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separate that case from the principal one. The use of paper money has long ceased to be a legal issue, and does not affect the principal case as it did the former one. In addition, cyclic inflation and deflation make the change in monetary value quite foreseeable, thereby further distinguishing the two cases.

Conclusion

While the decision in the principal case may be supported as being equitable in view of the facts involved, it does not suggest the general availability of hardship caused by the decline of the purchasing power of the dollar as a discretionary defense in equity. First, it is not the sole ground on which the decision in the case rests. Second, although the court was liberal in its extension of equitable discretion in this case,²² such liberality as here displayed is open to charges of being arbitrary and capricious, and of going beyond accepted practice, as described above. Finally, if the defense were developed into a consistently applied legal theory it would go a long way toward tying the courts to the administrative agencies which determine price indices.

JOHN M. DRESCHER, JR.

DOMESTIC RELATIONS—RIGHT OF CHILD TO SUE PARENTS FOR AN INTENTIONAL TORT.

Plaintiff, an unemancipated minor child, sued her deceased father's estate for damages (for mental pain and suffering) resulting from the father's killing plaintiff's mother in plaintiff's presence and then a week later committing suicide, also in plaintiff's presence. The child was the illegitimate offspring of the deceased persons.¹ A Maryland appellate court reversing the lower court's sustaining of defendant's demurrer declared:

. . . where 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 disci-

22. Another interesting example of Missouri liberality in the field of hardships is *Rockhill Tennis Club v. Volker*, 331 Mo. 947, 156 S.W.2d 9 (1932), noted in 47 HARV. L. REV. 441 (1933) as the "first case where a court of equity has declared civic beauty of sufficient importance to warrant a denial of specific performance," and one wherein the court had to determine what constituted beauty under the facts of the case.

1. The court gives no consideration to the fact that the child was illegitimate; rather it treats the father as the legitimate parent.

pline should be maintained, cannot logically be applied, for when he is guilty of such acts he forfeits his parental authority and privileges including his immunity from suit.²

The question whether an unemancipated child can maintain an action for personal injuries against his parent is one which, until recently, was easily answered by most courts. These courts proceeded to cite the precedents, which almost unanimously answered the question in the negative,³ and irrespective of the factual situation involved in the case being considered, reached a mechanical result by affirmance of the precedents. The answer to the problem given by the various courts has been subjected to severe criticism by both legal writers and dissenting judges.⁴

Thus the general rule was, and still is for the most part, that an unemancipated minor cannot maintain such an action.⁵ This rule, however, has been subjected to modification by the courts until, in recent cases, there exist at least three exceptions to the general rule, and the trend appears to be to modify it still further.

The three exceptions where recovery has been allowed are: (1) situations in which a parent guilty of actionable negligence has been covered by indemnity liability insurance;⁶ (2) situations in which courts have construed "wrongful death statutes"⁷ as a declaration of public policy on the point and have permitted such an action; and (3) situations in which some courts have taken a more realistic view of the varying fact situations and have differentiated between negligent and intentional conduct,⁸ allowing recovery in the latter instance. Thus, it will be shown

2. *Mahnke v. Moore*, 77 A.2d 923, 926 (Md. App. 1950).

3. *Mesite v. Kirchstein*, 109 Conn. 77, 145 Atl. 753 (1929); *Chastain v. Chastain*, 50 Ga. App. 241, 177 S.E. 828 (1935); *Luster v. Luster*, 299 Mass. 480, 13 N.E.2d 438 (1938); *Taubert v. Taubert*, 103 Minn. 247, 114 N.W. 763 (1908); *Hewellette v. George*, 68 Miss. 703, 9 So. 885 (1891); *Small v. Morrison*, 185 N.C. 577, 188 S.E. 12 (1923); *Damiano v. Damiano*, 6 N.J. Misc. 849, 143 Atl. 3 (Cir. Ct. 1928); *Mannion v. Mannion*, 3 N.J. Misc. 68, 129 Atl. 431 (Cir. Ct. 1925); *Dunlevy v. Butler County National Bank Adm'r.*, 64 Pa. D.&C. 535, 62 York 117 (1948); *Matarese v. Matarese*, 47 R.I. 131, 131 Atl. 198 (1925); *McKelvey v. McKelvey*, 111 Tenn. 388, 77 S.W. 664 (1903).

4. *Clark, J., Small v. Morrison*, 185 N.C. 577, 588 118 S.E. 12, 17 (1923); *Crownhart, J., Wick v. Wick*, 192 Wis. 260, 263, 212 N.W. 787, 788 (1927); *McCurdy, Torts Between Persons in Domestic Relations*, 43 HARV. L. REV. 1056 (1930); *Recent Cases*, 28 GEO. L. J. 430 (1939).

