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Parental Immunity And Respondeat Superior, 1970

some courts have considered unrealized appreciation in determining profit intent,[82] it is not regarded as taxable income.[83] Accordingly, it appears that the only means by which an art collector could benefit from this provision is by occasionally selling an art item and then claiming in that tax year an amount for the maintenance of his collection that is not in excess of the sale price.[84]

The *Wrightsman* decision provides no criteria for determining the primary purpose of the art investor beyond "consideration of all the circumstances." As was illustrated by the principal case, art investment can be businesslike, conscientiously pursued, and at least potentially profitable.[85] However, since an individual usually acquires art work "for the purpose of realizing benefits not measurable in money,"[86] these circumstances are still not sufficient to sustain the art investor's burden of proof. Therefore, unless there is a change in the current law, storing art treasures from both public and private view may be the only method by which the wealthy art investor can be certain of proving the required primary investment purpose.

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PARENTAL IMMUNITY AND RESPONDEAT SUPERIOR, 1970

Since the end of the nineteenth century, the great majority of jurisdictions[1] have consistently denied an unemancipated child[2] recovery

[82]*Cf.* DuPont v. Commissioner, 234 F. Supp. 681 (D. Del. 1964); Israel O. Blake, 38 B.T.A. 1457 (1938). In a treasury memorandum issued to the congressional committee considering this revision, it was urged that the term "profit" be defined not only as the immediate, economic profit but as any reasonably expected long-term increase in the value of the property. This suggestion, however, was not adopted. Technical Memorandum of Treasury Position, (Committee Print: Tax Reform Act of 1969, H.R. 13272, Sept. 30, 1969) 35, *as quoted in* Rhodes, *Hobby Losses—A New Challenge*, 56 A.B.A.J. 893 (1970).

[83]Commissioner v. First State Bank, 168 F.2d 1004, 1010 (5th Cir. 1948).

[84]INT. REV. CODE OF 1954, provides that if § 183(b) profits are made for two out of every five years, there is a "presumption" that the activity is carried on for profit although the "Secretary or his delegate" may establish to the contrary. INT. REV. CODE OF 1954, § 183(d). The legislative history of this provision indicates that it is intended to replace section 270 of the old code, a provision that unsuccessfully attempted to control long-term hobby losses. Rhodes, *Hobby Losses—A New Challenge*, 56 A.B.A.J. 893 (1970). Owing to the legislative intent and the considerable discretion left to the commissioner by this provision, it is doubtful that it could be used by the art collector to prove a primary profit intent.

[85]The fact that the Wrightsmans were both businesslike and conscientious in their enterprise is particularly well documented in the commissioner's opinion. Note 16 *supra*. By 1967, the plaintiffs had expended $8.9 million for a collection that was later valued for insurance purposes at $16.8 million. 428 F.2d at 1317.

[86]Juliet P. Hamilton, 25 B.T.A. 1317, 1320 (1932).

[1]Hewellette v. George, 68 Miss. 703, 9 So. 885 (1891); *See, e.g.*, Villaret v.

in tort against his parents.[3] Denial has rested upon the belief that permitting recovery in parent-child tort suits would cause undesirable familial disharmony.[4] On the other hand, the great majority of jurisdictions considering this question have allowed the child recovery in tort against the parent's employer for parentally inflicted negligent injuries when such injuries were occasioned by the parent acting within his scope of employment.[5] The child has been allowed to recover for injuries inflicted by his parent only when these injuries were business connected and the employer can be held liable for his employee's actions under the doctrine of respondent superior.[6] Most courts have refused to carve an exception out of the doctrine of respondeat superior to exempt an employer from liability for his employee's scope of employment personal injury torts, notwithstanding the fact that the employee is personally immune from tort suit by his injured child, under the doctrine of parental tort immunity.[7]

In light of the law in parental immunity and respondeat superior cases, it is significant that in *Sherby v. Weather Brothers Transfer Co.*,[8]

Villaret, 169 F.2d 677 (D.C. Cir. 1948); Rambo v. Rambo, 195 Ark. 832, 114 S.W.2d 468 (1938); Trudell v. Leatherby, 212 Cal. 678, 300 P. 7 (1931); Meece v. Holland Furnace Co., 269 Ill. App. 164 (1933); Smith v. Smith, 81 Ind. App. 566, 142 N.E. 128 (1924); Luster v. Luster, 299 Mass. 480, 13 N.E.2d 438 (1938); Elias v. Collins, 237 Mich. 175, 211 N.W. 88 (1926); Mannion v. Mannion, 3 N.J. Misc. 68, 129 A. 431 (1925); Matarese v. Matarese, 47 R.I. 131, 131 A. 198 (1925); Roller v. Roller, 37 Wash. 242, 79 P. 788 (1905).

