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## PARENT-CHILD TORT IMMUNITY—NO IMMUNITY FOR THE NONCUSTODIAL PARENT

*Fugate v. Fugate*<sup>1</sup>

Harold and Verla Mae Fugate were divorced in 1972. The custody of Denise, their only child, was awarded to Verla Mae. Harold paid child support and exercised the visitation and temporary custody rights he had been granted by the divorce decree. On March 15, 1974, Verla Mae was killed while riding as a passenger in an automobile operated by Harold. Liability insurance was in effect on the car at the time of the accident. After her mother's death, the care and custody of Denise were assumed by her father.

In 1974, Denise, by a next friend, brought an action against her father for the alleged negligent wrongful death of her mother.<sup>2</sup> The defendant filed a motion to dismiss on the ground that the action was barred by the doctrine of parental immunity.<sup>3</sup> The circuit court held an evidentiary hearing on the motion to dismiss. The court found that there had been no disruption in the relationship between Harold and his daughter because of the filing of the wrongful death action, but sustained the motion to dismiss on the belief that parental immunity barred the suit. Denise appealed to the Missouri Court of Appeals, Springfield District. That court

1. 582 S.W.2d 663 (Mo. En Banc 1979).

2. The action was filed pursuant to RSMo § 537.080 (1978), which provides in part:

Whenever the death of a person shall be caused by a wrongful act, neglect or default of another, and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then, and in every such case, the person who . . . would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured, which damages may be sued for and recovered

(1) By . . . minor children . . . of the deceased. (Emphasis added.)

3. The rule barring an action by a child against her parents for personal injuries seems to be a product of late nineteenth and early twentieth century American jurisprudence. *E.g.*, *Falco v. Pados*, 444 Pa. 372, 376, 282 A.2d 351, 353 (1971). Citing no authority, the Supreme Court of Mississippi gave birth to the parental immunity rule in *Hewlett v. George*, 68 Miss. 703, 9 So. 885 (1891) (action by married daughter against mother's estate for injury due to false imprisonment in an insane asylum). The *Hewlett* rule was followed in *McKelvey v. McKelvey*, 111 Tenn. 388, 77 S.W. 664 (1903) (action by child against father and stepmother for "cruel and inhuman treatment"), and probably reached its height of rigidity in *Roller v. Roller*, 37 Wash. 242, 79 P. 788 (1905) (daughter tried to recover in a battery action against her father who had been convicted and sentenced for forcibly raping her). "The *Hewlette* [sic], *McKelvey* and *Roller* cases constitute the great trilogy upon which the American rule of parent-child tort immunity is based." Akers & Drummond, *Tort Actions Between Members of the Family—Husband & Wife—Parent & Child*, 26 Mo. L. Rev. 152, 211 (1961).

recommended transfer to the Supreme Court of Missouri prior to opinion, noting that the bench and bar needed more specific guidance as to the application of the parental immunity doctrine.

The Supreme Court of Missouri held that "where the mother and father have been divorced the parent who does not have the primary, general custody of the unemancipated minor child at the time the tort occurs is not immune from suit in tort by the child."<sup>4</sup> This holding is restricted to instances where the child's injury does not arise from the exercise of the noncustodial parent's temporary custody and visitation rights.<sup>5</sup> By so holding, the court created another in the already long list of exceptions to the parental immunity rule.<sup>6</sup>

To understand the holding in *Fugate*, one must examine it in relation to some of Missouri's earlier cases. The first Missouri Supreme Court case using parental immunity to bar an action by an unemancipated child against her parent was *Baker v. Baker*.<sup>7</sup> In *Baker* the 15-month-old daughter of the defendant brought an action to recover for injuries negligently inflicted when her father backed over her in an automobile. The court

4. 582 S.W.2d at 669.

5. We are also cognizant of the fact that a noncustodial parent must perform parental duties of care, discipline, etc., when the child is in that parent's temporary custody, and that the relative rights and duties of the parties may result in a modification or denial of recovery when the injury arises out of the performance of such duties. Those matters will have to be adjudicated on a case-by-case basis. (Emphasis added.)

*Id.*

6. In Missouri, parental immunity is not recognized: (1) if the cause of action involves a property right, *Wells v. Wells*, 48 S.W.2d 109, 111 (K.C. Mo. App. 1932), cited in *Fugate v. Fugate*, 582 S.W.2d at 666 n.3; (2) when the child is emancipated, *Wurth v. Wurth*, 322 S.W.2d 745 (Mo. En Banc 1959); (3) when the child is suing a deceased parent's estate, *Brennecke v. Kilpatrick*, 336 S.W.2d 68 (Mo. En Banc 1960); and (4) the immunity rule probably is not recognized when the alleged wrongful conduct is wilful or intentional, *Baker v. Baker*, 364 Mo. 453, 263 S.W.2d 69 (1953) (it is not absolutely clear what exceptions to the immunity rule are within the holding of this case).

