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Torts--Parental Immunity Upheld in Wrongful Death Action (Strong v. Strong, 267 P.2d 240 (Nev. 1954))

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When the United States is subject to the liabilities of a private employer,[26] it should have the concomitant equitable rights of such an employer. Appropriate legislation to accomplish this is necessary to forestall the noted deleterious effects of this decision.

TORTS—PARENTAL IMMUNITY UPHELD IN WRONGFUL DEATH ACTION.—An unemancipated infant plaintiff sued his mother for the wrongful death of his father caused by her negligent operation of an automobile. The plaintiff contended that the Nevada wrongful death statute, which does not expressly except suits by minors, directly repealed the common-law rule of immunity of a parent from suit by a minor child. The Supreme Court of Nevada affirmed a summary judgment for the defendant, *holding* that the wrongful death statute did not abrogate the common-law rule. *Strong v. Strong,* 267 P.2d 240 (Nev. 1954).

Up to and including the latter part of the nineteenth century, there was no rule declaring parents immune from tort actions by their minor children.[1] In 1891, the common-law rule establishing parental immunity had its inception in the celebrated case of *Hewellette v. George.*[2] The Mississippi court, citing neither judicial precedent nor text material, based its decision solely on the ground that public policy prohibited tort suits between parent and child. Thereafter, other states adopted the rule, stating that maintenance of a suit by a child against the parent would be disruptive of family harmony;[3] that immunity should be extended to parents so as not to hamper their disciplinary function;[4] that recovery by a child would result in a depletion of the family resources to the detriment of the other children;[5] and, that the child is sufficiently protected by the criminal laws of the state from abuse at the hands of his parent.[6]

The broad terms of the parental immunity rule have led to injustice. The most extreme application of this rule occurred in *Roller v. Roller,*[7] where a minor child was precluded from maintaining a civil suit against her father who had raped her. The court para-

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[26] See note 1 *supra.*

[1] See PROSSER, TORTS 905 (1941).

[2] 68 Miss. 703, 9 So. 885 (1891); see PROSSER, TORTS 905 (1941).

[3] See Small v. Morrison, 185 N.C. 577, 118 S.E. 12 (1923); Wick v. Wick, 192 Wis. 260, 212 N.W. 787 (1927).

[4] See Bulloch v. Bulloch, 45 Ga. App. 1, 163 S.E. 708 (1932).

[5] See Roller v. Roller, 37 Wash. 242, 79 Pac. 788 (1905).

[6] See Rambo v. Rambo, 195 Ark. 832, 114 S.W.2d 468 (1938); Matarese v. Matarese, 47 R.I. 131, 131 Atl. 198 (1925).

[7] See note 5 *supra.*

doxically based its decision on domestic tranquility and declared that departure from the rule in an extreme case would leave no practical line of demarcation.[8] It is not surprising, therefore, that later cases have rejected the rigid application of the rule in the *Roller* case by delimiting it with a variety of exceptions. Thus, suits were allowed where wilful or malicious injuries have been inflicted by the parents [9] (rejecting the theory of the *Roller* case), and where the child is emancipated.[10] Parental immunity has also been restricted to wrongs occurring within the ordinary scope of domestic matters.[11] Accordingly, there is no immunity when the child is injured by the parent while the latter is engaged in his business or employment.[12] Moreover, where the injury to the child results from a wilful or malicious act,[13] or from excessive discipline,[14] some courts attach liability on the theory that the parent is acting outside the parental relationship. Indeed, a few states have rendered the parental immunity rule inapplicable where the parent is protected by liability insurance.[15] The reasoning is that parental discipline and domestic harmony are not offended where the recovery by the child is a loss, not to the father, but to the insurance company.[16] However, other jurisdictions, in-

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[8] The court, in Cowgill v. Boock, 189 Ore. 282, 218 P.2d 445 (1950), referring to the *Roller* case said, "It is absurd to talk about maintaining the peace and tranquility of the home when it had thus already been disrupted by such a monstrous crime." *Id.*, 218 P.2d at 450.

[9] See, *e.g.*, Siembab v. Siembab, 202 Misc. 1053, 112 N.Y.S.2d 82 (Sup. Ct. 1952); Meyer v. Ritterbush, 196 Misc. 551, 92 N.Y.S.2d 595 (Sup. Ct. 1949), *aff'd mem.*, 276 App. Div. 972, 94 N.Y.S.2d 620 (2d Dep't 1950).

[10] See Taubert v. Taubert, 103 Minn. 247, 114 N.W. 763 (1908). "Emancipation may be the result of a voluntary agreement, express or implied, between the parent and child . . . ; enlistment of the minor in the military service . . . ; abandonment or desertion by the parent . . . ; attainment of majority . . . ; by marriage . . . ." 4 BAYLOR L. REV. 249, 252 (1952).

[11] See Borst v. Borst, 41 Wash.2d 642, 251 P.2d 149, 156 (1952).

[12] Signs v. Signs, 156 Ohio St. 566, 103 N.E.2d 743 (1952); Borst v. Borst, *supra* note 11.

[13] See Mahnke v. Moore, 197 Md. 61, 77 A.2d 923 (1951); Cowgill v. Boock, 189 Ore. 282, 218 P.2d 445 (1950).

