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Parent-Child Tort Actions

Richard W. Dunn*

THE RULE IN ALL STATES that have heard such actions is that an unemancipated child cannot sue his parent for a negligent tort in their ordinary family relationships.¹ There does not appear to be any exception to that rule, unless the "business-injury" rule (discussed below) is an exception.

It is the opinion of this writer that this iron rule is archaic and should be changed. A total stranger may recover damages for the negligent act of a person who may be a parent, yet that same parent's own child may not recover.

As has been said so many times in court opinions dealing with parent-child tort actions, parental authority must not be undermined; the calm waters of the family pond must not be stirred. Defense attorneys and insurance companies, in the main,

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- ¹ Ala.—Owens v. Auto. Mut. Indem. Co., 235 Ala. 9, 177 S. 133 (1937);
 Ark.—Rambo v. Rambo, 195 Ark. 832, 114 S. W. 2d 468 (1938);
 Cal.—Trudell v. Leatherby, 212 Cal. 678, 300 P. 7 (1931);
 Conn.—Mesite v. Kirchstein, 109 Conn. 77, 145 A. 753 (1929);
 Del.—Strahorn v. Sears, Roebuck & Co., 50 Del. 50, 123 A. 2d 107 (1956);
 Ga.—Bullock v. Bullock, 45 Ga. App. 1, 163 S. E. 708 (1932);
 Ill.—Foley v. Foley, 61 Ill. App. 577 (1895);
 Ky.—Harralson v. Thomas, 269 S. W. 2d 276 (Ky. 1954);
 Me.—Skillin v. Skillin, 130 Me. 223, 154 A. 570 (1931);
 Mass.—Luster v. Luster, 229 Mass. 480, 13 N. E. 2d 438 (1938);
 Mich.—Elias v. Collins, 237 Mich. 175, 211 N. W. 88 (1926);
 Minn.—Lund v. Olson, 183 Minn. 515, 237 N. W. 188 (1931);
 Miss.—Durham v. Durham, 227 Miss. 76, 85 S. 2d 807 (1956);
 Mo.—Baker v. Baker, 364 Mo. 453, 263 S. W. 2d 29 (1953);
 Neb.—Pullen v. Pullen, 169 Neb. 211, 99 N. W. 2d 16 (1959);
 N. J.—Hastings v. Hastings, 33 N. J. 247, 163 A. 2d 147 (1960);
 N. H.—Worrel v. Moran, 101 N. H. 13, 131 A. 2d 438 (1957);
 N. Y.—Cannon v. Cannon, 287 N. Y. 425, 40 N. E. 2d 236 (1942);
 N. C.—Redding v. Redding, 235 N. C. 638, 70 S. E. 2d 676 (1952);
 Ohio—Canen v. Kraft, 41 O. App. 120, 180 N. E. 277 (1931);
 Pa.—Parks v. Parks, 390 Pa. 287, 135 A. 2d 65 (1957);
 R. I.—Matarese v. Matarese, 47 R. I. 131, 131 A. 198 (1925);
 S. C.—Kelly v. Kelly, 158 S. C. 517, 155 S. E. 888 (1930);
 Tenn.—Ownby v. Kleyhammer, 194 Tenn. 109, 250 S. W. 2d 37 (1952);
 Tex.—Aboussie v. Aboussie, 270 S. W. 2d 636 (Tex. Civ. App. 1954);
 Va.—Brumfield v. Brumfield, 194 Va. 577, 74 S. E. 2d 170 (1953);
 Wash.—De Lay v. De Lay, 337 P. 2d 1057 (Wash. 1959);
 W. Va.—Securo v. Securo, 156 S. E. 750 (W. Va. 1931);
 Wis.—Schwenkoff v. Farm. Mut. Auto. Ins., 6 Wis. 2d 44, 93 N. W. 2d 867 (1959);
 Wyo.—Ball v. Ball, 269 P. 2d 302 (Wyo. 1954).

lead in defending this rule. Their reasons seem superficially sound and, when presented, appeal to the natural instinct to preserve the family.

A dissenting opinion by Justice Fuld in a recent New York decision,² however, gives pause to anyone who considers the soundness of the old rule. Judge Fuld called for the abolition of the rule in automobile negligence cases only, not general abolition. The writer is in full agreement, feeling that a mother or father should not be liable for accidents in the home, nor at the summer cottage, nor in any other place where the family is functioning as a unit.

