



UNC  
SCHOOL OF LAW

NORTH CAROLINA LAW REVIEW

---

Volume 11 | Number 3

Article 17

---

4-1-1933

## Parent and Child -- Suit by Child Against Parent Carrying Liability Insurance

Wilson Barber

Follow this and additional works at: <http://scholarship.law.unc.edu/nclr>



Part of the [Law Commons](#)

---

### Recommended Citation

Wilson Barber, *Parent and Child -- Suit by Child Against Parent Carrying Liability Insurance*, 11 N.C. L. REV. 352 (1933).

Available at: <http://scholarship.law.unc.edu/nclr/vol11/iss3/17>

This Note is brought to you for free and open access by Carolina Law Scholarship Repository. It has been accepted for inclusion in North Carolina Law Review by an authorized editor of Carolina Law Scholarship Repository. For more information, please contact [law\\_repository@unc.edu](mailto:law_repository@unc.edu).

vious. The trend toward consideration of all of the circumstances seems decidedly the more rational view.

J. A. KLEEMEIER, JR.

### Parent and Child—Suit by Child Against Parent Carrying Liability Insurance.

An unemancipated minor sues her father to recover for injuries alleged to have been sustained while riding in a school bus owned by the father and operated by him under a contract with the school board. The action is one of *assumpsit* and is based upon the theory that the father breached his contract with the board to use due care in transporting pupils. Both the father and the board carry liability insurance. *Held*: A directed verdict for defendant reversed; plaintiff may maintain the action. Since the defendant is protected by insurance in his vocational capacity, the action is not an unfriendly one and family harmony will not be disrupted.<sup>1</sup>

Authorities are not in agreement as to the common law rule regarding suits by minors against their parents for torts.<sup>2</sup> This uncertainty arises from the fact that no case involving the point has ever been litigated in England.<sup>3</sup> The first decision in this country appeared in 1891.<sup>4</sup> The problem has been before the courts several times since that date.<sup>5</sup> With striking uniformity courts of the United

<sup>1</sup>Lusk v. Lusk, 166 S. E. 538 (W. Va. 1932). Noted in (1933) DUKE BAR ASS. J. 51.

<sup>2</sup>Those who contend that such suits were not allowable rely on the total absence of cases involving the point, as showing the general understanding of minors' rights in this respect. Furthermore, they say, the very idea of such a recovery was repugnant to the sanctity and harmony of the English family. Lo Galbo v. Lo Galbo, 138 Misc. Rep. 485, 246 N. Y. Supp. 565 (1931); Damiano v. Damiano, 143 Atl. 3 (N. J. 1928); Belleson v. Skilbeck, 185 Minn. 537, 242 N. W. 1 (1932). Others, quoting from old English text writers to the effect that a minor could sue his father for a malicious injury, assert that this demonstrates the state of the English mind with regard to infants' rights. They also take the view that it is wholly unreasonable to assume from a lack of decisions that the remedy would have been denied had a proper case been presented. Dunlap v. Dunlap, 84 N. H. 352, 150 Atl. 905 (1930), 71 A. L. R. 1055 (1931), citing 2 ADDISON, TORTS (4th ed.) 727; CLERK AND LINDSALL, TORTS (8th ed.) 199; POLLOCK, TORTS (12th ed.) 128. Note (1930) 79 U. OF PA. L. REV. 80.

<sup>3</sup>1 SCHOULER, THE LAW OF DOMESTIC RELATIONS (6th ed. 1921) 718, n. 49; Note (1923) 23 COL. L. REV. 686.

<sup>4</sup>Hewlett v. George, 68 Miss. 703, 9 So. 885 (1891), 13 L. R. A. 682 (1891); McCurdy, *Torts Between Persons in Domestic Relations* (1929) 43 HARV. L. REV. 1030, 1082.

<sup>5</sup>For a good review of the cases see Small v. Morrison, 185 N. C. 577, 118 S. E. 12 (1923), 31 A. L. R. 1135 (1924). Note (1923) 30 COL. L. REV. 686; (1929) 43 HARV. L. REV. 1030 (a most careful and comprehensive study of

States have denied recovery. The application of the rule has been so rigid that recovery is denied in the case of malicious and excessive punishment<sup>6</sup> and even in the case of the rape by a father of his daughter.<sup>7</sup> Inroads have been made into the rule denying recovery,<sup>8</sup> however, in the case of a minor, but emancipated child;<sup>9</sup> of suits

the subject). The most recent cases are *Bulloch v. Bulloch*, 45 Ga. App. 1, 163 S. E. 708 (1932); *Belleson v. Skilbeck*, *supra* note 2.

<sup>6</sup> *Smith v. Smith*, 81 Ind. App. 566, 142 N. E. 128 (1924).

