6-1-1952

Domestic Relations -- Right of Unemancipated Minor to Sue Parent for Personal Tort

as the waiver required.[15] The courts, alone, possess no power to grant immunity in order to force discovery.[16]

The court, in the instant case, based the waiver upon an implied contractual relationship arising between appellants and the court upon the former's assumption of the obligations of sureties. It reasoned that a surety's duty to the court does not end with forfeiture of the bail fund, but continues until the defendants are delivered into the custody of the court. Upon voluntary assumption of the role, the right to claim any privilege upon relevant topics is waived. The sureties were therefore held obliged to reveal knowledge of the fugitives' whereabouts, notwithstanding that "all the precedents say that the . . . privilege . . . cannot be abolished constitutionally by advance contracts between private persons or even between a government and its crime-detecting officials."[17]

Never before have the courts so extended an implied waiver.[18] Whether the privilege itself is an archaic result of the rebellion against the tyranny of the Church and its *Oath Ex Officio*,[19] or necessary for the preservation of our American heritage of "political liberty and personal freedom,"[20] the court in the instant case has, without adequate precedent, carved another exception out of a privilege already deeply scarred.[21]

DOMESTIC RELATIONS — RIGHT OF UNEMANCIPATED MINOR TO SUE PARENT FOR PERSONAL TORT

Plaintiff, an unemancipated minor, brought an action by his next friend against a partnership of which his father was a member for injuries sustained as a result of defendants' negligence in the maintenance of their property. *Held*, that a parent in his business or vocational capacity is not immune

---

15. See Apodoca v. Viramontes, 53 N.M. 513, 212 P.2d 425 (1949); People v. Lorch, 171 Misc. 469, 13 N.Y.S.2d 155 (Ct. Gen. Sess. 1939); People v. Reiss, 8 N.Y.S.2d 209, 20 N.E.2d 8 (1939).

16. Apodoca v. Viramontes, *supra* note 15.

17. *See* United States v. Field, 193 F.2d 92, 107 (2d Cir. 1951) (dissenting opinion by Frank, J.).

18. State v. Allison, 116 Mont. 352, 153 P.2d 141 (1944) (waiver of the privilege must be intelligent and informed); Powell v. Commonwealth, 167 Va. 558, 189 S.E. 433 (1937) (waiver must be made understandingly and willingly).

19. Seabury, *Address*, 18 A.B.A.J. 371 (1932) (detrimental to proper administration of justice); BENTHAM, RATIONALE OF JUDICIAL EVIDENCE, b. IX, pt. IV, c. III (Bowring's ed., vol. VII, pp. 452 ff., 1827) (He classifies reasons for the existence of the privilege into: (1) "old woman's reason" that it's "hard on a man;" (2) "fox hunter's" concept of fair sport; (3) confounding of interrogation with ancient torture; and (4) association of the privilege as against unpopular institutions such as the ecclesiastical courts.).

20. Boyd v. United States, 116 U.S. 616, 631 (1886). 8 WIGMORE, EVIDENCE § 2251 (3d ed. 1940) (though Wigmore reprints sections of Bentham's amusingly scathing criticisms, he advocates preservation of the privilege as preventive of the adverse effects of administrative reliance upon self-accusation and disclosure for conviction). See Imlay, *The Paradoxical Self-Incrimination Rule*, 6 MIAMI L.Q. 147, 148 (1952).

21. Query: Would the instant court have held the same way if the fugitives had not been alleged Communists?

from a personal tort action by his unemancipated minor child. *Signs v. Signs*, 103 N.E.2d 743 (Ohio 1952).

The early common law reveals no rule barring an unemancipated minor from maintaining a personal tort action against his parent.[1] However, such a rule was introduced by *Hewellette v. George*[2] and has crystallized into a doctrine of absolute parental immunity finding rigid application in an overwhelming majority of our courts.[3] The rationale principally employed by these courts is that a contrary rule would: (1) disrupt domestic harmony and parental discipline;[4] (2) encourage fraudulent and collusive suits;[5] (3) deplete family funds to the prejudice of other family members.[6]

Recently, the vigorous dissent in *Small v. Morrison*[7] initiated a trend denying parental immunity in certain cases. Recovery has been allowed where a dual relationship existed between the parties, such as master-servant[8] or carrier-passenger.[9] However, the presence of liability insurance was a factor in awarding recovery in these cases. Parents have been held liable when guilty of willful or malicious conduct.[10] Their immunity has further been disregarded by allowing the action against the parent's employer.[11] The privilege accorded natural parents has been denied persons in loco parentis

---

1. *See* Dunlap v. Dunlap, 84 N.H. 352, 354, 150 Atl. 905, 906 (1930); EVERSLEY, DOMESTIC RELATIONS 571 (4th ed. 1926); PROSSER, TORTS 905 (1941); McCURDY, *Torts Between Persons in Domestic Relations*, 43 HARV. L. REV. 1030, 1057 (1930); Comment, 18 B.U.L. REV. 468 (1938). *But see* McKelvey v. McKelvey, 111 Tenn. 388, 77 S.W. 664 (1903); Roller v. Roller, 37 Wash. 242, 243, 79 Pac. 788, 789 (1905).

2. 68 Miss. 703, 9 So. 885 (1891).

