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TORT LIABILITY OF PARENT TO MINOR CHILD

In *Mahnke v. Moore,* 77 A.2d 923 (Md. 1951), a four year old child was allowed to recover damages from her father's estate for the infliction by the parent of a willful and malicious injury.[1] Although this result may not be inconsistent with either justice or the early common law,[2] it directly conflicts

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40. That an indiscriminate application of immunity is capable of producing absurd results is made evident by Petrova v. Roberts, 216 App. Div. 814, 216 N.Y. Supp. 897 (2d Dep't. 1926). There it was held that the non-resident was immune from process in an independent action instituted by the defendant where the Civil Practice Act in effect at the time forbade a counterclaim of this nature. Had the counterclaim not been prohibited by statute, the defendant would have been given an opportunity to have his claim against the non-resident plaintiff adjudicated. It would seem inconsistent to say judicial administration will be disrupted by a non-resident's subjection to suits based on an independent cause of action but not by subjection to suits on facts more closely related and ordinarily assertable as a counterclaim.

41. As a criterion for guiding the courts in determining whether immunity should be granted, the language of Gulf Oil Corp. v. Gilbert, 330 U.S. 501 (1947), is pertinent: "Important considerations are the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive. There may also be questions as to the enforceability of a judgment if one is obtained. The court will weigh relative advantages and obstacles to a fair trial. . . . Administrative difficulties follow for courts when litigation is piled up in congested centers instead of being handled at its origin. Jury duty is a burden that ought not to be imposed upon the people of a community which has no relation to the litigation. In cases which touch the affairs of many persons, there is reason for holding the trial in their view and reach rather than in remote parts of the country where they can learn of it by report only. There is a local interest in having localized controversies decided at home."

1. The father murdered the mother and then committed suicide, all in the presence of the child.

2. "The ancient common law did not, it appears, expressly deny to a child a right of action against a parent for personal injury. . . ." Villaret v. Villaret, 169 F.2d 677 (D.C. Cir. 1948). "There has never been a common law rule that a child could not sue its parent." Dunlap v. Dunlap, 84 N.H. 352, 354, 150 Atl. 905, 906 (1930). Briggs v. City of Philadelphia, 112 Pa. Super. 50, 170 Atl. 871 (1934), discusses the same point; and at 43 HARV. L. REV. 1082 (1930), it is said: ". . . the few clear decisions we have go back no further than 1891."

with a series of cases commencing in 1891[3] and uniformly holding that no tort action may be maintained by a child against his parents.[4] A single uncited case serves as precedent for the *Mahnke* decision.[5] The doctrine against such recovery, which many have considered to be irrefutable, has its foundation in what has been called public policy.[6] This policy has served to preclude action by a daughter who had been raped by her father,[7] and to prevent suit by a girl against her stepmother for a violent beating with a horse whip.[8] It has been extended, with but few exceptions, so as absolutely to prevent a minor from suing his parent in tort.

In establishing that there could be no remedy for the child, the courts have determined that to permit such actions would disturb the tranquillity of the home,[9] undermine parental authority[10] and make family discipline difficult.[11] The action has also been denied on the ground that an award of damages might deprive other dependents of support[12] and, should the plaintiff-child die, the parent would succeed to the damages.[13] Criminal sanctions[14] and natural affection[15] have been thought to be the proper preventives of un-

3. Hewellett v. George, 68 Miss. 703, 9 So. 885 (1891), held, without citations, that a married child, separated from her husband and living with her mother was unemancipated, and therefore could not recover from her mother for the latter's malicious imprisonment of the child in an insane asylum.

4. Rambo v. Rambo, 195 Ark. 832, 114 S.W.2d 468 (1938); Wood v. Wood, 135 Conn. 280, 63 A.2d 586 (1948); Foley v. Foley, 61 Ill. App. 577 (1895); Taubert v. Taubert, 103 Minn. 247, 114 N.W. 763 (1907); Lund v. Olson, 183 Minn. 515, 237 N.W. 188 (1931); Goheen v. Goheen, 9 N.J. Misc. 507, 154 Atl. 393 (1931); Mannion v. Mannion, 3 N.J. Misc. 68, 129 Atl. 431 (1925); Thickman v. Thickman, 88 N.Y.S.2d 284 (1949); Lento v. Hajick, 16 N.Y.S.2d 776 (1939); Sorrentino v. Sorrentino, 222 App. Div. 835, 226 N.Y. Supp. 907 (1938); Ciana v. Ciana, 127 N.Y. Misc. 305, 215 N.Y. Supp. 767 (1926); Small v. Morrison, 185 N.C. 577, 118 S.E. 12 (1923); Matarese v. Matarese, 47 R.I. 131, 131 Atl. 198 (1925); Kelly v. Kelly, 158 S.C. 517, 155 S.E. 888 (1930); Buchanan v. Buchanan, 170 Va. 458, 197 S.E. 426 (1938). See COOLEY, TORTS § 174 (4th ed. 1932); SCHOULER, DOMESTIC RELATIONS § 691 (6th ed. 1921).