5. See note 3 *supra*.

6. *Dunlap v. Dunlap*, 84 N.H. 352, 150 Atl. 905 (1930); *Worrel v. Worrel*, 174 Va. 11, 4 S.W.2d 43 (1939); *Lusk v. Lusk*, 112 W. Va. 17, 166 S.E. 538 (1932).

7. *Minkin v. Minkin*, 336 Pa. 49, 7 A.2d 461 (1939).

8. *Mahnke v. Moore*, 77 A.2d 923 (Md. App. 1950); *Meyer v. Ritterbush*,

that the principal case is not an abrupt departure from the general rule, but rather the result of evolution and change therein. The three exceptions noted above are by no means universally followed by the courts, but the trend is toward more widespread adoption of them.

The General Rule and Its Development

The general rule seems to have originated in an early Mississippi case, *Hewellette v. George*.⁹ There a minor daughter was placed in an insane asylum for eleven days by her mother. She brought suit against her mother to recover for the injury to her character and for the time lost. The court held that a minor child could not recover from his parent. It should be noted that the court in the *Hewellette* case cited absolutely no authority to substantiate its holding. This fact is especially noteworthy in that there appear to have been no rulings at common law which forbade such an action by a child against his parent before the Mississippi case. Reeve and Cooley contend that such an action could be maintained. The former asserts that a parent ". . . may so chastise his child, as to be liable in an action by the child against him for a battery."¹⁰ The latter states that on principle there is no reason why such an action should not be permitted.¹¹

In 1903, in *McKelvey v. McKelvey*,¹² the Tennessee court followed the rule expounded in *Hewellette v. George* and cited that case as its only authority. As an additional reason for denying recovery, the court analogized the child-parent relationship to that between husband and wife, where an action is ordinarily denied one against the other because of the common law view of their identity. From this point on the die was cast. Case after case laid down the general rule of no recovery, giving diverse reasons for so holding, but failing entirely to distinguish and differentiate between varying fact situations and between negligent or intentional torts.

Among the more prominent reasons advanced by the courts for

196 Misc. 55, 92 N.Y.S.2d 595, *aff'd.*, 276 App. Div. 972, 94 N.Y.S.2d 620 (1950); *Cowgill v. Boock*, 189 Ore. 282, 218 P.2d 445 (1950).

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

10. REEVE, DOMESTIC RELATIONS 287 (1st ed. 1816).

11. COOLEY, TORTS 171 (2d ed. 1887). But he goes on to intimate that it might not be allowed.

12. *McKelvey v. McKelvey*, 111 Tenn. 388, 77 S.W. 664 (1903).

denying recovery were: (1) the "possibility of succession" idea;¹³ (2) the "family exchequer" doctrine;¹⁴ (3) the analogy to the denial of a cause of action between husband and wife because of the common law view of their identity;¹⁵ (4) the doctrine of "domestic tranquillity" (prevention of discord and disruption of family harmony);¹⁶ (5) "public policy";¹⁷ (6) the undermining of parental control and discipline.¹⁸

A few courts did allow recovery to a child, but in all of these early cases the person stood in *loco parentis*¹⁹ to the child and was not the natural parent. To what extent this was a factor in influencing the decisions is, of course, debatable. On the basis of their reasoning, however, it would appear that the writers of these opinions would have held a natural parent liable also.

The Effect of Insurance in Modifying the General Rule

The first deviation from the rule occurred as a result of the vast increase in the number of automobiles and indemnity insurance thereon. At first, the fact that the defendant had insurance was held immaterial,²⁰ and many later cases have continued to maintain that position.²¹ However, in the leading case of *Dunlap v. Dunlap*,²² where the father was a contractor carrying workman's compensation insurance and his son was injured while working for him, the New Hampshire court allowed recovery on the theory that the child could not be denied the right

13. *Roller v. Roller*, 37 Wash. 242, 79 Pac. 788 (1905). The theory involved here is that should the child die before the father, then the latter would get money which the child had recovered from him.

14. *Ibid.* The court claims that the funds of the family would be depleted to the detriment of the other children if the child were allowed to recover.

15. *McKelvey v. McKelvey*, 111 Tenn. 388, 77 S.W. 664 (1903).

16. *Small v. Morrison*, 185 N.C. 577, 118 S.E. 12 (1923); *Wick v. Wick*, 192 Wis. 260, 212 N.W. 787 (1927).

17. The significance of this conveniently vague phrase is not explained in the opinions. *Chastain v. Chastain*, 50 Ga. App. 241, 177 S.E. 828 (1935); *Small v. Morrison*, 185 N.C. 577, 118 S.E. 12 (1923).

