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## Torts -- Parent-Child Immunity

Thomas J. Bolch

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testamentary trust was not to be used exclusively for charitable purposes, and clearly the deduction should not be allowed.

It is doubtful that the *Watson* case stands for the proposition that a gift to a trust to provide retirement benefits for employees cannot be charitable for federal tax purposes. The deductibility of such gifts appears to depend upon the circumstances surrounding the gift, such as the persons benefited by the trust, the nature and extent of their benefits, the relation between the donor and the beneficiaries of the trust and any possible advantages accruing to the donor from the gift to the trust.

WILLIAM S. LOWNDES

### Torts—Parent—Child Immunity

In *First Union Nat'l Bank v. Hackney*<sup>1</sup> the North Carolina Supreme Court held that a parent's common-law immunity to tort claims brought by his unemancipated minor children<sup>2</sup> does not apply to prevent recovery where a wrongful death action is brought by the administrator of one parent against the estate of the other parent, for the benefit of the children.

In *Hackney* the parents of four minor children were killed when the family car ran off a highway and hit a tree. The administrator of the mother's estate brought a wrongful death action against the estate of the father based on his alleged negligence in losing control of the vehicle. The defendant asserted (1) that the children were the real parties in interest *as plaintiffs* since any recovery in the action would go to them as sole distributees of their mother;

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fund was charitable for purposes of the New Jersey Rule Against Perpetuities.

<sup>1</sup> 266 N.C. 17, 145 S.E.2d 352 (1965).

<sup>2</sup> Parent-child immunity to negligence claims of each other was an innovation of American courts. The first precedent for the rule was *Hewlett v. George*, 68 Miss. 703, 9 So. 885 (1891), where the court reasoned that:

The peace of society, and of the families composing society, and a sound public policy, designed to subserve the repose of families and the best interests of society, forbid to the minor child a right to appear in court in the assertion of a claim to civil redress for personal injuries suffered at the hands of the parent.

*Id.* at 711, 9 So. at 887.

"Parental authority" and the "security of the home" were two of the policy reasons which convinced a majority of the North Carolina court to adopt the parent-child immunity rule in *Small v. Morrison*, 185 N.C. 577, 118 S.E. 12 (1923).

(2) that the children were the real parties *defendant* as sole legatees under their father's will, and since the children were both plaintiffs and defendants in the action, the suit would be futile; and (3) that the children should not be permitted recovery from the estate of a parent under North Carolina's wrongful death statute because of the parent's immunity to negligence claims brought by his unemancipated minor children. This note will be limited primarily to the impact of *Hackney* upon the doctrine of parent-child tort immunity, and the other questions raised by the case will be referred to only briefly.

In disposing of the first defense, the court held, on the basis of existing authority, that a wife has the right to sue her husband and recover damages for personal injuries inflicted by his actionable negligence;<sup>3</sup> that if such injuries cause her death, her personal representative can maintain a wrongful death action against her husband or his estate;<sup>4</sup> and that in such action the persons entitled to the recovery (here, the children) are *not* the real parties in interest.<sup>5</sup> With respect to defendant's contention that the children were the real parties in interest *as defendants* because they were the beneficiaries of their father's estate, the court answered that there was no showing that any of the general distributable assets of their father's estate would be required to pay any judgment plaintiff might recover. It took judicial notice that "automobile liability insurance is a fact of present day life"<sup>6</sup> and said that absent an allega-

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<sup>3</sup> N.C. GEN. STAT. §§ 52-10, -10.1 (Supp. 1965); *Roberts v. Roberts*, 185 N.C. 566, 118 S.E. 9 (1923).

<sup>4</sup> N.C. GEN. STAT. § 28-173 (Supp. 1965); *King v. Gates*, 231 N.C. 537, 57 S.E.2d 765 (1950).

