

# Torts--Right of Unemancipated Minor to Sue Parent in Business Capacity (Signs v. Signs, 156 Ohio St. 566 (1952))

St. John's Law Review

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

---

### Recommended Citation

St. John's Law Review (1952) "Torts--Right of Unemancipated Minor to Sue Parent in Business Capacity (Signs v. Signs, 156 Ohio St. 566 (1952))," *St. John's Law Review*: Vol. 26 : No. 2 , Article 18.

Available at: <https://scholarship.law.stjohns.edu/lawreview/vol26/iss2/18>

This Recent Development in New York Law 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 [lasalar@stjohns.edu](mailto:lasalar@stjohns.edu).

to include the unborn child within that group whose possible injury can be reasonably foreseen.<sup>35</sup>

Having granted the child redress for prenatal injuries, a cause of action for its wrongful death<sup>36</sup> would seem to follow, since the denial of that action was based on the denial of the child's recovery in its own name.<sup>37</sup> The instant case, however, did not concern a wrongful death action; but sufficiently justified its place in legal annals by overthrowing the throttling grip of precedent and affording partial justice to children negligently injured before birth.



**TORTS—RIGHT OF UNEMANCIPATED MINOR TO SUE PARENT IN BUSINESS CAPACITY.**—Plaintiff, an unemancipated minor, sought damages for personal injuries allegedly caused by the negligent maintenance of a gasoline pump. The defendant, a partnership composed of plaintiff's father and another, moved for judgment on the pleadings, contending that a minor child could not sue a firm in which his parent was a partner. *Held*, motion denied. An unemancipated infant can sue its parent in his business capacity for damages for personal injuries caused by negligence. *Signs v. Signs*, 156 Ohio St. 566, 103 N. E. 2d 743 (1952).

The common law rule, followed by the majority of American jurisdictions, denies the minor child a cause of action in tort against its parent.<sup>1</sup> The rationale is that allowing such suits will disrupt the family harmony,<sup>2</sup> impair parental discipline,<sup>3</sup> and deplete the family exchequer.<sup>4</sup>

<sup>35</sup> See *Ehret v. Village of Scarsdale*, 269 N. Y. 198, 199 N. E. 56 (1935); *Palsgraf v. Long Island R. R.*, 248 N. Y. 339, 162 N. E. 99 (1928).

<sup>36</sup> N. Y. DECEDENT ESTATE LAW § 130. But see Laws of N. Y. 1847, c. 450 (the 1847 statute refers to "person," while the present one applies to a "decedent").

<sup>37</sup> *In re Roberts' Estate*, 158 Misc. 698, 286 N. Y. Supp. 476 (Surr. Ct. 1936); see 16 Am. Jur. 56 (1938); 25 C. J. S. 1087, 1091, 1093 (1941). *But cf.* *Cooper v. Blanck*, 39 So. 2d 352 (La. 1933); *Jasinsky v. Potts*, 153 Ohio St. 529, 92 N. E. 2d 809 (1950); see 1935 REPORT, N. Y. LAW REVISION COMMISSION 449, 471, 473; Cason, *supra* note 23, at 212.

<sup>1</sup> *Accord*, *Cannon v. Cannon*, 287 N. Y. 425, 40 N. E. 2d 236 (1942); see *Rozell v. Rozell*, 281 N. Y. 106, 110, 22 N. E. 2d 254, 256 (1939); *Cowgill v. Boock*, 189 Ore. 282, 218 P. 2d 445, 453 (1950); *Clasen v. Pruhs*, 69 Neb. 278, 95 N. W. 640, 642 (1903); see MADDEN, HANDBOOK OF THE LAW OF PERSONS AND DOMESTIC RELATIONS 449 (1931).

<sup>2</sup> *Accord*, *Krohngold v. Krohngold*, 181 N. E. 910 (Ohio App. 1932); see *Bulloch v. Bulloch*, 45 Ga. App. 1, 163 S. E. 708, 710 (1932); *Canen v. Kraft*, 41 Ohio App. 120, 180 N. E. 277, 278 (1931).

<sup>3</sup> See *Buchanan v. Buchanan*, 170 Va. 458, 197 S. E. 426, 432 (1938); see PROSSER, LAW OF TORTS 906 (1941).

