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Parental Immunity--Its Application and Future

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Virginia specifically denied public employees the right to strike, a summary of their plight is found. The attorney general pointed out that public employees have struggled from early times to improve their working conditions, wages, and hours of labor with history recording the fact that public employers at every turn in the early days attempted to thwart their efforts. Only the necessity of maintaining a labor supply, public opinion, and the concessions won by private employees forced the public employer to grant more favorable employment conditions.26

True, some concessions have been won by public employees, but the rate of their victories has been painfully slow. To a large extent, their progress remains blocked by the board common law rule which prohibits all public employees from engaging in a strike. The rule still stands despite numerous court tests. Even the theories for the rule, illogical though they may be, continue to survive with tenacity. The states which have dealt with the problem of public employee strikes have merely codified the common law prohibition. The deterrent effect of such statutes has been negligible. All urgings to adopt a common sense approach by denying the right to strike to only those public employees engaged in services vital to the community's health and safety have gone unheeded. A rule of law which denies the right to strike to all public employees is no more equitable than a criminal law statute which calls for the same punishment irrespective of the crime. But, only when this is realized can the public employee hope to gain any of the rights which have long been protected and enjoyed by the private worker.

Peter Thomas Denny

Parental Immunity—Its Application and Future

P, an unemancipated infant, brought an action by his next friend and mother seeking to recover from D, his father, damages for personal injuries sustained in an automobile accident. Evidence surrounding the mishap was conflicting and disputed. The jury however evidently believed P's version. P testified that he was driving since his father was intoxicated. D had been asleep in the front seat of the car but was subsequently awakened by a bump in the road.

Immediately, \( D \) gave his son \( P \) a "wild look," grabbed the steering wheel and concurrently placed his foot on the accelerator. Due to the increased speed of the trunk and \( P \)'s inability to overpower his father, \( P \) lost control of the truck, collided with an automobile and ran against a tree. \( P \) proceeded on a theory that his injuries were caused by the wilful, reckless and wanton conduct of his father; therefore, \( P \) contended that \( D \), even though his father, was not immune from the action. Accordingly, the trial court instructed the jury upon the question of wilful, reckless and wanton conduct of \( D \). The jury rendered a verdict in favor of \( P \) for $75,000 and judgment was entered for that amount. From that judgment \( D \) appealed. Held, reversed and remanded. The evidence adduced showed acts constituting negligence, not wilful and wanton conduct. Consequently, it was reversible error to give the instruction on the question of wilful, reckless and wanton conduct. And, since an unemancipated child cannot maintain an action against his parent for more negligence, \( P \) did not establish a cause of action. Groves v. Groves, 158 S.E.2d 710 (W. Va. 1968).

Before one can successfully pursue an action against another for the latter's tortious conduct it must generally be shown that there was a duty owing to the injured party, a breach of that duty and that the injury to the person was caused by such breach. Yet, when the injured party happens to be a child and the tort-feasor is that child's parent, recovery for the injuries involved may be denied. The well established rule persists that an unemancipated child cannot maintain a tort action against his parent.¹ This rule evolves from the doctrine of parental immunity.

The genesis of the doctrine of parental immunity is found in the Mississippi case of Hewlett v. George.² Prior to that case, American authority on the matter was "meager, conflicting, and obscure."³ Conspicuously lacking supporting authority, the court in Hewlett advanced two primary arguments to substantiate its holding that a child was precluded from recovering against his parent for false imprisonment: to allow such recovery would obstruct effective exercise of parental control and, the harmony of the family unit would be seriously invaded if such actions were sanctioned. The holding

¹ Parental immunity is sustained by the majority. Annot., 19 A.L.R. 2d 423 (1951).
² 68 Miss. 703, 9 So. 885 (1891).
³ McCurdy, Torts Between Persons in Domestic Relations, 43 Harv. L. Rev. 1030, 1059 (1930).
of the Mississippi court seemed rather innocuous since the tort involved was not serious, nor were the child's injuries longlasting. Yet, strict adherence to the doctrine thereafter precipitated grave injustices. Most illustrative of the possible evils incident to a blind application of parental immunity was the much criticized case of 

Roller v. Roller. There an unemancipated daughter had been brutally raped by her father.

