Tort Actions between Members of the Family–Husband & Wife--Parent & Child

Edwin D. Akers

William H. Drummond

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TORT ACTIONS BETWEEN MEMBERS OF THE FAMILY—HUSBAND & WIFE—PARENT & CHILD

I. INTRODUCTION

The lyon did with the lamb consort
And eke the dove safe by the faulcons side;
No each of other feared fraud or tort
But did in safe security abide.

Spencer, Faerie Queene

In recent years there have been some significant changes concerning the right of one family member to recover from another for a personal tort committed within the family relation. The familiar rule which once dogmatically barred such actions and which is well illustrated in allegory by the above quotation from Spencer’s fine work, has been seriously eroded. It is significant that Missouri has been among the leaders in this process of erosion, at least in the case of parent-child tort actions; nor has Missouri dogmatically applied the rule which bars suits between husband and wife.

The scope of this article, however, is not limited to Missouri decisions, but attempts to trace the inception, growth and seeming decline, in some areas of the law, of the rule barring family actions for torts as indicated in cases from all jurisdictions.

II. TORT ACTIONS BETWEEN HUSBAND AND WIFE

A. ENGLISH COMMON LAW:

At common law it was clear that neither the husband nor the wife could sue the other in any type of action at law, whether it concerned contract, tort, or property. One of the reasons for this was the common-law doctrine of unity of husband and wife.¹ By the unity fiction, the wife’s personality merged with that of the husband at marriage and they were, in effect, a single legal entity. At the time of marriage the husband also became possessed of the wife’s choses in action; and in order for the wife to enforce a cause of action against anyone, it was necessary that the husband be joined as party plaintiff. This presented a procedural impossibility if the wife attempted to sue the husband, for he would be both plaintiff and defendant in the same suit. In the same manner the common law doctrine which held a husband liable for the torts of his wife during coverture² brought about a procedural impossibility if the husband attempted to sue the

¹ 1 BLACKSTONE COMMENTARIES 442 (Lewis ed. 1902); Cage v. Acton, 1 Raym. Ld. 515 (K.B. 1699); 27 AM. JUR. HUSBAND & WIFE § 589 (1940).
² See McCurdy, Torts Between Persons in Domestic Relation, 43 HARV. L. REV. 1030, 1033 (1930).
wife. He would be responsible for the tort committed by her against himself, and again, the husband would be both plaintiff and defendant in the same suit.

The denial of suits between husband and wife on the basis of these two theories prompted early speculation that if the procedural difficulties could be removed, there would remain no real reason why one spouse could not sue the other at law.³ But in 1876, after the passage of the Divorce Act,⁴ there came to the Court of Queen's Bench the case of Phillips v. Barnett,⁵ which threw a different light on the matter. In that famous case the wife, after a divorce from her husband under the Divorce Act, sued her former spouse for an assault committed by him against her person during the marriage. It was held that the fact the woman had secured a divorce at the time of bringing the action removed the procedural impediment discussed above, but that such an action would not lie because the real reason for one spouse's inability to sue the other was the common-law doctrine of unity of husband and wife. Therefore no cause of action ever arose in her favor at the time the assault was committed. Whatever speculation may have existed before Phillips v. Barnett that the problem was merely one of procedure was laid to rest with the decision in that case and it became clear that the courts regarded the problem as being one of substantive law, as well as, or instead of, merely procedural.

B. THE AMERICAN RULE: SUITS BY WIFE AGAINST HUSBAND:

1. Before Married Women's Acts:

The doctrine of Phillips v. Barnett carried over to the American courts, as is amply illustrated by the case of Abbott v. Abbott.⁶ The facts were very similar to those in Phillips and the Maine court expressly approved of the reasoning used in that case to deny the right of action against the husband. It was further asserted by the court that such actions would be against public policy in that they would lay bare all that might transpire during coverture and afford to the wife the means to plunder a deceased husband's estate. Both Phillips and Abbott were decided upon common-law grounds before the passage of any Married Women's Acts.

2. After Married Women's Acts:

In America, from about 1850, Married Women's Acts began to appear in many states, until today all states have some form of legislation purporting to free the wife from at least some of the disabilities which attached to her at common law. While the statutes vary from state to state, most of them are written in rather broad, general terms, without expressly allowing or expressly forbidding

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³. See, e.g., Mr. Justice Blackburn in Phillips v. Barnett, 1 Q.B. 436, 438 (1876): "I was at first inclined to think, having regard to the old procedure and the form of pleas in abatement, that the reason why a wife could not sue her husband was a difficulty as to parties; . . ."
⁵. Supra note 3.
⁶. 67 Me. 304 (1877).
interspousal tort suits. Most of the statutes do employ language to the effect that the wife may sue and be sued as though unmarried. 7

To what extent have these statutes changed the husband-wife relationship in regard to litigation between them in the courts? Have they destroyed the common-law concept of unity of husband and wife? May one spouse now sue the other in actions at law whenever and however that action arises? Is the problem today purely one of statutory construction, or is the problem one of policy also? These, and many other questions, faced the courts after the passage of the Married Women's Acts.

In construing such statutes, courts at the outset find themselves faced with two canons of statutory construction which conflict. On the one hand is the maxim that statutes in derogation of the common law are to be strictly construed. 8 On the other is the doctrine that remedial legislation is to be liberally construed. 9 Thus, depending upon which of these canons is judged to be the weightier, there exists room and reason for different courts to reach different results in similar factual situations under statutes which are nearly identical in language.

There is general agreement that the Married Women's Acts were passed primarily to free the wife from the domination and control of the husband in her property rights, 10 allowing her to bring actions without joining her husband as party plaintiff to enforce those rights, and to enable her to transact business by contracting with others in her own name independently of her husband. 11 At the same time, a correlative duty was put upon her to become responsible, in her own name, for her own liabilities and obligations arising out of her newly acquired rights. In conjunction with this, the statutes enabled third parties who dealt with the wife to sue the wife alone, without the necessity of joining the husband as party defendant.

While there was unanimity of opinion that Married Women's Acts allowed a wife to sue and be sued as to third parties, the question remained whether under such acts one spouse could sue the other. Generally, as to property rights and contracts between the spouses, courts have, since the enactment of these statutes,


8. 3 Sutherland, Statutory Construction § 6903, at 346 (3rd ed. 1943).

9. Ibid.

10. See Madden, Persons & Domestic Relations ch. 4, §§ 42-43, at 110 (1931).

11. Id., § 47, at 137.
consistently allowed such suits. Early, the argument was made that, since most of the statutes did not expressly provide for suits between spouses, the canon that statutes in derogation of the common law should be strictly construed must be applied so as to prevent any such suit. Consistently, however, when dealing with property rights or contracts between the spouses, the courts rejected this argument, reasoning that since the principal purpose of the statutes was to equate the wife with the husband in respect to property and contract matters and to allow her to acquire and hold property in her own name and to contract with third persons independently of her husband, it would be illogical not to allow her to enforce her newly won rights in the courts, even against her husband. The same reasoning was applied to hold the wife liable in suits concerning property or contract matters when the husband was the plaintiff. Again, it would be illogical not to hold the wife liable in suits arising against her out of her newly created rights, even when the husband was plaintiff. Thus, as to property rights and contracts between the spouses, clearly one spouse may enforce her or his rights in court against the other under the Married Women's Acts.

As to personal torts committed by one spouse against the other during coverture, however, the matter is entirely different. As stated previously, most of the statutes neither expressly allow nor expressly prohibit suits between husband and wife, regardless of whether the action sounds in tort, property, or contract. Only four jurisdictions deal specifically with interspousal tort actions in their Married Women's Acts. New York expressly allows such suits, as does North Carolina. Wisconsin expressly allows suits by the husband against the wife. Illinois expressly prohibits tort actions by either spouse against the other. The states having no such express provision are in conflict on the question of the

13. See statutes cited supra note 7.
15. N.Y. Dom. Rel. Law § 57. But see N.Y. Vehicle & T. § 345(e)(2), which exempts an insurer from liability for injury to the person or property of the insured's spouse, unless an express provision in the policy provides otherwise.
17. Wis. Stat. Ann. § 246.075 (1957). This statute was passed after Wait v. Pierce, 191 Wis. 202, 209 N.W. 475 (1926), had allowed a wife to maintain an action based on negligence against the husband and Fehr v. General Acc. Fire & Life Assur. Corp., 246 Wis. 228, 16 N.W.2d 787 (1944), denied a husband the right to sue his wife for a negligent tort.
18. Ill. Rev. Stat. ch. 68, § 1 (1957). See also Mass. Gen. Laws Ann. ch. 209, § 6 (1958), which provides: "A married woman may sue and be sued in the same manner as if she were sole; but this section shall not authorize suits between husband and wife." This section has been construed as not allowing interspousal tort actions, but it does not prevent suits in equity as between spouses. Hawaii Rev. Laws § 325-5 (1955) is nearly identical in language with the statute quoted above.
effect of Married Women’s Acts on the ability of a wife to bring suit against her husband, though it can be said there is a clear majority view.

Thompson v. Thompson\(^9\) is the leading case which determined whether or not, under a Married Women’s Act, a wife may sue her husband for a personal tort committed during coverture. This case involved a statute of the District of Columbia\(^10\) which empowered married women “to sue separately... for torts committed against them as fully and freely as if they were unmarried, ...” The wife brought an action against her husband for an assault and battery committed during coverture. The Court held that to allow this would “open the doors of the court to accusations of all sorts by one spouse against the other, and bring into public notice complaints for assault, slander and libel,”\(^21\) and wondered “whether the exercise of such jurisdiction would be promotive of the public welfare and domestic harmony,”\(^22\) concluding that it was at least a debatable question. Mr. Justice Harlan, joined by Justices Holmes and Hughes, dissented, asserting that the statute was plainly intended to allow such actions and that the majority opinion would “defeat the clearly expressed will of the legislature by a construction of its words that cannot be reconciled with their ordinary meaning.”\(^23\) The dissent further pointed out that the Court should have no concern about the wisdom and policy of the legislation in question, but must only interpret the law as written by the legislature.

A large majority of American courts, following Thompson v. Thompson, have construed their Married Women’s Acts as not furnishing the means whereby one spouse may sue the other for a personal tort committed during coverture.\(^24\)

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21. 218 U.S. at 617-618.
22. Id. at 618.
23. Id. at 623-624.

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A small, but vocal minority of American states, following the reasoning of the dissent in Thompson v. Thompson, have interpreted their Married Women's Acts as allowing interspousal tort actions, at least when the wife is the plaintiff.25

a. Reasons Given By Courts Following Majority American Rule

Although it is true that some of the statutes are worded more restrictively than others, and consequently necessitate a more narrow construction, nevertheless all the cases cannot be reconciled on the basis of a difference in the wording of the applicable statute, for at times different results are reached by different courts under statutes with almost identical wording. Many of the reasons given for denying such suits are the same as the reasons given for denying suits between parent and child. The parent-child cases are not based upon statute at all, but wholly upon common-law principles, for there has been no legislation touching the question of parent-child suits. The most common reasons, several or all of which admittedly may be given by the same court in the same case, for denying interspousal tort actions are the following.

It is asserted by some courts that Married Women's Acts did not abrogate the common-law rule that spouses cannot sue one another for personal torts.26


Courts using this argument reason that, since Married Women's Acts are in derogation of the common law, they must be construed strictly. It is asserted that such statutes do not give the husband any new rights and therefore have not removed the husband's disability to sue the wife for a personal tort; therefore the statute cannot be construed so as to give the wife a right which the husband does not possess. Courts which raise this argument seem to feel that Married Women's Acts were passed for the sole purpose of equating the wife with the husband, insofar as ability to bring actions in a court is concerned, and since no statute has ever given the husband the right to sue the wife, the Married Women's Acts did not give this right to the wife.

Many courts refuse to allow interspousal tort actions on the ground that to allow such actions would be disruptive of domestic peace. Representative of the reasoning employed is the case of Corren v. Corren, wherein the court said:

When one ponders the effect upon the marriage relationship were each spouse free to sue the other for every real or fancied wrong springing even from pique or inconsequential domestic squabbles, one can imagine what the havoc would be to the tranquility of the home . . . success of the sacred institution of marriage must depend in large degree upon harmony between the spouses, and the relationship could easily be disrupted and the lives of offspring blighted if bickerings blossomed into law suits and conjugal disputes into vexatious, if not expensive, litigation.

The same court later expressed this reason as an alternative one, without indicating where it stands in the order of importance. In Shiver v. Sessions the court stated:

Even though some common law disabilities of married women have now been removed . . . it is generally held that the rule (denying interspousal tort actions) should still be adhered to, either on the ground that the . . . Act in question did not completely destroy the common law fiction of the unity of husband and wife, or on the ground that domestic tranquility is fostered by the prohibition of actions by a wife against her husband for his torts against her.

Another reason used by some courts to deny interspousal tort suits is that if the rule denying such actions is to be changed, it is a matter for the legislature, and not for the courts. The New Jersey court, in Kennedy v. Camp, well expressed the general tenor of this position when it said:

28. 47 So.2d 774 (Fla. 1950).
29. Id. at 776.
30. 80 So.2d 905 (Fla. 1955).
31. Id. at 906.
33. Supra note 24.
Such a radical change in the common law philosophy of marital union, identity and integrity cannot be made to rest upon statutory provisions of uncertain and doubtful import; it is fairly to be presumed that the lawgiver was familiar with this basic policy of centuries, and a purpose to effect a change so fundamental would be expressed in clear and indubitable terms.\textsuperscript{34}

As a further reason for not allowing interspousal tort actions, some courts have expressed a fear that allowance of such suits would result in collusive actions between spouses, at least where the defendant spouse is covered by insurance, and would greatly encourage petty lawsuits which would flood the courts with trivial matters.\textsuperscript{35} The majority of courts seem to feel that to allow one spouse to sue the other for an intentional or negligent tort would expose to litigation the whole field of domestic relations, and marital conduct between the spouses would stand on no different footing than conduct between a spouse and an outside, third person. Thus, a careless word, or an unwanted kiss might give rise to an action for slander or assault.

It is maintained by some courts that it is not necessary that one spouse be able to maintain a civil action for damages against the other, because there exist adequate remedies in the form of divorce and criminal proceedings.\textsuperscript{36} It is argued that, if the spouse is actually wronged, it is possible to obtain a divorce or to prosecute the wrongdoer in a criminal action so that the injured spouse may obtain redress for his or her grievances.

Essentially, the above reasons are the ones relied upon in denying one spouse a cause of action against the other for a tort which occurs during coverture. As will be noted, all the reasons given are not based upon construction of Married Women's Acts, but rather some are founded upon judicial notions of public policy. Further, it is not unusual to encounter statements by courts to the effect that even if a particular Married Women's Act is broad enough to allow such suits, to so hold would disrupt domestic peace, or flood the courts with litigation, and on that basis alone the right of action is denied. When reading such statements, one can not but harken to the words of Mr. Justice Harlan, dissenting in Thompson v. Thompson, that courts should have no concern with the wisdom or desirability of statutes but must merely interpret the language as written by the legislature.

b. Reasons Given by Courts Following the Minority American Rule

The minority of American courts which allow interspousal tort actions do so by refuting all the arguments listed above for denying such suits. The cases, for the most part, closely parallel the dissent in Thompson v. Thompson in reasoning and result. In answer to the majority view, the cases allowing such suits have set forth the following reasons, among others.

It is argued by some courts that the Married Women's Acts abrogated the

\textsuperscript{34} Id. at 397, 102 A.2d at 599.

\textsuperscript{35} Thompson v. Thompson, 218 U.S. 611 (1910); Harvey v. Harvey, supra note 26.

\textsuperscript{36} Thompson v. Thompson, supra note 35; Austin v. Austin, 136 Miss. 61, 100 So. 591 (1924); Rogers v. Rogers, 265 Mo. 200, 177 S.W. 382 (1915); Kennedy v. Camp, 14 N.J. 390, 102 A.2d 595 (1954).
common-law rule of unity of husband and wife.37 In answer to the majority view's contention that such statutes must be strictly construed because in derogation of the common law, the Oklahoma court, in Courtney v. Courtney,38 asserted that the rule of strict construction of statutes in derogation of the common law has been abolished and a tendency of liberal construction shown in the state's laws and constitution to the end of attaining an "open door" policy and redress for every wrong. The court further stated that another valid reason for liberal construction of such statutes is the fact that they are remedial in character. This view has been recognized by authoritative text writers who assert that the modern tendency should be to extend as far as possible the rights of husband and wife to recover from each other.39 It is recognized that a complete change in policy is intended by the Married Women's Acts and it should not be ignored. Professor McCurdy asserts:

Where a statute does not forbid or clearly preclude tort actions between spouses for personal injury, the judicial approach should be that the unity concept of husband and wife has ceased to be a legal concept in matters affecting the person as well as in matters affecting property, and that interests of a spouse in redress of injuries to the person should be given recognition no less than interests in protection and redress of injuries to property. The pertinent question should be whether there is an unprivileged conduct tortious in character.40

Another argument used by some courts in support of allowing interspousal tort actions is that such suits are no more disruptive of domestic harmony than interspousal contract and property actions, which are freely allowed.41 The dissenting opinion in Mertz v. Mertz42 points out that:

... the rule (disallowing suits between husband and wife) exists merely as a product of judicial interpretation, is vestigial in character and embodies no tenable policy of morals or of social welfare. To urge that it survives because it is an aid to conjugal peace disregards reality. Conjugal peace would be as seriously jarred by an action for breach of contract, or on a promissory note, or for an injury to property, real or personal, all of which the law permits, as by one for personal injury.43

38. Id.
39. E.g., PROSSER, LAW OF TORTS § 101 (2d ed. 1955).
42. 271 N.Y. 466, 3 N.E.2d 597 (1936).
43. Id. at 476, 3 N.E.2d at 601.
A few courts have dismissed the argument that any change in the existing rule must come from the legislature by asserting that courts may change the common-law rule as well as the legislature. Bogen v. Bogen44 illustrates the position taken by some courts that it is not out of the hands of a court to change the rule:

... there ... never has been any statute declaring husband and wife are one ... It was an inference drawn by courts in a barbarous age, based on the wife being a chattel and therefore without any right to property, or person ... The anomalous instances of that conception which still survive are due to courts construing away the changes made by corrective legislation or restricting their application. Whether a man has laid open his wife's head with a bludgeon, put out her eye, broken her arm, or poisoned her body, he is no longer exempt from liability to her on the ground that he vowed at the altar to 'love, cherish, and protect' her. We have progressed that far in civilization and justice.45

In answering the argument that such suits may well be brought with collusion, some courts assert there is no more danger of collusive suits between husband and wife than there is between other persons having a close relationship.46 It is argued by courts allowing interspousal tort actions that there exists as much possibility of collusion in other areas of the law, and that one who is seriously aggrieved should not be denied a remedy simply because of this possibility. It is argued that courts and juries are well equipped to distinguish the fraudulent claim from the honest one. In fact, they have been doing so in other areas of the law for centuries.

