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Torts - Parent & (and) Child - Unemancipated Minor Entitled to Bring Action against Parent to Recover for Personal Injuries Sustained in Motor Vehicle Accident

David S. Maring

appearance, the court has arrived at a new constitutional basis — the Ninth Amendment.

What has been decided is that a state's invasion into the personal rights and liberty of an individual, of whatever age or description, should and does present an issue worthy of judicial review.[39] The resolution of this issue will involve the balancing of competing interests, and strong justifications on the part of school administrators will be required before such regulation is allowed to infringe upon an individual's right of personal appearance.[40]

JAMES S. HILL

TORTS—PARENT & CHILD—UNEMANCIPATED MINOR ENTITLED TO BRING ACTION AGAINST PARENT TO RECOVER FOR PERSONAL INJURIES SUSTAINED IN MOTOR VEHICLE ACCIDENT.

Plaintiff, a seven-year-old child, brought an action against the administrator of her stepfather's estate to recover for injuries suffered in an automobile accident, allegedly resulting from her stepfather's negligence. The trial court dismissed the action holding that the stepfather stood *in loco parentis* to the child and was therefore immune from liability because of parent-child tort immunity. The trial court also stated that even if plaintiff could maintain the action, her stepfather would not be liable because she was a gratu-

39. However, on March 27, 1972, the United States Supreme Court declined to consider the issue of regulation of hair styles. Freeman v. Flake, 405 U.S. 1032 (1972), *denying cert. to* 448 F.2d 258 (1971). Mr. Justice Douglas dissented and stated in a very brief comment that eight circuits have now passed on the question of:

> whether a public school may constitutionally refuse to permit a student to attend solely because his hairstyle meets with disapproval of the school authorities.
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> . . . [O]n widely disparate rationales, four have upheld school hair regulations (*see* Freedman v. Flake, 448 F.2d 258 (C.A. 10, 1971); King v. Saddleback Jr. College, 445 F.2d 932 (C.A. 9, 1971); Jackson v. Dorrier, 424 F.2d 213 (C.A. 6, 1970); Ferrell v. Dallas Ind. School District, 392 F.2d 697 (C.A. 5, 1968), and four have struck them down (*see* Massie v. Henry, ——— F.2d ——— (C.A. 4, 1972); Bishop v. Colaw, 450 F.2d 1069 (C.A. 8, 1971); Richards v. Thurston, 424 F.2d 1281 (C.A. 1, 1970); and Breen v. Kahl, 419 F.2d 1034 (C.A. 7, 1969).
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> I can conceive of no more compelling reason to exercise our discretionary jurisdiction than a conflict of such magnitude, on an issue of importance bearing on First Amendment and Ninth Amendment rights.

Id. at 1032.

40. *See* Torvik v. Decorah Community Schools, 453 F.2d 779 (8th Cir. 1972), in which the Eighth Circuit Court of Appeals affirmed a District Court decision holding that the regulation in question was invalid as violative of an individual's constitutional rights of privacy and personal freedom. They again used the rational basis test and stated:

> This court recently found that no rational relation exists between a similar school regulation and the educational goals and processes of school administration. Bishop v. Colaw, 450 F.2d 1069 (8 Cir. 1971). We affirm the decision of the District Court under the analysis written in Bishop.

Id. at 779.

itous guest-passenger.[1] On appeal, the Supreme Court of Virginia reversed and remanded the trial court's decision and *held* that an unemancipated minor could bring an action against a parent for personal injuries suffered in an automobile accident.[2] The Supreme Court of Virginia further stated that a child under fourteen years is incapable of accepting the invitation to become a guest and is not included in the state's guest law. *Smith v. Kauffman*, 212 Va. 181, 183 S.E.2d 190 (1971).

The common law principle of parent-child tort immunity was first applied in the United States in the 1891 case of *Hewellette v. George*.[3] In this case, a Mississippi court ruled that a child could not bring a tort action against a parent for false imprisonment. Following this decision, parent-child tort immunity became an established rule in American law and was generally interpreted so as to disallow personal tort actions between a parent and child, whether negligent or intentional.[4] The rationale for the rule was founded upon two basic conclusions: (1) a suit between parent and child would cause disruption of family harmony and depletion of the family exchequer;[5] and, (2) a suit within the family may contain fraud and collusion.[6] Recognizing the hardships that this doctrine implemented,[7] many courts began finding ways to avoid the rule.[8]

In the 1963 case of *Goller v. White*,[9] the Supreme Court of Wisconsin took the final step and became the first state to abolish the doctrine within its jurisdiction. The Wisconsin court stated that parent-child tort immunity was abrogated except where the negligent act involved the exercise of parental authority over the child or

