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## TORTS BETWEEN PARENT AND CHILD

WILLIAM E. McCURDY†

CONDUCT BETWEEN PARENT and child may affect property or persons in situations similar to those between husband and wife\* and also present questions of whether causes of action in tort arise and whether remedies that otherwise would be available for tort are available to one against the other.\*\*

Some factors would seem to make the problem here simpler; others, however, more complex.

### I.

At common law no tort action could be brought by one spouse against the other spouse. Various reasons have been given for this result, but the principal immediate reasons were the incapacity of a married woman to sue or be sued generally without joinder of her husband as party plaintiff or defendant and the further inability of spouses to sue, or even to have certain rights against, each other, consequent upon the concept of legal unity of husband and wife.<sup>1</sup> The question of whether possible civil causes of action for tort would lie between spouses which seems to have been first raised after divorce

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\* See McCurdy, *Property Torts Between Spouses and Use During Marriage of the Matrimonial Home Owned by the Other*, 2 VILL. L. REV. 447 (1957); McCurdy, *Personal Injury Torts Between Spouses*, 4 VILL. L. REV. 303 (1959).

\*\* For an earlier discussion see McCurdy, *Torts Between Persons in Domestic Relationship*, 43 HARV. L. REV. 1030, 1056 (1930).

1. Under the doctrine of the separate estate in equity which developed in the eighteenth century a wife could maintain proceedings in equity in matters concerning her equitable separate estate. See 2 VILL. L. REV. 448-452 (1957); 4 VILL. L. REV. 304-305 (1959).

had been provided for by general law and the parties divorced, was decided in the negative.<sup>2</sup> It was again raised after enactment of Married Women's Statutes, and the answer thereafter has been considered to depend upon construction of those statutes. Since few Married Women's Statutes contain express provisions one way or the other in the matter, statutory construction has involved, in reality, application of public policies: whether the statute is to be regarded as in derogation of the common law and strictly construed or whether it is to be considered remedial and liberally construed; whether the general policy that every person should be secure in his person and in his property and should have a remedy for wrongful invasion of such interests should control; or whether such general policy should be qualified by a special policy to safeguard peace and harmony within the family and not encourage discord and disruption of domestic tranquillity. Since at least one purpose of these statutes is protection of the married woman in her property, even against her husband, interspousal property actions in general can be maintained (although in a few states the proceeding must be in equity);<sup>3</sup> but by the weight of authority there is no cause of action by one spouse against the other in tort for personal injuries; however, there is substantial minority authority recognizing such a cause of action, provided the act complained of is in substance tortious and not qualified by accepted standards of marital and family conduct.<sup>4</sup>

The relations of husband and wife and of parent and child are dissimilar in many respects, not only factually but also in legal effect. The marital relation is entered into by consent but is thereafter controlled by law. It can be dissolved only by death (either party predeceasing the other) or where provided by law, by divorce (a comparatively late development in Anglo-American law). Its purpose is a relationship for joint lives sanctioned by society by law for companionship and mutual assistance, control of concupiscence, and the orderly and lawful establishment of family and the procreation of children. Apart from these basic things incidents of the relationship may vary from society to society and from time to time. The parent-child relationship is usually based upon blood (but may be based on adoption),<sup>5</sup> and is therefore not normally entered into by mutual assent, but in either case once created it too is controlled by law. Blood relationship

2. *Abbott v. Abbott*, 67 Me. 304 (1877); *Phillips v. Barnet*, 1 Q.B.D. 436 (1876).

3. See 2 VILL. L. REV. 447 (1957). A contrary construction of the statutes would be more restrictive than the equitable separate estate doctrine they were designed to extend.

4. See 4 VILL. L. REV. 303 (1959).

5. Adoption was unknown to the common law. See *infra* note 169.

is permanent in time, but in Anglo-American law (unlike in the Roman law), with the exception of matters of inheritance, consanguinous or affinity marriage, incest, and possibly statutory duties of support in extreme situations, little if any legal significance attaches to the relation of parent and child after the child has reached majority. The purpose of the relation (factual as well as legally recognized) is to rear the minor child. To this end the parent has during minority the custody of and the right to control and discipline the child and the duty to support and properly care for him.<sup>6</sup>

The concept of legal identity or unity of husband and wife is not applicable to parent and child. Moreover at common law a parent (unlike a husband in the case of his wife) acquires no right to or in (even a right to use) property of any kind of his minor child,<sup>7</sup> although he can be guardian for the property, and under statutes may have a preferential but not absolute right to be appointed such.<sup>8</sup> A minor, unlike a married woman, has at least capacity to make voidable contracts,<sup>9</sup> transfers, and conveyances,<sup>10</sup> unless under property guardianship.<sup>11</sup> The parent has no indirect liability to others for the child's tortious conduct<sup>12</sup> as did the husband in the case of his wife,<sup>13</sup> and, also unlike husband and wife, the proceeds of a minor's own cause of action for tortious injury by others are his and not his parent's to appropriate.<sup>14</sup> A minor does not lack capacity to sue or be sued as did the married woman. True, suit is brought in his behalf by a next friend, and if sued, he is represented by a guardian *ad litem*, but only in representative capacities. The parent usually acts in these roles, but not if interests are adverse.<sup>15</sup> There are therefore no difficulties of legal identity or of procedure to preclude a civil action by a minor child against his parent. No statutes have been found dealing expressly with

6. See McCURDY, CASES ON DOMESTIC RELATIONS 791-807, 840-843, 862-888 (4th ed. 1952).

7. Pollard v. Pollard, 207 Ala. 270-272, 92 So. 488 (1922). Under certain circumstances a parent might apply the child's property toward the child's support. Linton v. Walker, 8 Fla. 144 (1858).

8. Estate of Tetsubumi Yano, 188 Cal. 645, 206 Pac. 995 (1922).

9. Edmunds v. Mister, 58 Miss. 765 (1881); Holt v. Ward Clarendieux, 93 Eng. Rep. 954, 2 Str. 937 (K.B. 1732).

10. Hubbard v. Cummings, 1 Greenl. 11 (Me. 1820); Zouch v. Parsons, 96 Eng. Rep. 332, 3 Burr. 1794 (K.B. 1765).

11. Tupper v. Cadwell, 12 Met. 559 (Mass. 1847); Stafford v. Roof, 9 Cow. 626 (N.Y. 1827).

12. Charbonneau v. Mac Rury, 84 N.H. 501, 153 Atl. 457 (1931); Briesse v. Maechtle, 146 Wis. 89, 130 N.W. 893 (1911); Huchting v. Engel, 17 Wis. 230 (1863); Scott v. Watson, 46 Me. 362 (1859).

13. Paul v. Hummel, 43 Mo. 119 (1868).

14. Wilton v. Middlesex R.R., 125 Mass. 130 (1878); Donahoe v. Richards, 33 Me. 376 (1854).

15. McCURDY, CASES ON DOMESTIC RELATIONS 836-840 (4th ed. 1952).

the matter, and no statutes similar to Married Women's Acts to "construe."

Other incidents, however, require mention, particularly in reference to the matter of personal injuries. At common law a husband was entitled to his wife's services of whatever character and to her earnings for services for whomsoever performed,<sup>16</sup> and was under a duty to support.<sup>17</sup> For tortious injury (even though permanent) to a married woman's person that affected her services or earnings, or resulted in medical expenses or the like the action to recover damages was the husband's own,<sup>18</sup> the possibility that she might survive him being disregarded. Dower served at a time when wealth was largely in land as a means of support for a widow. After divorce was provided for by general law awards in lieu of destroyed dower<sup>19</sup> were made possible<sup>20</sup> and alimony, in practice if not in theory, could take into account a divorced wife's needs resulting from personal injury.<sup>21</sup> Consequently, even if she could be said to have a cause of action for personal injuries inflicted upon her by her husband there would be either no primary elements of damages or else little that would be pressing for monetary redress, except for the possibility of dissipation of assets before termination of coverture.<sup>22</sup> Married Women's Statutes have not affected the husband's duty to support<sup>23</sup> but they have affected his right to services and earnings.<sup>24</sup> In many states a married woman has a right to her

16. *Clapp v. Stoughton*, 10 Pick. 463, 469 (Mass. 1830).

17. *Ott v. Hentall*, 70 N.H. 231, 47 Atl. 80 (1899); *Woodward v. Barnes*, 43 Vt. 330 (1871).

18. *Hooper v. Haskell*, 56 Me. 251 (1868); *Laughlin v. Eaton*, 54 Me. 156 (1866); *Dengate v. Gardner*, 4 M. & W. 5 (Ex. 1838). Pain and suffering and mental anguish were elements recoverable in the wife's action, which if brought during coverture was brought in the name of the husband and wife and if reduced to judgment during coverture the damages recovered belonged to the husband just as a wife's chose in action reduced to possession. Otherwise it remained the wife's.

19. *Maynard v. Hill*, 125 U.S. 190 (1888).

20. *Price v. Price*, 124 N.Y. 589, 27 N.E. 383 (1891). See also *Seuss v. Schukat*, 358 Ill. 27, 192 N.E. 668 (1934); 3 VA. L. REV. 58 (1922).

21. See *Kennard v. Kennard*, 87 N.H. 320, 179 Atl. 414 (1935); *Phillips v. Barnet*, 1 Q.B.D. 436 (1876).

22. Dower in its common-law sense has been widely abolished, the surviving wife (sometimes either spouse) instead being made a "statutory heir" and furthermore in many states is protected from disinheritance under her husband's will or by certain prejudicial transfers within a certain period of time preceding his death. See *infra* note 33.

23. *Ritchie v. White*, 225 N.C. 450, 35 S.E.2d 414 (1945); *French v. McAnarney*, 290 Mass. 545, 195 N.E. 714 (1935); *Kosanke v. Kosanke*, 137 Minn. 115, 162 N.W. 1060 (1917); *DeBrauwere v. DeBrauwere*, 203 N.Y. 460, 96 N.E. 722 (1911); *Fitzmaurice v. Buck*, 77 Conn. 390, 59 Atl. 416 (1904); *Ott v. Hentall*, 70 N.H. 231, 47 Atl. 80 (1899).

24. *Robert v. Haines*, 112 Ga. 842, 38 S.E. 109 (1901); *Brackett's Estate v. Burnham's Estate*, 207 Mich. 361, 174 N.W. 121 (1919); *Blaechinska v. Howard Mission*, 130 N.Y. 497, 29 N.E. 755 (1892); *Nuding v. Urich*, 169 Pa. 289, 32 Atl. 409 (1895).

earnings even when she is employed without her husband's consent;<sup>25</sup> but the husband is notwithstanding still considered to be entitled to "usual" domestic services.<sup>26</sup> Consequently the wife recovers from a third person in her own action in her own name for impairment of her earning capacity, and the husband recovers in his action for loss of services to which he is still entitled and for expenses of increased support.<sup>27</sup> In very few states is the entire action now the married woman's own for either or both elements.<sup>28</sup> And so, in an action by a wife against her husband, if sanctioned, the item of impairment of earning capacity would, at least to some extent, be a proper element of damages, and although the items of expense would still be referable to the husband's duty of support since the wife may have voluntarily paid or incurred them, they might or might not be recoverable in such action.

A parent is entitled to the services and earnings of his minor child but for a different reason, the correct view, it would seem, being that this is an attribute of custody and discipline, the amounts usually being so small that the parent is entitled to them as his own.<sup>29</sup> In an action by a parent against another for tortious injury to the person of the child he can recover damages for loss of services and earnings,<sup>30</sup> and for increased items of support during minority only.<sup>31</sup> Permanent injury or injury impairing earning capacity beyond minority is an item of damages recoverable in the child's own action.<sup>32</sup> Consequently in an action (if it is to be sanctioned) by a minor child against his parent for a tortious injury to his person the child's recovery should be limited to elements of damages that extend beyond the period of minority. There is, of course, the possibility that a sole surviving parent may predecease the child and die testate making no provision for the

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25. *Harmon v. Old Colony R.R.*, 165 Mass. 100, 42 N.E. 505 (1896).

26. *Kleinert v. Hutchinson*, 98 N.J.L. 831, 121 Atl. 743 (1923); *Bechtol v. Ewing*, 89 Ohio St. 53, 105 N.E. 72 (1913).

27. *Mewhirter v. Hatten*, 42 Iowa 288 (1875); *Guevin v. Manchester St. Ry.*, 78 N.H. 289, 99 Atl. 298 (1916); *Cook v. Atlantic Coast Line R.R.*, 196 S.C. 230, 13 S.E.2d 1 (1941).

28. *Gaillard v. Boynton*, 70 F.2d 552 (1st Cir. 1934); *Rodgers v. Boynton*, 315 Mass. 279, 52 N.E.2d 576 (1943); *Cassidy v. Constantine*, 269 Mass. 56, 168 N.E. 169 (1929).

29. *Hammond v. Corbett*, 50 N.H. 501 (1872). Statutes in some states protect an employer who pays wages to a minor child before he knows that the parent is claiming them. See VERNIER, *AMERICAN FAMILY LAWS* § 232. See also CAL. CIV. CODE § 36 (Deering, 1949), dealing with dramatic or professional athletic services of a minor, and empowering court to approve such contracts and to require a portion up to one-half of net earnings to be set aside in trust for the child.

30. *Wilton v. Middlesex R. Co.*, 125 Mass. 130 (1878).

31. *Netherland-American Steam Nav. v. Hollander*, 59 Fed. 417 (2d Cir. 1894).

32. *Dennis v. Clark*, 2 Cush. 347 (Mass. 1848). See further McCURDY, *CASES ON DOMESTIC RELATIONS* 981, 982 (4th ed. 1952).

orphaned child. That, however, is a problem that should be dealt with in other ways.<sup>33</sup>

Hence, properly limited, there seems more reason for sanctioning causes of action by a minor child against his parent than there is in the case of husband and wife, if the parent's conduct violates accepted standards of family conduct or exceeds the bounds of permissible parental control and discipline and would be tortious on general principles.

