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TORT ACTIONS BETWEEN PARENTS AND MINOR CHILDREN

It appears that neither the English nor American Courts have ever refused to protect the property and property rights of a minor either from the wrongful acts of its parents or third persons. As early as 1308 an English Court allowed a minor child to maintain an action against its parents for waste.¹ Yet, most American courts which have passed on the question refuse to allow an unemancipated minor child to sue its parent for injuries sustained by the negligent or wrongful acts of the parent.

The refusal of the courts to entertain such actions is usually based on the "common law" which in turn is based on the "public policy" against any rule which would tend to upset the family relationship. As a matter of fact, it never has been established that there was an affirmative prohibition against this type of action at common law.² Blackstone is simply silent on the subject,³ and Cooley saw no reason why such an action should not be maintained.⁴ Yet many courts are convinced that the law prohibits such actions.

Of course "public policy" is and should be such as to protect the parental relationship. No one would contend that a parent may be sued for assault and battery inflicted upon the child as punishment or in correcting the child. It is necessary for the welfare of the child and society as a whole that parents be allowed to reasonably chastize their children, and it is unthinkable that a parent should not have this right. Yet, it is equally unthinkable that a parent may commit a merciless assault upon his child, which may inflict a permanent injury, without any liability whatsoever. However, some courts have said that the child is sufficiently protected by existing criminal laws.⁵ A Washington court, in holding that a minor daughter who had been raped by her father could not maintain an action against him, said:

"If it be once established that a child has a right to sue a parent for a tort, there is no practical line of demarcation which can be drawn, for the same principle which would allow the action in the case of a heinous crime, like the one involved in this case, would allow an action to be brought for any other tort. The principle permitting the action would be the same. The torts would be different only in degree."⁶

This decision has been severely criticized by judges and legal writers,⁷ and yet the reasoning has been followed by other courts. The criticism leveled

1. Year Book, Second Year Edward II.

2. *Dunlap v. Dunlap*, 84 N.H. 352, 150 A. 905, 906, 71 A.L.R. 1055 (1930); Prosser, *Torts* at 879 refers only to "supposed policy."

3. *Bl. Comm.*

4. Cooley, *Torts* (1879 ed.) at 171.

5. *Hewlett v. George*, 68 Miss. 703, 9 So. 885 (1891); *McKelvey v. McKelvey*, 111 Tenn. 388, 77 S.W. 664, 64 L.R.A. 991 (1903).

6. *Roller v. Roller*, 37 Wash. 242, 79 P. 788, 68 L.R.A. 893 (1905).

7. *Mahnke v. Moore*, 77 A.2d 923 (1951); *Cowgill v. Booch*, 189 Ore. 282, 218 P.2d 445 (1950).

at this decision is based on the fact that since courts have seldom been reluctant to distinguish between different factual situations in other actions, it seems ridiculous to refuse to so distinguish merely because the action is between parent and child.

Prior to 1891 there were no reported cases between parent and child. But there was a Nebraska case involving one in loco-parentis with a minor child and who had negligently allowed the child to go outside without sufficient clothing, the consequence of which the child was badly frozen.⁸ The court as dicta said:

"So far as the duty of the plaintiff in error towards her was concerned, he stood in relation of her parent; and, in view of her want of experience and knowledge, it was his duty to see that she was properly clothed. If he failed in this through negligence he would be liable for the consequences."⁹

The court further stated that the instructions to the jury failed to embody this important element in the case. Thus it appears that the parties did not recognize that the peculiar relationship between the child and the defendant had any particular importance, and the judge, by his decision, seemed to be of the opinion that a parent could be sued by his child for tort. But in 1891, *Hewlett v. George*¹⁰ was decided by the Supreme Court of Mississippi and became the first reported case directly on point. It involved an action by a minor child against her mother for false imprisonment by maliciously having her confined in an insane asylum. In its opinion, which cited no authority whatsoever, the court said:

"So long as a parent is under obligation to care for, guide and control, and the child is under reciprocal obligation to aid and comfort and obey, no such action as this may be maintained."