[2]Emancipation of a child may result from an expressed parental consent or it may occur by operation of law. It may occur by conduct of the parent inconsistent with the performance of his parental obligations or by the assumption by the infant of a status inconsistent with subjection to control by his parent. *See* Mesite v. Kirchstein, 109 Conn. 77, 145 A. 753 (1929); Coleman v. Dublin Coca-Cola Bottling Co., 47 Ga. App. 369, 170 S.E. 549 (1933); Brandhorst v. Galloway Co., 231 Iowa 436, 1 N.W.2d 651 (1942); Taubert v. Taubert, 103 Minn. 247, 114 N.W. 763 (1908); Lessard v. Great Falls Woolen Co., 83 N.H. 576, 145 A. 782 (1929).

[3]Recovery by an unemancipated minor has been denied whether the parent's tortious conduct was intentional or unintentional. *See* Mahnke v. Moore, 197 Md. 61, 77 A.2d 923 (1951); Hewellette v. George, 68 Miss. 703, 9 So. 885 (1891); Hastings v. Hastings, 33 N.J. 247, 163 A.2d 147 (1960); McKelvey v. McKelvey, 111 Tenn. 388, 77 S.W. 664 (1903); Roller v. Roller, 37 Wash. 242, 79 P. 788 (1905).

[4]PROSSER, LAW OF TORTS 887 (3rd ed. 1964) [hereinafter referred to as PROSSER].

[5]Cases cited notes 61 and 62 *infra*.

[6]Respondeat superior may be translated as: "Let the master answer." When an act is done within the scope of a servant's employment or under the master's express command, the act of the servant is considered to be the act of the master. If the servant's act is negligent or wrongful, this conduct is imputed to the master and he is liable in damages therefor. *See* Mi-Lady Cleaners v. McDaniel, 235 Ala. 469, 179 So. 908, 911 (1908).

[7]See note 61 *infra* for states refusing to carve an exception out of the doctrine of respondeat superior.

[8]421 F.2d 1243 (4th Cir. 1970).

the Fourth Circuit Court of Appeals, construing Maryland law, held that an injured child could not recover from his father's corporate employer even though the child's injuries were inflicted by his father who was working within the scope of his employment. By so holding, the *Sherby* court delineated an exception to the doctrine of respondeat superior in favor of the employer.

In *Sherby,* the plaintiff was an unemancipated son of one of the defendant's employees. The son, while a passenger in a company-owned truck being driven by the father within his scope of employment, sustained injuries in a collision caused by the father's negligence. The suit by the son's next friend against the father's corporate employer resulted in a decision in favor of the employer, holding him not laible for the injuries inflicted by his servant. The court reasoned that:

> [T]o hold that the employer is liable because of the acts of its agent against whom no liability exists . . . would result in holding [the employer] liable, notwithstanding [the injured child's] inability to have legal redress against [his father], the person causing the injuries.[9]

In addition, the court reasoned that the plaintiff should not be allowed to attain recovery indirectly under respondeat superior for that which is denied him directly by the parental immunity rule.[10]

The Fourth Circuit decided the case under Maryland law, according to the *Erie* doctrine.[11] The case of an employee's child suing his father's corporate employer was one of first impression in Maryland, so the federal court, in accord with *Erie,* attempted to determine how the highest Maryland court would hold if confronted with the same issues. The decision in favor of the employer was reached after examination of several cases dealing with closely allied areas,[12] though no case

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[9]421 F.2d at 1246, *quoting* Riegger v. Bruton Brewing Co., 178 Md. 518, 16 A.2d 99, 101 (1940).

[10]*Id.*

[11]Erie R.R. v. Tompkins, 304 U.S. 64 (1938). The *Erie* doctrine is basically a policy statement by the United States Supreme Court to be applied in the federal court system in diversity actions. The court stated that the law which should be applied in matters which deal with "substantive law" will be the law of the state where the incident giving rise to the suit actually occurred. When determining what this law actually is, the federal court will first determine if the highest state court has ruled on the point of law involved. If the state court has not so ruled, the federal court will base its decision on lower state court decisions and applicable dicta. The federal court will always try to base its holding in the diversity case as it feels the highest state court would hold if confronted with a like fact situation. *See generally* F. JAMES, CIVIL PROCEDURE 38-42 (1965).

[12]Villaret v. Villaret, 169 F.2d 677 (D.C. Cir. 1948) (denial of unemancipated child's tort suit against parent, under Maryland law); Dennis v. Walker, 284 F. Supp. 413 (D.D.C. 1968) (discussing development of parental immunity rule in Maryland); Stokes v. Association Indep. Taxi Operators, 248 Md. 690, 237 A.2d

directly on point was found in Maryland decisions, and the court did not look outside the state for other precedents.