It is the policy of the law that a minor child should be reared and properly cared for and should reach majority and start adult life unencumbered by contractual obligations except those properly incurred for necessities,<sup>34</sup> unimpaired in person, and with his property having been properly handled, or else possess a money equivalent for wrongful impairment. It is universally conceded that for certain kinds of improper or wrongful conduct custody of the child may be taken from the parent and placed in another and that the parent is amenable to the criminal law. It is consistent with this policy that the parent should be legally compelled to repair by way of damages wrongful injuries to the child's person (as well as his property) the effects of which extend beyond minority, and that the child should have a civil action against the parent, rather than to leave the matter to the possible

33. A child, even a minor child, unlike a spouse, has generally no legal safeguard (even though orphaned) against disinheritance or prejudicial transfers by his parent. See *Robinson v. Robinson*, 131 W. Va. 160, 50 S.E.2d 455 (1948) (1 ALA. L. REV. 296; 62 HARV. L. REV. 1079; 97 U. PA. L. REV. 736; 35 VA. L. REV. 482); *Rice v. Andrews*, 127 Misc. 826, 217 N.Y.S. 528 (Sup. Ct. 1926) (25 MICH. L. REV. 555; 2 VA. L. REV. (n.s.) 702; 36 YALE L.J. 424). See also, 53 HARV. L. REV. 469-472 (1940).

In England, by statute (1 & 2 Geo. VI, ch. 45) enacted in 1938, applicable to persons dying testate and as amended by 15 & 16 Geo. VI and 1 Eliz. II, ch. 64 § 7, and schedule 3, extending it to intestacy, where a decedent leaving wife or husband; a daughter who has not been married or is mentally or physically disabled and incapable of self-maintenance; an infant son; or a son who is mentally or physically disabled and incapable of self-maintenance—the court may on application by such "dependent," if the court having in mind other provisions that had been made is of the opinion that the disposition of the decedent's estate is not such as to make a reasonable provision for the maintenance of that dependent order that such reasonable provision and on such terms that the court sees fit be made of the decedent's net estate for the maintenance of that dependent; but no such application may be made where the disposition of the estate is such that the surviving spouse is entitled to not less than two-thirds of the income of the net estate and when the only other dependent or dependents is a child or children of the surviving spouse. There are also provisions for termination of the order on the happening of certain events. The statute does not preclude possible dissipation of assets before death. Other parts of the British Commonwealth and components have similar legislation. See note, *Provisions for Dependents: The English Inheritance Act of 1938*, 53 HARV. L. REV. 465-469 (1940). See also Laufer, *Flexible Restraints on Testation*, 69 HARV. L. REV. 277, 287 (1955).

34. See *R. Leslie, Ltd. v. Sheill*, [1914] 3 K.B. 607 (C.A.). An infant is liable for necessities only if his parent is unable to supply them or is in default in his duty. *Cole v. Wagner*, 197 N.C. 692, 150 S.E. 339 (1929); *Bainbridge v. Pickering*, 2 Wm. Bl. 1325 (K.B. 1779).

bounty of the parent or others which may be affected by caprice or by changed circumstances or attitudes.<sup>35</sup>

Nevertheless, although property tort actions between parent and minor child have always been maintainable,<sup>36</sup> fewer jurisdictions sanction tort actions for personal injuries than in the case of husband and wife.

## II.

Although many cases sanctioned ordinary property actions between parent and minor child and similarly contract actions<sup>37</sup> no case has been found prior to 1891, either in England or in the United States, which even presented the question of a civil cause of action in tort for personal injuries. There were, however, cases that sanctioned such action against one in *loco parentis*, on the premise that a parent would be liable in a similar situation. These cases usually involved intentional wilful injuries (excessive chastisement), although there is one case holding liability in tort for negligence in not properly clothing a minor child. As to actions against a parent text-writers, in the absence of direct authority, were in some conflict.<sup>38</sup>

In 1891 in *Hewellette v. George*<sup>39</sup> it was held, reversing a judgment in favor of the plaintiff after trial and without citation of authority of any kind, that a minor daughter, who was married but separated from her husband and living with her mother, could not maintain an action against the estate of her deceased mother for a personal injury, for the reasons that such action would disturb domestic harmony and interfere with parental control. This case was followed in 1903 by *McKelvey v. McKelvey*,<sup>40</sup> an action against a father and a step-mother, which had been dismissed on demurrer, that again denied such cause of action as a well-settled—rule, citing *Hewellette v. George* and husband-wife cases. And this result was reached again in 1905 in *Roller v. Roller*<sup>41</sup> where

35. *Supra* note 33.

36. See *Davis v. Smith*, 126 F. Supp. 497 (E.D. Pa. 1954); *Blades v. So. Farmers Bureau Cas. Ins. Co.*, 95 So.2d 209 (La. App. 1957); *London Guarantee & Accident Co. v. Smith*, 242 Minn. 211, 64 N.W.2d 781 (1954); *Wells v. Wells*, 48 S.W.2d 109 (Mo. App. 1932); *In Re Flasch*, 51 N.J. Super. 1, 148 A.2d 208 (1958); *Dunlap v. Dunlap*, 84 N.H. 352, 150 Atl. 905 (1930); *Cowgill v. Boock*, 189 Ore. 282, 218 P.2d 445 (1950); *Minkin v. Minkin*, 336 Pa. 49, 7 A.2d 461 (1939); *Borst v. Borst*, 41 Wash. 642, 251 P.2d 149 (1952); *Lusk v. Lusk*, 113 W. Va. 17, 166 S.E. 538 (1932). See also *Darlington v. Basalt Rock Co.*, 321 P.2d 490 (Cal. App. 1959); *Stitinger v. Stitinger Lumber Co.*, 187 Pa. Super. 453, 144 A.2d 486 (1958). See further *Becker v. Rieck*, 188 N.Y.S.2d 725 (1959); 43 HARV. L. REV. 1057 (1930).

37. 43 HARV. L. REV. 1057, 1058 (1930).

38. 43 HARV. L. REV. 1059-1063 (1930).

39. 68 Miss. 703, 9 So. 885 (1891).

40. 111 Tenn. 388, 77 S.W. 664 (1903).

41. 37 Wash. 242, 79 Pac. 788 (1905).



a demurrer to a complaint had been overruled and judgment given for the plaintiff after trial.

These three cases were all extreme ones on their facts. The *Hewvellette* case involved alleged malicious incarceration in an insane asylum for a period of ten days; the *McKelvey* case was an action involving alleged cruel and inhuman treatment; in the *Roller* case it appeared that the father had been convicted of rape of his minor daughter and had been sentenced to prison, for which wrong the action was brought for damages. In the *McKelvey* and *Roller* cases additional policy reasons were invoked.

These cases were subsequently followed in other jurisdictions whether the conduct involved was wilful<sup>42</sup> or negligent,<sup>43</sup> and whether the action was brought after majority or before.<sup>44</sup> As late as 1930 there were few cases indeed that had held the other way. Some cases held that an action could be maintained for assault and battery where the defendant was not a parent but was in *loco parentis*.<sup>45</sup> One Canadian case, relying in part on a general right-wrong statute, held that an action could be brought by a minor child against the parent for injuries sustained as a result of the parent's negligent operation of a motor vehicle.<sup>46</sup> And in *Taubert v. Taubert*<sup>47</sup> it was held that an emancipated minor child could maintain an action for injury resulting from negligence while working in the parent's factory. Some jurisdictions that had held that a wife could maintain a personal injury tort action against her husband nevertheless held that a minor child could not maintain such an action against the parent.<sup>48</sup>

An examination of the opinions in the cases discloses that at least seven reasons, apart from the assumption that absence of case authority

42. *Smith v. Smith*, 81 Ind. App. 566, 142 N.E. 128 (1924); *Miller v. Pelzer*, 159 Minn. 375, 199 N.W. 97 (1924).

43. *Mesite v. Kirchstein*, 109 Conn. 77, 145 Atl. 753 (1929); *Small v. Morrison*, 185 N.C. 577, 118 S.E. 12 (1923); *Matarese v. Matarese*, 47 R.I. 131, 131 Atl. 198 (1925); *Wick v. Wick*, 192 Wis. 260, 212 N.W. 787 (1927); *Sorrentino v. Sorrentino*, 222 App. Div. 835, 225 N.Y. Supp. 907, *aff'd without opinion*, 248 N.Y. 626, 162 N.E. 551 (1928) (two judges dissenting without opinion). See also, 43 HARV. L. REV. 1067 (1930) referring to other lower court cases from Michigan, New Jersey and New York.

44. *Smith v. Smith*, 81 Ind. App. 566, 142 N.E. 128 (1924).

45. *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). And see, *Foley v. Foley*, 61 Ill. App. 577 (1895).

46. *Fidelity & Cas. Co. v. Marchand*, [1924] 4 D.L.R. 157.

47. 103 Minn. 247, 114 N.W. 763 (1908).

48. *Contrast Roberts v. Roberts*, 185 N.C. 566, 118 S.E. 9 (1923) and *Crowell v. Crowell*, 180 N.C. 516, 105 S.E. 206 (1920), 181 N.C. 66, 106 S.E. 149 (1921) with *Small v. Morrison*, 185 N.C. 577, 118 S.E. 12 (1923) (opinion filed on the same day as the *Roberts* case); and *Waite v. Pierce*, 191 Wis. 202, 210 N.W. 822 (1926) with *Wick v. Wick*, 192 Wis. 260, 212 N.W. 787 (1927); *Brown v. Brown*, 88 Conn. 42, 89 Atl. 889 (1914) and *Bushnell v. Bushnell*, 103 Conn. 583, 131 Atl. 432 (1925) with *Mesite v. Kirchstein*, 109 Conn. 77, 145 Atl. 753 (1929).

prior to 1891 established that no such action existed at common law, have been given for denial of a personal injury action between parent and minor child: the position of the family as a quasi-governing unit; the husband-wife cases denying an action despite a married women's statute; danger of fraud (stale claims asserted after majority); possibility of succession (inheritance of amount recovered in damages); family exchequer (financial detriment to other children); disturbance of domestic tranquillity (although a reason sometimes suggested of the danger of possible domestic collusion where there is liability insurance is antithetical); and interference with parental discipline and control. It is to be noted that only the last reason is applicable exclusively to the parent-child relation, and that not all are applicable to actions by a parent against his minor child. The two principal reasons relied upon have been the danger of disturbing domestic harmony and encouraging discord, and interference with parental discipline and control. The other reasons have tended to be lightly stressed or disregarded altogether as being either obsolete or inconsequential; some have been said to be unsound.<sup>49</sup>

### III.

In 1930 in *Dunlap v. Dunlap*,<sup>50</sup> the New Hampshire court, after referring to *Hewellette v. George*<sup>51</sup> as "[w]hat this case really did was to establish a new rule of exceptional character rather than enforce a rule already established," and after an elaborate exploration of all aspects of the problem of inter-parent-child tort actions, and an extensive review of all the cases decided to that time, expressed its conclusion thus: "It is conceded, of course, that parental authority should be maintained. To this end it is also conceded that the parent should not ordinarily be accountable to the child for a failure to perform a parental duty, and that vindication of personal rights should not be conceded to the child if it would impair the discharge of such duties. . . . For mistaken judgment as to the extent of chastisement, or for negligent disrepair of the home the father provides, there is usually no liability. These acts all grow out of and pertain to the relation of parent and child. The relation gives rise to the duty alleged to have been violated." But as to true torts, "[t]here is much to be said in support of the contention that the whole theory of nonliability effected through a rule of

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49. 43 HARV. L. REV. 1030, 1072-1077 (1930).

50. 84 N.H. 352, 150 Atl. 905 (1930) (10 B.U.L. REV. 584; 44 HARV. L. REV. 135; 15 MINN. L. REV. 126; 3 TENN. L. REV. 62; 6 WIS. L. REV. 106).

51. 68 Miss. 703, 9 So. 885 (1891).

incapacity to sue is unsound." And further, "[s]uch immunity as the parent may have from suit by the minor child for personal tort arises from a disability to sue, and not from lack of violated duty. This disability is not absolute. It is imposed for the protection of family control and harmony, and exists only where a suit or the prospect of a suit might disturb the family relations. Stated from the viewpoint of the parent, it is a privilege, but only a qualified one. It is not an answer to a suit for an intentional injury, maliciously inflicted."

*Dunlap v. Dunlap*, referred to in a later Maryland decision<sup>52</sup> as a landmark opinion, involved, however, only negligence and presented moreover even narrower questions of emancipation and insurance which will be considered later. That the general rule that no action can be maintained in matters of ordinary negligence remained unaffected was re-affirmed in the later New Hampshire case of *Levesque v. Levesque*.<sup>53</sup>

In *Cannon v. Cannon*,<sup>54</sup> the New York court held that a parent was not subject to a tort action for injuries to his minor child (a passenger in the automobile) resulting from ordinary negligence because the duty imposed by law "to support and discipline the child and to prescribe a course of conduct designed to promote his health, education and recreation, accords to the parent a wide discretion." In respect to the exercise of that discretion and the performance of those duties parents "are held to no higher standard of care than the measure of their own physical, mental and financial abilities to provide for the well-being of their child. . . . Indeed, if within the wide scope of daily experiences common to the upbringing of a child a parent may be subjected to a suit for damages for each failure to exercise care commensurate with the risk—for each injury caused by inattention, unwise choice or even selfishness—a new and heavy burden will be added to parenthood." The court concluded in these words: "In the absence of statutory sanction, we are not prepared, in cases where wilful misconduct by the parent is not a factor, to inject the disruptive risk of tort liability. . . ." Lower New York courts, following this intimation, have held a parent subject to tort liability for wilful injuries.<sup>55</sup>

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52. *Mahnke v. Moore*, 197 Md. 61, 77 A.2d 923 (1951).

53. 99 N.H. 147, 106 A.2d 563 (1954) (35 B.U.L. REV. 205).

54. 287 N.Y. 425, 40 N.E.2d 336 (1942).

55. *Siembab v. Siembab*, 202 Misc. 1053, 112 N.Y.S.2d 82 (1952) (4 SYRACUSE L. REV. 167), 284 App. Div. 652, 134 N.Y.S.2d 437 (1954) (complaint must allege the facts, not merely the words); *Henderson v. Henderson*, 11 Misc.2d 449, 169 N.Y.S.2d 106 (Sup. Ct. 1957) (involving New Jersey law which was presumed to be the same as the common law of New York); *Meyer v. Ritterbush*, 196 Misc. 551, 92 N.Y.S.2d 595 (Sup. Ct. 1949) (must be alleged).

