



UNC
SCHOOL OF LAW

NORTH CAROLINA LAW REVIEW

Volume 29 | Number 2

Article 17

2-1-1951

Torts -- Liability of Parent for Willful Injury to Child

Earl W. Vaughn

Follow this and additional works at: <http://scholarship.law.unc.edu/nclr>



Part of the [Law Commons](#)

Recommended Citation

Earl W. Vaughn, *Torts -- Liability of Parent for Willful Injury to Child*, 29 N.C. L. REV. 214 (1951).

Available at: <http://scholarship.law.unc.edu/nclr/vol29/iss2/17>

This Note is brought to you for free and open access by Carolina Law Scholarship Repository. It has been accepted for inclusion in North Carolina Law Review by an authorized editor of Carolina Law Scholarship Repository. For more information, please contact law_repository@unc.edu.

act which might be foreseen as likely to happen as a result of that risk. It has never been a requirement that the exact nature of the intervening act be foreseeable.

PAUL K. PLUNKETT.

Torts—Liability of Parent for Willful Injury to Child

By the overwhelming weight of authority in this country an unemancipated minor may not bring an action for personal tort against his parent.¹ The Supreme Court of Oregon has recently engrafted an exception on this general rule, holding that an unemancipated minor may maintain an action against his parent for a willful or malicious tort.²

In the Oregon case, a father, intoxicated and accompanied by his brother and son as passengers, drove his pickup truck at high speed at night over a mountainous highway. An accident ensued which resulted in the death of all the occupants of the truck. The court held that the father's estate could be sued for the wrongful death of the unemancipated minor, the majority regarding the case as one presenting "willful misconduct" for which the father should be held liable to his son.

With this decision another inroad has been made into the general rule disallowing tort actions between unemancipated minors and their parents. The action has been allowed heretofore in the case of a minor but emancipated child;³ where the child was of legal age but continued to live at home with his parents;⁴ where the suit was brought by or against one *in loco parentis*;⁵ and in negligence cases where the defendant is protected by liability insurance.⁶ An unemancipated minor has

¹ *Hewlett v. George*, 68 Miss. 703, 9 So. 885 (1891); *Small v. Morrison*, 185 N. C. 577, 118 S. E. 12 (1923); *McKelvey v. McKelvey*, 111 Tenn. 388, 77 S. W. 644 (1903); see Note, 71 A. L. R. 1071 (1931). "Proprietary torts" between parent and minor in matters affecting property and contract seem always to have been freely recognized. *Lamb v. Lamb*, 146 N. Y. 317, 41 N. E. 26 (1895); *Myers v. Myers*, 47 W. Va. 487, 35 S. E. 868 (1900); PROSSER, HANDBOOK OF THE LAW OF TORTS 905 (1941).

² *Cowgill v. Broock*, 218 P. 2d 445 (Ore. 1950).

³ *Wood v. Wood*, 135 Conn. 280, 63 A. 2d 586 (1948); *Fowlkes v. Ray-O-Vac Co.*, 52 Ga. App. 338, 183 S. E. 210 (1935); *Oliveria v. Oliveria*, 305 Mass. 297, 25 N. E. 2d 766 (1940); *Taubert v. Taubert*, 103 Minn. 247, 114 N. W. 763 (1908); *Cafaro v. Cafaro*, 14 N. J. Misc. 331, 184 Atl. 779 (Sup. Ct. 1936); *Crosby v. Crosby*, 230 App. Div. 651, 246 N. Y. Supp. 384 (1930); *Detwiler v. Detwiler*, 162 Pa. Super. 383, 57 A. 2d 426 (1948).

⁴ *Ledgerwood v. Ledgerwood*, 141 Cal. App. 538, 300 Pac. 144 (1931); *Farrar v. Farrar*, 41 Ga. App. 120, 152 S. E. 278 (1930); *Ponder v. Ponder*, 157 So. 627 (La. App. 1934); *Weyan v. Weyan*, 165 Miss. 257, 139 So. 608 (1932); *Taylor v. Taylor*, 232 S. W. 2d 382 (Mo. 1950).

⁵ *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); *Stiber v. Norris*, 188 Wis. 366, 206 N. W. 172 (1925).

⁶ *Dunlap v. Dunlap*, 84 N. H. 352, 150 Atl. 905 (1930); *Lusk v. Lusk*, 113 W. Va. 17, 166 S. E. 538 (1932); *Worrell v. Worrell*, 174 Va. 11, 4 S. E. 2d 343 (1939); *Fidelity & Cas. Co. v. Marchland*, [1924] (Can.) S. C. R. 86, 13 B. R. C. 1135. For a discussion of this problem, see Note, 11 N. C. L. Rev. 352 (1933).

also been allowed to sue his mother under a wrongful death statute for the death of the minor's father resulting from the mother's negligent operation of an automobile.⁷

To this list may now be added actions in which the injury sustained is the result of a willful or malicious tort. Authority on this point is meager. A New York court, although denying recovery on a showing of mere negligence, has indicated that an action would lie upon a showing of willful or malicious conduct.⁸ In Missouri the action has been allowed on a showing of mere negligence.⁹

The policy of seeking to preserve domestic tranquility is the reason most frequently given for denying the action.¹⁰ Some courts seem to fear a breakdown of the family unit and a blow to parental discipline and control.¹¹ Others rely on the complete lack of adjudicated cases at common law as precedent and would require action on the part of the legislature to change the old rule.¹² Other reasons given for denying the action are possibility of fraud¹³ and depletion of the family treasury.¹⁴

The general rule, in so far as it tends to preserve the peace and tranquility of the home, seems to be a wholesome one. Mere legal prohibitions alone, however, will not hold together the family life.¹⁵ The rule should not be exalted above ordinary common sense, or applied to all factual situations in tort actions between a minor child and his parent. As the Oregon court points out, it can hardly be said that an uncompensated tort makes for peace in the family and respect for the parent, especially if it be rape,¹⁶ a brutal beating,¹⁷ or as in the present case, a termination of the relation itself by death as the result of a wild drunken ride down a dark mountain road. The other reasons advanced by the court for nonliability are of doubtful validity, even with regard to ordinary torts.¹⁸ But, assuming their validity, they do not

⁷ *Hale v. Hale*, 312 Ky. 867, 230 S. W. 2d 610 (1950); *Minkin v. Minkin*, 336 Pa. 49, 7 A. 2d 461 (1939); *Munsert v. Farmers Mut. Auto. Ins. Co.*, 229 Wis. 581, 281 N. W. 671 (1938).

