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Tort - Parent and Child - Child's Right to Sue Parent

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The Uniform Contribution Among Joint Tortfeasors Act, adopted in nine states,[11] also reverses the common law rule.[12] The basic purpose of the Act is to achieve a "sharing of common responsibility according to equity and natural justice".[13] The Act does not create new liability in tort, but merely creates the right to contribution among those already liable. Recourse is now allowed by the injured party against the tortfeasors remaining after the release for their pro-rata shares,[15] unless said tortfeasors were specifically discharged.[16]

Whether a release of one joint tortfeasor would release all in North Dakota has not been decided by the courts. Inasmuch as the Act was designed to reverse the common law rule,[17] the adoption of the Act by the Legislature[18] would indicate that release of all tortfeasors would require a release specifically stating the same. A release in the general terms used in this case would appear not to come within the spirit and letter of the Act.

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TORT—PARENT AND CHILD—CHILD'S RIGHT TO SUE PARENT—An unemancipated minor child brought an action against her father for personal injuries sustained by his simple negligence in the driving of an automobile in which the child was a passenger. The Superior Court granted the father's motion for a summary judgement and the plaintiff appealed. The appeal was certified to the Supreme Court. The Court, in a split decision, invoked the parental immunity doctrine. It *held* that an unemancipated minor child could no maintain a cause of action against her father. Proceeding further, the Court held that even though the father had an automobile liability policy obligating his insurer to pay all sums for which he was legally responsible, the suit could not be maintained. The three dissenting justices, advocating the general harshness and injustice of the rule, prayed for its overthrow. *Hastings v. Hastings,* 163 A.2d 147 (N.J. 1960).

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11. Arkansas, Delaware, Hawaii, Maryland, New Mexico, North Dakota, Pennsylvania, Rhode Island, and South Dakota.
12. Ginoza v. Takai, 40 Hawaii 691 (1955); Hackett v. Hyson, 72 R.I. 132, 48 A.2d 353 (1946).
13. Judson v. Peoples Branch and Trust Co., 17 N.J. 67, 110 A.2d 24 (1954).
14. Steger v. Egyud, 219 Md. 331, 149 A.2d 762 (1959).
15. Daugherty v. Herskberger, 386 Pa. 367, 126 A.2d 730 (1956).
16. Hilbert v. Roth, 395 Pa. 270, 273, 149 A.2d 648, 651 (1959) (dictum).
17. Hackett v. Hyson, 72 R.I. 132, 48 A.2d 353 (1946).
18. N.D. Cent. Code § 32-38-04 (1961).

The parental immunity doctrine in this country evolved from the 1891 decision in *Hewellette v. George.*[1] The court felt that to allow an unemancipated minor child to maintain an action against one of his parents would seriously disturb the family relationship, and would be contrary to public policy. The case limited the redress by a minor child to the protection of the criminal law.[2] The restraint upon remedy is commonly imposed to protect the family control and harmony.[3] The general rule though, allows recovery for wilful and wanton misconduct, as such is considered to destroy the parental relationship.[4]

Through the years, the courts have buttressed their conclusion of non-recovery with a variety of explanations. Denial of relief has been justified upon the following grounds: (1) danger of fraud and collusion if insurance is involved;[5] (2) the possibility of succession;[6] and (3) the depletion of the family estate.[7]

Although no cases could be found allowing recovery for simple negligence standing alone, the courts have considered various extenuating factors which limit the general rule and considerably weaken it. In the landmark case of *Dunlop v. Dunlop,*[8] the presence of automobile liability insurance was emphasized as one of two alternative grounds upon which to allow a child to recover against a parent. The court felt that the reason for the rule was abrogated by the existence of insurance.[9] Critics of this position may reply that this is a raid on the insurance companies, but the insurer can specifically exclude this type of liability by inserting a limiting clause in the policies.[10] Also, it is submitted, they can be compensated for the additional risk by charging higher premiums. Although the likelihood of