5. Cowgill v. Boock, 218 P.2d 445 (Ore. 1950), where a father and son were killed in an automobile accident resulting from the reckless driving of the intoxicated father. It was held that an unemancipated minor child may maintain an action against its parent for a willful or malicious personal tort. The case is noted in 14 U. OF DETROIT L.J. 94 (1951); 29 N.C.L. REV. 214 (1951); 4 VAND. L. REV. 377 (1951).

6. The policy-doctrine was stated initially in Hewellett v. George, 68 Miss. 703, 711, 9 So. 885, 887 (1891). See also McCurdy, *Torts Between Persons in Domestic Relations*, 43 HARV. L. REV. 1080 (1930).

7. Roller v. Roller, 37 Wash. 242, 79 Pac. 788 (1905).

8. Cook v. Cook, 232 Mo. App. 994, 124 S.W.2d 675 (1939).

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

10. Matarese v. Matarese, 47 R.I. 131, 131 Atl. 198 (1925).

11. Roller v. Roller, 37 Wash. 242, 79 Pac. 788 (1905); Matarese v. Matarese, *supra* note 10; Wick v. Wick, 192 Wis. 260, 212 N.W. 787 (1927). See also SCHOULER, *op. cit. supra* note 4, at § 691.

12. Roller v. Roller, *supra* note 11.

13. Cook v. Cook, 232 Mo. App. 994, 124 S.W.2d 675 (1939).

14. *Ibid.*

15. Brown v. Cole, 198 Ark. 417, 129 S.W.2d 245 (1939).

conscionable treatment by the parent. These propositions have been accepted without consideration of their applicability to the facts of particular cases.

The consistent denial of this right to the child has been obtained by singularly inconsistent methods. Thus in states where the common law forbids actions between husband and wife,[16] it has been found reasonable that a similar rule should apply to those between parent and child.[17] But where a state permits husband-wife suits, the courts have held that the relationship is not at all comparable.[18] The apparent analogy of the long established right of a child to sue its parent in connection with property[19] has been distinguished from the right of a child to sue in tort.[20] This is accomplished by presuming that entertaining a complaint accusing a father of doing his son out of property is less likely to disturb the domestic harmony than one accusing him of causing a personal injury.

The first departure from the general rule was based upon the reasoning that the presence of insurance would create a cause of action.[21] Subsequently other exceptions were established. Some courts have felt that public policy recognizes somewhat less value in the tranquillity of the family of adoptive parents,[22] or ones *in loco parentis,*[23] than in the homes of blood parents, and have, therefore, permitted actions by the child. A wrongful death statute has been construed to permit a child as survivor of the deceased parent to bring an action against the other parent for causing death.[24] And a statute requiring insurance for certain activities has been interpreted as requiring not only indemnity for the parent but protection for all who may be injured, including the defendant's children.[25]

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16. Abbott v. Abbott, 67 Me. 304 (1877); Bandfield v. Bandfield, 117 Mich. 80, 75 N.W. 278 (1898).

17. McKelvey v. McKelvey, 111 Tenn. 388, 77 S.W. 664 (1903).

18. Mesite v. Kirchstein, 109 Conn. 77, 86, 145 Atl. 753, 755 (1929): "The suggested analogy between the action of a wife against her husband for personal injuries through his negligence, which we permit, and a like action by a child against his parents, is not a close one. . . ."

19. The earliest case on record in this connection appears to be Anonymous, Y.B. 2 Edw. 2 (1308), in Selden Soc. 35 (1888). More recent cases are: Young v. Wiley, 183 Ind. 449, 107 N.E. 278 (1915), which permitted a suit to declare void a judgment affecting the title of real estate; and McKern v. Beck, 73 Ind. App. 92, 126 N.E. 641 (1920), which held that where there was no evidence of fraud, an action to quiet title may be maintained between parent and child.

