1960); Maliner, *Intrafamily Immunity Doctrine: The Breached Wall*, 5 THE FORUM 58 (1969); Sanford, *Personal Torts Within the Family*, 9 VAND. L. REV. 823 (1956); Note, *A Child's Rights Against His Parent: Evolution of the Parental Immunity Doctrine*, 1967 ILL. L. FORUM 805 (1967).

4. There have been suggestions that the doctrine is rooted in the common law, but the Virginia court in *Smith* specifically rejected that possibility in reaching its decision.

5. 68 Miss. 703, 9 So. 885 (1891).

6. E.g., *McKelvey v. McKelvey*, 111 Tenn. 388, 77 S.W. 664 (1903).

7. McCurdy, *Torts Between Parent and Child*, 5 VILL. L. REV. 521 (1960).

Obliquely and somewhat late, Virginia first adopted the doctrine in 1934, in *Norfolk Southern R. Co. v. Gretakis*.<sup>8</sup> After a collision between Gretakis' automobile and a railroad car, Gretakis was found guilty of 90 percent of the total negligence, and the railroad contributorily negligent of the remainder. Gretakis' minor daughter, injured in the collision, sued the railroad and recovered a \$1500 judgment. The railroad then filed a bill asking 90 percent contribution of the \$1500 from Gretakis. The court sustained defendant's demurrer on the grounds that "an unemancipated minor child cannot sue his or her parent to recover for personal injuries resulting from an ordinary act of negligence," citing "the great weight of authority."<sup>9</sup>

However, the court did not adopt the doctrine wholeheartedly, refusing to extend immunity to cases where the parent had emancipated the child, or where the two had assumed a master-servant relationship. Virginia could also rely on the weight of authority for these exceptions:<sup>10</sup> given the extremes to which some courts had pushed the immunity,<sup>11</sup> the validity of the justifications for the broad doctrine had already begun to be questioned.<sup>12</sup>

Five years after backing into the doctrine via the contribution statute in *Gretakis*, the court in 1939 was confronted with the concept head on in *Worrell v. Worrell*.<sup>13</sup> There, a student who was returning to college on a bus owned by her father was injured as a result of the driver's negligence. She sued and recovered against both her father and the driver; on appeal, the court undertook "a careful examination of authority and precedent."<sup>14</sup> The defendant had relied on *Gretakis*; but as the court pointed out, "[a]n examination of the cases cited in [*Gretakis*] discloses that the court had in mind the qualifications which attend the rule, that is, that the rule is not to be regarded as absolute, but qualified."<sup>15</sup> In sustaining her judgment, the court grounded its reasoning on the family peace and the family funds rationales.

Thus Virginia was, paradoxically, simultaneously solidifying and cracking the wall of immunity: while on the one hand adopting and affirming the doctrine, its opinions reflected an uneasiness with the policy by emphasizing

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8. 162 Va. 597, 174 S.E. 841 (1934).

9. *Id.* at 600, 174 S.E. at 842.

10. *Id.*

11. *E.g.*, in *Roller v. Roller*, 37 Wash. 242 (1905), the plaintiff had been raped by her father. The court felt it would disturb family tranquility to allow her action against him.

12. A long list of courts and commentators attacking the doctrine was compiled by Justice Jacobs in his dissent to *Hastings v. Hastings*, 33 N.J. 247, 163 A.2d 147 (1960).

13. 174 Va. 11, 4 S.E.2d 343 (1939).

14. *Id.* at 18, 4 S.E.2d at 345.

15. *Id.* at 24, 4 S.E.2d at 348.

its specific exceptions and implying that there might be others of a more general nature.<sup>16</sup> This preservation of flexibility would serve the court well in *Smith*, although litigants and courts in the interim surely felt some uncertainty.

In 1960, the court performed its crack-and-solidify feat again by cleaving to the doctrine while rejecting it as a defense in *Midkiff v. Midkiff*,<sup>17</sup> when it held that an unemancipated infant may maintain a tort action against his unemancipated brother. The court specifically rejected any notions the defendant may have had about the relevance of other intrafamily barriers:

The suggested analogy of suits for personal injuries between husband and wife or parent and child has no application. Even though a husband and wife or parent and unemancipated child are not permitted to sue each other for personal injuries in this state, it does not follow that an unemancipated infant cannot sue his unemancipated brother. . . .<sup>18</sup>

The court saw this not as an exception to the court-created immunity doctrine, but as an action permissible at common law and unchanged today. However, it would appear that the policy reasons given for denying other intrafamily suits—*e.g.*, tranquility and fraud—would apply just as strongly to suits between siblings.