<sup>5</sup> The court said the children were not the real parties in interest *as plaintiffs* within the meaning of that term as used in N.C. GEN. STAT. § 1-57 (1953), that they had no right of action for the death of their mother under authority of *Howell v. Board of Comm'rs*, 121 N.C. 362, 28 S.E. 362 (1897), and that the right of action vested in their mother's personal representative, *Graves v. Welborn*, 260 N.C. 688, 133 S.E.2d 761 (1963). In distinguishing the wrongful death cases of *Davenport v. Patrick*, 227 N.C. 686, 44 S.E.2d 203 (1947), and *In the Matter of Estate of Ives*, 248 N.C. 176, 102 S.E.2d 807 (1958), the court said these cases were based on the proposition that no person will be permitted to profit from his own wrongdoing. It reasoned that the basic principle on which *Davenport* and *Ives* were decided was inapplicable in the instant case since there was no allegation that the children were in any way responsible for their mother's death.

<sup>6</sup> 266 N.C. at 22, 145 S.E.2d at 357. The court said:

Automobile liability insurance is a fact of present day life which defendant may not ignore. It is a matter of common knowledge that

tion that the father did not have liability insurance sufficient to safeguard the general assets of his estate in the event of a judgment against the estate, "it does not appear that use of any of the general distributable assets . . . would be required to pay, in whole or in part, such judgment."<sup>7</sup> Thus the children were not shown to be the real parties defendant.

In sustaining the striking of the third defense, the court noted that the present action did not involve the right of an unemancipated minor to sue the parent because of injuries to such child caused by the parent's actionable negligence. It stated that this action was brought by the administrator of the wife's estate to recover for *her* wrongful death and therefore the doctrine of parent-child tort immunity was inapplicable in the context of this case.<sup>8</sup> As an alternate ground for decision, however, the court said that since both the mother and father were dead, there was no parent-child relationship that would be disturbed by the suit.<sup>9</sup> "In this factual situation," the court added, "according to the weight of authority and sound reason, the immunity doctrine has no application."<sup>10</sup>

North Carolina is in accord with the majority of jurisdictions in refusing to permit tort actions between parents and their unemancipated minor children.<sup>11</sup> Parent-child suits are permitted when

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millions of car owners purchase automobile liability insurance. G.S. § 20-309 requires every owner of a motor vehicle, as a prerequisite to the registration thereof to show "proof of financial responsibility" in the manner prescribed by G.S. Chapter 20, Article 9A.

A liability policy purchased by the husband-father would constitute a valuable asset. During his lifetime, it would protect him in respect of his personal liability and preserve his general estate from depletion; and, upon his death, such policy would constitute a valuable asset of his estate and safeguard the general assets of his estate for distribution to the beneficiaries.

*Id.* at 22-23, 145 S.E.2d at 357.

The instant case is one of a very limited number of North Carolina cases in which the presence of liability insurance was a determinative factor. Another such case is in the Matter of Estate of Miles, 262 N.C. 647, 138 S.E.2d 487 (1964), where the court ruled that an automobile liability insurance policy was enough of an unadministered asset of a decedent's estate to justify reopening such estate to permit a wrongful death action to be brought against the administratrix, c.t.a., of the estate.

<sup>7</sup> 266 N.C. at 23, 145 S.E.2d at 357.

<sup>8</sup> *Id.* at 24, 145 S.E.2d at 358.

<sup>9</sup> *Id.* at 27, 145 S.E.2d at 360.

<sup>10</sup> *Ibid.*

<sup>11</sup> See 3 LEE, NORTH CAROLINA FAMILY LAW § 248 (3d ed. 1963) [hereinafter cited as LEE].

the cause of action is based on contract<sup>12</sup> or on a property right<sup>13</sup> but are not permitted when the action is based on a personal injury, whether such injury was caused by negligence<sup>14</sup> or by a willful or malicious act.<sup>15</sup> The immunity that the parent has from suit by the minor children in personal injury cases arises from a disability to sue and not from a lack of violated duty.<sup>16</sup> The immunity is said to be based upon a public policy to protect family harmony and parental discipline.<sup>17</sup>

