
Torts - Right of Unemancipated Child to Sue his Parent for Personal Tort

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That the state did "help" sectarian groups under the Champaign program cannot be seriously questioned; the threat of the truant officer if the released pupil did not attend his religious instruction, and the solicitation of pupils by secular teachers in the public schools are examples of that "help."

But how does the state "help" religious groups in New York? The verb signifies some type of affirmative action which, though admittedly present under the Champaign system, does not evidence itself in the New York case. There the regulations set out specifically that the classes may not be held within the public schools,²⁶ that the classes were never to be mentioned by teachers or principals,²⁷ and that the public school system declined any responsibility for the released students' attendance in classes of religious instruction.²⁸ The only "help" which can be said to have been rendered by the New York City Board of Education is a purely passive and negative allowance of the program to operate if and how it can.

The Supreme Court expresses this same view of the "help" rendered in the instant case, and goes on to conclude the opinion with:

We follow the McCollum case. But we cannot expand it to cover the present released time program unless separation of Church and State means that public institutions can make no adjustments of their schedules to accommodate the religious needs of the people. We cannot read into the Bill of Rights such a philosophy of hostility to religion.²⁹

TORTS—RIGHT OF UNEMANCIPATED CHILD TO SUE HIS PARENT FOR PERSONAL TORT

Plaintiff, a minor seven years of age, instituted an action by his next friend against his father and another. Defendants were partners in a business which required the maintenance of a gasoline pump on the premises of the family home where plaintiff resided. Although the father knew that plaintiff and other children often played near the pump, he was negligent in its operation. As a result, a fire originated near the pump and severely burned plaintiff. The Supreme Court of Ohio held that an unemancipated child has the right to sue his parent for negligence in the latter's business or vocational capacity. *Signs v. Signs*, 156 Ohio St. 566, 103 N.E. 2d 743 (1952).

From the early common law, the law has recognized the right of an unemancipated minor child to bring a tort action against the parent in matters affecting property.¹ It has also been held that actions for per-

²⁶ Note 9 supra.

²⁷ Note 16 supra.

²⁸ Note 15 supra.

²⁹ *Zorach v. Clauson*, 343 U.S. 306, 315 (1952).

¹ *Lusk v. Lusk*, 113 W. Va. 17, 166 S.E. 538 (1932); *Preston v. Preston*, 102 Conn. 96, 128 Atl. 292 (1925); *Lamb v. Lamb*, 146 N.Y. 317, 41 N.E. 26 (1895); *Alston v. Alston*, 34 Ala. 15 (1859); *Prosser, Torts* § 99 (1941).

sonal torts may be maintained between unemancipated brothers and sisters,² and in *Munsert v. Farmers' Mutual Auto Insurance Co.*,³ parents were allowed to recover in an action against one unemancipated child for causing the death of another. There is no doubt that an emancipated minor is free from disability to maintain an action for personal injuries against his parents.⁴ However, as to the right of an unemancipated child to sue his parents for personal torts, courts disagree and the law is in a state of development.

Hewlett v. George,⁵ decided in 1891, represents the first case wherein an American court refused to give relief to a child, not yet emancipated, in a personal tort action against a parent. In that case, the minor's mother wrongfully placed her in an insane asylum; subsequently, the daughter sued for false imprisonment. Without citing a single authority, the Supreme Court of Mississippi held that as long as the parent is under obligation to care for, guide, and control the child, and the child is under the reciprocal obligation to aid, comfort, and obey, no such action could be maintained. The court went on to state that the peace of society and of the families composing it and a sound public policy forbid the minor child to sue for civil redress for personal injuries suffered at the hands of the parent. The state, through criminal prosecution, would give the child protection from parental violence.

This reasoning was upheld in *McKelvey v. McKelvey*,⁶ where a father who brutally beat his minor child was held to be immune from civil liability. And, in *Roller v. Roller*,⁷ a child could not sue her father although he had raped her. It was contended that the child was emancipated because the act of rape disrupted the normal harmonious family relationship. The court, however, insisted on uniformity and did not desire to establish a rule which would vary with the degree of the tort. It feared that such a policy would lead to "confusion."⁸ The bulk of American au-

² *Rozell v. Rozell*, 281 N.Y. 106, 22 N.E. 2d 254 (1939); *Munsert v. Farmers' Mutual Auto Insurance Co.*, 229 Wis. 581, 281 N.W. 671 (1938); *Belke v. Knaack*, 207 Wis. 490, 242 N.W. 176 (1932).

³ 229 Wis. 581, 281 N.W. 671 (1938).

⁴ *Wood v. Wood*, 135 Conn. 280, 63 A. 2d 586 (1948); *Cannon v. Cannon*, 287 N.Y. 425, 40 N.E. 2d 236 (1942); *Belleson v. Skilbeck*, 185 Minn. 537, 242 N.W. 1 (1932); *Skillin v. Skillin*, 130 Me. 223, 154 Atl. 570 (1931); *Hewlett v. George*, 68 Miss. 703, 9 So. 885 (1891).

