

TORTS—RIGHT OF PERSONAL REPRESENTATIVE OF DECEASED CHILD TO
SUE NEGLIGENT PARENT UNDER WRONGFUL DEATH STATUTE

Harralson v. Thomas, 269 S.W.2d 276 (Ky. 1954)

Defendant's minor daughter, while a passenger in defendant's "family purpose" automobile,¹ was killed in an accident resulting from the negligence of the driver of the automobile, defendant's minor son. The children's mother, in her capacity as personal representative of the deceased daughter, brought suit against the father under the Kentucky wrongful death statute.² The Court of Appeals of Kentucky, reversing the judgment of the lower court, denied recovery, holding that the "established" rule that a child cannot sue his parent for a negligent tort had not been abrogated by the state's wrongful death statute, which was construed as merely enabling the personal representative to bring suit if the deceased could have maintained an action had she survived.³

Although there was no definite common law rule regarding the right of a child to sue his parent for a negligent tort,⁴ the vast majority of American cases decided since *Hewlett v. George*⁵ have held that a child cannot maintain an action for negligence against his parent.⁶ As justification for denying recovery, the courts have primarily emphasized the disruption of intra-family relations which might result

1. In Kentucky and several other states, when an automobile is maintained for the general use and convenience of the family the owner is liable for the negligence of any member of his family who uses the automobile with his permission. In such a situation, the member of the family using the automobile is considered to be acting as an agent of the owner. See 5A BLASHFIELD, CYCLOPEDIA OF AUTOMOBILE LAW AND PRACTICE § 3111 (1954).

2. KY. REV. STAT. § 411.130 (1953).

3. *Harralson v. Thomas*, 269 S.W.2d 276 (Ky. 1954).

4. See McCurdy, *Torts Between Persons in Domestic Relation*, 43 HARV. L. REV. 1030, 1059-62 (1930). It should be noted that in matters affecting wills, contracts, or other property rights, a suit may be maintained by a child against his parent. PROSSER, TORTS 905 (1941).

5. 68 Miss. 703, 9 So. 885 (1891) (child denied recovery in action against his parent for malicious false imprisonment).

6. While the *Hewlett* case involved an intentional tort, the rationale adopted there also has been utilized by the courts as a basis for denying recovery in negligence cases. *Villaret v. Villaret*, 169 F.2d 677 (D.C. Cir. 1948) (applying Maryland law); *Rambo v. Rambo*, 195 Ark. 832, 114 S.W.2d 468 (1938); *Mesite v. Kirchenstein*, 109 Conn. 77, 145 Atl. 753 (1929); *Luster v. Luster*, 299 Mass. 480, 13 N.E.2d 438 (1933); *Taubert v. Taubert*, 103 Minn. 247, 114 N.W. 763 (1908); *Reingold v. Reingold*, 115 N.J.L. 532, 181 Atl. 153 (1935); *Sorrentino v. Sorrentino*, 248 N.Y. 626, 162 N.E. 551 (1928); *Matarese v. Matarese*, 47 R.I. 131, 131 Atl. 198 (1925); *Wick v. Wick*, 192 Wis. 260, 212 N.W. 787 (1927).

While the majority of cases similarly have denied recovery when the parent's tort was intentional, *Owens v. Auto Mut. Indemnity Co.*, 235 Ala. 9, 177 So. 133 (1937) (wanton act); *Hewlett v. George*, 68 Miss. 703, 9 So. 885 (1891) (malicious false imprisonment); *Roller v. Roller*, 37 Wash. 242, 79 Pac. 788 (1905) (father not civilly liable for raping daughter), some recent cases have permitted the child to recover for intentional torts on the ground that the parent, by his wanton act, has in effect abandoned the parental relationship. *Mahnke v. Moore*, 197 Md. 61, 77 A.2d 923 (1951); *Cowgill v. Boock*, 189 Ore. 232, 213 P.2d 446 (1950). See 1952 WASH. U.L.Q. 151, for a discussion of the right of a child to sue his parent for an intentional tort.

from such action.⁷ In addition, most courts have held that the mere fact that the negligent parent is protected by liability insurance does not alter the general rule, even though allowing an action in such a situation would not disrupt the family relationship.⁸

