

Parent-Child Tort Liability and Compulsory Insurance

St. John's Law Review

Follow this and additional works at: <https://scholarship.law.stjohns.edu/lawreview>

This Note is brought to you for free and open access by the Journals at St. John's Law Scholarship Repository. It has been accepted for inclusion in St. John's Law Review by an authorized editor of St. John's Law Scholarship Repository. For more information, please contact selbyc@stjohns.edu.

PARENT-CHILD TORT LIABILITY AND COMPULSORY INSURANCE

The concept of unity of legal identity, recognized by the common law in the husband-wife relationship, was not adhered to in the parent-child area. Consequently there were no theoretical obstacles to the maintenance of suits between the parent and child. Rather, the minor was regarded as a separate legal entity who was fully responsible for his own wrongs and entitled to the enjoyment of his own property.¹ Thus causes of action between parent and minor child in matters of property were freely recognized.² Nevertheless, it is far from clear whether at common law a minor child was allowed to prosecute a suit against his parent for a personal tort. Some courts have suggested that the absence of judicial decisions in this area supports the proposition that no such action was recognized at common law.³ Others have reasoned that this absence shows rather that the validity of the action was undisputed.⁴

In 1891, however, a Mississippi case,⁵ citing no authority, established the rule that an unemancipated child could not bring an action for a personal tort against his parent. The basis of the denial was not that the parent had no duty with respect to his child, but rather that the child had no right to bring a civil action against his parent.⁶ Succeeding courts in upholding this rule have relied on a number of considerations of public policy, of which the most frequently cited has been the view that the allowance of such actions would disturb the peace and harmony of the family which is essential to a well-ordered society.⁷

Another view, repeatedly urged, is that such actions would impair parental authority.⁸ Some courts have reasoned that to permit the child to recover would be unfair to the other members of the family since the family fund would be depleted.⁹ And other courts have denied the right of a minor to recover, alluding to the somewhat

¹ See PROSSER, *TORTS* 675 (2d ed. 1955).

² See, e.g., *Lamb v. Lamb*, 146 N.Y. 317, 41 N.E. 26 (1895); *McCurdy, Torts Between Persons in Domestic Relation*, 43 HARV. L. REV. 1030, 1057-58 (1930).

³ See *Small v. Morrison*, 185 N.C. 577, 118 S.E. 12, 13 (1923); *Matarese v. Matarese*, 47 R.I. 131, 131 Atl. 198, 199 (1925).

⁴ See *Mahnke v. Moore*, 197 Md. 61, 77 A.2d 923, 924 (1951); *Dunlap v. Dunlap*, 84 N.H. 352, 150 Atl. 905, 906 (1930).

⁵ *Hewellette v. George*, 68 Miss. 703, 9 So. 885, 887 (1891).

⁶ *Ibid.*

⁷ See, e.g., *Mesite v. Kirchstein*, 109 Conn. 77, 145 Atl. 753, 755 (1929); *Small v. Morrison*, 185 N.C. 577, 118 S.E. 12, 15 (1923).

⁸ See, e.g., *Rambo v. Rambo*, 195 Ark. 832, 114 S.W.2d 468, 469 (1938); *Wick v. Wick*, 192 Wis. 260, 212 N.W. 787 (1927).

⁹ See, e.g., *Bulloch v. Bulloch*, 45 Ga. App. 1, 163 S.E. 708, 711 (1932); *Roller v. Roller*, 37 Wash. 242, 79 Pac. 788, 789 (1905).

imaginative ground that the defendant might inherit the amount recovered should the plaintiff die.¹⁰

It has been said that these cases afford an example of a doctrinaire application of legal formulae without a realistic recognition of the effect of liability insurance.¹¹

The Insurance Law

The widespread use of the automobile in American society and the concomitant toll on life and property caused the New York Legislature in 1929 to enact the Motor Vehicle Responsibility Act.¹² The act, which demanded proof of financial security only after a motorist was involved in an accident,¹³ was an attempt by the legislature to cope with the pressing and disruptive problem of uncompensated accident victims. In 1956, New York enacted the Motor Vehicle Financial Security Act,¹⁴ commonly known as the "Compulsory Insurance Law." As stated by the legislature, the act, by demanding financial security upon registration of the vehicle, is designed to compensate innocent victims of motor vehicle accidents by assuring that motorists be financially able to respond in damages for their negligent acts.¹⁵

It is in the light of compulsory insurance that we will re-examine the time-honored reasons advanced in support of the immunity doctrine and attempt to show that they no longer have any realistic basis.

