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COMMENTS

PARENT AND CHILD—IMMUNITY FROM ACTIONS BASED ON PERSONAL TORTS

There has arisen, in the United States, a conflicting body of decisions regarding suits for personal torts between parents and children. In 1891 the Mississippi Supreme Court handed down its decision in *Hewellette v. George*¹ announcing that, "The peace of society, and of the families composing society, and a sound public policy, designed to subserve the repose of families and the best interests of society, forbid to the minor child a right to appear in court in the assertion of a claim to civil redress for personal injuries suffered at the hands of the parent."²

This case has been regarded as the foundation for the rule that a parent is immune from suit by an unemancipated minor child for personal torts.³ The *Hewellette* case cited no authority for its decision, but many courts regard this decision as a statement of the common law.⁴ The more recent decisions, however, recognize that there was no rule of immunity at common law.⁵ Whether or not there was an immunity rule at common law, is a moot question since there are no English cases, ancient or modern, which discuss the point.⁶

BASIS OF THE IMMUNITY

Since the appearance, and general adoption of the immunity rule, several reasons have been advanced as the basis of the rule. The most common and often cited reason given by the courts when applying the rule is that public policy recognizes the maintenance of family tranquility and

¹ 68 Miss. 703, 9 So. 885 (1891).

² *Ibid.*, at 706, 887.

³ Although the *Hewellette* case was the first to pronounce the immunity rule, there are prior cases which hint at such a rule. See, in this regard, *Lander v. Seaver*, 32 Vt. 114, 76 Am. Dec. 156 (1859) which contains dicta to the effect that, from the intimacy and nature of the family relation, and the necessary character of family government, the law suffers no intrusion upon the authority of the parent and the privacy of domestic life, except in extreme cases of cruelty and injustice. *Gould v. Christianson, Blatchf. & H.* 507, 10 Fed. Cas. 857 (1836) states that a father enjoys immunity to chastise a child at his discretion without responsibility to the law.

⁴ *Redding v. Redding*, 235 N.C. 638, 70 S.E. 2d 676 (1952); *Elias v. Collins*, 237 Mich. 175, 211 N.W. 88 (1926); *McKelvey v. McKelvey*, 111 Tenn. 388, 77 S.W. 664 (1903).

⁵ *Dunlap v. Dunlap*, 84 N.H. 352, 150 Atl. 905 (1930).

⁶ There is one Scottish case, *Young v. Rankin*, [1934] Sc. 499, which held that an action of tort is competent at the instance of a minor son against his father.

requires that suits between parents and children not be permitted.⁷ Those courts which have allowed a suit against the parent have countered the above reasoning by holding that in the comparatively rare case where a child brings a tort action, the likelihood is that either the peace of the home has already been disturbed beyond repair,⁸ or that, because of the existing circumstances, the suit will not disturb existing tranquility.⁹

Another theory advocated in support of the immunity rule is that actions by children against their parents tend to undermine parental authority and discipline.¹⁰ It has been held, however, that where the suit has nothing to do with parental authority and control, it cannot be said that the suit weakens those sinews of family life.¹¹

The "family exchequer" argument was propounded as a reason for the immunity rule in *Roller v. Roller*,¹² where the court held that the public has an interest in the financial welfare of all minor members of the family and, therefore, the family property should not be appropriated by any one child. This argument fails to take into account the parent's power to distribute his favors as he will or that the child has no legally recognized claim to any portion of the parent's property, or even to equality of treatment.¹³ Related to the "family exchequer" argument is the theory that in absence of the immunity rule, the father might inherit any money the child would recover in an action against the parent.¹⁴

The possibility of collusion and danger of fraud has been mentioned as a reason for applying the rule, especially in those cases involving liability insurance.¹⁵ It has been said, however, that the fact that there may be greater opportunity for fraud or collusion in one class of cases than another, does not warrant courts of law in closing the door to all cases of that class. The fraud and collusion argument was also used in connection

⁷ *Mesite v. Kirchstein*, 109 Conn. 77, 145 Atl. 753 (1929); *Wick v. Wick*, 192 Wis. 260, 212 N.W. 787 (1927); *Matarese v. Matarese*, 47 R.I. 131, 131 Atl. 198 (1925); *Small v. Morrison*, 185 N.C. 577, 118 S.E. 12 (1923); *Hewellette v. George*, 68 Miss. 703, 9 So. 885 (1891).

