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Torts - Parent and Child - Parents' Immunity from Liability to Child for Tort Committed by Parent

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how the holding of the oranges primarily for sale to customers is changed to a holding primarily for some other purpose because the grower manages to realize his purpose to sell by making a sale to his liking before the oranges mature, or because as a part of the same transaction the land was also sold."

The problems raised in these cases are not confined solely to the citrus industry, but are of utmost importance to every farmer.[19] Not until the unique problems of the farmer are taken into consideration will uniformity be obtained, and a satisfactory solution to the capital gains provisions be a reality.

William E. Porter

TORTS—PARENT AND CHILD—PARENTS' IMMUNITY FROM LIABILITY TO CHILD FOR TORT COMMITTED BY PARENT. Plaintiff, an illegitimate child, sued her father's estate to recover for shock, mental anguish and permanent nervous and physical injuries resulting from her father's murdering the plaintiff's mother, imprisoning the plaintiff with the corpse, and subsequently committing suicide in her presence. Defendant demurred, relying on the generally recognized exception to tort liability that a parent is immune from liability to an unemancipated minor child.[1] It was *held* that this was not an action by the child against the parent for simple negligence, and since the family relations have been previously undermined, the reason for the parent's immunity does not exist. The child may therefore recover against the estate for malicious and wanton wrongs. *Mahukee* v. *Moore*. 77 A.2d 923 (Md. 1951).

Lacking English precedent, the American rule exempting a parent from tort liability to its minor child dates back to 1891.[2] In the vast majority of cases the immunity privilege will promote discipline and domestic harmony and encourage the most beneficial development of children. However, the reason for the exception no longer exists when the tort destroys the close family relationship intended to be protected. Nevertheless, the rule has generally been followed unwaveringly although the reason for it had entirely failed.[3] The few decisions which refuse to follow the rule do so on the grounds that: (1) allowing suit by the child will, in certain cases, promote and secure family ties rather than jeopardize them,[4] (2) controlling statutes forming public policy overrule any contrary policy[5] or (3) the close family ties meant to be protected have

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[19] Thomas J. McCoy, P-H T.C. 15.106, 15 T.C. 106 (1950). (income realized by a Kansas wheat farmer on the sale of a farm upon which there was a growing crop of wheat, was held to be ordinary income, and not capital gains, to the extent that it represented payment for the growing crop.).

[1] Taubert v. Taubert, 103 Minn. 247, 114 N.W. 763 (1908); Ciani v. Ciani, 127 Misc. Rep. 304, 215 N.Y. Supp. 767 (1926); Smith v. Smith 81 Ind. App. 566, 142 N.E. 128 (1924).

[2] Hewellette v. George, 68 Miss. 703, 9 So. 885 (1891).

[3] Roller v. Roller, 37 Wash. 242, 79 Pac. 788 (1905); Lasecki v. Kabara, 235 Wis. 645, 294 N.W. 33 (1940); Small v. Morrison, 185 N.C. 577, 118 S.E. 12 (1923).

[4] Worrell v. Worrell, 174 Va. 11, 4 S.E.2d 343 (1939); Lusk v. Lusk, 113 W.Va. 17, 166 S.E. 538 (1932).

[5] Minkin v. Minkin, 336 Pa. 49, 7 A.2d 461 (1939); Marchand v. Marchand, 4 D.L.R. 157 (Canada 1924).

previously been irreparably severed.[6] In general no distinction has been made between natural parents and those standing in *loco parentis*.[7] Such distinction could be utilized to relieve the severity resulting from an arbitrary application of the rule.

While under proper circumstances the parent should be immune from suit, the elastic rule of the instant case results in more substantial justice under certain conditions. The father who rapes his infant daughter[8] is no less guilty criminally, and the daughter has suffered no less because the act was performed by her father. Granting tort immunity to the parent is itself an exception to the rule that no wrong shall be without a remedy. Any exception to such a rule must be based on sound reason as the majority of exceptions concededly are. Criticism is leveled only at those decisions which have refused recovery on the basis of the exception when they should have followed the general rule of tort liability. The reason for the exception is not that the parent has committed no tort upon the child, but that allowing recovery would lead to worse results. Exceptions to the American rule in aforementioned cases have looked beyond the strict rule to allow recovery by the minor child where the reason for the rule would not be violated.[9] Canadian law follows the ordinary tort liability rule by statute[10] which, apparently, will not be so construed as to relieve parents from liability for torts committed against minor children.[11]

Considering the instant case, it is hard to conceive of a situation in which less reason for depriving one of a right of action could exist. The close family ties, basis for parental immunity, have been irreparably destroyed.

While care must be exercised to prevent collusion, it would seem that public policy would be better served by an elastic rule that would not deny justice to a child merely because of a close relationship. Policy is a nebulous and irrational ground upon which to deny a child recovery for rape or violent injury.

Casper F. Hanawalt

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[6] Clasen v. Pruhs, 69 Neb. 278, 95 N.W. 640 (1903); Treschman v. Treschman, 28 Ind. App. 206, 61 N.E. 961 (1901).

[7] Young v. Hipple, 273 Pa. 439, 117 Atl. 185 (1922).

[8] Roller v. Roller, 37 Wash. 242, 79 Pac. 788 (1905).

[9] Lusk v. Lusk, 113 W.Va. 17, 166 S.E. 538 (1932) (negligence suit wherein father of daughter burned in school bus accident was insured carrier); Minkin v. Minkin, 336 Pa. 49, 7 A.2d 461 (1939) (where child was among those entitled to share in proceeds for wrongful death, statute overrode any policy considerations and allowed recovery against mother for causing death of the father); Garcia v. Fantauzzi, 20 F.2d 524 (1927) (son allowed to recover from father who ascribed son's paternity to negro barber).

[10] Quebec Civ. Code, art. 1053.

[11] Fidelity & C. Co. v. Marchand, 4 D.L.R. (Can. S.C. 1924).