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Parental Immunity- Automobile Negligence

Parental Immunity—AUTOMOBILE NEGLIGENCE—*France v. A.P.A. Transport Corp.*

An action between a parent and his minor child was not prohibited at common law.[1] In fact, the child was allowed redress in matters concerning his property.[2] However, no action in tort for personal injuries was ever recorded.[3]

When the issue first appeared in an American jurisdiction,[4] recovery was denied for reasons of public policy.[5] On the basis of that one decision, other courts erroneously presumed the immunity to be a "common law rule" [6] and refused to draw a line of demarcation even when an extreme factual situation was presented.[7] The resulting American rule of parent-child immunity for personal injury torts has been followed in the great majority of states,[8] particularly in situations involving only ordinary negli-

[1] *See, e.g.*, Dunlap v. Dunlap, 84 N.H. 352, 150 A. 905 (1930). "The right of a child to bring an action against his parent in respect to the latter's dealings wih his personal property is unquestioned;" and although a tort action is not clearly authorized "there is no rule of common law to prevent such action being brought." W. EVERSLEY, DOMESTIC RELATIONS 554 (6th ed. 1951).

[2] *See, e.g.*, Alston v. Alston, 34 Ala. 15 (1859); Walker v. Crowder, 37 N.C. 478 (1843); Hall v. Hall, 44 N.H. 293 (1862); Ayer v. Ayer, 41 Vt. 302 (1868); W. PROSSER, HANDBOOK OF THE LAW OF TORTS 886 (3d ed. 1964).

[3] Annot., 19 A.L.R.2d 423, 425 n.1 (1951).

[4] Early cases in America indicated that the parent was subject to some personal injury tort liability. *See* Gould v. Christianson, 10 F. Cas. 857 (No. 5636) (C.C.S.D.N.Y. 1836); Nelson v. Johansen, 18 Neb. 180, 24 N.W. 730 (1885); Lander v. Seaver, 32 Vt. 114, 76 Am. Dec. 156 (1859); McCurdy, *Torts Between Persons in Domestic Relation*, 43 HARV. L. REV. 1030, 1062 (1930).

[5] Citing no authority, the Mississippi court denied an action by an unemancipated minor child against her mother for alleged malicious confinement in an insane asylum for eleven days. *See* Hewlett v. George, 68 Miss. 703, 9 So. 885 (1891).

[6] *See, e.g.*, Matarese v. Matarese, 47 R.I. 131, 131 A. 198 (1925); Kelly v. Kelly, 158 S.C. 517, 155 S.E. 888 (1930); McKelvey v. McKelvey, 111 Tenn. 388, 77 S.W. 664 (1903).

[7] A fifteen year old girl was denied recovery against her father who had been convicted and sentenced for raping her. *See* Roller v. Roller, 37 Wash. 242, 79 P. 788 (1905). The court explained that "if it be once established that a child has a right to sue a parent for a tort, there is no practical line of demarkation [*sic*] which can be drawn . . . ." *Id.* at 789.

Although no modern court would treat parental immunity as an absolute rule, the influence of *Roller* may still be detected in some jurisdictions. *See, e.g.*, Gunn v. Rollings, 250 S.C. 302, 157 S.E.2d 590 (1967) (action denied where parent was willful and reckless).

[8] *See generally* McCurdy, *Torts Between Parent and Child*, 5 VILL. L. REV. 521 (1960); Annot., 19 A.L.R.2d 423 (1951).

gence.[9] However, a recent trend has been to confine parental immunity to those activities strictly parental in the narrow sense.[10]

In *France v. A. P. A. Transport Corp.*[11] the New Jersey Supreme Court abandoned the parental immunity rule in automobile negligence cases.[12] A collision between an automobile driven by Carrol E. France, Jr. and a truck owned by A. P. A. Transport Corporation resulted in injuries to France's two unemancipated minor children, who were passengers in his car. The children sued A. P. A. Transport Corporation for personal injuries and the defendant filed a counterclaim for contribution against the children's father. The court held that the counterclaim was not barred by the parent-child relationship because the reasons for immunity are no longer present in automobile negligence cases.

