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Article 25

Torts--Right of an Unemancipated Minor Child to Sue Parent in Tort (Cowgill v. Boock, 218 P.2d 445 (Ore. 1950))

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It is submitted that in the instant case the testimony of plaintiff's witness and decedent's driver as to the warning given, together with the evidence pertaining to the driver's reaction to this warning, created issues of fact for the jury.

TORTS — RIGHT OF AN UNEMANCIPATED MINOR CHILD TO SUE PARENT IN TORT.—An unemancipated minor child was killed when a truck driven by his father plunged from a dangerous mountain road into a river. The father, who was intoxicated, forced his son to accompany him in the truck. The child's administrator brought an action for wrongful death [1] against the father's administrator. *Held,* judgment for plaintiff affirmed. An unemancipated minor child may maintain an action for damages against his parent for a "willful" tort. *Cowgill v. Boock,* 218 P. 2d 445 (Ore. 1950).

In most jurisdictions it is an established rule that an unemancipated minor child may not maintain an action in tort against his parent.[2] Some of these courts, however, have cautiously limited their holdings to negligent torts.[3]

This immunity doctrine and its rationale was first clearly laid down in *Hewlett v. George* [4] which was an action for false imprisonment, the court holding: "But, so long as the 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 can be maintained. The peace of society, and of the families composing society, and a sound public policy, designed to subserve the repose of

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[1] ORE. COMP. LAWS ANN. § 8-903 (1940): "When the death of a person is caused by the wrongful act or omission of another, the personal representative of the former . . . for the benefit of the estate of the deceased may maintain an action at law therefor against the latter, if the former might have maintained an action, had he lived, against the latter, for an injury done by the same act or omission . . . ."

[2] Rambo v. Rambo, 195 Ark. 832, 114 S. W. 2d 468 (1938), 24 VA. L. REV. 928; Mesite v. Kirchstein, 109 Conn. 77, 145 Atl. 753 (1929); Smith v. Smith, 81 Ind. App. 566, 142 N. E. 128 (1924); Hewlett v. George, 68 Miss. 703, 9 So. 885 (1891); Mannion v. Mannion, 3 N. J. Misc. Rep. 68, 129 Atl. 431 (1925); Small v. Morrison, 185 N. C. 577, 118 S. E. 12 (1923), 23 COL. L. REV. 686, 8 MINN. L. REV. 71; Matarese v. Matarese, 47 R. I. 131, 131 Atl. 198 (1925); Wick v. Wick, 192 Wis. 260, 212 N. W. 787 (1927); see Notes, 31 A. L. R. 1157 (1924), 71 A. L. R. 1071 (1931), 122 A. L. R. 1352 (1939); McCurdy, *Torts Between Persons in Domestic Relations,* 43 HARV. L. REV. 1030 (1930).

[3] *See* Bulloch v. Bulloch, 45 Ga. App. 1, 163 S. E. 708, 711 (1932); Luster v. Luster, 299 Mass. 480, 13 N. E. 2d 438, 440 (1938), 7 FORD. L. REV. 459, 86 U. OF PA. L. REV. 909; Cannon v. Cannon, 287 N. Y. 425, 40 N. E. 2d 236, 238 (1942).

[4] 68 Miss. 703, 9 So. 885 (1891).

families and the best interests of society, forbid to the minor child a right to appear in court in the assertion of a claim to civil redress for personal injuries suffered at the hands of the parent. The state, through its criminal laws, will give the minor child protection from parental violence and wrongdoing . . . ." [5]

The majority of cases are auto negligence actions. In an effort to escape the strictness of this immunity doctrine, it has been urged that the reason for the rule ceases when the defendant-parent is protected by liability insurance since under these circumstances family peace and the family pocketbook will not be disturbed. Rejecting this pragmatic approach, the weight of authority holds that coverage by insurance is immaterial in the absence of statutory sanction.[6]

In furtherance of this immunity doctrine, it is reasoned that since the state imposes certain obligations and duties on the parent, it must grant certain immunities necessary to their fulfillment.[7] If the child could recover for the parent's tortious acts, the tortfeasant parent might later profit from his own wrong through inheritance of the minor's estate.[8] Recovery by the child might result in depletion of the family exchequer to the detriment of other innocent members of the family.[9] The state guards the family relation against

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[5] *Id.* at 711, 9 So. at 887. This rule of parental immunity and family solidarity became firmly established in American law when a minor child was denied recovery against her father for rape. Roller v. Roller, 37 Wash. 242, 79 Pac. 788 (1905). As to the effect of the rule where torts by one *in loco parentis* are involved, the purpose and reasonableness of the punishment is taken into consideration. No recovery: Trudell v. Leatherby, 212 Cal. 678, 300 Pac. 7 (1931) (stepmother); McKelvey v. McKelvey, 111 Tenn. 388, 77 S. W. 664 (1903) (stepmother); Fortinberry v. Holmes, 89 Miss. 373, 42 So. 799 (1907). Recovery: Treschman v. Treschman, 28 Ind. App. 206, 61 N. E. 961 (1901) (stepmother); Clasen v. Pruhs, 69 Neb. 278, 95 N. W. 640 (1903) (maternal aunt).

