The Problems of Intrafamily Torts and Their Treatment in the Field of Conflict of Laws

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THE PROBLEMS OF INTRAFAMILY TORTS AND THEIR TREATMENT IN THE FIELD OF CONFLICT OF LAWS

Scope Note

Judges and lawyers are today reexamining the doctrine of intrafamily immunity from tort liability. Under the impact of increased insurance coverage and the advent of compulsory insurance statutes, cases testing the soundness of this principle have appeared more frequently in recent years. The purpose of this paper is to investigate the doctrine of intrafamily immunity from tort liability from its origin to its treatment in the more recent cases. The problems which this principle creates in the field of Conflict of Laws will be examined and the various solutions suggested for these problems will be discussed.

I

The controversy over the right of a minor to maintain an action in tort against his parents is a relatively new problem. Although the right of a minor child to maintain a contract action, and actions concerning real property, against his parents was settled early in our law, no case testing the existence of a right in the child to recover in a tort action arose until late in the nineteenth century. As late as 1930 there were but twelve cases dealing with the situation.

The first leading case on the subject was Hewlett v. George which was decided in 1891. There an action in tort for false imprisonment was brought by a minor against her parents. In denying relief, the court, speaking through Justice

3 "All of the authorities are modern. What may be termed the earlier ones, those prior to 1891 are meager, conflicting and obscure." McCurdy, Torts Between Persons in Domestic Relations, 43 HARV. L. REV. 1059 (1930).
4 Note, 79 U. OF P. L. REV. 80 (1930); Mesite v. Kirchstein, 109 Conn. 77, 145 Atl. 753 (1929); Smith v. Smith, 81 Ind. App. 566, 142 N.E. 128 (1924); Miller v. Pelzer, 159 Minn. 375, 199 N.W. 97 (1924); Hewlett v. George, 68 Miss. 703, 9 So. 885 (1891); Goldstein v. Goldstein, 4 N.J. Misc. 711, 134 Atl. 184 (1926); Sorrentino v. Sorrentino, 248 N.Y. 626, 162 N.E. 551 (1928); Small v. Morrison, 185 N.C. 577, 118 S.E. 12 (1923); Matarase v. Matarase, 47 R.I. 131, 131 Atl. 198 (1925); McKelvey v. McKelvey, 111 Tenn. 388, 77 S.W. 664 (1903); Roller v. Roller, 37 Wash. 242, 79 Pac. 788 (1905); Wick v. Wick, 192 Wis. 260, 212 N.W. 787 (1927); Zutter v. O'Connell, 200 Wis. 601, 229 N.W. 74 (1930).
5 68 Miss. 703, 9 So. 885 (1891).
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Woods, based its decision on the reciprocal rights and duties of both parties. "So long as the parent is under obligation to care for, guide and control, and as long as the child is under reciprocal obligation to aid and comfort and obey, no such action can be maintained." In *Roller v. Roller* a minor daughter after prosecuting her father criminally for rape, brought a civil action for damages. The court, following the theory of the *Hewlett* case, denied her the right to maintain such an action. The next case was *Small v. Morrison*, here the cause of action was based on failure of the parent to exercise reasonable care under circumstances which would have entitled a stranger to a right of action. Again the court followed the reasoning of the *Hewlett* case.

The arguments used in these cases are generally the same as those employed today in denying the right to maintain such actions. The traditional view is that if such actions were allowed they would encourage fraud and collusion and impair the parents' exercise of their disciplinary functions. However, in 1930 the Supreme Court of New Hampshire allowed a minor to maintain an action of trespass against his father for injuries which occurred while he was in his father's employ. Authority for denial of liability was sought on the traditional grounds that parental authority and family peace should be maintained. The court held however that a child cannot be denied the right to sue his parents for a tort because of the effect on discipline and family life, where the father's liability insurance prevented such effect. Although New Hampshire in a later case refused to extend this holding to cases of negligent injuries which were not as a result of the parent's business or vocational capacity, the modern trend is in the direction of abolishing the immunity and allowing unemancipated minors to sue their parents.

The movement toward the more liberal view however is slow. The vast majority of the courts in the United States deny any right to a child to maintain a tort action against his parents. Nevertheless, the more liberal view has made some strides forward in recent years. There is considerable authority holding that an emancipated minor child, that is a minor child released from legal subjection to his parents, is under no disability to maintain a tort action against his parents.

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6 *Hewlett v. George*, *supra* at 711, 9 So. at 891 (1891).