As to the possibility of such actions filling the courts with petty litigation, the Connecticut court in Brown v. Brown47 said:

... we see nothing which is injurious to the public, or against the public good, or against good morals ... The danger that the domestic tranquility may be disturbed ... and that the courts will be filled with actions ... we think is not serious.

Eleven years later, in Bushnell v. Bushnell48 the same court noticed that the fear of petty litigation and fraudulent suits which some feared would arise with the decision in Brown v. Brown had not materialized.

Some courts, though hesitant about dignifying the argument by answer, point out that divorce and criminal proceedings are very inadequate to compensate for a past injury, and therefore civil actions for damages between the spouses are indeed necessary. Courtney v. Courtney49 covers this point well:

44. 219 N.C. 51, 12 S.E.2d 649 (1941).
45. Id. at 53, 12 S.E.2d at 651, quoting from Crowell v. Crowell, supra note 37, at 524, 105 S.E. at 210.
47. Supra note 37, at 48, 89 Atl. at 891.
48. 103 Conn. 583, 131 Atl. 432 (1925).
49. Supra note 37.
The argument that the wife has sufficient remedy in criminal proceedings and separate maintenance and divorce actions for the wrongs committed by her husband is barely worthy of consideration in any case and especially in a negligence case. Such actions . . . certainly do not compensate for past injuries.\(^{50}\)

The above discussion and cases cited cover the field generally. All of the cases cited involved a wife-plaintiff. Most of the cases were actions for negligence. As can be seen by a count, those courts which deny such actions are in the majority by about two to one. Nevertheless, the more recent cases in the group have quibbled a bit with the rule, and there have been serious reservations in several majority opinions as to its desirability in our modern world. Generally, it would seem that the rule which prohibits one spouse from suing the other for a tort occurring during coverture, though still alive, has lost much of its vigor, and that future cases may well bring about its eventual destruction, if legislatures do not sooner do so.

C. THE AMERICAN RULE: SUITS BY HUSBAND AGAINST WIFE

The mere fact that a court may construe its Married Women's Act as allowing a wife to sue her husband does not necessarily mean that the husband may sue his wife. Unless the particular Married Women's Act is construed as having abrogated the common-law rule which prevented the husband from suing his wife, he still is subject to that disability and the action cannot be maintained. This is likely to be the case since most courts point out that Married Women's Acts were passed primarily to relieve the wife of her common-law disabilities and that such statutes do not purport to effect any change in the status of the husband. Because of this, suits in which the husband is the plaintiff involve problems somewhat different than suits wherein the wife is plaintiff.

This writer has found but five reported cases which involve the question of whether or not a husband may sue his wife for personal injuries negligently inflicted by her during coverture. Apparently the first case involving such a suit was Poling v. Poling.\(^{51}\) There the husband brought suit against the wife in West Virginia for a negligent tort committed in Alabama. Applying West Virginia law, the court refused to allow the action on the basis that it would be against the policy of the state. The court recognized that Alabama allowed the wife to sue the husband for negligent torts\(^{52}\) and said that, in their opinion, this would also authorize suits by the husband in Alabama. This, of course, is pure dictum as no Alabama case has ever decided that question.

The next case to arise which dealt with the question was Fehr v. General Acc., Fire & Life Assur. Corp.,\(^{53}\) where the plaintiff husband brought an action

\(^{50}\) Id. at 401, 87 P.2d at 666. To the same effect see Johnson v. Johnson, 201 Ala. 41, 77 So. 335 (1917); Crowell v. Crowell, 180 N.C. 516, 105 S.E. 206 (1920).


\(^{52}\) Citing Penton v. Penton, 223 Ala. 282, 135 So. 481 (1931).

\(^{53}\) 246 Wis. 228, 16 N.W.2d 787 (1944).
against the defendant insurer for injuries caused by the negligent operation of an automobile driven by his wife. *Wait v. Pierce* had previously allowed the wife to bring such a suit against her husband. But the Wisconsin court held that there was no cause of action as against the wife, and therefore no liability as against the wife's insurer, on the theory that the Wisconsin Married Women's Act was passed with a view to changing the rights of married women only and in no way enlarged any rights of a husband. It followed that the common-law rule prohibiting a husband from bringing action against his wife was a bar to the suit. Subsequent to this decision, the Wisconsin legislature enacted a statute which allows a husband to bring such a suit against his wife.

The law in North Carolina has followed the same pattern as that in Wisconsin. In *Scholtens v. Scholtens*, the husband sued the wife for injuries received as a result of the wife's negligence in the operation of an automobile. The court held that the North Carolina Married Women's Act did not create in the husband any rights which he did not have at common law; therefore such a cause of action would not lie, since at common law a husband could not sue his wife. This was the result in spite of the fact that North Carolina had allowed the wife to sue the husband for negligent torts committed during coverture. North Carolina now allows such suits by statute.

*Leach v. Leach*, an Arkansas decision in 1957, is apparently the only case which has recognized that a husband may recover from his wife for a tort negligently inflicted during coverture. There, the husband, driving a truck, and his wife, driving an automobile, were involved in a head-on collision. The husband sued the wife for injuries received in the accident, alleging that the wife was on the wrong side of the road and driving at an excessive rate of speed. The Arkansas court, relying on *Fitzpatrick v. Owens*, which allowed a wife to sue the husband for an intentional tort, and *Katzenberg v. Katzenberg*, where the wife was allowed to sue the husband for a negligent tort, held that the husband had a cause of action against the wife. The court also based its decision on the wording in the Arkansas Married Women's Act which asserts that a wife may "sue and be sued." It distinguished *Fehr v. General Acc., Fire & Life Assur. Corp.* and *Scholtens v. Scholtens* on the basis that the Married Women's Acts in those jurisdictions are narrower, in that they do not contain wording which allows a wife to "sue and be sued."

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54. 191 Wis. 202, 209 N.W. 475 (1926).
57. 230 N.C. 149, 52 S.E.2d 350 (1949).
60. N.C. Sess. Laws 1951, ch. 263, at 221.
61. 300 S.W.2d 15 (Ark. 1957).
63. 183 Ark. 626, 37 S.W.2d 696 (1931).
Brawner v. Brawner,65 a 1959 Missouri decision, involved an action by a husband against his wife for injuries negligently inflicted during coverture, and the Missouri court denied recovery under a Married Women's Act66 very similar to the Arkansas statute construed by the court in Leach v. Leach. Brawner v. Brawner is discussed more extensively in a later section.67

These five cases seemingly compose the whole authority with respect to the question of the husband's ability to sue the wife for torts committed during coverture. Only one case, Leach v. Leach, allowed recovery. Leach v. Leach, coupled with the Fitzpatrick and Katzemberg cases, makes Arkansas probably the most progressive jurisdiction in the nation as to the question of husband-wife suits. It apparently is the only state which has allowed a husband to recover for his wife's negligently inflicted tort in the absence of a statute expressly allowing interspousal tort actions. Leach v. Leach and the statutes expressly allowing such actions in New York, Wisconsin, and North Carolina, may be a preview of things to come in other jurisdictions in the not too distant future.

D. Pre-Marital Torts

In several jurisdictions the question has arisen as to whether or not one spouse may, after marriage, sue the other spouse for a tort which occurred before the marriage. Generally, those jurisdictions which deny the right to sue for a tort committed during coverture apply the same rule to frustrate a suit for a pre-marital tort after the parties have been married.68 Certainly, if the true reason for denying suits between spouses is fear of disruption of domestic harmony, or fraudulent and collusive claims, there would be no reason for changing the rule denying such actions merely because the alleged tort occurred before marriage. There would still exist the situation of one spouse suing the other and the possibilities of disrupting the home are present whether the tort occurred before or after the marriage. However, if the true reason for denying interspousal tort actions is that no cause of action arises after coverture, then the two situations are very different; it cannot be validly denied that a cause of action would arise when the tort occurred before marriage. Thus, it may well be that the true reason for denying such suits in these jurisdictions is only one of policy which does not permit suits between married persons, regardless of when the cause of action might have arisen.

65. 327 S.W.2d 808 (Mo. 1959).
67. See note 13 infra and accompanying text.
A very small number of American cases have allowed recovery for a pre-marital tort.\(^6\) It is interesting to note that North Carolina in *Shirley v. Ayers*\(^7\) allowed a husband to maintain suit against his wife for a pre-marital tort, but in *Scholtens v. Scholtens*\(^2\) denied him that right for a tort occurring during coverture. *Hamilton v. Fulkerson,*\(^7\) a Missouri decision, allowed a wife to maintain an action against her husband for negligence growing out of an automobile accident which occurred prior to the marriage, even though Missouri has consistently denied the right of one spouse to sue the other for a negligent tort committed during coverture. This case is discussed further in a later section.\(^7\)

English courts have allowed the wife to maintain an action for a pre-marital tort\(^7\) but have denied the same right when the husband is plaintiff.\(^7\)

The tenor of the cases allowing recovery for a pre-marital tort seems to be that since the wife was single when the tort occurred, she obtained a cause of action that is not extinguished upon marriage and she may enforce that cause of action under the Married Women’s Acts, even though it be against her husband. The courts involved seem not to have been concerned with the disruption of domestic peace argument, but have proceeded on a theory simply of statutory construction of the Married Women’s Acts.

E. Suits by Wife Against Husband’s Employer

Whether or not a wife may maintain a suit for damages against the employer of her husband for injuries sustained due to the husband’s negligence while within the scope of his employment is a question which is both interesting and confusing. Most of the cases have arisen out of a factual situation which found the wife a passenger in a vehicle owned by the husband’s employer and driven by the husband while acting within the scope of his employer’s business. The issues presented involve both the question of interspousal tort liability and the doctrine of respondeat superior.

There are two distinct lines of authority reaching an opposite result on the question. The leading case which holds that a wife may maintain such an action against her husband’s employer is *Schubert v. Schubert Wagon Co.*\(^7\) In that case, the plaintiff wife was struck by the defendant employer’s car being driven by the plaintiff’s husband, a servant of the defendant. At the time the case arose, New York did not allow interspousal tort actions for personal torts committed during coverture. The defendant contended that, since the plaintiff wife had no

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70. *Supra* note 69.
71. *Supra* note 57.
72. *Supra* note 69.
73. See note 127 *infra* and accompanying text.
76. 249 N.Y. 253, 164 N.E. 42 (1928); see Annot., 64 A.L.R. 293 (1930).
cause of action against the husband-servant, she had no cause of action against the husband's employer on the doctrine of respondeat superior. Justice Cardozo, speaking for the court, disagreed and asserted that the master is under a distinct and independent liability arising from the doctrine of respondeat superior. He pointed out that it was not the liability which was imputed from the servant to the master under the doctrine of respondeat superior but, rather, it was the negligent act, so that the servant's wrong became the master's wrong. Further, it was pointed out that the fact that the master had a right over against the husband-servant for indemnification was of no significance as a determining factor in the solution of the problem because "others may not hide behind the skirts of his [the husband's] immunity . . . ." Thus, the result of the case was that the wife could recover for her injuries inflicted by her husband from the husband's employer, even though she could not directly recover from the husband.

The Schubert Wagon doctrine has been followed in the majority of the jurisdictions which have decided the problem. As pointed out in the cases, the theory of liability seems to be strictly that of respondeat superior, with the courts emphasizing that the employer's liability for the wrongful acts of his servants is a primary one, dependent only upon the negligent act of the servant and not upon his liability or immunity from liability, which is immaterial.

The leading case which denies the wife the right to sue successfully her husband's employer for injuries sustained at the hands of the husband while he was acting within the scope of his employment is Maine v. James Maine & Sons Co. There the plaintiff, a married woman, sued to recover from the defendant, the employer of her husband, for a personal injury caused by the negligence of the husband while acting within the scope of his employment. The wife would not have been able to sue the husband directly under the Married Women's Act of Iowa. The Iowa court said:

Where there is no right of action in the wife for a wrongful or negligent personal injury inflicted upon her by her husband, there can be no liability therefor on his part; and, since there is no liability on his part, we see no escape from the conclusion that his employer cannot be made to respond in damages to her. . . .

77. Id. at 257, 164 N.E. at 43.
79. 198 Iowa 1278, 201 N.W. 20 (1924); see Annot., 37 A.L.R. 161 (1925).
80. IOWA CODE §§ 10462-10463 (1924).
81. 198 Iowa at 1281, 201 N.W. at 22.
A minority of jurisdictions follow the decision in *Maine v. James Maine & Sons Co.*, denying the wife the right to sue her husband's employer for injuries sustained as a result of the husband's negligence while within the scope of his employment. The reasoning seems to be that unless the servant is liable to the injured third person, there can be no liability imputed to the master under the doctrine of respondeat superior. If, for any reason, the servant is not liable, as where the wife may not maintain an action against her husband, then the master cannot be held for the servant-husband's acts.

The result reached by, and the reasoning employed in, cases following *Maine v. James Maine & Sons Co.*, has been criticized. It has been said by one author:

Cases not allowing recovery where the tort-feasor servant is immune from suit by the injured third party proceed on the theory that the liability and negligence of the master is secondary. They overlook the basic principle that the act of the servant is the act of the master. The primary liability of both servant and master is the tortious act. These cases do not distinguish between liability and negligence.

The tort remains the unlawful act of both master and servant; although the remedy is denied the wife as against her husband, the fact of that denial cannot, in logic, be available to the master for his independent liability. The wife is merely denied a remedy; this does not destroy the right of action against the master.

F. Suits by Wife Against Partnership or Unincorporated Association of Which Her Husband Is a Member

Another problem, somewhat analogous to the one discussed above, is whether the wife may sue a partnership of which her husband is a partner for a tort committed against her by her husband acting within the scope of the partnership business. There have been few cases on the question, and this writer has found none which have allowed recovery. Apparently only four jurisdictions have passed on the problem. The theory upon which recovery has been denied is that the partnership may not be considered a jural entity for purposes of such a suit and since each partner is jointly and severally liable for the acts of a partner within

84. For the principle that it is the act of the servant which is imputed to the master, rather than the liability, see MECHEN, OUTLINES OF THE LAW OF AGENCY §§ 421-23 (4th ed. 1952); RESTATEMENT (SECOND), AGENCY § 217 (1958).
85. David v. David, 161 Md. 532, 157 Atl. 755 (1932); Karalis v. Karalis, 213 Minn. 31, 4 N.W.2d 632 (1942); Eule v. Eule Motor Sales, 62 N.J. Super. 250, 162 A.2d 601 (Super. Ct. 1960); Caplan v. Caplan, 268 N.Y. 445, 198 N.E. 23 (1935). The latter case has been overruled by People v. Morton, 308 N.Y. 96, 123 N.E.2d 790 (1954), wherein it was held that the 1937 Amendment to DOM. REL. LAW § 57 has changed the rule prohibiting interspousal tort actions. Now, it would seem that such a suit as was attempted in Caplan v. Caplan could be successfully maintained in New York.
the scope of the partnership business, to allow such a suit would be to deprive indirectly the husband of his immunity to suit by the wife.

One other case should be mentioned at this point. In *Hary v. Arney* the court allowed the wife of a member of an unincorporated association to maintain an action for negligence against the membership for personal injuries when the husband refused to assert the defense of coverture. The court held that the partnership cases were not controlling and that a third person (the association) could not take advantage of the husband’s personal immunity.

G. Effect of Annulment

There have been few cases on the question of whether or not the common-law rule which prevented one spouse from suing the other is applicable when a purported marriage has been annulled and suit is brought for a tort which occurred during the time of the “marriage.”

Two leading cases have held that an annulment does not allow one spouse later to sue the other for torts which occurred during the purported marriage. In *Lunt v. Lunt* the wife, after the husband had procured an annulment of their marriage, brought suit against him for damages sustained as a result of an intentional tort committed by him against her during the purported marriage. The Texas court held, by analogy to cases where suit was brought after a divorce, that she had no cause of action.

In *Callow v. Thomas*, the wife, two months after procuring an annulment, brought suit against her former husband for a negligently inflicted tort which occurred after the marriage and before the annulment. The Massachusetts court stated that they were unaware of any other case in point and held that the plaintiff had no cause of action. Plaintiff contended that the annulment decree effaced the marriage ab initio; hence, at the time of the tort the relationship of husband and wife did not exist. The court answered this contention by quoting Lord Chief Justice Andrews in *Mason v. Mason* to the effect that, although an annulment has the effect of making a marriage void ab initio for almost every purpose, there is an exception as to transactions which occurred between the spouses during the period of the supposed marriage. As to those things, especially when the marriage was merely voidable and not void, the annulment decree does not operate to make the marriage void ab initio and, therefore, at the time the tort was committed the relationship of husband and wife did exist and no cause of action ever arose in the wife’s favor. The court indicated that if a marriage is prohibited at law, such as a bigamous marriage, the rule which prohibits one spouse from suing the other might not apply because in that case the annulment decree would operate to make the marriage void ab initio. But where the marriage

87. See also Damm v. Elyria Lodge, 158 Ohio St. 107, 107 N.E.2d 337 (1952).
is only voidable, it is valid until avoided and acts which transpired during that
time are between husband and wife.

Gordon v. Pollard,91 the facts of which were very similar to those in Callow
v. Thomas, seems to be the most recent case on the question of the effect of
annulment. The Tennessee court, following the Massachusetts court, held that the
annulment decree does not efface a voidable marriage ab initio, and refused to
allow the action on the ground that at the time the tort occurred, the parties
were husband and wife.