In *Cowgill v. Boock*<sup>56</sup> it was held by the Oregon court that driving a motor vehicle while intoxicated and ordering his child to ride with him with resultant injury to the child was a wilful tort for which the parent was liable. Approving the view that denying an action is a "wholesome rule" for unintentional acts and harms suffered from parental acts "within the scope of domestic relations" and from reasonable disciplinary punishment, the court said: "[I]f from wicked motives a parent should brutally beat his minor child and thus maim him for life, are we to say that he should be immune from liability merely by reason of his parenthood?" "Whatever may be the early common law rule, we should not be bound thereby unless it is supported by reason and logic. The law is not static. It is a progressive science." But "[i]t is only in comparatively recent years that dissenting voices have been raised in criticism of adhering to an absolute rule which in some instances has resulted in a denial of justice." However, "[t]here is a trend of modern decisions to depart from the general rule of non-liability where the injury sustained by an unemancipated minor child is the result of a wilful or malicious tort."

In *Mahnke v. Moore*,<sup>57</sup> where it was alleged that the father had killed the mother and a week later himself in the presence of their five year old child whom he had kept with the mother's body, the Maryland court, noting "that there is no home at all in which discipline and tranquillity are to be preserved," continued: "In these circumstances there can be no basis for the contention that the daughter's suit against her father's estate would be contrary to public policy, for the simple reason that there is no home at all in which discipline and tranquillity are to be preserved. . . . [When] the parent is guilty of acts which show complete abandonment of the parental relation, the rule giving him immunity from suit by the child, on the ground that discipline should be maintained in the home, cannot logically be applied, for when he is guilty of such acts he forfeits his parental authority and privileges, including his immunity from suit. Justice demands that a minor child shall have a right of action against a parent for injuries resulting from cruel and inhuman treatment or for malicious and wanton wrongs."

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56. 189 Ore. 282, 218 P.2d 445 (1950) (30 B.U.L. REV. 580; 36 IOWA L. REV. 384; 5 MIAMI L.Q. 328; 22 MISS. L.J. 174; 16 MO. L. REV. 214; 29 N.C.L. REV. 214; 23 ROCKY MT. L. REV. 225; 25 ST. JOHN'S L. REV. 118; 30 ORE. L. REV. 84; 14 U. DET. L.J. 94; 4 VAND. L. REV. 377).

57. 197 Md. 61, 77 A.2d 923 (1951) (39 GEO. L.J. 664; 64 HARV. L. REV. 1208; 23 IND. L.J. 455; 50 MICH. L. REV. 163; 6 N.Y.U.L. REV. 379; 29 TEX. L. REV. 974; 37 VA. L. REV. 625).

In *Wright v. Wright*,<sup>58</sup> it was also held in Georgia that a minor child may maintain an action against his parent to recover damages for injuries resulting from wilful and malicious acts (alleged driving at excessive speed after having become intoxicated, endangering his child passenger's life) the court expressing the matter thus: ". . . a parent shall be liable for a wilful or malicious wrong against an unemancipated minor child who is living with such parent and under his custody and control if the wrong is such an act as would authorize a judgment of a court of competent jurisdiction depriving the parent of parental power over the child. . . . What particular acts are necessary to divest custody and bring about the loss of parental control, however, are questions of fact and not questions of law, and, in an action such as the one here under consideration, the jury and not the court is the proper fact-finding tribunal. It cannot be said as a matter of law that a parent, who becomes intoxicated and thereafter risks his life and the lives of the general public by driving over the public roads in that condition at an excessive rate of speed, and who in addition wilfully and maliciously exposes his child's life and health to the dangers inherent in such conduct, would not be guilty of cruel treatment toward the child such as might operate to forfeit his parental authority."

In Washington, *Roller v. Roller*<sup>59</sup> has been overruled by *Borst v. Borst*,<sup>60</sup> in which the court made an extensive and elaborate review of the entire question of personal injury tort actions by minor child against the parent. The case, however, did not involve wilful or malicious misconduct. The court, nevertheless in making an exception to the rule of no action where injury occurs from acts done in a business capacity (to be considered later), and after noting that in situations of intentional harm or wilful misconduct "the recent decisions uniformly allow the child a cause of action", disapproved as too broad the holding in the *Roller* case: "In so doing, we have not lost sight of the suggestion that the courts should wait until there is legislative sanction for such an action. There is involved here no rule of property or contract, but only a rule of nonliability benefiting a particular class of persons in action *ex delicto*. There is no statutory sanction for the absolute rule of immunity announced in *Roller v. Roller*. The purported reasons for the absolute rule have been found, on analysis, to be without merit. The true role of the legislature, under the circumstances, is to restrict liability if it chooses to do so, as it did in the host-guest situation.

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58. 85 Ga. App. 721, 70 S.E.2d 152 (1952) (15 GA. BAR J. 83).

59. 37 Wash. 242, 79 Pac. 788 (1905).

60. 41 Wash. 642, 251 P.2d 149 (1952) (38 CORN. L.Q. 462; 39 VA. L. REV. 389; 28 WASH. L. REV. 162).

Where the proposal is to open the doors of the court, rather than to close them, the courts are quite competent to act for themselves."

In *Emery v. Emery*,<sup>61</sup> the California court, holding that a parent is subject to an action in tort for wilful misconduct (complaint alleging that a minor child was driving an automobile under the direction of his father, was unskilled, had not slept for twenty-four hours, and that speed was excessive—facts known to parent), quoted with approval *Davis v. Smith*<sup>62</sup> where the court, after observing that "in more recent years it would seem that the trend of judicial decisions and the thinking of legal writers has been toward the amelioration and limitation of the rule [of no civil action], based upon a recognition that the *Hewlett*, *McKelvey*, and *Roller* cases were wrongly decided," stated: "The parental non-liability is given as a means of enabling the parent to discharge his duties in preserving the domestic tranquillity. It should not shield the parent where the matter arises from a 'non-parental' occurrence, or where the parent commits an atrocious assault outraging the duties imposed upon him as a parent by society."

In *Nudd v. Matsoukas*,<sup>63</sup> after noting that the question was a novel one in Illinois, the court held that a cause of action will lie for wilful and wanton misconduct, saying "To tolerate such misconduct and deprive a child of relief will not foster family unity but will deprive a person of redress, without any corresponding social benefit, for an injury long recognized at common law." And further "We do not feel that the announcement of this doctrine should be left to the legislature. The doctrine of parental immunity, as far as it goes, was created by the courts. It is especially for them to interpret and modify that doctrine to correspond with prevalent considerations of public policy and social needs."<sup>64</sup>

On the other hand the New Jersey court<sup>65</sup> approved the view that wilful injuries should be left to be redressed by loss of custody or to the criminal law. An Arkansas case<sup>66</sup> took the view that a minor child cannot maintain a personal injury tort action against a natural parent even for voluntary acts. And the *Hewlett* case has been referred to with approval in a Mississippi case (although the case involved only

61. 45 Cal.2d 421, 289 P.2d 218 (1955).

62. 126 F. Supp. 497 (E.D. Pa. 1954).

63. 7 Ill.2d 608, 131 N.E.2d 525 (1956) (55 MICH. L. REV. 463).

64. It seems that actions for wilfully inflicted injuries might possibly be maintained in some other states. *Ball v. Ball*, 73 Wyo. 29, 269 P.2d 302 (1954); *Luster v. Luster*, 299 Mass. 480, 13 N.E.2d 438 (1938) (18 B.U.L. REV. 468; 7 FORDHAM L. REV. 459; 24 VA. L. REV. 298; 86 U. PA. L. REV. 909).

65. *Reingold v. Reingold*, 115 N.J.L. 532, 181 Atl. 153 (1935) (10 ST. JOHN'S L. REV. 343).

66. *Brown v. Cole*, 198 Ark. 417, 129 S.W.2d 245 (1939) (18 TEX. L. REV. 92; 1 WASH. & LEE L. REV. 136).

the question of ordinary negligence).<sup>67</sup> So too the *McKelvey* case has been adhered to in Tennessee (again in cases involving only the question of negligence).<sup>68</sup> Similarly other courts have followed their earlier decisions where ordinary negligence was involved.<sup>69</sup>

However significant the departure from the *Hewlett*, *McKelvey*, and *Roller* cases in the matter of malicious, wilful and wanton parental conduct, it would seem that the views expressed in some of the cases may go too far. It is doubtful that drunken and reckless driving even though resulting in injury would necessarily impair domestic harmony in any disruptive sense. It is also doubtful that such conduct would in itself be regarded as sufficient basis for depriving a parent of custody of his child. And even if it is to be so regarded, it should have resulted in such deprivation or ending of custody and parental control. Otherwise a tort action by the child could involve as much disruption of domestic harmony and parental discipline as in other situations. By such criteria the decision in *Mahnke v. Moore*,<sup>70</sup> for example, seems correct, and that in *Roller v. Roller*,<sup>71</sup> incorrect.

Courts that have held a tort cause of action for personal injuries may be maintained by a minor child against his parent for wilful injuries have made it plain that no such action can be maintained for negligence in respect to domestic activities or for negligence in the exercise of parental rights or performance of parental duties whether the negligence consists of affirmative conduct or of failure to act.<sup>72</sup> The parental conduct is to be regarded as either not tortious or else privileged; or the reason may be that policy is not strong enough to require departure from the supposed general rule of no liability. Maintenance of the home and conduct therein would clearly be domestic activities. Operation of a family car has also been considered as either a domestic

67. *Durham v. Durham*, 227 Miss. 76, 85 So.2d 807 (1956) (31 TUL. L. REV. 205).

68. *Ownby v. Kleyhammer*, 194 Tenn. 109, 250 S.W.2d 37 (1952); *Graham v. Miller*, 182 Tenn. 434, 187 S.W.2d 622 (1945); *Turner v. Carter*, 169 Tenn. 553, 89 S.W.2d 751 (1936).

69. *Redding v. Redding*, 235 N.C. 638, 70 S.E.2d 676 (1952) (5 So. CAR. L. REV. 294); *Goldsmith v. Samet*, 201 N.C. 574, 160 S.E. 835 (1931) (27 ILL. L. REV. 314) following *Small v. Morrison*. See also *Shea v. Pettee*, 19 Conn. Super. 125, 110 A.2d 492 (1954) following *Mesite v. Kirchstein*.

And in *Parks v. Parks*, 390 Pa. 287, 135 A.2d 65 (1957) (19 PITT. L. REV. 681); 31 TEMPLE L.Q. 233; 3 VILL. L. REV. 577; 35 U. DETROIT L. REV. 528), the court stated the matter of denial of an action broadly as a rule precluding "an action in tort for damages against its parent because of any negligent conduct" and approved it as sound, being "based on the sound principle of public policy to promote family unity and avoid family discord and disturbance."

70. *Supra* note 57.

71. *Supra* note 41.

72. *Supra* cases *passim*. See also, *Aboussie v. Aboussie*, 270 S.W.2d 637 (Tex. Civ. App. 1954) (20 MO. L. REV. 214; 35 TEX. L. REV. 407); *Strahorn v. Sears, Roebuck & Co.*, 50 Del. 50, 123 A.2d 107 (1956).

activity or coming within parental right-duty to rear the child. Most of the cases involving ordinary negligence and denying an action have been cases of minor children who were passengers in the family car.<sup>73</sup> In *Ball v. Ball*,<sup>74</sup> the Wyoming court denied an action for injuries suffered while the child was a passenger in the parent's plane which was piloted by the parent. And in *Baker v. Baker*,<sup>75</sup> a fifteen-months old child who was allegedly injured when the father backed his automobile over her in the driveway was denied an action.<sup>76</sup> In *Strahorn v. Sears, Roebuck & Co.*,<sup>77</sup> characterized by the court as a case of first impression in Delaware, a minor child brought an action against a store for injuries sustained on an escalator and the store sought to join the father as a contribution tort-feasor because of his alleged contributory negligence. Joinder was denied on the ground that there could be no action by the child against the father.

Even if no liability for ordinary negligence, either by non-action or by affirmative conduct, is confined to domestic activities or to the exercise of parental rights and the performance of parental duties, it would seem that such conduct could transcend these bounds just as in the case of wilful injury, and fall within the same reasons for allowing an action. Extreme neglect, for example, may be grounds for deprivation of custody even though not wilful.<sup>78</sup>

In cases antedating *Hewlett v. George*,<sup>79</sup> holding subject to liability in tort a person in *loco parentis*, the decisions were made to depend upon whether a natural parent would be subject to liability for the same kind of conduct.<sup>80</sup> Numerous cases have been since decided on this

73. *Villaret v. Villaret*, 169 F.2d 677 (D.C. Cir. 1948) (Md. Law) (32 MARQ. L. REV. 289; 12 U. DER. L.J. 57); *Zaccari v. United States*, 130 F. Supp. 50 (D. Md. 1955); *Owens v. Automobile Mut. Indem. Co.*, 235 Ala. 9, 177 So. 133 (1937); *Shea v. Pettee*, 19 Conn. Super. 125, 110 A.2d 492 (1954); *Strong v. Strong*, 70 Nev. 200, 267 P.2d 240 (1954); *Redding v. Redding*, 235 N.C. 638, 70 S.E.2d 676 (1952); *Trudell v. Leatherby*, 212 Cal. 678, 300 Pac. 7 (1931) (20 CALIF. L. REV. 342); *Lund v. Olsen*, 183 Minn. 515, 237 N.W. 188 (1931) (16 MINN. L. REV. 323); *Goldsmith v. Samet*, 201 N.C. 574, 160 S.E. 835 (1931) (27 ILL. L. REV. 314); *Securo v. Securo*, 110 W. Va. 1, 156 S.E. 750 (1931) (NOTRE DAME LAW. 259; 37 W. VA. L.Q. 315). See *Wright v. Wright*, 85 Ga. App. 721, 70 S.E.2d 152 (1952). In *Harralson v. Thomas*, 269 S.W.2d 276 (Ky. 1954) (15 LA. L. REV. 478; 16 OHIO ST. L.J. 125), the father's car was operated by another member of the family. See also, *Silverman v. Silverman*, 145 Conn. 663, 145 A.2d 826 (1958).