Reasons For the Rule

In the first American parent-child tort suit, in 1871,³ a Mississippi Court, without any precedent to guide it, decided that public policy and the peace of society forbade such an action. In 1871 that reasoning probably was correct. Subsequent decisions in parent-child suits followed the *Hewlett*⁴ decision, and in time expanded the reasons for parental immunity. The arguments of domestic harmony, public policy, and parental authority, all sounded righteous enough. As time passed and liability insurance became more prevalent, cries of collusion and fraud were added to those already mentioned. Yet the rationale for all these arguments sometimes has been set aside where there is an intra-family suit involving other than a parent and child,⁵ or where the accident occurred as a result of willful and wanton misconduct on the part of the defendant-parent.⁶

In a recent Virginia⁷ case the plaintiff, 13 years old, a passenger in the car of his 17 year old brother, sued for injuries sustained as a result of the older brother's negligence. The court, in finding for the plaintiff, was unimpressed by defense counsel's arguments regarding family immunity. It said that the immunity extended only between a husband and wife or a parent and an unemancipated child. No doubt there was liability in-

² *Badigan v. Badigan*, 9 N. Y. 2d 472, 174 N. E. 2d 718 (1961).

³ *Hewlett v. George*, 68 Miss. 703, 9 S. 885, 13 A. L. R. 682 (1891).

⁴ *Ibid.*

⁵ *Spaulding v. Mineah*, 239 App. Div. 460, 268 N. Y. S. 772 (1933); *Fox v. Fox*, 75 Wyo. 390, 296 P. 2d 252 (1956).

⁶ *Meyer v. Ritterbush*, 196 Misc. 551, 92 N. Y. S. 2d 595 (1949), *affd.* 276 App. Div. 972, 94 N. Y. S. 2d 620.

⁷ *Midkiff v. Midkiff*, 201 Va. 829, 113 S. E. 2d 875, 81 A. L. R. 2d 1150 (1960).

surance involved. When questions were raised by the defense regarding fraud and collusion, the court said that fraud was never presumed, and that courts should not immunize all tortfeasors because of the possibility of fraud or collusion. The court indicated that the decision was primarily based on the common law right of a minor to sue. Following the same reasoning, a California court allowed two sisters to sue their brother when they were injured as a result of his reckless driving.⁸ It logically follows that this same argument should be similarly applied in a parent-child suit.

Development of Litigation Between Spouses

Spousal immunity in tort actions has been an area of litigation similar to the subject matter of this article. Until the middle of the nineteenth century, a wife, unequivocally, could not sue her husband in tort. The Emancipation Acts, passed about 1844, were the first stepping stones towards the wife's right to sue her husband. A substantial minority of states now allow one spouse to sue the other for personal injuries.⁹

Legislation in New York expressly permits such suits.¹⁰ With the argument of domestic peace losing its appeal in husband-wife tort actions in a growing minority of jurisdictions, it follows that it should only be a matter of time before the same rationale will be applied to parent-child suits.

Suits Against Parent in Business Capacity

There is a small, but conspicuous number of decisions that have permitted the parent to be sued in his business capacity. In a recent Ohio case,¹¹ the plaintiff, a minor child, was injured and sued a partnership comprised of his father and another person. The court held that the immunity did not exist when the tort was committed in a non-parental transaction. In like man-

⁸ *Emery v. Emery*, 45 Cal. 2d 421, 289 P. 2d 218 (1955).

⁹ *Taylor v. Patten*, 2 Utah 2d 404, 275 P. 2d 696 (1954); *Maryland Cas. Co. v. Jacek*, 156 F. Supp. 43 (D. C., N. J. 1957) (Applying N. Y. law); *Leach v. Leach*, 227 Ark. 599, 300 S. W. 2d 15 (1957); *Lowman v. Lowman*, 166 Ohio St. 1, 139 N. E. 2d 1 (1956); *Jaeger v. Jaeger*, 262 Wis. 14, 53 N. W. 2d 740 (1952).

¹⁰ N. Y. Dom. Rel. L., Sec. 57.

¹¹ *Signs v. Signs*, 156 Ohio St. 566, 103 N. E. 2d 743 (1952).

ner, New Hampshire,¹² Washington,¹³ West Virginia,¹⁴ Virginia,¹⁵ and most recently Colorado^{15a} have allowed suits by the injured child, holding the parent not immune when sued in his business or vocational capacity. These same states, in other suits between a parent and child, have not allowed the suit where the tort was committed within the family relationship.¹⁶ The line drawn between the two types of suits seems very thin.