In Henneger v. Lomas,92 the court was faced with the question of whether
a woman who has been seduced, and marries her seducer, can, after the court
on her application has adjudged her marriage void, bring and maintain an action
against him for seduction, under a statute93 which reads: "... any unmarried
female may prosecute as plaintiff an action for her own seduction and may
recover therein such damages as may be assessed in her favor." The court found
that the marriage was procured by the fraud of the defendant in seeking to
escape bastardy proceedings, while not intending to ever fulfill his marital
obligations, but that a marriage procured by such fraud is voidable only. However,
the court further held that a decree rendered at the option of the party having
a right to void the marriage adjudges such a marriage void ab initio—that is,
the rights of the parties are the same as if the marriage had never taken place.

Henneger v. Lomas does not seem consistent with the three cases mentioned
above, especially in view of the fact that the court stated that the common-law
rule which extinguished antenuptial actions for tort between husband and wife
was still in force in the state and had not been changed by the Married Women's
Act. Therefore, it would seem that without an annulment which decreed the
marriage void ab initio the action could not have been maintained.

H. Actions by or Against a Spouse or His Estate Where
Death Has Terminated the Marital Relationship

Where death has claimed either one or both spouses, and suit is later brought
to recover for a tort inflicted by one spouse upon the person of the other before
death ensued, somewhat different considerations arise in determining liability
than where the suit is prosecuted by a living spouse against the other spouse. In
such a situation, two important factors come into play. First, there is no longer
any marital harmony left to disrupt if the suit is allowed. Second, various special
statutes may be applicable. Such statutes vary in form and effect from jurisdiction
to jurisdiction and the reader must keep in mind the fact that the cases which
are cited in this section are limited in their holdings to the particular statute
which was involved. Further, it must be remembered that statutes nearly identical
in language may be construed differently by different courts, so that it is necessary

91. 336 S.W.2d 25 (Tenn. 1960).
92. 145 Ind. 287, 44 N.E. 462 (1896).
in any jurisdiction to acquaint oneself with the manner in which the applicable
statute has been construed.

The writer has listed three different factual situations below, within which
will fall most of the cases which arise where one or both spouses are dead, and
suit is brought to recover for a tort committed against one of the spouses.

1. Injured Spouse Is Alive and Sues Tortfeasor's Estate

To determine whether or not an injured spouse can sue her or his spouse's
estate for injuries wrongfully inflicted by the deceased tortfeasor, courts seek
to ascertain the true reason for the disallowance of interspousal tort actions in
the particular jurisdiction. Cases which have allowed the injured spouse to recover
against the estate of the tortfeasor spouse seem to have reached this result on
the theory that in that particular jurisdiction the true reason for the rule dis-
allowing suits between living spouses is the danger of disrupting domestic peace
and harmony. These courts seem to recognize that a cause of action accrues
in favor of the injured spouse at the time of the tort, but that it cannot be
asserted against a living spouse for fear of breaking up the home. Once the marital
union is severed by death of one of the spouses, then the reason for the rule
disallowing such suits is gone, and with it, the rule also expires.

Cases which have not allowed such suits proceed upon the theory that the
real reason why interspousal tort actions cannot be maintained is that the Married
Women's Act did not abrogate the common-law rule of unity of husband and wife
and therefore no cause of action ever arises in favor of the injured spouse. Under
this approach, the subsequent death of one of the spouses is of no significance.

2. Where the Injured Spouse Is Dead and Suit Is Brought Against the
Surviving Spouse or His Estate Under a Death Act

While the general rule is that one spouse is not liable for torts committed
against the person of the other spouse, this rule may not hold true where the
injured spouse is dead and a death act which gives the deceased's administrator
or next of kin a cause of action against the tortfeasor comes into play. Such
statutes may be of two types. One type creates in some third person a new cause
of action which arises upon the death of the injured party. The other type

94. Ennis v. Truhitte, 306 S.W.2d 549 (Mo. 1957); Long v. Landy, 60 N.J.
Super. 362, 158 A.2d 728 (Super. Ct. 1960); Johnson v. Peoples First Nat'l Bank
95. Robinson v. Gaines, 331 S.W.2d 653 (Mo. 1960) (applying N.M. law);
96. E.g., § 537.080, RSMo 1959, which provides:
"... 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 main-
tain an action and recover damages in respect thereof, then, and in every
such case, the person who or the corporation which would have been liable
if death had not ensued shall be liable to an action for damages, notwith-
standing the death of the person injured, which damages may be sued for
and recovered
(1) By the husband or wife of the deceased; or
herein referred to as "survival type," merely keeps alive the same cause of action the injured party would have had against the tortfeasor had death not ensued.

Under the survival type of statute the cases seem to say that the determinative question to be resolved is whether or not the deceased spouse would have had a cause of action against the tortfeasor spouse if death had not ensued. If so, then the third party who is bringing the action may recover against the tortfeasor the damages which resulted from the tort committed against his spouse. If the injured spouse could not have maintained the action had she survived, then the third party instigating the suit after her death may not.

If the particular statute under which the suit is brought is construed as one which creates a new cause of action in someone other than the deceased, then it would seem that the personal immunity the tortfeasor would have had in a suit brought by the spouse had she survived is irrelevant and that the third party

(2) If there be no husband or wife . . . then by the minor child or children of the deceased . . . ; or
(5) If such deceased be a minor and unmarried . . . then by the father and mother, who may join in the suit, and each shall have an equal interest in the judgment; or if either of them be dead, then by the survivor; or if the surviving parents are unable or decline or refuse to join in the suit within six months after such death, then either parent may bring . . . the action . . .
(4) If there be no husband, wife, minor child or minor children . . . or if the deceased be an unmarried minor and there be no father or mother, then . . . suit may be instituted . . . by the administrator or executor of the deceased and the amount recovered shall be distributed according to the laws of descent."

97. E.g., § 537.020, RSMo 1959, which provides:
". . . Causes of action for personal injuries, other than those resulting in death, whether such injuries be to the health or to the person of the injured party, shall not abate by reason of his death, nor by reason of the death of the person against whom such cause of action shall have accrued; but in case of the death of either or both such parties, such cause of action shall survive to the personal representative of such injured party, and against the person, receiver or corporation liable for such injuries and his legal representatives, and the liability and the measure of damages shall be the same as if such death or deaths had not occurred. Causes of action for death shall not abate by reason of the death of any party to any such cause of action, but shall survive to the personal representative of such party bringing such cause of action and against the person, receiver or corporation liable for such death and his or its legal representatives. . . ."


in whom the action is vested may successfully sue the tortfeasor. This is in fact the position taken by the cases.\(^{100}\)

3. Where One Spouse Is Beneficiary of Recovery in an Action Against Other Spouse

In *Albrecht v. Potthof*,\(^{101}\) the defendant by his negligence caused the death of his daughter. The defendant's wife, as administratrix of the daughter's estate, brought action against her husband. Minnesota would not have allowed a wife to sue her husband for injuries to herself,\(^{102}\) but, under a survival type statute, allowed the wife to assert the cause of action in her capacity as administratrix in spite of the fact she would be the sole beneficiary of any recovery. The daughter was emancipated and could have maintained the action had she lived, and the majority thought it not significant that the daughter's administratrix happened to be the wife of the defendant.

A similar case is *Morgan v. Leuck*,\(^{103}\) in which the administrator of the estate of the deceased brought action against the defendant. Defendant contended that because his wife would be the sole beneficiary of any recovery, the action was in effect a suit by a wife against her husband which was prohibited in West Virginia.\(^{104}\) The court, however, allowed the action, pointing out that the mere fact the defendant's wife was the beneficiary under the statute was no defense where the action would lie in all other respects.

The above two cases, which seem to constitute the whole authority as to the rather narrow question presented, appear to be sound in that the mere coincidence that the person who is entitled to recover under a statutory cause of action happens to be the spouse of the tortfeasor should not relieve the defendant of an otherwise clear liability. But if the defendant is the sole beneficiary of any recovery under the statute, no action may be maintained.\(^{105}\)

I. Conflict of Laws Problems

Husband and wife are domiciled in state A. While traveling through state B the husband inflicts a personal tort upon the person of his wife. The wife later brings suit against the husband in states A, B, or C. What law is determinative of whether or not the wife may sue her husband?


101. 192 Minn. 557, 257 N.W. 377 (1934).


103. 137 W. Va. 546, 72 S.E.2d 825 (1952).


The general rule which is applied in situations of this kind is that the law of the place where the injury occurred determines the substantive rights of the parties.\textsuperscript{106} Thus, the forum state, be it state A, B, or C would, by majority rule, determine whether or not a wife is allowed to sue her husband according to the law in state B, the place of the tort. This is in accord with the "territorial tort" concept which has grown up in the field of conflict of laws. The theory is that the obligations of an actor are determined by the law of the place where the act occurred. If the act was wrongful by the law of the place where committed, then an "obligation" affixes itself to the tortfeasor and travels with him wherever he goes, so that the aggrieved party may recover a judgment against him elsewhere. Thus, if state B does not allow interspousal tort actions, the wife would have no cause of action against her husband even though the state of the parties' domicile or the state of the forum might allow such suits.

The results in the converse of the situation posed above are not, however, always consistent with the territorial tort theory. Thus, if state B allows interspousal tort suits, and state A, the forum state and the state of domicile, does not allow such suits on the basis that to do so would offend a strong public policy of that state, then the law of the forum may be applied to defeat the wife's cause of action.\textsuperscript{107} This, however, does not necessarily mean that merely because it has been adjudged that the Married Women's Act of the forum state does not allow interspousal tort actions that the wife will always be denied a remedy.\textsuperscript{108} The cases seem to indicate that some strong public policy of the forum state must be offended by allowing such suits before recovery will be denied.

It should be pointed out that the "territorial tort" concept is not a command upon state courts. There is nothing which compels a state to apply the law of the place where the acts were committed rather than the law of the domiciliary or forum state in determining the capacity of one spouse to sue the other.\textsuperscript{109}

The recent trend in the cases seems to be that the spouse's capacity to sue should be governed by the law of the parties' domicile, and not by the law of the place where the tort occurred.\textsuperscript{110} Text writers have voiced the opinion that

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\textsuperscript{106} Dawson v. Dawson, 224 Ala. 13, 138 So. 414 (1931); Bohenek v. Niedzwiecki, 142 Conn. 278, 113 A.2d 509 (1955); Robinson v. Gaines, 331 S.W.2d 653 (Mo. 1960); Gray v. Gray, 87 N.H. 82, 174 Atl. 508 (1934); Mertz v. Mertz, 271 N.Y. 466, 3 N.E.2d 597 (1936); Howard v. Howard, 200 N.C. 574, 158 S.E. 101 (1931); Lucas v. Phillips, 326 S.W.2d 905 (Tenn. 1957). See also Restatement (Second), Conflict of Laws § 378 (1958).


\textsuperscript{108} Franklin v. Wills, 217 F.2d 899 (6th Cir. 1954). Public policy was not violated because the Tennessee rule not allowing interspousal tort actions is not based on public policy, but upon the ground that the Married Women's Act of Tennessee has not destroyed the common law doctrine of unity of husband and wife.

\textsuperscript{109} Kryger v. Wilson, 242 U.S. 171 (1916). In Wells v. Simonds Abrasive Co., 345 U.S. 514, 516 (1953), Kryger v. Wilson is cited for the proposition that "states are free to adopt such rules of conflict of laws as they choose . . . ."

\end{flushleft}
the rule which looks to the domicile of the parties to determine capacity to sue is much more desirable than the rule which looks to the place of the tort.\textsuperscript{111} It is contended that whether or not a spouse is immune from suit is a matter of family law rather than tort law and should be governed by the law of the state of family domicile. Such a rule would also prohibit a spouse injured in state B, which allows such actions, and domiciled in state A, which denies interspousal tort suits, from going to state B, or any other state, to bring suit for the sole purpose of circumventing the established marital policy of the domiciliary state. It is only reasonable to suppose that the domiciliary state should be able to govern the incidents of the marital status of its own citizens and that a person should not be encouraged to shop for a forum in order to defeat the laws of the state of domicile. It is also not unreasonable to expect that in the future the recently adopted view that the law of the domicile, rather than the law of the place where the tort occurred, governs one spouse's ability to sue the other in tort will spread to other jurisdictions and will eventually replace the present prevailing rule, which is now employed in the majority of states and suggested by the Restatement of Conflict of Laws.\textsuperscript{112}

J. Missouri Cases Relating to Suits Between Husband and Wife

Missouri, like other jurisdictions, has passed a number of statutes expressly abolishing at least some of the common-law disabilities which attached to a married woman. Briefly, section 451.250\textsuperscript{113} allows a married woman to acquire and retain her own separate property, including causes of action. Section 451.290\textsuperscript{114} deems a married woman a femme sole for purposes of transacting business, and


\textsuperscript{112} Restatement (Second), Conflict of Laws § 378 (1958).

\textsuperscript{113} § 451.250, RSMo 1959, provides:

"1. All real estate and any personal property, including rights in action, belonging to any woman at her marriage, or which may have come to her during coverture, by gift, bequest or inheritance, or by purchase with her separate money or means, or be due as the wages of her separate labor, or has grown out of any violation of her personal rights, shall, together with all income, increase and profits thereof, be and remain her separate property and under her sole control, and shall not be liable to be taken by any process of law for the debts of her husband."

\textsuperscript{114} § 451.290, RSMo 1959, provides:

"A married woman shall be deemed a femme sole so far as to enable her to carry on and transact business on her own account, to contract, and be contracted with, to sue and be sued, and to enforce and have enforced against her property such judgments as may be rendered for or against her, and may sue and be sued at law or in equity, with or without her husband being joined as a party; provided, a married woman may invoke all exemption and homestead laws now or hereafter in force for the protection of personal and real property owned by the head of the family, except in cases where the husband has claimed such exemption and homestead rights for the protection of his own property."
allows her to sue and be sued in her own name. And section 537.040115 makes a married woman liable in her own name for civil injuries committed by her. As will be seen the Missouri courts have, in general, given these statutes the same effect as are given like statutes in a majority of other jurisdictions.

One of the first significant cases which reached the Missouri courts on the question of whether or not one spouse may sue the other for personal torts committed during coverture was Rogers v. Rogers.116 The wife there brought an action against the husband to recover damages resulting from his wrongfully causing the plaintiff to be committed to an insane asylum. The court held that the wife could not recover, on the ground that the Missouri statutes did not attempt to confer greater rights upon married women than are possessed by their husbands. The court relied upon Peters v. Peters,117 a 1909 California decision, which had held under similar statutes that a husband may not maintain such an action against his wife.

Butterfield v. Butterfield,118 decided by the Kansas City Court of Appeals the following year after Rogers v. Rogers, involved a suit by the wife against her husband for an assault and battery committed during coverture. The court held, on authority of Rogers v. Rogers that no such action would lie.

In Faris v. Hope,119 a wife, after a divorce in 1923, brought suit against her former husband for an alleged libel which occurred in 1921 during coverture. The United States district court, applying Missouri law, held that under the Missouri statutes the wife could not recover, citing Rogers v. Rogers.

The next significant case in Missouri involved an action by the wife against her husband for a negligent tort which occurred during coverture. This was Willott v. Willott,120 wherein the wife alleged that due to the husband’s negligence she lost control of an automobile which she was driving, resulting in serious injury to her. The court, in denying recovery, pointed out that Rogers v. Rogers had held in 1915 that a wife could not sue her husband for a personal tort and that the legislature had had ample opportunity to amend or change the existing statute since that time, had the court’s decision in Rogers not been in conformity with legislative intent. The court thought that this acquiescence on the part of the legislature indicated their approval of the holding in Rogers.

Then, in 1936, two important cases were decided which indicated a relaxation of the strict rules laid down in Rogers and Willott. In May of that year the Missouri Supreme Court handed down its decision in Mullally v. Langenberg Bros.

115. § 537.040, RSMo 1959, provides:
“For all civil injuries committed by a married woman, damages may be recovered against her alone, and her husband shall not be responsible therefor, except in cases where, under the law, he would be jointly responsible with her, if the marriage did not exist.”

116. 265 Mo. 200, 177 S.W. 382 (1915).
117. 156 Cal. 32, 103 Pac. 219 (1909).
119. 298 Fed. 727 (8th Cir. 1924).
120. 333 Mo. 896, 62 S.W.2d 1084 (1933).
Grain Co.\textsuperscript{121} where the wife sued the husband’s employer for injuries sustained as a result of the husband’s negligence in performing acts within the scope of his employment. For the first time in Missouri the court was presented the question which had faced the courts in Schubert \textit{v.} Schubert Wagon Co.\textsuperscript{122} and \textit{Maine v. James Maine \& Sons Co.}\textsuperscript{123} The Supreme Court approved the ruling of Justice Cardozo in Schubert that the wife could successfully maintain such an action. The court, however, held that there was no basis for a finding that the tort occurred while the husband was acting within the scope of his employment and reversed the circuit court’s judgment in favor of the plaintiff on that ground.

One month after the decision in Mullally, the Kansas City Court of Appeals decided the identical question anew in Rosenblum \textit{v.} Rosenblum.\textsuperscript{124} The court apparently was not aware of the decision in Mullally since no mention was made of it. Nor did the court rely upon Schubert \textit{v.} Schubert Wagon Co. Nevertheless, upon the ground that under the law of agency the principal is liable for an act as to which the agent has a personal immunity from suit, the court decided the employer could be held liable.

