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Domestic Relations - Illinois Public Policy Does Not Prevent Child From Suing Parent for Wilful and Wanton Conduct

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felon during the commission of a felony. Whether the doctrine will be applied in such a situation is problematical in light of the reasoning expressed in the *Butler* and *Garippo* cases.

Little difficulty has been encountered in the several jurisdictions in situations where the defendant has killed the victim while in the commission of a felony. It is when this pattern is varied that divergence of opinion arises as to the applicability of the felony murder rule. It well may be that the proximate cause approach as expressed in the instant case best serves the public policy which militates so vehemently against any action which endangers the life of another man.

DOMESTIC RELATIONS–ILLINOIS PUBLIC POLICY DOES NOT PREVENT CHILD FROM SUING PARENT FOR WILFUL AND WANTON CONDUCT

The wife and a son of defendant were killed and another son was severely injured as passengers in an automobile driven by defendant. The administrator of the estate of the deceased wife and minor child brought suit under the Illinois wrongful death statute charging defendant father with wilful and wanton conduct. The surviving minor son, through his next friend, proceeded against the defendant father for personal injuries alleging wilful and wanton misconduct. Motions to dismiss these actions were filed and sustained by both the trial and appellate courts. The Illinois Supreme Court reversed the lower court declaring that the contributory negligence of one beneficiary does not bar an action for wrongful death by the innocent beneficiaries. It was further held that the public policy of Illinois does not prevent a minor from suing a parent for injuries caused by the parents wilful and wanton misconduct. *Nudd v. Matsoukas*, 7 Ill. 2d 608,131 N.E. 2d 525(1956).

The impact of the decision in so far as it permits an innocent beneficiary to recover under the Illinois wrongful death act where other beneficiaries were contributorily negligent has been diminished because, in 1955, the legislature amended the act to provide for this result. However, the recognition of a cause of action in a child for wilful and wanton conduct of the parent definitely provides new fuel for litigation in Illinois.

The Illinois amendment to the wrongful death act is as follows:

> In any such action to recover damages where the wrongful act, neglect or default causing the death occurred on or after the effective date of this amendatory act of 1955, it shall not be a defense that the death was caused in whole or in part by the contributory negligence of one or more of the beneficiaries. . . . Provided, however, that the amount of damages given shall not include any compensation with reference to the pecuniary injuries resulting from such death, to such contributorily negligent person or persons; and pro-

vided further, that such contributorily negligent person or persons shall not share in any amount recovered in such action.[1]

Previous to the amendment this question had been settled in Illinois by the decision in *Hazel v. Hoopeston-Danville Bus Co.*[2] In that case the husband of deceased sued as administrator for the wrongful death of his wife alleged to have been caused by the negligence of defendant. Plaintiff husband was found guilty of contributory negligence and notwithstanding the fact that there were five innocent beneficiaries the court held that the whole action was barred. The *Hazel* decision was based on the reasoning:

> The cause of action is entirely statutory and is a single cause of action. There is no separation of the damages to be assessed by the jury. Their finding is for a single gross amount in an inseparable cause of action and contributorly negligence of one beneficiary who may be entitled to share in the amount recovered is a defense to the action.[3]

Such reasoning has been called "a fictitious theory of indivisibility" by the court in the instant case.

By reason of the 1955 amendment, and the decision in the instant case, Illinois has aligned itself with the majority. Indiana also has rejected the indivisibility theory holding that each of the beneficiaries has an individual interest in the damages recoverable. Thus, the action of one beneficiary cannot bar the right of recovery of the others.[4] If there is at least one innocent beneficiary, recovery is possible.[5] But if the sole beneficiary is guilty of contributory negligence no recovery is allowed.[6] Some authorities hold that negligence by a beneficiary does not require even a reduction of damages to the extent of the shares of the negligent beneficiary.[7] Generally then, it can be stated that innocent beneficiaries may recover under a wrongful death statute although there are negligent beneficiaries.[8] On the point of the minor suing his parent, the modern trend is to allow action in negligence and especially so where the action is for wilful and wanton conduct.[9] The Illinois court followed the theory

[1] Ill. Rev. Stat. 1955, chap. 70, pars. 1, 2. [2] 310 Ill. 38, 141 N.E. 392 (1923).

[3] Hazel v. Hoopeston-Danville Bus Co., 310 Ill. 38, 49, 141 N.E. 302, 396 (1923).

[4] Lindley v. Sink, 218 Ind. 1, 30 N.E. 2d 456 (1940).

[5] O'Connor v. Benson, 301 Mass. 145, 16 N.E. 2d 636 (1938).

[6] Purdy v. Kerentoff, 152 Ohio St. 391, 89 N.E. 2d 565 (1949).

[7] Danforth v. Emmons, 124 Me. 156, 126 Atl. 821 (1924); O'Connor v. Benson, 301 Mass. 145, 16 N.E. 2d 636 (1938).

[8] Nosser v. Nosser, 161 Miss. 636, 137 So. 491 (1931); Cleveland C.C.&St. L.R. Co. v. Grambo, 103 Ohio St. 471, 134 N.E. 648 (1921); Horne v. Atlantic Coast Line Railroad Co., 177 S.C. 461, 181 S.E. 642 (1935); Secrest v. Pacific Electric Railway, 60 Cal. App. 2d 746, 141 P. 2d 747 (1943).