A father is a father whether he is a factory worker and backs over a child in his driveway, or whether he is the owner of a store and negligently lets a stack of canned goods fall on his child. In either situation the child owes the parent the same filial devotion. Parental authority cannot be destroyed by a partnership agreement nor by articles of incorporation, yet it appears that these documents are sufficient in some jurisdictions to remove the cloak of family immunity from the shoulders of the parent. In the cases allowing the suit it appears that the courts did what they thought was equitable, and circumvented the parent's immunity via the business capacity avenue.

Judge Fuld, in his dissent in the *Badigan* case,¹⁷ raised a very interesting and pertinent point. He stated that the Biblical command, "Honor thy father and thy mother" did not cease when a child attained his majority or became emancipated. He cited in his dissent only a few of the decisions¹⁸ that have allowed suits by emancipated children or by children who have attained their majority. How can the courts reason that a child of tender years should be denied the right allowed to an older brother or sister who no longer is at home? Does the love or filial tie of a child to a parent lessen with the passage of time? I think not! Surely an older child is in a position to see and realize how much his parent has done for him, and comprehends matters of which

¹² *Dunlap v. Dunlap*, 84 N. H. 352, 150 A. 905 (1930).

¹³ *Borst v. Borst*, 41 Wash. 2d 642, 251 P. 2d 149 (1952).

¹⁴ *Lusk v. Lusk*, 113 W. Va. 17, 166 S. E. 538 (1932).

¹⁵ *Worrell v. Worrell*, 174 Va. 11, 4 S. E. 2d 343 (1939).

^{15a} *Trevarton v. Trevarton*, 378 P. 2d 640 (Colo. 1963).

¹⁶ *Canen v. Kraft*, 41 Ohio App. 120, 180 N. E. 277 (1931); *Worrell v. Moran*, *supra*, n. 1; *Brumfield v. Brumfield*, *supra*, n. 1; *Securo v. Securo*, *supra*, n. 1; *De Lay v. De Lay*, *supra*, n. 1.

¹⁷ *Badigan v. Badigan*, *supra*, n. 2.

¹⁸ *Wood v. Wood*, 135 Conn. 280, 63 A. 2d 586 (1948); *Taubert v. Taubert*, 103 Minn. 247, 114 N. W. 763 (1908); *Lancaster v. Lancaster*, 213 Miss. 536, 57 S. 2d 302 (1952); *Groh v. W. O. Krahn, Inc.*, 223 Wis. 662, 271 N. W. 374 (1937).

a child of tender years has no understanding, yet the suits by emancipated children and by children who have maintained their majority are permitted.

Dissenting Opinions and Views on the Child's Right

In dissenting opinions, where courts have disallowed the suit of the injured minor, the judges have come forth with some logical and powerful arguments. Judge Fuld's dissent¹⁹ is almost, in and of itself, an exhaustive treatise on the subject. He analyzes each "legal sanctuary" of the parent, and then proceeds with pragmatic reasoning and sound legal theory to dissolve the walls of protection. He contended that the doctrine of family immunity was wrong in principle and at odds with justice and the realities of the era in which we live. He stated that there had been many exceptions and qualifications to the rule, and thus the rule was weakened, if not completely consumed, by these exceptions. Although the fact that insurance may be present in a case does not create liability, by the same token that same insurance, the judge argued, should not be used as a tool to deprive the injured child of his legal right.

Judge Jacobs, forcefully dissenting in a New Jersey case,²⁰ said that insurance in the home or in the car should extend either to the wife or child, and thus family harmony would be assured instead of being disrupted. He indicated that the possibility of fraud would be no greater than would exist between that same parent and his adult friends. In New York,²¹ in a suit by a brother against a sister, Judge Rippey, dissenting, said that if the suit is sufficient to tear apart the family unit, then that which binds together the family unit is a slender thread. In a 1924 Canadian²² case the court said:

However repugnant it may seem that a minor child should sue his own father, it is equally repugnant that a child injured by his parent's negligent act, perhaps maimed for life, should have no redress for the injury he has suffered.

Wrongful Death Actions

In actions for wrongful death, decisions conflict; however, the majority do not allow the suit. In those cases where the suit

¹⁹ *Badigan v. Badigan*, *supra*, n. 2.

²⁰ *Hastings v. Hastings*, *supra*, n. 1.

²¹ *Rozel v. Rozel*, 281 N. Y. 106, 22 N. E. 2d 254, 123 A. L. R. 1015 (1939).