In recent years there has been a growing judicial inclination to find the immunity doctrine inapplicable where there is no family relationship, harmony, or parental authority or discipline to be preserved.<sup>18</sup> Until *Hackney* the North Carolina Supreme Court had steadfastly adhered to the traditional view,<sup>19</sup> paying little heed to the maxim that where the reason for a rule ceases, the rule itself

<sup>12</sup> See 39 AM. JUR. *Parties* §§ 88-92 (1942); HARPER, PROBLEMS OF THE FAMILY 565 (1952); 1 HARPER & JAMES, TORTS § 8.11 (1956); PECK, PERSONS AND DOMESTIC RELATIONS § 124 (3d ed. 1930); PROSSER, TORTS § 101 (3d ed. 1963); 4 VERNIER, AMERICAN FAMILY LAWS § 267 (1936).

<sup>13</sup> The court said in *Small v. Morrison*, 185 N.C. 577, 586, 118 S.E. 12, 16 (1923) (dictum), "The right of a minor child to bring an action against its parent in respect to the latter's dealing with its property is unquestioned. . . ."

<sup>14</sup> *Redding v. Redding*, 235 N.C. 638, 70 S.E.2d 676 (1952); *Small v. Morrison*, 185 N.C. 577, 118 S.E. 12 (1923); see *Lewis v. Farm Bureau Mut. Auto. Ins. Co.*, 243 N.C. 55, 89 S.E.2d 788 (1955); *Henson v. Thomas*, 231 N.C. 173, 56 S.E.2d 432 (1949); *Wright v. Wright*, 229 N.C. 503, 50 S.E.2d 540 (1948); *Goldsmith v. Samet*, 201 N.C. 574, 160 S.E. 835 (1931); 29 N.C.L. Rev. 214 (1951); 11 N.C.L. Rev. 352 (1933).

<sup>15</sup> There has been a noticeable trend in recent decisions of other jurisdictions to allow actions for personal injury to a child where such injury resulted from willful or malicious misconduct, but North Carolina has not yet joined this trend although inferences of a desire to do so can be gathered from a number of decisions. See *Lewis v. Farm Bureau Mut. Auto. Ins. Co.*, 243 N.C. 55, 89 S.E.2d 788 (1955); *Redding v. Redding*, 235 N.C. 638, 640, 70 S.E.2d 676, 677 (1952); *Goldsmith v. Samet*, 201 N.C. 574, 160 S.E. 835 (1931). As to the trend in other jurisdictions, see JACOBS & GOEBEL, CASES AND MATERIALS ON DOMESTIC RELATIONS 945 (4th ed. 1961); 1 HARPER & JAMES, TORTS § 8.11 (1956); PROSSER, TORTS § 101 (2d ed. 1955); *McCurdy, Torts Between Parent and Child*, 5 VILL. L. REV. 521, 529-34 (1960); 29 N.C.L. Rev. 214 (1951); 35 NOTRE DAME LAW. 467 (1960); 26 MO. L. REV. 152, 208-09 (1961).

<sup>16</sup> *Dunlap v. Dunlap*, 84 N.H. 352, 150 Atl. 905 (1930).

<sup>17</sup> *Gillikin v. Burbage*, 263 N.C. 317, 139 S.E.2d 753 (1965).

<sup>18</sup> *Annot.*, 19 A.L.R.2d 423, 427 (1951).

<sup>19</sup> See, e.g., *Cox v. Shaw*, 263 N.C. 361, 139 S.E.2d 676 (1965), where the administrator of a mother was not permitted to sue the estate of her unemancipated minor son for damages for her wrongful death caused by the son's negligence. Although both mother and son were dead and there was no family relationship to be disturbed, the immunity doctrine was still held applicable.

*Hackney* was an action by the administrator of a deceased parent against the estate of a deceased parent, with recovery going to the children. While it does not fall squarely within any of the categories outlined, it has implications for classes (2) through (7), for if *Hackney* shows an intention by the court to disregard the immunity rule in all cases where there is no relationship to be given immunity protection, then immunity should not be a bar to actions in classes (2) through (7).