An appreciation of the respondeat superior exception fostered by the *Sherby*[13] decision can best be gained by an examination of the principle bases upon which such a case rests, the doctrines of parental tort immunity and respondeat superior.

The origin of the parental tort immunity doctrine is not found in common law,[14] but is directly traceable to a trilogy of cases,[15] *Hewellette v. George*,[16] *McKelvey v. McKelvey*,[17] and *Roller v. Roller*.[18]

The *Hewellette* case is considered the keystone of the parent-child immunity rule and is the first American application of the defense of parental immunity.[19] This 1891 case, cited in the *Sherby* dissent,[20] held that a minor daughter, married but separated from her husband and living in her mother's home, could not maintain a suit in tort for false imprisonment against her mother. The rationale behind the decision was that:

> [S]o long as the parent is under obligation to care for, guide, and control, and the child is under reciprocal obligation to aid and comfort and obey, no such action as this can be maintained. *The peace of society, and of the families composing society, and a sound public policy, designed to subserve the repose of families* and the best interests of society, forbid to the minor child a right to appear in court in the assertion of a claim to civil redress for personal injuries suffered at the hands of the parent.[21]

The court in *McKelvey v. McKelvey*[22] refused to allow a child to sue his stepmother for "cruel and inhuman" punishment inflicted with

762 (1968) (deniel of wife's suit against her husband's employer for injuries sustained while a paying customer in taxi driven by husband within scope of employment); Mahnke v. Moore, 197 Md. 61, 77 A.2d 923 (1951) (court alowed recovery against father's estate for father's intentional infliction of mental distress on child); Riegger v. Bruton Brewing Co., 178 Md. 518, 16 A.2d 99 (1940) (wife denied right to sue husband's employer for husband's negligent injury of wife within scope of employment).

[13]421 F.2d 1243 (4th Cir. 1970).

[14]Dunlap v. Dunlap, 84 N.H. 352, 150 A. 905, 906 (1930); McCurdy, *Torts Between Persons in Domestic Relation*, 43 HARV. L. REV. 1030, 1059-60 (1930).

[15]Hebel v. Hebel, 435 P.2d 8, 10 (Alas. 1967); Balts v. Balts, 273 Minn. 419, 142 N.W.2d 66, 71 (1966).

[16]68 Miss. 703, 9 So. 885 (1891).

[17]111 Tenn. 388, 77 S.W. 664 (1903).

[18]37 Wash. 342, 79 P. 788 (1905).

[19]*See generally* cases cited notes 61 and 62 *infra*.

[20]421 F.2d 1243, 1247 (4th Cir. 1970) (Butzner, J., dissenting).

[21]Hewellette v. George, 68 Miss. 703, 9 So. 885, 887 (1891) (emphasis added).

[22]111 Tenn. 388, 77 S.W. 664 (1903).

the father's consent. This case cited *Hewellette* with favor and closed with a statement that parental immunity from tort action was a "well-settled rule controlling the relation of father and child."[23]

The *Roller* suit,[24] a rather extreme example of a court proclaiming parental immunity, concerned a father's rape of his daughter. Though the father had been convicted of the rape and was incarcerated as a result thereof, the court refused the daughter the right to sue her father in tort. The court, in explaining its strict application of the doctrine, wrote:

> [I]f it be once established that a child has a right to sue a parent for a tort, there is no practical line of demarkation [sic] which can be drawn, for the same principle which would allow action in the case of a heinous crime . . . would allow an action to be brought for any other tort.[25]

The parental immunity doctrine is based on the judicial belief that family peace, harmony, and parental disciplinary authority should take precedence over a child's recovery from his parents for their tortious actions.[26] There has been a balancing of the detriment to family peace and harmony caused by a child being able to sue his parent in tort against the benefits to be gained by the child "from the continuance of the parent-child relationship unhampered by the possible shattering effect of adversary civil litigation in which damages for personal injury are sought."[27] The scales tip toward the contentment of the home and away from the child's redress against his parent.[28]

In spite of the widespread judicial disfavor of tort actions between unemancipated children and their parents,[29] the years since the 1905 *Roller* decision[30] have seen numerous instances in which courts of many jurisdictions have firmly established an unemancipated child's right to sue his parent in tort.[31] From the time of the statement of the

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[23]77 S.W. at 665.

[24]37 Wash. 242, 79 P. 788 (1905).

[25]79 P. at 789.

[26]*See, e.g.*, Hewellette v. George, 68 Miss. 703, 9 So. 885 (1891); Gaudreau v. Gaudreau, 106 N.H. 551, 215 A.2d 695 (1965); Dunlap v. Dunlap, 84 N.H. 352, 150 A. 905 (1930).