⁸ See *Meyer v. Ritterbush*, 196 Misc. Rep. 551, 553, 92 N. Y. S. 2d 595, 598 (Sup. Ct. 1949). Also, an unemancipated minor has been allowed to sue his unemancipated minor sister in New York. 281 N. Y. 106, 22 N. E. 2d 254 (1939).

⁹ *Wells v. Wells*, 48 S. W. 2d 109 (Mo. 1932); *Dix v. Martin*, 171 Mo. App. 266, 157 S. W. 133 (1913).

¹⁰ *Roller v. Roller*, 37 Wash. 242, 79 Pac. 788 (1905); *Wick v. Wick*, 192 Wis. 260, 212 N. W. 787 (1927); see *McCurdy, Torts Between Persons in Domestic Relation*, 43 HARV. L. REV. 1030, 1056 (1930).

¹¹ *Small v. Morrison*, 185 N. C. 577, 118 S. E. 12 (1923).

¹² *Fidelity Sav. Bank v. Aulik*, 252 Wis. 602, 32 N. W. 2d 613 (1948).

¹³ *Treschman v. Treschman*, 28 Ind. App. 206, 61 N. E. 961 (1901).

¹⁴ *Roller v. Roller*, 37 Wash. 242, 79 Pac. 788 (1905).

¹⁵ *Rozell v. Rozell*, 281 N. Y. 106, 22 N. E. 2d 249 (1939).

¹⁶ *Roller v. Roller*, 37 Wash. 242, 79 Pac. 788 (1905).

¹⁷ *McKelvey v. McKelvey*, 111 Tenn. 388, 77 S. W. 644 (1903).

¹⁸ See *McCurdy, Torts Between Persons in Domestic Relation*, 43 HARV. L. REV. 1030, 1072-1077 (1930).

seem persuasive enough to justify denying a child recovery for an injury willfully and maliciously inflicted upon him by his parent.

The North Carolina Supreme Court adopted the general rule of nonliability in *Small v. Morrison*,¹⁹ a negligence case, notwithstanding the vigorous dissent of Chief Justice Clark, which closely parallels the opinion of the majority of the court in the Oregon case.²⁰ However, the question as to whether an unemancipated minor may sue his parent for a willful or malicious tort does not seem to have been yet presented in this state. The Oregon court, by refusing to apply a hard and fast rule of nonliability to the facts in this case, has recognized a trend which the North Carolina court should seriously consider when the question is presented in this state.

EARL W. VAUGHN.

Trusts—Exercise by Will of a Reserved Power of Revocation

In *Cohn v. Central National Bank of Richmond*¹ the revocation clause in an insurance trust agreement read:

"The right is reserved to the insured [settlor]; to revoke or annul this agreement in whole or in part, and to modify the terms in any respect . . . on the written demand of the insured, the trustee shall deliver to him any or all of the policies held under the terms of this agreement."

Held, the attempted exercise by will of the reserved power of revocation was ineffectual to revoke the trust.

It is clear that a settlor may validly reserve a power to revoke a trust and stipulate the manner in which such power is to be exercised.² When a particular mode of revocation is specified in the reserved power of revocation, however, it is essential that it be strictly complied with in order to make the revocation effective.³ When the revocation pro-

¹⁹ 185 N. C. 577, 118 S. E. 12 (1923), 2 N. C. L. REV. 113 (1924).

²⁰ Clark argues that neither the common law nor statutes deny the child a right to sue his parent in tort and that the court should never create a precedent upon a supposed public policy which will deprive anyone of just rights.

¹ 191 Va. 12, 60 S. E. 2d 30 (1950).

² *E.g.*, *Nichols v. Emery*, 109 Cal. 323, 41 Pac. 1089 (1895); *Cramer v. Hartford-Conn. Trust Co.*, 110 Conn. 22, 147 Atl. 139 (1929); *Kelley v. Parker*, 181 Ill. 49, 54 N. E. 615 (1899); *Jones v. Old Colony Trust Co.*, 251 Mass. 309, 146 N. E. 716 (1925); *Nat. Newark & E. Banking Co. v. Rosahl*, 97 N. J. Eq. 74, 128 Atl. 586 (1925); *Richardson v. Stephenson*, 193 Wis. 89, 213 N. W. 673 (1927). The settlor may reserve a power to revoke the trust only during his lifetime, or he may reserve also a power to revoke by will. 3 SCOTT, TRUSTS §330.8 (1939). The settlor has power to revoke the trust if and to the extent that by the terms of the trust he reserved such power. RESTATEMENT, TRUSTS §330(1) (1935).

³ *Hill v. Cornwall & Bro.'s Assignee*, 95 Ky. 512, 26 S. W. 540 (1894) (power to revoke by deed is not exercised when deed is undelivered); *Brown v. Fidelity Co.*, 126 Md. 175, 94 Atl. 523 (1915) (settlor reserved power of revocation upon