(A) *Disturbing Domestic Tranquility*

In upholding the immunity doctrine, it was argued with a great display of emotion that to recognize a cause of action in favor of a child against a parent would destroy the harmony and peace of the family.¹⁶ But several courts, in passing on the immunity rule, have suggested that when a child brings an action, the likelihood is that

¹⁰ *Roller v. Roller*, *supra* note 9.

¹¹ See James & Thornton, *The Impact of Insurance on the Law of Torts*, 15 *LAW & CONTEMP. PROB.* 431, 432 (1950); James, *Accident Liability Reconsidered: The Impact of Liability Insurance*, 57 *YALE L.J.* 549, 553 (1948).

¹² N.Y. Sess. Laws 1929, ch. 695.

¹³ *Ibid.*

¹⁴ N.Y. VEHICLE & TRAFFIC LAW §§ 93 to 93-k (Supp. 1958). In its declaration of purpose the act, in § 93, states that "the legislature is concerned over the rising toll of motor vehicle accidents . . ." and that "it is a matter of grave concern that motorists shall be financially able to respond in damages for their negligent acts, so that innocent victims of motor vehicle accidents may be recompensed for the injury and financial loss inflicted upon them."

¹⁵ N.Y. VEHICLE & TRAFFIC LAW § 93 (Supp. 1958).

¹⁶ See *Small v. Morrison*, 185 N.C. 577, 118 S.E. 12, 15-16 (1923); McCurdy, *Torts Between Persons in Domestic Relation*, 43 *HARV. L. REV.* 1030, 1074 (1930).

the peace of the home has already been disturbed beyond repair.¹⁷ As was said in *Dunlap v. Dunlap*, "The communal family life is held together and its continuity assured by something finer than legal command."¹⁸ Furthermore, since minors have always been able to sue their parents in matters affecting property rights, several courts expressed dismay at the basic inconsistency of the "domestic tranquility" rationale.¹⁹ They asserted that since this argument is not considered where property rights are involved, it ought not to stand in the way where the claim relates to personal injuries.²⁰

Thus it would seem that even before the extensive use of liability insurance the family tranquility argument was not universally accepted. Whether the reason retains any validity in light of the insurance law is doubtful. Now that insurance coverage is almost absolute one practical fact should be realized, and that is that a suit between a minor child and a parent is, in reality, a friendly one. Today the real party in interest is the insurer rather than the insured.²¹ Such a suit would not be a vindictive one, nor would it be designed to harass the parent, but rather it would be an attempt to secure the benefits provided and paid for under the insurance contract. These benefits serve a definite social purpose, for not only would the onerous burden of medical expenses be removed from the parent, but, more important, adequate medical attention would be available to the child. These benefits are some of the factors that cause a happy home to exist, and the fact that they must be obtained through the courts in no way detracts from their worth. Thus, it would seem that rather than disturb domestic tranquility, a recovery by a child under an insurance policy would tend to aid it.

(B) *Parental Authority*

It has been argued that to subject the parent to uncontrolled suits would be subversive of discipline.²² However true this may have been, when viewed in the light of the insurance law the conception becomes unrealistic. It would seem reasonable to presume that the parent would be the initiator of any suit against himself. Realizing that the only adverse effect would be a negligible increase in his insurance rate, the parent would urge the child to sue in order to come within the provisions of the policy. It does not follow, therefore, that there would be a resulting impairment of parental authority if such suits were recognized by the courts.

¹⁷ See, e.g., *Dunlap v. Dunlap*, 84 N.H. 352, 150 Atl. 905, 914 (1930); *Borst v. Borst*, 41 Wash. 2d 642, 251 P.2d 149, 153 (1952).

¹⁸ *Dunlap v. Dunlap*, *supra* note 17, at 915.

¹⁹ See *Signs v. Signs*, 156 Ohio St. 566, 103 N.E.2d 743, 748 (1952); *Borst v. Borst*, *supra* note 17.

²⁰ *Signs v. Signs*, *supra* note 19.

²¹ James & Thornton, *The Impact of Insurance on the Law of Torts*, 15 LAW & CONTEMP. PROB. 431, 433 (1950).

²² See, e.g., *Small v. Morrison*, 185 N.C. 577, 118 S.E. 12, 16 (1923); *Wick v. Wick*, 192 Wis. 260, 212 N.W. 787 (1927).