The courts have recognized various reasons for parental immunity. The argument considered most substantial has been that such actions disrupt family peace and harmony.[13] The *France* court, no longer convinced by this

[9] *See, e.g.*, Dennis v. Walker, 284 F. Supp. 413 (D.D.C. 1968); Begley v. Kohl and Madden Printing Ink Co., 157 Conn. 445, 254 A.2d 907 (1969); Rickard v. Rickard, 203 So. 2d 7 (Fla. Dist. Ct. App. 1967); Barlow v. Iblings, 156 N.W.2d 105 (Iowa 1968); Baker v. Baker, 364 Mo. 453, 263 S.W.2d 29 (1953); Small v. Morrison, 185 N.C. 577, 118 S.E. 12 (1923); Parks v. Parks, 390 Pa. 287, 135 A.2d 65 (1957); Groves v. Groves, 158 S.E.2d 710 (W. Va. 1968).

[10] *See* Davis v. Smith, 126 F. Supp. 497 (E.D. Pa. 1954), *aff'd*, 253 F.2d 286 (3d Cir. 1958).

Accordingly, Wisconsin has abrogated parent-child immunity except in two situations: "(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." Goller v. White, 20 Wis. 2d 402, 122 N.W.2d 193, 198 (1963); *accord*, Silesky v. Kelman, 281 Minn. 431, 161 N.W.2d 631 (1968).

Other jurisdictions have allowed recovery for negligent conduct but have limited the decision to the case at bar, declaring that each case must be decided on its own peculiar facts. *See, e.g.*, Hebel v. Hebel, 435 P.2d 8 (Alaska 1967) (auto negligence); Streenz v. Streenz, 471 P.2d 282 (Ariz. 1970) (auto negligence). The practical effect is probably total abrogation. *Id.* at 286 (dissenting opinion).

Only three states have expressly abrogated the immunity in toto. *See* Petersen v. Honolulu, 462 P.2d 1007 (Hawaii 1969); Tamashiro v. De Gama, 51 Hawaii 74, 450 P.2d 998 (1969); Briere v. Briere, 107 N.H. 432, 224 A.2d 588 (1966); Gelbman v. Gelbman, 23 N.Y.2d 434, 245 N.E.2d 192, 297 N.Y.S.2d 529 (1969).

[11] 56 N.J. 500, 267 A.2d 490 (1970).

[12] The *France* decision overruled a line of New Jersey cases which had upheld the immunity. However, the change is not so surprising in light of the fact that the Supreme Court had been split 4-3 on the issue since 1960. *See* Franco v. Davis, 51 N.J. 237, 239 A.2d 1 (1968); Heyman v. Gordon, 40 N.J. 52, 190 A.2d 670 (1963); Hastings v. Hastings, 33 N.J. 247, 163 A.2d 147 (1960).

[13] This argument has been employed since the earliest disposition of the issue. *See*

argument, maintained that "the widespread use of liability insurance has militated against the possibility that such suits will disrupt the domestic peace. . . ." [14] In a similar manner the court disposed of the argument that the action allows depletion of the family exchequer in favor of the injured child.[15] According to recent cases, the advent of liability insurance has occasioned as another reason for immunity the possibility of fraud and collusion.[16] The *France* court considered the collusion argument, which interestingly presumes the antithesis of the family harmony argument,[17] not sufficient in itself to justify immunity.[18]

Some courts have maintained that an action by a child against his parent would undermine parental authority[19] or is analogous to common law interspousal immunity.[20] Other reasons given in support of immunity

Hewlett v. George, 68 Miss. 703, 9 So. 885 (1891). "The peace of society, and of the families composing society, . . . forbid to the minor child a right to appear in court in the assertion of a claim to civil redress for personal injuries suffered at the hands of the parent." *Id.* at 887. For cases echoing this policy, *see* Smith v. Smith, 81 Ind. App. 566, 142 N.E. 128 (1924).

[14] France v. A.P.A. Transport Corp., 56 N.J. 500, 267 A.2d 490, 493 (1970).

The impact of liability insurance on parent-child immunity has been much debated. Some courts, like *France*, have stressed its practical effect on the reasons behind the rule. *See, e.g.*, Briere v. Briere, 107 N.H. 432, 224 A.2d 588 (1966); Worrell v. Worrell, 174 Va. 11, 4 S.E.2d 343 (1939); Lusk v. Lusk, 113 W. Va. 17, 166 S.E. 538 (1932). Other courts have held that the mere existence of liability insurance does not give rise to an action where none was present without it. *See, e.g.*, Signs v. Signs, 156 Ohio St. 566, 103 N.E.2d 743 (1952); Norfolk S.R.R. v. Gretakis, 162 Va. 597, 174 S.E. 841 (1934); Stevens v. Murphy, 69 Wash. 2d 939, 421 P.2d 668 (1966).