Not until 1955 did the next significant case reach Missouri’s courts. Then \textit{Hamilton v. Fulkerson}\textsuperscript{125} raised for the first time in Missouri the question of whether or not a wife could maintain an action against her husband for damages as a result of a negligent tort committed before marriage. The court held that section 451.250\textsuperscript{126} was applicable and that “rights in action” as used in that section includes a cause of action. The cause of action here arose before the marriage and remained her separate property to be thereafter dealt with as if she were not married. The court stated that any logical reason for the existence of the common-law rule that marriage extinguished all antenuptial claims between spouses had ceased to exist and therefore application of that rule should also cease. Thus, the wife was allowed to recover from her husband for the pre-marital negligent tort. The court further asserted:

Irrespective of statutes, any common law rule based upon the fiction of the identity of husband and wife, long since contrary to the fact, should not be applied to any ‘first-impression’ fact situation arising in this state.\textsuperscript{127}

And, referring specifically to the precise issue involved, the court said:

We remain unconvinced . . . that there are any logical reasons based upon considerations of public policy which should extend the spousal disability to actions for personal torts which occurred prior to marriage.\textsuperscript{128}

Then, in very broad and sweeping dictum the court stated that \textit{Mullally v. Langenberg Bros. Grain Co.}

\begin{itemize}
\item 121. 339 Mo. 582, 98 S.W.2d 645 (1936).
\item 122. 249 N.Y. 253, 164 N.E. 42 (1928).
\item 123. 198 Iowa 1278, 201 N.W. 20 (1924).
\item 124. 231 Mo. App. 276, 96 S.W.2d 1082 (K.C. Ct. App. 1936).
\item 125. 285 S.W.2d 642 (1955).
\item 126. Set out in note 113 supra.
\item 127. 285 S.W.2d at 645.
\item 128. Id. at 646.
\end{itemize}
. . . authorized a wife to accomplish indirectly that which she could not, under the rule of Rogers and Willott, do directly. The instant significance of that decision [Mullally] is that it clearly indicates that this court must have there recognized that there were no considerations of public policy weighty enough to prohibit a wife's suit against her husband for a personal tort even though committed during marriage.\(^{129}\) (Emphasis added).

The court expressly pointed out, however, that this decision was not to be construed as a reflection on the Willott and Rogers holdings.

The Missouri Supreme Court continued the liberal tendency it had exhibited in Mullally and Hamilton in the next case to come before it relating to the general question of interspousal tort liability. This was the case of Ennis v. Truhitte,\(^{130}\) where the court was faced for the first time with the question whether a wife may sue the administrator of the estate of her deceased husband for injuries received as a result of the husband's negligence. Here the suit arose out of the husband's alleged negligence in the operation of an automobile in which the wife was a passenger. The wife's petition actually alleged the husband's conduct was so gross and reckless as to impute wilfulness and wantonness and intentional wrongdoing. The court held that such an action would lie, since the reason for the rule not allowing interspousal actions was preservation of domestic harmony and that, since the husband was dead, there was, in this case, no family harmony with which to be concerned. Justice Eager, joined by Justice Hyde, dissented on the basis that if the rule disallowing interspousal tort actions is to be changed, such a change must come from the legislature and not from the court. Also, the dissent cited Prosser's text on torts\(^{131}\) to the effect that the reason for the liberalization of the rule disallowing interspousal tort actions has been greatly encouraged by the presence of insurance in automobile cases. The dissenters felt this was a poor reason for changing the rule.

A retreat from its previously liberal position was marked by the Supreme Court in the next decision relating to this question, though some of the language used belied the fact.

Brawner v. Brawner\(^ {132}\) involved for the first time in Missouri the question of whether a husband may maintain an action against his wife for a negligent tort committed during coverture. Rice v. Gray\(^ {133}\) had earlier indicated that no such action would lie for an intentional tort. The court stated:

If public policy does not prohibit such a suit, authority to maintain it is clearly permitted by § 537.040 without resort to the derivative sections of the Married Women's Act. . . .\(^ {134}\)

The court said, however, that it thought itself in no better position to construe the Married Women's Act than were the courts in the Rogers and Willott cases,
where the court held one cannot sue his spouse because of the common-law rule of immunity of husband and wife, notwithstanding section 537.040.135 It was also stated that the general assembly should take appropriate action if it desires to allow such suits. The basis for the decision, and at the same time an apparent expression of the court’s modern temperament, was as follows:

It may well be that this court would reach a different conclusion if it were construing similar statutes enacted in a modern day setting; but we are not at liberty to say that these prior decisions (Rogers and Willott) do not correctly interpret the legislative intent of 1889.138

There was a strong dissent from Chief Justice Hollingsworth, who adopted the opinion of Commissioner Stockard, which was written when the case was before Division Two. This opinion analyzes the Missouri cases extremely well and advances the belief of its writer that there is no statutory prohibition against such a suit nor any public policy reason against its maintenance, and hence would overrule Rogers and the cases which follow it and allow the action.

Deatherage v. Deatherage,139 though not really involving a new question, also came at a time when some might have predicted a different result. Here the question was the converse of the one involved in Brawner v. Brawner—whether the wife could sue the husband for a negligent tort committed during coverture. The court, in denying the action, stated that Brawner v. Brawner:

... held that the ‘common-law rule of spousal immunity from suit for a personal tort’ was and would remain the law of this state unless changed by the general assembly.138

Berry v. Harmon,140 a 1959 Missouri Supreme Court decision, reaffirmed Hamilton v. Fulkerson by holding that a wife may recover against her husband for a pre-marital negligent tort. The only basic difference in the facts in the two cases was that in Hamilton the action was started before the marriage. The court held that failing to start the action before the marriage would not defeat the cause of action and allowed recovery.

Brennecke v. Kilpatrick141 found the husband bringing suit against the administrator of his deceased wife’s estate to recover medical and hospital bills and impaired value of services of his child who was injured as a result of the deceased wife’s negligence. It was held that such an action would lie, the court relying on Ennis v. Truhitte142 to the effect that neither statute nor public policy prevents such a suit where one spouse is deceased. A dissent by Justice Eager again, as in Ennis v. Truhitte, asserted that the main reason for whittling away the common-law rule of immunity is the presence of insurance in a case and that this is not a

135. See note 115 supra.
136. 327 S.W.2d at 811.
137. 328 S.W.2d 624 (1959).
138. Id. at 625.
139. 329 S.W.2d 784 (1959).
140. 336 S.W.2d 68 (1960) (en banc).
141. Supra note 130.
valid reason for so doing. He also stressed the point that the reason for the rule is to protect the family relationship and that the reason for the rule may extend beyond the death of a wife, or a mother or father. There was present in this case not just a living spouse but also a living child. Thus, there might still be some family relationship left to disrupt.

Another case of first impression in Missouri, Robinson v. Gaines,142 involved the conflict of laws problem of what law is determinative of a spouse’s capacity to sue the administrator of a deceased spouse’s estate for a negligent tort committed during coverture. The plaintiff wife was a resident of Missouri, and brought suit here, alleging that an automobile collision in which she sustained injury occurred in New Mexico as a result of the deceased husband’s negligent driving. Under Missouri law it was clear that the wife could recover.143 The court, however, looked to the law of New Mexico and concluded that under New Mexico law such a suit would not lie and therefore she could not maintain the action in Missouri. This is an application of the “territorial tort” concept, aligning Missouri with the prevailing view on this question of conflict of laws. It is out of step, however, with recent cases which have held that in such a case the law of the domicile should control the question of the spouse’s ability to bring the suit. Again, it should be emphasized that there is no rule of law or constitutional mandate which compels Missouri to apply the law of New Mexico in such a situation.144

It would seem, then, that the rule disallowing interspousal tort actions is very much in force in Missouri except in the following situations: (1) where the suit is brought against a deceased spouse’s estate; (2) where the tort occurred prior to the marriage; (3) where the spouse’s employer is being sued on the basis of the doctrine of respondeat superior.

Dicta in the Missouri cases have indicated that if any change is to come in the future, it must emanate from the legislature, and not from the courts. It seems highly unlikely therefore that there will be any further encroachments upon the general rule of interspousal tort immunity in Missouri, in the absence of legislative action.

K. Conclusions and Predicted Trend

The fate of the rule which prohibits interspousal tort actions will depend in large measure, of course, on future public opinion. As has been seen, the rule has been abolished in a number of American states. The experience which is being gained by those states will in the future determine what effect abolition of the rule has on the matrimonial status. Most modern writers and several recent opinions have shown an inclination either to drastically modify or completely abolish the rule. Most modern cases which uphold the rule do so on the basis of precedent which was established, in many cases, nearly a half-century ago. There seem to be few modern decisions vigorously supporting the rule. On the other hand, one can find many modern dissenting opinions, gaining in number, which

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142. 331 S.W.2d 653 (1960).
143. Ennis v. Truhitte, supra note 130.
144. See cases cited supra notes 109, 110.
have cast doubt on both the statutory interpretations which uphold the rule and the public policy arguments in support of it. These dissents are causing much reflection and thought among jurists and the public alike.

At the present time, then, it would seem that it is highly likely that more and more states will abolish the rule in the future, either by court decision or by legislative enactments. Insurance has played a part and, whether or not it is legally relevant to the decision in any case, it has practical ramifications which will not be wholly ignored in the future, at least insofar as public opinion is concerned.

Professor McCurdy\textsuperscript{146} has suggested several modifications which may well be looked to as workable solutions in the future. As suggested by him, it would seem that an expanded concept of assumption of risk could be devised so that not all activity which transpires between spouses would be subjects of law suits. But where an actual wrong has occurred, it would seem that the aggrieved party should be entitled to his remedy, and that courts and juries are well equipped to separate the expected few frivolous claims from the many well-founded ones.

III. TORT ACTIONS BETWEEN PARENT AND CHILD

A. ACTIONS BETWEEN PARENT AND CHILD AT EARLY COMMON LAW

At early English and American common law there was no bar to an action between parent and minor child arising out of contract or property matters.\textsuperscript{146} Apparently there has never been a reported English decision involving a personal tort action based on negligence between parent and child.\textsuperscript{147} However, as to persons other than his parents, it was the settled general rule that a minor was liable for his personal torts\textsuperscript{148} and, conversely, he could recover if a person other than his parent committed a personal tort against him.\textsuperscript{149}

B. THE AMERICAN RULE: ITS INCEPTION AND DEVELOPMENT

As to personal torts the American rule as originally stated was to the effect that a minor is responsible to the whole world\textsuperscript{150} except to his parents\textsuperscript{151} and,

\begin{itemize}
\item 145. McCurdy, Torts Between Persons in Domestic Relation, 43 HARY. L. REV. 1030, 1054-1055 (1930).
\item 146. Anonymous, Y.B. 2 Edw. 2 (1308), in 2 SELDEN SOC. Y.B. SERIES 35 (1885); Roberts v. Roberts, Hardres 96, 145 Eng. Rep. 399 (Ex. 1657); Duke of Beaufort v. Berty, 1 P. Williams 702 (Ch. 1721); Morgan v. Morgan, 1 Atk. 489, 26 Eng. Rep. 310 (Ch. 1737). See also 39 AM. JUR. Parent & Child § 88 (1942); 67 C.J.S. § 61 (1950).
\item 147. For a review of the "meager, conflicting and obscure" pre-1891 case and text authority in both America and England see McCurdy, Torts Between Persons in Domestic Relation, 43 HARY. L. REV. 1030, 1059 (1930). See also Small v. Morrison, 185 N.C. 577, 118 S.E. 12 (1923).
\item 150. PROSSER, THE LAW OF TORTS § 109 (2d ed. 1955).
\end{itemize}
conversely, the whole world is liable to a minor for a personal tort committed upon him152 except his parents.153 An extremely important exception which applied from the very inception of the rule is the instance where the minor child is emancipated. In this case there is no immunity which protects either the parent or the child in an action for a personal tort committed by one upon the other.154

The general rule of parent-child tort immunity is of comparatively recent origin155 and has already been subjected by many courts to severe limitations. These departures have nearly always been stated as exceptions and not the rule, but the net effect is a strong modern trend toward emasculation of the original broad rule except where the injury is caused by simple negligence. A discussion of these limitations will follow later in this article156 but for the present the problem will be treated generally.

1. The Inception of the Parent-Child Tort Immunity Rule

Prior to 1890 there were three American cases supporting liability of a person standing in loco parentis (in a limited sense) to a minor child for abusive treatment or for gross neglect.157 Apparently there were no cases dealing with personal tort actions between the natural parent and the child.

In 1891, the Mississippi court in Hewellette v. George158 held that a minor child could not maintain an action against her mother for false imprisonment. The mother had placed her daughter in an insane asylum in order to obtain the child’s property. The decision was based on the court’s assumption that:

... the peace of society, ... and the sound public policy, designed to subserve the repose of families and the best interests of society, forbid to the minor child a right to appear in court in the assertion of a claim to civil redress for personal injuries suffered at the hands of the parent.159

The court cited no authority for its decision but, rather, relied on the lack of contrary decisions.

Twelve years later, in 1903, McKelvey v. McKelvey160 was decided by the Tennessee supreme court. There the plaintiff child was suing her father for con-
senting that the child’s stepmother treat the child cruelly and inhumanely. The court affirmed a judgment for the father and, for the first time by any court or text authority, announced that there was a common law rule denying a civil remedy to the child in such a case. The court cited only Hewellette, which had not purported to announce a common law rule, and further attempted to support the decision by cases dealing with the husband’s immunity to suit by his wife.

In Roller v. Roller,161 a Washington decision in 1905, the court announced the rather shocking result that a daughter could not recover from her father who raped her. The court voiced the fear that if such suits were allowed, “there is no practical line of demarcation which can be drawn.” The only cases cited in support of the result were Hewellette and McKelvey.

The Hewellette, McKelvey and Roller cases constitute the great trilogy upon which the American rule of parent-child tort immunity is based. Until 1930 the rule was uniformly applied where the child was suing the parent162 and, by analogy, to suits by parent against the child.163 The rule had the support of at least one early text writer164 but was not without its judicial critics almost from the very inception.165

2. The Growth of the Rule

It is interesting to note that not only is the rule of parent-child tort immunity of modern origin, but its real growth is even more modern. Apparently as late as 1930 there were but 21 American decisions on the subject.166 In recent years

161. Supra note 153.
165. See the dissent by Clark, C.J., in Small v. Morrison, supra note 147, and the dissent by Crownhart, J., in Wick v. Wick, supra note 162. In Sorrentino v. Sorrentino, supra note 162, the New York Court of Appeals affirmed without opinion the order of the lower court denying recovery by a minor child; the court split 4-3, with Judges Cardozo, Crane and Andrews dissenting without opinion.
166. See cases cited supra notes 162, 163; and see Dunlap v. Dunlap, 84 N.H. 352, 150 Atl. 905 (1930). See also Foley v. Foley, 61 Ill. App. 577 (1895); Treschman v. Treschman, 28 Ind. App. 206, 61 N.E. 961 (1901); Clasen v. Pruhs, 69 Neb. 278, 95 N.W. 640 (1903); Farrar v. Farrar, 41 Ga. App. 120, 152 S.E. 278 (1930); Steber v. Norris, 188 Wis. 366, 206 N.W. 173 (1925); Dix v. Martin, 171 Mo. App. 266, 157 S.W. 133 (1913); Fortinberry v. Holmes, 89 Miss. 373, 42 So. 799 (1907).
there has been a almost complete mushrooming of litigation in the area.\textsuperscript{167} The rule has been applied with almost complete uniformity to the case of the negligently inflicted personal tort in every jurisdiction where the question has arisen,\textsuperscript{168} but many exceptions have been made where other circumstances were involved.\textsuperscript{169}

C. Authority Reaching a Contrary Result

Because of the extreme paucity of authority contrary to the general rule of immunity it is thought that a more detailed examination of these would be useful at this point. The lone American decision squarely contrary to the general


\textsuperscript{169} For an analysis of these exceptions see pages 193-209 infra.
rule is *Wells v. Wells*,\(^{170}\) a 1932 decision of the Kansas City Court of Appeals. Here a mother was allowed recovery against her minor son for injuries arising from the negligent operation of an automobile, driven by the son, in which she was a passenger. The court said:

It may be that an action in tort by a parent against his minor child would introduce discord and contention into the home, but it is equally true that an action involving rights in property, strictly speaking, brought by a parent against his minor child would introduce discord and contention into the home and tend to disrupt the family relation, but it will not be claimed that the law forbids such actions.\(^{171}\)

The modern authoritative text writers are among the most severe critics of the general rule\(^ {172} \) and the contrary position is attracting increasing judicial support in America.\(^ {173} \)

There have been a few cases decided in foreign jurisdictions which are contrary to the general American rule of immunity. *Young v. Rankin*,\(^ {174} \) a 1934 Scottish case, squarely decides that a minor unemancipated child (16 years of age) may sue his father to recover damages for personal injuries resulting from the negligence of the father. All judges agreed that the case was one "*primae impressionis*" under Scottish law and none of them had ever heard of a similar case in any other jurisdiction. Against the argument advanced by defendant that the lack of authority on the point evidenced a rule forbidding such an action, the court said:

... Is an action that would be open to a stranger to be forbidden by the common law owing to relationship in the absence of express decision of the Court or exclusion upon some clear ground of morality or public policy? The absence from the books of actions of this kind avails little. It is modern conditions that gives rise to them.\(^ {175} \)

The court rejected 5-2 the notion that the action was forbidden on any ground analogous to the immunity between spouses.

A later Scottish case, *Wood v. Wood*,\(^ {176} \) decided in 1935, appears to hold that in the reverse situation, i.e., where the suit is by parent against minor child,

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170. 48 S.W.2d 109 (K.C. Ct. App. 1932). *But see Banta*, *May a Mother Sue Her Minor Child in Tort*, 48 U. Mo. Bull. 42 (1935), where it is suggested that the presence of insurance and the fact the minor son was acting as agent of the adult son does much to explain the decision in the *Wells* case.

171. 48 S.W.2d at 111.


174. [1934] Sess. Cas. 499 (Scot. 2d Div.).

175. Id. at 507.

there is no immunity which protects the child. Although the facts stated do not show the age of the child, the defense of immunity was raised by defendant and the court, relying on *Young v. Rankin*, disallowed the defense.

If for no other reason than the decision reached, these Scottish cases are remarkable because of fundamental differences in the Scottish civil law and the English common law. Although the Scottish law of delicts seems closely analogous to the English common law of torts, on closer examination one sees that liability in each country was originally based on principles which were diametrically opposed. In England an action in tort was based on *damnum*, the chief concern being not the degree of fault of the tortfeasor but the magnitude of the injury perpetrated.\(^{177}\) In Scotland, however, the action is based on *culpa* and the chief concern is the nature and quality of the act which occasioned the injury.\(^{178}\) Thus the compelling appeal of the common-law maxim that "for every injury there should be a remedy," the touchstone of the argument in favor of abolishing the immunity doctrine, would be much diminished in a Scottish court.