3. *E.g.*, Rambo v. Rambo, 195 Ark. 832, 114 S.W.2d 468 (1938); McKelvey v. McKelvey, 111 Tenn. 388, 77 S.W. 664 (1903); Roller v. Roller, 37 Wash. 242, 79 Pac. 788 (1905); Securo v. Securo, 110 W. Va. 1, 156 S.E. 750 (1931); 2 COOLEY, TORTS 41 (4th ed. 1932); PROSSER, TORTS 905 (1941). *But see* Gould v. Christianson, 10 Fed. Cas. 857, 864, No. 5636 (S.D.N.Y. 1836); Nelson v. Johansen, 18 Neb. 180, 24 N.W. 730 (1885); Lander v. Seaver, 32 Vt. 114 (1859).

4. Small v. Morrison, 185 N.C. 577, 118 S.E. 12 (1923); Matarese v. Matarese, 47 R.I. 131, 131 Atl. 198 (1925); Roller v. Roller, 37 Wash. 242, 79 Pac. 788 (1905); Wick v. Wick, 192 Wis. 260, 212 N.W. 787 (1927); EVERSLEY, *op. cit. supra* note 1, at 571; McCurdy, *supra* note 1, at 1074, 1076.

5. Luster v. Luster, 299 Mass. 480, 13 N.E.2d 438 (1938); McCurdy, *supra* note 1, at 1073.

6. Roller v. Roller, 37 Wash. 242, 79 Pac. 788 (1905); McCurdy, *supra* note 1, at 1073.

7. 185 N.C. 577, 118 S.E. 12 (1923); Sorrentino v. Sorrentino, 248 N.Y. 626, 162 N.E. 551 (1928) (Cardozo, C.J., and Andrews and Crane, J.J., recorded their dissent without opinion to decision barring action by child); Wick v. Wick, 192 Wis. 260, 212 N.W. 787 (1927) (dissenting opinion).

8. Dunlap v. Dunlap, 84 N.H. 352, 150 Atl. 905 (1930).

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

10. Brown v. Cole, 198 Ark. 417, 129 S.W.2d 245 (1939) (murder); Mahnke v. Moore, 77 A.2d 923 (Md. 1951) (murder of child's mother and committing suicide in child's presence); Meyer v. Ritterbush, 276 App. Div. 972, 94 N.Y.S.2d 620 (2d Dep't 1950) (murder occasioned by suicide of parent); Cowgill v. Boock, 189 Ore. 218, 218 P.2d 445 (1950) (manslaughter).

11. Chase v. New Haven Waste Material Corp., 111 Conn. 377, 150 Atl. 107 (1930); Foy v. Foy, 231 N.C. 161, 56 S.E.2d 418 (1949); LeSage v. LeSage, 224 Wis. 57, 271 N.W. 369 (1937).

by holding them liable for a failure to provide necessaries[12] and for the infliction of unreasonable punishment.[13]

The court in the instant case recognized that radical social and economic changes justify a departure from the general rule when the parent is acting in a business or vocational capacity.[14] The rationale underlying the general rule was criticized on the ground that the aforementioned objections are applicable to property actions between parent and child which have always been allowed.[15] It was also expressly stated that the presence of liability insurance should be disregarded since it has no effect upon the merits of the case.[16]

With this decision another inroad has been made into the general rule. Heretofore the parent has been held liable in his dual capacity only when protected by liability insurance. While the case furthers the present trend and reaches an equitable result the court seems to apply an artificial rule that may be difficult to administer since no standards are specified for determining when a parent is acting in a business or vocational capacity. The decision also leaves undecided the question whether the rule is to be exclusive in its application and thus bar redress for willful and malicious torts. It is unfortunate that the court did not differentiate between duties growing out of the parental relation and those owed to the world in general and base their recovery upon such fact rather than on the nebulous concept of dual capacity. A more workable rule would be to grant immunity only when the parent is reasonably discharging a parental duty.

EVIDENCE — BURDEN OF PROOF — BURDEN OF GOING FORWARD

Defendant, driving an automobile while under the influence of intoxicating liquor, struck deceased who died immediately. Defendant was charged with involuntary manslaughter.[1] *Held,* that when a wound from which death might ensue has been inflicted and thereafter death occurs, the *burden of proof* is upon accused to make it appear that death did not result from the wound but from some other cause. *Hopper v. State,* 54 So.2d 165 (Fla. 1951).

The general rule is that the state, in a criminal case, must prove by competent evidence every essential element of the crime beyond and to

12. Foley v. Foley, 61 Ill. App. 577 (1895) (medical care); Clasen v. Pruhs, 69 Neb. 278, 95 N.W. 640 (1903) (food and clothing).
13. Steber v. Norris, 188 Wis. 366, 206 N.W. 173 (1925).
14. Signs v. Signs, 103 N.E.2d 743, 748 (Ohio 1952).
15. Alston v. Alston, 34 Ala. 15 (1859); Preston v. Preston, 102 Conn. 96, 128 Atl. 29 (1925); Crowley v. Crowley, 72 N.H. 241, 56 Atl. 190 (1903); Lamb v. Lamb, 146 N.Y. 317, 41 N.E. 26 (1895).
16. Signs v. Signs, 103 N.E.2d 743, 747 (Ohio 1952).

1. FLA. STAT. § 860.01 (1951).