(C) *Depletion of Family Funds*

According to this "family exchequer" argument the family property should not be appropriated by one minor child to the detriment of the other members of the family.²³ With insurance this argument cuts both ways. If a child is injured and is prohibited from recovering on the insurance contract, the father, and thus the family, suffer a corresponding depletion of funds because of the medical expenses involved. It would seem that from a public policy standpoint the precise reason that has long been urged in denying suits by minors may now be advanced in favor of such actions. Furthermore, since these actions would, in effect, be friendly ones there is little fear that there would be an attempted recovery beyond the coverage of the policy.

(D) *Inheritance*

It has been suggested that if a parent is compelled to pay damages to a minor child he would, as next of kin, reacquire the amount so paid in the event of the child's death during minority. Therefore he should not be compelled to pay damages which he might later get back.²⁴ Even before compulsory insurance this reason had been attacked as a poor one.²⁵ It has been asserted that recovery to one in every other respect deserving of it, ought not be denied because of this remote contingency.²⁶ One court considered this reason nothing more than a mere makeweight.²⁷ Nevertheless, it might regain some of its lost regard because of liability insurance: whereas the reason formerly was employed because it would be a useless act to have the parent pay damages that he may later inherit, it may now be urged to prevent him from profiting from his own "wrong." That is, the courts may assert that since recovery would not be from the pocket of the father, but rather from the insurance company, an inheritance from the child would in a sense be an unwarranted profit. But a valid cause of action ought not be denied because there is a remote possibility that the "wrongdoer" may profit from it. And since the "wrong" is merely a negligent one, not intentional, even if the contingency should occur it would not be an unwarranted profit in the true sense of the word.

²³ See, e.g., *Bulloch v. Bulloch*, 45 Ga. App. 1, 163 S.E. 708, 711 (1932); *Roller v. Roller*, 37 Wash. 242, 79 Pac. 788, 789 (1905).

²⁴ *Roller v. Roller*, *supra* note 23.

²⁵ See *Dunlap v. Dunlap*, 84 N.H. 352, 150 Atl. 905, 909 (1930); *McCurdy, Torts Between Persons in Domestic Relation*, 43 HARV. L. REV. 1030, 1073 (1930).

²⁶ *McCurdy*, *supra* note 25, at 1073.

²⁷ *Dunlap v. Dunlap*, *supra* note 25, at 909.

Analogy to Spouses

However true the above arguments may be, recovery under the insurance policy may be denied to the child because of the possibility of fraud and collusion.²⁸ The courts may reason, by analogy, that since section 167(3) of the New York Insurance Law exempts insurers from responsibility in litigation between spouses because of the danger of fraud,²⁹ similar coverage between parent and child should be denied for the same reasons.

At common law a reciprocal disability existed between husband and wife which precluded one from bringing an action sounding in tort against the other.³⁰ This disability was swept away by the legislature in 1937,³¹ so that at the present time all inter-spouse actions are allowed.³² However, in the same act, the legislators revised the Insurance Law of 1909³³ to relieve the insurer of liability in such suits unless express provisions relating specifically thereto were included in the policy.³⁴ The legislative intent ascribed by the courts to the Insurance Law is to protect insurers against collusive suits.³⁵

However, recent interpretations of that law seem to indicate that the courts are no longer in favor of the statute.³⁶ In *Catania v. Hartford Acc. & Indem. Co.*³⁷ suit was brought by a wife against the employer of her husband for injuries sustained due to her husband's negligent operation of a car while on the defendant's business. The court held the husband's insurer responsible for payment of any judgment rendered against the employer. Had the wife sued her husband she would not have obtained the coverage of the policy because of the exclusion provision in section 167(3). However, since she sued the employer of her husband, she recovered on the theory that the employer was entitled to coverage as an "additional insured"

²⁸ See *Villaret v. Villaret*, 169 F.2d 677, 679 (D.C. Cir. 1948); *McCurdy*, *supra* note 25, at 1076.

²⁹ "No policy or contract shall be deemed to insure against any liability of an insured because of death of or injuries to his or her spouse or because of injury to, or destruction of property of his or her spouse unless express provision relating specifically thereto is included in the policy." N.Y. INS. LAW § 167(3).

³⁰ *Freethy v. Freethy*, 42 Barb. 641 (N.Y. Sup. Ct. 1865).