The significance of *Midkiff*, then, is that the court asserted that it could overcome these objections by reasoning that disruption of family harmony “is no more than a speculative assumption” and that “there is no logical reason for denying an unemancipated infant the right to sue his unemancipated brother for a tort because of possible disruption of family harmony.”<sup>19</sup>

Further, the argument that intrafamily tort actions

. . . would open the door to fraud and collusion, because of liability insurance, is based purely on an assumption. Fraud is never presumed. There is no more danger of fraud and collusion between minor brothers than there is between a minor brother and an adult brother, other relatives, host and passenger, or intimate friends, where actions are permitted. *Courts should not immunize tort-feasors 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. . . . If fraud and collusion do exist in an action between brothers, they may be ferreted out in the same manner in which courts handle that situation in other cases.<sup>20</sup>

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16. As the court in *Smith* observed, the lower court held alternatively that the plaintiff could not bring the action; or if she could, it was barred on other grounds.

17. 201 Va. 829, 113 S.E.2d 875 (1960).

18. *Id.* at 832, 113 S.E.2d at 877.

19. *Id.* at 833, 113 S.E.2d at 878.

20. *Id.* (emphasis added).

The court did not mention its parental immunity rule when rebutting these defenses, implying that the rule there was grounded in "the problem of parental discipline and support."<sup>21</sup> It could hardly say otherwise, having generally dismissed the tranquility and fraud grounds in *Midkiff*. Since the court added flatly that "[a]n unemancipated child cannot sue his parent for a personal tort,"<sup>22</sup> citing *Gretakis*, the only two policy barriers remaining were, therefore, preservation of parental authority and the family exchequer.

This then was the climate in 1971 when the *Smith* case was presented to the court. Christine Smith was injured in an automobile accident resulting from her stepfather's negligence. The trial court held that the stepfather was immune from liability, and alternately, if the action was maintainable, the Virginia guest statute<sup>23</sup> required only slight care by the driver toward his gratuitous passenger.

The court first re-examined the immunity rule, and in reviewing its past decisions seized on the policy argument behind *Worrell* to defeat the tranquility and exchequer rationale, that is, statutes providing for compulsory insurance indemnity to passengers evidenced a legislative policy to protect those passengers from harm.<sup>24</sup> Since Virginia in 1958 required automobile liability policies to include an uninsured motor vehicle endorsement,<sup>25</sup> virtually all<sup>26</sup> registered vehicles now carry this coverage.

The court described the rule of parental immunity as "anachronistic" in light of the nearly universal insurance coverage. "A rule adopted for the common good now prejudices the great majority."<sup>27</sup> It agreed with the New Jersey Supreme Court that "[d]omestic harmony may be more threatened by denying a cause of action than by permitting one where there is insurance coverage."<sup>28</sup> Finally, it "followed the precedent" of *Worrell* (which had at once affirmed the rule and cracked it by dictum) and abrogated the rule. Once having done this and allowed the suit, the court permitted seven-year-old Christine to recover by holding that a child under 14 is incapable of knowingly and voluntarily becoming a guest in an automobile, thus removing her from the gross negligence rule.<sup>29</sup>

The *Smith* case, then, can be seen as the logical end of a progression of

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21. *Id.* at 832, 113 S.E.2d at 877.

22. *Id.* at n.2.

23. VA. CODE ANN. § 8-646.1 (1957).

24. 174 Va. 11, 28, 4 S.E.2d 343, 350 (1939).

25. VA. CODE ANN. § 38.1-381 (1970).

26. The court cited the figure of 98.43 percent. The remainder either paid a \$50 fee in lieu of the endorsement, posted bond, or qualified as self-insurers.

27. 212 Va. at 185, 183 S.E.2d at 194.

28. *Immer v. Risko*, 56 N.J. 482, 490, 267 A.2d 481, 485 (1970).

