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Torts- Parent-Child Immunity- Reluctance To Further Abrogate The Immunity Rule

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Although there is no case authority, it is probable that at common law there was no prohibition against a minor child bringing suit against his parent for a personal tort. Indeed, a child could enforce his own choses in action and sue for wrongs to his property. Similarly, in the United States prior to 1891, case law seemed to indicate that there was no parent-child immunity. However, after that date, without citing any common law precedent, three cases laid the basis for the parent-child tort immunity rule by holding a parent not liable for a tort inflicted upon his unemancipated minor child.

In the recent case of Wright v. Wright, the Virginia Supreme Court confronted the issue of whether an unemancipated minor child could maintain a tort action against a parent. The plaintiff in Wright instituted a suit


Although there were no old decisions, the speculation on the matter has been that there is no good reason to think that the English law would not permit actions for personal torts as well, subject always to the parent's privilege to enforce reasonable discipline against the child.

2 Wilton v. Middlesex R. R., 125 Mass. 130 (1878); Donahoe v. Richards, 38 Me. 376 (1854).

3 See Alston v. Alston, 34 Ala. 15 (1859); Preston v. Preston, 102 Conn. 96, 128 A. 292 (1925); Lamb v. Lamb, 146 N.Y. 317, 41 N.E. 26 (1895); Roberts v. Roberts, 145 Eng. Rep. 399 (Ex. 1657). Apparently, a child could sue with regards to his property or his own choses in action because there was no conception of unity of legal identity with the parent. The child remained a separate legal person.


5 Hewellette v. George, 68 Miss. 703, 9 So. 885 (1891) (involving a suit by a minor daughter against her mother for maliciously confining her in an insane asylum); McKelvey v. McKelvey, 111 Tenn. 388, 77 S.W. 664 (1903) (involving a minor child's suit against stepmother and father for cruel and inhuman treatment); Roller v. Roller, 37 Wash. 242, 79 P. 788 (1905) (involving a suit by a 15-year-old daughter against her father for rape).

It should be noted that not only did the above courts cite no common law precedent for withholding from the children a right to sue their parents, but that each of the above cases involved an intentional tort, a tort for which today an unemancipated child can sue his parent. For cases allowing an unemancipated child to sue his parent for an intentionally inflicted injury, see Brown v. Cole, 198 Ark. 417, 129 S.W.2d 245 (1939); Mahnke v. Moore, 197 Md. 61, 77 A.2d 923 (1951).

6 213 Va. 177, 191 S.E.2d 223 (1972).
against her father for personal injuries allegedly caused by her father’s negligence.\(^7\) Plaintiff’s father, a general contractor, maintained a storage shed in a yard adjacent to the family’s residence and had placed several snow-damaged metal awnings with sharp, jagged edges near the shed. The plaintiff, three years old when the accident occurred, fell against the awnings while playing near the shed, severely damaging her left eye. The defendant father alleged that the child could not maintain an action against him because of the doctrine of parental immunity in tort actions.\(^8\)

The doctrine of parent-child tort immunity is generally recognized to have originated with the case of *Hewellette v. George*.*\(^9\)* Disregarding the fact that *Hewellette* cited no authority, other courts seized upon the case, and it became generally accepted that an unemancipated minor child could not maintain a tort action against a parent for injuries negligently inflicted.\(^10\) This immunity doctrine, subsequently expanded to cover intentionally inflicted injuries,\(^11\) including rape\(^12\) and cruel and inhuman treatment,\(^13\) seems to be based, not necessarily on the absence of a violated duty, but rather

\(^7\) *Id.* at 191 S.E.2d at 224.

\(^8\) The defendant father demurred to the plaintiff’s motion for judgment “on the grounds (1) that the child could not maintain this action against him because of the parental immunity doctrine in tort actions . . . .” Plaintiff’s counsel, on argument on demurrer, stated that the father was insured and contended that the parental immunity doctrine either should not be applied under the allegations in the motion for judgment or that the doctrine should be abrogated in its entirety.

The trial court sustained the demurrer. *Id.* at 178, 191 S.E.2d at 224.

\(^9\) 68 Miss. 703, 9 So. 885 (1891).