[6] Owens v. Auto Mut. Indemnity Co., 235 Ala. 9, 177 So. 133 (1937); Rambo v. Rambo, 195 Ark. 832, 114 S. W. 2d 468 (1938); Shaker v. Shaker, 129 Conn. 518, 29 A. 2d 765 (1942); Luster v. Luster, 299 Mass. 480, 13 N. E. 2d 438 (1938); Elias v. Collins, 237 Mich. 175, 211 N. W. 88 (1926); Lund v. Olson, 183 Minn. 515, 237 N. W. 188 (1931); Goheen v. Goheen, 9 N. J. Misc. 507, 154 Atl. 393 (1931); Small v. Morrison, 185 N. C. 577, 118 S. E. 12 (1923); Norfolk Southern R. R. v. Gretakis, 162 Va. 597, 174 S. E. 841 (1934); Segall v. Ohio Casualty Co., 224 Wis. 379, 272 N. W. 665 (1937); Villaret v. Villaret, 169 F. 2d 677 (D. C. Cir. 1948). *But see* Lo Galbo v. Lo Galbo, 138 Misc. 485, 488, 246 N. Y. Supp. 565, 568 (1930). Nor does death of the child or the parent or both, as a result of the wrongdoing, change this rule. Owens v. Auto Mut. Indemnity Co., 235 Ala. 9, 177 So. 133 (1937); Chastain v. Chastain, 50 Ga. App. 241, 177 S. E. 828 (1934); Goldsmith v. Samet, 201 N. C. 574, 160 S. E. 835 (1931); Lasecki v. Kabara, 235 Wis. 645, 294 N. W. 33 (1940). *But cf.* Ruiz v. Clancy, 182 La. 935, 162 So. 734 (1935).

[7] "Any other doctrine . . . would absolutely destroy the dominion of the father as the head of the family and the agent upon whom the state has placed the responsibility of properly rearing and controlling his offspring." Bulloch v. Bulloch, 45 Ga. App. 1, 163 S. E. 708, 711 (1932).

[8] *See* Roller v. Roller, 37 Wash. 242, 79 Pac. 788, 789 (1905).

[9] *Ibid.* Plaintiff child attached the family homestead.

commercialization [10] and does not want to encourage outsiders to invade family privacy in search of facts sufficient to support a cause of action.[11]

On the other hand, it may be argued: [12] No policy of the state is served by granting immunity to the tortfeasor when the tort was committed outside the scope of parental authority. The criminal or custodial powers of the state do not always afford adequate redress to the injured child. When death or a tort, *malo animo,* has put an end to the family relation, it is pointless to talk of preserving "family peace." Moreover, family harmony or the family exchequer will not be impaired when the real party in interest is the insurance company.

Finally, since the courts have entertained actions involving property rights between parent and child for centuries,[13] why should they not allow certain tort actions? If the maintenance of actions, such as conversion, between parent and child have not yet destroyed the peace of society, why assume that a personal injury action would be more destructive?

The instant holding is in accord with the modern tendency to limit the rule of a parental immunity. But it is submitted that the emphasis upon a "willful" tort in the principal case will lead to confusion because the term cannot be satisfactorily defined. A modification is offered which, although not free from difficulties, serves the needs of society while recognizing the dignity and human worth of the minor child: An unemancipated minor child cannot maintain an action against his parent for a tort *committed within the scope of parental authority and without malice.*

WILLS—EFFECT OF DEATH OF DISTRIBUTEE IN ACT OF SUICIDE BY TESTATRIX — PROSPECTIVE RIGHTS — CONSTRUCTIVE TRUST THEORY.—Plaintiff's intestate, an infant, died as a result of gas asphyxiation by reason of the suicide of his mother. It was not possible to establish that the infant had survived the mother. Since

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[10] *See* Miller v. Pelzer, 159 Minn. 375, 199 N. W. 97, 98 (1924), 9 MINN. L. REV. 76.

[11] *See* Luster v. Luster, 299 Mass. 480, 13 N. E. 2d 438, 439 (1938).

[12] It is to be noted, however, that every critic recognizes, at least by implication, that the family is still the fundamental unit of society and that therefore parents, charged with prime responsibility for the proper rearing of tomorrow's men and women, must of necessity be accorded certain privileges and immunities.

[13] McCurdy, *Torts Between Persons in Domestic Relations,* 43 HARV. L. REV. 1030 at p. 1058 (1930), traces this right to bring an action involving property to a Year Book case decided in 1308.