[15] *See, e.g.*, Roller v. Roller, 37 Wash. 242, 79 P. 788 (1905). "[I]t would not be the policy of the law to allow the estate, which is to be looked to for the support of all the minor children, to be appropriated by any particular one." *Id.* at 789.

[16] *See, e.g.*, Villaret v. Villaret, 169 F.2d 677 (D.C. Cir. 1948); Luster v. Luster, 299 Mass. 480, 13 N.E.2d 438 (1938); Borst v. Borst, 41 Wash. 2d 642, 251 P.2d 149 (1952).

[17] The arguments are mutually exclusive. In order for there to be a danger that the parent and his child will collude against an insurance company, some degree of harmony must be assumed. *See* Immer v. Risko, 56 N.J. 482, 267 A.2d 481 (1970) (this interspousal decision involves the same policy questions as encountered in parental immunity); Borst v. Borst, 41 Wash. 2d 642, 251 P.2d 149, 154 (1952).

[18] Those courts which have rejected the fraud and collusion argument have emphasized the injustice of denying recovery purely because of family relationship and the adequacy of our judicial system to uncover fraudulent claims. *See, e.g.*, Tamashiro v. De Gama, 51 Hawaii 74, 450 P.2d 998 (1969); Dunlap v. Dunlap, 84 N.H. 352, 150 A. 905 (1930); Cowgill v. Boock, 189 Ore. 282, 218 P.2d 445 (1950); Midkiff v. Midkiff, 201 Va. 829, 113 S.E.2d 875 (1960) (intersibling suit).

[19] *See, e.g.*, Small v. Morrison, 185 N.C. 577, 118 S.E. 12 (1923); Borst v. Borst, 41 Wash. 2d 642, 251 P.2d 149 (1952). *But see* Hebel v. Hebel, 435 P.2d 8 (Alaska 1967).

[20] *See* Mesite v. Kirchstein, 109 Conn. 77, 145 A. 753 (1929); McKelvey v. McKelvey, 111 Tenn. 388, 77 S.W. 664 (1903). *But see* Worrell v. Worrell, 174 Va. 1, 4 S.E.2d

have included the possibility of succession,[21] the sovereign family government concept,[22] and an illogical and unsupported assumption that there must have been immunity at common law since no case has been reported.[23] These arguments have been employed as "makeweights,"[24] and have not been regarded as individually justifying immunity.

Deviation from the rule of parental immunity is nothing new. Frequent departure has been made in areas where special facts have been deemed to remove the reasons for the rule. For example, a minor child, if emancipated, was allowed recovery;[25] or where the parent's conduct was characterized as gross, willful or wanton, an exception was made;[26] or if the child sued the estate of his deceased parent, the immunity was held no longer applicable.[27] Some courts have allowed recovery where the parent was in a vocational capacity[28] or in a master-servant[29] or carrier-passenger[30] relationship with the child.

343 (1939); McCurdy, *Torts Between Persons in Domestic Relation*, 43 HARV. L. REV. 1030, 1074 (1930).

[21] In the event of the child's death, the parent would become heir to the very property wrested from him in such judgement. *See* Roller v. Roller, 37 Wash. 242, 79 P. 788 (1905).

[22] *See* Mesite v. Kirchstein, 109 Conn. 77, 145 A. 753 (1929); Small v. Morrison, 185 N.C. 577, 118 S.E. 12 (1923) (concurring opinion); Matarese v. Matarese, 47 R.I. 131, 131 A. 198 (1925).

However, this conception that the parent, like the king, can do no wrong, is obsolete. *See* Dunlap v. Dunlap, 84 N.H. 352, 150 A. 905 (1930); McCurdy, *Torts Between Persons in Domestic Relation*, 43 HARV. L. REV. 1030, 1076 (1930).

[23] *See, e.g.*, Matarese v. Matarese, 47 R.I. 131, 131 A. 198 (1925); McKelvey v. McKelvey, 111 Tenn. 388, 77 S.W. 664 (1903).