³¹ N.Y. Sess. Laws 1937, ch. 669.

³² N.Y. DOM. REL. LAW § 57, which reads in part: "A married woman has a right of action against her husband for his wrongful or tortious acts resulting to her in any personal injury . . . as if they were unmarried, and she is liable to her husband for her wrongful or tortious acts resulting in any such personal injury to her husband . . . as if they were unmarried."

³³ N.Y. Sess. Laws 1909, ch. 13.

³⁴ N.Y. INS. LAW § 167(3).

³⁵ *Fuchs v. London & Lancashire Indem. Co.*, 258 App. Div. 603, 605, 17 N.Y.S.2d 338, 340 (2d Dep't 1940); *Jacobs v. United States Fid. & Guar. Co.*, 2 Misc. 2d 428, 431, 152 N.Y.S.2d 128, 132 (Sup. Ct. 1956).

³⁶ *Lynch, Insurance*, 33 N.Y.U.L. Rev. 1159, 1160 (1958).

³⁷ 4 App. Div. 2d 440, 166 N.Y.S.2d 389 (1st Dep't 1957) (per curiam).

under the terms of the policy issued to the husband-employee. It would seem that the possibility of collusion is not materially reduced merely by virtue of the fact that there is an additional insured under the policy. Nevertheless, this decision limited the application of section 167(3) to direct actions between spouses.

In *American Sur. Co. v. Diamond*³⁸ the action was brought against the insured on the theory of imputed negligence. The question arose as to the nature and extent of the co-operation clause of the policy and the court held that the clause binding the defendant to assist in the conduct of suits did not obligate him to verify a cross-complaint, thus the insurance company had to defend and pay any judgment despite the possibility of collusion.

The subrogation privileges of the insurer were limited in *Ulanoff v. Croyden Shirt Co.*³⁹ The wife instituted suit against the corporation whose car her husband was driving at the time of the accident. The insurer of the corporation demanded subrogation privileges against the husband-employee. The court held that the corporation did not violate the co-operation and subrogation clauses of the policy by refusing to verify or sign the complaint of impleader. Again the wife recovered indirectly that which she could not directly. It has been said "that the philosophy of the courts in the *Ulanoff*, *Catania* and *American Surety* decisions indicates that, since we have compulsory insurance in this state, they are no longer in sympathy . . ." with section 167(3).⁴⁰ The same commentator has indicated that this present judicial trend may prompt the legislature to amend the section, making it mandatory to cover inter-spouse liability.⁴¹ In fact such an amendment was proposed in the last session of the legislature.⁴²

It would seem then, in light of the recent interpretations of section 167(3) and its proposed amendment, that the fear of fraud and collusion in this area has subsided.

Thus if the courts or the legislature reject the validity of the common-law reasons for the immunity between parent and child, but nevertheless deny insurance coverage on the analogy of section 167(3), they would not be consonant with the present trend to negate the effects of the statute.

Furthermore, the concept of fraud as a basis for denying suits between parent and minor child appears questionable in view of the

³⁸ 1 N.Y.2d 594, 136 N.E.2d 876, 154 N.Y.S.2d 918 (1956).

³⁹ 14 Misc. 2d 13, 174 N.Y.S.2d 357 (Sup. Ct. 1958).

⁴⁰ Lynch, *Insurance*, 33 N.Y.U.L. REV. 1159, 1160 (1958).

⁴¹ *Ibid.*; see Note, 32 ST. JOHN'S L. REV. 273 (1958).

⁴² A. Int. No. 316; S. Int. No. 277 (1959). The proposed amendment provides that every such policy or contract would be deemed to insure against any liability of an insured because of the death of, or injuries to, his or her spouse or because of injury to, or destruction of property of his or her spouse, and that no such policy may be issued in this state unless it includes express provisions relating specifically thereto.

inconsistencies created by the courts themselves when dealing with such cases.

Other courts have held,⁴³ and New York courts have implied,⁴⁴ that the immunity doctrine is limited to unintentional torts. In *Cannon v. Cannon*⁴⁵ the child was suing for ordinary negligence. The court said it was ". . . not prepared, in cases where willful misconduct by the parent is not a factor . . ." ⁴⁶ to impose parental liability. Noteworthy in this regard is that three judges in *Sorrentino v. Sorrentino*⁴⁷ dissented and voted to sustain the complaint in an action by a minor child against the parent to recover for *ordinary* negligence.