7 37 Wash. 242, 79 Pac. 788 (1905).

8 185 N.C. 577, 118 S.E. 12 (1923).

9 *Dunlap v. Dunlap*, 84 N.H. 352, 150 Atl. 905 (1930).


11 See Note, 19 A.L.R. 2d 423-462 (1951); 79 U. OF P. L. REV. 80; 9 VAND. L. REV. 832 (1948); 39 AM. JUR. Parent and Child § 64. However the general rule is that actions between sisters and brothers may be maintained in law; considerations of public policy do not abate such actions as in the case of a suit brought by a parent against his minor child. 52 AM. JUR., *Torts* § 97.


Children have been permitted in four states to recover under guest statutes for willful conduct. In many jurisdictions the doctrine of intrafamily immunity from suit by a member of the family expires upon the death of the person protected and does not extend to a decedents estate. The reason given for this rule is that death terminates the family relationship and there is no longer a family relationship in which the state or public policy has an interest.

With the increase in the amount of insurance coverage the exponents of the abolition of the doctrine are given another argument to support their view. When the insurer must bear the financial burden for the wrongful act it would seem that such a suit would not be a disturbing factor of family life. It is more likely to be viewed as something to be welcomed, as adding to the family assets. However there is considerable authority holding that the fact that the particular parent who is the defendant is protected by insurance against legal liability should not enable the minor child to maintain the action if he could not otherwise have maintained it.

Typical of those jurisdictions which adhere to the traditional doctrine are those of Pennsylvania, Maryland and Connecticut. However in each of these jurisdictions exceptions have been made to the broad application of the doctrine. However the courts of these states have been careful to limit these exceptions to only extraordinary cases.

In Pennsylvania the first case dealing with intrafamily torts was *Duffy v. Duffy*. There the converse of the usual situation was considered: could an action for personal injuries resulting from negligence be maintained by a parent against an unemancipated child? The court refused to permit the parent to maintain the action, assigning as its reasons therefor the allowance of such an action would result in "discord in the home, disorganization of the family relation and severing of the natural ties of affection." Four years later, in the case of *Minkin v. Minkin* the Pennsylvania Supreme Court took a more liberal view. There an eight year old child brought suit against his mother to recover damages for the death of his father alleged to have resulted from the mother's negligent operation of an automobile. The lower court, being of the opinion that public policy prohibited a suit by a minor child against his mother and that the Pennsylvania Death Statute...
gave no right of action to the minor child when one parent survived, entered judgment for the defendant. The Pennsylvania Supreme Court, by a 4-3 vote, reversed the court below. The majority of the court was of the opinion that the Death Statutes, which allowed a minor child to share in compensation payable to one where negligence caused his parent's death, indicated a legislative intent in this type of action to displace the public policy which disallowed generally actions by a minor against a parent. However, the majority limited its ruling to that type of action wherein the Death Statute applies. Pennsylvania's latest case on point is Parks v. Parks which was heard by the Pennsylvania Supreme Court in 1957. That case was an action by an unemancipated minor child against her mother for personal injuries sustained, when, while a guest passenger in an automobile operated by her mother, an accident occurred. In deciding the case the court reverted to the traditional argument of public policy and the preservation of family unity. However a vitriolic dissent by Justice Musmanno gives irrefutable evidence that the liberal view is aptly represented on the Court.

In Maryland the question of whether or not a woman is allowed to sue her husband in a tort action was squarely presented in Furstenburg v. Furstenburg. In that case the wife brought suit against the husband for injuries sustained as a result of his negligent operation of the car in which she was riding with him. The court held that the wife could not maintain the suit. The same result was reached three years later in Schneider v. Schneider. There a mother brought an action in tort against her minor son for injuries sustained in an automobile accident as a result of his negligence. In refusing to allow the action the court said: "We need not dwell upon the importance of maintaining the family relation free . . . from the antagonisms which such suits imply." This was the same policy adhered to in the Furstenburg case and seems to be the underlying reasoning of the court in establishing a strong public policy against allowing such suits.

In spite of this strong public policy, the Maryland Court of Appeals in 1951 held that an action in tort on behalf of a minor daughter for personal injuries caused by atrocious acts committed by her father in her presence could be maintained. In so holding however, the court did not overrule the traditional immunity doctrine. The holding of this case was cautiously limited by the court to cases "where a parent is guilty of acts which show complete abandonment of the parental relation." Thus, it cannot be claimed that by allowing this suit Maryland has removed itself from the list of "traditional jurisdictions", however it does

22 152 Md. 247, 136 Atl. 534 (1927).
23 160 Md. 18, 152 Atl. 498 (1930).
24 197 Md. 61, 77 A.2d 923 (1951).
illustrate that the doctrine of intrafamily immunity from tort liability is no longer a hard and fast rule invulnerable to exception.

