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Torts - Parent - Child Action By Child for Indirect Interference with Family Relationship

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TORTS—PARENT-CHILD—ACTION BY CHILD FOR INDIRECT INTERFERENCE WITH FAMILY RELATIONSHIP—Five minor children sued for the loss of their mother's support, care and affection which resulted from the defendant's negligent injury of the mother in an auto accident. Defendant moved to dismiss the complaint for failure to state a claim upon which relief could be granted. *Held,* motion denied. A minor child has a cause of action for damages resulting from an indirect, negligent interference with his rights in the family relationship. *Scruggs v. Meredith,* (D.C. Hawaii 1955) 134 F. Supp. 868.

The history of recovery for interferences with the family relationship[1] has been one of almost continual extension. By drawing an analogy to the master-servant relationship, the common law early recognized the right of the husband to recover for interferences in the marital relationship which resulted in the loss of his wife's services.[2] The recovery was extended to cover indirect interferences (e.g., the negligent injury of the wife) as well as direct interferences (e.g., abduction),[3] and loss of the society and affection of the wife as well as of her services.[4] Since the wife had no claim to her husband's services at common law, her right to recover for interferences in the marital relationship has been recognized only since the emancipation statutes and, in general, much more hesitantly.[5] The analogy to the loss of the services of a servant was also employed to give the parent

1 See Green, "Relational Interests," 29 ILL. L. REV. 460 (1934).
2 8 HOLDSWORTH, HISTORY OF ENGLISH LAW, 2d ed., 427-430 (1937).
3 3 TORTS RESTATEMENT §§683-685, 693 (1938).
4 Ibid.
5 See Holbrook, "The Change in Meaning of Consortium," 22 MICH. L. REV. 1 (1923). While the wife's right to recover for direct interferences is generally allowed, only a minority of states recognize her right to recover for indirect interferences. PROSSER, TORTS, 2d ed., 690-692, 703-705 (1955).

a right to recover for direct or indirect interferences in the parent-child relationship.[6] The requirement that the loss of services must underlie the recovery has similarly been largely dispensed with.[7] Like the wife, the child had no legally protected interest in the family relationship at common law and it is only recently that even a minority of states have recognized his right to recover for *direct* interferences in that relationship.[8] The principal case is the first successful attempt to recover for an *indirect* interference.[9] This review of the developments in the area might be viewed as indicating a strong "trend" of judicial precedent and sentiment toward giving fuller protection to the family relationship.[10] But a court considering the possibility of permitting a child to recover for indirect (and especially unintentional) interferences with his interest in that relationship might deny recovery by reference to any of the following arguments.[11] First, since the child has no claim to the services of the parent, the technical basis for recovery at common law is absent, and no cause of action will lie.[12] Secondly, admitting that some cause of action may now be recognized, there is no precedent for the recovery in the court's jurisdiction. Therefore, the recognition of any right to recover must be left to either the legislature[13] or an appellate court.[14] Thirdly, even though absence of precedent is not determinative, there is no interest in the child which should be legally protected. The minor child's interest in the family relationship is not certain enough,[15] is too remote from the wrong actually committed,[16] and cannot and should not be compensated for by money damages.[17] Fourthly, although some interest may exist, the practical problems of litigation argue against its recognition. Assessment of damages to the interest is too difficult in light of the intangibles involved and the possibilities of overlapping with the parent's recovery for his or her own injury;[18] litigation will be multiplied excessively by recognizing rights in

6 3 TORTS RESTATEMENT §§699-701, 703 (1938).

7 PROSSER, TORTS, 2d ed., 694-696, 699-701 (1955). But cf. 3 TORTS RESTATEMENT §703, comment *g* (1938).

8 See the leading case of Daily v. Parker, (7th Cir. 1945) 152 F. (2d) 174. See also Russick v. Hicks, (D.C. Mich. 1949) 85 F. Supp. 281; 39 CALIF. L. REV. 294 (1951).