Furthermore, there is also a very basic difference in the civil law and the common law relating to the status of children. Under the Roman civil law a child was without an independent existence in the eyes of the law. The state dealt only with the heads of families and children were merely included in the *pares potestas*; the head of the family was charged with the responsibility of settling all disputes arising within it. Of course, in the modern law of Scotland this concept does not persist in the severe form stated here. The Scottish child is in a state of pupillage up to the age of 12 for girls and 14 for boys, a state very similar in most respects to the child under the Roman civil law, i.e., a state of absolute legal incapacity. At this time he becomes a minor *pubes* and is invested with some of the incidents of a minor of the age of discretion under the common law.\(^{179}\) This is to be contrasted with the fact that at common law a minor was *sui juris* for many purposes and could, by the proper procedure, bring and defend property and contract actions involving his parent as adverse party.\(^{180}\)

Considering the nature of the Scottish tort action and the extremely inferior position the child occupied under the Roman law which served as the basis for the Scottish civil law, one is immediately struck with the difficulty which must have faced the courts in deciding *Young v. Rankin* and *Wood v. Wood* the way they did. Apparently the Scottish courts felt that the logic and policy favoring tort actions between parent and child were very compelling indeed.\(^{181}\)

Two Canadian cases have reached a result contrary to the general rule of immunity. The first, *Fidelity & Cas. Co. v. Marchand*,\(^ {182}\) held that a five year old

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177. See the court's discussion of this point in Haycraft v. Grigsby, 88 Mo. App. 354, 361 (St. L. Ct. App. 1901).
178. See 12 ENCYC. L. SCOT. *Reparation* § 1073 (1931).
180. See notes 146-150 supra, and accompanying text.
181. A case decided under civil law rather than common law principles which reaches the opposite result is Augustin v. Ortiz, 187 F.2d 496 (1st Cir. 1951) (applying the civil law of Puerto Rico).
child could recover damages from his father for injuries sustained when the father negligently backed over him with the family auto. The court considered the American authorities and decided they were not conclusive of public policy, saying:

... however repugnant it may seem that a minor child should sue his own father ... it would ... be equally repugnant that a child injured by his father's negligent act, perhaps maimed for life, should have no redress for the damages he has suffered.\textsuperscript{183}

The second Canadian case, Williams v. Lobenstein,\textsuperscript{184} held that a mother could recover from her 19 year old daughter for injuries sustained as a result of the daughter's negligence in driving an automobile in which the mother was a passenger. On the facts the daughter would have been emancipated according to American law but according to Quebec law she was still under the legal control of her mother. It was said:

... Considering that in law the fact that the defendant ... is the plaintiff's daughter and was under her mother's legal control at the time of the accident, ... does not in the opinion of the Court, deprive the plaintiff of her right to recover the damages she has suffered through the defendant's ... said imprudence, negligence and want of skill.\textsuperscript{185}

Both of the above cited Canadian cases were decided under a statute of Quebec\textsuperscript{186} which provided, \textit{inter alia}, that "every person capable of discerning right from wrong" was responsible for damage caused by his fault to another. In both opinions the courts adverted to the statute and both cases were based on a violation of it. However, it is submitted that the presence of the statute should not detract from the authoritativeness of the cases as supporting liability under the common law, as some courts have held.\textsuperscript{187} In each case the court squarely faced the issue of public policy apart from the statute.\textsuperscript{188} The statute itself is merely expressive of the common law of negligence which would obtain in any American jurisdiction without the aid of statute. In Canada the question was whether the statutory civil law of responsibility for negligence admitted of an

\textsuperscript{183} Id. at 97, 4 D.L.R. at 166.
\textsuperscript{184} [1934] 78 Que. Super. 507 (1940).
\textsuperscript{185} Id. at 508.
\textsuperscript{186} Code Civil (Que.) art. 1053.
\textsuperscript{187} See Bulloch v. Bulloch, 52 Ga. App. 338, 163 S.E. 210 (1932); Matarese v. Matarese, 47 R.I. 131, 131 Atl. 198 (1925). It is particularly interesting that the Rhode Island court took this position in view of their interpretation of the Rhode Island Married Women's Act as not allowing suits between husband and wife founded on personal torts even though it contains similar general wording. See Oken v. Oken, 44 R.I. 291, 117 Atl. 357 (1922).
\textsuperscript{188} In the Williams case, 78 Que. Super. at 509: "Nor can it be said that it is, speaking generally, against public policy to recognize the parent's right to recover damages from his own minor child; otherwise, it should have to be held that if such a child, who had been brought up properly by his parents, assaulted his father and caused him body injuries, the father could not recover the damages suffered. This it seems, would be much more against public policy than the converse proposition." And see the quote from the Marchand case, supra note 183 and accompanying text.
exception in the case of tort action between parent and child; in American jurisdictions it would be a question of whether the common law of responsibility for negligence admitted of a like exception.

There remains one other American case, Briggs v. City of Philadelphia, which is worthy of comment at this point because the end result of the case is squarely at odds with the general rule of immunity. In this case a minor child was injured as a result of a defective sidewalk in front of the house leased by her father and occupied as the family dwelling. She sued the city in an action based on the negligence of the city in failing to keep the sidewalk in proper repair. The defendant city impleaded the father-lessee and the owner-lessee as co-defendants under Pennsylvania procedure, contending that they had the primary duty to repair the sidewalk and that the city was, therefore, entitled to indemnification from them. The trial court dismissed the action as to the defendant lessor and the jury returned a verdict of $1200 in favor of the plaintiff child against the city and a $1200 verdict in favor of the city against her father.

On appeal the city contended that the recovery accorded the daughter enabled her, in effect, to do indirectly what she could not do directly, i.e., recover from her father in a negligent personal tort action. The Pennsylvania superior court recognized and approved the general rule of immunity but decided that it did not control the case. However, the case was reversed on the ground that it was error to dismiss the action as to the defendant landowner-lessee. The case was later appealed to the Supreme Court of Pennsylvania where it was held that the tenant alone was liable to indemnify the city. The judgment of the superior court was reversed and that of the trial court reinstated and affirmed.

The action in this case involved, in practicality, all of the objectionable features of a tort suit between parent and child which are raised in support of the immunity doctrine. It is a strange bedfellow with other cases where the Pennsylvania courts upheld the parent-child tort immunity doctrine in opinions couched in no uncertain terms.

D. The Reasoning Used by Courts in Support of the Rule: Some Observations

Preservation of family harmony is perhaps the leading argument in support of the rule. The proponents of the rule contend that to allow family members to array themselves in court against one another would produce disunity and discord.
in their relations outside court. This possibility is usually conceded by the critics of the rule. The counter-argument usually runs that the position is logically unsound in that suits between parents and children are allowed as a matter of course in contract and property matters and even in cases of torts to property; that it is common knowledge that some of the most acrimonious family disputes arise in the latter cases and that there is no reason to afford such complete protection in personal tort actions and ignore the effect on family relations of suits in these and other areas.

If the family harmony interest deserves protection it is difficult to fathom the reasoning of courts when it is ignored in order to allow suits between minor brother and minor sister, minor brother against adult brother, infant against grandmother, father against son-in-law, brother-in-law against brother-in-law, husband against wife, wife against husband and stepson against stepfather. In trying to harmonize these results with the "family harmony" reasoning one wonders whether the real interest sought to be protected is the intrinsic "happiness" of the home. Logically this interest could just as easily be disrupted by suits between other family members.

Apparently harmonious relations between parent and child are considered worthy of protection even though they must be neglected in other family relationships because of the duty of the parent to discipline and control the child, a duty which does not exist in the other relationships. If this is so then the courts should not reason to the result of the immunity doctrine on the basis of "family harmony" but should proceed upon the more fundamental and more practical.


195. See, e.g., Wells v. Wells, 48 S.W.2d 109 (K.C. Ct. 1932); Parks v. Parks, supra note 192 (dissent).


201. Potter v. Potter, 224 Wis. 251, 272 N.W. 34 (1937). (Also father against son and sister against brother).


basis of preservation of the parent's ability to control and discipline the child.\textsuperscript{205} It will be noticed that this reasoning is peculiarly applicable only to cases where the child is suing the parent; in the reverse situation it would be no basis for support of the doctrine of immunity at all.

In several cases decided under death acts\textsuperscript{206} the courts involved seem to have impliedly rejected the "family harmony" reasoning. \textit{Munsert v. Farmer's Mut. Indem. Ins. Co.},\textsuperscript{207} was a decision of the Wisconsin court in 1938, under a survival type statute which provided that if the persons to whom the whole amount recovered belongs are the parents, a suit might be brought directly in their names. The mother was allowed to recover from one minor son whose negligence had caused the death of another son. In \textit{Minkin v. Minkin},\textsuperscript{208} a minor child recovered under a death act for the death of his father at the hands of his negligent mother. The Massachusetts court in \textit{Olivera v. Olivera},\textsuperscript{209} decided that a mother could not recover for her own injuries from her minor son whose negligence had caused an auto accident. The court said:

\text{... it is repugnant to the prevailing sense of propriety that a mother should bring an action at law against her own minor child ...} \textsuperscript{210}

However, the court then about-faced and allowed the mother to recover against the son for negligently causing the death of his father in the same accident. The court reasoned that this was not objectionable because in the latter action the mother was acting in her capacity as administratrix of the father's estate.

In the \textit{Munsert}, \textit{Minkin} and \textit{Olivera} cases the parent and child were arrayed against each other in court; the same possibility of recriminations, discord, and fraud were present which were so carefully guarded against in other cases decided by the same courts.\textsuperscript{211} A second reason given for the bar to the parent-child tort action is that the ability of the parent to discipline and control the child would be impaired.\textsuperscript{212} The theory is that the possibility of such actions would act as a restraint on any incentive the parent might have to apply effective sanctions because of fear that the child would retaliate by bringing a tort action.

Such a possibility might be admitted without the necessity of stating the disability to sue in such broad terms as the general rule of immunity. If the re-

\textsuperscript{205} A case squarely based on this theory rather than the more general "family harmony" approach is Burdick v. Nawrocki, supra note 204.

\textsuperscript{206} The question of the effect of death on parent-child immunity is discussed in greater detail later in this article. See pages 205-207 infra.

\textsuperscript{207} 229 Wis. 581, 281 N.W. 671 (1938).

\textsuperscript{208} 336 Pa. 49, 7 A.2d 461 (1939).

\textsuperscript{209} Supra note 194.

\textsuperscript{210} Id. at 299, 25 N.E.2d at 767.

\textsuperscript{211} Wick v. Wick, supra note 193; Parks v. Parks, supra note 192; Luster v. Luster, supra note 193.

ported cases\footnote{213} are any indication there may be more instances of compelling reasons for allowing a recovery than for denying it. Query whether it is really sound public policy to put prospectively the stamp of benign judicial approval on intentionally excessive punishment, wilful neglect, and the like by a parent, who by such conduct has placed serious doubt on the desirability and wisdom of allowing him to exercise the normal parental functions in the first place? It might be that the protection of the parental functions could be just as effectively accomplished by scrutinizing the conduct of the parent on a case to case basis, applying normal tort concepts of reasonable care and recognizing parental privilege to apply reasonable sanctions, coupled with somewhat extended versions of the orthodox defenses of assumption of risk and contributory negligence.

Since the right to control and discipline resides only in the parent and not in the child it follows that to allow suits by the parent against the child would not impair the exercise of these rights.\footnote{214} However, such actions have been disallowed on the theory that there should be mutuality of remedy in this area.\footnote{215} As an answer to the "mutuality" argument it should be recognized that, in the eyes of the law, there are few inequalities of rights and privileges greater than in the relationship of parent and child. The rights and duties of each are totally dissimilar and there is no theoretical or practical basis for equalizing these rights consistent with the mores of our society.

It is difficult to see that the ability of the parent to sue the child for tortious conduct would impair the ability of the parent to control and discipline the child. The logic of the position that an uncompensated tort would enhance or at least leave unaffected the chances of harmonious family relations and the ability of the parent to control and discipline the child is problematical.\footnote{216}

It has been reasoned that to allow one child to recover compensation for his injuries from his parent would deplete the family exchequer and reduce the amount of money available for the care of other children and their share of the accumulated family wealth when the parents are gone.\footnote{217} By this reasoning are the courts recognizing in the law of torts an interest in the child which has never been recognized in the law of property, i.e., a vested right to a distributive share of the parent's property accruing at the time the property is acquired by the parent, including a concomitant present right to have that distributive share used exclu-

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214. \textit{Contra} Shaker v. Shaker, \textit{supra} note 212, wherein it is stated that such an action by parent against child is even more unseemly than one by child against parent.


sively for his benefit? Aside from the prohibitively complicated technical problems in computing what this share should be and how its disposition should be controlled, one is struck by the plain undesirability of an affirmative policy of the law to encourage such a selfish attitude on the part of one family member toward another.

The presence of liability insurance was early recognized as the basis for refutation of the depletion of the family exchequer reasoning. A very compelling argument in favor of judicial recognition of the presence of liability insurance is found in Dunlap v. Dunlap, a New Hampshire decision of 1930. There the court asserted that in such a case the insurance company is the real party in interest so that the depletion of the family exchequer argument is defeated along with the argument that such suits would destroy parental discipline and family harmony. In LoGalbo v. LoGalbo, a New York case, the court said, arguendo, that since a great proportion of automobile owners were protected against damages by insurance, in such case, except in the event of fraud in the action itself, resort to the old common law doctrine established in aid of family relationships was not sound public policy, and might and usually would result in the defeat of the very purpose for which the common law rule was maintained. The court stated further that, if the matter were before it de novo, it would favor the abolition of the rule against parent-child tort suits in its entirety, or at least in automobile cases.

Critics of this position would immediately reply that this is nothing but a raid on insurance companies. However, the insurance company can specifically exclude this type of liability by inserting a limiting clause in the policy or can be compensated for the additional risk by charging higher premiums. Insurance should not be thought of as creating the right to sue but as merely removing one of the main impediments to that right. In Borst v. Borst the court said that if insurance was not taken into account in determining whether the family harmony argument can be disregarded and immunity therefore denied, neither should insurance be taken into account in determining whether there is such prospect of fraud and collusion that immunity must be granted.

Another reason cited for support of the immunity doctrine is that the injured party has a remedy in criminal proceedings and, in the case of the injured child,

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220. Id.; see also Worrell v. Worrell, 174 Va. 11, 4 S.E.2d 343 (1939); Lusk v. Lusk, 113 W. Va. 17, 166 S.E. 538 (1932); Ruiz v. Clancy, 182 La. 935, 162 So. 734 (1935). And see pages 197-198 infra.
221. Supra note 215.
223. See State Farm Mut. Auto. Ins. Co. v. Ward, 340 S.W.2d 637 (Mo. 1960), where such a limiting clause was given effect.
224. 41 Wash. 2d 642, 251 P.2d 149 (1952).
there is a remedy in removing the child from the custody of the offending parent.\footnote{225}

This will at once be recognized as merely a makeweight argument. In no sense can an injury be redressed in a criminal proceeding except in the sense of private retribution, a theory long ago discarded in the field of criminal law. The same logic could be applied with equal force to the custody proceeding. It would seem that these "remedies" would be inherently disruptive of family harmony and parental enforcement of discipline, the primary reasons cited for the existence of the doctrine in the first place.

A number of courts have concluded that the possibility of fraud and collusion between the injured party and the tortfeasor was so great that actions of this kind should not be entertained.\footnote{226} Again, this would appear to be merely a makeweight argument. The possibility of fraud in personal tort actions between parent and child would be no greater than in property, contract and property tort actions arising between the same parties. The law entertains personal tort suits between other members of the family, between good friends and in a number of other relations such as driver-guest, master-servant, and other situations fraught with possibilities of collusion but the objection is not raised in these actions.

The argument that to allow such suits would flood the courts with petty and frivolous claims\footnote{227} has long been a favorite and well-worn crutch upon which to rest opposition to the recognition of legitimate interests which require changes in well-entrenched principles of law. In the past, courts have shown remarkable skill in distinguishing the petty and frivolous claim from the valid one in order to redress other injuries such as slander and libel, and in making very fine distinctions in criminal cases.\footnote{228} If the claims are not in fact petty and frivolous, then the answer to the problem of a multiplicity of suits lies not in the withholding of recognition of a valid interest which should be protected but in the simplification of existing procedures for handling these claims.

Some courts\footnote{229} have taken the position that the doctrine of parent-child tort immunity was admittedly ill-conceived but that it is the law and, if a change is to be made, it is properly the province of the legislature and not a job for the

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\footnote{227}{See, e.g., Roller v. Roller, \textit{supra} note 217; Borst v. Borst, \textit{supra} note 224 (dissent).}

\footnote{228}{See Borst v. Borst, \textit{supra} note 224, on this point. See also McCurdy, \textit{supra} note 226.}

courts. This argument might have validity if the problem arose from a statute which was ill-conceived by the legislature or the application of which produced unexpectedly absurd or unjust results, even though the courts had gone to the permissible limit in their function of statutory interpretation to mitigate the harshness of the result. In that situation it would be improper indeed for the court to concern itself with the wisdom or desirability of the result. However, it must be recognized that we are not here concerned with a problem of statutory construction but rather with a judge-made rule. The doctrine was advanced by the American courts with no support from the common law. It was formulated, not by legislative enactment propounding an expressed public policy, but by the courts who asserted their conception of what public policy was. Of course, no one would maintain that courts are under any disability to interpret or apply sound principles of public policy. However, once a court does assert what it believes to be public policy, that court has a duty to keep abreast of changes in public policy and make modifications when the temper of the times demands a different attitude. A model approach was taken by the Illinois court in Nudd v. Matsoukas, decided in 1956. It asserts that where the doctrine of parental immunity was created by courts, it was especially for them to interpret and modify the doctrine to correspond with prevalent considerations of public policy and social needs and not a matter for the legislature.

Other reasons have been advanced in isolated cases in support of the immunity rule. They have not been repeated enough times to raise them to the stature of a "traditional" argument in support of the rule. Among these are: (1) the parent may inherit any money the child recovers in such an action; (2) the child would otherwise be permitted to raise "stale" claims after majority; (3) the concept of sovereign family government demands the result reached by the immunity rule; (4) because of a legal identity between parent and child analogous to the legal identity between spouses the personal tort action should be barred in this relation also.

