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Torts—Unemancipated Minor Allowed Tort Action Against Parent for Negligence

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officer. This conditional privilege would protect him as long as his remarks are made on reasonable grounds. However, the whole policy behind executive immunity is to allow the officer freedom of action so that he will not be called to account for his every word. It may be in the public interest to extend absolute immunity to officers with investigative duties, in order to prevent the suppression of important information. As executive immunity is a creation of the courts, it is their delicate task to balance these various considerations of personal freedom and public security.

Frank J. Laski

TORTS—UNEMANCIPATED MINOR ALLOWED TORT ACTION AGAINST PARENT FOR NEGLIGENCE

Plaintiff, an unemancipated minor child, sought damages for personal injuries caused by the negligence of a partnership of which plaintiff's father was a member. *Held*: A parent in his business or vocational capacity is not immune from a personal tort action by his unemancipated minor child. *Signs v. Signs*, 156 Ohio 566, 103 N. E. 2d 743 (1952).

Various reasons have been assigned for disallowing tort actions between parent and minor child. The majority of American courts which have denied the action have relied heavily on an analogy to the policy considerations behind the common law inter-spouse immunity, *i. e.*, that such an action would disrupt the peace and harmony of the home. *Crosby v. Crosby*, 230 App. Div. 651, 246 N. Y. Supp. 384 (3rd Dep't 1930); *Small v. Morrison*, 185 N. C. 577, 118 S. E. 12 (1923); *Matarese v. Matarese*, 47 R. I. 131, 131 Atl. 198 (1925); *Wick v. Wick*, 192 Wis. 260, 212 N. W. 787 (1929); McCurdy, *Torts Between Persons In Domestic Relations*, 43 HARV. L. REV. 1030 (1930); PROSSER, TORTS 901-3 (1941). Other reasons advanced for denying the action are that such suits would: (1) impair parental discipline, *Matarese v. Matarese*, *supra*, *Buchanon v. Buchanon*, 170 Va. 458, 197 S. E. 426 (1938); (2) deplete the family finances, *Small v. Morrison*, *supra*; *Roller v. Roller*, 37 Wash. 242, 79 Pac. 788 (1905); (3) encourage fraudulent and collusive suits, *Luster v. Luster*, 299 Mass. 480, 13 N. E. 2d 438 (1938).

However, where there exists a relationship additional to that of parent and child and the fact of parenthood is, under the circumstances, merely incidental, the minor has been permitted to maintain the action. *Dunlap v. Dunlap*, 84 N. H. 352, 150 Atl. 905 (1930). Thus recovery has been allowed where the parties are

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in the relation of master and servant, *Dunlap v. Dunlap*, *supra*, or carrier and passenger, *Worrell v. Worrell*, 174 Va. 11, 4 S. E. 2d 343 (1939); *Lusk v. Lusk*, 113 W. Va. 17, 166 S. E. 538 (1932). Also involved in these cases is the fact that the defendant is usually protected by liability insurance. The courts have recognized that while insurance cannot create a cause of action, it may vitiate the reasons for the rule granting immunity. *Dunlap v. Dunlap*, *supra* at 367, 150 Atl. at 912; *Lusk v. Lusk*, *supra* at 19, 166 S. E. at 538; *Worrell v. Worrell*, *supra* at 27, 4 S. E. 2d at 350; *cf. Elias v. Collins*, 237 Mich. 175, 211 N. W. 88 (1926); *Lasecki v. Kabara*, 235 Wis. 645, 294 N. W. 33 (1940).

There also is a strong inclination in favor of allowing the action where the injury or death was caused by an intentional or malicious tort. *Cowgill v. Boock*, 189 Ore. 282, 218 Pac. 2d 445 (1950); *Mahnke v. Moore*, — Md. —, 77 A. 2d 923 (1951); *Treschman v. Treschman*, 28 Ind. App. 206, 61 N. E. 961 (1901); *cf. Cannon v. Cannon*, 287 N.Y. 425, 40 N. E. 2d 236 (1924).