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1. 68 Miss. 703, 9 So. 885, 13 L.R.A. 682 (1891).
2. Hewellette v. George, **supra** note 1; Wich v. Wich, 192 Wis. 260, 212 N.W. 787 (1927).
3. Roller v. Roller, 37 Wash. 242, 79 Pac. 788 (1905); Wich v. Wich, 192 Wis. 260, 212 N.W. 787 (1927). There is a strong dissent in this case.
4. Wright v. Wright, 85 Ga. App. 721, 70 S.E.2d 152 (1952); Nudd v. Matsoukas, 1 Ill. 2d 608, 131 N.E.2d 525 (1956); Henderson v. Henderson, 169 N.Y.S.2d 106 (1958); Cowgill v. Broock, 189 Ore. 282, 218 P.2d 445 (1950). **Contra:** Roller v. Roller, 37 Wash. 242, 79 Pac. 788 (1905).
5. Parks v. Parks, 390 Pa. 287, 135 A.2d 65 (1957).
6. Roller v. Roller, 37 Wash. 242, 79 Pac. 788 (1905). The parent could benefit from his own wrongdoing if the child predeceased him, that is, he would recover back under the intestate laws.
7. **Ibid.** The family estate would be depleted since one member would benefit to the detriment of the rest of the family.
8. Dunlap v. Dunlap, 84 N.H. 352, 150 Atl. 905, 71 A.L.R. 1055 (1930). The other reason for granting recovery was the employment of the son by his father, a theory followed by Signs and Signs, 156 Ohio St. 566, 103 N.E.2d 743 (1952).
9. Dunlap v. Dunlap, **supra.** p. 912.
10. Signs v. Signs, 156 Ohio St. 566, 103 N.E.2d 743 (1952) (distum).

family disharmony would be avoided in cases involving insurance, the possibility of collusion in such cases has been considered by some courts as a factor in the refusal to alter the general rule.[11] Nevertheless, it is argued, minors have always been permitted to sue their parents in matters affecting property and contract rights.[12] The possibility of fraud would seem to be no greater in those instances, and as stated in some cases, they would do just as much to disturb the domestic tranquillity and deplete the family estate as would personal injury suits.[13] If the legislative branch of the government should be of the opinion that the danger of collusion outweighs the right of redress, it could abolish that right by legislative enactment.[14]

It is noteworthy that certain jurisdictions have held that the doctrine of parental immunity does not extend to a stepfather standing in *loco parentis*.[15] It is submitted that the parental immunity doctrine, in its "strict sense,"[16] should also not be extended to the blood parent and child.

North Dakota has no case law dealing with the immunity doctrine. In this writer's opinion, the legislature and court's of this state should bring the law into conformity with present day standards of wisdom and justice, by taking a liberal approach to the doctrine. It is a maxim of common law that there is no wrong without a remedy. Therefore, the child should be allowed recovery.

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11. Luster v. Luster, 299 Mass. 480, 13 N.E.2d 438, 440 (1938); Parks v. Parks, 390 Pa. 287, 135 A.2d 65, 73 (1957).
12. Dunlap v. Dunlap, 84 N.H. 352, 150 Atl. 905, 71 A.L.R. 1055 (1930); Signs v. Signs, 156 Ohio St. 566, 103 N.E.2d 743, 747 (1952); Worrell v. Worrell, 174 Va. 11, 4 S.E.2d 343, 345 (1939); Borst v. Borst, 41 Wash. 2d 642, 251 P.2d 149, 153 (1952); Lusk v. Lusk, 113 W. Va. 17, 166 S.E. 538, 539 (1932).
13. Cowgill v. Broock, 189 Ore. 282, 218 P.2d 445, 452 (1950); Borst v. Borst, 41 Wash. 2d 642, 251 P.2d 149, 153 (1952).
14. Signs v. Signs, 156 Ohio St. 566, 103 N.E.2d 743, 748 (1952).
15. Burdick v. Nawroki, 21 Conn. Sup. 272, 154 A.2d 242 (1960).
16. By "strict sense" is meant absolutely no immunity. However, abolition of all parental immunity would be precipitant, for there are situations where parental authority should be protected, for instance a father's right to spank his child. Refusing to allow recovery in such cases will work no undue hardship on the child.