Another jurisdiction which has recently allowed exceptions to their public policy against intrafamily tort actions is Connecticut. In Silverman v. Silverman25 a wife sued her husband for injuries sustained while she was in a car driven by their son. The wife was allowed to recover under the family car doctrine for the tort of the defendant husband's unemancipated son. The court so held even though it was against the public policy of Connecticut for a parent to sue her child in such actions.

These three cases, the Minkin case in Pennsylvania, the Mahnke case in Maryland and the Silverman case in Connecticut, can serve to illustrate two points: 1—the reluctance on the part of American courts to overrule the traditional concept as laid down in the Hewlett case; 2—the awareness of the courts of the possible dangers which would result by a blind application of the doctrine in its broadest sense. Although, as pointed out, these cases do not overrule the doctrine, they do at least modify it.

It is submitted that these modifications are only a step in the right direction. The growing belief that personal injuries should promptly and adequately be compensated for should lead to a complete abandonment of the doctrine and the adoption of a more realistic approach to the growing problem. It must be remembered that the immunity doctrine was established at a time when accident litigation was looked upon as a private contest between individuals with which society was not concerned,26 liability was considered as shifting the loss from the person who suffered it to the person who caused it.27 There is today however an altogether different approach to tort law. Society has a definite and vital interest in accidents and their resulting losses.28 The principle reason relied on by the exponents of the doctrine is that such actions cause disharmony in the home, and are an impairment to the parental right to discipline. It is difficult to see how a tort action would have these catastrophic effects on family unity while a contract action leads to none of these calamitous results. The view which seems to be more in keeping with today's legal thinking would be a rule which limits the application of the parental immunity doctrine so that it applies only to those cases where the injuries occur while the parent is, in fact, exercising his parental duties, in the narrow sense. The interest of society in compensating its members for personal injuries caused by tortious conduct of others should be sufficient to abolish a doctrine which has outlived its practical application.

25145 Conn. 663, 145 A.2d 826 (1958).
27James, Accident Liability Reconsidered: The Import of Liability Insurance, 57 YALE L. J. 549 (1948).
When final determination of whether or not a minor has the capacity to sue his parent has been reached, only half the problem has been solved. It must now be determined whether this is simply a question of tort, where the applicable law of the place of wrong will govern, or whether it is a question of domestic relations where capacity to sue will be determined by the law of the forum or the law of the party's domicile. This problem can readily be seen by way of illustration. A father and son, both domiciled in Pennsylvania, are traveling in the state of Washington. Through the father's wrongful acts the son sustains injuries. In a suit by the son against his father for damages, which law is to decide whether or not such an action can be maintained; the law of Washington, the place of the tort, where such actions are allowed,\(^{29}\) or the law of Pennsylvania, the place of the parties' domicile, where no such action can be maintained.\(^ {30}\) There are three distinct views on this problem.

The traditional view, as stated by the restatement is "if no cause of action is created at the place of the wrong, no recovery in tort can be had in any other state."\(^ {31}\) However, there are those who hold that capacity should be treated as procedural and the law of the forum should govern in determining the capacity of a party to sue or be sued and incapacity to sue imposed by a foreign law should not be recognized.\(^ {32}\)

There is still another view which holds that it is not a question of tort but one of capacity to sue, the parents immunity, if any, from tort liability is based on the minor child's disability to sue rather than on the absence of a violated duty, the substantive question of tort and of capacity should be kept separate, with the question of capacity being decided by the law of the domicile.\(^ {33}\) This view is in accordance with the holdings of the civil law countries where actions for torts between parent and child are incidents of family law.\(^ {34}\) The first American jurisdiction to adopt this view was California in the case of Emery v. Emery.\(^ {35}\) There

\(^{29}\) Borst v. Borst, 41 Wash. 2d 642, 251 P.2d 149 (1952).


\(^ {34}\) RABEL, CONFLICT OF LAWS, A COMPARATIVE STUDY, 315, 606 (1945).