There are several exceptions to the immunity rule which Missouri has not adopted. For example, some jurisdictions have held that the immunity rule does not apply: (1) where the defendant has liability insurance, *Sorensen v. Sorensen*, 369 Mass. 350, 339 N.E.2d 907 (1975); (2) where the cause of action arises out of an automobile accident, *Lee v. Comer*, 224 S.E.2d 721 (W. Va. 1976); (3) where the defendant-parent injured the plaintiff-child while the parent was acting within the scope of his employment, *Signs v. Signs*, 156 Ohio St. 566, 103 N.E.2d 743 (1952); *Borst v. Borst*, 41 Wash. 2d 642, 251 P.2d 149 (1952); (4) where there is a master-servant relationship between the parent and child, *Dunlap v. Dunlap*, 84 N.H. 352, 150 A. 905 (1930); (5) where a carrier-passenger relationship existed between the parties, *Worrell v. Worrell*, 174 Va. 11, 4 S.E.2d 343 (1939); *Lusk v. Lusk*, 113 W. Va. 17, 166 S.E. 538 (1932); and (6) where the father is a member of a partnership and his negligent activity is in furtherance of partnership business, *Felderhoff v. Felderhoff*, 473 S.W.2d 928 (Tex. 1971). This list illustrates that courts are very result-oriented in this area and tend to be creative in finding ways to avoid the immunity rule. See *Hebel v. Hebel*, 435 P.2d 8, 10 (Alas. 1967); *Akers & Drummond*, *supra* note 3, at 193; Annot., 41 A.L.R.3d 904, 964 (1972); Annot., 60 A.L.R.2d 1284, 1288 (1958); Annot., 19 A.L.R.2d 423, 433 (1951).

7. 364 Mo. 453, 263 S.W.2d 29 (1953).

held that the action was barred because: (1) "under the common law no such actions could be maintained;"<sup>8</sup> and (2) "to permit such actions would disturb the family relationship."<sup>9</sup> The court held that when the theory was "mere negligence"<sup>10</sup> there would be an absolute bar between parent and child in actions for personal injury.<sup>11</sup>

In *Bahr v. Bahr*,<sup>12</sup> specifically referred to by the Springfield Court of Appeals in recommending the transfer of *Fugate* to the Missouri Supreme Court, a four-year-old child of divorced parents attempted to bring a negligence action against her father for injuries suffered while the father was exercising his right of "reasonable" visitation. The court held that the action would be barred by the parental immunity doctrine unless in an evidentiary hearing the plaintiff could show that she was emancipated

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8. *Id.* at 455, 263 S.W.2d at 29. It is doubtful that the parental immunity rule was part of the common law of Missouri prior to the *Baker* opinion. No early English case dealing with parental immunity has been reported. McCurdy, *Torts Between Persons in Domestic Relation*, 43 HARV. L. REV. 1030, 1059 (1930); Annot., 19 A.L.R.2d 423, 425 (1951). From this absence of authority, it has been inferred that "there is no good reason to think that the English law would not permit actions [by unemancipated minor children against their parents] for personal torts." W. PROSSER, HANDBOOK OF THE LAW OF TORTS 865 (4th ed. 1971). Probably the most honest approach is to admit that no one knows the state of the English law concerning parental tort immunity that Missouri adopted in its reception statute. RSMo § 1.010 (1978). See *Dunlap v. Dunlap*, 84 N.H. 352, 356, 150 A. 905, 907 (1930) ("The issue is, and must remain, an insoluble mystery.").

Also militating against the proposition that parental immunity was part of Missouri's common law prior to *Baker* is the relatively recent adoption of the rule. In fact, the parent-child tort immunity rule was rejected in an action by parent against child involving negligent injury in *Wells v. Wells*, 48 S.W.2d 109 (K.C. Mo. App. 1932). *Contra*, *Brown v. Parker*, 375 S.W.2d 594 (St. L. Mo. App. 1964). The first Missouri case clearly embracing parental immunity is *Cook v. Cook*, 232 Mo. App. 994, 124 S.W.2d 675 (Spr. 1939). For a history of the immunity rule in Missouri, see *Akers & Drummond*, *supra* note 3, at 211.

9. *Baker v. Baker*, 364 Mo. 453, 455, 263 S.W.2d 29, 29 (1953). For a discussion of the domestic tranquility rationale, see notes 25-42 and accompanying text *infra*.