[27]Tucker v. Tucker, 395 P.2d 67, 68 (Okla. 1964).

[28]*E.g.*, Small v. Morrison, 185 N.C. 577, 118 S.E. 12, 16 (1923).

[29]Cases cited note 1 *supra*.

[30]37 Wash. 242, 79 P. 788 (1905).

[31]*See, e.g.*, Emery v. Emery, 45 Cal. 2d 421, 289 P.2d 218 (1955); Buttrum v. Buttrum, 98 Ga. App. 226, 105 S.E.2d 510 (1958); Nudd v. Matsoukas, 7 Ill.2d 608, 131 N.E.2d 525 (1956); Mahnke v. Moore, 197 Md. 61, 77 A.2d 923 (1951); Dunlap v. Dunlap, 84 N.H. 352, 150 A. 905 (1930); Cowgill v. Boock, 189 Ore. 282, 218 P.2d 445 (1950); Goller v. White, 20 Wis.2d 402, 122 N.W.2d 193 (1963).

parental immunity rule, quoted in the 1891 *Hewellette* case,[32] to the present, the "exceptions . . . have almost swallowed the rule."[33] Exceptions have been made where the parent's tortious activity arose in the conduct of his business,[34] where the parent-child relationship has been manifestly abandoned,[35] and where liability insurance has been held to abrogate the family peace and harmony basis of the doctrine.[36]

Numerous courts have permitted an unemancipated child to sue his father for injuries which the child sustained as a result of the parent's business negligence.[37] These courts "distinguish between claims arising out of negligence of the parent in the discharge of parental duties and the negligence of the parent in connection with the conduct of his business or employment."[38] For instance, recovery has been allowed in an action by an unemancipated child against his father for personal injuries sustained when the father, while operating his business vehicle for business reasons, ran over the child.[39] The court allowed recovery because it considered the "relationship between the two at the time of [the] accident was not parent and child, but driver and pedestrain."[40] The judicial feeling is that, when a parent is engaged in his business, he owes the same duty to his child that he owes to any other member of the community.[41]

Parent-unemancipated child tort suits have been permitted where

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[32]Note 21 and accompanying text.

[33]Badigian v. Badigian, 9 N.Y.2d 472, 174 N.E.2d 718, 722, 215 N.Y.S.2d 35, 40 (1961) (Fuld, J., dissenting).

[34]Trevarton v. Trevarton, — Colo. —, 378 P.2d 640 (1963); Dunlap v. Dunlap, 84 N.H. 352, 150 A. 905 (1930); Signs v. Signs, 156 Ohio St. 566, 103 N.E.2d 743 (1952); Worrell v. Worrell, 174 Va. 11, 4 S.E.2d 343 (1939); Borst v. Borst, 41 Wash.2d 243, 251 P.2d 149 (1952); Lusk v. Lusk, 113 W.Va. 17, 166 S.E. 538 (1932). *See generally* Sanford, *Personal Torts Within the Family*, 9 VAND. L. REV. 823, 835 (1956).

[35]*See* Buttrum v. Buttrum, 98 Ga. App. 226, 105 S.E.2d 510 (1958); Emery v. Emery, 45 Cal. 2d 421, 289 P.2d 218 (1955); Nudd v. Matsoukas, 7 Ill. 2d 608, 131 N.E.2d 525 (1956); Teramano v. Teramano, 6 Ohio St. 2d 117, 216 N.E.2d 375 (1966); Cowgill v. Boock, 189 Ore. 282, 218 P.2d 445 (1950).

[36]Hebel v. Hebel, 435 P.2d 8 (Alas. 1967); Balts v. Balts, 273 Minn. 419, 142 N.W.2d 66 (1966); Briere v. Briere, 107 N.H. 432, 224, A.2d 588 (1966); Dunlap v. Dunlap, 84 N.H. 352, 150 A. 905 (1930); Gelbman v. Gelbman, 23 N.Y.2d 434, 245 N.E.2d 192, 297 N.Y.S.2d 529 (1969); Worrell v. Worrell, 174 Va. 11, 4 S.E.2d 343 (1939); Lusk v. Lusk, 113 W.Va. 17, 166 S.E. 538 (1932); Goller v. White, 20 Wis.2d 402, 122 N.W.2d 193 (1963).

[37]Cases cited note 34 *supra*.

[38]Trevarton v. Trevarton, — Colo. —, 378 P.2d 640, 642 (1963).

[39]Borst v. Borst, 41 Wash. 2d 642, 251 P.2d 149 (1952).

[40]251 P.2d at 157.