29. 212 Va. at 187, 183 S.E.2d at 195.

decisions which, while appearing to affirm the rule, actually chipped away at it by holding or by dicta. Widespread liability insurance had removed all but one of the former rationales.<sup>30</sup>

### *Spousal Immunity and the Surratt Case*

The *Surratt* case, by contrast, can be seen as a more definite break with tradition in Virginia. Unlike parental immunity, a husband's immunity from personal injury suits brought by his wife is rooted in the common law. At common law, a married woman lacked capacity to sue (or be sued) in her own name. Husband and wife were legally one person<sup>31</sup> and thus neither could sue the other.

However, in the nineteenth century, Married Women's Acts supposedly freed women to pursue legal actions as though they were single,<sup>32</sup> but the courts were reluctant to interpret this as including tort actions. In the leading case of *Thompson v. Thompson*,<sup>33</sup> the U.S. Supreme Court asserted that while the District of Columbia Code plainly allowed a married woman to bring tort actions as though she were single, this still barred any cause of action against her husband. Rather, the statute "freed" women from having to join their husbands in bringing complaints against third parties. The Court insisted that before a husband could be held liable to his wife in a tort, the legislature must clearly indicate its intention to abolish the rule established at common law.

While a few courts took a more liberal view,<sup>34</sup> the majority, including Virginia, felt that since the Acts are in derogation of the common law, they must be strictly construed so as to preclude wives from suing husbands for personal injuries.<sup>35</sup>

Three other grounds advanced for the doctrine of interspousal immunity included the assertion that criminal and divorce courts provide adequate

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30. The problem of parental discipline was not mentioned, although it loomed large in the *Midkiff* opinion as discussed in the text. Since the court limited its holding to the facts—*i.e.*, automobile accidents, it may have felt the discipline rationale was not relevant in a case confined to these facts.

However, the court in *Smith* presented the rule as "grounded" solely on the theory that a suit by a child against his parent ". . . [T]ends to disturb the peace and tranquility of the home, or disrupt the voluntary and natural course of disposal of the parents' exchequer," citing *Worrell*. Yet in *Midkiff*, the court presented *Worrell* as authority for a different rationale: parental discipline.

31. 1 W. BLACKSTONE, COMMENTARIES 442 (1768).

32. *E.g.*, VA. CODE ANN. § 55-36 (1969).

33. 218 U.S. 611 (1910).

34. *E.g.*, *Brown v. Brown*, 88 Conn. 42, 89 A. 889 (1914).

35. *Keister's Adm'r v. Keister's Ex'rs*, 123 Va. 157, 96 S.E. 315 (1918).

remedies,<sup>36</sup> family peace, and the danger of fraud and collusion. The first of these has long since been abandoned as illusory or inadequate;<sup>37</sup> and the Virginia court had disposed of the latter two in *Smith* earlier that same day.

Thus only the common law hurdle needed to be cleared. The Virginia constitution<sup>38</sup> and statute<sup>39</sup> specify that:

The common law of England, insofar as it is not repugnant to the principles of the Bill of Rights and Constitution of this State, shall continue in full force within the same, and be the rule of decision, except as altered by the General Assembly.

In the 1918 decision of *Keister's Adm'r v. Keister's Ex'rs*<sup>40</sup> the wife's administrator was denied a cause of action because "[a]t common law, husband and wife were, for the most part, regarded as one, . . ."<sup>41</sup> and the Virginia Married Woman's Act<sup>42</sup> did not give, either expressly or by implication, the wife the right to sue her husband for a personal tort. The 1952 case of *Furey v. Furey*<sup>43</sup> reasserted this view of the Act, noting that in the 34 years between *Keister* and *Furey*, the legislature amended the Act three times in regard to elements of damage recoverable by wives for personal injury, but no change had given the wife the right to sue her husband for personal injury. The principle was reaffirmed, by dictum, as recently as 1955 in *Vigilant Ins. Co. v. Bennett*.<sup>44</sup>

However, in reviewing these holdings, the court in *Surratt* subtly shifted its verbal tense, and with that shift changed its view of the common law from a static body of law to a dynamic one. In looking back at *Keister*, the court said, ". . . the *then* common law *conferred* no right in the wife. . ."; and ". . . the *Keister* case stands for the proposition that *in 1918* the common law *afforded* the wife no right. . . ." It then presented the issue in *Surratt* as "does the common law, *as it exists in 1971*, cling to the concept. . . ."<sup>45</sup> Thus the court freed itself from the constitutional and statutory re-

36. Criminal remedies—*see, e.g.*, *Austin v. Austin*, 136 Miss. 61, 100 So. 591 (1924)—and cases cited there at 593. Divorce remedies—*see, e.g.*, *Rogers v. Rogers*, 265 Mo. 200, 177 S.W. 382 (1915) or *Abbott v. Abbott*, 67 Me. 304 (1877).

