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Torts--Parent and Child Immunity--Suit Against Parent's Estate

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Two children were injured while riding in an automobile driven by their father, who was killed in the accident. The children brought an action in negligence against their father's estate to recover for personal injuries. Defendant administrator moved for summary judgment on the sole ground that an unemancipated minor cannot sue a parent for negligence. The trial court refused to dismiss the complaint and entered judgment for the plaintiffs. Defendant appealed. Held: Affirmed. The common law inability of a minor to sue his parent in tort ends with the parent's death and does not extend to the parent's estate. 


It is not clear whether a child could sue his parents in tort at the early common law; however treatise writers believed such an action could be maintained. The only English case reported allowed a tort action between father and son. But in the first American case in point decided in 1891, the Mississippi Supreme Court held:

... [S]o 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 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.

For a comprehensive analysis of the early history of parent-child tort immunity see McCurdy, Torts Between Persons in Domestic Relations, 43 Harv. L. Rev. 1030, 1059 (1929). McCurdy terms the authorities prior to 1891, "meager, conflicting, and obscure."

Prosser points out that the problems of legal unity which plagued husband-wife suits were never present in the parent-child relation. W. Prosser, Law of Torts (hereinafter cited as Prosser) § 116 (3d ed. 1964).

W. Blackstone, Commentaries on the Laws of England 455 (1897). A Reeves, Domestic Relations 287 (1816) states, "... a parent may so chastise his minor child as to be liable in an action by the child for damages for a battery."

Young v. Rankin, [1934] Sess. Cas. 499 (Scot. 1st. Div.). Here the court made the following remark about the historical antecedents of parent-child immunity:

Is there any clearly settled rule or principal of the common law or the public policy to prevent a son in minority, who had been injured through the fault of the father, from maintaining an action to be compensated for his injuries? I can find no such rule or principal, and we were referred to no judicial formulation of it, if such a rule exists. Id. at 508.

Hewellett v. George, 68 Miss. 703, ---, 9 So. 885, 887 (1891).
This decision was uniformly adopted in every American jurisdiction having occasion to decide the point.\textsuperscript{5} For many years immunity of a parent or child from suit operated as a complete bar to tort actions for both negligent\textsuperscript{8} and intentional acts.\textsuperscript{7}

Thus in recent years the rule has been deluged with criticism by legal scholars\textsuperscript{8} and judges.\textsuperscript{9} The result has been a long series of exceptions which greatly limit the parent-child immunity rule, and at least five states have expressly abolished the rule.\textsuperscript{10} Courts have allowed suits between parent and child where: (1) the child is emancipated,\textsuperscript{11} (2) the injuries were intentionally inflicted,\textsuperscript{12} (3) the child

\textsuperscript{5} Annot., 19 A.L.R.2d 423 (1951).
\textsuperscript{6} PROSSER § 116.
\textsuperscript{7} Id.

Generally all courts presented the same reasons for abolition of the rule: (1) It is illogical to sanction property and contract actions between parent and child, to allow tort actions if the child is emancipated, or if the injuries were intentionally inflicted, or the injuries occurred in the business of the father, or where the action is against one who stands in loco parentis and then to deny any unemancipated minor redress for personal injuries when caused by the negligence of a living parent; (2) insurance dissipates the old family harmony argument in nearly all cases; (3) the traditional arguments which have been proffered in support of the rule simply do not outweigh the necessity of allowing a minor civil redress of negligent torts against his parents.

It is important to note the Wisconsin court abolished the immunity rule prospectively only. In a thoughtful decision the court reasoned that prospective aboliotion would give the insurance companies time to change their policies if need be and also stem the flow of state actions if such flow exists. Goller v. White, supra.

\textsuperscript{11} Emancipation usually terminates the close family relationship and therefore the suit would not be so damaging to the family. Wood v. Wood, 135 Conn. 280, 63 A.2d 586 (1948); Skilling v. Skilling, 130 Me. 223, 154 A. 570 (1931); Wurth v. Wurth, 323 S.W.2d 745 (Mo. 1959); Logan v. Reaves, 209 Tenn. 631, 354 S.W.2d 499 (1962); Glover v. Glover, 44 Tenn. App. 713, 319 S.W.2d 238 (1958); Groh v. Krahn, 223 Wis. 662, 271 N.W. 674 (1937). Partial emancipation is not sufficient. Perkins v. Robertson, 140 Cal. App. 2d 536, 285 P.2d 972 (1956).