[41]*See generally* Trevarton v. Trevarton, — Colo. —, 378 P.2d 640 (1963); Dunlap v. Dunlap, 84 N.H. 352, 150 A. 905 (1930); Signs v. Signs, 156 Ohio St. 566, 103 N.E.2d 743 (1952); Worrell v. Worrell, 174 Va. 11, 4 S.E.2d 343 (1939); Borst v. Borst, 41 Wash. 2d 243, 251 P.2d 149 (1952); Lusk v. Lusk, 113 W.Va. 17, 166 S.E. 538 (1932).

the tortious action of the parent is deemed willful or wanton.[42] The actions typically show that the parent has manifestly abandoned the parent-child relationship. Where, for instance, the parent's drunkenness causes an automobile accident which injures the child, the child has been allowed recovery.[43] Recovery has also been granted for mental injuries intentionally inflicted by a father upon his infant daughter.[44] The fact situation shows that the father had totally disregarded his duty as a parent. In holding in favor of the daughter, the court stated:

> On its face, the rule [of parental immunity] is a harsh one. . . . The father who brutally assaults his son or outrages his daughter ought not to be heard to plead his parenthood and the peace of the home as an answer to an action seeking compensation for the wrong. . . . Outside that relation [of parent and child], the rules are inapplicable; and any attempt to apply them leads to irrational and unjust results.[45]

An increasingly common circumstance where parent-unemancipated child tort suits have been permitted is that where liability insurance is held to negate the underlying arguments in favor of parental immunity.[46] Courts have traditionally held that insurance does not create liability where none exists in the absence of such insurance,[47] but there is a recent tendency for courts to take notice of insurance as a fact of life which should not be disregarded in parent-child tort suits.[48] While the judicial reliance upon the existence of liability insurance is not confined to cases within the last decade,[49] it is significant to consider the recent holdings of five jurisdictions.

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[42]Cases cited note 35 *supra*.

[43]*See, e.g.*, Wright v. Wright, 85 Ga. App. 721, 70 S.E.2d 152 (1952); Cowgill v. Boock, 189 Ore. 282, 218 P.2d 445 (1950); Hoffman v. Tracy, 67 Wash. 2d 31, 406 P.2d 323 (1965).

[44]Mahnke v. Moore, 197 Md. 61, 77 A.2d 923 (1951). This decision has been interpreted by the *Sherby* court as "a narrow exception" to the parental immunity rule. Sherby v. Weather Bros. Transfer Co., 421 F.2d 1243, 1245 (4th Cir. 1970).

[45]77 A.2d at 925, *quoting* Dunlap v. Dunlap, 84 N.H. 352, 150 A. 905, 909 (1930).

[46]Cases cited note 36 *supra*. Note that five of the eight cases have been decided since 1963.

[47]*See, e.g.*, Villaret v. Villaret, 169 F.2d 677 (D.C. Cir. 1948); Owens v. Auto Mut. Indem. Co., 235 Ala. 9, 177 So. 133 (1937); Rambo v. Rambo, 195 Ark. 832, 114 S.W.2d 468 (1938); Luster v. Luster, 299 Mass. 480, 13 N.E.2d 438 (1938); Siembab v. Siembab, 202 Misc. 1053, 112 N.Y.S.2d 82 (Sup. Ct. 1952), *rev'd on other grounds*, 284 App. Div. 652, 134 N.Y.S.2d 437 (1954); Worrell v. Worrell, 174 Va. 11, 4 S.E.2d 343 (1939).

[48]Hebel v. Hebel, 435 P.2d 8 (Alas. 1967); Balts v. Balts, 273 Minn. 419, 142 N.W.2d 66 (1966); Briere v. Briere, 107 N.H. 432, 224 A.2d 588 (1966); Gelbman v. Gelbman, 23 N.Y.2d 434, 245 N.E.2d 192, 297 N.Y.S.2d 529 (1969); Goller v. White, 20 Wis.2d 402, 122 N.W.2d 193 (1963).

[49]*See* Dunlap v. Dunlap, 84 N.H. 352, 150 A. 905 (1930); Worrell v. Worrell, 174 Va. 11, 4 S.E.2d 343 (1939); Lusk v. Lusk, 113 W.Va. 17, 166 S.E. 538 (1932).

Since 1963, five states[50] while permitting parent-child tort suits, have totally abrogated parental immunity or have emasculated its effect.[51] The suits in all jurisdictions involve negligent vehicular accidents caused by an insured family-member driver. A significant basis upon which these jurisdictions rest their holdings is the belief that the existence of liability insurance tends to negate any possible disruption of family harmony and parental discipline.[52] The belief is that the parent-child litigation is, in reality, between the injured party and the negligent driver's insurance company.[53] The suit is, therefore, not between parent and child, and there is only a remote possibility of any unpleasantness which would tend to disrupt the family unit. One court, in spite of the fact that it determined that the plaintiff was not allowed to recover from the defendant's insurer, wrote:

> [W]e consider the wide prevalence of liability insurance in personal injury actions a proper element to be considered in making the policy decision of whether to abrogate parental immunity in negligence actions.[54]

The fact that five states have recently permitted parent-unemancipated child tort suits where liability insurance was involved implies judicial hostility toward parental immunity. More importantly, these decisions, all handed down since 1963, show that there is a definite trend toward liberalization in parent-unemancipated child tort suits.