When the parent's negligence causes the death of his child and an action is brought by the child's personal representative under the applicable wrongful death statute, the majority of cases have held that the child's disability to sue also prevents the personal representative from recovering against the negligent parent.⁹ The typical wrongful death statute, however, contains an express provision limiting the personal representative's right to bring suit to cases in which the deceased could have maintained an action if death had not ensued;¹⁰ the Kentucky wrongful death statute does not contain such a provision,¹¹ nor had the Kentucky court expressly ruled that a child cannot sue his parent for a negligent tort. The court in the principal case, therefore, could have exercised an independent judgment in determining whether to permit recovery by the child's personal representative.¹²

7. *Small v. Morrison*, 185 N.C. 577, 118 S.E. 12 (1923); *Wick v. Wick*, 192 Wis. 260, 212 N.W. 787 (1927). For a listing of various "policy factors" which have been cited by the courts as a basis for denying recovery, see *McCurdy, Torts Between Persons in Domestic Relation*, 43 HARV. L. REV. 1030, 1072-77 (1930); 36 IOWA L. REV. 384 (1950).

8. *Villaret v. Villaret*, 169 F.2d 677 (D.C. Cir. 1948) (applying Maryland law); *Rambo v. Rambo*, 195 Ark. 832, 114 S.W.2d 468 (1938); *Luster v. Luster*, 299 Mass. 480, 13 N.E.2d 438 (1938); *Levesque v. Levesque*, 106 A.2d 563 (N.H. 1954).

Some courts have permitted recovery when the negligent parent had liability insurance and an additional relationship, e.g., master-servant or carrier-passenger, existed between the parent and child. *Dunlap v. Dunlap*, 84 N.H. 352, 150 Atl. 905 (1930) (master-servant); *Worrel v. Worrel*, 174 Va. 11, 4 S.E.2d 343 (1939) (carrier-passenger); *Lusk v. Lusk*, 113 W. Va. 17, 166 S.E. 538 (1932) (carrier-passenger). In these cases, the parent-child relation was considered to be merely incidental.

9. *Owens v. Auto Mut. Indemnity Co.*, 235 Ala. 9, 177 So. 133 (1937); *Chastain v. Chastain*, 50 Ga. App. 241, 177 S.E. 828 (1934); *Cronin v. Cronin*, 244 Wis. 372, 12 N.W.2d 677 (1945).

10. See, e.g., ALA. CODE tit. 7, § 123 (1940); ILL. REV. STAT. c. 70, § 1 (1951); ORE. REV. STAT. § 30.020 (1953); WIS. STAT. § 331.03 (1953). See 44 HARV. L. REV. 980, 983 (1931).

11. The Kentucky statute provides:

Whenever the death of a person results from an injury inflicted by the negligence or wrongful act of another, damages may be recovered for the death from the person who caused it, or whose agent or servant caused it. If the act was willful or the negligence gross, punitive damages may be recovered. The action shall be prosecuted by the personal representative of the deceased.

KY. REV. STAT. § 411.130 (1953).

In *Chastain v. Chastain*, 50 Ga. App. 241, 177 S.E. 828 (1934), the Georgia court, under a wrongful death statute similar to the Kentucky statute, held that the personal representative's right to sue is dependent on whether the deceased could have recovered if he had survived. In denying recovery, the court merely handled the case as if the action had been brought by the child himself, and did not attempt to determine if a different rule should apply in a wrongful death action under the Georgia statute. See text supported by notes 18-20 *infra*.

12. In *Hale v. Hale*, 312 Ky. 867, 230 S.W.2d 610 (1950), the same court which decided the principal case permitted the personal representative of a deceased child to maintain a wrongful death action against the negligent parent. While

Since, in the vast majority of cases, the child's personal representative is the non-tortious parent it would seem that the same basic reason for denying recovery when a child sues his parent—the disruption of the family relation¹³—could also be used to preclude a wrongful death action by the child's personal representative. The difficulty is that the supposed disruption of the family relation is based more on judicial fantasy than positive fact.¹⁴ Realistically, there are two situations in which an action would be brought: (1) where the negligent parent is protected by liability insurance;¹⁵ or (2) where the child, or his personal representative, is antagonistic to the negligent parent and seeks to use the opportunity afforded by the latter's negligence to "wreak vengeance."¹⁶ In the first situation, allowing the child or his personal representative to recover would probably promote, rather than disrupt, the family relationship since the judgment would be paid by the liability insurer.¹⁷ In the second situation, where there is hostility between the parties, there is no family relation to disrupt by permitting such an action; the relationship is already discordant. In addition, it is highly unlikely that the courts will promote domestic

the court in the *Hale* case gave primary consideration to two other issues not directly related to the question of whether a child's disability to sue would prevent an action by the child's personal representative, the *Hale* case is indistinguishable, on its facts, from the principal case. The fact that the court did not consider the *Hale* case to be controlling may be partially attributed to the failure of counsel for the plaintiff in the principal case to submit a brief. In any event, it is clear that the principal case has impliedly overruled the *Hale* decision.