<sup>4</sup> *Accord*, *Small v. Morrison*, 185 N. C. 577, 118 S. E. 12, 15 (1923); *Wick v. Wick*, 192 Wis. 260, 212 N. W. 787 (1927); see *McCurdy, Torts Be-*

When the infant is injured by the wilful tort of the parent so as to render the latter punishable under criminal law,<sup>5</sup> some jurisdictions allow the child to recover in tort against the parent.<sup>6</sup> In such cases, the reason for the parental immunity, preservation of domestic tranquillity and order, has already vanished—*cessante ratione, cessat et ipsa lex*.<sup>7</sup>

In the early decisions allowing recovery to a child injured through negligence, the defendant-parent was protected by liability insurance.<sup>8</sup> The parent, therefore, did not actually suffer from an adverse judgment, and the family treasury was the better for the suit.<sup>9</sup> In those cases the courts were influenced to relax the immunity rule because of the presence of liability insurance;<sup>10</sup> but later the

*tween Persons in Domestic Relations*, 43 HARV. L. REV. 1030, 1072 *et seq.* (1930); 36 IOWA L. REV. 384 (1951). Frequently the denial of such a cause of action is based upon "public policy" motives, which include more than preservation of family harmony, discipline and assets. *Accord*, Krohngold v. Krohngold, 181 N. E. 910 (Ohio App. 1932); McKelvey v. McKelvey, 111 Tenn. 388, 77 S. W. 664 (1903); *cf.* Cowgill v. Boock, 189 Ore. 282, 218 P. 2d 445, 453 (1950); Duffy v. Duffy, 117 Pa. Super. 500, 178 Atl. 165 (1935); Roller v. Roller, 37 Wash. 242, 79 Pac. 788 (1905); *see* Bulloch v. Bulloch, 45 Ga. App. 1, 163 S. E. 708, 710 (1932); Rines v. Rines, 97 N. H. 55, 80 A. 2d 497, 498 (1951); Cannon v. Cannon, 287 N. Y. 425, 429, 40 N. E. 2d 236, 238 (1942).

<sup>5</sup> See N. Y. PENAL LAW §§ 246, 483, 1054, 2010; MADDEN, *op. cit. supra* note 1, at 446, 448.

<sup>6</sup> Mahnke v. Moore, 77 A. 2d 923 (Md. 1951); Cowgill v. Boock, 189 Ore. 282, 218 P. 2d 445 (1950); *cf.* Treschman v. Treschman, 28 Ind. App. 206, 61 N. E. 961 (1901); Dix v. Martin, 171 Mo. App. 266, 157 S. W. 133 (1913); Clasen v. Pruhs, 69 Neb. 278, 95 N. W. 640 (1903); *see* Bulloch v. Bulloch, 45 Ga. App. 1, 163 S. E. 708, 711 (1932); Meyer v. Ritterbush, 196 Misc. 551, 554, 92 N. Y. S. 2d 595, 597 (Sup. Ct. 1949), *aff'd*, 276 App. Div. 972, 94 N. Y. S. 2d 620 (2d Dep't 1950); *see* McCurdy, *supra* note 4, at 1060. *Contra*: McKelvey v. McKelvey, 111 Tenn. 388, 77 S. W. 664 (1903); Roller v. Roller, 37 Wash. 242, 79 Pac. 788 (1905).

<sup>7</sup> 2 BL. COMM. \*391. Cowgill v. Boock, 189 Ore. 282, 218 P. 2d 445, 453 (1950); *see* Dunlap v. Dunlap, 84 N. H. 352, 150 Atl. 905, 910 (1930).

<sup>8</sup> PROSSER, LAW OF TORTS 907-908 (1941); *see* Dunlap v. Dunlap, 84 N. H. 352, 150 Atl. 905 (1930); Rozell v. Rozell, 281 N. Y. 106, 22 N. E. 2d 254 (1939); Worrell v. Worrell, 174 Va. 11, 4 S. E. 2d 343 (1939); Lusk v. Lusk, 113 W. Va. 17, 166 S. E. 538 (1932); MADDEN, *op. cit. supra* note 1, at 450.

