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Tort Liability of a Parent to a Minor Unemancipated Child for Wilful and Wanton Acts

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TORT LIABILITY OF A PARENT TO MINOR UNEMANCIPATED CHILD FOR WILFUL AND WANTON ACTS

I. Introduction

It is well settled in the law that, barring any defenses, one can recover a judgment for the damages resulting from an intentional interference with his person. Thus, let us suppose that *A* is sitting on a park bench minding his own business, when *B*, a stranger, approaches and without cause gives *A* a severe blow on the side of the head, which blow causes serious injuries to *A*. There is no question but that *A* is entitled to recover damages from *B* in a civil action. The reason for the recovery being the fact that *A* has a legally recognized interest of freedom from intentional interferences with his person and *B* has a legal duty not to interfere with this interest. *B*'s breach of this duty renders him liable to *A* for any harm which resulted as a result thereof.

There is little room for argument as to *B*'s liability in the aforementioned stiuation. However, by adding the fact that *A* is the unemancipated minor son of *B* the entire complexion of the situation changes and the issue arises as to whether or not the relationship of parent and child will in any way affect *B*'s liability. This, basically, is the problem involved in the case of a wilful and wanton injury to a minor child, which injury was caused by its parent. More specifically, are the parent's acts privileged, and if so, to what extent?

II. Common Law View As To The Parents Liability

Much confusion exists as to the common law view on parental liability. The law has developed as a matter of conjecture and inference. The cleavage of opinion as to actual common law rule is exemplified by the following views. The view of some courts has been:

> "There has never been a common-law rule that a child could not sue its parent. It is a misapprehension of the situation to start with that idea and to treat the suits which have been allowed as exceptions to the general rule. The minor has the same right to redress for wrongs as any other individual."[1]

Other courts have stated:

> "At common law, the right of the father to the control and custody of his infant child grew out of the corresponding duty on his part to maintain, protect and educate it. . . . In case parental power was abused, the child had no civil remedy against the father for the personal injuries inflicted."[2]

[1] Dunlap v. Dunlap, 84 N.H. 352, at 353, 150 Atl. 905, at 906 (1930); See also: Mahnke v. Moore, 197 Md. 1, at 2, 77 A.2d 923, at 924 (1951); Briggs v. City of Philadelphia, 112 Pa. Super. 50, at 51, 170 Atl. 871, at 872 (1934).

[2] McKelvey v. McKelvey, 111 Tenn. 388, 77 S.W. 664 (1903). See also: Red-

It is most obvious that these views cannot be reconciled. While both are quite positive in their assertion as to the common law rule, neither has cited any authority for the position which they have taken.

The earlier text writers have expressed varying and inconsistent views on the subject. In this specific aspect of the parent-child relationship, the first, and perhaps the most elementary, premise advanced by such writers is, "Thy father may correct the child in a reasonable manner. . . ."[3] However, when the correction exceeds the bounds of reasonableness, the question arises as to whether the appropriate remedy is civil or criminal. While all appear to admit that the father may be criminally liable for malicious acts injurious to the child, there is a vast area of disagreement as to whether or not there exists any civil liability for such acts.

One view was that the child had no civil remedy:

> ". . . if he plainly exceeds all bounds, he is liable to criminal prosecution, but it seems never to have been held that the child might maintain a personal action for his injury. In principle there seems to be no reason why such an action should not be sustained; but the policy of permitting actions that thus invite the child to contest the parents' authority is so questionable, that we may well doubt if the right will ever be sanctioned."[4]

However, another authority has taken the opposite view:

> "The parent has a right to govern his minor child; and, as incident to this, he must have power to correct him. The maxim is, that he has power to chastise him moderately. The exrecise of this power must be, in a great measure, discretionary. He may so chastise his child as to be liable in an action by the child against him for a battery. The child has rights which the law will protect against the brutality of a barbarous parent. . . . For error of opinion, he ought to be excused; but for malice of heart, he must not be shielded from the just claims of the child."[5]

Despite this confusion, the greater number of courts have accepted the rule to be that no cause of action was allowed; not because of any direct authority to that effect but simply because of the absence of any authority to the contrary.

III. Present Majority View

The majority of the American courts hold that an unemancipated minor child has no cause of action for personal injuries inflicted upon it by its parent. The first reported case, directly in point, in which this

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ding v. Redding, 235 N.C. 638, 70 S.E.2d 676 (1952); Small v. Morrison, 185 N.C. 577, 118 S.E. 12 (1923).

[3] Browne, Domestic Relations p. 75 (2d ed. 1890).

[4] Cooley, Torts p. 197 (2d ed. 1888).

[5] Reeve's, Domestic Relations p. 420 (3d ed. 1862).

question arose was *Hewellette v. George.*[6] In that case, the plaintiff, while a minor, had been wrongfully confined in an insane asylum by her mother. Upon her release she brought an action for the injuries sustained. The action was disallowed and the court stated:

> "But so long as the parent is under obligation to care for, guide and control, and the child is under reciprocal obligation to aid comfort and obey, no such action as this can be maintained."[7]

It is to be noted that the Mississippi Court, in arriving at this decision, cited no authority for its position. The court went on to say that public policy and the interests of society forbid the minor child civil redress for personal injuries suffered at the hand of the parent. The public policy involved being the maintenance of domestic tranquility. But can it be reasonably argued that tranquility exists when the parent has inflicted injury upon the child to such a degree that the child has seen fit to institute a lawsuit? It would appear that the relationship which the court is so desirous of protecting is no longer in existence.