Even though the immunity rule has been seen as a bar of the unemancipated child’s remedy, there has been a concurrent recognition of parental duties. *Cosmopolitan Nat. Bank v. Heap*, 128 Ill. App. 2d 165, 262 N.E.2d 826 (1970); *Barlow v. Iblings*, 261 Iowa 713, 156 N.W.2d 105 (1968); *Dunlap v. Dunlap*, 84 N.H. 352, 150 A. 905 (1930). In *Trévarton v. Trévarton*, 151 Colo. 418, 378 P.2d 640 (1963), the court found that the parent owed the child a duty of due or reasonable care and that the denial of recovery was being based solely on public policy considerations.


\(^12\) *Roller v. Roller*, 37 Wash. 242, 79 P. 788 (1905).

\(^13\) *McKelvey v. McKelvey*, 111 Tenn. 388, 77 S.W. 664 (1903).
on a disability to sue the parent. Courts have found a variety of reasons, usually based on public policy arguments, for upholding the disability of an emancipated minor child to bring a tort action; however, the main arguments developed for the immunity doctrine are to preserve domestic tranquility and to prevent destruction of or interference with parental discipline and control.

Dissatisfaction with the harshness of the immunity has led some jurisdictions to find exceptions to the doctrine. It has been held that a suit could be maintained if the child was injured in the course of the parent’s business, rather than personal, activity. The courts have also sustained actions where a child has been “emancipated.” Also, if the parent-child relation-


15 One of the first arguments for upholding the immunity doctrine contended that allowing the suit would tend to deplete the family exchequer. Supposedly, if the suit was allowed, one child would take the money which would normally be used for the benefit of the entire family. See Bulloch v. Bulloch, 45 Ga. App. 1, 163 S.E. 708 (1932); Small v. Morrison, 185 N.C. 577, 118 S.E. 12 (1923). Contra, Briere v. Briere, 107 N.H. 432, 224 A.2d 588 (1966); Borst v. Borst, 41 Wash. 2d 642, 251 P.2d 149 (1952).

Another reason for the immunity is that there would be danger of fraud and collusion if the child was allowed to maintain a suit. Barlow v. Iblings, 261 Iowa 713, 156 N.W.2d 105 (1968); Parks v. Parks, 390 Pa. 287, 135 A.2d 65 (1957). But for recent cases criticizing this reason, or arguing that the danger of fraud and collusion is present in all liability insurance cases, see Hebel v. Hebel, 435 P.2d 8 (Alaska 1967); Streenz v. Streenz, 106 Ariz. 86, 471 P.2d 282 (1970); France v. A.P.A. Transp. Corp., 56 N.J. 500, 267 A.2d 490 (1970).

A third reason advanced for the rule is that there is a possibility a parent might inherit and use the proceeds recovered by the child. Thus, if an insurer was involved and, after recovery, the child should die, the negligent parent might receive the funds that were given as a result of his own negligence. See Agustin v. Ortiz, 187 F.2d 496 (1st Cir. 1951); Barlow v. Iblings, 261 Iowa 713, 156 N.W.2d 105 (1968).


19 Trevarton v. Trevarton, 151 Colo. 418, 378 P.2d 640 (1963) (duties relating to father’s business); Dunlap v. Dunlap, 84 N.H. 352, 150 A. 905 (1930) (master-servant relationship); Borst v. Borst, 41 Wash. 2d 642, 251 P.2d 149 (1952) (non-parental transaction); Lusk v. Lusk, 113 W. Va. 17, 166 S.E. 538 (1932) (carrier-passenger relationship). In Worrell v. Worrell, 174 Va. 11, 4 S.E.2d 343 (1939), the Virginia Supreme Court allowed an exception to the immunity rule where a carrier-passenger relationship existed, but the court also had another factor, compulsory liability insurance, to consider in reaching its decision.

20 Weinberg v. Underwood, 101 N.J. Super. 448, 244 A.2d 538 (L.Div. 1968); Fitzgerald v. Valdez, 77 N.M. 769, 427 P.2d 655 (1967); Logan v. Reaves, 209 Tenn. 631,
ship has been terminated by the death of either the parent or the child, or both, or if the personal injuries have been intentionally inflicted, the child or his personal representative has been allowed to maintain a suit. Although one can argue that the immunity rule is probably no different in the case of a step-parent or adoptive parent, certain jurisdictions have allowed an action where the negligence was that of an adoptive parent or a person in loco parentis to the child.