⁸ *Mahnke v. Moore*, 197 Md. 61, 77 A. 2d 923 (1951).

⁹ *Borst v. Borst*, 41 Wash. 2d 642, 251 P. 2d 149 (1952); *Dunlap v. Dunlap*, 84 N.H. 352, 150 Atl. 905 (1930).

¹⁰ *Mesite v. Kirchstein*, 109 Conn. 77, 145 Atl. 753 (1929); *Wick v. Wick*, 192 Wis. 260, 212 N.W. 787 (1927); *Small v. Morrison*, 185 N.C. 577, 118 S.E. 12 (1923); *Roller v. Roller*, 37 Wash. 242, 79 Pac. 788 (1905).

¹¹ Authority cited note 9, supra.

¹² 37 Wash. 242, 79 Pac. 788 (1905).

¹³ Authority cited note 9, supra.

¹⁴ *Roller v. Roller*, 37 Wash. 242, 79 Pac. 788 (1905).

¹⁵ *Villaret v. Villaret*, 169 F. 2d 677 (App. D. C., 1948); *Parks v. Parks*, 390 Pa. 254, 135 A. 2d 65 (1957); *Luster v. Luster*, 299 Mass. 480, 13 N.E. 2d 438 (1938).

with the automobile guest statute cases, but courts have consistently allowed recovery by a guest. In theory, there is no difference between that situation and a suit against a parent.¹⁶

The common-law rule that a wife could not sue her husband for a personal tort has been held analogous to the parent-child relationship as justification for the immunity rule.¹⁷ The courts which follow this reasoning fail to take into account the rationale of the husband-wife immunity; that is, at common law the husband and wife were regarded as one person, and there is no comparable relationship in the case of parent and child.¹⁸

Other reasons advanced for applying the immunity rule are that if there was no rule, the child would be permitted to bring a "stale" action after reaching majority;¹⁹ and the concept of a sovereign family government depends upon the immunity rule.²⁰

EXTENT OF THE IMMUNITY RULE

Until 1930, the immunity rule was applied with steadfast regularity in most jurisdictions, without regard to the nature of the tort. This absolute application of the rule resulted in some anomalous and loudly criticized decisions.²¹

In the famous case of *Dunlap v. Dunlap*,²² the plaintiff, an unemancipated minor, was injured while working on a construction job for his father, a contractor and builder. In allowing a recovery, the court said:

There never has been a common-law rule that a child could not sue its parent. It is a misapprehension of the situation to start with that idea and to treat the suits which have been allowed as exceptions to a general rule. The minor has the same right to redress for wrongs as any other individual. . . . Out of it all there emerges one substantial and reasonable ground for denying a recovery, and one only. The parental authority should be so far supreme that whatever would unduly impair it should be foregone by the child for his ultimate good.²³

This decision was the first major break with the idea of an absolute immunity. The *Dunlap* case held that there is immunity only where the suit or prospect of suit might disturb family relations.

¹⁶ *Borst v. Borst*, 41 Wash. 2d 642, 251 P. 2d 149 (1952).

¹⁷ *Mesite v. Kirchstein*, 109 Conn. 77, 145 Atl. 753 (1929).

¹⁸ Authority cited note 9, *supra*.

¹⁹ *Small v. Morrison*, 185 N.C. 577, 118 S.E. 12 (1923).

²⁰ *Mesite v. Kirchstein*, 109 Conn. 77, 145 Atl. 753 (1929); *Matarese v. Matarese*, 47 R.I. 131, 131 Atl. 198 (1925).