74. 73 Wyo. 29, 269 P.2d 302 (1954).

75. 364 Mo. 453, 263 S.W.2d 29 (1953). See also *Luster v. Luster*, 299 Mass. 480, 13 N.E.2d 438 (1938) (18 B.U.L. REV. 468; 7 FORDHAM L. REV. 459; 24 VA. L. REV. 298; 86 U. PA. L. REV. 909).

76. See also *Levesque v. Levesque*, 99 N.H. 147, 106 A.2d 563 (1954) (35 B.U.L. REV. 205).

77. 50 Del. 50, 123 A.2d 107 (1956).

78. *Cf.*, *Nelson v. Johansen*, 18 Neb. 180, 24 N.W. 730 (1885).

79. *Supra* note 39.

80. *Gould v. Christianson*, 5 Fed. Cas. 636 (No. 5) (S.D.N.Y. 1836); *Fitzgerald v. Northcote*, 4 F. & F. 656 (N.P. 1865); *Lander v. Seaver*, 32 Vt. 114 (1859). See also, *Nelson v. Johansen*, 18 Neb. 180, 24 N.W. 730 (1885).



premise. In some, therefore, it has been held that an action may be maintained for wilful injury,<sup>81</sup> in some that an action cannot be maintained for negligent injury.<sup>82</sup> As stated in *London Guarantee & Accident Co. v. Smith*,<sup>83</sup> "Whatever may be said of the merits of the rule which bars a personal injury action in ordinary negligence by an unemancipated minor against his parent—and it has been criticized effectively by respectable authorities—; as long as it stands unchanged there is no justification for refusing to apply the rule to step-parents who genuinely stand in *loco parentis* to the child of a spouse by a former marriage."

But in *Brown v. Cole*,<sup>84</sup> it was held by the Arkansas court that an adopted child could maintain an action against the adoptive parent for pain and suffering due to poison allegedly administered, although an action cannot be maintained against a natural parent even for voluntary torts, reasoning "It will be observed that in these [adoption] statutes no attempt is made to invest either the child or the adopting parents with natural affections existing between blood relations, so the reason for the rule that prevents natural children from suing natural parents for voluntary torts committed upon them does not exist between adopted children and adoptive parents." And in *Adams v. Nadel*,<sup>85</sup> where a minor child was allegedly negligently injured while a passenger in defendant's car and was later adopted by the defendant, it was held that the child could maintain an action, although such action could not be maintained if the defendant had been the child's natural parent. Although the New York adoption statute antedated the injury, the court relied upon provisions to the effect that "the statute shall not affect any proceedings now pending or impair any accrued right." This is the only case that has been found that presents a situation analogous to ante-nuptial torts.<sup>86</sup>

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81. *Perkins v. Robertson*, 140 Cal. App. 536, 295 P.2d 972 (1956) (automobile); *Calway v. Williamson*, 130 Conn. 575, 36 A.2d 377 (1944) (92 U. PA. L. REV. 466) (schoolmaster); *Gillett v. Gillett*, 335 P.2d 736 (Cal. Dist. Ct. App. 1959) (excessive punishment).

82. *Trudell v. Leatherby*, 212 Cal. 678, 300 Pac. 7 (1931) (20 CALIF. L. REV. 342); *Reingold v. Reingold*, 115 N.J.L. 532, 187 Atl. 153 (1935) (10 ST. JOHN'S L. REV. 343) (automobile).

83. 212 Minn. 211, 64 N.W.2d 781 (1954) (8 MINN. L. REV. 71; 15 MINN. L. REV. 126; 16 MINN. L. REV. 323), citing PROSSER, TORTS § 99 (2d ed. 1955).

84. 198 Ark. 417, 129 S.W.2d 245 (1939) (18 TEX. L. REV. 92; 1 WASH. & LEE L. REV. 136), referring to *Rambo v. Rambo*, 195 Ark. 832, 114 S.W.2d 468 (1938).

85. 124 N.Y.S.2d 427 (Sup. Ct. 1953).

86. See 4 VILL. L. REV. 322-325 (1959). In *Cannon v. Cannon*, 287 N.Y. 425, 40 N.E.2d 336 (1942) it had been held that the question of cause of action is to be determined as of the time of injury, a result consistent with the general rule denying a cause of action to an adult child for injuries suffered during minority. See *infra* note 154.

Likewise it has generally been held that a parent cannot maintain a personal injury tort action against the minor child. In *Schneider v. Schneider*,<sup>87</sup> which seems to have been the first case to decide the question,<sup>88</sup> the Maryland court held that an action by a mother to recover damages for ordinary negligence resulting from operation of an automobile could not be maintained since it would be inconsistent with her being guardian of the child (presumably property) even if there were no property. But it would not seem that the position of the mother as guardian, either *ad litem* or general, should itself operate as a bar, since presumably she could, interests being adverse, be replaced by another person acting as guardian. In *Oliveria v. Oliveria*,<sup>89</sup> although the child was nineteen years old at the time of the alleged automobile negligence injury the Massachusetts court held that such action could not be brought since "In our opinion it is repugnant to the prevailing sense of propriety that a mother should bring an action at law against her own minor child, perhaps of tender years, for some act of carelessness in the course of family life which it might seem that the child had the capacity to foresee and to prevent." The usual reason given for refusing to sanction such action is the danger of disturbing domestic harmony,<sup>90</sup> although sometimes the result is simply stated in reciprocal terms—since a minor child cannot maintain an action against the parent, the parent cannot against the child.<sup>91</sup> Danger to parental discipline and control is hardly a reason unless it should be considered that such action would breed disrespect. A minor child has, however, been held subject to an action for wilful injury.<sup>92</sup>

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87. 160 Md. 18, 152 Atl. 499 (1930) (44 HARV. L. REV. 995; 79 U. PA. L. REV. 649; 17 VA. L. REV. 507).

88. See also *Crosby v. Crosby*, 260 App. Div. 651, 248 N.Y.S. 384 (1930) (31 COLUM. L. REV. 507; 16 CORNELL L.Q. 386).

89. 305 Mass. 297, 25 N.E.2d 767 (1940) (20 B.U.L. REV. 394).

90. *Duffy v. Duffy*, 177 Pa. Super. 500, 178 Atl. 165 (1935) (15 B.U.L. REV. 857; 11 NOTRE DAME LAW. 373) (case of first impression). See also, *Detwiler v. Detwiler*, 162 Pa. Super. 383, 57 A.2d 426 (1948) (9 U. PITT. L. REV. 310). In *Becker v. Rieck*, 188 N.Y.S.2d 724 (Sup. Ct. 1959), it was held that a parent can maintain a "derivative" action to recover for loss of services and medical expenses resulting from an automobile negligence injury to one minor child while a passenger in a car driven by another of the parent's minor children, since the matter involved was in the nature of a property right "as to which there has never been any question that a parent may maintain an action."

91. *Rines v. Rines*, 97 N.H. 55, 80 A.2d 497 (1951) (Maine Law); *Fidelity Sav. Bank v. Aulik*, 252 Wis. 602, 32 N.W.2d 613 (1948) (1949 WIS. L. REV. 398). For other cases of parent against child see *Thompson v. Thompson*, 264 S.W.2d 667 (Ky. 1954); *Parker v. Parker*, 230 S.C. 49, 94 S.E.2d 12 (1956); *Turner v. Carter*, 169 Tenn. 553, 89 S.W.2d 751 (1936). These cases have all arisen from automobile operation.

92. *Wells v. Wells*, 48 S.W.2d 109 (Mo. App. 1932) (alleged excessive and reckless speed in operating an automobile relying on the child against parent case of *Dix v. Martin*, 171 Mo. App. 266, 157 S.W. 133 (1913)). And an emancipated child (at time of injury) is subject to action. See *Cafaro v. Cafaro*, 118 N.J.L. 123, 184 Atl. 179 (1936) and *infra* p. 556.

Where the injury has resulted in death of the plaintiff (either child or parent) or where action is brought on behalf of the beneficiaries of the deceased child or parent who would have been in the position of plaintiff had death not resulted (in which case a living child may be suing a parent or vice versa as beneficiary or administrator of the decedent) the wrongful death statute may be of the type that creates a cause of action upon death as distinguished from permitting a cause of action to survive and perhaps not in all respects the same as the deceased's cause of action had he lived.<sup>93</sup> In *Oliveria v. Oliveria*,<sup>94</sup> two actions were brought by a mother against a minor child to recover for her own injuries and for the death of the husband-father both resulting from operation of an automobile. It was held that the mother's own action could not be maintained but her action for wrongful death could be maintained although the father, had he lived, could not have maintained his action against the child. "The reasons of public policy which forbid actions between parent and minor child for personal injury caused by negligence apply with diminished force where the action is for death caused either by negligence or by wilful, wanton or reckless act and is brought not only for the benefit of a surviving wife or husband but of all the next of kin by an executor or administrator appointed by the Probate Court. . . . But there are still stronger reasons for a distinction. The right of action for death is created by statute and is governed by the terms of the statutes. . . . Although an action under it wears the aspect of a civil suit . . . yet the damages are assessed wholly with reference to the degree of culpability of the defendant and constitute in effect a fine levied upon him for his wrongful conduct." "There are no exceptions based upon family relationship."<sup>95</sup>

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93. For husband and wife cases involving the distinction see 4 VILL. L. REV. 321 (1959).

94. 305 Mass. 297, 25 N.E.2d 767 (1940) (20 B.U.L. REV. 394). Also, "the defendant in this case would ordinarily owe a duty to exercise some degree of care toward persons riding in an automobile which he was driving. The only reason why the deceased, if living, could not recover . . . for negligence would be a public policy which forbids the bringing of an action . . . we would be interpreting the word 'negligence' as used in the statute too narrowly and too technically were we to say that it does not include a case where all the elements of duty and careless failure to perform it would be present, if it were not that the relation . . . would have imposed a bar. . . ."

95. See also, *Hale v. Hale*, 312 Ky. 867, 230 S.W.2d 610 (1950) (39 KY. L.J. 479; 29 TEX. L. REV. 560); *Minkin v. Minkin*, 336 Pa. 49, 7 A.2d 461 (1939) (18 CHI. KENT L. REV. 211; 44 DICK. L. REV. 143; 13 TEMP. L.Q. 529; 18 TEX. L. REV. 93; 6 U. PITT. L. REV. 41) (action for child against mother for death of father); *Perkins v. Robertson*, 140 Cal. App. 536, 295 P.2d 972 (1956) (action for child against father for death of mother). Cf., *Munsert v. Farmers Mut. Auto. Ins. Co.*, 294 Wis. 581, 281 N.W. 671 (1938) (37 MICH. L. REV. 658).

If, however, the statute is a "survival" type limiting the remedy to instances where the deceased could have maintained the action had he lived (as in the case of death before suit but not resulting from the injury) or creates a cause of action for wrongful death in terms of decedent's own right of action, the result logically would be that no such proceeding could be brought or maintained if the decedent child or parent could not have maintained an action.<sup>96</sup>

If the defendant has died before suit, either as the result of the negligence that has injured the plaintiff (who survived) or from other causes, the matter logically is one of the survival of the cause of action.<sup>97</sup> The Wisconsin court<sup>98</sup> has given, however, additional policy reasons for denying action against a deceased parent. Characterizing such action "shocking to our concept of justice," the court said, "To hold that an unemancipated minor may not recover from its parent, if living, for the latter's negligence, but may do so if the parent die, would open wide the door and permit unemancipated minors to file claims of all kinds, sounding in tort, against the estates of their parents or to bring actions based thereon against the administrators of their parent's estates. . . . We consider that such a far-reaching step, so at variance with common law, should not be taken by this court." The court alluded to the possibility of "serious controversies between, and ill feeling among, other surviving children" and that such actions "might take from a surviving widow and other infant children, the very essentials of their support."

In Pennsylvania, however, it has been held,<sup>99</sup> although the statute was in terms of "action as though decedent were alive," that the action can be maintained since the home and its harmony, has ceased.<sup>100</sup>

96. *Owens v. Automobile Mut. Indem. Co.*, 235 Ala. 9, 177 So. 133 (1937); *Harralson v. Thomas*, 269 S.W.2d 276 (Ky. 1954) (15 LA. L. REV. 478; 16 OHIO ST. L.J. 125); *Strong v. Strong*, 70 Nev. 200, 267 P.2d 240 (1954) (child against mother for death of father); *Goldsmith v. Samet*, 201 N.C. 574, 160 S.E. 835 (1931) (27 ILL. L. REV. 314); *Parker v. Parker*, 230 S.C. 49, 94 S.E.2d 12 (1956); *Turner v. Carter*, 169 Tenn. 553, 89 S.W.2d 751 (1936); *Fidelity Sav. Bank v. Aulik*, 252 Wis. 602, 32 N.W.2d 613 (1948) (1949 WIS. L. REV. 398); *Cf. Durham v. Durham*, 227 Miss. 76, 85 So.2d 807 (1956) (31 TUL. L. REV. 205).

97. *Graham v. Miller*, 182 Tenn. 434, 187 S.W.2d 622 (1945); *Lasecki v. Kabara*, 235 Wis. 645, 294 N.W. 33 (1940). See also, *Cannon v. Cannon*, 287 N.Y. 425, 40 N.E.2d 236 (1942).

98. *Lasecki v. Kabara*, 235 Wis. 645, 294 N.W. 33 (1940).

99. *Brower v. Webb*, 5 Pa. D.&C.2d 193 (C. P. Phila. 1955). The same result had been reached previously (by construction of the statute) in *Minkin v. Minkin*, 336 Pa. 49, 7 A.2d 461 (1939) (18 CHI. KENT L. REV. 211; 44 DICK. L. REV. 143; 13 TEMP. L.Q. 529; 18 TEX. L. REV. 93; 6 U. PITT. L. REV. 41 (an action by a child against the mother for wrongful death of the father resulting from operation of an automobile, one judge specially concurring on the ground that, although the statute had not changed the law precluding tort actions between husband and wife for personal injury, the action by the child was to vindicate a property right as to which there is no policy precluding actions between parent and child).

100. See also *Davis v. Smith*, 126 F. Supp. 497 (E.D. Pa. 1954); *Gortva v. Feldman*, 19 Mtgy. Rep. 97 (Pa. 1956) (immunity does not extend beyond life).