[14] *See* Cowgill v. Boock, *supra* note 13, 218 P.2d at 452.

[15] Dunlap v. Dunlap, 84 N.H. 352, 150 Atl. 905 (1930); Lusk v. Lusk, 113 W. Va. 17, 166 S.E. 538 (1932).

[16] "There is no reason for applying the rule [of parental immunity] in the instant case [where the parent is protected by insurance]. This action is not unfriendly as between the daughter and the father. A recovery by her is no loss to him. In fact, their interests unite in favor of her recovery, but without hint of 'domestic fraud and collusion' (charged in some cases). There is no filial recrimination and no pitting of the daughter against the father in this case. No strained family relations will follow. On the contrary, the daughter must honor the father for attempting to provide compensation against her misfortune. Family harmony is assured instead of disrupted. A wrong is righted instead of 'privileged.'" Lusk v. Lusk, *supra* note 15, 166 S.E. at 539. See McNiece and Thornton, *Is The Law Of Negligence Obsolete?*, 26 ST. JOHN'S L. REV. 255, 265 (1952).

cluding New York, take a contrary position, reasoning that the presence of insurance ". . . creates no right to sue where one otherwise would not exist." [17]

In the present case the child sued through his guardian *ad litem* as a beneficiary under the Nevada wrongful death statute. Such an action is derivative solely because it is dependent upon a right of action in the decedent. It arises out of, and is founded upon, the same wrong that has been done to him, that is, the death itself.[18] Beyond that, the injury to the beneficiary is separate and distinct from the injury to the decedent.[19] The damage to the beneficiary is not a personal injury but rather the deprivation of support,[20] a compensable loss in the nature of a property right.[21] Consequently, the Court, in arriving at its decision by a process of statutory construction of the Nevada wrongful death statute,[22] has in effect applied the parental immunity rule to an action based on a property right. Yet suits by minors to vindicate *property* rights have never been disallowed,[23] nor were they prohibited by the rule of the *Hewellette* [24] case which involved only *personal injury.* Thus, the courts have recognized

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[17] Siembab v. Siembab, 202 Misc. 1053, 112 N.Y.S.2d 82, 83 (Sup. Ct. 1952); see Villaret v. Villaret, 169 F. 2d 677, 678-679 (D.C. Cir. 1948) (applying Maryland law); Luster v. Luster, 299 Mass. 480, 13 N.E.2d 438 (1938). In the *Villaret* case the court gave additional reasons for not discarding the parental immunity rule where the parent is covered by liability insurance: "Such policies frequently contain a provision requiring the insured to cooperate in the defense of any action brought against him. Compliance with such a requirement might readily produce the domestic disharmony to avoid which the rule was formulated. Moreover, to permit the maintenance of a suit such as this because the parent has liability insurance would tend to encourage collusive fraud between the child and parent in order to recover against the insurer." Villaret v. Villaret, *supra* at 679.

[18] *See* Hegerich v. Keddie, 99 N.Y. 258, 267, 1 N.E. 787, 792 (1885).

[19] Perry v. Tonopah Mining Co., 13 F.2d 865 (D. Nev. 1915); Estes v. Riggins, 68 Nev. 336, 232 P.2d 843 (1951).

[20] See Wells, Inc. v. Shoemake, 64 Nev. 57, 177 P.2d 451 (1947).

[21] See Matter of Meekin v. The Brooklyn Heights R.R., 164 N.Y. 145, 58 N.E. 50 (1900); Matter of Weaver, 195 Misc. 405, 90 N.Y.S.2d 770 (Surr. Ct. 1949). "Injuries suffered by the plaintiffs by the lessening of their estate and the invasion and deprivation of their pecuniary interest and right to future support from their decedent by the commission of the wrongful act is . . . a destruction or injury to property . . . . Where the courts have not held such losses to be injuries to property, it has been due to a reluctance to depart from ancient judicial declarations . . . ." Hunt v. Authier, 28 Cal.2d 288, 169 P.2d 913, 918 (1946).

[22] However, in an action brought under the Pennsylvania wrongful death statute, a minor child was permitted to recover against his mother. The court held that since the statute did not expressly preclude a suit by a child against its parent, such an action was maintainable. See Minkin v. Minkin, 336 Pa. 49, 7 A.2d 461 (1939).

[23] *See* Borst v. Borst, 41 Wash.2d 642, 251 P.2d 149, 153 (1952); see PROSSER, TORTS 905 (1941); McCurdy, *Torts Between Persons In Domestic Relation*, 43 HARV. L. REV. 1030, 1057 (1930).

[24] See note 2 *supra.*

causes of action by minors against their parents to recover wages,[25] rent,[26] or money advanced to the parent.[27] It is submitted, therefore, that the Court has made an unwarranted extension of the parental immunity rule.

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[25] See Jine v. Jine, 226 S.W. 51 (St. Louis Ct. of Appeals 1920).

[26] See Lamb v. Lamb, 146 N.Y. 317, 41 N.E. 26 (1895).

[27] See Smith v. Smith, 38 Cal. App. 388, 176 Pac. 382 (1918); Jine v. Jine, *supra* note 25.