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1. Smith v. Kauffman, 212 Va. 181, 183 S.E.2d 190, 191-92 (1971).
2. *Id.* at 181, 183 S.E.2d at 190.
3. Hewellette v. George, 68 Miss. 703, 9 So. 885 (1891). The Mississippi court considered parent-child tort immunity to be a common law principle but it gave little support for this reasoning. For a discussion of the early history of parent-child tort immunity, see W. PROSSER, THE LAW OF TORTS § 122, at 864-65 (4th ed. 1971).
4. W. PROSSER, *supra* note 3, at 865. *See* Comment, *Tort Actions Between Members of the Family—Husband & Wife—Parent & Child*, 26 MO. L. REV. 152, 183 n.168, (1961).
5. Mesite v. Kirchstein, 109 Conn. 77, 145 A. 753 (1929); Worrell v. Worrell, 174 Va. 11, 4 S.E.2d 343 (1939). *See* W. PROSSER, *supra* note 3, at 866.
6. Hastings v. Hastings, 33 N.J. 247, 163 A.2d 147 (1960). *See* W. PROSSER, *supra* note 3, at 865-66; McCurdy, *Torts Between Parent and Child*, 5 VILL. L. REV. 521 (1960).
7. Roller v. Roller, 37 Wash. 242, 79 P. 788 (1905) (immunity was upheld even when parent raped minor daughter); Cook v. Cook, 232 Mo. App. 994, 124 S.W.2d 675 (1939) (immunity was upheld even when 15 year old girl was beaten by parent with a riding whip). *See* W. PROSSER, *supra* note 3, at 866.
8. Perkins v. Robertson, 140 Cal. App. 2d 536, 295 P.2d 972 (1956) (no immunity when child is emancipated); Buttrum v. Buttrum, 98 Ga. App. 226, 105 S.E.2d 510 (1958) (no immunity when gross negligence of parent involved); Farrar v. Farrar, 41 Ga. App. 120, 152 S.E. 278 (1930) (no immunity when child has attained majority); Dean v. Smith, 106 N.H. 314, 211 A.2d 410 (1965) (no immunity when suit is brought against the estate of a deceased parent); Signs v. Signs, 156 Ohio St. 566, 103 N.E.2d 743 (1952) (no immunity when injury resulted from parent's operation of a business); Vidmar v. Sigmund, 192 Pa. Super. 355, 162 A.2d 15 (1960) (no immunity when parent was abusive in punishing child); Fowler v. Fowler, 242 S.C. 252, 130 S.E.2d 568 (1963) (no immunity when suit is for the wrongful death of child's other parent). *See generally* 7 CALIF. WEST. L. REV. 466 (1971).
9. Goller v. White, 20 Wis. 2d 402, 122 N.W.2d 193 (1963).

where the negligent act involved an exercise of ordinary parental discretion with respect to provision of necessities of life such as food, housing, and other care.[10] The court reasoned that since common law actions are maintainable between the parent and child in property or contract disputes, tort actions should also be maintainable in protecting the personal rights of the parent or child.[11] Since the *Goller* decision, twelve states have followed the Wisconsin court and have departed, in varying degrees, from the doctrine of parent-child tort immunity.[12]

In Virginia, the courts followed a pattern of finding exceptions to the doctrine[13] and eventually announced the abrogation of parent-child tort immunity for injuries sustained in motor vehicle accidents. This announcement was made in *Smith v. Kauffman*[14] in which the court based its elimination of the rule on two policy considerations which have been repeatedly mentioned in jurisdictions that have abolished the doctrine: (1) the social value of upholding the doctrine of parent-child tort immunity no longer outweighs the value of allowing recovery to an injured plaintiff;[15] and, (2) the increasing presence of liability insurance protects the defendant from actual monetary damage.[16] The court emphasized that due to the passage of uninsured motorist laws and the increasing desire in tort law to allow an injured plaintiff a cause of action, the principle of parent-child tort immunity in reference to automobile accidents was an anachronistic rule which should be eliminated.[17]

In *Smith v. Kauffman*, the presence of the Virginia guest law presented another obstacle which had to be overcome before the plaintiff would be allowed to recover from her stepfather for injuries sustained in an automobile accident. Virginia is one of thirty