E. Exceptions to the General Rule

Stated in its original and broadest form the rule of immunity precludes tort actions between parent and minor unemancipated child arising from any conduct which results in personal injury. As a general statement of the modern law this is probably incorrect, for with increasing frequency and facility the courts have erected exceptions which severely limit the general rule.

230. See pages 180-182 supra.
236. Id.
A number of circumstances have prompted various courts to make these exceptions. In most cases the exception depends on several concurring factors, but for convenience the various factors emphasized by the courts are stated separately below, with a citation of cases in which that factor was at least one of the bases for the decision.

1. Exceptions Based on the Special Status of or Some Peculiarity Connected with One of the Parties

a. Where the Minor Child Was Emancipated at the Time of the Injury

The general immunity rule has never been applied to bar suits between parent and emancipated child. Therefore, in strictness, it is improper to say that this is an exception to the rule. However, since all courts recognize that this one circumstance makes the rule inapplicable it is included here to emphasize its importance, for it would seem that no lawyer involved in a case of this type has adequately prepared himself until he has thoroughly investigated this one facet, no matter how young the child may be.

The only really safe statement one could make regarding the law of emancipation as it affects the immunity doctrine is that all courts are agreed that tort suits can be maintained between parent and emancipated child. Beyond this one immediately meets an almost unresolvable conflict among jurisdictions as to the degree and type of emancipation required, the evidentiary facts necessary to prove this type or degree and whether it is the province of the court or the jury or both to make this determination. For this reason, it is far beyond the scope of this article to make any detailed analysis of the law of emancipation as it affects the parent-child tort immunity doctrine in all jurisdictions. The reader must content himself with the few remarks of a general nature which follow and an analysis of the Missouri decisions.

The courts generally have recognized that a minor child may be emancipated for some purposes and not for others. Where the question is whether the

237. The first case enunciating the broad general rule assumed that such suits could be maintained where the child was emancipated. Hewlett v. George, 68 Miss. 703, 9 So. 885 (1891).

238. See Murphy v. Murphy, 206 Misc. 228, 133 N.Y.S.2d 796 (Sup. Ct. 1954), where the court held a 4-year-old child was emancipated for the purpose of bringing a tort action against her father.


240. See pages 211-216 infra.

241. See Lufkin v. Harvey, 131 Minn. 238, 154 N.W. 1097 (1915).
child is entitled to his earnings to the exclusion of the parent one "type" or "degree" of emancipation may be required and where the question is whether the parent has given up his right to the custody of the child another "type" or "degree" of emancipation may be required. Here lies the root of the confusion in the cases involving a parent-child tort action. Before authorizing such actions some courts at one extreme require a type or degree of emancipation which amounts to an absolute destruction of the filial relation, while, at the other extreme, other courts require only that the parent must have given up his right to the child's earnings and services or refrained from exercising a high degree of control over the child's activities.

Emancipation is essentially a matter of the parent's intent and may be worked by an express declaration of the parent or implied from the parent's conduct. Certain changes in the status of the child will work emancipation as a matter of law, such as enlistment in the military services, marriage, or other actions such as entering a convent, which are totally inconsistent with the idea of any further control by the parent. Once established it is possible to revoke an emancipation, though there is authority that an express emancipation cannot be revoked in all circumstances. Emancipation resulting from operation of law can be revoked when the circumstances giving rise to it are altered, as where a son returns to his father's household and submits to his


247. See, e.g., Swenson v. Swenson, 241 Mo. App. 21, 227 S.W.2d 103 (K.C. Ct. App. 1950) (not involving a tort action between parent and child). But see Glover v. Glover, supra note 239, inferentially recognizing that an emancipation results from enlistment as a matter of law but leaving to the jury the question of whether such emancipation had been revoked while the minor son was on leave and where son testified that he considered himself under the control of his father. Cf. Iroquois Iron Co. v. Industrial Comm'n, 294 Ill. 106, 128 N.E. 289 (1920) (claim for workmen's compensation which involved the question of emancipation resulting from enlistment).

248. See the leading case of Hewlett v. George, supra note 237, where the court assumes the action could have been maintained if the married minor daughter had not separated from her husband and resubmitted to parental control. Cf. Chocran v. Chocran, 196 N.Y. 86, 89 N.E. 470 (1909); McWhorter v. Gibson, 19 Tenn. App. 152, 84 S.W.2d 108 (1935); Crook v. Crook, 80 Ariz. 275, 296 P.2d 951 (1956).


control after the expiration of his period of enlistment in military service.\(^{253}\) There is a split of authority as to whether this revocation occurs automatically upon the termination of the enlistment\(^{254}\) or whether it is essentially a matter of intention of the parent and child as indicated by their subsequent conduct.\(^{255}\)

Generally, the burden of pleading and proving emancipation rests on the party relying on it;\(^{256}\) for there is a presumption that a minor child is un-emancipated.\(^{257}\) Apparently, to toll the immunity rule it must be shown that the emancipation existed at the time of the injury.\(^{258}\)

Some courts have declared that the existence or non-existence of emancipation is a question of law for the court.\(^{259}\) On the other hand, some have held that a slight inconsistency in facts makes it a jury question.\(^{260}\) The more generally held view is that it is a mixed question of law and fact, i.e., that the court must decide in the first instance whether the facts would permit an inference either way and, if so, it becomes a question for the jury.\(^{261}\) A unique solution was provided in *Gallagher v. Gallagher*,\(^{262}\) where, on application of defendant, the determination was referred to a referee for decision before trial "in the interest of orderly procedure and a minimum of confusion of the issues."

It is apparent that the courts are becoming increasingly liberal in their requirements for emancipation sufficient to allow the parent-child tort action.\(^{263}\) This probably results from a combination of two factors—the general loosening in both the legal and popular conception of the integrity of the family unit and also it is an easy way out where a strict application of the immunity rule would lead to a manifestly unjust or absurd result.

One point deserves special attention because of the great number of cases in which it is likely to be important. It is not generally true that the mere fact

\(^{253}\) See Iroquois Iron Co. v. Industrial Comm'n, supra note 247.


\(^{255}\) That it is a matter of the intention of the parties: Peters v. Industrial Comm'n, 314 Ill. 560, 145 N.E. 629 (1924).


\(^{257}\) Bulloch v. Bulloch, supra note 239; Cafaro v. Cafaro, supra note 242.

\(^{258}\) Cannon v. Cannon, supra note 239.


that a minor child resides in the family home, or even the additional facts that he receives food, clothing or shelter from his parents, ipso facto makes him un-emancipated.\textsuperscript{264} The general tenor of the cases probably can be well illustrated by a quote from a Missouri decision where Judge Sherwood, in a poetic mood, wrote:

It is not necessary that the father . . . should proclaim that fact (eman-
cipation) from the housetops, or accompany it by some token or cere-
monial as open and as odious as that which formerly attended the
manumission of a slave; nor is it necessary to accomplish that end, that
the son should cease to be a member of his father’s family; that the
dearest domestic ties should be rudely sundered, and he driven like some
alien and outcast from beneath the paternal roof.\textsuperscript{265}

On the other side of the coin it is noteworthy that the mere fact the child does
\textit{not} live at home does not ipso facto make him emancipated.\textsuperscript{266}

\textbf{b. Where Defendant Has Liability Insurance}

In the first case wherein the majority of a court ever undertook a frontal
attack on the general rule as such, the presence of insurance was emphasized
as one of two alternative grounds upon which to allow a child to recover against
a parent. This was the landmark case of \textit{Dunlap v. Dunlap},\textsuperscript{267} where the New
Hampshire court reasoned that the immunity doctrine was not based on the
lack of an actionable wrong but upon a disability to sue, and said that the only
reason cited in support of this disability which had even a colorable basis in
logic and fact was the “family harmony” argument. The court then recognized
that liability insurance would defeat this argument, concluding:

Just as the defense (of immunity) may be taken away by the father’s
act emancipating the child, so a like result should follow from any
other act of his which removes from the situation the factor which has
been relied upon to defeat recovery.\textsuperscript{268}

Two years later in \textit{Lusk v. Lusk}\textsuperscript{269} the West Virginia court attributed to
the fact of insurance an even greater significance. The court first expressly declined
to follow the suggestion that a suit could be maintained by the child because
the injury was caused by the father acting in his vocational capacity, but then
permitted the minor unemancipated daughter to recover from her father for
personal injuries caused by his negligent operation of a school bus, solely on
the basis that the parent was protected by insurance. The opinion recognized

\begin{thebibliography}{9}
\bibitem{265} Dierker v. Hess, 54 Mo. 246, 250 (1873).
\bibitem{267} 84 N.H. 352, 150 Atl. 905 (1930). \textit{But compare} Levesque v. Levesque,
99 N.H. 147, 106 A.2d 563 (1954), where the court seems to have overruled this
aspect of the \textit{Dunlap} case.
\bibitem{268} \textit{Id.} at 370, 150 Atl. at 914.
\bibitem{269} 113 W. Va. 17, 166 S.E. 538 (1932).
\end{thebibliography}
that the action was not unfriendly as between father and daughter, that the recovery was no loss to him, that there was no filial recrimination and no pitting of daughter against father, that there were no strained family relations and concluded that “family harmony is assured instead of disrupted. A wrong is righted instead of ‘privileged.’”

The suggestion of these two cases as to the significance of insurance has been followed by a few courts, but there are a number of cases reaching a contrary result. Under one view liability insurance is actually used as a reason to deny the action because the courts feel the opportunity for fraud and collusion is too great. Another view is that the presence or absence of liability insurance is totally irrelevant.

c. Where the Parent Is Not Acting Qua Parent

In a number of cases it has been contended that a parent is liable to a child injured by the parent acting other than in his parental capacity. This contention has been accepted in at least two cases. In one such case, Signs v. Signs, the plaintiff, a minor emancipated child, had been severely burned while playing near a defective gasoline pump at his father's store. The court allowed recovery, pointing out that the father in maintaining a defective gasoline pump had not been engaged in any duties imposed by the parent-child relation but was, rather, acting in his business or vocational capacity. The general rule of parent-child tort immunity was severely criticized by the court but the decision went only so far as necessary to permit recovery, the court holding that in such extra-parental capacity the father was liable to the child in a tort action. And in Borst v. Borst the Washington court atoned to some degree for its decision in the Roller case when it held that a five year old boy could recover from his father for injuries sustained when the father backed the employer's truck over the child. With reasoning similar to that in the Signs case, including an attack

270. Id. at 19, 166 S.E. at 539.
271. See Ruiz v. Clancy, 182 La. 935, 162 So. 734 (1935) (a minor emancipated child allowed to recover from the administrator of her deceased father's estate for loss of companionship and grief caused by the negligence of her father where he had been protected by liability insurance); Worrell v. Worrell, 174 Va. 11, 4 S.E.2d 343 (1939). (The Virginia court permitted a minor emancipated child to recover from her father under facts similar to those in the Lusk case because the father was protected by liability insurance.)
272. See cases cited supra note 226; see also Schneider v. Schneider, 160 Md. 18, 152 Atl. 498 (1930); Turner v. Carter, 169 Tenn. 553, 89 S.W.2d 751 (1935).
274. 156 Ohio St. 592, 103 N.E.2d 743 (1952).
275. 41 Wash. 2d 642, 251 P.2d 149 (1952).
on the broad general rule, the court held the father’s act had not been committed while acting *qua* parent and therefore the immunity rule did not apply.

On the other hand, at least three courts have specifically rejected the contention that a parent acting outside his capacity as such is liable to the child. In two of these cases, *Luster v. Luster*[^276] and *Belleson v. Skilbeck*,[^277] recovery was denied altogether to the child. But in *Lusk v. Lusk*[^278] the child was allowed to recover on the basis that the father was insured in his vocational capacity, as previously mentioned. In all three of these cases the courts insisted that the line between acts done in a parental capacity and those done in a vocational capacity was too fine to be of any significance.

d. Where Plaintiff Sues Someone Other Than Parent or Child—Wrongful Act of Parent or Child Caused or Contributed to the Injury

(i) Suits Against Employer of Parent

One of the most interesting questions in this area of the law is whether a child may maintain an action for damages against the employer of the parent for injuries sustained as a result of the parent’s negligence within the scope of his employment. Here, as in the husband-wife area, there is a split of authority. A majority of the jurisdictions that have passed on the question have held that it is the negligent act, and not the liability of the employee that is imputed to the employer, and hence have allowed the action.[^279] Some courts, however, have insisted that if the employee is not liable the employer cannot be, and the action by the child against the employer has been disallowed.[^280] These latter courts have

[^277]: *Supra* note 273.
[^278]: *Supra* note 269.
[^279]: Clover Creamery Co. v. Diehl, 183 Ala. 429, 63 So. 196 (1913) (court considered question as whether negligence of the parent was imputable to child); Mi-Lady Cleaners v. McDaniel, 235 Ala. 469, 179 So. 908 (1938); Chase v. New Haven Waste Material Corp., 111 Conn. 377, 50 Atl. 107 (1930); Stapleton v. Stapleton, 85 Ga. App. 728, 70 S.E.2d 156 (1951); Radelicki v. Travis, 39 N.J. Super. 263, 120 A.2d 774 (Super. Ct. 1956); Harter v. Richardson Corp., 257 App. Div. 907, 12 N.Y.S.2d 180 (1939); Wright v. Wright, 229 N.C. 503, 50 S.E.2d 541 (1948); Foy v. Foy Elec. Co., 231 N.C. 161, 56 S.E.2d 418 (1949). (Infant plaintiff recovered against a corporation, employer of her father, for injuries negligently caused by the father notwithstanding her parents owned half the stock in the corporation.) Patsy Oil & Gas Co. v. Odom, 186 Okla. 116, 96 P.2d 302 (1939). (Employer of person in loco parentis who created conditions leading to injury of child, held liable to child.) City of Danville v. Howard, 156 Va. 36, 157 S.E. 733 (1931); LeSage v. LeSage, 224 Wis. 57, 271 N.W. 369 (1937). See also Smith v. Smith, 116 W. Va. 230, 174 S.E. 812 (1935). (Father held liable to third person for son-agent’s negligence, the court approving the *Schubert Wagon* doctrine.) The *Schubert Wagon* doctrine has also been applied to deny immunity to the owner of a car driven negligently by the father resulting in injury to the child where the owner was not the employer of the father. Shomber v. Tait, 207 Misc. 328, 140 N.Y.S.2d 746 (Sup. Ct. 1955).
also expressed concern about allowing a child to do indirectly what he could not do directly, in view of the fact the employer, if held liable, would be entitled to indemnification from the negligent parent-employee.

(ii) Suits Against Partnership of Which Parent Is Member

A somewhat different question is whether a child may sue the partnership of which the parent is a member for injuries due to the parent's misconduct within the scope of the partnership business. The few cases that have arisen are unanimous in holding that such a suit may not be maintained unless the parent himself can be held liable individually. The basis of these cases is the aggregate concept of the partnership, i.e., that the partnership has no personality apart from its individual members and therefore if one of the members cannot be individually liable the partnership as an aggregate cannot be liable. In addition, the courts, recognizing the partnership if held liable would be entitled to indemnity from the parent, have again expressed the fear of allowing the child to do indirectly what he could not do directly.

(iii) Right of Third-Party Tortfeasor to Contribution From Parent or Child

A question that has been raised frequently is whether a tortfeasor who has been held liable or may be liable in a suit by a child or parent is entitled to contribution from the child or parent whose negligence concurred in producing the injury. The general rule is that before a tortfeasor is entitled to contribution from another tortfeasor whose negligence concurred in producing an injury to a third person, it must be shown that such third person has an enforceable cause of action not only against the tortfeasor seeking contribution but also against the one from whom contribution is sought. On the basis of this general rule, the courts with almost complete uniformity have denied a tortfeasor the right of contribution from a parent or child, holding that because of the relationship between the parent and child neither of them has an enforceable cause of action against the other and therefore the element of common liability of both tortfeasors to the injured person, essential to the right of contribution, is lacking.

281. Belleson v. Skilbeck, supra note 273; Mehaffey v. Mehaffey, 15 Tenn. App. 570 (1932); Aboussie v. Aboussie, 270 S.W.2d 636 (Tex. Civ. App. 1954). There would seem to be room in the Aboussie case to argue that the actual negligence was that of a copartner. The point was not raised, but it may be questionable whether the court would have protected the partnership if this had been established.

282. In Borst v. Borst, supra note 275, and Signs v. Signs, supra note 274, the partnerships of which the parents were members were held liable, but in both cases the fathers were also held liable individually.


Apparently only one jurisdiction, Pennsylvania, dissent from this view, thus erecting in that state another exception to the general rule of immunity insofar as the parent or child is ultimately liable to pay any part of a judgment obtained by the other, albeit to a third person.

2. Exceptions Based on Relationship Other Than Parent-Child Alone
   a. Master-Servant

In several cases the courts have held that the existence of a master-servant relationship between the parent and child could be the basis for a finding that the child was emancipated, thus making the immunity rule inapplicable. It appears that these courts, in the process of enunciating a very liberal view of what is required to show that the child is emancipated, have in reality erected another exception to the general rule, the real basis for the exception being the superadded master-servant relationship.

In Dunlap v. Dunlap the minor son, 16 years old, lived at home and attended high school. During the summer in question the child was injured by the collapse of a scaffold while performing his duties as an employee of his father, a building contractor. The facts are such that there would have been no basis for a finding that the child was emancipated otherwise, but the court held that the existence of the master-servant relationship alone would support a finding that the child was emancipated, thus permitting (as a ground alternative to the presence of liability insurance) the action by the son against his father. However, the opinion reads:

The present suit is not for an intentional wrong, but for a negligent one, growing out of the relation of master and servant. As to this employment, the father had intentionally surrendered his parental control. The plaintiff worked for the usual wage of an employee, and was in fact as well as in name the hired servant of the defendant. . . . There is evidence that the father understood that he had done whatever was necessary to make him accountable to the son for failure to perform a master's duty.