10. It is interesting to note how the court in *Baker* made use of precedents. In *Wells v. Wells*, 48 S.W.2d 109 (K.C. Mo. App. 1932), the parent-child tort immunity rule was rejected in an action by a parent against her child for negligent injury. The *Baker* decision distinguished the *Wells* case from the facts in *Baker* on the theory that *Wells* was decided in reliance on *Dix v. Martin*, 171 Mo. App. 266, 157 S.W. 133 (K.C. 1913). In that case an unemancipated minor was allowed to recover for a "criminal and wicked" battery. Thus, the *Baker* court implied that an action based on an intentional tort theory would not be barred.

The *Baker* decision also failed to mention *Taylor v. Taylor*, 360 Mo. 994, 232 S.W.2d 382 (1950), where a mother was allowed to bring an action against her son for the wrongful death of her husband. The son was living at home with his mother at the time the action was filed. Here the theory was "mere negligence" and the action could have disrupted the familial relations, yet the court in *Taylor* allowed the action because the son had reached majority.

11. *Baker v. Baker*, 364 Mo. 453, 458, 263 S.W.2d 29, 32 (1953).

12. 478 S.W.2d 400 (Mo. 1972). For a more extensive analysis of the *Bahr* case, see MacDonald, *Torts-Parental Immunity Doctrine in Missouri*, 38 Mo. L. REV. 699, 704 (1973).

within the breadth of *Wurth v. Wurth*<sup>13</sup> or that the action "would [not] seriously disturb the family relations and thus [not be] contrary to public policy."<sup>14</sup>

At first glance, because *Bahr* also involved divorced parents, *Fugate* seems to overrule *Bahr* despite the fact that the *Fugate* opinion explicitly states that it only modifies *Bahr*.<sup>15</sup> One distinction between *Bahr* and *Fugate* is that the injury in *Bahr* arguably arose out of the performance of a parental duty whereas the injury in *Fugate* clearly did not. The holding in *Fugate*, allowing a cause of action to a child against her father, was restricted to instances in which the child's injury does not arise out of the exercise of the noncustodial parent's temporary custody and visitation rights.<sup>16</sup> If *Bahr* is still viable, a plaintiff is entitled to an evidentiary hearing to determine whether family harmony will be disrupted by allowing the suit in any case in which the parental immunity doctrine might be invoked to bar the action.<sup>17</sup>

*Fugate* also brings into question the holding of *Baker*—that an unemancipated minor may not sue her parent for mere negligence. In *Fugate*, the Missouri Supreme Court allowed an unemancipated minor to bring an action under the wrongful death statute for negligence against her living parent with whom she resided. Thus, after *Fugate* there is no situation in which one would be absolutely certain that a Missouri court would apply the parental immunity rule.

The plaintiff in *Fugate* unsuccessfully argued that Missouri's wrongful death statute abrogated the "common law" doctrine of parental immunity by vesting a cause of action in minor children for the wrongful death of a parent "in every such case" that the person would have been liable if death had not ensued.<sup>18</sup> In rejecting this argument the court concluded that while the statute "could conceivably be construed to permit a cause of action 'in every such case' . . . , we are of the opinion that the legislature never intended the wrongful death act . . . to be an exception to parental immunity."<sup>19</sup> Some courts have expressed their hostility toward parental immunity by ignoring the well-known canon of statutory construction that statutes in derogation of the common law should be strictly

13. 322 S.W.2d 745 (Mo. En Banc 1959).

14. *Brenneke v. Kilpatrick*, 336 S.W.2d 68, 70 (Mo. En Banc 1960). In this case an unemancipated minor brought an action against her deceased mother's estate. The court's reasoning, which is analogous to that used in *Fugate*, was that the purpose of the parental immunity rule was to maintain domestic tranquility in the family. Since plaintiff's mother was no longer living, there was no familial relation between the unemancipated minor child and her mother for the suit to disrupt. Therefore, the suit was allowed because it "would [not] seriously disturb family relations and thus [is not] contrary to public policy."

15. 582 S.W.2d at 669.

16. See note 5 and accompanying text *supra*.

17. *Bahr v. Bahr*, 478 S.W.2d 400, 402 (Mo. 1972).