Also, in *Siembab v. Siembab*⁴⁸ the court indicated that it would have sustained a complaint based on willful misconduct had the plaintiff included sufficient factual averments to support the general allegations of willfulness. The immunity doctrine was finally abolished in New York in the area of willful torts in *Henderson v. Henderson*,⁴⁹ where the plaintiff alleged that the father drove at an excessive rate of speed while intoxicated. In so holding, the court did not question the possibility of fraud. Yet it would seem that the danger of fraud is no greater in cases involving ordinary negligence. Therefore, if the courts uphold the immunity doctrine in cases of ordinary negligence because of the danger of fraud, but deny its application in cases of willful torts without mention of fraud, there will be a basic dichotomy in the law difficult of rational explanation.

In like manner, there have been other qualifications to the general doctrine. In each instance the possibility of fraud was no less than in the usual case and yet in each of the instances recovery was allowed.

In *Dunlap v. Dunlap*⁵⁰ a minor was permitted to sue for injuries sustained in the course of employment by his father. Although one of the factors leading the court to allow the maintenance of the

⁴³ See, e.g., *Emery v. Emery*, 45 Cal. App. 2d 421, 289 P.2d 218, 223-24 (1955); *Mahnke v. Moore*, 197 Md. 61, 77 A.2d 923 (1951). The court in the latter case stated: "[W]hen . . . the parent is guilty of acts which show complete abandonment of the parental relation, the rule giving him immunity from suit by the child, on the ground that discipline should be maintained in the home, cannot logically be applied, for when he is guilty of such acts he forfeits his parental authority and privileges, including his immunity from suit." 77 A.2d at 926.

⁴⁴ See *Cannon v. Cannon*, 287 N.Y. 425, 40 N.E.2d 236 (1942).

⁴⁵ *Ibid.*

⁴⁶ *Id.* at 429, 40 N.E.2d at 238.

⁴⁷ 248 N.Y. 626, 162 N.E. 551 (1928) (memorandum decision). The three dissenting judges were Cardozo, Crane and Andrews.

⁴⁸ 284 App. Div. 652, 134 N.Y.S.2d 437 (4th Dep't 1954).

⁴⁹ 11 Misc. 2d 449, 169 N.Y.S.2d 106 (Sup. Ct. 1957).

⁵⁰ 84 N.H. 352, 150 Atl. 905 (1930).

action was the presence of liability insurance, it dismissed as unsound the danger of fraud and collusion.⁵¹

Similarly, when an action was brought against the father in his vocational capacity as a common carrier, recovery was allowed.⁵² Here again, the court relied somewhat on the presence of insurance but nevertheless dismissed the contention of fraud.

In *Davis v. Smith*⁵³ the court said that although there may be parental immunity during life, it does not extend to the personal representative of the deceased parent; thus an action was allowed against the estate without mention of the danger of fraud.⁵⁴

It is obvious that there is also a possibility of collusion where an emancipated child sues his parent. Nevertheless, in such cases the immunity doctrine is not applied and the emancipated child is permitted to recover.⁵⁵ And in *Minkin v. Minkin*, where the minor plaintiff fell within the class of persons entitled to entertain actions under the wrongful death statutes, the court held that this was a declaration of public policy by the legislature which necessarily displaced any policy to the contrary.⁵⁶

In each of the above cases, the courts dismissed as unsound or failed to discuss the possibility and danger of fraud. But the danger of fraud is no greater when the parent is sued for negligence in his parental capacity than when he is sued in another capacity. The danger cannot logically be a basis for denying an action in one case, and not in the other.

Danger—Real or Apparent?

Since the fear of fraud tends to bring confusion into the law it is worthy of examination in order to determine whether the fear is more apparent than real.

⁵¹ 150 Atl. at 909.

⁵² *Worrell v. Worrell*, 174 Va. 11, 4 S.E.2d 343 (1939) (action against father for negligence of his employee); *Lusk v. Lusk*, 113 W. Va. 17, 166 S.E. 538 (1932) (defendant father was operator and owner of school bus in which plaintiff rode to school).

⁵³ 253 F.2d 286 (3d Cir. 1958).