Thus, Roller graphically revealed that parental immunity could not be universally applied without regard to attendant circumstances. Accordingly, courts began to modify the application of the doctrine. This refinement of parental immunity is linked to an examination of the traditional rationales advanced in support of the disallowance of intra-family tort actions. For example, if the disallowance of a tort action by a child against his parent was predicated upon a desire to abstain from interfering with a parent's control over his child, such was not necessary when the parent was acting in a non-parental capacity. Consequently, some courts have held that if a parent, while engaged in vocational activity, injures his child in such a way as to give rise to a cause of action, the rights of the injured child should not be obviated since a non-parental transaction was involved. But,

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4 37 Wash. 242, 79 P. 788 (1905).
5 Serious attack on the doctrine of parental immunity was signaled by Dunlap v. Dunlap, 84 N.H. 352, 150 A. 905 (1930). There a child was injured by a parent who at the time of the injury was acting in a vocational capacity. The importance of this case is marked by its refutation of common law precedent for the doctrine of parental immunity. Prior to this case it was generally believed that at common law a child could not maintain a tort action against his parent. The court pointed out however that such common law immunity extended only to tort actions by a wife against her husband.

6 Professor McCurdy in Torts Between Persons in Domestic Relations, supra note 3, examines in detail the various reasons given for upholding parental non-liability. Generally, the reasons he sets forth are as follows: (1) the danger of fraud incident to such actions; (2) the succession to the money of the child by the parent if the child dies intestate which would result in allowing the parent to retrieve money previously acquired by the child in an action against the parent; (3) the depletion of the family's estate and thus taking it from other children; (4) the analogous situation where a wife is not allowed to sue her husband; (5) the maintenance of domestic tranquility; and (6) security of the parent's discipline and control.

7 Signs v. Signs, 156 Ohio St. 556, 103 N.E.2d 743 (1952); Borst v. Borst, 41 Wash.2d 642, 251 P.2d 149 (1952). The court in Signs v. Signs, supra at 748, compared the accepted principle that a child can maintain an action against his parent for the child's property rights with the rule of immunity relating to tort actions by the child and stated: "It seems absurd to say that it is legal and proper for an unemancipated child to bring an action against his parent concerning the child's property rights yet to be utterly without redress with reference to injury to his person." The West Virginia Supreme Court of Appeals had language to the same effect in Lusk v. Lusk, 113 W. V. 17, 19, 166 S.E. 538, 539 (1932): "It is familiar law that a child
if preservation of family unity be the central-most theme to parental immunity, it seems that whether the father is engaged in a vocational or parental capacity would be immaterial. Nice "vocational distinctions" would be meaningless to a child and his parent.8

In addition to those decisions based on the type of parental activity, whether vocational or otherwise, other courts have reached the same result by emphasizing the nature of the parent's conduct. Specifically, where the parent was guilty of wilful and wanton conduct, rather than mere negligence, the immunity doctrine would not protect the offending parent.9 Similarly, where the parent's conduct was of a malicious nature, designed to inflict intentional harm, immunity has been set aside.10 Other notable exceptions relate to a situation when family unity could not possibly be disrupted: the accident giving rise to the child's suit against his parent resulted in the death of the parent. In that event actions against the estate of the deceased parent have been allowed.11

The most significant attack on the doctrine of parental immunity has resulted from the knowledge that an ever increasing number of parents carry liability insurance. The presence of the insurance factor is most evident in those cases dealing with automobile accidents and subsequent injury to the driver's child. Courts espousing the abrogation of immunity when injury results from an activity generally covered by insurance admit that the presence of insurance should not create a cause of action where one otherwise did not exist. Nonetheless, these courts reason that parental immunity is strictly a policy matter, and that the efficacy of such policy should be tested in light of the widespread presence of liability insurance.12 And, may bring to account the parent for wrongful disposition of the child's own property. It must not be said that courts are more considerate of the property of the child than of its person (when unaffected by the family relationship)."