The plaintiff in *Sherby* based his argument for allowance of recovery against the employer on the existence of this trend toward liberalization.[55] The *Sherby* court, however, was not persuaded that, in light of the trend, "there is no logical reason to deny a child the right to sue the father's employer for injuries incurred by reason of the father's

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[50]Cases cited note 48 *supra.*

[51]Wisconsin was the first state to abrogate parent-child immunity. The state stopped short of total abrogation by continuing immunity in circumstances

> (1) [W]here the alleged negligent act involves an exercise of parental authority over the child; and (2) where the alleged negligent act involves an exercise of ordinary parental discretion with respect to the provision of food, clothing, housing, medical and dental services, and other care.

Goller v. White, 20 Wis. 2d 402, 122 N.W.2d 193, 198 (1963). Both New Hampshire and Minnesota totally abrogated parent-child immunity in 1966. Balts v. Balts, 273 Minn. 419, 142 N.W.2d 66 (1966); Briere v. Briere, 197 N.H. 432, 224 A.2d 588 (1966). Alaska, in 1967, appears to have totally abolished parent-child immunity. Hebel v. Hebel, 435 P.2d 8 (Alas. 1967). New York, in 1969, surpassed the other four states by totally abolishing any and all forms of intra-familial immunity. Gelbman v. Gelbman, 23 N.Y.2d 434, 245 N.E.2d 192, 297 N.Y.S.2d 529 (1969).

[52]Cases cited note 48 *supra.*

[53]*Id.*

[54]Goller v. White, 20 Wis.2d 402, 122 N.W.2d 193, 197 (1963).

[55]421 F.2d 1243, 1246 (4th Cir. 1970).

negligence while engaged in his regular employment and within its scope."[56] The apparent leaning of Maryland's highest court was interpreted by the Fourth Circuit as being against the plaintiff's argument.[57]

The trend permitting tort suits between an unemancipated child and his parent began only in the middle of the last decade.[58] However, the trend in respondeat superior suits between an injured child and his father's corporate employer for injuries inflicted by the father while acting within the scope of his employment dates back to 1930.[59] The decisions have been decidedly in favor of the injured children, notwithstanding the *Sherby* decision.[60]

Of the sixteen jurisdictions which have ruled on the employer's liability to his employee's child, eleven have held in favor of the plaintiff.[61] Only five, including Maryland, by implication in *Sherby,* have held for the defendant-employer.[62] In these sixteen jurisdictions, nearly all the cases have involved injuries sustained as a result of negligent vehicular accidents.[63] These accidents have generally caused injury to the child in one of two ways, either by the child being struck by the employer's vehicle[64] or by the child being injured while a passenger in the vehicle during its collision with another vehicle.[65] Regardless of the

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[56]*Id.* at 1246-47.

[57]*See generally* cases cited note 12 *supra.*

[58]Goller v. White, 20 Wis. 2d 402, 122 N.W.2d 193 (1963).

[59]Chase v. New Haven Waste Material Corp., 111 Conn. 377, 150 A. 107 (1930).

[60]*See* cases cited notes 61 and 62 *infra.*

[61]The eleven states indicating that the child may recover are: Alabama, Connecticut, Georgia, Massachusetts, New Jersey, New York, North Carolina, Pennsylvania, Texas, West Virginia and Wisconsin. Mi-Lady Cleaners v. McDaniel, 235 Ala. 469, 179 So. 908 (1938); Chase v. New Haven Waste Material Corp., 111 Conn. 377, 150 A. 107 (1930); Stapleton v. Stapleton, 85 Ga. App. 728, 70 S.E.2d 156 (1952); O'Connor v. Benson Coal Co., 301 Mass. 145, 16 N.E.2d 636 (1938); Radelicki v. Travis, 39 N.J. Super. 263, 120 A.2d 774 (1956); Sullivan v. Christiensen, 191 N.Y.S.2d 625 (Sup. Ct. 1959); Wright v. Wright, 229 N.C. 503, 50 S.E.2d 540 (1948); Koontz v. Messer, 320 Pa. 487, 181 A. 792 (1935); Littleton v. Jordan, 428 S.W.2d 472 (Tex. Civ. App. 1968); Smith v. Smith, 116 W.Va. 230, 179 S.E. 812 (1935); Le Sage v. Le Sage, 224 Wis. 57, 271 N.W. 369 (1937).