In contrast with the reasons given in the Pennsylvania cases for allowing an action where there has been death of one of the parties it was held in *Parks v. Parks*<sup>101</sup> that no action could be maintained either by the child for his own damages or by the father for "consequential" damages where it appeared that the child (less than six months old) had been so badly injured (again a case of an automobile operated by the mother) that it would have to be in an institution for the rest of its life: "With death there comes an irreversible end and termination of the family relationship and such relationship lives only in memory; confinement in an institution may be only temporary and it lacks the finality of death in the severance of the family relationship. Family relationship is a two-way affair: parental devotion and care and affection may still flow toward the member of the family confined in the institution and this phase of family relationship may well be severed by litigation between the child and the parent."

#### IV.

The parent causing injury to the child (or vice versa) may be an employee of a third person. If no action can be maintained between parent and child, may the employer nevertheless be subject to liability on principles of *respondeat superior*?

In the husband-wife situation a number of cases have held that the employer is not liable unless the employee is liable, and where there is no right of action against the employee-husband (or wife) there can be no liability on the employer's part.<sup>102</sup> The contrary, however, was held in *Schubert v. Schubert Wagon Co.*,<sup>103</sup> apparently the first case so holding, on the ground that the marital relation did not make lawful acts that would otherwise be unlawful or wrongs, and that the employee-spouse is simply exempt or has a personal immunity from liability to the injured spouse,<sup>104</sup> and moreover the employee's act is the employer's act; true, the employer would have a remedy against the

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For death of both plaintiff and defendant see *Graham v. Miller*, 182 Tenn. 434, 187 S.W.2d 622 (1945); *Chesonis v. Chesonis*, 4 Pa. D.&C.2d 449 (C.P. Sull. 1953).  
101. 390 Pa. 287, 135 A.2d 65 (1957) (19 U. PITT. L. REV. 681; 31 TEMP. L.Q. 233; 3 VILL. L. REV. 577; 35 U. DET. L. REV. 528).

102. 4 VILL. L. REV. 325 (1959).

103. 249 N.Y. 253, 164 N.E. 42 (1928) (29 COLUM. L. REV. 222; 42 HARV. L. REV. 697; 24 ILL. L. REV. 232; 27 MICH. L. REV. 830; 6 N.Y.U.L. REV. 53). See also 43 HARV. L. REV. 1049 (1930).

104. It would not seem that at common law it was considered a matter of immunity, but rather no cause of action—no tort between husband and wife, just as there could not be a contract made between them; hence in the theory no civil wrong. A spouse was subject to the criminal law—a wrong against the state; also to divorce *à mensa et thoro* for a marital wrong. See *Phillips v. Barnett*, 1 Q.B.D. 436 (1876) *per* Blackburn, J.

employee, but it is based on breach of an independent duty owed by the employee to the employer. The result reached in the *Schubert* case has been reached in a number of later cases both in England and in the United States<sup>105</sup> and is the view stated in the American Law Institute's *Restatement of Agency*.<sup>106</sup> But even if the principle of *respondet superior* rests on these reasons, and if the injuring spouse's position is regarded as that of a personal immunity from liability to the plaintiff-spouse, it is apparent from the point of view of the domestic relation that the right of the employer to indemnity or to discharge the employee is in fact an indirect liability of the injuring spouse to the injured spouse that is capable of just as much domestic disruption as direct liability, unless the employer has liability insurance coverage.

The *Schubert* case was decided in 1928. In 1930 the Connecticut case of *Chase v. New Haven Waste Material Corp.*<sup>107</sup> followed the *Schubert* case in a parent-child situation, and there is an Alabama case to the same effect.<sup>108</sup> The opposite view has been taken in Georgia<sup>109</sup> and in Tennessee.<sup>110</sup> In *Graham v. Miller*,<sup>111</sup> the court regarding the question as not an open one in Tennessee and rejecting the *Chase* view observed that to hold the employer and the employee-parent liable as joint-tortfeasors where the employer would have a right of recovery against the employee "would be to countenance an encircling movement when a frontal attack upon the parent is prohibited." A similar difference in points of view has occurred where the parent was not an employee but was driving an automobile of another with permission of the owner.<sup>112</sup> And in *Briggs v. City of Philadelphia*<sup>113</sup> an action was brought by a minor child against a city for injuries caused by defects in a sidewalk. The city brought in the father as a defendant primarily liable. The child recovered judgment against the city and the city recovered a judgment against the father. The only issue involved, reasoned the court, was whether there was liability on the part of the

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105. 4 VILL. L. REV. 326-329 (1959).

106. Section 217(2), comment b.

107. 111 Conn. 377, 150 Atl. 107 (1930).

108. *Mi-Lady Cleaners v. McDaniel*, 235 Ala. 469, 179 So. 908 (1938). And see *Chesonis v. Chesonis*, 4 Pa. D.&C.2d 449 (C.P. Sull. 1953) referring to *Koontz v. Messer*, 320 Pa. 487, 181 Atl. 792 (1935).

109. *Fowles v. Ray-O-Vac. Co.*, 53 Ga. App. 338, 183 S.E. 210 (1935).

110. *Graham v. Miller*, 182 Tenn. 434, 187 S.W.2d 622 (1945).

111. *Supra* note 110.

112. *Ownby v. Kleyhammer*, 194 Tenn. 109, 250 S.W.2d 37 (1952) (owner not liable); *Schomber v. Tait*, 207 Misc. 328, 140 N.Y.S.2d 746 (Sup. Ct. 1955) (owner/liable).

113. 112 Pa. Super. 50, 170 Atl. 871 (1934). The parent was a tenant in occupation and control of the premises. Judgment given by the trial court against the city in favor of the owner of the premises was reversed in the superior court. This part of the case was in turn reversed in 316 Pa. 48, 173 Atl. 316 (1934) (82 U. PA. L. REV. 773; 1 U. PRIT. L. REV. 22).

city to the child and "that issue was not extended by introducing additional defendants" and "while the minor may not sue her father, she is not barred from suing another who is liable."

Where the parent is a member of a partnership it is generally held that no action can be maintained against the partnership by the injured child if an action cannot be maintained by the child against a parent.<sup>114</sup>

## V.

In *Dunlap v. Dunlap*,<sup>115</sup> a sixteen year old boy who was living at home and attending high school but who was employed during summer vacation by his father, a building contractor, for the same wages as those paid other workmen, was injured while so employed by collapse of a staging. The father's employer's liability insurance listed the child as an employee, and premiums paid were a certain percentage of the payroll. It was held that the action could be maintained against the father (a necessary prerequisite to insurance recovery) since the father had not only emancipated the child<sup>116</sup> but had arranged for insurance against the specific risk. The court further observed that the suit was for a negligent wrong "growing out of the relation of master and servant." Whether as a result of this statement, or of the *Schubert* case, or of the developing exception to the general rule of non-liability for wilful injury as being outside the parent-child relation, there have been emerging cases holding that a minor child may maintain an action against its parent when the latter is acting in a business or vocational capacity, especially when the specific risk is covered by liability insurance.

In *Lusk v. Lusk*,<sup>117</sup> a school girl was injured by the negligent operation of a school bus owned by her father and driven by one of his employees. The father operated the bus under a contract with the city which required indemnity insurance. It was held that the action could be maintained. The court expressed itself "not impressed with the idea that the ills accredited to such actions can be obviated merely by suing the parent in his business capacity [involving distinctions mean-

114. *Belleson v. Skilbeck*, 185 Minn. 537, 242 N.W. 1 (1932) (16 MINN. L. REV. 872); *Aboussie v. Aboussie*, 270 S.W.2d 637 (Tex Civ. App. 1954) (20 MO. L. REV. 214; 35 TEX. L. REV. 407). Cf., *Signs v. Signs*, 156 Ohio St. 566, 103 N.E.2d 743 (1952) *infra* p. 543. See 4 VILL. L. REV. 328 (1959) for the husband-wife cases.

115. 84 N.H. 352, 150 Atl. 905 (1930) (10 B.U.L. REV. 584; 44 HARV. L. REV. 135; 15 MINN. L. REV. 126; 3 TENN. L. REV. 62; 6 WIS. L. REV. 106).

116. See *infra* p. 551.

117. 113 W. Va. 17, 166 S.E. 538 (1932).

ing nothing to the child or to the parent]. . . . But a different situation arises when the parent is protected by insurance in his vocational capacity."

The same result was reached in *Worrell v. Worrell*<sup>118</sup> where the minor child, a college student, was injured while a passenger in a bus owned by her father and operated as a common carrier. Admitting that liability insurance carried by the owner "creates no cause of action where no cause of action exists in [its] absence" the court nevertheless concluded that, "The injuries were occasioned in the performance of the duties of a common carrier, not in the parental relation. As a common carrier, he owed a fixed duty to persons occupying the status of passengers. For the protection of such passengers, in the event of the violation of his duty, the State required him to carry liability insurance. Can it be that his duties to other passengers are higher than his obligations to his own child?"

In *Signs v. Signs*<sup>119</sup> a seven year old child brought action against her father and his partner for injuries sustained when a fire burst out at the gasoline pump on defendant's business premises which were also part of the home premises. After an extensive review of tort cases between parent and child the court held that the action could be maintained against the father, if negligent, saying, "In view of the changed conditions to which we have referred, we have come to the conclusion that, if there ever was any justification for the rule announced in Mississippi in 1891, that justification has now disappeared and . . . an unemancipated child should have as clear a right to maintain an action in tort against his parent in the latter's business or vocational capacity as such child would have to maintain an action in relation to his property rights." In a later proceeding in the same case it was found that the child had been warned to keep away and it was held that where the child is in the position of a trespasser or a warned invitee, the father is under no greater liability than he would have been to the child of another.<sup>120</sup>

In *Borst v. Borst*<sup>121</sup> it was held again in an elaborate opinion that a complaint alleging that plaintiff-minor child suffered injuries when its parent, operating a motor vehicle for business purposes, ran over

118. 174 Va. 11, 4 S.E.2d 343 (1939) (8 DUKE B.A.J. 58; 2 GA. B.J. 62; 28 GEO. L.J. 430; 24 MINN. L. REV. 286; 14 TUL. L. REV. 468; 26 VA. L. REV. 235).

119. 156 Ohio St. 566, 103 N.E.2d 743 (1952) (3 ALA. L. REV. 173; 2 BUFF. L. REV. 166; 6 MIAMI L.Q. 617; 10 WASH. L. REV. 121).

120. 161 Ohio St. 241, 118 N.E.2d 411 (1954).

121. 41 Wash. 642, 251 P.2d 149 (1952) (38 CORNELL L.Q. 462; 39 VA. L. REV. 389; 28 WASH. L. REV. 162).



it in the street, stated a cause of action, saying "It cannot be denied that suits by minors against their parents to recover damages sustained as a result of the parent's negligence in carrying on a business or vocation may disturb family tranquillity. But is that a sufficient ground for denying a cause of action as a matter of law? . . . Minors have always been permitted to sue their parents in matters affecting property and contract rights. . . ." Observing that the activity whereby the child was injured may have had nothing to do with parental control and discipline, the court continued, "And even if such a suit should tend to impair family discipline in some degree, that would not seem to call for application of the immunity rule any more than in cases where the child sues to enforce a property right."

There are cases, however, that have rejected the "business or vocational capacity" distinction. In *Luster v. Luster*,<sup>122</sup> where it appeared that the child had been injured when the parent's truck backed over him on the parent's store premises, it was held by the Massachusetts court that the action could not be maintained: "We cannot follow the plaintiff's contention that this case is taken out of the general rule because, as it is said, the circumstances of the accident were not connected with the father's duty to rear his child or with the conduct of his domestic establishment and were such that any other child in the plaintiff's position would have been injured. We do not perceive how it would be possible in practice to draw such a line of distinction as that here suggested. The objections based upon public policy reach to and include this case."

In *Epstein v. Epstein*,<sup>123</sup> a case of first impression in New York, a lower court held that a cause of action can be maintained for negligent injuries sustained at a parent's place of business, distinguishing *Cannon v. Cannon*<sup>124</sup> and following *Signs v. Signs*.<sup>125</sup> The holding was, however, reversed by the Appellate Division.<sup>126</sup> In *Aboussie v. Aboussie*,<sup>127</sup> where it appeared that the child suffered injuries to its hand in an electric fan in a retail store in which the father was a partner, a Texas court declined to adopt the business or vocational capacity distinction.

122. 299 Mass. 480, 13 N.E.2d 438 (1938) (18 B.U.L. REV. 468; 7 FORDHAM L. REV. 459; 24 VA. L. REV. 298; 86 U. PA. L. REV. 909).

123. 124 N.Y.S.2d 867 (1953) (18 ALBANY L. REV. 270; 23 FORDHAM L. REV. 110).

124. *Supra* note 54.

125. *Supra* notes 119, 120.

126. 283 App. Div. 855, 129 N.Y.S.2d 54 (1954).

127. 270 S.W.2d 637 (Tex. Civ. App. 1954) (20 MO. L. REV. 214; 35 TEX. L. REV. 407).

## VI.

Just as in interspousal cases many if not most of the parent-child cases reaching appellate courts have been cases of personal injuries arising from the operation of automobiles, and in most of those the injured plaintiff has been a passenger. Perhaps in a high percentage of such cases the operator or owner of the car has a policy of insurance covering his liability. Indeed, it has been said by the Massachusetts court,<sup>128</sup> with some apparent cynicism, that such a parent-child litigation: "was unknown here until the recent extension of liability insurance held out the hope that occurrences within the home circle might become a source of net profit to the family. The great weight of existing authority, most of which is found in very recent cases, is against such an action."

If the defendant, having liability insurance coverage,<sup>129</sup> is legally liable, the insurer would be liable to him (and under some policies subject to direct suit by the injured party) by way of indemnity or reimbursement (limited by the maximum amount of coverage) for damages recovered or recoverable by the injured person. If there is no legal liability on the part of the insured, there would be none on the part of the insurer. The insurance covers legal liability, does not create it.<sup>130</sup> The decisions are all to this effect in the parent-child automobile personal injury cases.<sup>131</sup>

128. *Oliveria v. Oliveria*, 305 Mass. 297, 25 N.E.2d 767 (1940) (20 B.U.L. Rev. 394).