The second reported case was *McKelvey v. McKelvey*¹¹ which was decided in 1903. In sustaining the defendant's demurrer to the child's petition alleging cruel and inhuman treatment, the court said:

"At common law the right of the father to the control and custody of his infant child grew out of the corresponding duty on his part to maintain, protect, and educate it. These rights could only be forfeited by misconduct on his part. . . . Whatever redress was afforded in these cases was to be found in an appeal to the criminal law and in the remedy furnished by the writ of habeas corpus."

As for this proposition that a parent was under a duty at common law to maintain, protect, and educate his children, there is quite some doubt as to whether this was actually a legal duty or merely a moral obligation.¹²

8. *Sorrentino v. Sorrentino*, 248 N.Y. 626, 162 N.E. 551 (1928).

9. See note 8, *supra*.

10. 68 Miss. 703, 9 So. 885 (1891).

11. See note 5, *supra*.

12. *Cooley, Law of Torts* (1888 ed.) at 40, "law provides no means of enforcing parental obligation to support child."

It seems that in Blackstone's time the most the law would require was the maintenance of the child if it was unable to work, and the maximum penalty for refusal was a fine of not more than twenty shillings a month.¹³

More cases followed the McKelvey case and reached the same result based generally on "common law" and "public policy." Additional reasons were also advanced with at least one court saying that to allow recovery would have the effect of depriving other children of care and maintenance to which they would otherwise be entitled.¹⁴ While this may be true, the purpose of any action for damages is to redress a wrong, and anytime a court allows recovery, someone is injured thereby. It was also said that to allow a minor to recover from its parent might serve to unjustly enrich the parent, since the parent would be an heir and might inherit the child's estate in the event of the death of the child before attaining majority, and the parent would thus benefit from his own wrong.¹⁵ The argument has been advanced that there would be great danger of fraud in such cases,¹⁶ and it must be admitted that the argument is somewhat sound. But the issue of fraud has been successfully handled in other actions, and it is difficult to see why it could not be successfully dealt with here. Also, some courts, as dictum in actions involving other questions, have compared the parent-child relationship with the relationship existing between husband and wife at common law.¹⁷ This, of course, is a poor analogy since the prohibition against actions against a spouse was based on the idea of the legal entity of the husband and wife.¹⁸ It has never been assumed that a parent and child are one person in the eyes of the law, and therefore, any analogy to the husband-wife relationship is unsound.

While there have been a few courts which have allowed recovery, they have generally been very careful to base their decisions on *exceptions* to the general rule. Thus, while a child may not sue its father for an injury which occurred while the parent was acting in a "parental capacity," an action has been allowed where the parents was acting in a "business capacity."¹⁹ The reason given for such a relaxation of the rule seems to be "changed conditions", which have caused the justification for the rule to disappear, at least as to a parent in his business or vocational capacity.²⁰ Just why the parent should be liable while acting in one "capacity" and not in the other, is not quite clear.

Recovery has been allowed in some cases where there has been insur-

13. Chase's Blackstone (4th ed.) at 163.

14. See note 6, *supra*.

15. See note 6, *supra*.

16. Treschman v. Treschman, 28 Ind. App. 206, 61 N.E. 961 (1901).

17. McKinney v. McKinney, 59 Wyo. 500, 135 P.2d 940, 952 (1943) "Hence a suit by a wife against a husband stands on the same footing and is governed by the same principle as a suit by a child against his parent or parent against a child, . . ."

18. 43 Harv. L. Rev. 1074.

19. Signs v. Signs, 156 Ohio St. 566, 103 N.E.2d 743 (1952); *Contra*: Owens v. Auto Mut. Indemnity Co., 235 Ala. 9, 177 So. 133 (1937).