Shortly after 1960 several jurisdictions took a more direct attack against

354 S.W.2d 789 (1962). "Emancipation" has usually occurred when the parent surrenders the right to the child's earnings and services, and to parental control. For a case defining emancipation, see Gillikin v. Burbage, 263 N.C. 317, 139 S.E.2d 753 (1955).


Recovery has also been allowed an unemancipated minor child where his parent has been guilty of "wilful and wanton" or reckless conduct. Emery v. Emery, 45 Cal. 2d 421, 289 P.2d 218 (1955); Wright v. Wright, 85 Ga. App. 721, 70 S.E.2d 152 (1952); Nudd v. Matsoukas, 7 Ill. 2d 608, 131 N.E.2d 523 (1956); Cowgill v. Brock, 189 Or. 282, 218 P.2d 443 (1950).

Though recovery has been allowed in a case involving gross negligence, Rodebaugh v. Grand Trunk W.R.R., 4 Mich. App. 559, 145 N.W.2d 401 (1966), it has also been held that an allegation of gross negligence, even if sustained, would not entitle a child to recovery. Brumfield v. Brumfield, 194 Va. 577, 74 S.E.2d 170 (1953). One should include, when considering earlier Virginia cases such as Brumfield, the recent Virginia case of Smith v. Kauffman, 212 Va. 181, 183 S.E.2d 190 (1971), which held that an unemancipated minor child could recover from his parent for injuries resulting from an automobile accident caused by the parent's negligence.


the parent-child tort immunity. Certain jurisdictions, previously committed to the rule, judicially abolished it; still others, previously not committed, refused to adopt it. The scope of the attack upon the parental immunity has ranged from abrogation of the rule in cases involving an automobile accident, to any case involving negligence except those involving the exercise of parental authority or the exercise of parental discretion in such functions as supplying food, clothing and medical services, to total abrogation in some jurisdictions. To substantiate their positions, courts abrogating the doctrine have noted the comparison with contract

28 The first jurisdictions to start the trend for abrogation of the parent-child immunity rule were: Wisconsin, Goller v. White, 20 Wis. 2d 402, 122 N.W.2d 193 (1963); New Hampshire, Briere v. Briere, 107 N.H. 432, 224 A.2d 588 (1966); North Dakota, Nuelle v. Wells, 154 N.E.2d 364 (N.D. 1967). Also, in Xaphes v. Mossey, 224 F. Supp. 578 (D.C.Vt. 1963), a federal court anticipated Vermont law, having no prior Vermont cases on point, and held that an unemancipated minor child could recover from his stepfather for personal injuries resulting from stepfather's negligent operation of an automobile.


31 See, e.g., Smith v. Kauffman, 212 Va. 181, 183 S.E.2d 190 (1971), although many may consider this an exception to the immunity rule rather than a partial abrogation.


It should be noted for reference in the discussion of the Wright case that under Wisconsin law, supervision of a child's play does not fall into the second exception given in the text under this footnote, where the negligent act involves an exercise of ordinary parental discretion with respect to the provision of food, clothing, and medical services. Lemmen v. Servais, 39 Wis. 2d 75, 158 N.W.2d 341 (1968).


At least one jurisdiction has taken the view that if the parental immunity rule is no longer of any benefit, any change should be made by the legislature. Downs v. Poulin, 216 A.2d 29 (Me. 1966).

Typical of the reasoning behind the abrogation of the immunity is that of the federal district court in Xaphes v. Mossey, 224 F. Supp. 578 (D.C. Vt. 1963), on page 579:

The primary reason asserted to hold that a child cannot sue its parent is that it would tend to disrupt the peace and harmony of the family unit. First, it is difficult to see the application of this argument to the facts in this case [the case involved injuries resulting from an automobile accident]. Secondly, the relationships within the family have undergone many changes within the recent decades. Members of the family are becoming more independent. Insuring oneself against the negligent operation of an automobile is common, and in fact expected. It would seem unusual to deny the protection of such a common thing to those whom the insured would most desire to protect.
and property damage liability, or the lack of a common law rule of immunity.