²² *Fidelity and Casualty Co. v. Marshland*, Can. S. C. 86, 4 D. L. R. 157, 13 B. R. C. 1135, 19 A. L. R. 2d 442 (1924).

has been allowed,²³ generally involving willful and wanton misconduct on the part of defendant-parent, the courts have stated that by the negligent act which caused the death of the child, the parent-child relationship was destroyed and the suit could be maintained. In a strongly worded dissent in a New York case,²⁴ Judge Schwartzwald stated that the common law could not hope to survive by stubborn adherence to decisions written for a different world. He said that Seventeenth and Eighteenth Century rules could not and should not be applied to Twentieth Century conditions. In those jurisdictions where wrongful death actions by an unemancipated child are not allowed, the courts strictly construe the wrongful death statute and say that had the child survived the suit could not have been maintained.²⁵

In Kentucky,²⁶ in 1961, a wrongful death action was brought in the deceased infant's behalf. The court allowed the suit and indicated that the family relationship would not be disrupted where the child was no longer alive. It certainly appears that there is a strong trend, which should shortly attain majority status, that where the parent is guilty of willful misconduct and causes injury or death to the child there is complete abandonment of the parental immunity.

Insurance Problems

The main issue in many of the parent-child suits is the involvement of insurance. Defense attorneys argue that when there is an intra-family suit, the jury surely suspects the presence of liability insurance. The public has become more and more aware of insurance. Juries certainly are intelligent enough to know that insurance is often involved; yet, its presence seems hardly adequate reason to deny the suit. Insurance companies can increase their premiums, or by exclusion not extend coverage to a loss involving a member of the household. New York has passed legislation²⁷ which provides that liability insurance will

²³ *Hale v. Hale*, 312 Ky. 867, 230 S. W. 2d 610 (1950); *Cowgill v. Brock*, 189 Ore. 282, 218 P. 2d 445, 19 A. L. R. 2d 405 (1950); *Palcese v. Tepper*, 71 N. J. S. 294, 176 A. 2d 818 (1962); *Decker v. Decker*, 20 Misc. 2d 438, 193 N. Y. S. 2d 431 (1959).

²⁴ *Henderson v. Henderson*, 11 Misc. 2d 449, 169 N. Y. S. 2d 106 (1957).

²⁵ *Owens v. Auto. Mut. Indem. Co.*, 235 Ala. 9, 177 S. 133 (1937); *Cronin v. Cronin*, 244 Wis. 372, 12 N. W. 2d 677 (1944).

²⁶ *Harlan National Bank v. Gross*, 346 S. W. 2d 482 (Ky., 1961).

²⁷ N. Y. Ins. L., Sec. 167 (3).

not extend to a spouse for injury or property damage, unless the contrary is stated in the policy. Legislators could get the pulse of their constituents and pass appropriate acts to cover parent-child suits. Allowing suits by children against parents would not perpetrate fraud nor bring about frivolous law suits. If it did, the insurance companies and/or legislators could act to create the safeguards they deemed necessary. If it did, surely the courts and the juries would be intelligent enough to comprehend the obvious and take the necessary action to discourage fraudulent claims. In any event the tide must turn, and only when it does will the problems that arise be dealt with.

Summary

The rule in the *Hewlett* decision²⁸ should be abrogated. When the reason for a rule ceases to exist, the rule should cease to exist. A decision rendered in 1871 should not blindly control the rights of an injured child almost a century later. The dissenting opinions of today will grow until they become the majority. Until that time the injured child will go uncompensated. When the injuries are severe the monetary drain alone will severely disrupt the serenity of the family. All parents pray that they never injure their children by an act of simple negligence. The grief attendant on such an act, coupled with the financial obligations that may result, are sufficient to completely alter the lives of the entire family. Children are struck down with crippling and killing diseases that alone are enough to try the souls of parents. Why should a similar burden be on a parent when he negligently injures his child with his car? We do not believe that public policy, family tranquillity, parental authority, nor any of the other long argued defenses that have been raised should deprive a child of an inherent right to be justly dealt with and fairly compensated for his injury.

This is a problem that courts, lawyers, juries, legislators, insurance companies and the public cannot forever avoid. In ancient times (and the practice still exists in some primitive societies) a father could sell his child into slavery, or for that matter offer him in sacrifice, if he chose to do so, but the laws corrected those injustices and just as surely will make more reasonable the position of the injured-unemancipated child.

²⁸ *Hewlett v. George*, *supra*, n. 3.

In conclusion, reference is once again made to the words of Judge Fuld,²⁹

The law does not deliberately carve an exception in favor of parents, out of the right of a minor child to be secure from negligent harm to his person.

This means, to the writer, that my child is entitled at least to that to which a total stranger is entitled from me.

²⁹ *Badigan v. Badigan*, *supra*, n. 2.