18. Missouri's wrongful death statute is set out in part in note 2 *supra*.

19. 582 S.W.2d at 667.

construed.<sup>20</sup> These courts have found it within the legislative intent to abrogate the immunity rule when an action is brought under a wrongful death statute even though that statute makes no reference to the immunity doctrine.<sup>21</sup>

In fact, courts generally have been hostile to the immunity rule. The "tendency has been to whittle away the rule by statute and by the process of interpretation, distinction and exception, until what we have left today is a conglomerate of paradoxical and irreconcilable judicial decisions."<sup>22</sup> "These exceptions reflect distaste for the injustices which often result from a strict, pervasive application of the parental immunity rule."<sup>23</sup> The law has now evolved to a point where many states do not use parental immunity as a general rule; they have either formally abandoned the rule or use it only in special circumstances.<sup>24</sup>

20. R. DICKERSON, *THE INTERPRETATION AND APPLICATION OF STATUTES* 206 (1975); 3 J. SUTHERLAND, *STATUTES AND STATUTORY CONSTRUCTION* § 61.01 (4th ed. 1974); R. Pound, *Common Law and Legislation*, 21 HARV. L. REV. 383 (1908).

21. *Hale v. Hale*, 312 Ky. 867, 230 S.W.2d 610 (1950); *Minkin v. Minkin*, 336 Pa. 49, 7 A.2d 461 (1939); *Fowler v. Fowler*, 242 S.C. 252, 130 S.E.2d 568 (1963). *Contra*, *Horton v. Uniguard Ins. Co.*, 355 So. 2d 154 (Fla. Dist. Ct. App. 1978); *Durham v. Durham*, 227 Miss. 76, 85 So. 2d 807 (1956).

22. *Falco v. Pados*, 444 Pa. 372, 377, 282 A.2d 351, 354 (1971) (unemancipated child who was passenger in automobile driven by her mother was injured in collision with defendant Pados; Pados joined child's mother as a defendant). For a list of some of the exceptions to the parental immunity rule, see note 6 *supra*. For an example of a statute abrogating the immunity rule in part, see N.C. GEN. STAT. § 1-539.21 (Supp. 1977).

23. *Streenz v. Streenz*, 107 Ariz. 86, 88, 471 P.2d 282, 284 (1970) (unemancipated child's mother drove automobile into tree, thereby injuring child).

24. In abrogating the parental immunity rule, the courts have reached different conclusions as to the breadth of the abrogation. *Goller v. White*, 20 Wis. 2d 402, 122 N.W.2d 193 (1963), abrogated the immunity rule, except: "(1) where the alleged negligent act involves an exercise of parental authority over the child; and (2) where the alleged negligent act involves an exercise of ordinary parental discretion with respect to the provision of food, clothing, housing, medical and dental services, and other care." *Id.* at 413, 122 N.W.2d at 198. Supportive of this approach are *Hebel v. Hebel*, 435 P.2d 8 (Alas. 1967) and *Streenz v. Streenz*, 106 Ariz. 86, 471 P.2d 282 (1970).

*Plumley v. Klein*, 388 Mich. 1, 199 N.W.2d 169 (1972), purported to follow *Goller*, but the court abrogated the immunity rule only where the exercise of parental authority or the provision of necessities is *reasonable*. Also supportive of this position is *Rigdon v. Rigdon*, 465 S.W.2d 921 (Ky. 1971). This raises the problem of whether or not the court created a standard of care for parents in areas in which the immunity is not abrogated. *Gibson v. Gibson*, 3 Cal. 3d 914, 921, 479 P. 2d 648, 653, 92 Cal. Rptr. 288, 293 (1971), did create a standard of care peculiar to parents. "Thus, we think the proper test of a parent's conduct is this: what would an ordinary reasonable and prudent *parent* have done in similar circumstances?" (Emphasis in original.)

Another approach has been to abrogate the immunity rule where the alleged negligent conduct did not arise out of the family relationship and was not connected with family purposes. *Schenk v. Schenk*, 100 Ill. App. 2d 199, 241 N.E.2d 12 (1968) (father brought action against unemancipated daughter for injuries he sustained when she negligently ran into him with an automobile).

Other courts have abrogated the parental immunity doctrine "absolutely." *Balts v. Balts*, 273 Minn. 419, 142 N.W.2d 66 (1966); *Briere v. Briere*, 107 N.H.

The court in *Fugate* justified the parental immunity rule solely on the ground that to allow actions between family members would "result in disharmony or destruction of family relations."<sup>25</sup> This seems to be a retreat from the number of justifications that have historically been made for the rule.<sup>26</sup> Apparently two of the other traditional justifications, the right of the parent to discipline his child and the possibility of collusive suits,<sup>27</sup> are not "mere makeweights."<sup>28</sup> Neither was relied on in *Fugate*.