18. *Matarese v. Matarese*, 47 R.I. 131, 131 Atl. 198 (1925); *Wick v. Wick*, 192 Wis. 260, 212 N.W. 787 (1927).

19. *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); *Steber v. Norris*, 188 Wis. 366, 206 N.E. 173 (1925).

20. *Mesite v. Kirchstein*, 109 Conn. 77, 145 Atl. 753 (1929); *Elias v. Collins*, 237 Mich. 175, 211 N.W. 88 (1926).

21. *Schneider v. Schneider*, 160 Md. 18, 152 Atl. 498 (1930); *Lund v. Olsen*, 183 Minn. 515, 237 N.W. 188 (1931); *Lasecki v. Kabara*, 235 Wis. 645, 294 N.W. 33 (1940).

22. 84 N.H. 352, 150 Atl. 905 (1930).

to sue his parent because of the effect on discipline and family life, when the father's liability insurance prevented such effect and in fact transferred liability to a third party. In other words, fears that a suit by a child against his parents might disrupt family relations or might deplete family funds to the detriment of the other children under the "family exchequer" theory, have no applicability when, in fact, the real party defendant is not the father, but the insurance company. Instead of depleting the family funds, the action would augment them, and certainly the action would not be conducive to any strained relations between the child and parent.

The same rule was applied in *Lusk v. Lusk*,²³ the West Virginia Supreme Court holding that, since the reason for the general rule failed, parental immunity from suit by the child did not apply.

These cases represent the first modification of the general rule.

Construction of Wrongful Death Statutes as a Declaration of Public Policy in Modifying the General Rule

The second modification of the general rule was effected by the construction of a wrongful death statute. In *Minkin v. Minkin*,²⁴ the plaintiff brought suit against his mother under a wrongful death act for the death of his father as a result of her negligent operation of an automobile in which the deceased was a passenger. A Pennsylvania court allowed recovery. The court held that the legislature had created no exceptions in the operation of the statute so that there were no grounds for depriving the child of the benefit of recovery under the statute because the surviving parent is the tortfeasor.²⁵

A More Realistic Approach by the Courts as a Factor in Modifying the Rule (Distinguishing Between the Negligent and Intentional Torts)

As was stated previously, the courts generally refused recovery whether the tort was negligent or intentional. A change in the

23. *Lusk v. Lusk*, 113 W. Va. 17, 19, 166 S.E. 538, 539 (1932). The court aptly stated "when no need exists for parental immunity the courts should not extend it as a mere gratuity."

24. 336 Pa. 49, 7 A.2d 461 (1939).

25. *Id.* at 51, 7 A.2d at 463. "The legislature made no exception, such as defendant would imply, to the effect that the child shall be deprived of the benefit of the statute when the surviving parent is the tortfeasor."

attitude of many tribunals is reflected in the statements found in later cases where, though the courts continued to deny relief for negligently caused injuries, they indicated that the result might be otherwise in the case of malicious and intentional torts by the parent against the child. It is from this background that the holding in the principal case evolved.

For example, in a Georgia negligence action,²⁶ although the court denied recovery, it went on to say:

... we do not hold that a father could not be liable for wilful or malicious wrongs or for some act of cruelty which operated at the same time to forfeit his parental authority.²⁷

It should be noted that the idea of parental forfeiture of immunity represents one of the main bases upon which the *Mahnke* case is predicated.

The above case and others of a similar nature²⁸ indicate by dicta that when the presence of malicious and intentional torts on the part of the parent is shown there might possibly be recovery in an action by the injured child. Certainly the commission of an intentional tort renders the disruption of family relations argument inapplicable; they will have already been interrupted.²⁹

This developing practice of differentiating between negligent and intentional torts is best exemplified and carried to its logical extreme by three of the latest cases,³⁰ one of which is the principal case. For example, in a recent New York case,³¹ the court stated that although a child may not maintain an action against a parent for negligence, "an action may lie where wilful misconduct is present."³²

26. *Bulloch v. Bulloch*, 45 Ga. App. 1, 163 S.E. 708 (1932).

27. *Id.* at 8, 163 S.E. at 711.

28. *Cannon v. Cannon*, 287 N.Y. 425, 427, 40 N.E.2d 236, 238 (1942).
 "... We are not prepared, in cases where wilful misconduct by the parent is not a factor, to inject the disruptive risk of tort liability between parents and their unemancipated children. . . ."

29. For statements as to why other reasons given by the courts for denying recovery are invalid at one time or another see *McCurdy*, *supra* note 4, at 1056.

30. *Mahnke v. Moore*, 77 A.2d 925 (Md. App. 1950); *Meyer v. Ritterbush*, 196 Misc. 551, 92 N.Y.S.2d 595, *aff'd.*, 276 App. Div. 972, 94 N.Y.S.2d 620 (1950).