129. Insurance may be available to cover accidents in the legal sense of the term, *i.e.*, irrespective of fault. Such coverage is usually for an explicit amount, for death, and/or for injuries to specific parts of the body, and also for loss of time for a maximum period. An automobile liability policy often contains emergency medical payments coverage, irrespective of legal liability, or may in terms include members of the insured's family. These are not liability policies and their coverage may fall far short of the monetary injury suffered in an action based on legal liability. On the other hand the policy may expressly exclude certain risks such as injuries to members of the insured's family.

130. See 4 VILL. L. REV. 329-335 for a discussion of husband-wife cases.

131. *Villaret v. Villaret*, 169 F.2d 677 (D.C. Cir. 1948) (32 MARQ. L. REV. 289; 12 U. DET. L.J. 57); *Parks v. Parks*, 390 Pa. 287, 135 A.2d 65 (1957) (19 U. PITT. L. REV. 681; 31 TEMP. L.Q. 233; 3 VILL. L. REV. 577; 35 U. DET. L. REV. 528); *Baker v. Baker*, 364 Mo. 453, 263 S.W.2d 29 (1953); *Rines v. Rines*, 97 N.H. 55, 80 A.2d 497 (1951); *Fidelity Sav. Bank v. Aulik*, 252 Wis. 602, 32 N.W.2d 613 (1948); *Worrell v. Worrell*, 174 Va. 11, 4 S.E.2d 343 (1939) (8 DUKE B.A.J. 58; 2 GA. B.J. 62; 28 GEO. L.J. 430, 24 MINN. L. REV. 286; 14 TUL. L. REV. 468; 26 VA. L. REV. 235); *Rambo v. Rambo*, 195 Ark. 832, 114 S.W.2d 468 (1938); *Luster v. Luster*, 299 Mass. 480, 13 N.E.2d 438 (1938) (18 B.U.L. REV. 468; 7 FORDHAM L. REV. 459; 24 VA. L. REV. 298; 86 U. PA. L. REV. 909); *Owens v. Automobile Mut. Indem. Co.*, 235 Ala. 9, 177 So. 133 (1937); *Lund v. Olsen*, 183 Minn. 515, 237 N.W. 188 (1931) (16 MINN. L. REV. 323); *Detwiler v. Detwiler*, 162 Pa. Super. 383, 57 A.2d 426 (1948) (9 U. PITT. L. REV. 310); *Brower v. Webb*, 5 Pa. D.&C.2d 193 (C.P. Phila. 1955); *Siembab v. Siembab*, 202 Misc. 1053, 112 N.Y.S.2d 82 (1952) (4 SYRACUSE L. REV. 167); 284 App. Div. 652, 134 N.Y.S.2d 437 (1954).

In *Addison v. Employers Mut. Liab. Co.*, 64 So.2d 484 (La. App. 1953) it was held that a wife injured by her husband could recover from the insurer who

It is apparent that the two reasons which have come to be regarded as the principal, if not the only, ones for denying a cause of action in tort between parent and minor child, *viz.* danger of disrupting or disturbing domestic tranquillity and interference with the exercise of parental rights and the performance of parental duties in the matter of rearing and disciplining the child, have no application when the action is, in substance if not in form, against an insurance company which will pay the damages recovered. As was remarked in *Lusk v. Lusk*<sup>132</sup> the action is not unfriendly, a recovery by the child is no loss to the parent, their interests unite in favor of recovery, no strained family relations will follow, family harmony is assured instead of disrupted; but, as the court went on to say of the facts of that particular case, "without hint of 'domestic fraud and collusion' (charged in some cases)." But in the view of the Pennsylvania court, expressed in *Parks v. Parks*,<sup>133</sup> the rule that a minor child "cannot maintain an action in tort for damages against its parent because of any negligent conduct on the part of the parent is sound" in part because "it prevents possible collusive action between parent and child in situations where the liability . . . is covered by insurance." This possible difficulty has been discussed more in the husband-wife than in the parent-child cases.<sup>134</sup> However, the mere possibility of fraud and collusion has not been generally considered more relevant than in other situations where there might be thought a similar danger.<sup>135</sup>

The rule of no tort liability for personal injury because of domestic relation and the wide use of (and even insistence upon in states where it is made compulsory) automobile "liability" insurance present a conflict, of which courts apparently are becoming aware.

In *Harralson v. Thomas*<sup>136</sup> it was said: "Recent cases in this Court have made us aware that certain established principles of tort liability are somewhat awkwardly applied in automobile negligence cases where liability insurance is shown or may exist. The increasing

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had undertaken to pay on behalf of the insured all sums which the insured "shall become legally obligated to pay", since a tort had occurred but the husband had a "personal immunity". See also, *McLain v. National Cas. Co.*, 28 So.2d 680 (La. App. 1947). No parent-child case has been found involving this view. The insurance case is distinguishable from the employee-employer cases. It is often said, as in the *Schubert* case, that the doctrine of *respondeat superior* rests on the principle that he who acts through another acts himself. Whatever the correct explanation, the relation of the master to the servant's acts is entirely different from the relation of the insurer to the insured's acts.

132. 113 W. Va. 17, 166 S.E. 538 (1932).

133. 390 Pa. 287, 135 A.2d 65 (1957).

134. 4 VILL. L. REV. 330-332, and see 43 HARV. L. REV. 1030, 1052, 1076 (1930).

135. *Dunlap v. Dunlap*, 84 N.H. 352, 150 Atl. 905 (1930); *Chiuchiolo v. New England Wholesale Tailors*, 84 N.H. 329, 150 Atl. 540 (1930).

136. 269 S.W.2d 276 (Ky. 1954) (15 LA. L. REV. 478; 16 OHIO ST. L.J. 125).

complexity of highway travel has brought on many new problems in the adjudication of rights, and perhaps the automobile in all its aspects should be placed in a category different from that of other instrumentalities. However, that is a matter for legislative action and this Court is not inclined to initiate a new set of motor vehicle rules."

And in *Levesque v. Levesque*.<sup>137</sup> "We do not believe that the existence of liability insurance should create a right of action where none would otherwise exist. . . . If however the almost general existence of liability insurance has so materially changed the circumstances which militated against such suits that a change in the public policy now prevailing in this state should be made, we think that is a matter for the legislature to determine rather than being within the province of this court."

As early as 1929, in *Schwenkhoff v. Farmers Mut. Auto. Ins. Co.*,<sup>138</sup> Fairchild, J., concurring in holding that no recovery could be had against a father's automobile liability insurer, had this to say: "This case poses a problem which needs a better solution than we find is in the province of the court. Perhaps it would be no more disruptive of the family relationship to destroy the father's immunity from an action for personal injuries brought by his child than it has been to destroy the husband's immunity from similar action by his wife. Perhaps, because the problem more frequently arises in connection with injuries caused by the operation of automobiles, it would be better simply to require that the automobile liability insurer of a parent be directly liable to an injured child, notwithstanding the parent's immunity by reason of his parenthood. I agree, however, with the majority of the court that in this situation the choice of solutions should be made by the legislature."

The germs of two solutions (one of which would require only agreement, the other, legislative action) are also to be found, perhaps not so clearly, in two other cases, one earlier than the Wisconsin case.

In *Small v. Morrison*,<sup>139</sup> the court observed that an insurance policy could have been obtained "which would have given the instant plaintiff [a minor child] a right to maintain an action against the indemnity company, without first suing the assured [parent]." Such a suggestion is logically unsound if the risk assumed by the insurer is against liability and if the only distinction is between the necessity of a suit against the insured and the possibility of a direct action against

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137. 99 N.H. 147, 106 A.2d 563 (1954) (35 B.U.L. Rev. 205).

138. 6 Wis. 2d 44, 93 N.W.2d 867 (1929).

139. 185 N.C. 577, 118 S.E. 12 (1923).

the insurer; if, however, by the words "instant plaintiff" is meant the assumption of a specific risk, the suggestion, which would appear in part analogous to insurance in the business-vocational cases already discussed,<sup>140</sup> is of considerable interest.<sup>141</sup> Perhaps more so is the suggestion in *Mesite v. Kirchstein*<sup>142</sup> similar to that of Fairchild, J., and which could be analogous to the theory of some wrongful death statutes that create an independent statutory right: "When compulsory insurance in automobile cases is required, and the legislative enactment provides that recovery can be had directly from an insurer by one injured through the negligence of the insured, the child might recover of the insurer for the negligent injury inflicted by his parent. That is not the action before us." A provision of direct recovery, however, should include: "notwithstanding non-liability of the insured because of the parent-child (or husband-wife) relation."

New York in 1937, where prior thereto a wife could not maintain an action against her husband for a personal injury tort, enacted a statute expressly providing that either husband or wife "has a right of action" against the other for "wrongful or tortious acts" resulting in injury to person or property, as if they were unmarried.<sup>143</sup> The same statute amended the Insurance Law<sup>144</sup> to provide (as subsequently amended)<sup>145</sup> that no liability insurance policy shall be deemed to insure against liability of an insured for death of or injury to the insured's spouse or destruction of or injury to the insured's spouse's property "unless express provision relating specifically thereto is included in the policy." These statutory provisions, which are thought to be unique, allow causes of action between spouses but attempt to guard against possible insurance abuses.<sup>146</sup> However, no liability insurance policies, it is believed, have been issued with the inclusion clause.<sup>147</sup> It is to be regretted that therefore there has been no experience with such special risk category, possibly contemplated by the statute to be a special one, whereby to check prior assumptions of possible domestic fraud and

140. *Supra* p. 542.

141. See *Dunlap v. Dunlap*, 84 N.H. 352, 150 Atl. 905 (1930): "But upon the issue whether it was insured against, a distinction may be made between cases where there is no evidence that such a result was intended, and those where it affirmatively appears that the insuring contract was made with the specific liability in mind. This goes upon the ground that in the case of general insurance contract (if recognition of general liability for active intervention be refused) that no such liability was covered. The then necessary intent to insure the specific risk is lacking."

142. 109 Conn. 77, 145 A.2d 753 (1929).

143. N.Y. DOM. REL. LAW § 57.

144. N.Y. INS. LAW § 167, amended see note 145 *infra*.

145. N.Y. INS. LAW § 167(3).

146. *Fuchs v. London & Lancashire Indem. Co.*, 171 Misc. 908, 14 N.Y.S.2d 387 (Sup. Ct.), *aff'd*, 258 App. Div. 603, 17 N.Y.S.2d 338 (1940).

147. 4 VILL. L.REV. 335 (1959).

collusion or to establish premium costs for coverage. Nevertheless, the New York statute presents an interesting compromise in the matter of negligence liability, and an invitation to underwriters.

For some time a substantial number of states have allowed interspousal personal injury tort actions, without such insurance restriction as that of New York, but insurance companies, it would seem, have no statistics to compare such states with other states where such actions cannot be maintained, or to show the number or amount of interspousal automobile liability claims or their impact on general insurance liability losses. It would seem that the rate effect, if any, is not regarded as significant.<sup>148</sup> This attitude seems inconsistent with refraining from writing such specific coverage.

There is no similar statute in New York covering inter-parent-child tort liability and none has been found in other states. If it is thought that the term "wrongful or tortious acts" in the statute of that state sufficiently copes with questions in the case of husband and wife of whether particular conduct is tortious in the domestic establishment (and the scope thereof) and with the matter of marital privilege, the same general words would seem sufficient in the case of parent and child. Perhaps not, and perhaps it would be impracticable to draft satisfactorily more precise wording. But some statutory provisions could nevertheless be drafted in the matter of liability insurance, for example: (1) in states that have compulsory automobile liability insurance a required provision that the term "injured person" shall include a person other than the operator of the car to whom the insured would be legally liable except for the relation of parent and child (or husband and wife); (2) in states that do not have such compulsory insurance, an insurance policy provision to the same effect obtainable at the option of the insured; (3) rates for such coverage to be established from time to time; or (4) in lieu of the above it be required that a provision be inserted in the policy expressly calling attention to the fact that parent-child (or husband-wife) injuries are not covered,<sup>149</sup> so that the insured may obtain some form of accident insurance if he wishes. If there is to be specific "quasi-liability" coverage the matter of the family passenger would require consideration and co-ordination with general "guest" provisions.

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148. 4 VILL. L. REV. 334 (1959).

149. Some insurance companies in some states use policies excluding members of the insured's family. See *Kick v. State Farm Mut. Auto. Ins. Co.*, 200 Tenn. 37, 289 S.W.2d 538 (1956). Statutory or other "guest" provisions may operate as restrictions in respect to passengers in a car.

It is to be noted that in addition to situations where the parent (or child) is an employee of another<sup>150</sup> general liability insurance has already been affected by categories of liability between parent and child that have developed in some states: wilful injuries (applied in some instances of automobile operation);<sup>151</sup> wrongful death;<sup>152</sup> and vocational capacity.<sup>153</sup> It has also been affected in cases of emancipation to be next considered.

## VII.

Public policies precluding personal injury tort actions between parent and child are considered to have no application when the child is an adult at the time the injury is inflicted.<sup>154</sup> The policy of preserving domestic tranquillity or at least not encouraging disharmony or disruption may however still be involved. But if the controlling policy, as it would seem to be, is non-interference in or to discourage impairment of the exercise of parental rights and the performance of parental duties, nonetheless such rights and duties (at least at common law) terminate when the child reaches majority. And in *Hewlett v. George*,<sup>155</sup> the case that started the decisions holding no cause of action, mention was made of emancipation: "Whether [the plaintiff] had resumed her former place in her mother's house, and the relationship, with its reciprocal rights and duties, of a minor child to her parent, does not sufficiently appear. If by her marriage the relation of parent and child had been finally dissolved, in so far as that relationship imposed the duty upon the parent to protect and care for and control, and the child to aid and comfort and obey, then it may be the child could successfully maintain an action against the parent for personal injuries." In *Taubert v. Taubert*<sup>156</sup> it was held that a "fully" emancipated minor child could maintain an action, and the question

150. *Supra* p. 540.

151. *Supra* p. 531.

152. *Supra* p. 538.

153. *Supra* p. 542.