In *Bahr* it was stated that the "preservation of the parent's right to discipline his minor children has been the basic policy behind the rule of parental immunity."<sup>29</sup> This justification for the rule was not relied on in *Fugate*, perhaps because it does not address how a parent's right to discipline his child is applicable to negligence cases. Discipline is usually administered intentionally; almost by definition one cannot negligently discipline a child. Thus, in a negligence case such as *Bahr* or *Fugate*, a parent's right to discipline the child seems irrelevant. Another possible reason *Fugate* did not mention the right of the parent to discipline the child is that the defendant, a non-custodial parent who was not exercising any right of temporary custody, may not have had the right to discipline his child.

Whatever the reasons, *Fugate* justified the immunity rule only on the basis that to allow actions would disturb domestic tranquility. Although traditionally this has been the strongest justification for employing the

432, 224 A.2d 588 (1966); *Gelbman v. Gelbman*, 23 N.Y.2d 434, 245 N.E.2d 192, 297 N.Y.S.2d 529 (1969); *Falco v. Pados*, 444 Pa. 372, 282 A.2d 351 (1971).

Still other courts either have never adopted the parental immunity rule or have left the breadth of the abrogation undefined. *Tamashiro v. De Gama*, 51 Hawaii 74, 450 P.2d 998 (1969); *Rupert v. Stienne*, 90 Nev. 397, 528 P.2d 1013 (1974); *France v. A.P.A. Transport Corp.*, 56 N.J. 500, 267 A.2d 490 (1970); *Nuelle v. Wells*, 154 N.W.2d 364 (N.D. 1967); *Wood v. Wood*, 135 Vt. 119, 370 A.2d 191 (1977). See also Annot., 41 A.L.R.3d 904, 964 (1972).

25. 582 S.W.2d at 668.

26. An examination of the opinions . . . discloses that . . . seven reasons . . . have been given for denial of a personal injury action between parent and minor child: the position of the family as a quasi governing unit; the husband-wife cases denying an action despite a married women's statute; danger of fraud (stale claims asserted after majority); possibility of succession (inheritance of amount recovered in damages); family exchequer (financial detriment to other children); disturbance of domestic tranquillity (although a reason sometimes suggested of the danger of possible domestic collusion where there is liability insurance is antithetical); and interference with parental discipline and control.

McCurdy, *Torts Between Parent and Child*, 5 VILL. L. REV. 521, 528 (1960). For an explanation of these rationales, see McCurdy, *Torts Between People in Domestic Relation*, 43 HARV. L. REV. 1030, 1072 (1930).

27. "When an action is brought against a parent, frequently it will be brought at the instance of, or with the approval of, the parent with an eye toward recovery from the parent's already purchased liability insurance." *Sorensen v. Sorensen*, 369 Mass. 350, 362, 339 N.E.2d 907, 914 (1975).

28. *Dunlap v. Dunlap*, 84 N.H. 352, 361, 150 A. 905, 909 (1930) (contains a good discussion of the traditional justifications for the rule).

29. *Bahr v. Bahr*, 478 S.W.2d 400, 401 (Mo. 1972).

parental immunity rule, it is not in itself unassailable. First, the domestic tranquility fostered by the immunity rule is based on "a procedural disability of the child to sue . . . and not from a lack of violated duty."<sup>30</sup> The doctrine admits that the bar to the action is premised "on the theory that an uncompensated tort makes for peace in the family."<sup>31</sup> It seems that the evil to be avoided by the immunity rule is the filing of the action and not the underlying injury that gives rise to the suit. The assumption that compensation of a wrong is more disruptive of family harmony than the underlying wrong itself should be reexamined. Second, there never has been a bar between parent and child for actions in property<sup>32</sup> or contract;<sup>33</sup> yet these kinds of disputes are sometimes more hostile than disputes among family members in personal injury cases.<sup>34</sup> The result of this distinction is that the law protects "the property rights of a minor more zealously than the rights of his person."<sup>35</sup>

The domestic tranquility justification is made even less defensible because of the interaction of liability insurance with tort law.<sup>36</sup> It is im-

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30. *Brennecke v. Kilpatrick*, 336 S.W.2d 68, 73 (Mo. En Banc 1960). It remains unclear why denying the cause of action on a "procedural disability" is significant. Substantive rights cannot exist in the abstract; there must be some procedural mechanism that will make the substantive right concrete. Therefore, a "procedural disability" that denies any mechanism for the realization of the right is essentially the same as a denial of the substantive duty.