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10. *Id.* at 413, 122 N.W.2d at 198.
11. *Id.* at 410, 122 N.W.2d at 197.
12. Hebel v. Hebel, 435 P.2d 8 (Alas. 1967); Streenz v. Streenz, 106 Ariz. 86, 471 P.2d 282 (1970); Gibson v. Gibson, 3 Cal. 3d 914, 479 P.2d 648, 92 Cal. Rptr. 288, (1971); Tamashiro v. De Gama, 51 Haw. 74, 450 P.2d 998 (1969); Schenk v. Schenk 100 Ill. App. 2d 199, 241 N.E.2d 12 (Dist. Ct. App. 1968); Rigdon v. Rigdon, 465 S.W.2d 921 (Ky. Ct. App. 1970); Silesky v. Kelman, 281 Minn. 431, 161 N.W.2d 631 (1968); Briere v. Briere, 107 N.H. 432, 224 A.2d 588 (1966); France v. A.P.A. Transport Corp., 56 N.J. 500, 267 A.2d 490 (1970); Gelbman v. Gelbman, 23 N.Y.2d 434, 245 N.E.2d 192, 297 N.Y.S.2d 529 (1969); Nuelle v. Wells, 154 N.W.2d 364 (N.D. 1967); Smith v. Kauffman, 212 Va. 181, 183 S.E.2d 190 (1971).
13. Brumfield v. Brumfield, 194 Va. 577, 74 S.E.2d 170 (1953) (emancipated child can maintain an action against a parent); Worrell v. Worrell, 174 Va. 11, 4 S.E.2d 343 (1939) (unemancipated child allowed to bring action against her father because the father was the owner of a common carrier and the child was a ticketed passenger).
14. Smith v. Kauffman, 212 Va. 181, 183 S.E.2d 190 (1971).
15. *Id.* at 412, 183 S.E.2d at 194.
16. *Id.* The court argues that depletion of the family exchequer is more apt to occur if the parent cannot use his liability insurance to cover injuries to his child but rather must pay these expenses out of his pocket.
17. *Id.* at 413, 183 S.E.2d at 198.

states which has a guest statute.[18] The Virginia statute[19] is a codification of a rule presented in the 1931 case of *Boggs v. Plybon.*[20] This case held that "a person transported in a motor vehicle as a guest without payment for such transportation cannot recover for death or injuries resulting from the operation of the motor vehicle except upon proof of the owner's or operator's gross negligence or willful and wanton conduct."[21] The rationale supporting guest law legislation centers around two considerations: (1) protection should be provided for the hospitable, gratuitous host who is supplying the ride; and, (2) lack of such a law would flood the courts with collusive law suits between drivers and guests.[22]

Recently, a great deal of controversy has erupted over the legislative intent of the application of guest laws to young children.[23] Three approaches have been used by the courts in determining whether a child in their jurisdiction has the status of a guest.[24] The first approach is to treat children, riding at the invitation of a host, as a guest and therefore incapable of recovering without showing willful or wanton misconduct.[25] The second view is that the guest statute calls for an acceptance of the guest status by the rider. These courts have held that either the child can accept the guest status for himself or that the acceptance can be predicated from the implied or expressed consent of the child's parent.[26] The third interpretation is formulated under the principle that a minor child, because of assumed mental incapacity, is incapable of accepting

18. Morrison & Arnold, *Automobile Guest Laws Today,* 27 INS. COUNSEL J. 223 (1960).

19. VA. CODE ANN. § 8-646.1 (1957):

> No person transported by the owner or operator of any motor vehicle as a guest without payment for such transportation and no personal representative of any such guest so transported shall be entitled to recover damages against such owner or operator for death or injuries to the person or property of such guest resulting from the operation of such motor vehicle, unless such death or injury was caused or resulted from the gross negligence or willful and wanton disregard of the safety of the person or property of the person being so transported on the part of such owner or operator.

20. Boggs v. Plybon, 157 Va. 30, 160 S.E. 77 (1931).

21. Smith v. Kauffman, 212 Va. 181, 183 S.E.2d 190, 194 (1971). This quotation is the Virginia Supreme Court's interpretation of the holding in Boggs v. Plybon, 157 Va. 30, 160 S.E. 77 (1931).

22. Stephan v. Proctor, 235 Cal. App. 2d 228, 45 Cal. Rptr. 124 (1965). For a general discussion see 20 DEPAUL L. REV. 559 (1971).

23. The courts have been unable to determine whether a child could accept the status of a "guest", whether a parent could accept the status of a "guest" for the child, or whether no acceptance of the "guest" status is actually needed. 4 JOHN MARSHALL J. PRACTICE & PROCEDURES 137 (1970).