154. *Waltzinger v. Birsner*, 212 Md. 107, 218 A.2d 617 (1957). But see *Rines v. Rines*, 97 N.H. 55, 80 A.2d 497 (1951) suggesting that a child over twenty-one may not necessarily be emancipated, and referring to *Skillin v. Skillin*, 130 Me. 223, 154 Atl. 570 (1931). No action can be maintained after majority for acts which occurred during minority if the relation precludes its being maintained during minority. *Reingold v. Reingold*, 115 N.J.L. 532, 181 Atl. 153 (1935) (10 St. JOHN'S L. Rev. 343); *Smith v. Smith*, 81 Ind. App. 566, 143 N.E. 128 (1924) (No action after majority for acts which occurred during minority). Cf., *Cannon v. Cannon*, 287 N.Y. 425, 40 N.E.2d 236 (1942). See also, *Clasen v. Pruhs*, 69 Neb. 278, 95 N.W. 640 (1903).

155. 68 Miss. 703, 9 So. 885 (1891).

156. 103 Minn. 247, 114 N.W. 763 (1908) (injury suffered while working outside the home in parent's factory).

of emancipation was also raised in *Mesite v. Kirchstein*.<sup>157</sup> In *Dunlap v. Dunlap*, in holding that a minor child could maintain an action against the parent, the court based the result in part on emancipation and in part upon insurance against a specific risk in a business enterprise, or more accurately a combination of the two. As to emancipation the court observed it is everywhere conceded that the act of the father in emancipating the child results in a situation where "there is no longer valid reason for denying recovery. When the right of discipline and family association have been surrendered, a rule intended to preserve their integrity is not applicable." And furthermore, "The release may be valid although it be partial only. It is not made invalid by the fact that the child remains at home and continues to be supported by his father. . . . There seems to be no distinction in principle between permitting the father to create a situation where the son may sue him for wages and allowing the son to complain of a violation of the master's duty which was created by the valid contract for service. As was said in *Hall v. Hall*, *supra*, the son labors 'as a hired servant.' Every consideration of policy which is urged against this action is equally applicable to the suit for wages. The maintenance of parental authority and the preservation of the family peace are as much imperiled by one as by the other."<sup>158</sup> It would seem, however, that not only was the parental release partial but on the analogy to *Hall v. Hall*<sup>159</sup> a right to maintain an action against the parent should also be partial, that is, confined within the area of the release. Parental custody and control, it would seem, remained unaffected except in the master-servant relation that had been created. In that area, but that area only, an action might be maintained even without the combined element of insurance.

Since 1930 the contention of emancipation has been made in numerous personal injury cases,<sup>160</sup> and it may be that it is increasing.

157. 109 Conn. 77, 145 A.2d 753 (1929).

158. 84 N.H. 352, 365, 150 Atl. 905, 911 (1930).

159. 44 N.H. 293 (1862), a case where the father agreed to pay a minor daughter wages as a domestic, and it was held that the daughter could maintain an action to recover the wages promised. See also, *Glover v. Glover*, 319 S.W.2d 238 (Tenn. App. 1958).

160. *Perkins v. Robertson*, 140 Cal. App. 536, 295 P.2d 972 (1956); *Wurth v. Wurth*, 313 S.W.2d 161 (Mo. App. 1958); *Cannon v. Cannon*, 287 N.Y. 425, 40 N.E.2d 236 (1942); *Parks v. Parks*, 390 Pa. 287, 135 A.2d 65 (1957); *Glover v. Glover*, 319 S.W.2d 238 (Tenn. App. 1958); *DeLay v. DeLay*, 337 P.2d 1057 (Wash. 1959); *Groh v. Krahn, Inc.*, 223 Wis. 662, 271 N.W. 374 (1937); *Shea v. Pettee*, 19 Conn. Super. 125, 110 A.2d 492 (1954); *Fowles v. Ray-O-Vac. Co.*, 53 Ga. App. 338, 183 S.E. 210 (1935); *Gallagher v. Gallagher*, 15 Misc. 427, 181 N.Y.S.2d 811 (Sup. Ct. 1958).

About half the total number of cases have been actions by parent against child in most of which the parent has been the mother. *Thompson v. Thompson*, 264 S.W.2d 667 (Ky. 1954); *Rines v. Rines*, 97 N.H. 55, 80 A.2d 497 (1951); *Cafaro*



It is therefore important to determine what the concept of emancipation is, particularly in reference to the question of maintaining actions between parent and child to recover tort damages.

The term "emancipation" is probably traceable to early Roman law. But in ancient Roman society the organization of the family was entirely different from that in later England and America, and in many respects different from that in later periods of Roman law. A male person who was *civis* with no living ancestor in the direct male line was *pater familias*. His sons and male descendants in direct male line, his daughters unless married in the most formal way, his daughters-in-law if thus married and their children, regardless of the form of marriage of their mother, were members of his family *sub potestate*. Age had nothing to do with *potestas*, a person however old could still be *sub potestate*.<sup>161</sup> The ages of majority which was a different matter were 14 for males and apparently 12 for females. These ages were important principally for guardianship of one not *sub potestate*.<sup>162</sup>

In the Roman law emancipation was a method whereby *potestas* was ended earlier than it would have been by the death of the *pater familias*, and the person emancipated made actually or potentially a *pater familias* himself, thus enabling him to have or to establish a family of his own having *potestas* over those under him regardless of their ages. Roman law in its early or strict period made little or nothing of parental duties (leaving them to self-interest or to developing moral and ethical ideas) but recognized only rights.<sup>163</sup>

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v. Cafaro, 118 N.J.L. 123, 184 Atl. 779 (1936); Crosby v. Crosby, 230 App. Div. 651, 248 N.Y.S. 384 (1930); Detwiler v. Detwiler, 162 Pa. Super. 383, 57 A.2d 426 (1948) (9 U. Pitt. L. Rev. 310); Parker v. Parker, 230 S.C. 49, 94 S.E.2d 12 (1956); Turner v. Carter, 169 Tenn. 553, 89 S.W.2d 751 (1936).

161. See, BUCKLAND, MANUAL OF ROMAN PRIVATE LAW 60-63 (2d ed. 1939); BUCKLAND, TEXT-BOOK OF ROMAN LAW 103-105 (1921); BUCKLAND & McNAIR, ROMAN LAW AND COMMON LAW 35-37 (1936).

162. Age for this purpose was later raised to 25. A female, being incapable of *potestas*, was always at least theoretically under guardianship or tutelage regardless of age. BUCKLAND, MANUAL OF ROMAN PRIVATE LAW 89 (2d ed. 1939); BUCKLAND, TEXT-BOOK OF ROMAN LAW 143 ff. (1921); BUCKLAND & McNAIR, ROMAN LAW AND COMMON LAW 44 ff. 1936).

163. BUCKLAND, TEXT, *op. cit. supra* note 162 at 132-33; BUCKLAND, MANUAL, *op. cit. supra* note 162 at 37, 81 ff.

In early Rome the *pater familias* had unlimited power both as to person and as to property. This however, was ameliorated in later times, although still leaving wide powers. "Further . . . [he] could at any moment [emancipate] the child, though the Praetor remedied this to some extent by giving the child so emancipated a certain right of succession. . . . To give the son a *peculium* with power of administration was normal. The son was capable of civil rights and liabilities and could bring some actions, though the limits of this power are narrow. Emancipation was usual, and was often accompanied by a gift of money." BUCKLAND & McNAIR, *op. cit. supra* note 162 at 35 ff. As to *peculium*, see Pp. 25, 37.

In the early or strict period of the Roman Law, and also formally at least into the classical period, emancipation was accomplished by three successive sales into slavery with respective sales back which ended *potestas* of the *pater familias*, and after the third sale by some further steps that conferred *potestas* upon the person

Anglo-American law has no concept corresponding to the Roman emancipation,<sup>164</sup> although it is at times said that emancipation must be complete such as to end all rights and duties, all filial ties.<sup>165</sup> Reaching the age of majority accomplishes this except for consanguinous or affinity marriage, incest, and intestate succession, and certain other statutory duties in the area of support. In some states marriage of a female (and in a few the marriage of a male as well) below the age of majority, but above the age of eighteen, makes the person of age; in some states the age of majority for a girl is eighteen instead of twenty-one, or at time of marriage if below twenty-one. In a few states special judicial proceedings may remove the disabilities of infancy.<sup>166</sup> These are modes of reaching majority and have to do primarily with legal capacity. Incidentally they also affect parent-child rights and duties just as does reaching the traditional common-law age of twenty-one. The term "emancipation" is sometimes used in the above senses, but it is more generally applied to certain situations arising before the age of majority, by whatever mode, is reached, and in this sense is not equivalent to general legal capacity. It does not confer capacity.<sup>167</sup>

In Anglo-American law the status of parent-child cannot be dissolved short of death by unilateral act or even by mutual assent any more than the dissolution of the husband-wife status can be so accomplished, although the fundamental reasons are different. Adoption,<sup>168</sup> which is entirely statutory,<sup>169</sup> does not necessarily have this effect. It is only by a few more recent statutes that the child is removed for all

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emancipated. This method was supplanted in the period of the Empire under Justinian by court procedure, in a manner similar to adoption. BUCKLAND, TEXT, *op. cit. supra* note 162 at 132; BUCKLAND, MANUAL, *op. cit. supra* note 162 at 81; BUCKLAND & McNAIR, *op. cit. supra* note 162 at 37.

164. BUCKLAND & McNAIR, *op. cit. supra* note 162 at 35.

165. See *Holland v. Hartley*, 171 N.C. 376, 88 S.E. 567 (1916); *Round Bros. v. McDaniel*, 133 Ky. 669, 118 S.W. 896 (1909).

166. See 1 WILLISTON, CONTRACTS §§ 224, 225 (rev. ed. 1936); WILLISTON, SALES § 10b (rev. ed. 1948); See also, McCURDY, CASES ON DOMESTIC RELATIONS 788 (4th ed. 1952).

167. *Tennessee Mfg. Co., v. James*, 91 Tenn. 154, 18 S.W. 262 (1892). Nor was orphanage, *Wickham v. Torley*, 136 Ga. 594, 71 S.E. 881 (1911). *Cf.*, *Hyman v. Cain*, 48 N.C. Ill. (1855).

168. For adoption in roman law see BUCKLAND & McNAIR, *op. cit. supra* note 162 at 39-42. See also, BUCKLAND, TEXT, *supra* note 162 at 121-124; BUCKLAND, MANUAL, *supra* note 162 at 74-79. And see *Woodward's Appeal*, 81 Conn. 152, 162, 70 Atl. 453 (1908).

169. Adoption was unknown in the common law. See *Woodward's Appeal*, 81 Conn. 152, 162, 70 Atl. 453 (1908); *Chehak v. Battles*, 133 Iowa 107, 110 N.W. 330 (1907). An adoption statute was not enacted in England until 1926 (16 & 17 Geo. V. c. 29) and has been characterized as "in fact little more than a special form of guardianship." BUCKLAND & McNAIR, *op. cit. supra* note 162 at 42. In the United States adoption statutes of various types date in some states from about 1850. See further, McCURDY, *op. cit. supra* note 166 at 486-500.

purposes (except marriage and incest) from his natural family and placed in the adoptive family.<sup>170</sup>

If the only legal incidents of the parent-child relation during minority were parental rights it would seem that these could be relinquished even by parental unilateral action. But it is self-evident that if there are parental duties imposed by law these cannot be so repudiated. It has been said in England<sup>171</sup> and in a few states<sup>172</sup> that a parent has no common-law duty to support even a minor child, his duty being only moral. In the other states there is held to be such a common-law duty, not simply one referred to as moral.<sup>173</sup> The parent satisfies this duty by furnishing adequate support, and one way of doing this is to permit the child to work for others and to keep his wages on condition that they be used for the child's support. As long as the child works and the wages are adequate it may be said that the parent is under no duty to support; more accurately he is performing his duty. In *Lufkin v. Harvey*,<sup>174</sup> where it was held that a minor child who worked outside the home for another and earned sufficient for his support had no power conferred by law to make his parent liable for necessities purchased, the court said: "We think a gift to the son of his wages has about the same bearing upon the liability of the parent for necessities that a gift of any other money would have. If it is sufficient to supply the son with all necessities, he may not pledge his parents' credit and the parents are not chargeable therewith. If it is not sufficient, the parents remain liable for any necessities which the wages are not sufficient to supply. This is the substance of the rule of many cases where recovery has been sustained against a parent for necessities furnished to a minor child, notwithstanding such minor has been given his earnings."<sup>175</sup>

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170. See, *In re Zaepfel's Estate*, 102 Cal. App. 2d 774, 228 P.2d 600 (1951) (24 So. CAL. L. REV. 478); McCURDY, *op. cit. supra* note 166 at 486-500.

171. *Mortimer v. Wright*, 6 M. & W. 482 (Ex. 1840). The minor child has no power conferred by law (as in the case of husband and wife) to buy necessities on the parent's credit. This seems simply to equate duty with a particular method of enforcement. See *Shelton v. Springett*, 11 C.B. 452 (1851). In equity a duty was recognized. *Wellesley v. Beaufort*, 2 Russ. 1, 28 (Ch. 1827). And statutes beginning in the 16th century recognize or impose such duty.

172. See *Dunlap v. Dunlap*, 84 N.H. 352, 150 Atl. 905 (1930); *Hammond v. Corbett*, 50 N.H. 501 (1872). The reference seems to be a denial of the power to bind the parent for necessities.

173. And it may be enforced by the same method as in the case of husband and wife, by exercising a power conferred by law to obtain necessities where the parent is in default in the performance of his duty. See *Porter v. Powell*, 79 Iowa 151, 44 N.W. 295 (1890).

174. 131 Minn. 238, 154 N.W. 1097 (1915).