*Hackney* was not an ideal vehicle for the court to use in announcing an intention to disregard the immunity rule in cases where there is no relationship to be given immunity protection. It was not a case of an unemancipated minor suing the estate of a deceased parent for the parent's negligent injury of the child. Such a case would have presented the question in a more clean-cut fashion. *Hackney* was one step removed. The immunity doctrine was urged defensively in an attempt to deny recovery to children in a wrongful death suit brought by the administrator of one deceased parent against the estate of the other. This raised an issue of statutory construction of the wrongful death statute, which the court resolved by saying that the immunity doctrine should not be read into the statute in this fact situation. The fact that *Hackney* was such a difficult case in which to carve out an exception to the immunity rule is perhaps an indication of the court's desire to apply the exception across the board, in all cases where there is no relationship to be protected. However, this interpretation may be too broad, since the court in *Hackney* did not indicate disfavor for any of its earlier decisions where the immunity doctrine was applied even though there was no relationship to be protected.<sup>26</sup>

There also remains to be resolved the impact of *Hackney* upon a line of decisions holding that the administrator of an unemancipated minor child killed by his parent's negligence has no cause of action against the parent for wrongful death.<sup>27</sup> *Hackney* logically points the way to overturning this line of decisions, since the same

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<sup>26</sup> Among its earlier decisions was one decided only eleven months before *Hackney*, the case of *Cox v. Shaw*, 263 N.C. 361, 139 S.E.2d 676 (1965). The court there held that the administrator of a mother may not sue the estate of her unemancipated minor son for her wrongful death caused by the son's negligence.

<sup>27</sup> *Capps v. Smith*, 263 N.C. 120, 139 S.E.2d 19 (1964); *Lewis v. Farm Bureau Mut. Auto. Ins. Co.*, 243 N.C. 55, 89 S.E.2d 788 (1955); *Goldsmith v. Samet*, 201 N.C. 574, 160 S.E. 835 (1931).

should cease. In *Hackney*, however, the court took an important first step toward the modern approach. The court examined cases from jurisdictions that have taken a new approach to the problem, found their logic convincing, and held that since the policy reasons on which the immunity doctrine rests did not apply to the factual situation under consideration in *Hackney*, the immunity doctrine itself should not apply. Authorities which the court found to be persuasive include decisions from Tennessee,<sup>20</sup> New Hampshire,<sup>21</sup> Missouri,<sup>22</sup> New Jersey,<sup>23</sup> Pennsylvania,<sup>24</sup> and Louisiana.<sup>25</sup>

Before *Hackney*, the parent's immunity from negligence actions brought by his children conceivably could have extended to the following classes of cases: (1) actions by a living child against a living parent; (2) actions by a living child against the estate of a deceased parent; (3) survival actions by the administrator of a deceased child against a living parent; (4) survival actions by the administrator of a deceased child against the estate of a deceased parent; (5) wrongful death actions by the administrator of a deceased child against a living parent; (6) wrongful death actions by the administrator of a deceased child against the estate of a deceased parent; and (7) actions by a child against a divorced parent, or against a parent whose own action has caused a breakdown of the family unit.

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<sup>20</sup> *Brown v. Selby*, 206 Tenn. 71, 332 S.W.2d 166 (1960), where the court said the immunity rule is based solely upon the public policy of preserving domestic peace and tranquility in the family, and since the father in the case at hand had destroyed that peace by murdering the mother, the immunity rule should not be applied.

<sup>21</sup> *Dunlap v. Dunlap*, 84 N.H. 352, 150 Atl. 905 (1930), where the court said the immunity exists only where a suit might disturb the family relations.

<sup>22</sup> *Brennecki v. Kilpatrick*, 336 S.W.2d 68 (Mo. 1960), where the court said:

The doctrine of intrafamily immunity from such suits expires upon the death of the person protected and does not extend to the decedent's estate for the reason that death terminates the family relationship and there is no longer in existence a relationship within the reasonable contemplation of the doctrine.

*Id.* at 73.