⁵⁴ *Ibid.* *Contra*, *Lasecki v. Kabara*, 235 Wis. 645, 294 N.W. 33 (1940), which held that death of the parent does not affect the application of the immunity rule. *Cf.* *Terwilliger v. Terwilliger*, 201 Misc. 453, 106 N.Y.S.2d 481 (Sup. Ct. 1951). This was an action by the administrator of the mother's estate against her son for negligence. The court held that the immunity doctrine applies even though the suit is by the estate rather than the mother.

⁵⁵ See, e.g., *Taubert v. Taubert*, 103 Minn. 247, 114 N.W. 763 (1908); *Lancaster v. Lancaster*, 213 Miss. 536, 57 So. 2d 302 (1952); *accord*, *Crosby v. Crosby*, 230 App. Div. 651, 246 N.Y. Supp. 384 (3d Dep't 1930), wherein the mother alleged the emancipation of the child and the court held that this was a question for determination by the jury.

⁵⁶ 336 Pa. 49, 7 A.2d 461 (1939); *accord*, *Oliveria v. Oliveria*, 305 Mass. 297, 25 N.E.2d 766 (1940). *Contra*, *Durham v. Durham*, 227 Miss. 76, 85 So. 2d 807 (1956), where it was held that the statute did not abrogate the common-law rule.

It can truthfully be said that there is a danger of fraud in every area of the law.⁵⁷ But to conclude from this that an entire body of cases should be removed from judicial determination and thereby leave aggrieved persons without a remedy is an altogether different matter. The efficacy of the judicial system in deciding between truth and falsity should not be rendered inoperative because of an "impotence which is not usually assumed."⁵⁸

Furthermore, since the purpose of the compulsory insurance law is that drivers be financially responsible, can it be said that a parent's duty to protect the rest of the community is higher than his obligation to his own child?⁵⁹

The inability of the courts to deal with fraud is not so great that these unfavorable effects must be tolerated. As stated by one court, "where such relationship exists, however, the conduct and testimony of the parties should be carefully scrutinized . . ."⁶⁰ With the proper safeguards the courts can effectively guard against the occurrence of fraud. In order to provide these safeguards it must be realized that the insurance companies are the actual defendants and that they must be able "to protect themselves in the light of the true situation, without being hampered by technical procedural rules."⁶¹ Thus, in Massachusetts, which also has compulsory liability insurance, the insurance company is permitted to impeach its own witness (the insured).⁶² In another jurisdiction the court admitted evidence of the fact of insurance coverage and the relationship between the nominal parties in order to assist the jury in appraising the testimony of the motorist and his wife.⁶³

Finally, the answer to the ultimate problem of whether recovery should be allowed in such actions involves the reconciliation of those social interests fundamental to the law of torts with the possible occurrence of fraud in the actions. It would seem, with the precautions mentioned above and others the courts devise, that the interests served by permitting suits between parent and child exceed to a great degree the danger of fraud presented by such suits.

⁵⁷ This is evidenced by the fact that in contract cases the courts have been reluctant to define fraud in exact terms. They reason that if a boundary line between what is fraud and what is not fraud is defined, unscrupulous persons may manage their conduct so as to be "within the law." WHITNEY, CONTRACTS § 57, at 149 (6th ed. 1958).

⁵⁸ *Dunlap v. Dunlap*, 84 N.H. 352, 150 Atl. 905, 911 (1930).

⁵⁹ *Worrell v. Worrell*, 174 Va. 11, 4 S.E.2d 343, 349 (1939).

⁶⁰ *State Auto. Mut. Ins. Co. v. York*, 104 F.2d 730, 734 (4th Cir. 1939).

⁶¹ James & Thornton, *The Impact of Insurance on the Law of Torts*, 15 LAW & CONTEMP. PROB. 431, 433 n.11 (1950).

⁶² *Horneman v. Brown*, 286 Mass. 65, 190 N.E. 735 (1934).

⁶³ *Christie v. Eager*, 129 Conn. 62, 26 A.2d 352 (1942).