37. Criminal actions do not compensate the victims, nor do divorce actions in this sense. There may be religious barriers or lack of grounds to a divorce action. A criminal action requires violation of a statute having penalties of intentional acts. For a good argument against these "remedies," *see Damm v. Elyria Lodge No. 465*, 158 Ohio St. 107, 107 N.E.2d 337 (1952).

38. VA. CONST. sched. 3, 1971.

39. VA. CODE ANN. § 1-10 (1966).

40. 123 Va. 157, 96 S.E. 315 (1918).

41. *Id.* at 176, 96 S.E. at 321.

42. VA. CODE ANN. § 55-36 (1969).

43. 193 Va. 727, 71 S.E.2d 191 (1952).

44. 197 Va. 216, 89 S.E.2d 69 (1955).

45. 212 Va. at 193, 183 S.E.2d at 201 (emphasis added).



strictions, quoting a New Jersey court opinion which said

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. 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. . . .<sup>46</sup>

The Virginia court also defended its view by observing that "[n]othing in the nature of the common law required us . . . to adhere to a parental immunity rule [in *Smith*]. . . . Likewise, nothing in the nature of the common law requires us to adhere to an outmoded concept [in *Surratt*]. . . ."<sup>47</sup>

This overlooks—or ignores—the probability that the parental immunity rule was *never* a common law concept! And the court had specifically adopted that probability in *Smith* when it said, "[The parental immunity rule] was followed by many other courts in this country, *perhaps under the mistaken belief* that the rule was part of the English common law."<sup>48</sup> However, once the court permitted itself to view the common law as "dynamic" and as something which could be changed by decision, it was able to abrogate the spousal immunity rule.

### *The Impact of the Decisions*

Although the court did not appear to struggle in coming to its decisions in either *Smith* or *Surratt*, the former was held by a 4-3 vote, the latter 5-2.<sup>49</sup> And in both decisions, the court restricted its holding to automobile accidents. Will the impact be restricted to that type of case, and how will the effects be felt?

Commentators have observed<sup>50</sup> that while liability in tort is looked on as shifting a loss that has already occurred from one individual to another, wherever there is widely held insurance, tort liability no longer merely shifts the loss but tends to distribute it over society. The person nominally liable

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46. *State v. Culver*, 23 N.J. 495, 505, 129 A.2d 715, 721 (1957).

47. 212 Va. at 194, 183 S.E.2d at 202.

48. *Id.* at 182, 183 S.E.2d at 192, n.2 (emphasis added).

49. Justices Cochran and Harman concurred in part and dissented in part to both decisions; Justice P'Anson dissented in *Smith* only to the guest statute portion of the opinion.

50. James, *Accident Liability Reconsidered: The Impact of Liability Insurance*, 57 YALE L.J. 549 (1948); James and Thornton, *The Impact of Insurance on the Law of Torts*, 15 LAW AND CONTEMPORARY PROBLEMS 431 (1950).

is often only a conduit through whom this process of distribution starts to flow.

Thus, a catastrophic loss resulting from an automobile accident will fall not on the single individual responsible for the mishap, but be spread out over a large segment of the public through higher insurance rates. Justice Cochran, dissenting in *Surratt*,<sup>51</sup> felt the decision to so spread the cost among the citizens to be one of public policy and thus best left to the legislature. The majority, however, saw in the present automobile insurance requirements an already expressed legislative policy to spread losses. The intra-family barrier was an unfortunate remnant of earlier policy and at odds with modern legislative intent.

Whether the General Assembly feels that distribution of loss overrides all other concerns is a question that may be answered in the next session of the legislature. Three routes are open to that body: overrule the decision by statute; codify the decision; or do nothing.