[62]The five states holding in favor of the employer are: California, Illinois, Maryland, Nebraska, and Tennessee. Sherby v. Weather Bros. Transfer Co., 421 F.2d 1243 (4th Cir. 1970) (construing Maryland law); Myers v. Tranquility Irrig. Dist., 26 Cal. App. 2d 385, 79 P.2d 419 (D. Ct. App. 1938); Meece v. Holland Furnace Co., 269 Ill. App. 164 (1933); Pullen v. Novak, 169 Neb. 211, 99 N.W.2d 16 (1959); Graham v Miller, 182 Tenn. 434, 187 S.W.2d 622 (1945).

[63]*See generally* cases cited notes 61 and 62 *supra.*

[64]Chase v. New Haven Waste Material Corp., 111 Conn. 377, 150 A. 107 (1930); Meece v. Holland Furnace Co., 261 Ill. App. 164 (1933); O'Connor v. Benson Coal Co., 301 Mass. 145, 16 N.E.2d 636 (1938); Pullen v. Novak, 169 Neb. 211, 99 N.W.2d 16 (1959); Graham v. Miller, 182 Tenn. 434, 187 S.W.2d 622 (1945).

[65]Mi-Lady Cleaners v. McDaniel, 235 Ala. 469, 179 So. 908 (1938); Myers v. Tranquility Irrig. Dist., 26 Cal. App. 2d 385, 79 P.2d 419 (1938); Stapleton v. Staple-

precise manner in which the accident occurred, the basis of recovery in all cases where the employer is sued is respondeat superior.[66]

The basis of an employer's defense in a respondeat superior suit by his servant's child is generally reduced to that of relying on one or a combination of the following contentions. First, since the child is precluded by the parental immunity rule from suing his parent as a matter of public policy,[67] the master cannot be made to answer in damages for an injury which did not give rise to liability in the servant. The master's liability is derivative of, or dependent upon, that of his servant. Second, the granting of recovery to the child would lead to family disharmony because of the employer's rights under indemnification to secure recovery from his tortious employee-parent.[68]

Courts tend to treat as analogous respondeat superior cases involving suits by an injured child against his father's employer and an injured wife against her husband's employer.[69] Those which deem it necessary to grant or deny recovery to an injured child are inclined to rely upon a prior decision which has held that a wife may or may not sue her husband's employer.[70] This judicial tendency is constant, almost without exception.[71]

Sherby is in line with this tendency, as evidenced by the wife-employer case cited by the court as being closest to its fact situation. *Riegger v. Bruton Brewing Co.*,[72] relied upon as controlling in the *Sherby* decision,[73] held that an employer was not liable to his employee's wife for personal injuries inflicted by the employee-husband within his scope of employment. The *Riegger* court, in line with the employer's contentions, stated that it considered *liability* and not *culp-*

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ton, 85 Ga. App. 728, 70 S.E.2d 156 (1952); Schomber v. Tait, 207 Misc. 328, 140 N.Y.S.2d 746 (1955); Wright v. Wright, 229 N.C. 503, 50 S.E.2d 540 (1948); Le Sage v. Le Sage, 224 Wis. 57, 271 N.W. 369 (1937).

[66]*See, e.g.*, Myers v. Tranquility Irrig. Dist., 26 Cal. App. 2d 385, 79 P.2d 419 (1938); Chase v. New Haven Waste Material Corp., 111 Conn. 377, 150 A. 107 (1930).

[67]Hewellette v. George, 68 Miss. 703, 9 So. 885 (1891).

[68]Cases cited notes 61 and 62 *supra*.

[69]*Compare* Schubert v. August Schubert Wagon Co., 249 N.Y. 253, 164 N.E. 42 (1928) *and* Garnto v. Henson, 88 Ga. App. 320, 76 S.E.2d 636 (1953) *with* Sullivan v. Christiensen, 191 N.Y.S.2d 625 (Sup. Ct. 1959) *and* Stapleton v. Stapleton, 85 Ga. App. 728, 70 S.E.2d 156 (1952).

[70]*Id.*

[71]Illinois appears as a significant exception in that it denies a child the right to recover from its father's employer, but permits a wife to recover from the employer. *Compare* Meece v. Holland Furnace Co., 269 Ill. App. 164 (1933) *with* Tallios v. Tallios, 345 Ill. App. 387, 103 N.E.2d 507 (1952).

[72]178 Md. 518, 16 A.2d 99 (1940).

[73]421 F.2d 1243, 1246 (4th Cir. 1970).

ability to be the true basis of the doctrine of respondeat superior.[74] The employee-husband is immune from tort liability to his wife, in spite of his culpable actions, and, accordingly, it is illogical to hold the employer liable for acts of the agent who escapes liability.