285. Puller v. Puller, 380 Pa. 219, 110 A.2d 175 (1955). (Insurance company which had paid judgment obtained by wife and daughter held entitled to contribution from the father in a separate action. The court stated that this was not recovery for tort as between tortfeasors but rather enforcement of equitable duty to share liability for the wrong done.) Seymour v. Folberg, 46 Pa. D. & C. 292 (C.P. 1942). (Joint action by father as owner and son as driver of car involved in a collision to recover damages from driver of other vehicle. The court held the defendant was entitled to join the son as additional defendant to protect his right to contribution, but that father could not amend his petition to assert the action directly against the son nor could he collect any part of the judgment from the son.) To the same effect see Morris v. McKinley, 33 Pa. D. & C. 696 (C.P. 1938). (Defendant allowed to join unemancipated minor son as additional defendant.) Contra, Diggin v. York-Buffalo Motor Express, Inc., 31 Pa. D. & C. 560 (C.P. 1938). Compare Briggs v. City of Philadelphia, 112 Pa. Super. 50, 170 Atl. 871 (Super. Ct. 1934), where in a suit by the daughter against the city, the city recovered a verdict of the same size against the father by way of indemnification.

286. 84 N.H. 352, 150 Atl. 905 (1930).
287. Id. at 364, 150 Atl. at 911.
Thus, while the decision is ostensibly based on a finding that the son was emancipated, it seems that the real basis was a waiver of the immunity by the father when he employed the son.

In *Taubert v. Taubert* the Minnesota court held that it was error to direct a verdict for the defendant mother where it appeared that plaintiff, her seventeen-year-old son, was injured while in the scope of his full-time employment in the family business. The court stated that the fact of employment "although not entirely satisfactory," could furnish the basis for a jury finding the son was emancipated.

b. Carrier-Passenger

The special fact of the existence of the relation of carrier-passenger between a child and parent has been the occasion for at least one court to allow a parent-child tort action. In *Worrell v. Worrell* the Virginia court held a father liable to his minor unemancipated daughter for injuries she received while a passenger on a bus owned by her father and operated in a negligent manner by his employee. The court reasoned that:

> Here the child occupied the position of passenger of a common carrier, the relation of parent and child being purely incidental; . . . [T]he action was brought against the father . . . as a common carrier, not against the father for the violation of a moral or parental obligation, in the exercise of his parental authority.

Having thus disposed of the immunity to suit the court strengthened its decision by pointing out that liability insurance protected the father from the effects of his liability.

Two other cases, *Lusk v. Lusk* and *Luster v. Luster* have been characterized by some courts as involving a carrier-passenger relation. But these cases, while similar on their facts to the *Worrell* case, are distinguishable in that the child in both cases was riding on a school bus, rather than a common carrier, operated by the father. Thus these two cases are not authority either way on the significance of the presence of a carrier-passenger relation as it affects liability of the parent.

c. Where Defendant Is Not the Natural Parent

(i) Defendant Is Stepparent of Plaintiff

The stepparent merely by reason of such relationship does not automatically stand in loco parentis to the stepchild and therefore is not necessarily accorded

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288. 103 Minn. 247, 114 N.W. 764 (1908).
289. 174 Va. 11, 4 S.E.2d 343 (1939).
290. Id. at 26-27, 4 S.E.2d at 349.
291. 113 W. Va. 17, 166 S.E. 538 (1932).
the immunity of natural parents and persons who do stand in loco parentis. And it may be said that the cases are not in accord as to the circumstances where it will be found that the stepparent does occupy this status.

Thus, where the minor child resided at home, received his support and some of his spending money from his stepfather and in most practical respects stood in the relation of natural child to the stepfather, the court in *BurDick v. Nawrocki* recognized that, although the stepfather voluntarily stood in loco parentis to the child, he had no legal duty to support, guide and control the child. This, said the court, was standing in loco parentis in only a limited sense and it refused to extend the doctrine of parent-child tort immunity to cover such a case. Apparently under this view the stepparent could achieve the status of a person in loco parentis only by adopting the child. On the other hand, the court in *Trudell v. Leatherby* seems to say that whether a stepparent stands in loco parentis is not merely a question of the legal duty to support and care for the child but is, rather, a factual determination of whether the stepparent and stepchild mutually regard one another as natural parent and child. Where this test was satisfied the California court extended the immunity doctrine to protect the stepparent in a tort action based on negligence. Moreover, it is possible that the courts will apply a different test to determine the status as to a stepmother than as to a stepfather.

Where the test of in loco parentis status has been satisfied the courts indicate they will apply the same rule of liability to the stepparent as applied to the natural parent. Illustrative are the California cases of *Trudell v. Leatherby*, mentioned above, where the stepparent in loco parentis was held not liable for a negligent tort, and *Gillette v. Gillette*, where the stepparent in loco parentis was held liable for a wilful assault—the same rules that would have been applied in that state had the defendant been a natural parent. However, one jurisdic-

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294. See cases cited note 303 infra.
296. 212 Cal. 678, 300 Pac. 7 (1931).
299. See *Treschman v. Treschman, 28 Ind. App. 206, 210, 61 N.E. 961, 962 (1901)*, where the court pointed out that the stepfather's marriage to the mother of infant children does not automatically place him in loco parentis to the children and then concluded:
   
   While the infant children of the wife by a former marriage may or may not be members of the family after the new relation is formed, yet it necessarily follows that the infant children of the husband by a prior marriage are members of the family into which the stepmother has come by marriage. . . .
300. *Supra* note 296.
tion, Indiana, seemingly has held a stepparent in loco parentis liable to a stepchild for intentional misconduct, but has refused to apply the same rule where a natural parent was involved.\textsuperscript{303}

(ii) Defendant Is Adoptive Parent of Plaintiff

It is generally said that the effect of a decree of adoption is to transfer from the natural parents to the adoptive parents the custody of the child's person, the duty of obedience owing by the child, and all other legal consequences and incidents of the natural relation.\textsuperscript{304} Thus, it appears that the doctrine of parent-child tort immunity would generally be applied to actions between parent and adopted child. It was so applied in the Missouri case of Cook v. Cook,\textsuperscript{305} where the court held that an adoptive parent legally stands in loco parentis and therefore is immune to a tort action brought by the adopted child. There is dictum to the same effect in the Illinois case of Foley v. Foley,\textsuperscript{306} where the court rejected the contention that the defendant was an adoptive parent. But in Brown v. Cole\textsuperscript{307} the Arkansas court refused to apply the immunity doctrine to shield the adoptive parent, saying that the adoptive relation is not invested with the natural affections existing between the natural parent and child. However, this case can probably be explained on the basis of the extremely aggravated character of the wrong committed by the adoptive parent, i.e., the murder of the child.

Apparently Cook v. Cook and Brown v. Cole are the only cases squarely passing on the question of an adoptive parent's liability in tort where the relation existed at the time of the injury. However, one court has held that an adoption subsequent to the injury will not bar the tort action by the child against the adopting parent.\textsuperscript{308} This case presents problems analogous to those in suits based on premarital torts, discussed earlier in this article.

(iii) Defendant Stands in Loco Parentis to Plaintiff

In two early cases\textsuperscript{309} a person in loco parentis, though not a stepparent or adoptive parent, was held liable in a suit by a child. Some authorities\textsuperscript{310} have

\textsuperscript{303} In the early case of Treshman v. Treshman, supra note 299, the Indiana court held that the immunity accorded stepparents who stand in loco parentis would not be extended to protect a stepmother who had inflicted injuries on the child \textit{mal animo}. But then 23 years later the same court held in Smith v. Smith, 81 Ind. App. 566, 142 N.E. 128 (1924), that a child's petition, filed after he had reached majority, alleging "cruel, inhuman, excessive, unreasonable, unwarranted, and malicious" conduct on the part of the natural parent did not state a cause of action. However, the Treshman case was distinguished (it is believed incorrectly) on the basis that there was no showing in Treshman that the stepmother stood in loco parentis.

\textsuperscript{304} 1 Am. Jur. Adoption of Children § 51 (1936).

\textsuperscript{305} 232 Mo. App. 994, 124 S.W.2d 675 (Spr. Ct. App. 1939).

\textsuperscript{306} 61 Ill. App. 577 (1895).

\textsuperscript{307} 198 Ark. 417, 129 S.W.2d 245 (1939).


\textsuperscript{309} Foley v. Foley, supra note 306. (An uncle in loco parentis was held liable for simple negligence.) Clasen v. Pruhs, 69 Neb. 278, 95 N.W. 640 (1903) (aunt in loco parentis held liable for gross neglect). See also Steber v. Norris, 188 Wis. 366, 206 N.W. 173 (1925) (employer who stood in loco parentis in a limited sense held liable for excessive punishment).

\textsuperscript{310} See Annot., 19 A.L.R.2d 425 (1951).
characterized three other early cases\(^\text{311}\) as holding that a person "in loco parentis" may be liable.\(^\text{312}\) However, upon closer inspection it will be seen that these characterizations are imprecise, "in loco parentis" being used more in a popular sense than as a strict legal definition of a status. At any rate, it is doubtful whether many modern courts would distinguish between the liability of a person in loco parentis (regardless of how the status arises) and that of a natural parent; certainly there is a wealth of constantly recurring dictum to this effect.\(^\text{313}\)

(iv) Where the Child Is Illegitimate

A special circumstance which may yet be seized upon by the courts as warranting an exception to the general immunity rule is the illegitimacy of a child-plaintiff. To date there apparently are no cases where the issue has been directly presented. In the only cases which this writer has been able to find involving a suit in tort by an illegitimate child against the father there was some special circumstance which prompted the decision.\(^\text{314}\)

3. The Effect of Death

Where death has terminated or altered the normal parent-child relation, the court should be relieved, to some degree, of the considerations relative to the protection of the family relation which would be present in the ordinary parent-child tort case. However, there will be additional questions, not faced in the ordinary action, because the suit is in most instances based on some special statute. Nevertheless many of the cases perhaps illustrate a tendency toward further erosion of the immunity doctrine, for, whatever the niceties of legal theory involved, the ultimate question is liability for tortious conduct within the parent-child relation.

The cases wherein action was brought by a living parent or child against the

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\(^{312}\) Compare Fortinberry v. Holmes, 89 Miss. 373, 42 So. 799 (1907); Patsy Oil & Gas Co. v. Odom, 186 Okla. 116, 96 Pac. 302 (1939).


\(^{314}\) In Borzik v. Miller, 22 Fay L.J. 5 (Pa. C.P. 1958), the child had been legitimated by marriage of his parents subsequent to his injury due to the negligence of the father. The court held that the fact the child was illegitimate at the time of the injury did not render the immunity doctrine inapplicable, and denied the action. Compare Adams v. Nadel, supra note 308. (Subsequent adoption did not bar the action.) In Vidmar v. Sigmund, 192 Pa. Super. 355, 162 A.2d 156 (1960), the court refused to rule on the question of the immunity of a parent when sued by his illegitimate child, instead holding the parent's estate liable on the theory that an aggravated and intentional assault would not have been privileged even if the defendant had been the legitimate parent of the child. See also Mahnke v. Moore, 197 Md. 61, 77 A.2d 923 (1951), where the father's estate was held liable, the court expressly refusing to concern itself with the fact the child was illegitimate.
estate of the other are in conflict. Some courts in determining whether to allow
the suit have first sought to define the real basis for the immunity doctrine—is it a theory of
disability to sue because of public policy, i.e., preservation of family
harmony and discipline, or a theory of lack of actionable wrong. Once determining
that it is the former, two jurisdictions\(^{315}\) have logically held that the immunity
is personal to the parent, whose death renders inapplicable any of the reasons
usually cited to support the immunity doctrine. On the other hand, some courts
have rather mechanically stated that the child could not have sued his parent
were the latter alive, and therefore no action may be maintained against his
estate.\(^{316}\)

A different approach to the problem was utilized by the Maryland court in
\textit{Mahnke v. Moore},\(^{317}\) where the court pointed out that certain conduct on the
part of a parent may be so gross and unwarranted as to support a finding that
the parental relationship has been abandoned, such abandonment constituting
a forfeiture of the parental immunity to suit by the child. On this basis a
child was allowed to recover from her father’s estate for shock and fright induced
by the father’s killing the mother and then committing suicide in the child’s
presence.

Where the situation is the reverse of that posed above in terms of parties,
i.e., where the injured parent or child is dead and his administrator sues the
other, the result in a particular case has generally depended upon whether the
applicable statute provided only for survival of an action or was held to create
a new cause of action. In the instance of survival type acts the courts have almost
uniformly denied the action by the deceased’s administrator against the tort-
feator.\(^{318}\) It may be questioned whether these courts are not saying that the

\(^{315}\) Brennecke v. Kilpatrick, 336 S.W.2d 68 (Mo. 1960) (en banc); Vidmar
v. Sigmund, \textit{supra} note 314 (injuries willfully inflicted—child’s action against
father’s estate allowed); Gartova v. Feldman, 32 Pa. D. & C.2d 188 (C.P. 1956)
(negligence—child’s action against father’s estate allowed); Brower v. Webb, 5
Pa. D. & C.2d 193 (C.P. 1955). (The children’s action against their mother’s
estate for injuries “negligently, carelessly, recklessly, willfully and wantonly”
inflicted was permitted. The court did not distinguish between the several types
of conduct alleged.)

\(^{316}\) Cannon v. Cannon, 287 N.Y. 425, 40 N.E.2d 236 (1942). (The court
specifiedally said the question was whether a cause of action arose on the date
of the injury and that the fact of the intervening death of the mother could
not create a cause of action.) Lasecki v. Kabara, 235 Wis. 645, 294 N.W. 33
(1940) (negligence—child’s action against father’s estate for personal injuries
not allowed).

\(^{317}\) \textit{Supra} note 314.

\(^{318}\) Owens v. Auto Mut. Indem. Co., 235 Ala. 9, 177 So. 133 (1937) (suit
by administrator of child’s estate against father’s insurer—recovery denied, the
court saying it made no difference whether the conduct was willful and wanton
or simple negligence); Shaker v. Shaker, 124 Conn. 518, 29 A.2d 765 (1942)
(father’s administrator against child—negligence); Chastain v. Chastain, 50 Ga.
App. 241, 177 S.E. 828 (1934) (child’s administrator against father—negligence);
Harralson v. Thomas, 269 S.W.2d 276 (Ky. App. 1954) (child’s administrator
against father—negligence); Damiano v. Damiano, 6 N.J. Misc. 849, 143 Atl. 3
(Cir. Ct. 1928) (child’s administrator against father—negligence); Goldsmith v.
immunity doctrine is based on a theory that no cause of action arose, rather than treating it as a mere disability. At any rate, it may be said that the decisions are the result of a rather strict and literal construction of the statutes involved. At least one court has dissented from this view, holding that the child's administrator could recover from a defendant parent under a survival type act where the injury causing death was wilfully and wantonly inflicted. On the other hand, where the death act was held to create a new cause of action in the personal representative of the decedent, the Massachusetts court in Olivera v. Olivera permitted the mother, administratrix of the deceased father's estate, to recover for his death due to her son's negligence. The same result has been reached in Kentucky under a broad constitutional provision granting recovery to "every person."

A question somewhat different is whether a child may sue one parent's administrator for causing the death of the other parent. At least two cases have given an affirmative answer to this question. In one such case the child recovered in his own right for loss of companionship and mental suffering arising from the death of the mother. But in the other case the action was in a real sense derivative, for the court reasoned that the deceased mother would have had an action had she lived and that the cause of action accrued to her children at her death. In what may be a harder case, the Pennsylvania court has allowed a child to recover under a death act against one living parent for negligently causing the death of the other parent.

Where both the injured party and the tortfeasor are dead there would seem little room for application of the immunity rules; add to this some other appealing ground for making an exception and the conclusion of liability would seem almost inescapable. In the cases involving this particular factual situation, the courts apparently have been persuaded by this combination of circumstances.

Samel, 201 N.C. 574, 160 S.E. 835 (1931) (child's administrator against father—negligence); Cronin v. Cronin, 244 Wis. 372, 12 N.W.2d 677 (1944) (mother as administrator against father for child's death—negligence).

319. Nudd v. Matsoukas, 7 Ill. 2d 608, 131 N.E.2d 525 (1956). The court had never before had the occasion to make an exception for injuries wilfully inflicted.


321. Hale v. Hale, 312 Ky. 867, 230 S.W.2d 610 (1950). (Defendant's negligence had caused the death of both his mother and his daughter. The Kentucky court allowed recovery by the administrator of both estates.) Cf. Harralson v. Thomas, supra note 318.

322. Ruiz v. Clancy, 182 La. 953, 162 So. 734 (1935). (Recovery was allowed under the court's interpretation of a Louisiana statute denying the child's tort action against the parents "while they are alive.")

323. Lasecki v. Kabara, supra note 316. (Recovery was allowed despite the fact that, as previously mentioned, the child was denied recovery for his own injuries.) Contra, York Trust Co. v. Blum, 13 Pa. D. & C. 313 (C.P. 1934) (child's action against father's administrator for death of mother denied).


325. Brown v. Cole, 198 Ark., 417, 129 S.W.2d 245 (1939) (action for pain and suffering of the child caused by strychnine administered by the adopted father); Cowgill v. Boock, 189 Ore. 282, 218 P.2d 445 (1950). (Recovery was
4. Where the Injury Is Caused by Conduct Other Than Simple Negligence

An ever increasing number of courts have allowed a parent or child to sue the other where the injuries were caused by conduct other than simple negligence. In addition, in nearly all recent cases involving tort actions between parent and child arising from negligent conduct of the tortfeasor, the courts, while approving the general rule of immunity, are careful to point out either by way of dictum or inference that the rule might be or is different where the injury is not occasioned by simple negligence. 326

Many of those courts allowing the action have been somewhat less than precise in the use of the terms "wanton and reckless," "grossly negligent," "willful and malicious," "cruel and abusive," and so forth. In some cases these terms were used to describe a broad exception to the general immunity rule which the court then applied without ever accurately describing the exact type of conduct which was the basis for the exception. This has served to confuse the meaning to be ascribed to these terms. For convenience and clarity the writer has classified the cases in what is hoped to be some semblance of consistency according to the conduct actually involved.

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326. One of the most conservative statements of this variety is made in the case of Ball v. Ball, 73 Wyo. 29, 57, 269 P.2d 302, 314 (1954), where the Wyoming court, after approving the general rule by way of caveat declared:

... we feel that it is proper to say... that the judiciary should be reluctant to encourage actions as maintainable between children and their parents unless sanctioned by the statute law or where they disclose so clear an invasion of the rights of the child as tending to bring discord into the family and to discourage its proper government....