31. W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* 866 (4th ed. 1971). "When serious injury has occurred, harm to the relationship has occurred; ill-feelings, however, may be lessened where reparation may be made." *Tamashiro v. De Gama*, 51 Hawaii 74, 78, 450 P.2d 998, 1001 (1969). See also *Gibson v. Gibson*, 3 Cal. 3d 914, 919, 479 P.2d 648, 651, 92 Cal. Rptr. 288, 291 (1971); *Sorensen v. Sorensen*, 369 Mass. 350, 360, 339 N.E.2d 907, 913 (1975); *Falco v. Pados*, 444 Pa. 372, 380, 282 A.2d 351, 355 (1971) ("it is the injury itself which is the disruptive act").

32. *Hebel v. Hebel*, 435 P.2d 8, 10 (Alas. 1967); *Streenz v. Streenz*, 106 Ariz. 86, 87, 471 P.2d 282, 283 (1970); *Gibson v. Gibson*, 3 Cal. 3d 914, 916, 479 P.2d 648, 649, 92 Cal. Rptr. 288, 289 (1971); *Rigdon v. Rigdon*, 465 S.W.2d 921, 922 (Ky. 1971); *Wells v. Wells*, 48 S.W.2d 109, 111 (K.C. Mo. App. 1932); W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* 865 (4th ed. 1971); *McCurdy*, *supra* note 8, at 1057.

33. *Streenz v. Streenz*, 106 Ariz. 86, 88, 471 P.2d 282, 284 (1970); *Briere v. Briere*, 107 N.H. 432, 434, 224 A.2d 588, 590 (1966).

34. *Wells v. Wells*, 48 S.W.2d 109, 111 (K.C. Mo. App. 1932); *Goller v. White*, 20 Wis. 2d 402, 410, 122 N.W.2d 193, 197 (1963); *McCurdy*, *supra* note 8, at 1075.

35. *Goller v. White*, 20 Wis. 2d 402, 410, 122 N.W.2d 193, 197 (1963).

36. When we consider the significance of the miscegenetic union [of tort law and liability insurance] for social life, we find that although lawyers and judges recognize the close relationship of liability insurance and the tort process, they have not considered and are not aware of the full implications of the relationship. If its importance is realized, it is not stressed; remarkably little has been written on the subject. It is common, even for those of us who know better, to continue to talk of "tort law" as if the process to which personal injury claims were subjected in the nineteenth century still were in effect. Our analysis of our claims system follows a bifurcated path. On the one hand we examine the tort process and on the other we examine the liability insurance institution. When we



portant to note that the court in *Fugate* did not mention the existence of liability insurance except in its enumeration of the relevant facts. In *Baker* the existence of liability insurance was explicitly declared to be irrelevant to the issue of the viability of the immunity rule.<sup>37</sup> The court's silence in *Fugate* might be an indication that the *Baker* position is not as tenable as it once was.

The existence of liability insurance has several effects which mitigate the importance of the domestic tranquility rationale. First, where insurance is nonexistent, it is doubtful that unemancipated minor children will sue their parents.<sup>38</sup> Second, where the practice of insuring is widespread the domestic tranquility argument rings hollow, for "in reality the sought after litigation is not between child and parent, but between the child and the parent's insurance carrier."<sup>39</sup> Thus, the "action between parent and child is not truly adversary."<sup>40</sup> If the action is not really an adversary proceeding between parent and child, then the disruptive effect of the suit will be minimal.

A third effect that the presence of liability insurance has on the viability of the domestic tranquility rationale is that "with today's skyrocketing health costs" an injury to a family member is a fact "which often works the greatest hardship on the family unit."<sup>41</sup> In denying insurance proceeds to compensate the family unit for its expenditures stemming from the child's injuries, the parental immunity doctrine may create greater disharmony in the family relations than already exists by placing a financial burden on the family unit that it cannot easily bear.<sup>42</sup>

The Missouri Supreme Court considered the injustice created by the parental immunity rule and stated that under the facts in *Fugate* "the family in its traditional sense already [had] been disrupted through divorce prior to the time this action arose."<sup>43</sup> The court then concluded that the filing of the action could not disrupt a domestic establishment that had already been disrupted.

Deciding the case on the basis of protecting domestic tranquility

consider proposals for reform in the one or the other we rarely ask how changes in the one will affect the other.

Smith, *The Miscegenetic Union of Liability Insurance and Tort Process in the Personal Injury Claims System*, 54 CORNELL L. REV. 645, 646 (1969) (citations omitted).

37. 364 Mo. 453, 263 S.W.2d 29 (1953).

38. *Streenz v. Streenz*, 106 Ariz. 86, 88, 471 P.2d 282, 284 (1970).

39. *Id.*

40. *Sorensen v. Sorensen*, 369 Mass. 350, 362, 339 N.E.2d 907, 914 (1975) (Query: If the action is not a true adversary proceeding, does that necessarily make it a collusive action?).