\textsuperscript{12} Several courts have held that an intentional and willful tort against a child is evidence that the parent has abandoned the parent-child relationship and therefore allowed a suit. Brown v. Cole, 198 Ark. 417, 129 S.W.2d 245 (1939) (where a father murdered his son); Gillett v. Gillett, 163 Cal. App. 2d 102, 335 P.2d 736 (1959); Treschman v. Treschman, 28 Ind. App. 208, 61 N.E. 961 (Continued on next page)
is injured in the course of business of his father,\(^\text{13}\) (4) the action is brought under the wrongful death act,\(^\text{14}\) or (5) the suit is between a child and one who stands *in loco parentis.*\(^\text{15}\) The present majority rule is so limited by these exceptions it could be said that liability is the rule and immunity the exception.

*Thurman* was a case of first impression in Kentucky, and the Court followed the modern trend by allowing the suit. But the Court did not abolish parent-child immunity, instead it merely carved out another exception. The Court reasoned that the death of one party undermined the policy of the rule, therefore the rule should not be applied. The Court stated:

> The reasons which may have justified barring the child’s remedy against a living parent have lost their compelling significance when the living family relationship no longer exists.\(^\text{16}\)

But is this logic sound? Generally the estate will go to the immediate family by either will or intestate succession. Therefore, a child’s judgment must be paid from the family exchequer whether the parent is living or dead. It appears a suit against an estate will involve the same family problems as one against a living parent because a suit against an estate is a suit against the family as it exists at that time.

Perhaps the Court was looking beyond the immediate case to the general erosion of the policies supporting family immunity. First, it is argued that parent-child suits will disrupt family relations. At first glance this appears to be a sound argument, but it has not been proven

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\(^{13}\) Where a boy works in his father’s business and is injured many courts have reasoned the boy stands in the shoes of any other employee, and he can therefore sue for negligence. Dunlop v. Dunlop, 84 N.H. 852, 150 A. 905 (1930); Signs v. Signs, 156 Ohio St. 566, 103 N.E.2d 743 (1952); Borst v. Borst, 41 Wash. 2d 642, 241 P.2d 149 (1952); Lusk v. Lusk, 113 W. Va. 17, 166 S.E. 538 (1932). Cf. Worrel v. Worrell, 174 Va. 11, 4 S.E.2d 343 (1939). In this case the court emphasized mandatory employee insurance.

\(^{14}\) Most courts have held that in passing a Wrongful Death Act the legislature intended to create a cause of action that cannot be abridged by a common law rule. Harlan National Bank v. Gross, 346 S.W.2d 482 (Ky. 1961); Hale v. Hale, 312 Ky. 867, 230 S.W.2d 610 (1950); Oliveria v. Oliveria, 305 Mass. 207, 25 N.E.2d 766 (1940); Albrect v. Pothoff, 192 Minn. 557, 257 N.W. 377 (1934); Morgan v. Leuck, 137 W. Va. 548, 79 S.E.2d 825 (1956). Contra, Harrallon v. Thomas, 269 S.W.2d 276 (Ky. 1954).

\(^{15}\) Annot., 19 A.L.R.2d 434 (1951). This appears to be the weakest of all the exceptions. Courts have simply held that immunity was limited to the blood parent in some cases.

by experience.\textsuperscript{17} Children have always been able to sue their parents in property and contract law,\textsuperscript{18} but not in tort. Would a suit in tort be anymore likely to disrupt family relations? It is difficult to understand why a court would be more zealous in protecting property rights than personal rights, or why a court would grant monetary damages under one legal theory but not another.

