Louisiana Law Review

Volume 15 | Number 2
The Work of the Louisiana Supreme Court for the 1953-1954 Term
February 1955

Torts - Personal Injury or Wrongful Death Suits by Child or Administrator Against Parent

Billy H. Hines

runs counter thereto, whether such legislation pertains to capital, labor, or any other subject."[13] The provision which the court of appeal held to be superseded by the Constitution is one of the absolute prohibitions contained in R.S. 23:841. Although all of those prohibitions are incorporated into R.S. 23:844(4),[14] the remainder of that section consists of procedural requirements, the validity of which were not at issue in the *Twiggs* case. In the instant case the court confined the authority of the legislature to regulate the issuance of injunctions even further by invalidating the procedural requirements of R.S. 23:844 because they prevented the granting of "immediate" relief.[15] There were no absolute prohibitions involved.

If the decision declaring the procedural provisions of R.S. 23:844 "illegal and ineffective" is not limited to the particular facts of the case, grave doubt will be cast upon all legislative limitations on the issuance of the various writs. Especially vulnerable to attack would be the many absolute prohibitions which the legislature has imposed.[16] Surely the Supreme Court did not intend to cast such doubt upon the validity of these statutes. Because the Constitution itself contains no detailed procedural rules governing the issuance of writs by the courts, it would be unfortunate if the legislature were unnecessarily limited in its power to enact needed rules of procedure in this field. Therefore, it is hoped that the rule laid down in the instant case will be confined to the particular facts there involved.

Billy H. Hines

TORTS—PERSONAL INJURY OR WRONGFUL DEATH SUITS BY CHILD OR ADMINISTRATOR AGAINST PARENT

A minor driving the family automobile negligently caused the death of his minor sister. The administrator of the deceased's estate sued the father of the minors to recover damages for wrongful death. *Held*, suit dismissed. The Kentucky wrongful

13. *Id.* at 302, quoted with approval in Douglas Public Service Corp. v. Gaspard, 74 So.2d 182, 186 (La. 1954).

14. Before issuing an injunction the court must find as a fact that none of the relief to be granted is prohibited by LA. R.S. 23:841 (1950).

15. The court stated in *dictum* that "procedural statutes will be upheld in our courts so long as they do not violate our basic law." 74 So.2d 182, 187 (La. 1954). It is difficult to see how this statutory regulation violates "basic law" any more than do the numerous other statutes referred to above.

16. See note 9 *supra*.

death statute only entitles the administrator to institute such actions as the deceased could have maintained, and public policy would have prevented the minor from maintaining a suit against her father for personal injury. The fact that the father was insured is immaterial. *Harralson v. Thomas*, 269 S.W.2d 276 (Ky. App. 1954).

In the early common law, husband and wife were regarded as a single juridical entity, but this was never true of parent and child.[1] Actions by children to recover property from their parents have frequently been permitted,[2] and while the English reports apparently contain no successful personal injury suits by children against their parents, such suits do not seem to have been prohibited.[3] The so-called common law rule that an unemancipated minor cannot sue its parent for personal injury[4] is traceable to the American case of *Hewlett v. George*,[5] decided in 1891. The Mississippi court in that case, relying on no precedent, merely stated that a contrary rule would be detrimental to the "peace of society."[6] The reason most frequently offered in support of the rule is that allowing the child to maintain a suit for injury against the parent would undermine "parental authority."[7] This could mean that parents should be free to discipline their children without fear of incurring civil liability. If so, then it seems that the rule should extend only to suits by minors for the intentional torts of the parent. If it means in-

1. McCurdy, *Torts Between Persons in Domestic Relation*, 43 HARV. L. REV. 1030, 1056 (1930); Albrecht v. Potthoff, 192 Minn. 557, 257 N.W. 377 (1934); Dunlap v. Dunlap, 84 N.H. 352, 150 Atl. 905 (1930), and authorities therein cited.

2. Duke of Beaufort v. Berty, 1 P. Wms. 703, 24 Eng. Rep. 579 (1721); Morgan v. Morgan, 1 Atk. 489, 26 Rep. 310 (1737); Alston v. Alston, 34 Ala. 15 (1859); Preston v. Preston, 102 Conn. 96, 128 Atl. 292 (1924); Faulk v. Faulk, 23 Tex. 653 (1859); Myers v. Myers, 47 W.Va. 487, 35 S.E. 868 (1900).

3. PROSSER, HANDBOOK OF THE LAW OF TORTS 905 (1941); Dunlap v. Dunlap, 84 N.H. 352, 150 Atl. 905 (1930), and authorities therein cited.

4. Rambo v. Rambo, 195 Ark. 832, 114 S.W.2d 468 (1938); Schneider v. Schneider, 152 Atl. 498 (Md. App. 1930); Damiano v. Damiano, 6 N.J. Misc. 849, 143 Atl. 3 (1928); 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); Securo v. Securo, 110 W.Va. 1, 156 S.E. 750 (1931); Wick v. Wick, 192 Wis. 260, 212 N.W. 787 (1927).

5. 68 Miss. 703, 9 So. 885 (1891).