31. *Meyer v. Ritterbush*, 196 Misc. 551, 92 N.Y.S.2d 595, *aff'd.*, 276 App. Div. 972, 94 N.Y.S.2d 620 (1950).

32. *Id.* at 554, 92 N.Y.S.2d at 598.

However, it is in the case of *Cowgill v. Boock*³³ that the most realistic and lucid thought is expressed in dealing with the entire question. There the son of defendant's decedent was ordered into a car by his intoxicated father, the latter then attempting to drive home. Due to the father's gross negligence in attempting to drive while intoxicated, the car ran off a bluff, killing both father and son. An action was brought against the father's estate by the son's administrator. The court, in allowing recovery, stated that:

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. What may have been a wholesome common law a hundred years ago may not be adapted to the changing economic and social conditions of this modern age.³⁴

In a later paragraph, the court cited the following words from the Lusk case, ". . . we must not exalt this rule [the general rule of no liability] above ordinary common sense."³⁵ It then decided that the general rule so well established should be modified to allow an unemancipated minor to sue his parent for a wilful and malicious tort. The court held that the defendant's gross negligence amounted to wilful misconduct and allowed recovery.

It is in the light of these decisions that the principal case was decided. Although the instant case cites none of these decisions, it shows the modern tendency to allow recovery when the logic of the case compels it.

We may fairly conclude that in any case where the recovery will in fact be against an insurance company, the usually stated objections to recovery are not present whether the tort be intentional or negligent. In the absence of insurance, however, the problem is more complex and depends upon the particular facts of each case. This is true because of the fact that although some of the reasons advanced for denying recovery may be valid in one factual situation, they may not be in another. It may well be generally true, for example, that wilful and wanton misconduct on the part of a parent may have disrupted family relations to such an extent that a law-suit will have little effect on them

33. *Cowgill v. Boock*, 189 Ore. 282, 218 P.2d 445 (1950).

34. *Id.* at 295, 218 P.2d at 450.

35. *Id.* at 297, 218 P.2d at 451.

either way. Yet, that may be no answer to the "family exchequer" argument if there are other children in the family, whereas the argument would lose most of its force if there were no other children. Again, if the conduct complained of is only negligence, there would normally be no family disruption in the absence of a lawsuit, but if the tortfeasor were dead and recovery was to be had from his estate to the exclusion of strangers who would take under his will, even the bringing of the law-suit would not disrupt family relations. The examples given are, of course, merely illustrative, for many combinations of factors could be devised. One feasible solution would be recognition by the courts of the existence of such factors and analysis of each case in terms of them in order to determine whether those in favor of recovery outweigh those opposed to it.

Thus, the modern trend as exemplified by the *Mahnke* and *Cowgill* cases would appear to represent the better view. Although in some cases recovery might well be denied, there should be no static rule of no recovery.³⁶

J. MILTON STEIN

36. The principal case is further complicated by the fact that it might be argued that there was no impact involved in causing the child's injury. This would pose additional problems to those courts which refuse recovery for mental disturbance unless there is an impact. However, in the principal case when the father shot himself some of his blood lodged on plaintiff's hands and face. It is quite possible that some courts which consider impact necessary might construe this to constitute sufficient impact.

Vicarious Liability of Third Parties: Whether a child may maintain an action against his parent's employer for injuries inflicted on the child by the parent while the parent was acting in the scope of his employment, is a question on which the few courts that have decided this issue have split. In those jurisdictions where the father is liable to his child for a tort, no question arises as to the employee's liability. But in those states where the father is not liable because of the child-parent relationship, is the principal then liable? Some courts take the view that the employer is liable even though the parent is not. *Mi-Lady Cleaners v. McDaniel*, 235 Ala. 469, 179 So. 908 (1938); *Clover Creamery Co. v. Diehl* 183 Ala. 429, 63 So. 196 (1913); *Chase v. New Haven* 111 Conn. 377, 150 Atl. 107 (1930); *LeSage v. LeSage*, 224 Wis. 57, 271 N.W. 369 (1937). One of the reasons given is that the liability of each (principal and agent) exists without relation to that of the other, the servant for his own wrongful conduct, the master for the wrongful conduct of his servant while acting for him. The few other courts that have decided the issue have taken a contrary view. *Meece v. Holland Furnace Co.* 269 Ill. App. 164 (1933); *Graham v. Miller*, 182 Tenn. 434, 187 S.W.2d (1945). One of the reasons advanced for denying recovery is that when there is an absence of legal liability on the part of the agent the principal is not liable. The master's liability is considered derivative. The reader is to be warned, however, that most of the courts have not as yet considered the problem, although there are numerous analogous cases in which a wife or husband has successfully sued the other spouse's employer.