Parental tort immunity, wherein a parent is not liable to his unemancipated minor child for personal injuries, was first recognized in Virginia in *Norfolk Southern R.R. Co. v. Gretakis.* The first exception in Virginia appeared in *Worrell v. Worrell.* In that case, an unemancipated minor daughter was allowed to sue her father, an operator of a common carrier of passengers, for injuries she suffered in an accident while a passenger in her father’s bus. It should be noted, however, that the bus was operated by an employee of the defendant. Similarly, *Smith v. Kauffman,* decided in 1971, involving personal injuries resulting to an unemancipated minor from an automobile accident caused by the negligence of the driver-father, permitted another exception to the immunity rule. *Wright* is the first case

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Prior to the direct attack on the immunity rule, some courts had already started to recognize liability insurance as a factor in permitting exceptions to the rule. See *Dunlap v. Dunlap,* 84 N.H. 352, 150 A. 905 (1930); *Worrell v. Worrell,* 174 Va. 11, 4 S.E.2d 343 (1939); *Lusk v. Lusk,* 113 W.Va. 17, 166 S.E. 538 (1932). However, most courts argued that merely because the particular defendant-parent was covered by liability insurance, the child could not maintain an action if he could not otherwise have done so. See, e.g., *Rambo v. Rambo,* 195 Ark. 832, 114 S.W.2d 468 (1938); *Baker v. Baker,* 364 Mo. 453, 263 S.W.2d 29 (1953); *Maxey v. Sauls,* 242 S.C. 247, 130 S.E.2d 570 (1963).

Those jurisdictions that today consider insurance argue that the existence of the insurance removes the objection to the action on grounds that the family or finances would be disturbed, *Dean v. Smith,* 106 N.H. 314, 211 A.2d 410 (1965), or that the parental authority would be impaired, *Ruiz v. Clancy,* 182 La. 935, 162 So. 734 (1935).

39 In *Gretakis,* there was a collision between plaintiff’s electric car and defendant’s automobile, which was the result of negligence on the part of both parties. Defendant’s minor daughter, a passenger in defendant’s automobile, sued the plaintiff for personal injuries received, and recovered. Plaintiff then sued defendant for contribution. Defendant demurred, and the demurrer was sustained; on appeal, the Virginia Supreme Court held that the plaintiff was not entitled to recover.

39 In allowing an exception to the parental immunity rule, the court emphasized three elements as influencing its decision: (1) the legislative requirement that the father, as a motor carrier, must provide liability insurance covering his passengers; (2) the fact that the father’s liability was derivative; and (3) the fact that the child was a “passenger” and that the parent-child relationship was purely incidental. *Id.* at 26, 4 S.E.2d at 349.
40 In *Smith* was limited solely to those injuries resulting from an automobile accident.
on the doctrine to be decided by the Virginia Supreme Court since the holding in *Smith*.

In establishing an exception to the immunity rule in *Smith*, the Virginia Supreme Court relied heavily on the high incidence of liability insurance among Virginia automobile owners. The plaintiff in *Wright*, relying on *Smith*, attempted to use the existence of liability insurance by her father to persuade the court to allow her to maintain her action, arguing that the defendant carried in force a liability insurance policy at the time of the accident, and that such policy provided that damages would be paid by the insurer if the defendant negligently injured anyone in the course of his business. However, the plaintiff failed to present evidence of the prevalence in Virginia of the type of insurance that the defendant carried, and hence, failed to place her case within one of the important considerations of the *Smith* case.

A further argument by the plaintiff in *Wright* urged that the injury resulted from the business activities of the parent, which are not within the area of parental discretion, such that the plaintiff should be able to re-


41 In *Smith v. Kaufman* the court stated:

> The very high incidence of liability insurance covering Virginia-based motor vehicles, together with the mandatory uninsured motorist endorsements to insurance policies, has made our rule of parental immunity anachronistic when applied to automobile accident litigation. In such litigation, the rule can be no longer supported as generally calculated to promote the peace and tranquility of the home and the advantageous disposal of the parents' exchequer. A rule adopted for the common good now prejudices the great majority. 212 Va. 181, 185, 183 S.E.2d 190, 194 (1971).

