Personal Injuries: Unemancipated Child Given Cause of Action Against Parent Negligent in Non-parental Act

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permanent home and go into business there after the war. An exhaustive dissent points out that the rigid requirements set up in this decision in effect deny a military man the right to change his domicile. *Wilson v. Wilson*, Tex. Civ. App., 189 S.W. 2d 212 (1945), overruled a finding of domicile by the trial court on similar facts, pointing out that final intent as to domicile will actually be determined by opportunities yet to be offered. To the same effect, see the interesting dissent to *Hawkins v. Winstead*, 65 Idaho 12, 138 P. 2d 972, 975 (1943). On the same facts, other courts will find domiciliary intent as readily as the *Sasse* case. E.g., *Clark v. Clark*, 71 Ariz. 194, 225 P. 2d 486 (1950); *St. John v. St. John*, 291 Ky. 363, 163 S.W. 2d 820 (1942). Often, there are other factors showing the intent. E.g., *Kankelborg v. Kankelborg*, supra (registration and voting); *West v. West*, 35 Haw. 461 (1940) (change of home address on service records); *Burgan v. Burgan*, 207 La. 1057, 22 So. 2d 649 (1945) (marriage within the jurisdiction). Even contributions to the community chest have been considered. *Strubble v. Strubble*, Tex. Civ. App., 177 S.W. 2d 279 (1943).

Unless otherwise provided by statute, cf. *Blouin v. Blouin*, 67 Nev. 314, 218 P. 2d 937 (1950), bodily presence in the jurisdiction for the entire statutory period is not essential to divorce jurisdiction, provided the domiciliary intent remains constant. *Summerville v. Summerville*, 31 Wash. 411, 72 Pac. 84 (1903). In the *Summerville* case, P left her child in the state while gone. The rule has been stated that if, when a person leaves a jurisdiction, no vestige of residence remains—as in the *Sasse* case—"intention alone cannot retain a residence." *Turner v. Turner*, 87 Vt. 65, 88 Atl. 3, 4 (1913). This proposition is inconsistent with the general rule that a domicile, once established, remains the same until a contrary intention is shown. *Spielman v. Spielman*, 144 Wash. 421, 258 Pac. 37 (1927); *Polk v. Polk*, 158 Wash. 242, 290 Pac. 861 (1930); *Kankelborg v. Kankelborg*, supra. Continued actual residence is not an element of domicile, and is relevant only in the determination of intent. The misleading proposition of the *Turner* case, as preserved in 17 Am. Jur, Divorce and Separation, § 251 (1938), has nominally survived to confuse the decisions. E.g., *Campbell v. Campbell*, ... Fla. ... , 57 So. 2d 34 (1952). The *Sasse* case, as have practically all decisions, ignores it.

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The point brought to issue was whether an unemancipated minor has a cause of action against his parent for personal injuries negligently caused. The court reviews the traditional reasons for denying a cause of action and demonstrates their inadequacy. The reasons (which suffer an uninspired repetition in the cases and the authorities) and the court's comments thereon may be summarized. (1) *The maintenance of family tranquility.* The possibility of such a disturbance is a matter of fact, not law. "In the comparatively rare cases where a child brings such an action, the likelihood is that the peace of the home has already been disturbed beyond repair, or that, because of the existing circumstances, the suit will not disturb existing tranquility." (2) *The desire not to undermine parental authority and discipline.* The scope of parental discipline is subject to delineation in civil suits as it is in criminal actions. (3) *The maintenance of an equitable distribution of the family exchequer.* The appor-
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tionment of the family assets and income is almost within the discretion of the parent. Under certain circumstances the award of damages in a suit of child against parent may augment the total, and in any case is just as likely to rebalance as to unbalance the distribution. *(4) The prevention of possible collusion and fraud.* The righteou should not suffer for the guilt. “Courts must depend on the efficacy of the judicial processes to ferret out the meritorious from the fraudulent in particular cases.” If that fails the legislature can act. *(5) An analogy to the husband-wife immunity.* The analogy is broken by the absence of the legal identity between parent and child which exists between spouses. *(6) Other arguments that have more rhetoric than reason are that the parent might inherit the money recovered by the child, that the child would otherwise be permitted to bring a “stale” action after reaching majority, and the argument based on the obsolete concept of the family as being a governmental unit with the parent in loco regis.

For nearly half a century the law in Washington has been set by the decision in *Roller v. Roller*, 37 Wash. 242, 79 Pac. 788 (1905), a suit by a minor daughter who was raped by her father. Most of these traditional reasons were relied on to deny recovery although the injury was patently intentional, all semblances of the parental relationship were extinguished and the Fifth-Commandment was reduced to nonsense. In the *Borst* case the court shelves this sophistry and “draws the Thing as he sees It for the God of Things as They Are!”

Liability insurance is a condition precedent to the granting of a common carrier permit by the Washington Public Service Commission, RCW 81.80.190 [RRS 6382-16], so presumably an insurer was the real party defendant. Recovery against a negligent parent indemnified by a policy of insurance was allowed in *Lusk v. Lusk*, 113 W.Va. 17, 166 S.E. 538 (1932) where the court remarked, “when the reason for a rule ceases the rule itself ceases... This action is not unfriendly as between the daughter and the father... In fact their interests unite in favor of her recovery, but without hint of ‘domestic fraud and collusion’ (charged in some cases)... No strained family relations will follow.”

The principal case predicates the erasure of the parent’s immunity on the injury occurring to the minor during execution of other than a parental duty. “The fact that the child on the public street was respondent’s son added nothing to the father’s duties or difficulties in operating the business vehicles. For all practical purposes the relation between the two at the time of the accident was not parent and child but driver and pedestrian.” Similar rationale appears in opinions from other jurisdictions, *Dunlap v. Dunlap*, 84 N.H. 352, 150 Atl. 905 (1930) (father and son as employer and employee); *Signs v. Signs*, 156 Ohio St. 566, 103 N.E. 2d 743 (1952) (father and son in business relationship). However, the *Borst* parent was engaged in earning the family livelihood which would seem to be pointedly within the parental duty, and in this respect counsel will doubtless experience some difficulty in adumbrating the exact scope of the rule of the case.

Generally the result would seem to be reasonable and salutory. It is well in accord with the current trend to use industry (or the insurers) as the means for spreading the load imposed on individuals suffering injury or loss caused by modern technical equipment or products. If the legislators decide that the evils of possible collusion out-weigh the merits of this load-spreading, the way is always open to deal with the situation in the way the Washington Guest Statute met a parallel problem.

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