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Torts - Parental Immunity - Abolished with Exceptions

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TORTS — PARENTAL IMMUNITY —ABOLISHED WITH EXCEPTIONS — Plaintiff, a foster son,[1] twelve years of age, brought an action against his foster father and foster father's insurer, which had issued a farmer's liability and medical payments policy, for injuries sustained while riding on the drawbar of a tractor operated by the foster father The Wisconsin Supreme Court *held*[2] that the foster father was not relieved from liability under the parental-immunity rule, that the parental-immunity rule in negligence cases is abrogated with two exceptions,[3] and that the insurer was not liable under the policy *Goller v White*, 122 N.W.2d 193 (Wis. 1963)

Without the aid of English precedent there has emerged in America a doctrine prohibiting the maintenance of actions, for civil redress for tort liability, by an unemancipated minor against a parent. The doctrine of parental-immunity had its beginning in an early Mississippi case[4] where the court reasoned, without the aid of any authority, that society's interest in harmonious family relationships was too great to permit such redress. Although strangely unprecedented, this early decision has been followed unwaveringly by succeeding courts applying similar public policy considerations to deny recovery [5] In cases denying the right to recover, the true theory seems to be that of disability to sue the parent rather than the absence of a violated duty [6] The inconsistency of this theory with the fundamental maxim that "there is no wrong without a remedy" is readily apparent.

The parental-immunity rule in negligence cases has created hostility in some of the courts and this is exemplified

1. Goller v. White, 122 N.W.2d 193, 195 (Wis. 1963). The court accepted the trial court's determination that plaintiff was a member of defendant foster father's family by quoting from the trial court's memorandum opinion.

2. *Id.* at 198. Although concurring in the result, Chief Justice Brown felt the relationship of the parties did not raise the question of parental-immunity.

3. *Ibid.* "(1) where the alleged negligent act involves an exercise of parental authority over the child and (2) where the alleged negligent act involves an exercise of ordinary parental discretion with respect to the provision of food, clothing, housing, medical and dental services, and other care."

4. Hewellette v. George, 68 Miss. 703, 9 So. 885 (1891).

5. *E.g.*, Bulloch v. Bulloch, 45 Ga. App. 1, 163 S.E. 708 (1932). (Family property should not be appropriated by one minor child to the detriment of other family members.) Small v. Morrison, 185 N.C. 577, 118 S.E. 12 (1923) (Subjecting parent to uncontrolled suits would be subversive of discipline.) Parks v. Parks, 390 Pa. 287, 135 A.2d 65 (1957) (danger of fraud and collusion where insurance is involved) Roller v. Roller, 37 Wash. 242, 79 Pac. 788 (1905) (because father might become heir to very property taken from him).

6. Ennis v. Truhitte, 306 S.W.2d 549 (Mo. 1957).

by exceptions which have been carved out of it. In *Brennecke v Kilpatrick*,[7] a Missouri court recently held that the parental-immunity rule was not applicable in a suit by a child against the personal representative of the deceased parent. The rationale seemingly is that the death terminated the family relationship the existence of which was an essential element in contemplation of the doctrine. Similar reasoning was applied in a recent case permitting an action for wrongful death against the parent by the child's administrator.[8] Another exception has permitted the action where the parents' act constitutes wilful or wanton misconduct.[9] Parental-immunity has also been circumvented where there existed a relationship in addition to that of parent and child; such as master-servant[10] or carrier-passenger.[11] A parent's engagement in his vocational capacity at the time of the negligent act[12] and the existence of insurance[13] have also caused departures from the rule.

At least one jurisdiction has refused the immunity to an adoptive parent as distinguished from a natural parent.[14] Most noteworthy, and certainly most recent, is the exception made in our principal case,[15] that of recovery to a minor for injury caused by the simple negligence of his parent. Other circumstances[16] which emerged as early exceptions to

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7. 336 S.W.2d 68 (Mo. 1960). *Accord* Paicsey v. Tepper, 71 N.J. Super. 294, 176 A.2d 818 (1962).