[9] Dunlap v. Dunlap, 84 N.H. 352, 150 Atl. 905 (1930); Wick v. Wick, 192 Wis. 260, 212 N.W. 787 (1927).

set out in *Cowgill v. Boock*[10] which indicates this trend. The court in that case said that the rule of non-liability of a parent for a personal injury sustained by an unemancipated child, though based on the wholesome policy of preserving the security of the home, is not an absolute rule to be adhered to regardless of the character of the tort or the factual situation involved, and should be modified to allow recovery for a wilful and malicious tort. The holding there, as in the instant case, was that where a parent is guilty of wilful and wanton conduct he is not exercising a parental function. In *Clasen v. Pruhs*,[11] it was held that a parent is not liable for moderately and reasonably correcting a child, but is liable for unreasonable correction.[12]

In *Taubert v. Taubert*,[13] the court held that a minor cannot sue his parent for tort unless he has been emancipated. In a later Indiana case,[14] the court would not allow a child to recover from a parent, placing its decision on the criminal laws and the equity powers of the court to protect the child. The court stated that it was not prepared to rule that in no such case should a suit not be allowed. In *Dix v. Martin*,[15] the Missouri court allowed an action to recover damages occasioned by an assault upon a minor. The court said that a parent can inflict reasonable punishment for misconduct of the child, but the parent is without right to subject the child to inhuman treatment.

The court in the instant case considered the question of parental immunity from tort action by a child for wilful and wanton conduct a novel one in Illinois. The rule of parental immunity from tort actions sounding in negligence was first adopted in Illinois in *Foley v. Foley*.[16] There the child was not permitted to sue the negligent parent who did not provide medical attention. The theory postulated was that the public policy of the state required the preservation of the family unit. This policy is reiterated in the instant case wherein it is stated that any justification for the rule of parental immunity can be only in reluctance to create litigation and strife between members of a family unit. The court noted that this action was for wilful and wanton conduct and not for negligence and thus not prevented by public policy.

The Illinois Supreme Court is thus following the modern trend. While it allows an action between a parent and child for wilful and wanton mis-

[10] 189 Ore. 282, 218 P. 2d 445 (1950).

[11] 69 Neb. 278, 95 N.W. 640 (1903).

[12] See also the dissenting opinion in Small v. Morrison, 185 N.C. 577, 118 S.E. 12 (1923).

[13] 130 Minn. 247 (1908).

[14] Smith v. Smith, 81 Ind. App. 566, 142 N.E. 128 (1924).

[15] 171 Mo. App. 266, 157 S.W. 133 (1913).

[16] 61 Ill. App. 577 (1895).

conduct, it recognizes the doctrine of the parent's immunity from a suit by an unemancipated minor child, sounding in negligence.

In conclusion, it would seem that the cases run strongly to the effect that an unemancipated minor cannot maintain an action against his parent to recover damages for negligence.[17] But there is a strong modern trend which accords with certain of the older rulings to allow an action by the unemancipated minor against his parent for negligence in some instance, and especially to allow the action where the injury is intentional, or resulted from wilful misconduct or an evil mind.[18]

LANDLORD AND TENANT–EXCULPATORY CLAUSE RELIEVES LESSEE OF LIABILITY FOR OWN NEGLIGENCE

The plaintiffs as lessor and the fire insurance subrogee under the lessor's insurance policy brought an action against the lessee to recover damages for the loss of the leased building, machinery, and equipment allegedly caused by lessee's negligence in causing a fire. A jury trial in the Superior Court of Cook County found that the fire and resulting damage were caused by the lessee's negligence. The Supreme Court of Illinois reversed the trial court and held that the exculpatory clause in the lease should be construed to release the lessee from tort liability for negligence. *Cerny-Pickas & Co. v. C. R. Jahn Co.*, 131 N. E. 2d 100 (7 Ill. 2d 393, 1956).

Three clauses in the lease were relied upon for the determination of the case:

> (2) Lessee will keep said premises . . . in good repair . . . and upon the termination of this lease, in any way, will yield up said premises to lessor in good condition and repair (loss by fire and ordinary wear excepted).
>
> (8) . . . And the lessee at his own expense will keep all improvements otherwise in good repair (injury by fire or other cause beyond lessee's control excepted). . . .
>
> (14) Lessor shall pay for fire insurance on the building and equipment and machinery hereby leased, and lessee agrees to pay for any increase in fire insurance premium on such insurance policies due to any increase in the insurance rate due to the nature of lessee's business. . . .[1]

In the first trial, the judge ruled as a matter of law that the lessee was exonerated from liability for loss due to fire, interpreting clause eight as an exculpatory clause. On appeal, the Appellate Court of Illinois for the

[17] Augustin v. Ortiz, 187 F. 2d 496 (C.A. 1st, 1951); Owens v. Auto. Mut. Indem. Co., 235 Ala. 9, 177 So. 133 (1937); Schneider v. Schneider, 160 Md. 18, 152 Atl. 498 (1930).

[18] Brown v. Cole, 198 Ark. 417, 129 S.W. 2d 245 (1939); Sorrentino v. Sorrentino, 248 N.Y. 626, 162 N.E. 551 (1928).

[1] Cerny-Pickas v. C. R. Jahn, 7 Ill. 2d 393, 394, 131 N.E. 2d 100, 102 (1956).