42 Brief for Appellant at 5, *Wright v. Wright*, 213 Va. 177, 191 S.E.2d 223 (1972) (It should be noted that the plaintiff's counsel also argued the fact of the defendant's insurance in his oral arguments before the court). Since insurance was involved, the plaintiff contended that the suit would not be unfriendly and therefore family harmony and domestic tranquility would not be disturbed.

In the appellant's brief, counsel argued that the rule of *Smith*, which can be used "as a guideline for governing when an unemancipated child may sue its parent for personal injuries due to negligence" is:

> In situations other than those arising in an area involving parental discretion, where an unemancipated child is negligently injured by its parent, the child may maintain an action against the parent for personal injuries received, provided the parent has in force, at the time, a policy of liability insurance covering such injuries. *Id.* at 13.

Apparently, the court was not ready to adopt such a wide ranging interpretation of *Smith*.

43 This failure to present evidence concerning the prevalence of the type of insurance that defendant carried was amply pointed out and argued by the defendant's counsel. Brief for Appellee at 8-9, *Wright v. Wright*, 213 Va. 177, 191 S.E.2d 223 (1972).
This argument is a generally accepted exception to the immunity rule, and within the facts of the Worrell case, this exception has been recognized in Virginia. Unfortunately, the plaintiff failed to demonstrate any type of business relationship between the plaintiff and the defendant as existed in Worrell. Holding that the negligence of the defendant in placing the awnings in the yard was not related to his business or vocational capacity, the court noted that the defendant had merely failed to discharge his parental duty to supervise the child and to provide his child with a safe area in which to play. Thus, because the plaintiff's allegations failed to establish a business or vocational relationship, or to place the case within the parameters of the Smith case, the Virginia Supreme Court held that the daughter had no cause of action against her father.

It is submitted that the court's holding in Wright halts any further abrogation of the parental tort immunity doctrine in Virginia. The court may have been overly technical in refusing to allow the plaintiff to maintain her action, because if the reason for the rule no longer applies to automobile accidents, it would seem that the existence of any type of liability insurance in a case would also extinguish the reason for the rule regardless of the area in which the parent's negligence occurs. However, the court's ruling in Wright may not have been strictly limited to the exceptions to the immunity rule as they now stand. The court declared that it was "unwilling to further abrogate the doctrine on the basis of plaintiff's allegations and under the circumstances of this case." However, the court has left open

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44 Brief for Appellant at 9, Wright v. Wright, 213 Va. 177, 191 S.E.2d 223 (1972).
46 See note 39 supra.
47 As was stated by the court:
In the case at bar plaintiff's allegation that the father was negligent in placing the awnings in the yard bespeaks only his failure to discharge the normal parental duty of supervising and providing a safe place for the child to play. Thus the alleged negligence was incident to the parental relationship of the father with his unemancipated child, and not to a business or vocational relationship. Wright v. Wright, 213 Va. 177, 179, 191 S.E.2d 223, 225 (1972).
But as discussed earlier, note 32 supra, at least one jurisdiction has held that supervision of a child's play does not fall into the category of an exercise of ordinary parental discretion.
49 One wonders why there should be a different result when a parent's negligence is covered by different types of liability insurance. If one of the factors for the holdings in Worrell and Smith was the existence of liability insurance on motor vehicles, the existence of insurance should affect the determination of the liability in other negligence situations. Once the reason for the rule no longer exists, the rule should be eliminated in its entirety.
50 213 Va. at 179, 191 S.E.2d at 225.
the possibility in the future that if a plaintiff could place his case in a position analogous to the facts of Smith, it might be persuaded to further abrogate, partially or totally, the immunity rule. However, according to the requirements laid down in Wright, a plaintiff would have to establish clearly that the reasons for the rule would not do justice to the parties.

J.P.W.

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51 The court did not categorically state that it would not abrogate further the immunity rule, but only that under the circumstances of the case and plaintiff’s allegations, it was unwilling to further abrogate the doctrine. This would indicate that if, at the present time, a case could be placed within the reasons and factors for the holding in Smith, recovery might be allowed a minor child other than for injuries resulting from an automobile accident.

52 213 Va. at 179, 191 S.E.2d at 225.