20. Small v. Morrison, 185 N.C. 577, 118 S.E. 12 (1923).

21. 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). See 18 B.U.L. Rev. 468 (1938); 9 U. of Pitt. L. Rev. 310 (1948); 26 Geo. L.J. 139 (1937); 8 Duke B.A.J. 58 (1930).

22. Brown v. Cole, 198 Ark. 417, 129 S.W.2d 245 (1939).

23. Treschman v. Treschman, 28 Ind. App. 206, 61 N.E. 961 (1901); Classen v. Pruhs, 69 Neb. 278, 95 N.W. 640 (1903); Nelson v. Johansen, 18 Neb. 180, 24 N.W. 730 (1885).

24. Minkin v. Minkin, 336 Pa. 449, 7 A.2d 461 (1936).

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

Many of the opinions indicate, but do not decide, that a right of action by a child should be recognized more generally. Where an employee-parent has been negligent and his employer is vicariously liable, it has been held that an action by the child against the employer will lie, even though the employer may later recover from the parent for breach of the agency contract.[26] In several of the cases denying the right of action, assertions have been made that to avoid liability there must be an absence of willful misconduct.[27] Others, by dictum, have limited immunity to simple negligence and injuries connected with the family relationship.[28]

Cowgill v. Boock,[29] in finding a right of action arising from willful misconduct and not from incidental circumstances, furnishes the only case authority for the *Mahnke* decision. In the *Cowgill* opinion the court had the opportunity to base parental liability upon either insurance[30] or statutory changes in public policy.[31] It relied upon neither. The case was treated as involving a breach of duty resulting in a right of action. While this is the usual course of procedure in most controversies, it was unique in the field of parent-child tort suits, and established a precedent which logically may be followed in other fact situations.

Mahnke v. Moore, without reference to the *Cowgill* case, has pursued the same course and arrived at the same conclusion. Prior to these two cases the reasons for granting a right of action have been no less tenuous than those

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26. That a child may recover from a third party to whom the parent will be liable has been held in Chase v. New Haven Material Co., 111 Conn. 377, 50 Atl. 107 (1930); Foy v. Foy Electric Co., 231 N.C. 161, 56 S.E.2d 418 (1950); Wright v. Wright, 229 N.C. 503, 50 S.E.2d 540 (1948); Briggs v. City of Philadelphia, 112 Pa. Super. 50, 170 Atl. 871 (1934).

27. Meyer v. Ritterbush, 196 N.Y. Misc. 551, 92 N.Y.S.2d 595 (1949), permitted the plaintiff-child to amend the complaint so as to allege willful misconduct, and stated that under proof of such an allegation the mother might be liable. See also Canon v. Canon, 287 N.Y. 425, 40 N.E.2d 236 (1942).

28. Yost v. Yost, 172 Md. 128, 190 Atl. 74 (1937), based immunity upon passive negligence incident to the parental relation. In Treschman v. Treschman, 28 Ind. App. 206, 211, 61 N.E. 691 (1901), it is stated: "And it may be admitted that there may be good ground for questioning an infant child's right of action against its father or against the mother, as head of the family, but we are not prepared to say that in no case should such an action be allowed." And in Securo v. Securo, 110 W. Va. 1, 2, 156 S.E. 750, 751 (1931), the following statement is found: "The basis of this rule . . . lies in the very vital interest which society has in preserving harmony in domestic relations, and in not permitting families to be torn asunder by suits for damages by petulant, insolent, or ungrateful children against their parents for real or fancied grievances. . . . But whether the rule should be carried to the extent, as some cases have done, of denying an infant the right to maintain an action for damages against his parent for injury inflicted with evil intention and from wicked motives, is a question not now before us." See also Bulloch v. Bulloch, 45 Ga. App. 1, 11, 163 S.E. 708, 712 (1932); 7 FORD L. REV. 459 (1938).

29. 218 P.2d 445 (Ore. 1950).