<sup>23</sup> *Palcsey v. Tepper*, 71 N.J. Super. 294, 176 A.2d 818 (1962), where the court said, "It is self-evident that if the family relationship no longer exists, having been dissolved by death, then the public policy consideration which supports the rule of immunity likewise no longer exists." *Id.* at 297, 176 A.2d at 819.

<sup>24</sup> *Davis v. Smith*, 126 F. Supp. 497 (E.D. Pa. 1954), holding that the immunity of a living parent from suit by an unemancipated child was a personal defense that died with the father.

<sup>25</sup> *Ruiz v. Clancy*, 182 La. 935, 162 So. 734 (1935).

reason for not reading the immunity into the wrongful death statute in *Hackney* could have been applied there. In none of these cases was there a family relationship that would have been harmed, and the only thing that prevented recovery was a literal and seemingly erroneous interpretation of North Carolina's wrongful death statute, which in pertinent part provides :

When the death of a person is caused by a wrongful act, neglect or default of another, *such as would, if the injured party had lived, have entitled him to an action for damages therefor*, the person or corporation that would have been so liable . . . shall be liable to an action for damages, to be brought by the executor, administrator or collector of the decedent. . . .<sup>28</sup>

The court has denied recovery in this line of cases by reading the parent-child immunity doctrine into the wrongful death statute, saying that the child could not have maintained a suit against its parent had it lived and therefore the terms of the wrongful death statute preclude recovery.<sup>29</sup> The court would not be varying the terms or intent of the statute by applying its newly created exception to the immunity rule in cases where the child was killed by the parent's negligence. North Carolina's wrongful death statute was enacted twenty-two years *before* the doctrine of parent-child tort immunity came into existence<sup>30</sup> and fifty-four years before North Carolina judicially adopted the immunity.<sup>31</sup> It is a fundamental tenet of statutory construction that every statute is to be interpreted in the light of the common law as it was understood at the time of its enactment.<sup>32</sup> At the time of this statute's enactment there was no parent-child tort immunity to prevent a child from suing its parent. Thus the emphasized portion of the statute quoted above did not

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<sup>28</sup> N.C. GEN. STAT. § 28-173 (Supp. 1965). (Emphasis added.)

<sup>29</sup> See cases cited note 27 *supra*.

<sup>30</sup> North Carolina's wrongful death statute was enacted by the General Assembly of 1868-69. N.C. Sess. Laws, ch. 113, §§ 70-72 (1869). It was a successor to England's Lord Campbell's Act, which in 1846 created the first statutory right of action for wrongful death. The Fatal Accidents Act, 1846, 9 & 10 Vict., c. 93, §§ 1-6. The doctrine of parent-child tort immunity came into existence twenty-two years after passage of North Carolina's wrongful death act in the case of *Hewlett v. George*, 68 Miss. 703, 9 So. 885 (1891). See *Dunlap v. Dunlap*, 84 N.H. 352, 150 Atl. 905 (1930), for research indicating there was no such immunity prior to *Hewlett v. George*.

<sup>31</sup> North Carolina adopted the immunity doctrine in *Small v. Morrison*, 185 N.C. 577, 118 S.E. 12 (1923).

<sup>32</sup> *State v. Emery*, 224 N.C. 581, 31 S.E.2d 858 (1944); *State v. Mitchell*, 202 N.C. 439, 163 S.E. 581 (1932).

operate at the time of its enactment to prevent the administrator of a child from suing for the child's wrongful death and should not operate in such a manner now, especially if the court is not going to apply the immunity rule wherever there is no longer any reason for its application. It still remains to be seen, however, whether the court will logically extend *Hackney* to overturn this line of decisions.

A number of writers have urged that either the courts or the legislatures of the several states should abolish parent-child tort immunity<sup>33</sup> in light of "the ever-increasing criticism of the general rule"<sup>34</sup> and the growing number of exceptions to it. Examining the genesis of the rule in 1930, Chief Justice Peaslee of the New Hampshire Supreme Court said the immunity has "not infrequently been advocated with rhetoric rather than by reason"<sup>35</sup> during the course of its evolution. Certainly "family harmony" alone is not an adequate reason for permitting a wrong without a remedy in the parent-child negligence area.