\(^ {35}\) 45 Cal. 2d 421, 289 P.2d 218 (1955).
two minor girls presumably domiciled in California, were injured in an automo-
ble accident when driving through the state of Idaho with the brother driving
under the father's direction. In a negligence action by the two girls against the
father and the brother, the California Supreme Court, speaking through Justice
Traynor, unanimously reversed a judgment sustaining a demurrer based on the
defendant's parental immunity. The court reached this result under the law of
California as the state of the parties' domicile without regard to any rule to the
contrary that might have prevailed in Idaho which was the state of the place of
wrong. The California Supreme Court thereby rejected the proposition of the
restatement that "if no cause of action is created at the place of the wrong no
recovery in tort can be had in any other state." The modern view, as expressed
by Justice Traynor, can be said to have a stabilizing effect on the liabilities of a
parent. If a child's capacity to sue is determined by his domicile rather than the
place of wrong, the parent's liability will be stable rather than changing each time
he crosses the border of a traditional state into a reform jurisdiction. However a
Constitutional argument may arise: can a state refuse to enforce a defense vested
under the law of the place of the tort? In situations involving family relationships
the forums determination to the applicable law has generally been influenced by
the vested rights doctrine as a result of which the forum enforces a party's
foreign created right as a matter of obligation. Consequently matters of defense
which are regarded as substantive are treated as rights vested in the defendant and
hence to be governed by the place of wrong. The vested rights theory as written
into the restatement readily results in a mechanical application of the conflicts
formula. However, since the courts frequently turn to the restatement when
faced with a conflicts problem, the result in the area of intrafamily suit for tort
is that domiciliaries are deprived of a day in their own courts, for the sole reason
that the injury was suffered in a jurisdiction not recognizing tort liability between
spouses. There are legal scholars who view the restatement's mechanical approach
as one leading to undesirable consequences.

Another argument which may be raised against adopting the modern view,
in which the law of the domicile prevails, is that such an approach may offend
the public policy of the forum. If both the forum and the place of the wrong are

86 RESTATEMENT, CONFLICT OF LAWS § 384(2) (1934).
89 RESTATEMENT, CONFLICT OF LAWS § 42 (1934).
91 Note, 4 WAYNE L. REV. 79 (1957).
traditional jurisdictions will the forum allow itself to be influenced by the fact that the domicile of the parties is a reform jurisdiction, which has abolished the immunity, thereby being contrary to its own public policy? In such a case the forum can refuse to allow the action to be maintained and rely on the restatement for its authority. There does not seem to be any case in which recovery was allowed contrary to the parental immunity rule of the forum. It seems significant that among the many cases decided in this field, there has not been a single one in which recovery was based on the law of the place of wrong contrary to both the law of the forum and the law of the place of domicile.

In August 1957 the Court of Common Pleas of Philadelphia County was confronted with a case in which a Pennsylvania widow brought an action against her husband's estate for personal injuries arising out of an automobile accident which occurred in Florida. The main reason suggested for denying the right to sue was the preservation of domestic harmony. The court held that the rule therefore expresses a policy of domestic relations rather than a policy of liability. Hence the law of the domicile should govern. The court therefore, allowed the widow to maintain the action, even though, under the law of Florida—the place of the wrong—such a suit would not be permitted. If an analogy can be drawn between an action against an estate of the parent, and an action against the parent personally, it would seem that Pennsylvania has adopted the California rule as expressed in the Emery case. However, if the converse of this situation presented itself, that is, if a minor domiciled in a reform jurisdiction attempted to maintain an action against his parent in Pennsylvania, it seems highly unlikely that Pennsylvania would apply the domicile rule and allow its courts to entertain an action, the result of which would be directly contrary to its own public policy as expressed in the Duffy and Parks cases.

It is submitted that to allow the law of the domicile of the parties to determine their capacity to sue is a rule which will result in a more equitable distribution of insurance losses. Suability of a parent by his minor child should be determined by the law under which the premiums based on the incidents of such suits are most readily calculatable by the parent's liability insurer. Recognition of the

43 Restatement, Conflict of Laws § 612 (1934), "No action can be maintained upon a cause of action created in another state the enforcement of which is contrary to the strong public policy of the forum."
party's domicile as a proper connecting factor in conflicts rules governing such
torts would be a step toward stabilizing the liability of the parents which is now
precariously balanced between the substantive law of the place of wrong and
procedural characterizations or public policy. It seems that it would be desirable
for the parent and his insurer to have a means of readily determining their
liability, rather than have it change as the insured crosses the borders between
traditional and modern jurisdictions.

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