8. Harlan Nat'l Bank v. Gross, 346 S.W.2d 482 (Ky 1961). *Contra* Harralson v. Thomas, 269 S.W.2d 276 (Ky 1954)

9. Emery v. Emery, 45 Cal. 2d 421, 289 P.2d 218 (1955) See Harbin v. Harbin, 218 N.Y.S.2d 308 (N.Y. 1961), *aff'd* 16 A.D.2d 696, 227 N.Y.S.2d 1023 (1961). *Contra* Roller v. Roller, 37 Wash. 242, 79 Pac. 788 (1905).

10. Dunlap v. Dunlap, 84 N.H. 352, 150 Atl. 905 (1930) (for injuries sustained by minor in course of employment with father).

11. Worrell v. Worrell, 174 Va. 11, 4 S.E.2d 343 (1939) (action against father for negligence of employee) Lusk v Lusk. 113 W Va. 17, 166 S.E. 538 (1932) (defendant parent owned and operated the school bus in which plaintiff rode to school).

12. Trevarton v. Trevarton, 378 P.2d 640 (Colo. 1963) Signs v. Signs, 156 Ohio St. 566, 103 N.E.2d 743 (1952) Borst v. Borst, 41 Wash. 2d 642, 251 P.2d 149 (1952).

13. *Supra* notes 10 and 11. In these cases presence of insurance was a factor relied upon by the court. *Contra,* Hastings v. Hastings, 33 N.J. 247, 163 A.2d 147 (1960).

14. Brown v. Cole, 198 Ark. 417, 129 S.W.2d 245 (1939). *Accord* Burdick v. Nawrocki, 21 Conn. Sup. 272, 154 A.2d 242 (1959). Here the step-father was not immune from suit.

15. *Supra* note 1. The insurance coverage issue, present in this case, was resolved against the plaintiff indicating the court did not rely upon it in arriving at their decision. *Contra,* Heyman v. Gordon, 40 N.J. 52, 190 A.2d 670 (1963).

16. Gillett v. Gillett, 168 Cal. App. 2d 102, 335 P.2d 736 (1959) Steber v. Norris, 188 Wis. 366, 206 N.W 173 (1925) (unreasonable chastisement by parent) Clasen v. Pruhs, 69 Neb. 278, 95 N.W 640 (1903) (failure of parent to provide necessaries) Murphy v. Murphy, 206 Misc. 228, 133 N.Y.S.2d 796 (1954) (emancipated minor child).

parental-immunity are now generally accepted, and as such, less noteworthy

Two of the pillar decisions[17] of parental-immunity best demonstrate the shocking injustice of which the rule is capable. The accomplishment of our principal case in putting this harsh, archaic doctrine to flight is of two-fold significance. One, it exceeded all prior exceptions by permitting recovery for simple negligence. Two, it leaves the parent protected from suit by his child only to the extent necessary for him to properly perform his parental function[18] as outlined by our accepted social standards.

There are no reported North Dakota cases on this subject. It is submitted that the approach taken by the Wisconsin court is just and realistic. North Dakota could well heed the example set by the Wisconsin decision but spare themselves, by legislative enactment, the construction problems which may confront this judge-made law

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HABEAS CORPUS — EXHAUSTION OF REMEDIES — FAILURE TO APPEAL AS A BAR TO FEDERAL HABEAS CORPUS FOR STATE PRISONERS — The petitioner was convicted of murder in 1942. He failed to appeal for fear of receiving a death sentence upon retrial and reconviction. The Federal District Court denied habeas corpus despite the state's admission that a coerced confession was the sole basis for conviction. The Circuit Court reversed and the Supreme Court affirmed. The Court *held*, three Justices dissenting: (1) that the adequate ground rule[1] as applied to direct review of state decisions does not apply to habeas corpus, (2) that the statutory requirement of exhaustion of remedies[2] applies only to those

17. *Supra* note 4. (denied recovery to a child wrongfully imprisoned in an insane asylum by a parent) Roller v. Roller, *supra* note 5. (recovery of damages was refused a daughter who had been raped by her father).
18. *Supra* note 3.

1. The Supreme Court will not review a state decision wherein, upon correcting its view of federal law, the same result would be reached on a basis of the state law also involved, for in such a case review would amount to no more than an advisory opinion. Herb v. Pitcairn, 324 U.S. 117 (1945) Murdock v. Memphis, 87 U.S. 429 (1874).

2. 28 U.S.C. Sec. 2254 "An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgement of a State court shall not be