⁵ 68 Miss. 703, 9 So. 885 (1891).

⁶ 111 Tenn. 388, 77 S.W. 664 (1903).

⁷ 37 Wash. 242, 79 Pac. 788 (1905).

⁸ This decision has met much disfavor in the following cases: *Mahnke v. Moore*, 77 A. 2d 923 (Md., 1951); *Cowgill v. Boock*, 189 Ore. 282, 218 P. 2d 445 (1950); *Dunlap v. Dunlap*, 84 N.H. 352, 150 Atl. 905 (1930); *Matarese v. Matarese*, 47 R.I. 131, 131 Atl. 198 (1925).

thority has followed the *Hewlett* case and the rationale expounded therein.⁹

It is interesting to note that many of the American courts refer to the rule of the *Hewlett* case as "the common law rule."¹⁰ Nevertheless, argument has been made that there never existed such a rule at common law.¹¹ In fact, some authorities assert that there were no objections to such actions before 1891.¹²

While the rationale of the *Hewlett* case was being followed in many jurisdictions in the United States, dissenting voices were heard. Disagreeing with the majority opinion of the court, Justice Crownhart, in *Wick v. Wick*,¹³ could see no valid reason why a child could not sue a parent for injuries resulting from the latter's negligence. He felt that the views that such actions might disturb cherished concepts of family unity or be contrary to public policy were overridden by modern concepts of individual rights and remedies. The justice added that the fact that the defendant was protected by insurance justified modification. Although recovery based on the father's negligence was denied in *Sorrentino v. Sorrentino*,¹⁴ Justices Cardozo, Crane, and Andrews dissented without opinions in this New York case.¹⁵

Today, courts seem to distinguish negligence cases from those involving wilful torts. Generally, an unemancipated minor cannot sue a parent for negligence.¹⁶ On the other hand, in recent years, indications have appeared of a growing judicial inclination to depart very materially from the broad doctrine of parental immunity in tort actions and some decisions have allowed recovery for negligence. The results in these cases almost

⁹ *Rambo v. Rambo*, 195 Ark. 832, 114 S.W. 2d 468 (1938); *Mesite v. Kirchenstein*, 109 Conn. 77, 145 Atl. 753 (1929); *Wick v. Wick*, 192 Wis. 260, 212 N.W. 787 (1927); *Elias v. Collins*, 237 Mich. 175, 211 N.W. 88 (1926); *Chastain v. Chastain*, 50 Ga. App. 241, 177 S.E. 828 (1934); *Smith v. Smith*, 81 Ind. App. 566, 142 N.E. 128 (1924).

¹⁰ *Belleson v. Skilbeck*, 185 Minn. 537, 242 N.W. 1 (1932); *Kelly v. Kelly*, 158 S.C. 517, 155 S.E. 888 (1930); *Roller v. Roller*, 37 Wash. 242, 79 Pac. 788 (1905); *McKelvey v. McKelvey*, 111 Tenn. 388, 77 S.W. 664 (1903).

¹¹ *Mahnke v. Moore*, 77 A. 2d 923 (Md., 1951); *Dunlap v. Dunlap*, 84 N.H. 352, 150 Atl. 905 (1930); *Clark, C.J.*, dissenting in *Small v. Morrison*, 185 N.C. 577, 118 S.E. 12 (1923).

¹² *Dunlap v. Dunlap*, 84 N.H. 352, 150 Atl. 905 (1930); *Prosser, Torts* § 99 (1941).

¹³ 192 Wis. 260, 212 N.W. 787 (1927).

¹⁴ 248 N.Y. 626, 162 N.E. 551 (1928).

¹⁵ See, for a vigorous dissenting opinion by *Clark, C.J.*, *Small v. Morrison*, 185 N.C. 577, 118 S.E. 12 (1923).

¹⁶ *Baugh v. Rogers*, 24 Cal. 2d 200, 148 P. 2d 633 (1944); *Cannon v. Cannon*, 287 N.Y. 425, 40 N.E. 2d 236 (1942); *Luster v. Luster*, 299 Mass. 480, 13 N.E. 2d 438 (1938); *Rambo v. Rambo*, 195 Ark. 832, 114 S.W. 2d 468 (1938); *Meece v. Holland Furnace Co.*, 269 Ill. App. 164 (1933); *Foley v. Foley*, 61 Ill. App. 577 (1895).

invariably depend on the presence of liability insurance and an additional relationship besides the parent-child relationship.