41. *Falco v. Pados*, 444 Pa. 372, 380, 282 A.2d 351, 355 (1971).

42. "The child's suit, if successful, will provide a fund to care for its injuries which might otherwise be unavailable. Far from upsetting family ties, the suit is actually an incident in the course of a family's provident management of its affairs." *Badigian v. Badigian*, 9 N.Y.2d 472, 479, 174 N.E.2d 718, 723, 215 N.Y.S.2d 35, 41 (1961) (Fuld, J., dissenting).

43. 582 S.W.2d at 669.

presents some problems. First, the familial relationship between a father and daughter is not always destroyed when the daughter's parents are divorced. In the instant case there was an evidentiary hearing which found a "harmonious relationship between defendant and his daughter."<sup>44</sup> A child does not stop having a congenial relationship with her noncustodial parent just because her parents are divorced. Second, assuming that the familial relationship between father and daughter was severed when the general care and custody of Denise was granted to her mother, that relationship was re-established after Verla Mae Fugate's death. By the time the suit was filed, Harold had assumed the general care and custody of Denise. A new family unit which consisted of plaintiff and her father was thus established.

It is not clear why the court looked to the time the tort was committed when evaluating the family unit since *that* family unit was not the domestic establishment that would be disrupted by the filing of the suit. Since the policy behind the rule is to prevent the disruption in family harmony caused by the filing of the suit, it seems that one should look to the time of filing as the crucial time for deciding what the family unit is.

The court's method of determining the family unit would raise a number of additional problems and complexities in other fact situations. For example, would the action be barred if a child's parents became divorced after the child is injured by one of the parents, but before the action is filed? What if a child's parents were divorced prior to the time the child is injured, but the child's parents remarry prior to the time the action is filed? At least in the latter situation, it seems that the justification for the rule would be defeated if the family unit was determined by using the *Fugate* analysis.

The concurring opinion in *Fugate*<sup>45</sup> rejected the majority's "per se" rule that after a child's parents have been divorced, an unemancipated minor may bring an action against her noncustodial parent for injuries that do not arise from the exercise of the noncustodial parent's temporary custody and visitation rights. The concurring opinion based its conclusion that the child could bring the wrongful death action on the fact that the evidentiary hearing at the trial level showed "no disruption in the harmonious relationship between defendant and plaintiff because of the filing of this action."<sup>46</sup> Since *Fugate* did not expressly overrule but only "modified" the *Bahr* opinion,<sup>47</sup> even under the majority opinion the plaintiff may

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44. *Id.* at 664.

45. Then Chief Justice Morgan and Judge Rendlen joined in the concurring opinion written by Judge Donnelly. One may only speculate as to how the recent personnel changes in the Missouri Supreme Court will affect the law in this area.

46. 582 S.W.2d at 670 (Donnelly, J., concurring).

47. For a comparison of the *Fugate* and *Bahr* opinions, see text accompanying notes 15-17 *supra*.

still be entitled to an evidentiary hearing<sup>48</sup> to show that family harmony will not be disrupted by allowing the suit whenever the defendant attempts to invoke the parental immunity doctrine to bar the action.<sup>49</sup>

It remains uncertain how the trial courts will decide whether to bar a suit as a result of its findings in the evidentiary hearing.<sup>50</sup> If the action has not caused any disruption (as was found in *Fugate*), then the action should not be barred. If the action has already disrupted the domestic relations, then, under the reasoning of the majority in *Fugate*, the action cannot again disrupt those relations; thus, it should not be barred. In other words, if the majority and concurring opinions in *Fugate* are carried to their logical extremes, the suit will not be barred regardless of whether the trial court finds disruption. Using this analysis, the only time a trial court should bar an action is in the relatively rare case when it determines that there has not yet been any disruption, but that family harmony *will* be disrupted if the suit is allowed to continue.

Both the majority and concurring opinions fail to address another of the plaintiff's contentions for reversal, namely, that the parental immunity rule should be abolished. In doing so the court failed to resolve the underlying problem of the case, *i.e.*, whether there should be a parental immunity rule, and if so, when this rule should be applied. In the solution of this problem, there should first be an examination of the social costs and benefits of abrogating the parental immunity rule. The familiar social goals or public policies behind tort law are advanced by allowing the action, *e.g.*, compensating the victim for his injuries and deterring the parent from injuring the child. Some of the social costs of abolishing the immunity rule are: the possibility of friendly or collusive suits; the effects of an increase in liability insurance rates; and any family disruption

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48. Indeed, if one gets an evidentiary hearing, then it is plausible that the existence of liability insurance may be admissible. However, in order to get this admitted into evidence, the plaintiff would have to overcome the *Baker* decision which explicitly declared that the existence of liability insurance is not admissible because it is irrelevant in determining whether the parental immunity rule should be applied. In *Fugate*, however, the court emphasized that an action should not be barred if family harmony would not be disrupted by allowing the suit. Therefore, one can certainly make a valid argument that the presence of liability insurance is relevant because it lessens the adverseness and thus the disruption caused by the suit. To keep this relevant evidence out, the defendant would have to show that its prejudicial effect outweighs its probative value.

