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Torts - Parent and Child-Doctrine of Parental Immunity

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TORTS—PARENT AND CHILD—DOCTRINE OF PARENTAL IMMUNITY—Plaintiff, a minor, sustained injuries in a collision which occurred while he was riding in a car owned and driven by defendant, his father. The complaint alleged

that defendant was guilty of willful and wanton misconduct, consisting of speeding on a wet road on a foggy night and of running a stop light. A motion to dismiss on the ground that the suit was contrary to public policy was sustained. On appeal, *held*, reversed. The doctrine of parental immunity is inapplicable to cases of willful and wanton misconduct. *Nudd v. Matsoukas*, (Ill. 1956) 131 N.E. (2d) 525.

With the loss in popular favor of the theory of parental autocracy, there has been a slow but noticeable erosion of the doctrine first laid down in *Hewlett v. George*¹ that an unemancipated child's only protection from personal injuries inflicted by a parent rested in the deterrent effect of criminal sanctions imposed by the criminal law.² The rule barring suit in such cases stems from the solicitude of the courts for the preservation of domestic tranquility, although it would seem that this position overlooks the probability that uncompensated torts would, if anything, promote family discord. This objection loses all force, however, in the numerous instances where an insurance company is really the defendant party in interest.³ Probably in revulsion to such cases as *Roller v. Roller*,⁴ where a daughter was denied civil recovery against her father who had been convicted of raping her, a line of authority has grown up that immunity to civil suit is lost in instances where a parent is guilty of intentional tortious conduct.⁵ Concurrently, impressive authority has developed denying recovery to children injured in ordinary negligence actions arising from automobile accidents in which their parents are at fault, on the basis of the traditional immunity rule.⁶ Courts deciding these cases have ignored the reason for retention of the negligence aspect of the rule, viz., to discourage judicial interference with parents' legitimate disciplinary rights.⁷ In the sense that the term "negligence" is used in automobile accident cases, it is wholly extraneous to the problem of preserving the necessary freedom for parental discipline. It would appear, rather, that these cases should be treated like those in which there is a recognized additional relationship between the parent and child such as master-servant or carrier-passenger. In situations of the latter type authority exists which permits a child to recover for injuries negligently inflicted by his parent.⁸ Of course, such an approach

¹ 68 Miss. 703, 9 S. 885 (1891).

² The court, perhaps by erroneous analogy to the husband and wife situation, thought it was applying a common law doctrine. It cited no cases in support of its position and apparently there were none.

³ Despite this, no jurisdiction has repudiated the rule in its entirety. Prosser's opinion that Missouri had done so was shown to be incorrect by the case of *Baker v. Baker*, 364 Mo. 453, 263 S.W. (2d) 29 (1954). See PROSSER, *TORTS*, 2d ed., 677 (1955).

⁴ 37 Wash. 242, 79 P. 788 (1905). This case was overruled by the Washington court in *Borst v. Borst*, 41 Wash. (2d) 642, 251 P. (2d) 149 (1952).

⁵ See *Brown v. Cole*, 198 Ark. 417, 129 S.W. (2d) 245 (1939); 19 A.L.R. (2d) 423 at 451 (1951).

⁶ *Ownby v. Kleyhammer*, 194 Tenn. 109, 250 S.W. (2d) 37 (1952). See 19 A.L.R. (2d) 423 at 442 (1951).

⁷ *Borst v. Borst*, note 4 *supra*, at 156.

⁸ *Dunlap v. Dunlap*, 84 N.H. 352, 150 A. 905 (1930); *Lusk v. Lusk*, 113 W.Va. 17, 166 S.E. 538 (1932).

would not seem to be possible where a state has an automobile guest statute, as did Illinois in the principal case,⁹ which requires an aggravated degree of negligence in order to create liability.¹⁰ Oddly enough, the court in the principal case did not mention that, by alleging willful and wanton misconduct, plaintiff brought himself squarely within the express language of the guest statute. The parental immunity doctrine apparently was considered the only possible obstacle to the suit. In conjunction with the holding that as to the behavior involved here the doctrine is no bar, there is the implication that a parent remains immune in Illinois against actions for ordinary negligence. However, other language in the opinion¹¹ indicates that the court is concerned with the matter of the scope of the parental relation, i.e., when a parent is acting as a parent and when he is not. From this a faint hope may be derived that the future operation of the rule will be restricted as suggested.¹² Unfortunately, in stating the bounds of parental liability, the Illinois court makes use of an imprecise and troublesome standard. Experience under the guest acts indicates that "willful and wanton misconduct" and its several counterparts¹³ are not very meaningful pegs on which to fasten liability.¹⁴ Surely it is a monstrous proposition to hold a parent to a lesser degree of care toward his child than toward others. If the rule of the principal case were applied in cases arising in jurisdictions not having guest statutes, or in cases of parentally inflicted injuries not involving automobiles, the result would be to hold a parent generally to a substantially lesser degree of care toward his child than toward other persons. It would seem that it is only in the area of discipline stemming from the peculiar parent-child relation that there can appropriately be room for such limitation.

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⁹ Ill. Rev. Stat. (1955) c. 95½, §58a.

¹⁰ Situations can be imagined, however, in which a child would be outside of the "guest" category. See 3 Wyo. L.J. 225 (1949).

¹¹ Principal case at 531.

¹² If the court in the principal case does not go far enough, in allowing any concept of constructive intent to broaden the parents' potential area of liability, it nevertheless goes farther than most jurisdictions have gone as yet. See *Wright v. Wright*, 85 Ga. App. 721, 70 S.E. (2d) 152 (1952); *Emery v. Emery*, 284 P. (2d) 150 (1955), mod. 45 Cal. (2d) 421, 289 P. (2d) 218 (1955). *Contra*, *Owens v. Auto Mutual Indemnity Co.*, 235 Ala. 9, 177 S. 133 (1937).

¹³ See 35 MICH. L. REV. 804 (1937).

¹⁴ See Appleman, "Wilful and Wanton Conduct in Automobile Guest Cases," 13 IND. L.J. 131 (1937).