Volume 37 | Issue 3 Article 15

April 1931

Parent and Child--Right of Minor Child to Sue Parent for Personal Tort

Jerome Katz
West Virginia University College of Law

reads: "An insurer. . . .against liability from loss. . . .cannot escape liability under a condition contained therein to the effect that it shall not be liable if such accident occurs while the truck is being operated by any person under the age of sixteen years, except it establish the relation of principal and agent as between the assured and the party, under the age of sixteen years, who is claimed to have been operating. . . ." Under this syllabus, in order for the insurance company to escape liability under any state of facts, it must establish agency between the insured and the operator. Certainly neither the insured nor the insurer contemplated liability because of the operation of the car by totally unauthorized persons under the age of sixteen years. How could the assured himself be liable?[4] It is difficult to find any reason whatsoever for putting this decision on the grounds of agency. It seems to be purely the construction of a word in an insurance contract. This syllabus, if literally followed, might lead the court far afield. It may be that the result is desirable but the steps by which it is attained are unsubstantial indeed.

—ROBERT E. STEALEY.

PARENT AND CHILD—RIGHT OF MINOR CHILD TO SUE PARENT FOR PERSONAL TORT.—The plaintiff, an unemancipated child of sixteen, residing with her father, the defendant, was injured in an automobile accident while a passenger in her father's automobile, driven by him. She sued him for damages, alleging negligent driving of the car by her father.

Held: No recovery since an unemancipated infant may not maintain against his parents an action for personal injuries caused by the parent's negligence in driving his automobile wherein the child was a passenger. *Securo v. Securo*.[1]

In this case the West Virginia Court has spoken for the first time on the right of a minor child to sue his parent for personal tort. In refusing such an action the court follows the great weight of authority in the United States.[2] The Supreme Court of South

[4] Hossley v. Union Indemnity Co., 137 Miss. 537, 102 So. 561 (1924); BLASHFIELD, AUTOMOBILE LAW (1927) 2642.

[1] 156 S. E. 750 (W. Va. 1931).

[2] Small v. Morrison, 185 N. C. 577, 118 S. E. 12 (1923); Materese v. Materese, 47 R. I. 131, 131 Atl. 198 (1925); Elias v. Collins, 237 Mich. 175, 211 N. W. 88 (1926); McKelvey v. McKelvey, 111 Tenn. 388, 77 S. W. 664 (1923); Fortinbury v. Holmes, 89 Miss. 373, 42 So. 799 (1907); Goldstein v.

Carolina adopted the same rule on a similar state of facts in the recent case *of Kelly v. Kelly.*[3] The court, in a brief opinion, declared the rule well settled that an unemancipated child cannot sue his parent in tort, citing the many authorities to this effect. In many of the cases considered[4] the parent is charged with negligence in the operation of the automobile in which the minor child was riding at the time of the injury, as in the *Securo* case.

The West Virginia Court in the *Securo* case refused the action on the ground that society has an interest in preserving harmony in domestic relations, and in not permitting families to be torn asunder by suits for damages by insolent and ungrateful children, for real or fancied grievances.

It has been urged that to permit such an action would be interfering with parental control and discipline; disturbing domestic tranquility.[5] Some courts have refused such an action because it would encourage fraud and be directly opposed to the economic identity of parent and child.[6] The controlling reason assigned for the established rule in all cases is well summed up in the Wisconsin case of *Wick v. Wick.*[7]

No case directly opposed to the view of *Securo v. Securo* as to negligent wrongs has been found. However, many strong dissenting opinions have been expressed in the cases.[8] It is contended that the change of times and the common practice of carrying insurance to protect against civil consequences of negligence justifies modification of the common law rule, despite the consideration of

---

Goldstein, 4 N. J. Misc. R. 711, 134 Atl. 184 (1926); Zutter v. O'Connell (Wis.) 299 N. W. 74 (1930); Mesite v. Kirchenstein, 109 Conn. 77, 145 Atl. 753 (1929); Damiano v. Damiano, 6 N. J. Misc. R. 849, 143 Atl. 3 (1928); Ciani v. Ciani, 215 N. Y. S. 767, 127 Misc. Rep. 304 (1926); Mannion v. Mannion, 3 N. J. Misc. R. 68, 129 Atl. 431 (1925); Hewlett v. George, 68 Miss. 703, 9 So. 885 (1891); Wick v. Wick, 192 Wis. 260, 212 N. W. 787 (1927); Taubert v. Taubert, 103 Minn. 247, 114 N. W. 763 (1908); Smith v. Smith, 81 Ind. App. 566, 142 N. E. 128 (1924); Roller v. Roller, 37 Wash. 242, 79 Pac. 788 (1905).

[3] 155 S. E. 888 (S. C. 1930).

[4] Ciani v. Ciani, Materese v. Materese, Wick v. Wick, *supra* n. 2.

[5] Wick v. Wick, Materese v. Materese, Small v. Morrison, *supra* n. 2.