Furthermore, the courts seem to have disregarded the immunity and allowed an action between parent and child in matters concerning property, *Lamb v. Lamb*, 146 N. Y. 317, 41 N. E. 26 (1895); *Myers v. Myers*, 47 W. Va. 487, 35 S. E. 860 (1900); *Preston v. Preston*, 102 Conn. 96, 128 Atl. 292 (1925), and in the case of a minor but emancipated child, *Wood v. Wood*, 135 Conn. 280, 63 A. 2d 586 (1948); *Crosby v. Crosby*, *supra*.

Even though the New York Legislature eliminated the interspouse immunity in 1937, (DOMESTIC RELATIONS LAW §57), the courts of this state have adhered to the rule of non-liability in the case of parent and child. *Cannon v. Cannon*, 287 N. Y. 425, 40 N. E. 2d 236 (1942); see dissent in *Sorrentino v. Sorrentino*, 248 N. Y. 626, 162 N. E. 551 (1928). However, in *Rozell v. Rozell*, 281 N. Y. 106, 22 N. E. 2d 254 (1939), which involved an action by an unemancipated minor brother against an unemancipated minor sister, the court intimated that various social changes have invalidated the reasons for the rule denying liability. Nevertheless, in *Cannon v. Cannon*, *supra*, the court ruled that an action involving a parent and minor child was not maintainable where wilful misconduct of the parent was not a factor.

The Ohio Court has added to the expanding list of exceptions to the rule of non-liability of a parent for a tort action by an unemancipated minor child. If there ever was any justification for the immunity doctrine, such justification has now disappeared, at least in situations in which the tort arises out of circumstances not incident to the administration of parental duties.

Irwin N. Davis

WILLS—LIFE INSURANCE SUFFICIENT SETTLEMENT
UNDER DECEDENT ESTATE LAW § 26

Deceased executed a will three years prior to the birth of his second daughter, the plaintiff in this action. The plaintiff was neither mentioned nor provided for in the will but was subsequently made a co-beneficiary of several life insurance policies. She seeks to take her intestate share as against the will under New York Decedent Estate Law §26. *Held*: (3-2) The child has no right to take against the will. Proceeds from life insurance policies provided by the testator are within the definition of "settlement" as used in §26. *In re Faber's Will*, 280 App. Div. 394, 144 N. Y. S. 2d 119 (4th Dept. 1952).

DECEDENT ESTATE LAW §26 reads: "Whenever a testator shall have a child born after the making of a last will, either in the lifetime or after the death of such testator, and shall die leaving such child, so after-born, unprovided for by any settlement and neither provided for nor in any way mentioned in such will, every such child shall succeed to the same portion of such parent's real and personal estate as would have descended or have been distributed to such child, if such parent had died intestate . . ." The civil law principle which nullifies a will made prior to the birth of a child was in part adopted by this section. *Tarshanjian v. Abbot*, 200 N. Y. 378, 93 N. E. 978 (1911). Such section partially revokes a will to the extent of the child's intestate share. *Matter of Murphy*, 144 N. Y. 562, 36 N. E. 691 (1895); *Matter of Kraston*, 58 N. Y. S. 2d 364 (Surr. Ct. 1945). The purpose of this section is to protect after-born children from oversight on the part of the testator in the disposition of his estate. *McLean v. McLean*, 207 N. Y. 371, 101 N. E. 178 (1913).

The problem which faced the court in the instant case is what constitutes "any settlement" under this section. The majority felt that where a testator has named the child joint beneficiary to a "substantial" amount in life insurance policies, that it could not be said that testator lacked the intention to make a "settlement". This position exemplifies the broad interpretation of the word "settlement". Under this interpretation a settlement need not be of any particular kind, *Matter of Froeb*, 143 Misc. 660, 257 N. Y. Supp. 850 (Surr. Ct. 1932), nor does it need to be adequate. *Matter of Kraston, supra*. The following have been held to constitute a "settlement": (Child's savings of \$7.13 put in trust as against an estate of over \$140,000). *In re Griffin's Will*, 159 Misc. 12, 287 N. Y. Supp. 514 (Surr. Ct. 1936). (Two children made beneficiaries of policies of life insurance, savings bank trust accounts, and United States savings bonds in the aggregate sum of \$7,469.51 and \$7,128.22). *In re Stone's Will*, 200 Misc. 639,