24. Note, *supra* note 22.

25. Kemp v. Parmley, 16 Ohio St. 2d 3, 241 N.E.2d 169 (1968): "Assent to the motor vehicle transportation is not ordinarily necessary. Consequently, a child of tender years may be a guest within contemplation of the statute." *Id.* at 4, 241 N.E.2d at 170. For other cases rejecting the exception of minors, see Shiels v. Audette, 119 Conn. 75, 174 A. 323 (1934); Ruett v. Nottingham, 200 Va. 722, 107 S.E.2d 402 (1959).

26. Buckner v. Vetterick, 124 Cal. App. 2d 417, 269 P.2d 67 (Dist. Ct. App. Cal. 1954): "Many decisions of more importance and involving greater hazard are made by parents for their small children daily." *Id.* at 418, 269 P.2d 69. For other cases with similar holdings, see Chancey v. Cobb, 102 Ga. App. 636, 117 S.E.2d 189 (1960); Whitfield v. Bruegel, 134 Ind. App. 636, 190 N.E.2d 670 (1963).

a guest status.[27] Furthermore, consent of a parent does not make the child a guest, imputing the acceptance of the parent on the child.[28] This third method of construing a guest statute is based on the preferred status that a young child often has in the law.[29] In *Fuller v. Thrun*,[30] the court expresses this concept by stating:

> It is our opinion that this child, being an infant under the age of seven years, is a person conclusively presumed to be *non sui juris* and therefore incapable in law of accepting the appellant's invitation and hospitality.[31]

In the few jurisdictions which have stated as a matter of law that a young child cannot accept the status of a guest, the age of seven has frequently been mentioned.[32] Virginia, in stating as a matter of law that "a child under the age of fourteen years is incapable of knowing and voluntarily accepting an invitation to become a guest,"[33] has become the first court to categorically set its age limit at "under fourteen."

In summarizing *Smith v. Kauffman*, it should be noted that the Supreme Court of Virginia has made two relatively novel holdings: (1) that an unemancipated minor is entitled to bring a tort action against a parent to recover for injuries sustained in a motor vehicle accident; and, (2) that the Virginia guest statute should be interpreted to exclude, as a matter of law, any minor under the age of fourteen.[34]

Due to the similarity in Virginia and North Dakota law in terms of a guest statute and the treatment of parent-child tort immunity, a view of North Dakota law in this area may be of some relevance. In the case of *Nuelle v. Wells*,[35] the North Dakota Supreme Court ruled that the parent-child tort immunity doctrine was not to be applied to an unemancipated minor's suit against a parent for injuries suffered in an automobile accident. The court stated:

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27. Rosenbaum v. Raskin, 45 Ill. 2d 25, 257 N.E.2d 100 (1970).
28. *Id.*
29. R. PERKINS, PERKINS ON CRIMINAL LAW 837 (2d ed. 1969); W. PROSSER, *supra* note 3, at 154-57.
30. Fuller v. Thrun, 109 Ind. App. 407, 31 N.E.2d 670 (1941).
31. *Id.* at 413, 31 N.E.2d at 672.
32. Virginia appears to be only the second state that has ruled as a matter of law that a child is excluded from the guest statute in all circumstances. The first state to make such a ruling was Illinois which set its age limit at "under seven years" in the case of Rosenbaum v. Raskin, 45 Ill. 2d 25, 257 N.E.2d 100 (1970). Other states have ruled as a matter of law that a minor child (under seven) cannot accept the status of a guest, however these cases did not deal with the impact of parental consent because no such consent was found. Had parental consent been expressed or implied in these cases, the child would have probably been barred from recovery. *See* Green v. Jones, 136 Colo. 512, 319 P.2d 1083 (1957); Fuller v. Thrum, 109 Ind. App. 407, 31 N.E.2d 670 (1941).
33. Smith v. Kauffman, 212 Va. 181, 183 S.E.2d 190, 195 (1971).
34. *Id.*
35. Nuelle v. Wells, 154 N.W.2d 364 (N.D. 1967).

> It suffices to say that notwithstanding the fact that the great weight of authority is to the contrary, the trend of the decisions in recent years has been to depart very materially from the broad doctrine that an unemancipated minor cannot maintain a tort action against his parents.[36]

The Supreme Court reasoned that since the legislature had allowed for parental immunity from tort liability under specific circumstances,[37] this demonstrated that the legislature did not intend for parents to be immune from tort liability for acts not covered by the statute. The Supreme Court went on to state that even though an unemancipated child would not be denied a cause of action against a parent for injuries suffered as a result of the parent's negligent act, relief in such an action may be affected by the North Dakota guest statute.[38] While controversy surrounds the application of guest laws in other jurisdictions because the statutes do not specifically mention minors,[39] it appears that the intent of the North Dakota legislature was to alleviate that problem by wording the guest statute[40] as to expressly include a "minor" who is "riding as a guest."[41] Due to the wording of this statute, it seems unlikely that a North Dakota court would be willing to exclude young children from guest statute treatment.