Parent v. Child

It is interesting to note that in the relatively few reported cases involving actions by parents against their children for personal torts, the courts have almost uniformly held that no such action could be maintained.⁶⁴ In support of this conclusion, the courts have relied primarily upon the policy of protecting family harmony⁶⁵ and the analogous rule barring actions for personal tort by a child against his parent.⁶⁶ The courts have pointed out that the parent is the natural guardian of the child and should not be allowed to assume the inconsistent position of attempting to recover damages from him.⁶⁷

In *Boehm v. C. M. Gridley & Sons*⁶⁸ the court quoted at great length from *Cannon v. Cannon*,⁶⁹ a case wherein a child was suing the parent. The former concluded its decision by stating

that the reasons and principles set forth above, which prompted the Court of Appeals to deny to an unemancipated child a right of action against the parents . . . apply with equal vigor and force to an action of similar nature by a parent against his or her unemancipated child.⁷⁰

This decision was premised on the similarity in nature between the two types of action. However, the court did not establish any relationship between them nor did it endeavor to explain why the same reasoning is applicable in both instances. The only possible similarity is that in both cases there may be a disturbance of domestic tranquility. But if the action by the parent against the child is viewed as a manifestation of the parent's right to discipline and punish his child, then such an action would be a proper disturbance of family harmony.

Accepting the conclusion of the court in the *Boehm* case that the reasoning in both situations should be the same, the problem may well be considered academic. Since, because of compulsory insurance the immunity doctrine would seem logically to be no longer applicable in suits by children against parents, it a fortiori ought not be applicable to suits by parents against children.

⁶⁴ See, e.g., *Shaker v. Shaker*, 129 Conn. 518, 29 A.2d 765 (1942); *Schneider v. Schneider*, 160 Md. 18, 152 Atl. 498 (1930); *Rines v. Rines*, 97 N.H. 55, 80 A.2d 497 (1951). *Contra*, *Wells v. Wells*, 48 S.W.2d 109 (Mo. App. 1932).

⁶⁵ *Duffy v. Duffy*, 117 Pa. Super. 500, 178 Atl. 165 (1935).

⁶⁶ *Boehm v. C. M. Gridley & Sons*, 187 Misc. 113, 63 N.Y.S.2d 587 (Sup. Ct. 1946).

⁶⁷ *Shaker v. Shaker*, *supra* note 64; *Schneider v. Schneider*, *supra* note 64.

⁶⁸ 187 Misc. 113, 63 N.Y.S.2d 587 (Sup. Ct. 1946).

⁶⁹ 287 N.Y. 425, 40 N.E.2d 236 (1942).

⁷⁰ *Boehm v. C. M. Gridley & Sons*, *supra* note 66, at 119, 63 N.Y.S.2d at 592-93.

Conclusion

Before the widespread use of liability insurance, the holdings of the courts in denying intra-family negligence actions were generally correct. The reasoning of the doctrine might not have been clearly articulated nor logically presented, but the general revulsion of the community to such suits was reason enough for their disallowance. It must be remembered, however, that the immunity doctrine was established at a time when accident litigation was looked upon as a private contest between individuals with which society was not concerned; ⁷¹ liability was considered as shifting the loss from the person who suffered it to the person who caused it.⁷² There is today, however, an altogether different approach to tort law. Society has a definite and vital interest in accidents and their resulting losses.⁷³

Furthermore, since section 167(3), which excepts a spouse from the other spouse's insurance coverage unless the policy specifies such coverage, is subject to a recent trend to limit its application, it is poor authority for disallowing personal tort actions between parent and child.

Upon analysis of the reasons urged for its support, it is clear that present application of the rule prohibiting suits between parent and child would be contrary to logic and good reason. The doctrine should therefore be abolished.



COMMUNICATIONS WITH A GRAND JURY

Objections to the validity of indictments in recent cases have spotlighted the problem of grand jury secrecy, especially as it pertains to unauthorized communications.¹ The purpose of this note is to examine this area of the law.

Secrecy has cloaked grand jury proceedings for centuries.² The

⁷¹ See McNiece & Thornton, *Is the Law of Negligence Obsolete?*, 26 ST. JOHN'S L. REV. 255, 258 (1952); BOWMAN, *ELEMENTARY LAW* 80 (1929).

⁷² See James, *Accident Liability Reconsidered: The Impact of Liability Insurance*, 57 YALE L.J. 549 (1948).

⁷³ *Id.* at 549-50.

¹ *United States v. Powell*, Crim. No. 156-15, S.D.N.Y., July 22, 1958.

² See *Goodman v. United States*, 108 F.2d 516, 519 (9th Cir. 1939); *Latham v. United States*, 226 Fed. 420, 421 (5th Cir. 1915); *People v. Hulbut*, 4 Denio 133, 135 (N.Y. 1847); EDWARDS, *THE GRAND JURY* 28 (1906); 8 WIGMORE, *EVIDENCE* § 2360, at 716 (3d ed. 1940).