20. Signs v. Signs, *supra*, also see Borst v. Borst, 251 P.2d 149 (1953).

ance, but the insurance was not listed as the reason for allowing recovery. In one such case a minor child was allowed recovery against her father, who owned and operated a school bus, on the ground that he was required by law and by the terms of his contract with the school authorities to carry insurance for the protection of his passengers, and since the child was within the class so protected, the reason for the rule had ceased and therefore the rule should cease.²¹

In another case a minor was injured while working during the summer on his father's construction project. The court based its opinion on "at least partial emancipation" of the child by the father as *evidenced* by the contract of employment, and the fact that the father had taken out insurance to protect himself against liability, thus showing his intent to "assume the full liability of a master."²²

In an action by an eight year old minor against his mother to recover for the death of his father, alleged to have been caused by her negligent operation of a motor vehicle, the Supreme Court of Pennsylvania, in a four to three decision, reversed the lower court's judgment entered on a demurrer.²³ The basis of the opinion was that the Pennsylvania wrongful death statute was a declaration of public policy and "necessarily displaced any policy to the contrary, if, in fact, it existed." In a concurring opinion,²⁴ Justice Stern refused to subscribe to the view that statutes had changed the rule, but was of the opinion that it is not against public policy for a minor to sue its parent:

"Where the suit is to vindicate *property* rights and not to recover damages for acts of violence or negligence affecting the person. . . . An action for damages resulting from a parent's death is to recover for a *property* loss—the deprivation of support that would have been received from the deceased parent had he lived."

Another distinction has been made where the complaint alleged "wilful misconduct" on the part of defendant in operating a motor vehicle, as a result of which the plaintiff (the minor child) was injured. Thus, it has been held that the father's estate is liable to the estate of a deceased minor child who was killed by the father's negligent operation of a motor vehicle when drunk.²⁵ Likewise, a complaint which alleged that the defendant "so wilfully, wantonly and culpably operated" an automobile in violation of statutes and ordinances "in such a manner as to strike a hydrant and thereafter a utility pole" stated a cause of action.²⁶ The distinction made in these cases is that the common law rule applies only to *negligent* or *unintentional* acts as contrasted with *wilful* or *malicious* acts causing injury

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

22. Dunlap v. Dunlap, 84 N.H. 352, 150 A. 905, 910, 71 A.L.R. 1055 (1930).

23. Minkin v. Minkin, 336 Pa. 49, 7 A.2d 461, 463 (1939).

24. Minkin v. Minkin, *supra* note 23, at 465.

25. Cowgill v. Booch, 189 Ore. 282, 218 P.2d 445 (1950).

26. Siembab v. Siembab, 112 N.Y. Supp.2d 82 (1952); see also Wright v. Wright, 85 Ga. App. 721, 70 S.E.2d 153 (1953).

to the child. However, this exception has not yet been extended to other than automobile negligence actions.

The mass of conflicting rules is so complex that it is impossible to say for certain what the law is. The present weight of authority confers an absolute civil privilege for personal injuries, subject only to criminal liability or forfeiture of custody,²⁷ but the decisions date back only to 1891 and courts have interposed the exceptions set out above. It is generally agreed that the absolute prohibition against the maintenance of such actions is too harsh. It is suggested that inasmuch as the law imposes certain parental duties, the law should protect the parent while engaged in these duties and leave the criminal law to protect the child from the abuse of this privilege by the parent, except when the parent acts with malice. But as to injuries inflicted by the parent while acting outside the scope of the parental duties, the law should afford redress. While at first glance such a rule would seem to be extremely radical, it would actually be well tempered by other law. In the first place, the child could only seek redress for pain and suffering, permanent injury, and impairment of earning capacity after attaining majority, because the parent is entitled to the services of the child during minority and is responsible for the expenses of treatment.²⁸ In the second place, the parent would have the protection of the same law which would be available to him if the action were brought by a third person, i.e. contributory negligence and automobile guest statutes. In the third place, as a practical matter, there would be no such actions unless, either the parental relationship had actually terminated because of the nature of the incident from which the cause of action arose, or the loss was covered by insurance. In the later instance, there is merely a contractual relationship between the insurer and the insured, and the insurer may, if it so desires, refuse to assume such liability. Such a rule would continue to protect the parent in the exercise of the duties imposed upon him by law, and would provide the child redress for semi-permanent or permanent injuries inflicted by the parent while acting outside the bounds of the parental duties.

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27. 43 Harv. L. Rev. 1079.

28. 67 C.J.S. 740.