<sup>7</sup> *Roller v. Roller*, 37 Wash. 242, 79 Pac. 788 (1905), 68 L. R. A. 893 (1905).

<sup>8</sup> Perhaps it would be wise to make a fourth category on the basis of the two forceful dissents in *Small v. Morrison*, *supra* note 5, and in *Wick v. Wick*, 192 Wis. 260, 212 N. W. 787 (1927), 52 A. L. R. 1113 (1928). In the latter case *Crownhart, J.*, points out that the constitution of Wisconsin, art. 1, §9, provides for the relief of *any* person for injuries to his property, person, or character. He says, at 788, that no court at common law ever said an infant was without a remedy in the case of an injury due to the parent's negligence. "Indeed there is no doubt that the infant may sue the parent to preserve his property rights. The court now declares a public policy which forbids an infant for suing for wrongs inflicted upon the infant by the parent. But courts may not make public policy contrary to the organic law of the land. The constitutional provision is as broad and comprehensive as the English language is capable of expressing." The dissent of *Clark, C. J.*, in the *Small* case includes the rationale of the *Lusk* case, and in addition, persuasively urges that neither common law nor statutes deny the child a right to sue his parent in tort. See *infra* note 11.

A case in point was recently decided under the civil law of Quebec. *Fidelity & Casualty Co. v. Marchand*, [1924] (Can.) S. C. R. 86, 13 B. R. C. 1135. The plaintiff (*Marchand*) had injured his infant son by the negligent operation of his automobile. The father, having insurance, got the son to institute a suit for damages, and a judgment having been recovered, the father paid it without resorting to an appeal or without giving the insurance company time in which to do so. The case cited is the father's suit against the insurance company to recover the amount of the judgment he had been "forced" to pay his son. The court held that this payment before appeal was in clear violation of the terms of the policy and denied recovery. The court, however, by way of *dicta* approved the son's recovery from his father, saying that it seemed to be a proper ruling under art. 1053 of the civil code. *Mignault, J.*, said, at 1146, that the rule of the code "is in as wide terms as possible and renders every person capable of distinguishing right from wrong responsible for damage caused by his fault to another. There is here no limitation, no exception of persons, and the class of those to whom compensation is due is as wide as that of the persons on whom liability is imposed. It seems therefore sufficient to say *lex non distinguit*, however repugnant it may seem that a minor child should sue his own father, although it would probably be equally repugnant that a child injured by his father's negligent act, perhaps maimed for life, should have no redress for the damage suffered."

<sup>9</sup> *Taubert v. Taubert*, 103 Minn. 247, 114 N. W. 763 (1908), sanctions the rule that an emancipated minor may sue his parent, but the case was remanded to determine whether in point of fact the plaintiff had been emancipated or not. In *Lo Galbo v. Lo Galbo*, *supra* note 2, the court held that a widow may maintain an action for damages for the death of her husband, the defendant's father, since the father himself could have maintained a suit for his injuries had they not proved fatal. The court says in effect that the reverse of this would also be true—that a suit by an emancipated minor would have been allowed.

against one *in loco parentis*,<sup>10</sup> and in negligence cases where the parent has insurance.<sup>11</sup>

The reasons most frequently relied upon in support of the rule denying recovery are: (1) "public policy" (*i.e.*, the policy of seeking to preserve family unity and harmony);<sup>12</sup> (2) the supposed common law authority for the rule;<sup>13</sup> (3) the availability of a remedy

<sup>10</sup> *Treschman v. Treschman*, 28 Ind. App. 206, 61 N. E. 961 (1901) (suit against stepmother for grave and permanent injuries, the result of chastisement); *Clasen v. Pruhs*, 69 Neb. 278, 95 N. W. 640 (1903) (suit against an aunt, with whom plaintiff resided, for damages because of improper care, and severe and brutal whippings); *Steber v. Norris*, 188 Wis. 366, 206 N. W. 173 (1925) (suit for damages for injuries caused by severe whippings administered by one in whose care the plaintiff was left for the summer).

<sup>11</sup> The case of *Dunlap v. Dunlap*, *supra* note 2, is not as strong as the instant case. The defendant father employed his infant son during the summer. He, the father, carried employer's liability insurance, the premiums of which were computed at an agreed percentage of the pay roll. The defendant furnished a list of the employees, and the amounts of their pay, from time to time, including the plaintiff's name. The agent of the insurance company knew the relationship existing between the parties. The court, in summarizing its opinion, said, at 195: "It [parental immunity from infant's suits] is imposed for the protection of family control and harmony, and exists only where a suit or the prospect of a suit might disturb the family relations. . . . It does not apply to an emancipated child, or to a case where liability in fact has been transferred to a third party." *Cf. supra* note 8 regarding the dissent of Clark, C. J., in *Small v. Morrison*.