²¹ In *Roller v. Roller*, 37 Wash. 242, 79 Pac. 789 (1905), the defendant was previously convicted of raping his minor daughter. She sued for damages and the court dismissed the suit, applying the immunity rule, and holding that the maintenance of harmonious and proper family relations called for application of the rule.

²² 84 N.H. 352, 150 Atl. 905 (1930).

²³ *Ibid.*, at 354, 906.

Relying on the *Dunlap* case, other jurisdictions have adopted the view that where the injury is outside the scope of parental duties, there is no immunity, and the child may recover. In *Signs v. Signs*,²⁴ the court stated:

In these modern times, with the advent of the motor vehicle and the growing complications of business and industry and where in an industrial age we are living under changed conditions, it would seem a fantastic anomaly that in a case where two minor children were negligently injured in the operation of a business, one of them, a stranger, could recover compensation for his injuries and the other one, a minor child of the owner of the business, could not. . . . In view of the changed conditions to which we have referred, we have come to the conclusion that, if there ever was any justification for the rule announced in Mississippi in 1891, that justification has now disappeared and that an unemancipated child should have as clear a right to maintain an action in tort against his parent in the latter's business or vocational capacity as such child would have to maintain an action in relation to his property rights.²⁵

In the area of wilful torts, as distinguished from simple negligence, almost all courts today refuse to apply the immunity rule.²⁶ The courts reason that leaving a child without redress for a wrong suffered through wilful or malicious misconduct is more repugnant than allowing a child to sue its parent.²⁷ Of course, some allegation of facts to show in what way the parent allegedly wilfully injured the child must be made, and without such factual allegations, the nature of the action is not so changed as to take it out of the immunity rule.²⁸ In a recent opinion, the Illinois Supreme Court said:

Any justification for the rule of parental immunity can be found only in a reluctance to create litigation and strife between members of the family unit. While this policy may be such justification to prevent suits for mere negligence within the scope of the parental relationship we do not conceive that public policy should prevent a minor from obtaining redress for wilful and wanton misconduct on the part of a parent. To tolerate such misconduct and deprive a child of relief will not foster family unity but will deprive a person of redress, without any corresponding social benefit, for an injury long recognized at common law.²⁹

²⁴ 156 Ohio St. 566, 103 N.E. 2d 743 (1952).

²⁵ *Ibid.*, at 575, 748. Accord: *Borst v. Borst*, 41 Wash. 2d 642, 251 P. 2d 149 (1952); *Worrell v. Worrell*, 174 Va. 11, 4 S.E. 2d 343 (1939); *Lusk v. Lusk*, 113 W. Va. 17, 166 S.E. 538 (1932).

²⁶ *Nudd v. Matsoukas*, 7 Ill. 2d 608, 131 N.E. 2d 525 (1956); *Emery v. Emery*, 45 Cal. 2d 421, 289 P. 2d 218 (1955); *Siembab v. Siembab*, 284 App. Div. 652, 134 N.Y.S. 2d 437 (1954); *Cowgill v. Boock*, 189 Ore. 282, 218 P. 2d 445 (1950).

²⁷ *Emery v. Emery*, 45 Cal. 2d 421, 289 P. 2d 218 (1955); *Fidelity & Casualty Co. v. Marchand*, [1924] 4 D.L.R. 157 (Canada, 1923).

²⁸ *Siembab v. Siembab*, 284 App. Div. 652, 134 N.Y.S. 2d 437 (1954).

²⁹ *Nudd v. Matsoukas*, 7 Ill. 2d 608, 619, 131 N.E. 2d 525, 531 (1956).