The Ball case involved an inevitable fact situation—a suit by a minor child against his father for injuries sustained when the father negligently failed to fill the gas tanks of the family airplane.

An example of a more liberal statement by way of dictum is found in Wurth v. Wurth, 313 S.W.2d 161, 164 (St. L. Ct. App. 1958), where the court recognized there were certain exceptions to the general rule:

... Such cases involve circumstances such as assault and battery, willful mistreatment, conduct of an intoxicated parent, relationship of master and servant, and other situations where the acts complained of were not committed within the scope of true domestic relationship, or were not the acts of mere unintentional negligence.

For other examples of recognition of an exception to the general immunity rule by way of dictum or inference where the injury is occasioned by other than...
a. Unintentional But Wilful and Wanton, Reckless or Grossly Negligent Misconduct

An exception to the general immunity rule which has developed comparatively recently and which very definitely represents a modern trend is the case where the injuries to plaintiff were occasioned by unintentional but wilful and wanton, reckless or grossly negligent conduct. There are at least seven cases where the court squarely rules that the exception will be made where such misconduct is involved. 327 The rationale is generally that, by such conduct, the parent is not acting in his capacity as such and that by such departure from his prescribed role he forfeits whatever immunity he might otherwise have.

b. Intentional or Malicious Acts

The earliest exception made to the general immunity rule is the case where the injuries were inflicted intentionally, wilfully or maliciously. 328 Many courts which have recently had an opportunity have expressly ruled that this exception exists 329 and it is probably a safe statement that, were the case of an intentional, malicious tort presented today, many (if not almost all) courts would refuse to apply the general immunity doctrine. 330

c. Exercise of Parental Authority in a Cruel and Abusive Manner

It is undoubtedly the general rule that a parent in the exercise of his parental authority to discipline and control the child is fully protected so long as the punishment inflicted is reasonable. 331 The immunity rule persists in some jurisdictions even where the punishment is unreasonable 332 but there is authority that the exercise of parental authority in a cruel or abusive manner strips the parent of his immunity to a tort action by the child. 333


328. See the leading case of Treschman v. Treschman, 28 Ind. App. 206, 61 N.E. 961 (1901).


330. See, e.g., Chesonis v. Chesonis, supra note 325, at 454, for this sort of a prediction. See also Abousie v. Abousie, 270 S.W.2d 636 (Tex. Civ. App. 1954).

331. See Fortinberry v. Holmes, 89 Miss. 373, 42 So. 799 (1907).


E. Conflict of Laws Problems

The conduct occasioning the injury to plaintiff occurs in state A and the parent and child are domiciled in state B, where suit is instituted. What law applies to determine whether a tort action can be maintained between the parent and child? Because the degree of emancipation necessary to toll the immunity doctrine and the evidentiary facts which can be used to prove or disprove the required degree vary widely from jurisdiction to jurisdiction, this may be one of the chief areas where a conflict of laws arises. There is also a good chance there will be a conflict as to whether conduct other than simple negligence is cloaked with immunity.

A majority of the courts would probably apply the old territorial tort concept, utilizing the law of the place where the injury occurred to determine not only the substantive elements of the cause of action but also the capacity of the parties to sue, i.e., to determine whether the immunity doctrine applies to the particular conduct involved and whether the child was emancipated so as to render the immunity doctrine inapplicable.334 At least one court has gone so far as to rule that emancipation and the immunity doctrine are matters of substance affecting the very existence of a cause of action rather than matters relating to a mere disability to sue.335

A modification of the territorial tort concept is that the law of the forum and domicile will be applied where there is no showing that the law of the place of injury is any different.336 Presumably, if shown to be different the law of the place of the injury would be applied.

A more modern approach is to apply the law of the place of the injury to determine the substantive elements of the cause of action but to look to the domicile of the parties to determine whether a disability to sue on that cause of action exists.337 The rationale of these cases is that the state of domicile has the paramount interest in the continued well-being of the family relationship and that it is the public policy of that jurisdiction as expressed by the decisions of the courts and the enactments of the legislature which should control.

It is submitted that the law of the domicile should control the question of disability to sue and related questions of emancipation if for no other reason than to measure the liability of the parties by one standard so that it would not vary each time a state line is crossed. Certainly the courts are free to apply aggravated assault on the child under the guise of a disciplinary measure. In Haycraft v. Grigsby, 85 Mo. App. 354 (St. L. Ct. App. 1901), a schoolteacher was held liable for wilful assault, the court equating her liability to that of a parent.

whatever law they feel will reach the most desirable result in a particular case.338

A discussion of the conflict of laws problems associated with suits between husband and wife appears earlier in this article.339 Since there is a very good chance that a court which has not had the opportunity of ruling on the question in a parent-child suit would rely heavily on the husband-wife cases, the cases cited there may be of considerable importance in this area.

F. Analysis of Missouri Decisions

1. Liability of Parent or Person Standing in Loco Parentis

The first pronouncement in the reported decisions of the courts of Missouri concerning the problem of parent-child tort liability was in the case of Haycraft v. Grigsby.340 There a minor child brought suit against his schoolteacher for injuries resulting from excessive punishment. In allowing the action, the Springfield Court of Appeals first stated the teacher was privileged to inflict reasonable punishment as a disciplinary measure, but then added the qualification that punishment in no degree could be inflicted maliciously or without provocation.341 But the core of the decision is found in the court's summarization of the rights and liabilities of teachers, where it was stated:

Persons are not allowed to immoderately beat and injure either children or adults from any motive good or bad; parents have no such right, nor teachers either.342 (Emphasis added.)

The language in the opinion relating to the liability of a parent was later characterized as dictum,343 but it was somewhat inconsistent with the rule of the Hewellette case344 (decided 10 years earlier), which was not cited by the court.

Eleven years later the Kansas City Court of Appeals decided the case of Dix v. Martin.345 There a minor unemancipated child was suing a woman with whom she had lived for three years as a companion and servant for injuries caused by a brutal and criminal beating administered by the woman, after which the relationship was terminated. The chief defense was that the woman stood in loco parentis and, therefore, had the right to administer punishment whether moderate or immoderate. The court disagreed, for after equating the liability of a parent and a person standing in loco parentis generally, this statement was made:

One who assumes to take the place of a parent has a right to inflict reasonable corporal punishment for misconduct of the child, but he has no right to subject the child to inhuman, unusual and torturing castigation and if he does he becomes liable to answer to the child in damages.

339. See pages 172-174 supra.
340. Supra note 333.
341. Id. at 359.
342. Id. at 360.
344. See note 158 supra and accompanying text.
as for a malicious assault. (citing Haycraft) . . . The assault was wicked
and criminal and, assuming that defendant stood in the relation of a
parent to plaintiff she should answer for the damages resulting from
such excessive punishment.346

The court then examined the relation between the parties and found that, at
most, there was a relationship of master and servant, thus rendering the discussion
of the liability of a parent or a person in loco parentis dictum. Again, apparently
the Kansas City court was not aware of the Hewellette case, nor of any of the
other leading cases347 which had been decided since Haycraft.

The situation of the negligently inflicted injury was presented in 1932 in
the singular case of Wells v. Wells.348 There the mother sued both an uneman-
cipated minor son and an adult son, both of whom lived at home. In deciding
the liability of the minor son, the Kansas City court was confronted, for the
first time in Missouri, with the broad general rule of parent-child tort immunity
which had earlier flourished in other jurisdictions, producing such absurdities
as Roller and McKelvey. The court was unimpressed by the “family harmony”
argument because of the lack of concern over this interest in property and con-
tract actions both in Missouri decisions and in decisions of other courts which
had followed the immunity rule. Rather, the court considered Dix v. Martin as
expressive of the judicial policy in Missouri toward parent-child tort actions.
The result was the only American case ever to rule directly that the parent-
child tort immunity doctrine was ill-conceived and should not be applied even
in the case of an injury inflicted unintentionally by the child on the parent.

Thus is was that, in 1932, Missouri stood alone among all jurisdictions. The
intermediate appellate courts of Missouri had ruled that personal tort actions
based on negligence and, at least by strong inference, those based on intentional
conduct, could be maintained between parents or persons in loco parentis and
minor unemancipated children.

Then in 1929 the Springfield Court of Appeals decided Cook v. Cook,349
which marked a distinct retreat from the liberal tenor of the previous cases.
There an adoptive minor unemancipated daughter sought recovery from her
adoptive mother for an assault which for purposes of appeal was admitted as
“wilful, wanton and malicious.” Apparently the court considered that an adoptive
parent and a natural parent were on exactly equal footing as far as their liability
is concerned for, although the issues stipulated for appeal by the parties were
in terms of “adoptive parent,” the court framed the issue as follows:

... the one issue before us is whether or not the parent is liable in ...
tort to a minor child of such person for a willful, wanton and malicious
assault . . . .350

346. Id. at 274, 157 S.W. at 136.
347. McKelvey v. McKelvey, 111 Tenn. 388, 77 S.W. 664 (1903); Roller v.
Roller, 37 Wash. 242, 79 Pac. 788 (1905); Treschman v. Treschman, 28 Ind.
App. 206, 61 S.E. 961 (1901).
349. Supra note 343.
350. Id. at 996, 124 S.W.2d at 676.
The court said that plaintiff relied largely on the cases of Dix v. Martin and Haycraft v. Grigsby. But both were dismissed as totally inapplicable, and the action was disallowed on the authority of Corpus Juris, which cited the leading cases which had been decided at the time of its publication. The opinion seems to indicate that neither the court nor counsel was aware of the decision of the Kansas City court in Wells v. Wells. Had they been, the case might have been decided differently, for the court expressly based its refusal to permit the action on the fact that it could find no authority in either Dix or Haycraft to justify holding that the action was not barred.

In 1950 the Missouri Supreme Court finally ruled on a case in which the question of parent-child tort immunity was involved, though then only indirectly. In Taylor v. Taylor an adult son was sued by his mother for damages for the wrongful death of the father. Defendant raised the defense that to allow such an action between an adult child and the parent residing in the same house would violate public policy, but the court was “not disposed to consider the question at great length.” In holding the adult son liable, the court merely reviewed two cases from other jurisdictions where such an action was permitted even though the child involved was living at home, was a minor and was unemancipated. The discussion concluded:

There is more reason to apply the rule [of immunity] in a case where the child is a minor than where he is of age.

Obviously, this was something less than an acceptance of the general rule of immunity. Interestingly, Wells was cited as permitting the action by mother against adult son who resided at home, but the court made no mention of the fact that Wells had also permitted the mother’s action against the minor son.

A fact situation requiring the Supreme Court to rule squarely on the question of parent-child tort immunity finally came in 1953 in the case of Baker v. Baker. There suit was by a 15 month-old infant against her father for injuries inflicted when the father negligently backed the family automobile over the child. Early in the opinion the court stated that the general rule, without doubt, was that a child could not sue the parent in tort, but later qualified this greatly by the statement that “to say a child may not sue its parent in tort is stating the rule too broadly.” Nevertheless the action by the child was disallowed, the opinion, after a review of Wells and several cases from other jurisdictions, concluding:

We, by this opinion, do not intend to approve or disapprove any of the particular cases referred to in this opinion. What we do hold is that plaintiff’s suit in this case cannot be maintained for the reason that to do so would be against public policy.

351. 46 C.J. Torts of Parent Against Child § 159 (1928).
352. 360 Mo. 994, 232 S.W.2d 382 (1950).
354. 360 Mo. at 1000, 232 S.W.2d at 385.
355. 263 S.W.2d 29 (Mo. 1953).
356. Id. at 30.
357. Id. at 32.
Thus, Missouri aligned itself with other jurisdictions holding that a child could not maintain an action against the parent for negligently inflicted injuries, but did so without the Wells case having been disapproved.

2. Exceptions to the Immunity Rule in Missouri
   a. Child Is Emancipated

The chief exception to the immunity rule in Missouri, just as it is in other jurisdictions, is the instance where the minor child is emancipated. But, while other jurisdictions have at times laid down rather strict requirements for emancipation, Missouri seemingly adopted a very liberal view in Wurth v. Wurth, the only case in Missouri on the point. In the Wurth case a 19 year-old daughter had been injured due to the negligence of her father. It was shown at the trial that she had been employed outside the home for one and one-half years, was allowed to keep her earnings and paid her own bills, including an amount to her parents for board. The jury returned a verdict for the daughter, but the trial court granted defendant's motion for judgment notwithstanding the verdict on the basis that the facts did not constitute a sufficient degree of emancipation to take the case out of the general rule of parent-child tort immunity. The St. Louis Court of Appeals affirmed, holding that a complete emancipation, i.e., one terminating defendant's rights and duties as completely as if the daughter had attained her legal majority, was necessary to remove the parental immunity. On appeal to the Missouri Supreme Court, it was held that emancipation could be express or implied from circumstances, and that here the father's acquiescence in his daughter's working for others and receiving pay therefor, and the fact that she paid her own bills was sufficient evidence upon which a jury could find the daughter emancipated. Accordingly, the decision of the St. Louis court was reversed and the case remanded with directions to reinstate the jury verdict in favor of the plaintiff daughter.

The Supreme Court in its opinion adopted only some of the language from Corpus Juris Secundum on emancipation, but omitted all reference to the requirement that the parent divest himself of the power to control the child. In so doing, the Supreme Court squarely overruled the decision of the court of

358. 322 S.W.2d 745 (Mo. 1959).
360. 67 C.J.S. Parent & Child § 88, at 812-814 (1950): "The intention of the parent to emancipate the child may be expressed either in writing or orally, or it may be implied from his conduct or from other circumstances. . . . Emancipation may also be implied by the parent's acquiescence in his child's working for others, receiving its pay therefor and spending the money as it pleases."
361. The following language also appears in the section of C.J.S. quoted from, but was not adopted by the court: "Emancipation occurs where the parent renounces all the legal duties and voluntarily surrenders all the legal rights of his position to the child or to others. . . . An emancipation is not effected by the mere relinquishment by the parent of the right to the child's earnings or services, or by the granting of permission to the child to live separate from the parent. . . . There must be an intention on the part of the parent to relinquish all the legal rights and to divest himself of all the legal duties of the relationship. . . ."
appeals that there must be a complete severance of the filial ties before a child is emancipated for the purposes of bringing a tort action against his parent. Thus, this was the adoption of a very liberal view indeed, for even those courts which require only partial emancipation at least require that it relate to and affect the parent's control over and power to discipline the child.362

There are, of course, other Missouri decisions relating to emancipation. But these cases deal with such questions as the liability of the father to continue to pay support under a divorce decree,363 the right of the father to recover the child's wages from the employer of the child,364 the liability of the father for necessaries furnished the child,365 the right of the child to recover from foster parents for services rendered during minority366 or the right of creditors to reach the child's earnings in satisfaction of the debts of the father.367 A perusal of these cases and reflection on the various tests on what constitutes emancipation therein leads immediately to the conclusion that the type or degree of emancipation required depends on the purpose for which emancipation is asserted. For this reason it is submitted that these cases are not authority as to the type or degree of emancipation necessary to remove the disability to sue on tort claims between parents and children. Apparently, the only definitive case for this purpose is the Wurth case.

b. Effect of Liability Insurance

There is no mistaking the attitude of the Missouri court regarding the contention that the fact that defendant is protected by liability insurance is ground for making an exception to the rule of parent-child tort immunity. In the first case relating to the question to come before the Supreme Court, it was made clear that the presence of insurance would not move the court to allow an action which otherwise would not be allowed, and that the court was equally unimpressed by the suggestion that fraud and collusion might be present.368 This attitude that insurance is totally immaterial has been carried forward and expressed in every opinion where the matter has been raised.369

c. Where Injury Is Caused By Conduct Other Than Simple Negligence

The Missouri Supreme Court has never had occasion to rule on the question whether the immunity doctrine applies to bar a parent-child tort action where the conduct causing the injury was other than simple negligence. However, in the Baker case the court seemingly evinced an attitude that such actions would

362. See cases cited supra note 243.
368. Taylor v. Taylor, supra note 352.
be allowed were the question presented. The court there characterized the Hewellette and Roller decisions, both of which involved intentional misconduct, as “extreme”\(^\text{370}\) and recognized that they had been subjected to severe criticism in many subsequent cases and “not without reason.”\(^\text{371}\) Furthermore the court took special notice that the petition in the case had no allegation indicating that the injuries were caused by anything more than mere negligence.\(^\text{372}\) However, the court’s remarks were dictum, and with the Springfield court’s decision in Cook v. Cook,\(^\text{373}\) where recovery for injuries intentionally inflicted was denied to an adoptive daughter, still not having been disapproved, the most that could be said is that the question whether a parent or child can recover from the other for injuries intentionally inflicted is an open one in Missouri.

d. Effect of Death in Missouri

In the latest case to arise in Missouri concerning the parent-child tort immunity doctrine, this state was aligned with the more progressive jurisdictions on the question of the effect of death on the immunity rule. This was the case of Brennecke v. Kilpatrick,\(^\text{374}\) decided in 1960. There an action was brought by a minor unemancipated child against the estate of the deceased mother, who had negligently injured the child and who was killed in the same accident. The Supreme Court, in allowing the action, definitely stated that the immunity rule is based only upon a theory of a disability to sue because of public policy and not upon a theory that no cause of action arises. The court then logically took the position that the policy reasons for the rule—preservation of family harmony and discipline—had been rendered inapplicable because the death of the mother had destroyed the parent-child relationship.

The Brennecke case would seem to open up the whole field of parent-child tort actions where the parent or child is suing the estate of the other, for other jurisdictions have generally conceded that the case where action is brought under a death act is an easier one.\(^\text{375}\) In addition, if the Supreme Court’s refusal to disapprove the Wells case in Baker v. Baker means that the Missouri courts will draw a distinction between the case where a parent is suing a child and where a child is suing the parent, Wells would be authority that an action could be maintained by a parent even when the child is living.

G. Conclusion

The inception, growth and erosion of the doctrine of parent-child tort immunity probably furnishes an excellent example of those “little decisions” that interested Mr. Justice Holmes most keenly “which have in them the germ of