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

7. 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); *cf.* Luster v. Luster, 299 Mass. 480, 13 N.E.2d 438 (1938), in which the court expressed fear of the effect of third parties' intermeddling in familial relations, and McCurdy, *Torts Between Persons in Domestic Relation*, 43 HARV. L. REV. 1030, 1072 (1930), in which is brought out the danger of prosecution by the child of stale claims against the parent is pointed out.

stead that the tranquillity of the family scene would be disturbed by the child's engaging in the prosecution of a suit against the parent, then it would seem that the prohibition should also extend to suits by minors to recover property from their parents. It has also been argued that the rule should not apply in cases of intentional torts of a heinous character, since the authority of the parent and the tranquillity of the family are irreparably disrupted by the tort itself.[8] It seems absurb, for example, to refuse recovery to a minor girl forcibly raped by her father for the reason that the "family fireside" might suffer.[9] One jurisdiction prohibits child-parent suits because they strike at the peace of the family, but permits husband-wife suits which cause an equal family disturbance.[10] The extensive use of liability insurance has introduced a new factor in the problems of interfamily litigation. In a suit by the child against his insured parent, the financial structure of the family would not be shaken in the event of recovery.[11] Far from having a disruptive influence on the family, such a suit might be so welcome as to lead to collusion between parent and child.[12] Although this danger of fraud would seem to be the soundest basis for denying recovery in such cases, it is questionable that wrongs should be ignored simply to avoid the difficult task of separating fraudulent claims from the well-founded.[13] The problem is accentuated in jurisdictions having a so-called Direct Action Statute permitting suits against the tortfeasor's insurer without joinder of the insured. One jurisdiction has refused to sustain a child's direct action against his parent's insurer for personal injury.[14] Another has intimated that such an action would lie.[15] It is apparent that these considerations suggest no ready solution to the problem of child-parent litigation.

8. See Dix v. Martin, 171 Mo. App. 266, 157 S.W. 133 (1913); Clasen v. Pruhs, 69 Neb. 278, 95 N.W. 640 (1903); Dunlap v. Dunlap, 84 N.H. 352, 150 Atl. 905 (1930); Securo v. Securo, 110 W.Va. 1, 156 S.E. 750 (1931). See also dissent in Small v. Morrison, 185 N.C. 577, 588, 118 S.E. 12, 17 (1923).

9. Roller v. Roller, 37 Wash. 242, 79 Pac. 788 (1905).

10. The problem is dealt with in Owens v. Auto Mut. Indemnity Co., 235 Ala. 9, 177 So. 133 (1937).

11. Lusk v. Lusk, 113 W.Va. 17, 166 S.E. 538 (1932); *cf.* Fidelity & Casualty Co. v. Marchand, 4 D.L.R. 157 (1924).

12. PROSSER, A HANDBOOK OF THE LAW OF TORTS 908 (1941); McCurdy, *Torts Between Persons in Domestic Relation*, 43 HARV. L. REV. 1030, 1072 (1930); *cf.* Brown v. Gosser, 262 S.W.2d 480 (Ky. App. 1953); Rozell v. Rozell, 281 N.Y. 106, 22 N.E.2d 254 (1939).

13. Brown v. Gosser, 262 S.W.2d 480 (Ky. App. 1953).

14. Owens v. Auto Mut. Indemnity Co., 235 Ala. 9, 177 So. 133 (1937).

15. Mesite v. Kirchstein, 109 Conn. 77, 145 Atl. 753 (1929).

Plaintiff in the instant case urged upon the court the effect of the parent's insurance, presumably to dispel the notion that recovery by the deceased child's estate would merely transfer family funds from one pocket to another. The court considered the presence of insurance immaterial and apparently attached no importance to the fact that the suggested reasons for the rule of parental immunity appear in a somewhat different light in actions for the wrongful death of a minor. For example, if the need for preservation of parental control over the plaintiff child were the only consideration in child-parent suits, then that consideration would disappear with that child's death. On the other hand, since the administrator of the deceased's estate in wrongful death actions is usually a member of the immediate family, the same danger of creating a litigious atmosphere within the family, and the same danger of collusion between parent and administrator are presented as where the injured child himself sues. Aside from these considerations, however, the decision seems well supported by authority, since under the Kentucky wrongful death statute, the deceased's administrator is deemed to have no greater right of action than the deceased had.[16]

In Louisiana, under Article 104 of the Code of Practice, an unemancipated minor cannot sue a parent during the lifetime of that parent. Whether or not the Louisiana Direct Action Statute[17] can be employed to circumvent this disqualification has not been decided. However, in *Edwards v. Royal Indemnity Co.*,[18] the Louisiana Supreme Court held that the husband's insurer could not invoke the husband's immunity under Article 105 of the Code of Practice against an action by the injured wife. By analogy, it seems probable that the Louisiana courts would also permit a minor or the administrator of his estate to sue the parent's insurer for personal injury or wrongful death.

Patrick T. Caffery

16. KY. R.S. 411.130 (Supp. 1953).
17. LA. R.S. 22:655 (1950).
18. 182 La. 171, 161 So. 191 (1935).