<sup>9</sup> "Such a suit does not, in fact, tend to disrupt the family relation nor break down parental discipline, so that to that extent the reason for the general rule fails." MADDEN, *op. cit. supra* note 1, at 450; *accord*, Lusk v. Lusk, 113 W. Va. 17, 166 S. E. 538 (1932); *cf.* Worrell v. Worrell, 174 Va. 11, 4 S. E. 2d 343 (1939). Great care should be given to this type of suit, since it could be a fraudulent attempt to mulct the insurer. Villaret v. Villaret, 169 F. 2d 677, 679 (D. C. Cir. 1948).

<sup>10</sup> ". . . the essential fact which establishes the suability of the father is that he has provided for satisfying the judgment in some way which removes the suit from the class promotive of family discord." Dunlap v. Dunlap, 84 N. H. 352, 150 Atl. 905, 913 (1930); *see* Rozell v. Rozell, 281 N. Y. 106, 113, 22 N. E. 2d 254, 257 (1939). *But cf.* Schneider v. Schneider, 160 Md. 18, 152 Atl. 498 (1930); Lund v. Olsen, 183 Minn. 515, 237 N. W. 188 (1931); Goheen v. Goheen, 9 N. J. Misc. 507, 154 Atl. 393 (1931); Canen v. Kraft, 41 Ohio App. 120, 180 N. E. 277 (1931); Fidelity Sav. Bank v. Aulik, 252 Wis.

immunity rule itself was criticized<sup>11</sup> because of the change in the economic status of the home. When *Hewellette v. George*<sup>12</sup> enunciated the parental immunity rule for the first time in the United States, the home was the place where the entire family lived, worked and played; today, unfortunately, it is fast becoming a mere temporary roost for eating and sleeping.

Some courts have said that suits between child and parent tend to disrupt the family.<sup>13</sup> Nevertheless, a child may sue its parent in order to protect a property right;<sup>14</sup> and one child may bring a tort action against his brother or sister.<sup>15</sup> These suits are allowed because the courts find no precedent denying recovery;<sup>16</sup> but such litigation would seem to injure the very domestic tranquillity which so influences the courts in the case of a parent's negligent injuries to his child.<sup>17</sup>

---

602, 32 N. W. 2d 613 (1948); see *Detwiler v. Detwiler*, 162 Pa. Super. 383, 57 A. 2d 426, 428 (1948).

<sup>11</sup> "There never has been a common-law rule that a child could not sue its parent. It is a misapprehension of the situation to start with that idea and to treat the suits which have been allowed as exceptions to a general rule. The minor has the same right to redress for wrongs as any other individual." *Dunlap v. Dunlap*, 84 N. H. 352, 150 Atl. 905, 906 (1930); see PROSSER, LAW OF TORTS 905-906 (1941).

<sup>12</sup> 68 Miss. 703, 9 So. 885 (1891) (*P*, an unemancipated minor, was wrongly committed to an insane asylum by her deceased mother. *P* sued the mother's executor for damages sustained. The trial court erroneously refused to allow the jury to consider, as a basis for damages, anything beyond *P*'s actual expenses in getting out of the asylum. The Supreme Court of Mississippi therefore reversed. The question of *P*'s right to sue, apparently not in issue in the appeal, was questioned by the court, and assigned as the reason for the court's refusal to reinstate an earlier verdict for *P*.)

<sup>13</sup> See note 2 *supra*; *Dunlap v. Dunlap*, 84 N. H. 352, 150 Atl. 905, 912 (1930) ("As often stated before, the sole debatable excuse advanced for the denial of the child's right to sue is the effect a suit would have upon discipline and family life. If, therefore, the situation is such that the suit will not affect these matters at all, the reason for the theory fails, and it should not be applied."). In the normal family the child would not sue the parent; where such litigation is brought, it would seem to be the effect of existing family discord, and not a possible cause of disturbances. *Signs v. Signs*, 156 Ohio St. 566, 103 N. E. 2d 743, 748 (1952).

<sup>14</sup> See *Wells v. Wells*, 48 S. W. 2d 109, 111 (Mo. App. 1932); *Minkin v. Minkin*, 336 Pa. 49, 7 A. 2d 461, 465 (1939).

