William & Mary Law Review

Volume 3 (1961-1962)
Issue 1

Article 13

October 1961

# Torts: Immunity of Parent from Suit by Child Does Not Extend to Estate of Deceased Parent

Allan H. Harbert

## TORTS

### *Immunity of Parent from Suit by Child Does Not Extend to Estate of Deceased Parent*

Recently, an unemancipated, minor plaintiff sued to recover damages from her mother's estate for personal injuries sustained while riding as a passenger in a car driven by her mother. Due to the negligent operation of the automobile, the vehicle collided with a truck, killing the mother instantly. The trial court applied the general rule "that unemancipated, minor child cannot recover against the parent when the action is based upon negligence." The Supreme Court of Missouri reversed the trial court, holding that the doctrine of interfamily immunity does not extend to the estate of a deceased parent.[1]

The doctrine of interfamily immunity was first announced in 1891,[2] and has been followed in almost every American jurisdiction.[3] The courts have permitted some exceptions to the general rule when there has been a separate and distinct relationship in addition to that of parent and child,[4] or where the tort was intentional, aggravated or brutal.[5] The major justification for the doctrine is that courts should do nothing that would interfere with domestic tranquillity or parental discipline. Where the courts have allowed exceptions to the general rule, it has

---

[1]Brennecke v. Kilpatrick, Mo. Supp., 336 S.W. 2d 68 (1960).

[2]Hewellette v. George, 68 Miss. 703, 9 So. 885 (1891).

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

[4]See Taubert v. Taubert, 103 Minn. 247, 114 N.W. 763 (1908) (master and servant); *accord,* Dunlap v. Dunlap, 84 N.H. 352, 150 A. 905 (1930) (master and servant); Worrell v. Worrell, 174 Va. 11, 4 S.E. 2d 343 (1939) (parent owner of a common carrier); Lusk v. Lusk, 113 W. Va. 17, 166 S.E. 538 (1932) (parent operator of a common carrier). In these cases insurance was a key factor.

[5]See Chastain v. Chastain, 50 Ga. App. 241, 177 S.E. 828 (1934) (assault and battery); Meyer v. Ritterbush, 196 Misc. 551, 92 N.Y.S. 2d 595 (1949), *affirmed,* 276 App. Div. 972, 94 N.Y.S. 2d 620 (1950) (murder); Hewelette v. George, 68 Miss. 703, 9 So. 885 (1891) (false imprisonment); Cowgill v. Boock, 189 Or. 282, 218 P. 2d 545 (1950) (defamation); *contra,* Roller v. Roller, 37 Wash. 242, 79 P. 788 (1905) (rape).

been because there was no chance of disrupting the family relationship if recovery were permitted.[6] Despite these noteworthy exceptions a cause of action has been denied when the parent was deceased at the time of the trial.[7] The courts maintain that the right of the child to sue should be determined by the status of the relationship of parent and child at the time the alleged cause of action arose and not at the time of the trial.[8] In the instant case the Missouri Court by a needless interpretion of their Survival Statutes,[9] held "there was a cause of action in being to survive."[10] Previously, the same court had ruled that the failure of a member of a family to recover was due to a procedural disability to sue rather than an absence of a substantive cause of action for negligence.[11] "This disability is not absolute and the cause of action otherwise existing may be asserted, if the reasons for its denial are no longer in existence."[12] The court relied heavily on *Hamilton* v. *Fulkerson*[13] in which it had permitted a wife to recover against a husband for an antenuptial tort on similar reasoning. The basis for that decision was that according to the Survival Statutes, "Causes of action for personal injuries ... shall not abate by reason of the death of the person against whom such cause of action shall have accrued."[14]

By analogy the court applied the same principles to the instant case in regard to the parent and child relationship. Since the cause of action had accrued, and since the procedural disability to sue had vanished with the death of the parent, the court held the plaintiff had a cause of action.[15]

---

[6]Dunlap v. Dunlap, 84 N.H. 352, 150 A. 905, 908 (1930).

[7]Lasecki v. Kabara, 235 Wis. 645, 294 N.W. 33 (1940); 39 Am. Jur. *Parent and Child* #90 (1942).

[8]Cannon v. Cannon, 287 N.Y. 425, 40 N.E. 2d 236 (1942).