8 "We are not impressed with the idea that ills accredited to such actions may be obviated merely by suing the parent in his business capacity." Lusk v. Lusk, 113 W. Va. 17, 18, 169 S.E. 538 (1932).
11 See, e.g., Dean v. Smith, 106 N.H. 314, 211 A.2d 410 (1965). The holding in this case is also important for its observation that parental immunity is a court made doctrine and therefore need not be left to the legislatures to alter. Moreover, the court in this case seemed to be advocating a complete abrogation of the doctrine although it expressly confined itself to the situation incident to a suit against a parent's estate.
if the parent possesses insurance coverage, surely unity would not be disrupted nor would the family estate be depleted by allowing the child to maintain a tort action against his parent.13

The decision in the principal case reaffirmed the West Virginia Supreme Court of Appeal's adherence to the doctrine of parental immunity. Although clearly intimating a contrary result would follow had the defendant father been guilty of wilful or wanton conduct,14 the court disallowed an unemancipated child recovery when the parent was merely negligent. As a result, the court's position was not altered from that taken in the 1931 case of Securo v. Securo.15 In that case the court also indicated that a parent's immunity might be denied if wilful and wanton conduct were shown.16 It was possibly this earlier indication in Securo that led P in the instant case not to rely on the showing of mere negligence.17 In the future, however, it might be advisable to attack the doctrine of parental immunity directly rather than attempting to draw the fine distinction between mere negligence and wilful, reckless and wanton conduct.18

A direct attack on the doctrine would be particularly appropriate in view of the more recent cases confronting the problem in other jurisdictions. The most significant approach is that taken by the Wisconsin court in Goller v. White.19 There an unemancipated child was injured by the negligent operation of a farm tractor. After reviewing the policy upon which parental immunity is founded, the

13 Whether or not the defendant parent was covered by insurance in the particular case would not be important as such; rather the universal coverage of insurance would be a factor affecting the doctrine of parental immunity generally. This would be especially the situation regarding automobile accidents and injury to the driver's children. For a complete discussion of this matter see 8 St. Louis Univ. L.J. 247 (1967).

14 The court said that "As the evidence shows mere negligence but not wilful and wanton conduct by the defendant, this case is within the rule of parental immunity. . . ." Groves v. Groves, 158 S.E.2d 710 (W. Va. 1968).

15 110 W. Va. 1, 156 S.E. 750 (1931).

16 Id. at 2, 751.

17 The court at two different places emphasized that the plaintiff was proceeding on the theory that the defendant's conduct was wilful and wanton. Groves v. Groves, 158 S.E.2d 710, 711 and at 713 (W. Va. 1968).

18 The court itself recognizes the difficulties incident to drawing such a distinction. Groves v. Groves, 158 S.E.2d 710 (W. Va. 1968) citing Kelly v. Checker White Cab, Inc., 131 W. Va. 816, 50 S.E.2d 888 (1948). At least one writer has pointed out that the difference between wilful and wanton conduct and mere negligence is a "slender reed" on which to hang a doctrine of immunity. 1982 Univ. or In. L. F. 557.

court concluded the doctrine was wholly unsupportable in negligence cases except in two instances: (1) where the alleged negligent act involves an exercise of parental authority over the child, and (2) where the alleged negligent conduct involves an exercise of ordinary parental discretion with respect to the provision of food, clothing, housing, medical and dental services, and other care.

Parental immunity can serve a very real purpose when one considers the multitude of occasions in family life when a parent must act without fear of possible court action by his child. The problem is particularly acute in circumstances evidenced by the principal case—separated parents and natural jealousy of the other's control over the child in a split house. Nonetheless, parental immunity should not be given as a reward to one simply because he happens to be a parent. Immunity should be granted one not because he is a parent but because, as a parent, "he pursues a course within his household which society exacts of him." Therefore, non-liability should be granted as a means to enable the parent to effectively discharge these duties so exacted. It is for this reason that the decision of the Wisconsin court in Goller v. White is most logical.

As was shown, the West Virginia Supreme Court of Appeals was not presented the opportunity to re-examine the policy of parental immunity. Presently, then, the law in West Virginia is that an unemancipated child cannot recover for the mere negligent conduct of his parent. Moreover, the court suggests that the non-liability of a parent would be removed if the parents conduct was wilful, reckless and wanton. Earlier the court held parental immunity inapplicable where the child was injured in the parent's vocational capacity and the father had insurance coverage. In the future, the West Virginia Court may have an opportunity to re-examine the basic policy decision behind parental immunity if the doctrine is attacked directly.

Thomas Ryan Goodwin

20 The case disclosed that the mother brought the action initially without the knowledge of the infant son. Groves v. Groves, 158 S.E.d 710 (W. Va. 1968).
22 20 Wis.2d 402, 122 N.W.2d 193 (1963).