[24] Dunlap v. Dunlap, 84 N.H. 352, 150 A. 905, 909 (1930).

[25] *See, e.g.*, Martinez v. Southern Pac. Co., 45 Cal. 2d 244, 288 P.2d 868 (1955); Wood v. Wood, 135 Conn. 280, 63 A.2d 586 (1948); Wurth v. Wurth, 322 S.W.2d 745 (Mo. 1959); Brumfield v. Brumfield, 194 Va. 577, 74 S.E.2d 170 (1953).

[26] *See, e.g.*, Gillett v. Gillett, 168 Cal. App. 2d 102, 335 P.2d 736 (1959); Nudd v. Matsoukas, 7 Ill. 2d 608, 131 N.E.2d 525 (1956); Treschman v. Treschman, 28 Ind. App. 206, 61 N.E. 961 (1901); Mahnke v. Moore, 197 Md. 61, 77 A.2d 923 (Ct. App. 1951). *But see* Gunn v. Rollings, 250 S.C. 302, 157 S.E.2d 590 (1967); Brumfield v. Brumfield, 194 Va. 577, 74 S.E.2d 170 (1953).

[27] Death of the parent removes the possibility that family harmony would be disturbed by a tort action. *See, e.g.*, Davis v. Smith, 253 F.2d 286 (3d Cir. 1958); Vidmar v. Sigmund, 192 Pa. Super. 355, 162 A.2d 15 (1960). *But see* Gunn v. Rollings, 250 S.C. 302, 157 S.E.2d 590 (1967); Campbell v. Gruttemeyer, 432 S.W.2d 894 (Tenn. 1968).

[28] *See, e.g.*, 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).

[29] *See* Dunlap v. Dunlap, 84 N.H. 352, 150 A. 905 (1930).

[30] *See* Worrell v. Worrell, 174 Va. 11, 4 S.E.2d 343 (1939); Lusk v. Lusk, 113 W. Va. 17, 166 S.E. 538 (1932).

The wisdom of the *France* decision is in its simplicity and restraint. Rather than making nice distinctions which might breed more confusion as to what "parental activities" may encompass,[31] New Jersey has unequivocably placed the operation of an automobile outside those activities,[32] whatever else they may include. Neither did *France* take the course of total abrogation which, it is submitted, may be an overreaction to a need for restricting the immunity to its proper sphere. *France* has dealt parent-child immunity a fatal blow in the area of its most frequent and inappropriate application—automobile negligence. There still remain parental activities in which the child should not be allowed an action for his parent's negligence.[33] With *France,* parental immunity is properly confined to those areas in which it is still justified.

J. W. P. III

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[31] There is little utility in restricting parent-child immunity to "parental activities" without specifically deciding whether the operation of an automobile is such an activity. The failure of courts to decide that basic question has been a shortcoming of the trend in parental immunity and has led to confusion and uncertainty. *See* note 10 *supra.*

Countless situations arise in the operation of an automobile which may or may not be strictly parental activities. Is the parent immune from suit if he drives negligently while taking his child to school, but subject to liability if he is driving to keep his own dental appointment? Frequently, the automobile is being operated for a multiplicity of purposes, only one of which may be "parental" in nature. What is the result in that situation? Authoritative answers can be supplied only by litigation. *See generally* H. CLARKE, THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES 256-60 (1968).

[32] It has been urged previously that the operation of an automobile would require a specific solution in the area of parent-child immunity. *See* Parks v. Parks, 390 Pa. 287, 135 A.2d 65, 81 (1957) (Musmanno, J., dissenting); McCurdy, *Torts Between Parent and Child,* 5 VILL. L. REV. 521, 559 (1960).

[33] Life within the family unit requires frequent interaction of parent and child. To attach tort liability for negligent conduct in all facets of the relationship would be to seriously impede if not defeat its function.

"Liability lurks in every corner of the household." Streenz v. Streenz, 471 P.2d 282, 286 (Ariz. 1970) (dissenting opinion). The examples are infinite: an aspirin bottle is inadvertantly left within the child's reach; water boiling on the stove is left unattended while mother pays the newsboy; a frayed electrical cord is carelessly left unrepaired. *See generally* Dunlap v. Dunlap, 84 N.H. 352, 150 A. 905 (1930); Matarese v. Matarese, 47 R.I. 131, 131 A. 198 (1925).