[9]Ann. Mo. Stat. 537. 020 (Vernon, 1951).

[10]Brennecke v. Kilpatrick, Mo. Supp., 336 S.W. 2d 68, 72 (1960).

[11]Ennis v. Truhitte, Mo. Supp., 306 S.W. 2d 549 (1957).

[12]Brennecke v. Kilpatrick, Mo. Supp., 336 S.W. 2d 68, 73 (1960).

[13]Mo. Supp., 285 S.W. 2d 642 (1955).

[14]Ann. Mo. Stat. 537. 020 (Vernon, 1951).

[15]Brennecke v. Kilpatrick, Mo. Supp., 336 S.W. 2d 68, 73 (1960).

It is submitted that the mental gymnastics of the court to justify their position were unnecessary. It is obvious that if the parent is deceased, the danger of disrupting family unity or subverting parental discipline is nil. When the reason for the rule ceases, the rule itself should cease.

The court expressly stated that "the presence of insurance is immaterial to any issue in the case . . ."[16] Despite this language, it seems dubious that any court would fail to be conscious of the significance of insurance in this type of action with the universal awareness of insurance in contemporary American life. Many modern textwriters criticize the doctrine of interfamily immunity on this basis.

> Since the defendant will not have to pay out of his own pocket, it is obvious that the family exchequer will not be diminished and that domestic harmony will not be disrupted by allowing the action as by denying it.[17]

It is conceded that such a suit may encourage collusion between the parent and child, and therefore the repudiation of the strict interfamily immunity rule should be accompanied by a careful scrutiny of the *bona fides* of the plaintiff's cause of action. Nevertheless, in cases where the negligent parent is dead or where the injury inflicted is intentional, domestic tranquility would seem to be an inappropriate reason for denying recovery.[18]

There is little authority in Virginia on the narrow issue of this case. Recently, an unemancipated infant was denied a recovery against a living parent.[19] In *Worrell* v. *Worrell*[20] a state statute requiring all common carriers to carry liability insurance was held to be enough to extend the right of action to the daughter of an owner of a common carrier, but the court distinguished between this type of situation and the typical case of negligence on the

---

16*Ibid.*

17Prosser, TORTS, 677-8 (2d ed., 1955).

18McCurdy, *Torts Between Persons in Domestic Relations*, 43 HARV. L. REV. 1077-1081 (1930).

19Brumfield v. Brumfield, 194 Va. 577, 74 S.E. 2d 170 (1953).

20174 Va. 11, 74 S.E. 2d 170 (1939).

part of a parent who carries liability insurance.[21] Here the relationship of parent and child was incidental, the negligence of the father was derived through his agent, the driver of the common carrier, and the insurance carried by the father was compulsory whereas in the typical case the relationship would not be changed: the negligence of the father would be direct, and liability insurance would be voluntary. In the field of workman's compensation recovery has been allowed not because the action is one to recover damages for a wrong but rather because liability is predicated on the employment relationship.[22] The Married Woman's Act[23] which gives a wife the right to have a separate estate, make contracts in her own name, and which precludes the husband from being liable on the contracts of his wife has been interpreted to mean that one spouse may be liable to the other for damage to the latter's property.[24] But this does not extend to actions for personal torts.[25] There has been some statutory limitation on the doctrine of interfamily immunity, but it must be noted that the restrictions are based on an additional and distinct relationship besides that of parent and child or husband and wife, and there has been no attempt to destroy the fundamental immunity from personal actions. It should be recognized that while the Virginia courts have permitted these exceptions to the general rule, they have shown no inclination to go further and have at every opportunity reaffirmed the general principle of interfamily immunity.

A. H. H.

---

[21]Norfolk Southern v. Gretakis, 162 Va. 597, 174 S.E. 841 (1934).

[22]Glassco v. Glassco, 195 Va. 239, 77 S.E. 2d 843 (1953).

[23]Va. Code Ann. §§ 55-35, 55-36, 55-37 (Repl. vol., 1959).

[24]Vigilant Ins. Co. v. Bennett, 197 Va. 216, 89 S.E. 2d 69 (1955).

[25]Keister's Adm'rs v. Keister's Ex'ors, 123 Va. 157, 96 S.E. 315 (1918); Furey v. Furey, 193 Va. 727, 71 S.E. 2d 191 (1951).