The importance of *Smith v. Kauffman* can best be analyzed by

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36. *Id.* at 366.

37. N.D. CENT. CODE § 12-26-03 (1960):

> To use or to attempt or to offer to use force or violence upon or toward the person of another is not unlawful in the following cases:
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> . . .
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> 4. When committed by a parent . . . in the exercise of a lawful authority to restrain or correct his child . . . or by his refusal to obey the lawful command of such parent . . . and the force or violence used is reasonable in manner and moderate in degree.

Nuelle v. Wells, 154 N.W.2d, 364, 366 (N.D. 1967).

38. Nuelle v. Wells, 154 N.W.2d 364 (N.D. 1967).

39. *See* Note *The Need for Clarification: Should a Child Under The Age of Seven Be Included Within The Provisions of Automobile Guest Statutes?* 75 DICK. L. REV. 432 (1971).

40. N.D. CENT. CODE § 39-15-02 (1960):

> Any person who as a guest accepts a ride in any vehicle moving upon any of the public highways of this state, and who while so riding as such guest receives or sustains an injury, shall have no right of recovery against the owner or driver or person responsible for the operation of such vehicle. In the event that such person while so riding as such guest is killed or dies as the result of an injury sustained while so riding as such guest, then neither the estate nor the legal representatives nor heirs of such guest shall have any right of recovery against the driver or owner of said vehicle by reason of the death of such guest. If such person so riding as a guest is a minor and sustains an injury or is killed or dies as a result of injury sustained while so riding as such guest, then the parents, guardian, legal representatives, and heirs of such minor shall have no right to recovery against the driver or owner or person responsible for the operation of said vehicle for injury sustained as a result of the death of such minor.

41. The statute seems to eliminate the controversy of whether a child is to be included by specifically wording N.D. CENT. CODE § 39-15-02 (1960), as to include "minors" and by defining "guest" in N.D. CENT. CODE § 39-15-01 (1960), as "a person who accepts a ride in any vehicle without giving compensation therefor." However, an argument could still be made that a minor of a very tender age is not legally competent to accept a ride and should not be included under the guest statute.

looking to the future trends in the areas of parent-child tort immunity and guest statute application to young children. First of all, although a majority of states still adhere to the doctrine of parent-child tort immunity, it appears that this doctrine will receive less emphasis in the future. Under the principles of modern tort law, the social value of allowing a cause of action for every plaintiff seems to outweigh the desirability of allowing parents to be immune from all tort actions brought by their unemancipated child.[42] The second area, involving the liberalized interpretation of guest law application to young children, will not undergo a rapid change. Guest laws are statutory creations and hence, a strong argument can be made that such laws should not be judicially interpreted to exclude young children, but rather should be changed only by legislative action.[43] Notwithstanding the problems involved in judicial liberalization of guest statutes,[44] future decisions may show a willingness of courts to exclude minor children from guest statute application due to the seeming injustice of allowing a very young child to legally bind himself in a 'guest' status.

DAVID S. MARING

INSURANCE—RISKS AND CAUSES OF LOSS—PAYMENT OF REWARD BY INSURED CONSTITUTES A "LOSS BY THEFT"—The plaintiffs had jewelry stolen, which was insured under defendant's insurance policy providing coverage for loss by theft. The value of the stolen property exceeded the $2,000 coverage limit. Plaintiffs, in attempting to recover the property, offered a reward in excess of the policy limits. Voluntary payment was made by the plaintiffs with knowledge that the company refused to participate in offering such a reward. Upon defendant's refusal to reimburse, the plaintiffs sued defendant claiming that payment of the reward was a loss by theft. The trial court found in favor of the defendants. The question considered on appeal by the Supreme Court of Oregon was whether a payment of a reward is covered under a provision in an insurance policy

42. In most cases, the parent would still be immune from tort liability for activities involving parental control and authority. This immunity, however, would not extend to all types of tort actions, i.e., injuries sustained by an unemancipated child to the parent's negligent operation of a motor vehicle. *See generally* W. PROSSER, *supra* note 3, § 122.

43. *See generally* Note, *supra* note 39.

44. The problems involved in judicial liberalization of guest laws include: (1) determining what affect the liberalization would have on present automobile accident insurance policies; and, (2) determining what age group should be excluded from guest statute application. *See generally* Note, *supra* note 22.