<sup>12</sup> *Stacy, J.*, in writing the majority opinion in *Small v. Morrison*, *supra* note 5, said, 185 N. C. at 584, 118 S. E. at 15: "From the very beginning the family in its integrity has been the foundation of American institutions, and we are not now disposed to depart from this basic principle. . . . Hence in a democracy or a polity like ours, the government of a well ordered home is one of the surest bulwarks against the forces that make for social disorder and civic decay. It is the very cradle of civilization, with the future welfare of the commonwealth dependent, in a large measure, upon the efficacy and success of its administration." In *Matarese v. Matarese*, 47 R. I. 131, 131 Atl. 198 (1925), 42 A. L. R. 1360 (1926), the court said, at 199: "Anything that brings the child into conflict with the father or diminishes the father's authority or hampers him in its exercise is repugnant to the family establishment and is not to be countenanced save in positive provisions of the statute law. Any proceeding tending to bring discord into the family and disorganize its government may well be regarded as contrary to the common law and not to be sanctioned by the courts. Such conflict would arise by recognizing the right of a minor child to bring an action against the father to recover damages for torts alleged to have been committed by the father in the course of the family relation, and resulting in personal injury to the child."

<sup>13</sup> *Supra* note 2. As indicated, the existence of a rule at common law denying a recovery by the infant is problematical. Those who believe in its existence give as the rule's basis: (1) policy; (2) the analogy of the inability of a husband or wife to sue the other at common law. But this analogy is not a true one for the reason that in theory the two spouses were identical. Such was not true, however, of the relationship which existed between the father and child.

under the criminal law.<sup>14</sup> The strongest and most frequently employed argument is the one of policy.<sup>15</sup> In practically all cases in which the defendant has had insurance such element has been lightly brushed aside as a wholly irrelevant consideration,<sup>16</sup> but under the present decision it has been treated as one of decided importance.

Strictly viewed, the holding of the present case extends only to a situation where the parent is protected by insurance in his vocational capacity, but the court's rejection of refined distinctions suggests that it would sanction other suits where the defendant has insurance covering liability outside his vocational sphere.<sup>17</sup> It appears quite clear that the case does not go beyond this point; to do so would infringe upon the holding of the same court in *Securo v. Securo*<sup>18</sup> (denying the child's cause of action where the parent himself has to pay the judgment), a result the West Virginia court did not intend.<sup>19</sup> Inasmuch as the policy which is the core of the rule denying recovery when child sues parent is dissolved by the element of insurance, it appears that the court, in allowing the action to be maintained, has reached a result that is as logical as it is laudable.

WILSON BARBER.

#### Public Utilities—Regulation of Private Contract Carriers.

A recent decision of the United States Supreme Court<sup>1</sup> marks the successful culmination of a long series of efforts on the part of the

<sup>14</sup> In *Hewlett v. George*, *supra* note 4, the court said, 9 So. at 887, 13 L. R. A. at 684: "The state, through its criminal laws, will give the minor child protection from personal violence and wrongdoing, and this is all the child can be heard to demand." *Matarese v. Matarese*, *supra* note 12, at 199.

<sup>15</sup> One of the most celebrated and widely commented upon cases is that of *Wick v. Wick*, *supra* note 8, and it contains an excellent statement of the policy argument. *Cf. supra* note 12. Note (1926) 1 ST. JOHN'S L. REV. 209; Note (1926) 11 MARQUETTE L. REV. 164.

<sup>16</sup> *Small v. Morrison*, *supra* note 5; *Ledgerwood v. Ledgerwood*, 114 Cal. App. 538, 300 Pac. 144 (1931). The suit was by a mother against her infant son, the court saying the presence of insurance is irrelevant. The rule would have been the same had the parties been reversed.

<sup>17</sup> The court speaking through Hatcher, J., said, at 539: "When no need exists for parental immunity, the courts should not extend it as a mere gratuity. Without such an extension, nothing stands in the way of this action. It is familiar law that a child may bring to account the parent for wrongful disposition of the child's own property. It must not be said the courts are more considerate of the property of the child than of its person (when unaffected by the family relationship)."

<sup>18</sup> 110 W. Va. 1, 156 S. E. 750 (1931).

<sup>19</sup> In the *Lusk* case the court said, at 539: "They [counsel for plaintiff] recognize that *Securo v. Securo* opposes a recovery from the father. But they would differentiate this case. . . ." The distinction was allowed by the court.

<sup>1</sup> *Stephenson v. Binford*, 287 U. S. 251, 53 Sup. Ct. 181, 77 L. ed. 203 (1932).