30. See 30 ORE. L. REV. 86 (1950).

31. The action was brought under a wrongful death statute by the child's administrator and was susceptible to the same treatment as that in Minkin v. Minkin, 336 Pa. 449, 7 A.2d 461 (1936).

given for denying it. If it is the domestic tranquillity which the courts seek to defend without defining, the non-liability rule should be no less appropriate for adoptive parents than for blood parents.[32] Some argue that the natural affection existing between a father and mother and their child by birth is sufficient protection against tortious abuse, and consequently a suit between a child and its adoptive parent may be allowed since this natural affection is lacking.[33] The fallacy of such an argument is apparent on its face. The commission of an intentional wrong would appear to demonstrate the absence of at least a significant measure of affection regardless of the origin of the child; and it can hardly be contended that natural love will prevent a negligent wrong already sustained.[34] It is difficult to perceive why criminal sanctions, relied on to prevent injury, should be used to deny redress when the injury has occurred,[35] and so create the unusual situation of permitting the injured child to be prosecuting witness but denying him the role of plaintiff.[36] It is also difficult to see how insurance can create a right of action where none would otherwise exist.[37] Practically, the problem of a child suing its parent will seldom arise where there is no insurance and the parent is a pauper. But it would not be claimed that the right of action should be contingent upon the wealth of the defendant; neither should it be contingent upon the presence of insurance.

In a few instances where recovery has been allowed or exceptions to the rule stated, the courts perhaps have been thinking of the effect of the many factors of the domestic relationship upon the measure of damages, while speaking of their effect upon the right of action. A large majority, however, have denied the action without going beyond the parent-child relationship to consider the facts surrounding it. Had they done so, as did the court in *Mahnke v. Moore,* they might have found that a tort action is no more likely to disturb the family tranquillity than one for property;[38] that family discipline is not undermined where the act complained of was beyond the domestic relationship and did not occur in the exercise of parental authority;[39] and that

32. See Trudell v. Leatherby, 212 Cal. 687, 300 Pac. 7 (1931); Samborski v. Beck, 41 D. & C. 387 (Pa. Comm. 1941).

33. Brown v. Cole, 198 Ark. 417, 129 S.W. 245 (1931), stated that parental immunity is based upon the natural love of the parent for the child, of which there is no presumption in the case of foster parents.

34. HARPER, TORTS § 285 (1933).

35. See Cook v. Cook, 232 Mo. App. 994, 124 S.W.2d 675 (1939).

36. See Roller v. Roller, 37 Wash. 242, 79 Pac. 788 (1905); Treschman v. Treschman, 28 Ind. App. 206, 61 N.E. 961 (1901).

37. See Villaret v. Villaret, 169 F.2d 677, 678 (D.C. Cir. 1948): "The existence of liability insurance ought not to create a cause of action where none exists otherwise"; and Bulloch v. Bulloch, 163 S.E. 708, 712 (Ga. 1932): "Moreover, the fact that defendant father carried liability insurance upon his automobile would be irrelevant. . . ."

38. See Mesite v. Kirchstein, 109 Conn. 77, 145 Atl. 753 (1929).

39. See Bulloch v. Bulloch, 45 Ga. App. 1, 163 S.E. 708, 711 (1932): "We do not hold that a father could not be held liable for a malicious wrong or for some act of cruelty which operated at the same time to forfeit his parental authority."

a suit against an employer accusing a parent of a wrong with subsequent recovery from the parent is not so entirely different from suing and recovering directly from the parent as to justify opposite results.[40]

It is not to be contended that for every improper act by a parent there should be recovery. If the action is for an injury occurring in the course of reasonable family discipline it should be considered privileged, and allowing the action, the privilege may be shown by way of defense. If there is sufficient evidence of fraud, or if the defendant-parent would succeed to the whole damages, necessarily there should be no recovery. Where these extreme circumstances are absent, however, the balance between the harm complained of and the effect of recovery upon the future relations of parent and child should determine the measure of damages and not affect the right of action. So if it should be found—from the facts of the case, not from the dogma of parental immunity—that a substantial recovery would cause disturbance of the home far out of proportion to the benefit to be derived from the award by the child, nominal damages only should be given. The denial of a parent-child action without consideration of the circumstances surrounding the relationship implies a presumption of parental righteousness which a long series of cases clearly invalidates.[41]

Mahnke v. Moore was considered upon demurrer contesting the *right* of a child to proceed against his parent in tort. Had the court decided that no such right existed, manifestly it could not have considered the realities of the case—that both father and mother were dead and the home already destroyed. In permitting this action it appears that the court has made a rational approach to the problem of child-parent tort suits.

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40. See Meece v. Holland Furnace Co., 269 Ill. App. 164 (1933); Graham v. Miller, 182 Tenn. 434, 187 S.W.2d 622 (1945); Mahaffey v. Mahaffey, 15 Tenn. App. 570 (1932).

41. HARPER, TORTS § 285 (1933), suggests that an action be allowed "either by a parent or a child in every case in which it is reasonably clear that the domestic peace has already been disturbed. . . ."