In cases where the child sues the parent in another capacity, or indirectly, there is some divergence of opinion. It has been held that an unemancipated child may maintain an action in tort against a corporation of which his parents own one half of the outstanding stock.³⁰ Where the plaintiff was injured as a result of his father's negligent operation of an automobile owned by a third party, the court dismissed the suit against the third party because the defendant could recover from plaintiff's father and fasten ultimate liability on the father in contravention of the immunity rule.³¹ Similarly, a child was not allowed to sue his father's partner where the injury occurred within the scope of the partnership business.³²

There have been, in recent years, many suits where the injuries arose out of the negligent operation of an automobile. In these automobile cases, the courts are in apparent agreement that where the child, while riding in the family automobile, is injured as a result of negligence on the part of the parent driver, no cause of action against the parent may be maintained.³³ Courts have expressed the view that these automobile injuries are within the scope of parental authority.³⁴

EFFECT OF DEATH OF PARENT OR CHILD

Some courts have held that where either the parent or child is dead, there is no domestic harmony to be protected, and the immunity rule should not apply. In *Davis v. Smith*,³⁵ the court stated:

It [the immunity rule] should not shield the parent where the matter arises from a "non-parental" occurrence, or where the parent commits an atrocious assault outraging the duties imposed upon him as a parent by society, or where either the parent or child is dead and there is thus no tranquil relationship between them to preserve.³⁶

Other courts are of the opinion that death of either party does not affect the immunity rule. In *Lasecki v. Kabara*,³⁷ it was said:

It is, to say the least, shocking to our concept of justice that an unemancipated child, who has no cause of action against his living parent, may, if the parent die, and contingent upon such event, have a cause of action against his parent's estate or his administrator.³⁸

Where either the parent or child is dead, the very basis of the immunity rule is undermined, there is no domestic harmony to be preserved, there

³⁰ *Foy v. Foy Electric Co.*, 231 N.C. 161, 56 S.E. 2d 418 (1949).

³¹ *Ownby v. Kleyhammer*, 194 Tenn. 109, 250 S.W. 2d 37 (1952).

³² *Belleson v. Skilbeck*, 185 Minn. 537, 242 N.W. 1 (1932).

³³ *Borst v. Borst*, 41 Wash. 2d 642, 251 P. 2d 149 (1952). *Contra*: *Wells v. Wells*, (Mo. App.) 48 S.W. 2d 109 (1932). Note discussion of liability insurance, *infra*.

³⁴ *Baker v. Baker*, 364 Mo. 453, 263 S.W. 2d 29 (1953).

³⁵ 126 F. Supp. 497 (E.D. Pa., 1954).

³⁶ *Ibid.*, at 504. *Accord*: *Brower v. Webb*, 5 D. & C. 2d 193 (Pa. Com. Pl., 1955).

³⁷ 235 Wis. 645, 294 N.W. 33 (1940).

³⁸ *Ibid.*, at 649, 35.

is no question of parental control, and it seems illogical to apply the rule in these cases. Logically, the maxim *mutata legis ratione, mutatar et lex*³⁹ should apply and recovery should be allowed.

EFFECT OF LIABILITY INSURANCE

The question of whether the fact that the parent has liability insurance precludes application of the immunity rule, is perhaps the most controversial issue in the field of parent-child tort actions. The argument for abandoning the immunity rule in cases where there is liability insurance is based upon the theory that since the parent does not have to pay the judgment, there is no disruption of family harmony, hence the rule does not apply.⁴⁰

Those courts which hold that liability insurance does not affect the immunity rule, base their decisions upon the theory that collusive action and fraud would result; and the presence of insurance should not give a cause of action where none existed before.⁴¹ Recovery is also denied in those states which allow an action directly against an insurer, the courts holding that since the plaintiff could not recover from the insured, he cannot recover from the insurer.⁴²

In *Elias v. Collins*,⁴³ one of the first cases in which the effect of insurance upon the rule was an issue, the court, in denying recovery, said:

Plaintiff's counsel recognizes this as a rule of the common law, but he argues that modern business methods have so changed, with the coming of the automobile and the insurance thereon, that the common-law rule should be modified to allow minors to recover against their father for torts, inasmuch as insurance companies promise to reimburse the insured for any judgment gotten against him for injuries caused by the automobile. Perhaps there is a spice of good sense in this, but, if the rule is to fade away because the reason is gone for its existence, what will we say as to boys who are injured while working on farms or in industrial plants, by reason of the negligence of their fathers? In these cases there is as much need of the common-law rule as there ever was.⁴⁴

The plaintiff has been denied recovery even where automobile liability insurance is compulsory. In *Parks v. Parks*,⁴⁵ it was argued that since the state Motor Vehicle Act made liability insurance compulsory, and the

³⁹ When the reason of a law is changed, the law also is changed.