175. See *Porter v. Powell*, 79 Iowa 151, 44 N.W. 295 (1890) where a parent was held liable for medical services rendered a minor daughter, seventeen years old, who had been residing and working about thirty miles away from her father's

The parent-child relation involves a bundle of right-duties, some being apparently reciprocal, but all being functions of the relation. The right to custody involves a duty to rear, discipline, and educate (in a general sense at least); but perhaps the matter might be put the other way around. Thus the parent has a right to the services and earnings of his minor child, and he has a duty to support. Sometimes the right is thought to result from the duty to support; sometimes the duty is thought to result from the right to services. Neither is correct. The "right-duty" are both functions of the relation although each has ordinarily dual as well as correlative aspects. The parental right to services is related to custody, discipline and education (which also is parental duty). This is its duality. The correlative of this right is the child's duty to obey, which involves also duality. The duty to support (also attributable to the duty to rear) is therefore neither a cause nor an effect of the right to services. They both flow from the objective of the parent child relation. These right-duties, dual or correlative, may be separated where it is appropriate for the law to do so.<sup>176</sup>

In Anglo-American common law a usual meaning, narrow but nevertheless primary, of emancipation, is a relinquishment by a parent of his right to his minor child's services and earnings either by conduct forfeiting the right or by assent or agreement with the child or in some instances by conduct of the child. Since the right to services and earnings depends upon custody this concept of emancipation may operate within the entire area of custody and control. Thus emancipation may result from abandonment of the child, by marriage of the child, by the child's enlistment in the armed forces, or by the parent's voluntary relinquishment of the right to services and earnings as well as by an effective transfer of custody. "Relinquishment of the right to services may be by consent if for any reason the parent feels that it is proper for the stimulation of initiative or incentive or for the training of the child in habits of management and industry. . . . [and so] a father may make an enforceable contract with his minor child for employment

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house for three years, earning and controlling her own wages, but who became ill and unable to work.

In *Dwyer v. Dwyer*, 366 Ill. 630, 10 N.E.2d 344 (1937) (26 ILL. B.J. 211; 32 ILL. L. REV. 477; 36 MICH. L. REV. 1028; 13 NOTRE DAME LAW. 279; 71 U.S. L. REV. 673), it was held that a natural parent's duty to support was not terminated by the child's adoption, since adoption ended only parental rights. It would seem that it had been supplanted but might revive if it became necessary. And in *Thompson v. Childers*, 231 Ky. 179, 21 S.W.2d 247 (1929) it was held that a contract with a third person may terminate the parent's duty but he nevertheless remains secondarily liable, *i.e.*, it would seem, could be called upon if the contract was not performed. *Cf.*, *Betz v. Horr*, 250 App. Div. 457, 294 N.Y.S. 546 (1937) (9 FORDHAM L. REV. 462).

176. See note, *Reciprocity of Rights and Duties Between Parent and Child*, 42 HARV. L. REV. 112 (1928).

of the child in the parent's home for wages. . . . Relinquishment is irrevocable as to wages earned thereafter pursuant to it and before revocation and perhaps to wages to be earned under a contract made pursuant to it. . . ." However, "It is sometimes said that a parent may emancipate or relinquish all parental rights and duties and that emancipation may be express or implied, total or partial, temporary or permanent, revocable or irrevocable."<sup>177</sup>

It would seem therefore that some of the definitions of emancipation that are to be found include some elements of both the old Roman law and of the common law and are not entirely accurate as to either. However that may be, since the controlling reason for not sanctioning personal injury tort actions between parent and minor child is the impairment of the parental right-duty to custody, control, rearing and discipline, the concept of emancipation (whether designated by that term or not) to be applied should be the one relevant to that particular dual right-duty. Thus, merely permitting a child to work outside the home and keep his wages for himself while still living in the home and a member of the parent's household should not be enough, except where the parent is the employer and then only within the limits of that relation. But where for some reason discipline has already lapsed or has been relinquished to an extent that in fact it is permanently lost or impaired or the custody of the child is not with the parent at the time of injury the child should have a right to maintain an action even though custody may later be resumed by or restored to the parent. Thus it may be that emancipation in the case of children approaching majority is more properly to be found than in the case of younger children. However the cases are in much confusion.

In *Crosby v. Crosby*,<sup>178</sup> an action by a mother against a nineteen year old child for automobile injuries, it was held that a complaint alleging that the child was permitted to work for a third person, earned an amount in excess of his living expenses, and was allowed to use any surplus as he saw fit, sufficiently alleged emancipation. But in *Thompson v. Thompson*,<sup>179</sup> another case of an action by a mother against a seventeen year old child, evidence of such facts was held insufficient to show emancipation, the court saying: "It appears to be the general rule that before a suit of this sort can be maintained there

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177. See McCurdy, *Relinquishment by Parent of Right to Minor Child's Services and Earnings*, 15 BOSTON BAR ASS'N BULL, 49 (1944).

178. 230 App. Div. 651, 248 N.Y.S. 384 (1930) (31 COLUM. L. REV. 507; 16 CORNELL L.Q. 386). See also, *Fowles v. Ray-O-Vac. Co.*, 53 Ga. App. 338, 183 S.E. 210 (1935).

179. 264 S.W.2d 667 (Ky. 1954). See also, *Parker v. Parker*, 230 S.C. 49, 94 S.E.2d 12 (1956).

must be emancipation in the primary sense of complete severance of the filial tie, and an entire surrender of care and custody of the child, as well as renunciation of parental duties. Emancipation limited to renunciation of the parent's right to the child's services and earnings is not sufficient." It was, however, unnecessary to include "severance of the filial tie" and "renunciation of parental duties," which cannot legally be accomplished by mere unilateral act or agreement however much it may be in fact. However, it would seem that the conclusion reached is correct on the narrower concept when the question is one of maintaining an action for tort. As was said in *Perkins v. Robertson*,<sup>180</sup> "The fact that a minor is permitted to keep and spend his earnings for odd jobs done after school or in summer vacation does not establish his emancipation, . . . and the qualified independence allowed to both minors in this case seems to be about the same as that granted to the older 'teenagers' in the average American home today. Certainly there is nothing in the complaint showing a complete termination of the parental rights with respect to the control of minors, or indicating that either child 'did not occupy a subordinate position in the family unit'."<sup>181</sup>

When additional facts are added that the child, gainfully employed, has left school but lives at home, paying board, the cases are again in conflict. Some cases have regarded this as sufficient emancipation.<sup>182</sup> But in *Detwiler v. Detwiler*<sup>183</sup> it was said that the child is still subject to parental discipline and not emancipated since emancipation requires "total severance of parental tie." Again the conclusion may be correct, but the statement too broad.

In *DeLay v. DeLay*<sup>184</sup> it was held that a child living with a relative since the death of the mother and not supported by the father, but who visited the father from time to time, and was negligently injured while on a visit had not been emancipated. Again the conclusion may be correct if during the visits the father had the right to exercise disciplinary control.

Enlistment in the armed forces has been regarded as emancipation by operation of law at least for the duration of the enlistment.<sup>185</sup>

180. 140 Cal. App. 536, 295 P.2d 972 (1956).

181. Citing *Martinez v. Southern Pac. Co.*, 45 Cal. 2d 244, 288 P.2d 868 (1955).

182. *Wurth v. Wurth*, 322 S.W.2d 745 (Mo. 1959), reversing 313 S.W.2d 161 (Mo. Ct. App. 1958); *Groh v. Krahn, Inc.*, 223 Wis. 662, 271 N.W. 374 (1937). But cf., *Turner v. Carter*, 169 Tenn. 553, 89 S.W.2d 751 (1936). See also *Fowles v. Ray-O-Vac. Co.*, 53 Ga. App. 338, 183 S.E. 210 (1935).

183. 162 Pa. Super. 383, 57 A.2d 426 (1948) (9 U. PRRT. L. REV. 310).

184. 337 P.2d 1057 (Wash. 1959).

185. *Peters v. Industrial Comm.*, 314 Ill. 560, 145 N.E. 629 (1924) (20 ILL. L. REV. 25); *Glover v. Glover*, 319 S.W.2d 238 (Tenn. App. 1958); *Swenson v. Swenson*, 241 Mo. App. 21, 227 S.W.2d 103 (1950).

Here not only are the parent's right to custody and discipline suspended and his duty to support as well, but they have been for the time being supplanted by another relationship under authority of law that is inconsistent with the parental rights-duties in question. In *Wadon v. United Nat. Indem. Co.*,<sup>186</sup> where it appeared that a twenty year old daughter had left home to enter a convent and thereafter had returned, it was held a question for the jury. In *Parks v. Parks*,<sup>187</sup> where a young child had been so badly injured by negligent operation of an automobile in which she was a passenger that it was contended that she would be required to remain in an institution for life, it was held no emancipation, since emancipation requires release from legal subjection to the parent. While the reason may be sound, it would be sufficient to say that she was not an emancipated child at the time of the accident.

For the purpose of deciding whether a child was an emancipated child when injured so as to be able to maintain a personal injury tort action against the parent (or vice versa) the question should be whether at that time the parent had relinquished or been lawfully deprived of custody or of parental discipline and control, and not simply whether he had relinquished to some extent his right to the child's services or earnings. Whether the parent is or is not supporting the child should be of importance only in its bearing upon the determination of the above facts. It is not necessary to go further in applying the term emancipation.

Emancipation focuses attention sharply on the true reason for the general rule denying personal injury tort actions between parent and minor child.

### VIII.

Although in the matters of wilful injury,<sup>188</sup> of liability of defendant's employer,<sup>189</sup> of insurance against business risk,<sup>190</sup> and more broadly of vocational or business non-parental capacity<sup>191</sup> some exceptions have been made by some courts since 1930 to the approach to personal injury torts between parent and unemancipated minor child established by the earlier *Hewlett*,<sup>192</sup> *McKclvey*,<sup>193</sup> and *Roller*<sup>194</sup> cases, it is still the general view that such actions cannot be maintained.

186. 274 Wis. 383, 80 N.W.2d 262 (1957).

187. 390 Pa. 287, 135 A.2d 65 (1957) (19 U. PITT. L. REV. 681; 31 TEMP. L.Q. 233; 3 VILL. L. REV. 577; 35 U. DET. L. REV. 528).

188. *Supra* at 531.

189. *Supra* at 550.

190. *Supra* at 542.

191. *Supra* at 542.

192. *Supra* note 39.

193. *Supra* note 40.

194. *Supra* note 41.

The reasons given have tended to crystallize into two: protection of domestic tranquillity, and non-interference with the exercise and performance of parental rights and duties. The first should be discarded;<sup>195</sup> the second has merit if properly confined and applied.

Not all conduct that would be tortious on general principles should be so regarded if occurring between parent and child. Physical contact is not necessarily to be viewed in the same way as that between others, and the conduct of the home may require recognition of a different quantum of care. Moreover, the parent has functions, rights, and duties conferred and imposed by law, in the exercise and performance of which there must be a privileged discretion; only their abuse would be wrongful.<sup>196</sup>

In the matter of "true torts" should this privilege be absolute or qualified? In the criminal law and in proceedings for the deprivation of custody for misconduct the privilege is qualified. In tort actions for personal injury the privilege is by the weight of authority absolute.<sup>197</sup>

Apart from a difference in the standard or amount of care required, the conduct of the home has also been regarded as within the scope of the parental right-duty. Conduct in activities outside the home is more remote, except as a particular incident involves parental discipline. Within which of these categories should come operation of the family car?

The impact of the automobile upon the economy, including family life, and the wide-spread use of liability insurance require a change in attitude, in this respect at least, toward the question of the inter-parent-child personal injury tort action. If precluding such action is to be adhered to in all cases or as a general rule, a specific solution of automobile injury redress is badly needed. Making exceptions for wilful injuries and extending the concept of what constitutes a wilful

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195. See 2 VILL. L. REV. 470-471 (1957); 4 VILL. L. REV. 336-337 (1959); 43 HARV. L. REV. 1052, 1067, 1074-1076 (1930). It is not always clear what it is that is thought to disturb domestic harmony: the conduct of the injuring parent (or spouse); the existence of an action; the bringing of the action; or confrontation as adversaries in court. Moreover, there are many inconsistencies in application. Protection of domestic harmony does not preclude property actions, nor personal injury actions if the child is an adult or emancipated minor at the time of the injury. In a substantial number of states personal injury tort actions can be maintained between spouses, and yet in these states cannot be maintained between parent and child although the type of conduct involved be the same. In many states exceptional categories in the parent-child situation have developed, and yet in those states the general principle adverse to permitting a personal injury tort action is still adhered to, and often with safeguarding domestic harmony given as a reason. Finally, tort actions between minor brothers or sisters are not precluded and may be maintained.

196. See 43 HARV. L. REV. 1077-1078 (1930).

197. *Ibid.* 1079.



injury to the operation of an automobile not used for inflicting intentional injury not only may be uneven in application but may be objected to as a logical fiction. The distinction between parental and business or vocational capacity is necessarily of limited utility, although it may be logical. And the application of emancipation is in much confusion.<sup>198</sup> The solution can be found in providing for insurance coverage, compulsory or consensual, for quasi-liability, which means a provision for the specific type of risk irrespective of legal liability (but unlike accident insurance) for situations where the insured would be subject to legal liability were it not for the parent-child relationship.<sup>199</sup>

Possible lack of sufficient parental assets may make an insurance solution still of importance, but aside from this it would seem that a fundamental need is to provide by statute for protection of the minor child, and also of the disabled child, in the event of the parent's death, by empowering probate judges to make orders, during minority and without limit of time in the case of the disabled, for such maintenance as might be necessary and reasonable,<sup>200</sup> thus controlling the exercise of the power of disinheritance or the operation of intestacy law.<sup>201</sup> As long as the parent is alive it may be expected that he will care for the needs of the child, and methods of enforcing this duty are provided by law. If the child were also to be assured necessary and reasonable protection after his parent's death, assuming parental assets, some of the pressure for the personal injury tort action would be lacking, and resort might not be necessary to a litigation (which, however futile in the past, appellate cases would indicate has nevertheless increased in volume) that has been regarded by courts as unseemly.<sup>202</sup>

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198. *Supra* at 556.

199. *Supra* at 549. Also relevant to spouses where inter-spousal action cannot be maintained.

200. *Supra* note 33.

201. *Supra* note 22.

202. That a minor, or a mentally or physically disabled child can be disinherited, or insufficient provision be made for necessary support, by his parent or by the operation of the intestacy laws may also be unseemly. See *Rice v. Andrews*, 127 Misc. 826, 217 N.Y.S. 28 (1926) (25 MICH. L. REV. 555; 2 VA. L. REC. (NS) 702; 36 YALE L.J. 424).