In a New Hampshire case,¹⁷ decided in 1930, a minor was permitted to recover against his parent for injuries sustained in the latter's employ. Since the father paid premiums on employers' liability insurance and there existed an employer-employee relationship, the court expressed the opinion that the elements which were usually held to justify the rule favoring parental immunity were removed. After this decision, similar results followed in *Lusk v. Lusk*,¹⁸ and *Worrell v. Worrell*.¹⁹ In the *Worrell* case, the court acknowledged the principle that the presence of insurance creates no cause of action when none otherwise exists,²⁰ but continued to state that insurance did lessen the burden of the liability on the wrongdoer.

Though American cases agree that a parent or person standing *in loco parentis* has the privilege of using corporal punishment to discipline or correct a child,²¹ there is a strong modern and growing tendency to regard actions for damages maintainable where injury or death was intentionally caused or resulted from wilful misconduct.²² This view is based on the theory that a parent, guilty of wilful misconduct, may be regarded as having abandoned his parental role and any protection from civil liability deducible from it.²³

In reaching the decision in the instant case, the Ohio court did not mention whether the father was protected by liability insurance. Furthermore, it was stated:

¹⁷ *Dunlap v. Dunlap*, 84 N.H. 352, 150 Atl. 905 (1930).

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

¹⁹ 174 Va. 11, 4 S.E. 2d 343 (1939).

²⁰ *Fidelity Sav. Bank v. Aulik*, 252 Wis. 602, 32 N.W. 2d 613 (1948); *Rambo v. Rambo*, 195 Ark. 832, 114 S.W. 2d 468 (1938); *Small v. Morrison*, 185 N.C. 577, 118 S.E. 12 (1923).

²¹ *Mahnke v. Moore*, 77 A. 2d 923 (Md., 1951); *Steber v. Norris*, 188 Wis. 366, 206 N.W. 173 (1925); *Fortinberry v. Holmes*, 89 Miss. 373, 42 So. 799 (1907); *Treschman v. Treschman*, 28 Ind. App. 206, 61 N.E. 961 (1901); *Foley v. Foley*, 61 Ill. App. 577 (1895).

²² *Mahnke v. Moore*, 77 A. 2d 923 (Md., 1951); *Cowgill v. Boock*, 189 Ore. 282, 218 P. 2d 445 (1950); *Brown v. Cole*, 198 Ark. 417, 129 S.W. 2d 245 (1939); *Dix v. Martin*, 171 Mo. App. 266, 157 S.W. 133 (1913). See *Cannon v. Cannon*, 287 N.Y. 425, 40 N.E. 2d 236 (1942); *Sorrentino v. Sorrentino*, 248 N.Y. 626, 162 N.E. 551 (1928).

²³ *Cowgill v. Boock*, 189 Ore. 282, 218 P. 2d 445 (1950); *Dunlap v. Dunlap*, 84 N.H. 352, 150 Atl. 905 (1930). Accord: *Matarese v. Matarese*, 47 R.I. 131, 131 Atl. 198 (1925). As early as 1888, in *Reeve, The Law of Husband and Wife* 375 (4th ed., 1888), it was stated that the parent has the power to chastise the child. "He may so chastise his child as to be liable in an action by the child against him for a battery. . . . But when the punishment is, in their opinion, thus unreasonable, and it appears that the parent acted, *mala animo*, . . . he ought to be liable to damages."

We are not in accord with the reasoning of some of the courts that the presence or absence of liability insurance should make a difference in respect to liability, as we are of the opinion that the problem presented to us should be solved irrespective of the question . . . since it does not have any effect upon the merits of a tort controversy between any parties.²⁴

Therefore, in the present tendency to limit or step away from the doctrine of parental immunity, the *Signs* case stands as a new development in the law since the court strongly indicates that the question of insurance should not be considered in an action by an infant against the parent.

It would seem that to allow a child to recover in a justifiable case would be sound policy. The correct determination of each case should depend on the facts and circumstances, and rules of thumb should give way to rules of reason.²⁵ Judge Cooley states that on principle, there is no reason why an action of a child against a parent should not be sustained.²⁶

Legal prohibition alone will not hold together the family life.²⁷ As was stated in a Canadian case,²⁸ however repugnant it may be to allow an unemancipated minor to sue his parent, it is equally repugnant that a child, injured by the parent's negligence, should have no redress though perhaps he will be maimed for life.

²⁴ *Signs v. Signs*, 156 Ohio St. 566, 573, 103 N.E. 2d 743, 747 (1952).

²⁵ *Worrell v. Worrell*, 174 Va. 11, 4 S.E. 2d 343 (1939).

²⁶ Cooley, *Torts* 197 (2d ed., 1888).

²⁷ *Rozell v. Rozell*, 281 N.Y. 106, 22 N.E. 2d 254 (1939).

²⁸ *Fidelity and Casualty Co. v. Marchand*, [1924] 4 D.L.R. 157.