⁴⁰ *Worrell v. Worrell*, 174 Va. 11, 4 S.E. 2d 343 (1939); *Lusk v. Lusk*, 113 W. Va. 17, 166 S.E. 538 (1932); *Dunlap v. Dunlap*, 84 N.H. 352, 150 Atl. 905 (1930).

⁴¹ *Villaret v. Villaret*, 169 F. 2d 677 (App. D.C., 1948); *Parks v. Parks*, 390 Pa. 254, 135 A. 2d 65 (1957); *Levesque v. Levesque*, 99 N.H. 147, 106 A. 2d 563 (1954); *Duffy v. Duffy*, 117 Pa. Super. 500, 178 Atl. 165 (1935); *Elias v. Collins*, 237 Mich. 175, 211 N.W. 88 (1926).

⁴² *Worrell v. Worrell*, 174 Va. 11, 4 S.E. 2d 343 (1939).

⁴³ 237 Mich. 175, 211 N.W. 88 (1926).

⁴⁴ *Ibid.*, at 178, 89.

⁴⁵ 390 Pa. 254, 135 A. 2d 65 (1957).

damages sought did not exceed the amount of the policy, recovery should be allowed. The court denied recovery, holding that insurance does not create a cause of action in and of itself.

It was held in *Lusk v. Lusk*,⁴⁶ that where the parent is protected by insurance, there is no reason for applying the immunity rule. The court cited *Dunlap v. Dunlap*⁴⁷ with approval, and said:

There is no reason for applying the rule in the instant case. This action is not unfriendly as between the daughter and her father. A recovery by her is no loss to him. In fact, their interests unite in favor of her recovery. . . . There is no filial recrimination and no pitting of the daughter against the father in this case. No strained family relations will follow. On the contrary, the daughter must honor the father for attempting to provide compensation against her misfortune. Family harmony is assured instead of disrupted. A wrong is righted instead of "privileged."⁴⁸

Although the arguments of the courts which have accepted the view that insurance precludes application of the immunity rule are sound, most courts are adamant in denying recovery, holding that it is a matter for the legislature.

CONCLUSION

Since the adoption of the immunity rule, only one clearcut exception to the rule has developed—in the case of a wilful tort.⁴⁹ In recent years, however, there has been a trend toward abrogating the rule in cases where the tort is committed in the business or vocational capacity of the parent,⁵⁰ where one of the parties is dead,⁵¹ or where there is liability insurance involved.⁵² Whether this trend will grow and finally overshadow the rule remains to be seen. It seems reasonable to assume that in the future, the more progressive courts will allow suits between parents and children in all cases where the family tranquility will not be disturbed.

⁴⁶ 113 W. Va. 17, 166 S.E. 538 (1932).

⁴⁷ 84 N.H. 352, 150 Atl. 905 (1930).

⁴⁸ *Lusk v. Lusk*, 113 W. Va. 17, 19, 166 S.E. 538, 539 (1932).

⁴⁹ Authority cited note 26, *supra*.

⁵¹ Authority cited notes 35, 36, *supra*.

⁵⁰ Authority cited note 25, *supra*.

⁵² Authority cited note 40, *supra*.

SOCIETIES REQUIRING NO BELIEF IN GOD ALLOWED TO SHARE IN RELIGIOUS TAX EXEMPTIONS

When a court undertakes to define religion, its decision raises questions of importance in the area of freedom of religion and separation of Church and State. For the most part, the courts in the past have stated that "religion" suggests the concept of a Supreme Being, a Governor of the Universe. However, this generally accepted concept in American jurisprudence has just come under severe attack.