North Carolina was one of the leaders in abolishment of husband-wife tort immunity.<sup>36</sup> While founded on a different theory,<sup>37</sup> this immunity was also supported by the same "family harmony" argument that is said to be an adequate ground for retaining the parent-child immunity. No family disharmony of serious proportion has resulted from abolishment of the former immunity. There is nothing to prevent one minor child from suing his minor brother or sister in tort.<sup>38</sup> Yet surely as much family disharmony would result from this type of action as would result from a suit by a child against a parent. The same "family disharmony" argument could be used to support a rule forbidding suits between parent and child in respect to contract and property rights, but North Carolina and the majority of jurisdictions permit such suits. It has been argued that permitting children to maintain suits against their parents where liability insurance is involved will lead to wholesale collusion and fraud.<sup>39</sup> However, the same argument could be made

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<sup>33</sup> See 3 LEE § 248 n.232; 43 N.C.L. REV. 932 (1965).

<sup>34</sup> 3 LEE § 248, at 177.

<sup>35</sup> *Dunlap v. Dunlap*, 84 N.H. 352, 354, 150 Atl. 905, 906 (1930).

<sup>36</sup> See 2 LEE § 211.

<sup>37</sup> Annot., 43 A.L.R.2d 632 (1955). "At common law, a husband and wife were one, and that one was the husband; a tort by one spouse against the person or character of the other gave rise to no cause of action in favor of the injured spouse." *Id.* at 634.

<sup>38</sup> See 3 LEE § 248, at 178.

<sup>39</sup> See Annot., 19 A.L.R.2d 423, 436 n.7 (1951).

with respect to actions between husband and wife; yet these actions are permitted.<sup>40</sup> In short, the present immunity rule and its exceptions result in cases difficult to determine with any degree of fairness and lead in many cases to injustice. It has been suggested that the simplest way to abolish parent-child tort immunity is to enact a statute doing so. At least one writer has gone so far as to suggest that legislation is the only way.<sup>41</sup> However, it should be remembered that the immunity was a creature of the courts,<sup>42</sup> and what the courts have created they can destroy.

THOMAS J. BOLCH

### Workmen's Compensation—Average Weekly Wage—Combination of Wages

Barnhardt had been working during the days for National Cash Register Company, at an average weekly wage of 68 dollars, and during the evenings for Yellow Cab Company, at an average weekly wage of 26 dollars. He sustained a compensable injury while working for Yellow Cab. In *Barnhardt v. Yellow Cab Co.*<sup>1</sup> the North Carolina Supreme Court held that it was error for the Workmen's Compensation Commission to have combined the wages earned from both employers in fixing the compensation at 37.50 dollars per week (the maximum) and that the compensation should have been limited to 16.14 dollars per week, sixty per cent of the average wage earned from Yellow Cab.

North Carolina's Workmen's Compensation Act provides that an employee is to be compensated for sixty per cent of his average weekly wage, up to a maximum of 37.50 dollars per week, for a period not exceeding 400 weeks.<sup>2</sup> Average weekly wage is defined as the average of the employee's wages earned over a period of a year in the employment in which he was working at the time of the injury.<sup>3</sup> When the employment is casual or for a shorter period than a year, the statute authorizes consideration of the average weekly wage of employees in the same class of employment or an

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<sup>40</sup> *Dunlap v. Dunlap*, 84 N.H. 352, 354, 150 Atl. 905, 906 (1930).

<sup>41</sup> See *Castellucci v. Castellucci*, 188 A.2d 467, 469 (R.I. 1963).

<sup>42</sup> See note 2 *supra*.

<sup>1</sup> 266 N.C. 419, 146 S.E.2d 479 (1966).

<sup>2</sup> N.C. GEN. STAT. § 97-29 (1965).

<sup>3</sup> N.C. GEN. STAT. § 97-2(5) (1965).