13. See text supported by note 7 *supra*.

14. See PROSSER, TORTS § 99 (1941); McCurdy, *Torts Between Persons in Domestic Relation*, 43 HARV. L. REV. 1030 (1930).

15. The court in the principal case did not definitely state that the negligent parent had liability insurance, but the entire tenor of the opinion leaves no doubt that there was such insurance. *Harrison v. Thomas*, 269 S.W.2d 276, 277-78 (Ky. 1954).

If the parent's liability insurance policy contained the usual "omnibus clause" extending coverage to any person legally operating the automobile with the insured's consent, then plaintiff might have been more successful if she had sued the driver, defendant's minor son. See *Rozell v. Rozell*, 256 App. Div. 61, 8 N.Y.S.2d 901 (3d Dep't 1939), *aff'd*, 281 N.Y. 106, 22 N.E.2d 254 (1939); *Munsert v. Farmers Mutual Automobile Ins. Co.*, 229 Wis. 581, 281 N.W. 671 (1938). In the *Munsert* case, the personal representative of a child killed by the negligent driving of the child's minor brother was allowed to sue the minor brother under the state wrongful death statute. The automobile which the deceased's brother was driving was owned by his father, and an omnibus clause in the insurance policy extended coverage to anyone driving with the insured's consent. Recovery was allowed in this case even though Wisconsin follows the general rule that a child or his personal representative cannot sue the child's parent for a negligent tort. *Cronin v. Cronin*, 244 Wis. 372, 12 N.W.2d 677 (1944); *Wick v. Wick*, 192 Wis. 260, 212 N.W. 787 (1927). Thus, if suit had been brought in the principal case against the driver of the automobile, defendant's minor son, the court might well have permitted recovery.

16. In a situation in which the family relationship was harmonious and the negligent parent did not have liability insurance then, as a practical matter, no suit would be brought. The possibility that by allowing an action the court might arouse an intra-family antagonism which otherwise would have remained dormant is so remote as to be unworthy of serious consideration.

17. See, for example, *Worrel v. Worrel*, 174 Va. 11, 4 S.E.2d 343 (1939); *Lusk v. Lusk*, 113 W. Va. 17, 166 S.E. 538 (1932).

harmony in such a situation merely by allowing the parent's tort to go uncompensated.

Even if it were conceded that a child should not be allowed to recover for injuries resulting from his parent's negligence, the court in the principal case, under the unusual provisions of Kentucky's wrongful death statute,¹⁸ could have permitted recovery by the child's personal representative. In theory, a wrongful death action is not merely an extension of the *same* cause of action which the deceased could have maintained had he survived; rather, such an action is a *new* cause of action, arising upon the death of the deceased.¹⁹ Thus, the factors which might have prevented recovery by the deceased should not necessarily preclude an action by the deceased's personal representative. The distinction is especially important in the principal case, since the only reason that the child could not have sued her parent was a *personal disability* arising from the parent-child relationship, which the court might well have considered to have terminated with her death.²⁰

While the result of the principal case is clearly in accord with the majority rule, there can be little justification for the decision. To deny recovery in a wrongful death action merely because the child might not have been allowed to recover had she survived is to compound an already serious error. The problem is whether, under modern conditions, there is any justification for denying either the child or his personal representative the right to recover damages for the negligence of the child's parent. In the light of the foregoing considerations, a judicial re-examination of the basis of the rule is certainly to be desired.

18. KY. REV. STAT. § 411.130 (1953). See text supported by notes 11-12 *supra*.

19. MCCORMICK, DAMAGES 336 (1935).

20. An analogous situation is found in *Schubert v. August Schubert Wagon Co.*, 249 N.Y. 253, 164 N.E. 42 (1928), where the court held that a wife who was injured by her husband's negligence could recover from the husband's employer (the accident occurred while the husband was on the employer's business), even though she could not have maintained an action against her husband.

The personal disability arising from the family relation should be distinguished from the situation in which the deceased could not have recovered under any circumstances, as in a case in which he was contributorily negligent, or had assumed the risk of defendant's tortious conduct. PROSSER, TORTS 966 (1941).