Often the family relationship is damaged beyond repair long before a lawsuit is contemplated. Harper and James advocate the maintenance of an action in tort against a parent or child in every case "in which it is reasonably clear that the domestic peace has already been disturbed beyond repair."\textsuperscript{19} There is no reason why an action should not be allowed in these cases.

The effect of liability insurance has been considered the final strike against the parent-child immunity rule by some courts. In abolishing parent-child immunity, the Wisconsin Supreme Court stated:

We consider the wide prevalence of liability insurance in personal injury actions a proper element to be considered in making the policy decision of whether to abrogate parental immunity in negligence actions. This is because in a great majority of such actions, where such immunity has been abolished, the existence of insurance tends to negate any possible disruption of family harmony and discipline.\textsuperscript{20}

Secondly, it is contended that abolition of family immunity rule will undermine a parent's ability to discipline his child. Though a parental privilege in disciplining children has long been recognized\textsuperscript{21} independent of the parent-child immunity rule, indiscriminate use of the rule has produced absurd results. In one case the rule was invoked to dismiss a suit by a minor girl who had been raped by her father,\textsuperscript{22} an application hardly in the interest of family harmony.

Finally, it is argued that if the immunity rule is abolished it will result in fraud and collusion against the insurance companies. The argument does not explain how the risk of fraud is less in those cases

\textsuperscript{17} Where suits have been sanctioned under one of the exceptions to parent-child immunity they do not appear to have damaged the family institution. Since the Married Woman's Act, wives and husbands have been able to sue each other, with no apparent weakening of the family institution.

\textsuperscript{18} A child has never been barred from maintaining a contract or property action against his parent. \textit{Prosser} \textsuperscript{2} 116. McCurdy, \textit{supra} note 1, at 1057.

\textsuperscript{19} F. Harper \& F. James, \textit{The Law of Torts} \textsuperscript{§} 8.11 (1956).

\textsuperscript{20} Goller v. White, 70 Wis. 2d 402, 405, 122 N.W.2d 193, 197 (1963).

\textsuperscript{21} Prosser \textsuperscript{2} 27. In order to discipline and teach children a parent must have a legal right to punish his child, and a parent is privileged in punishing his child just as a school teacher has a limited privilege of punishment.

\textsuperscript{22} Roller v. Roller, 37 Wash. 2d 242, 179 P. 788 (1935).
allowed by such exceptions as requiring only that the plaintiff-child have reached legal majority. The potential for fraud is no greater than in suits between close friends and between persons related other than as parent and child, especially intersibling suits. Yet a cause of action is not denied in those cases. If a cause of action was denied simply because there was an opportunity for fraud and collusion, many torts outside the family would go without a remedy. Is it justice to deny an entire class of people a remedy because it is possible that some of them will pursue fraudulent claims? The possibility of fraudulent and collusive suits is always present in the common law system of justice and this threat cannot be properly guarded against by refusing to allow claims. It is the job of our legal machinery, the judge and the jury, to ferret out unwarranted claims and lay them to rest.

Moreover, insurance companies have also devised several ways to protect against fraudulent claims. Most policies include a co-operation clause which provides that the company will be released from its contractual obligations should the clause be violated. Also, if insurance companies find fraudulent claims are being lodged, they can expressly exclude family coverage from their policies.

After nearly a century of life, the parent-child immunity rule is in full retreat and the catastrophic results which many legal minds believed would result from intrafamily tort suits simply have not occurred. The prevalence of liability insurance also tends to negate any further family trouble where it is present. In any event, uncompensated torts are a dubious device for maintaining family solidarity.

The rule is ripe for abolition and the Kentucky Court might well do so when presented squarely with the opportunity. It is encouraging to note at least two judges are in favor of abolishing the rule now.

One of the oldest maxims of the common law is *cessante ratione legis cessant ipsa lex* (when the reason for the rule ceases, the rule itself ceases). It is submitted that the reasons which may have once supported parent-child immunity have ceased to exist.

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23 This is a standard clause in nearly all policies. For a detailed analysis of the effects of liability insurance on parent-child immunity see Fleming, *Accident Liability Reconsidered: The Impact of Liability Insurance*, 57 *Yale L.J.* 549 (1948).