[6] 37 Wash. 242, 79 Pac. 788 (1905).

[7] "To question the authority of the parent or to encourage the disobedience of the child is to impair the peace and happiness of the family and undermine the wholesome influence of the home. To permit the child to maintain an action in tort is to introduce discord and contention where the laws of nature have established peace and obedience."

[8] See dissenting opinions in Wick v. Wick, *supra* n. 2; Dunlop v. Dunlop, 150 Atl. 905 (N. H. 1930).

public policy invoked in support of the rule by the majority. An infant's personal rights, they say, are as sacred as his property rights, yet an action is permitted in the latter and not the former instance. The "domestic tranquility" argument is over-ridden by modern concepts of individual rights and remedies. Insurance is nation-wide. A man need not think less of his own flesh and blood than of his employee's or the stranger on the highway. Insurance, the writer believes, is the real basis for the dissenting views.

A Canadian case, *Marchand v. Marchand*[9] involved a successful tort action by a child against its parent under statute. Text writers have said there is no rule of common law to prevent such an action being brought by the child against its parent for personal injury.[10]

The case of *Dunlap v. Dunlap*,[11] decided by the New Hampshire Court, is important because here the meaning of "emancipation" was stretched to permit a minor child to recover from an Employer's Liability Insurance Fund when injured while working for his father, who was also his employer. While the court did not have before it the case of an "unemancipated" child, it did, nevertheless, go into a lengthy discussion of what it believed the "fallacious majority rule."[12]

Most courts have extended this disability to sue to intentional wrongs, such as rape by the father upon his daughter,[13] false imprisonment and malicious assault.[14] The writer believes this extends the rule too far. The reasons for the rule no longer apply. The family tranquility no longer needs safeguarding. The parent has ended it. The New Hampshire court has allowed an action for an intentional wrong.[15] Would the West Virginia

---

[9] 27 Rev. Leg. (Canada) 254 (1923).

[10] EVERSLEY, DOMESTIC RELATIONS (4th ed. 1926) 571. Judge Cooley favored recovery by the infant. COOLEY ON TORTS (3rd ed. 1906) 771.

[11] *Supra* n. 8.

[12] "The parent has escaped liability because it has been thought that a right of recovery would lead to worse results. The child has been sacrificed for the family good. Argument is not needed to sustain the thesis that such a proposition be limited to cases clearly within the reason for the rule."

[13] Roller v. Roller, *supra* n. 2.

[14] Hewlett v. George, *supra* n. 2.

[15] Zebrik v. Razmus, 81 N. H. 45, 124 Atl. 460 (1923).

An able discussion of the entire subject is found in an article by Professor McCurdy, *Torts Between Persons in Domestic Relations* (1930) 43 HARV. L. REV. 1030, 1056.

Court follow the New Hampshire decision? In the *Securo* case the West Virginia Court said:

> "But whether the rule should be carried to the extent, as some of the cases have done, of denying the infant a right to maintain an action for damages against his parent for injury inflicted with evil intention and from wicked motives is a question not now before us but remains for consideration if such unfortunate situation should arise."

—JEROME KATZ.

REAL PROPERTY—USE OF "DESCEND" IN DEED—WORD OF LIMITATION.—On February 19, 1868, Matthew L. Ward and wife conveyed a certain tract of land to "Lewis Woolwine (for the use and benefit of Columbia, his wife and upon her decease to descend to her heirs)." Columbia Woolwine thereafter conveyed parcels of the land in fee simple, and, through mesne conveyances, those lands come to A. S. Bosworth and Nellie A. Maxwell, among others. In November, 1928, Columbia Woolwine died and thereafter her heirs brought a bill for partition, claiming that they had a fee simple interest as remainder-men. *Held*: The deed from Matthew L. Ward and wife to Lewis Woolwine operated to vest in Columbia Woolwine an equitable fee simple estate, and the heirs took nothing as remaindermen. *Trahern v. Woolwine.*[1]

It would seem that the phrase "to Lewis Woolwine for the use and benefit of Columbia, his wife" gave Columbia Woolwine an equitable fee simple,[2] unless the words following were intended to limit or qualify such an interest: "and upon her decease to descend to her heirs." The Court said that the latter phrase did not limit or qualify the fee, but was merely descriptive of the fee, *i. e.*, an estate which would descend to the heirs of Columbia Woolwine at her decease. That construction rests upon the theory that the grantor used the word "descend" in its technical sense, as meaning "to pass by succession." It is doubtful, however, that the word was not used in its technical sense, for there are apparently other and better words to show an intent to pass a fee, and least of all would one expect a conveyancer to express such an intent in such an awkward way. Of course, if "descend" was used technically, Columbia Woolwine took a fee simple and her heirs took nothing.

---

[1] 155 S. E. 909 (W. Va. 1930).

[2] W. VA. REV. CODE (1931) c. 36, art. 1, § 11; W. VA. CODE ANN. (Barnes, 1923) c. 71, § 8