If in *Smith* and *Surratt* the court read the mood of the Assembly incorrectly, the legislature can react as did the Illinois lawmakers after that state's highest court reached a similar decision: within a year from the decision, a statute was passed which provides that "neither husband nor wife may sue the other for a tort to the person committed during coverture."<sup>52</sup>

This route is doubtful, however, given the Virginia legislature's tacit approval of, or at least acquiescence in, *Midkiff*, which discarded the disruption-of-family-peace and collusion arguments. Further, a standard "cooperation clause" is already included in Virginia automobile insurance policies which is designed to prevent collusion. This provision requires the insured to assist the insurer in defending any action covered by the policy brought against the insured upon penalty of non-payment by the carrier.<sup>53</sup>

If the legislature chooses the second route and codifies the decisions, as had been done in several states,<sup>54</sup> insurance rates will certainly go up, unless (as is likely) insurers exclude this coverage from their policies.

If the legislature chooses the last route, and does nothing, and the court's decisions stand as "common law as it exists in 1971," the same results can

51. 212 Va. at 195, 183 S.E.2d at 203.

52. *Brandt v. Keller*, 413 Ill. 503, 109 N.E.2d 729 (1953) was reversed by ILL. REV. STAT. ch. 68, § 1 (1959).

53. W. VANCE, HANDBOOK ON THE LAW OF INSURANCE 915-16 (3d ed. 1951). The effectiveness of such clauses is questionable in less than egregious cases, of course.

54. E.g., New York—*Coster v. Coster*, 289 N.Y. 438, 46 N.E.2d 509 (1943), codified by N.Y. GEN. OBLIGATIONS LAW § 3-313 (1964); North Carolina—*Jernigan v. Jernigan*, 236 N.C. 430, 72 S.E.2d 912 (1952), codified by N.C. GEN. STAT. § 52-5 (1966); Wisconsin—*Fehr v. General Accident, F. & L. Assurance Corp.*, 246 Wis. 228, 16 N.W.2d 787 (1944), codified by WIS. STAT. ANN. § 246.075 (1957).

be expected as if the legislature codifies the rulings. The insurance carriers can simply exclude wives and children from the policy's liability coverage. Not until this exclusion has attained widespread adoption in Virginia does the State Corporation Commission (and, by delegation, the state insurance commissioner) take official cognizance of it. Once the exclusion clause is being used "extensively,"<sup>55</sup> the Commission will draw up a standard clause and publish it. Unless objections to the clause are filed, it becomes effective within 30 days.<sup>56</sup> Otherwise, hearings are held and the clause will be rewritten, adopted as is, or rejected altogether.<sup>57</sup> However, the Commission must determine that such additional provisions do not conflict with state law.<sup>58</sup>

Thus, under any of the three routes open to the legislature, chances are excellent that the court's decisions in *Smith* and *Surratt* will become meaningless.<sup>59</sup> This is precisely what has happened elsewhere in some instances. In New York, for instance, the Domestic Relations Law was amended in 1939<sup>60</sup> to authorize suits instituted by the wife against her husband. However, the Insurance Law was also amended<sup>61</sup> to provide that policies issued to automobile owners need *not* insure against injuries to the spouse of the owner. Thus while the wife's right of action is statutorily preserved, the insurer has the option of excluding her from coverage!

Approval of exclusionary clauses in Virginia would not violate the actual holdings of these cases, however much violence they might do to the spirit of the policy behind them. Thus the State Corporation Commission can determine that these clauses do not conflict with state law. Only if the legislature forbids such exclusions, as has been done elsewhere,<sup>62</sup> with a corresponding increase in insurance rates, will the court's reading of public policy be furthered.

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55. VA. CODE ANN. § 38.1-382 (1970).

56. *Id.*

57. VA. CODE ANN. § 38.1-383 (1970).

58. VA. CODE ANN. § 38.1-387 (1970).

59. This would appear to be true even if the court's holding is extended to cases beyond automobile liability, as seems inevitable. (See Justice Harman's dissent to *Smith*.) The percentage of citizens carrying personal liability insurance is much smaller, of course, than those carrying automobile liability insurance.

60. N.Y. LAWS, Ch. 669.

61. N.Y. GEN. OBLIGATIONS LAW § 3-313.

62. MINN. STAT. 474 § 1 (1969) and MINN. STAT. 713 § 3 (1969) prohibit household exclusion clauses in liability insurance policies, and allow for inclusion of supplemental accident indemnity coverage for members of the household in automobile liability policies.