49. For a case granting an evidentiary hearing under *Bahr*, see *Kiefer v. Kiefer*, 497 S.W.2d 851 (Mo. App., D. Spr. 1973).

50. Intuitively it seems unlikely that an evidentiary hearing will be very effective. Preservation of domestic tranquillity is the goal behind the immunity rule, but having an evidentiary hearing to see if the filing of an action will disrupt family relations may not promote that goal. Once an adversary proceeding has begun—whether that proceeding is called an evidentiary hearing or not—it seems likely that any additional acrimony or ill feelings that the suit creates will be unleashed. On the other hand, if the evidentiary hearing is restricted to avoid any disruption in family relations, there will not be enough evidence on the merits to determine whether the suit will cause disharmony in the family.

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resulting from the filing of the suit beyond that already caused by the underlying tort.

The cost of entertaining collusive suits may be a major problem, yet there are at least two factors that might mitigate the effects of not barring these potentially collusive actions. First, many liability insurance contracts impose on the insurer a duty to defend.<sup>51</sup> If an insurance company is hiring the defendant's attorney, one can assume that the possibility of collusive actions is lessened. Second, if one were to deny a cause of action in all cases because there is the possibility that some future cases will be collusive or fraudulent, then one would end up denying all causes of action.<sup>52</sup>

The effects of an abolition of the parental immunity rule on the liability insurance business are harder to discern. Presumably, allowing tort actions between parent and unemancipated child would increase homeowner's and automobile liability insurance rates since injury between parent and child is probably not infrequent. This increase in insurance rates conceivably could have such adverse effects as causing older homeowners or single unmarried automobile drivers to pay higher insurance rates, though these groups are not likely to have unemancipated children, or causing a greater number of persons to drive with inadequate insurance coverage, thus increasing the number of accidents involving judgment-proof drivers.

Consideration of the social costs and benefits described above is illustrative of the analysis that should be used *explicitly* in determining whether to retain the immunity rule.<sup>53</sup> If the court finds that the benefits of abolishing the immunity rule outweigh the costs, then it should abolish the rule. If the social costs of abrogation outweigh the benefits of keeping the rule, then the immunity rule should be retained. The use of halfway measures, however, such as evidentiary hearings and the incessant creation of judicial exceptions, only creates uncertainty and wasteful litigation.

*Fugate* may be the sounding of the death knell for the parental immunity rule as an absolute bar to an action. Here an unemancipated minor child was allowed to sue the *parent with whom she was living* at the time the suit was filed, the underlying alleged wrong was *negligence*, and there was the possibility—though never discussed by the court—that this was a *friendly* suit. By permitting this action the Missouri Supreme Court has certainly endangered the vitality if not the very existence of

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51. This duty to defend may have adverse effects on the insured. See Smith, *supra* note 36, at 656.

52. Gibson v. Gibson, 3 Cal. 3d 914, 920, 479 P.2d 648, 652, 92 Cal. Rptr. 288, 292 (1971).

53. One way to rationalize the holding in *Fugate* is to look at it in the context of liability insurance. The narrow holding allowed plaintiff to recover, but was not so broad as to effect a general increase in insurance rates. Thus, the case can be read as striking a fragile balance between two social goals—compensation for the victim and avoiding the adverse effects of an increase in liability insurance rates.

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this tort immunity. While the parental immunity rule may never be completely abrogated in Missouri,<sup>54</sup> the supreme court has indicated a willingness to search for reasons not to invoke it.

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54. Even in those jurisdictions where the parental immunity rule has been abrogated, the policy rationales justifying the rule resurface when a court considers the breadth of liability between parent and child. New York, a state which has "absolutely" abrogated the parental immunity rule, recently denied recovery to a child by finding that a parent owed the child no "duty" of care for supervision. The court noted that in determining exactly what actions a child may maintain against a parent, the policies justifying parental immunity come into play, thus narrowing the kinds of actions a child may maintain against a parent. *Holodook v. Spencer*, 36 N.Y.2d 35, 324 N.E.2d 338, 364 N.Y.S.2d 859 (1974).