<sup>15</sup> "The general rule is that actions between sisters and brothers, even though minors, may be maintained in law; considerations of public policy do not abate such actions as in the case of a suit brought by a parent against his minor child." *Detwiler v. Detwiler*, 162 Pa. Super. 383, 57 A. 2d 426, 429 (1948); *accord*, *Rozell v. Rozell*, 281 N. Y. 106, 22 N. E. 2d 254 (1939); *Munsert v. Farmers Mut. Automobile Ins. Co.*, 229 Wis. 581, 281 N. W. 671 (1938).

<sup>16</sup> See note 13 *supra*; *Rozell v. Rozell*, 281 N. Y. 106, 114, 22 N. E. 2d 254, 258 (1939) ("Even though the past furnishes no current declaration of the right to maintain such an action, neither reason nor logic dictates that it must be held that no such cause of action exists.")

<sup>17</sup> See note 4 *supra*; see *Wells v. Wells*, 48 S. W. 2d 109, 111 (Mo. App. 1932).

The only apparent reason for the immunity rule is precedent, and the precedent in this country is questionable.<sup>18</sup>

Courts are faced with a choice: either to continue to enforce a common law doctrine of dubious ancestry<sup>19</sup> under the drastically changed circumstances of present day life;<sup>20</sup> or to recognize the rights of the child by allowing it a cause of action against its parents.<sup>21</sup> The preferable choice would appear to be to modify the parental immunity rule by restricting it to the home;<sup>22</sup> and by permitting recovery in cases where the injury was negligently inflicted by a person who was acting in some capacity other than as parent.<sup>23</sup>



TRADEMARKS—UNFAIR COMPETITION—INJUNCTION.—Plaintiff publishes a pictorial magazine of nation-wide circulation, displaying on its cover the registered trade mark "Life" in white block letters on a red background. In 1947 defendant opened a mail order business developing color film, and advertised in photography magazines under the name of "Life Color Labs." Defendant's title was in black and white, with the word "Life" given the same prominence as the other words. Plaintiff sought an injunction and an accounting. Although the parties were not engaged in competing businesses, and it was unlikely that their products would be confused, Special Term granted the injunction.<sup>1</sup> *Held*, reversed. An injunction will not

<sup>18</sup> See note 12 *supra*. The Mississippi court, which established the precedent for the rule in the United States, either failed or was unable to cite any sound authority for its position denying suits against parents. The necessity of the court's statement of the "rule" is also debatable.

<sup>19</sup> *Ibid*.

<sup>20</sup> See text at note 12 *supra*. *But see* Cannon v. Cannon, 287 N. Y. 425, 430, 40 N. E. 2d 236, 238 (1942).

<sup>21</sup> See note 8 *supra*. *But cf.* Cannon v. Cannon, 287 N. Y. 425, 40 N. E. 2d 236 (1942); Boehm v. C. M. Gridley & Sons, 187 Misc. 113, 63 N. Y. S. 2d 587 (Sup. Ct. 1946); *cf.* Hewellette v. George, 68 Miss. 703, 9 So. 885, 887 (1891).

<sup>22</sup> "Since parental discipline and control and the conduct of the domestic establishment are at the root of the denial of a cause of action, it would seem that the denial should, at least, be so confined. . . ." McCurdy, *supra* note 4, at 1080. *Cf.* Foy v. Foy Electric Co., 231 N. C. 161, 56 S. E. 2d 418 (1949); Wright v. Wright, 229 N. C. 503, 50 S. E. 2d 540 (1948); Cowgill v. Boock, 189 Ore. 282, 218 P. 2d 445 (1950). *But cf.* Cannon v. Cannon, 287 N. Y. 425, 40 N. E. 2d 236 (1942); Thickman v. Thickman, 83 N. Y. S. 2d 284 (Sup. Ct. 1949). The word "home" could be restricted to include *only* the actual physical dimensions of the domicile, or such activities as the members of the family engage in as a cohesive unit, *e.g.*, a Sunday picnic.

<sup>23</sup> *Cf.* Dunlap v. Dunlap, 84 N. H. 352, 150 Atl. 905 (1930); Worrell v. Worrell, 174 Va. 11, 4 S. E. 2d 343 (1939); Lusk v. Lusk, 113 W. Va. 17, 166 S. E. 538 (1932).

<sup>1</sup> Time, Inc. v. Life Color Laboratory, 198 Misc. 1038, 101 N. Y. S. 2d 586 (Sup. Ct. 1950). The court denied the accounting, there having been no proof of injury or damage to plaintiff.