The possibility of employer indemnification is a further basis used to support non-liability. In *Myers v. Tranquility Irrigation District,*[75] factually similar to *Sherby,* the court denied recovery from the employer, basing its decision on the belief that a judgment against the employer would finally be paid by the parent because of the employer's right of indemnification. The *Myers* court felt that since the family harmony argument bars suit by the child against his parent, the same argument should bar suit by the son against the father's employer. The fact that the father could be forced to indemnify his employer would cause family discord and would tend to cause a breakdown in parental discipline.[76]

Courts holding that an employer is liable to his employee's child typically hold that the employer's liability to the injured child is primary and is not based upon his employee's liability or immunity therefrom.[77] These courts hold that the agency maxim of "he who acts through another acts by himself" is paramount when determining an employer's liability.[78] It is the employee's responsibility for the negligent injuries to his child for which the employer must answer in damages.[79]

> The servant has committed a tort which by ordinary rules of law should make the master liable, and there is no reason to include the latter within the purely personal immunity of the family.[80]

The employer's assertion that his right of indemnification against his tortfeasor-employee will lead to family disharmony by circumventing

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[74]*Contra,* PROSSER at 890. Dean Prosser states that such an argument "confuses immunity from suit with lack of responsibility."

[75]26 Cal. 2d 385, 70 P.2d 419 (1938).

[76]Of little persuasive value in combatting this argument is Professor Prosser's statement that the

> master's recovery over against the servant is not based upon any continuation of the original domestic claim, but upon the servant's independent duty of care for the protection of the master's interests. . . .

PROSSER at 890. The technical distinction mentioned here does not alleviate the fact that the parent has been forced to pay indirectly damages to his injured child.

[77]Cases cited note 61 *supra.*

[78]*Id.*

[79]*See* PROSSER at 890.

[80]PROSSER at 890.

parental immunity might be countered merely by a judicial denial of indemnity.[81]

The *Sherby* court did not specifically reject the arguments presented by either Professor Prosser or the *Restatement (Second) of Agency,* both of which militate in favor of the plaintiff in a suit by a child against his father's employer. Prosser has termed decisions such as that in *Sherby* as the "almost entirely obsolete" view of vicarious liability,[82] and he has stated that the overwhelming majority of courts now hold the employer liable even though the employee is immune from suit.[83] Buttressing Prosser's observations is the view espoused by the *Restatement*[84] which states that in a respondent superior suit, the principal has no defense because of the fact that the agent has an immunity from civil liability.[85]

In light of the *Erie* doctrine, the holding in *Sherby* is tenable.[86] With the significant exception of *Mahnke v. Moore,*[87] an extreme factual situation,[88] the Court of Appeals of Maryland has been consistent in its espousal of the doctrine of parental tort immunity.[89] The *Sherby* court chose to rely heavily on the *Riegger* case because of its close analogy to the *Sherby* fact situation, and the 1968 Maryland Court of Appeals' reaffirmance of *Riegger.*[90] The Fourth Circuit has, thus, preserved Maryland's position as a stalwart supporter of the employer's non-liability under this narrow case of vicarious liability.

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[81]*Id.*

[82]*Id.*

[83]*Id.*

[84]In an action against a principal based on the conduct of a servant in the course of employment . . .[t]he principal has no defense because of the fact that . . . the agent had an immunity from civil liability as to the act.
RESTATEMENT (SECOND) OF AGENCY § 217 (b)(ii) (1958).

[85]Chief Judge Cardozo wrote, of the employer's lack of immunity defense, that "the employer may not hide behind the skirts of the employee's immunity." Schubert v. August Schubert Wagon Co., 249 N.Y. 253, 164 N.E. 42, 43 (1928).

[86]The holding is tenable when examined in light of Professor Wright's statement:

> In vicariously creating the law for a state, the federal court may look to such sources as the Restatements of Law, treatises and law review commentary, and "the majority rule." The federal court must keep in mind, however, that its function is not to choose the rule that it would adopt for itself, if free to do so, but to choose the rule that it believes the state court, from all that is known about its methods of reaching decisions, is likely in the future to adopt.

C. WRIGHT, LAW OF FEDERAL COURTS 240 (2d ed. 1970).

[87]197 Md. 61, 77 A.2d 923 (1940).

[88]A father murdered his common-law wife within the sight of their infant daughter. The father later committed suicide in front of his daughter after forcing the child to remain in the same room with the mother's decaying body for a week.

[89]*See generally* cases cited note 12 *supra.*

[90]Stokes v. Association Indep. Taxi Operators, 248 Md. 690, 237 A.2d 762 (1968).