9 Three cases have denied recovery: Jeune v. Del E. Webb Constr. Co., 77 Ariz. 226, 269 P. (2d) 723 (1954); Hill v. Sibley Memorial Hospital, (D.C. D.C. 1952) 108 F. Supp. 739; Eschenbach v. Benjamin, 195 Minn. 378, 263 N.W. 154 (1935).

10 For an exhaustive citation and discussion of the very substantial number of cases opposing this "trend," see Lewis, "Three New Causes of Action? A Study of the Family Relationship," 20 Mo. L. REV. 107 (1955).

11 These arguments have been drawn from cases and materials dealing with direct or indirect interferences with the wife's or child's interest in the family relationship.

12 Nelson v. Richwagen, 326 Mass. 485, 95 N.E. (2d) 545 (1950).

13 Gleitz v. Gleitz, 88 Ohio App. 337, 98 N.E. (2d) 74 (1951).

14 Hill v. Sibley Memorial Hospital, note 9 supra.

15 See 83 UNIV. PA. L. REV. 276 (1934).

16 Hinnant v. Tidewater Power Co., 189 N.C. 120, 126 S.E. 307 (1925).

17 Henson v. Thomas, 231 N.C. 173, 56 S.E. (2d) 432 (1949).

18 See Pound, "Individual Interests in the Domestic Relations," 14 MICH. L. REV. 177 at 194 (1916).

a potentially large group of persons like the children;[19] the recognition of rights in the children may upset settlements made with the parent;[20] and the claims themselves are too susceptible of fabrication.[21] Finally, the court may conclude that recovery is limited by the presence of a "heart balm" statute in its jurisdiction.[22] Many of these arguments are equally applicable to any extension which allows the wife to recover for *indirect* interferences in the family relationship or the child to recover for *direct* interferences, and the rebuttal which has been presented in that connection can only be mentioned by reference.[23] However, the arguments that the injury to the child's interest is too remote for recognition and too difficult of assessment gain special weight from the fact that recovery is being extended in the principal type of case so that it covers, at the same time, a potentially large group of persons—the children—and indirect interferences with their interests. If recovery is allowed for loss of support, care and affection against Mr. Motorist, who has negligently injured the mother of five in an auto accident, he may find his liability skyrocketing out of all proportion to any lack of care of which he may have been guilty. Liability may be stretched so far that it may be necessary to find that injury to the children was not a hazard "apparent to the eye of ordinary vigilance"[24] or that it was not a "normal, substantial part of the risk."[25] Allied with the other considerations noted above this may be sufficient to warrant a denial of the children's claims. On the other hand, the children have undoubtedly been injured. The recognition of the parent's important role in developing the mental health of the child makes even the claim for loss of affection far from tenuous.[26] If a court is to create a legal right to recovery where none existed before it can and should consider this injury. But before it glibly catches hold of the maxim *ubi jus, ibi remedium,* it should also carefully consider the above-mentioned arguments which militate against allowing recovery.

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19 Morrow v. Yannantuono, 152 Misc. 134, 273 N.Y.S. 912 (1934).

20 Ripley v. Ewell, (Fla. 1952) 61 S. (2d) 420.

21 Taylor v. Keefe, 134 Conn. 156, 56 A. (2d) 768 (1947).

22 PROSSER, TORTS, 2d ed., 697, 698 (1955).

23 See Lippman, "The Breakdown of Consortium," 30 COL. L. REV. 651 (1930); 20 CORN. L. Q. 255 (1935); 39 CALIF. L. REV. 294 (1951). But cf. Lewis, "Three New Causes of Action? A Study of the Family Relationship," 20 Mo. L. REV. 107 (1955).

24 That is, that no *duty* of due care was owed the children. Palsgraf v. Long Island R. Co., 248 N.Y. 339 at 342, 162 N.E. 99 (1928).

25 That is, that his act was not the *proximate cause* of the injury. PROSSER, TORTS, 2d ed., 259 (1955).

26 Gesell, "Child Psychology," 3 ENCYC. OF SOCIAL SCIENCES 391-393 (1930).