Twelve years later the Tennessee Court was confronted with a similar situation in *McKelvey v. McKelvey.*[8] In holding that the action was not allowable, the court followed the same line of reasoning as the *Hewellette* case and cited it as its only authority.

The extreme which can be reached by the application of the "public policy" doctrine can best be appreciated by reference to *Roller v. Roller.*[9] The defendant had been convicted of rape, committed upon his fifteen (15) year old daughter. The daughter then commenced an action to recover damages. The defendant's demurrer to the complaint was overruled and judgment was subsequently entered for the plaintiff. On review by the Supreme Court of the State of Washington this judgment was reversed, the court holding that the demurrer should have been sustained. In making its decision, the court made the following statement:

> "The rule of law prohibiting such suits between parent and child is based upon the interest that society has in preserving harmony in the domestic relations, an interest which has been manifested since the earliest organization of a civilized government, an interest inspired by the universally recognized fact that the maintenance of harmonious and proper family relations is conducive to good citizenship, and therefore works to the welfare of the state."[10]

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[6] 68 Miss. 703, 9 So. 885 (1891).
[7] *Id.* at 887.
[8] 111 Tenn. 388, 77 S.W. 664 (1903).
[9] 37 Wash. 242, 79 Pac. 788 (1905).
[10] *Ibid.*

The court then considered the appellant's argument that any harmonious relationship which had existed had been so rudely disturbed that it could never again be re-established, and therefore, the reason for the rule being non-existent, the rule does not apply.

That court admitted that, "There seems to be some reason in this argument . . . .",[11] but then went on to hold:

> " . . . . , if it be once established that a child has a right to sue a parent for a tort, there is no practical line of demarcation which can be drawn, for the same principle which would allow the action in the case of a heinous crime, like the one involved in this case, would allow an action to be brought for any other tort."[12]

However, the principle which would allow recovery in the case of an intentional tort is not applicable where negligence is involved. Thus the principle allowing the action would not allow an action to be brought for any tort. Surely it is not too difficult to draw a line between intentional torts and negligence; yet the court appears to be saying just that! There does not seem to be any practical difficulty in denying recovery in cases of negligence, yet allowing it in those cases involving wilful and wanton conduct. If the triers of fact are able to compare the percentage of negligence,[13] they certainly must be able to distinguish between negligence and conduct which is willful and wanton, or between conduct which disrupts family harmony and that which does not.

The "public policy" argument appears to be the major reason for refusing to allow a minor redress for parental-inflicted wrongs. The idea being that the best interests of society are furthered by harmonious domestic relations. That this premise is sound, there is no dispute. But can the application of this principle be justified when the harmonious family ties are irreparably broken and there exists an uncompensated injury? Even granting that the family relations could be adequately restored to the satus quo, is this more easily accomplished when the injuries inflicted are left uncompensated?

The courts, however, in their consideration of this problem, have not rested their decisions solely on the basis of public policy. Another reason frequently advanced for the disallowance of a cause of action is the "inheritance theory." That is, assuming that the action were allowed and the child recovered a judgment, should the child then die, the parent would become heir to the very property taken away from him.[14] The basis of the theory is the mere possibility of the child's death, rather than any immediate danger that the feared consequences

[11] *Ibid.*
[12] *Id.* at 789.
[13] WIS. STATS. §331.045 (1955).
[14] 79 Pac. at 789.

will occur. By this reasoning it would appear that the courts should refuse to allow an action by any person against one who is his possible heir. The inherent weakness of the "inheritance theory" is shown by the fact that it has never been employed as the sole ground for denying recovery, and the courts have never shown any tendency to put any great reliance on its logic.

A third argument used to defeat the child's cause of action is the "family exchequer" theory. The reasoning here is that the money of the family should be held for the benefit of all the family.[15] However this same theory does not bar an action against the parent by a stranger to the family relationship, in which case the benefits of the family assets are withheld from the members of the family; nor does it apply so as to require a minor child to distribute, among the family, any recovery received in an action against one not a member of the family.

The final argument advanced in denying the cause of action is the analogy of the parent-child relationship with that of the husband-wife relationship. The common law barred suits between husband and wife because of the very nature of the relationship created by marriage:

> "By marriage, the husband and wife are one person in law: that is, the very being as legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband . . . ."[16]

Thus, by reason of this concept, to allow a husband, or wife, to sue the other spouse would be to allow, in effect, a person to sue himself! While this may have been true as to suits between husband and wife, no such similar relationship exists between parent and child. The legal existence of parent and child are separate and distinct.

The majority of the American courts, then, have refused to allow an unemancipated minor child a cause of action aganist its parents for personal torts, regardless of the nature of the tort or the degree of harm inflicted. This conclusion has been supported by one or more of the following reasons: public policy, *i.e.*, the maintenance of harmonious family relationships; "inheritance theory," viz., should the child die after recovering a judgment, the parent would be heir to the very property taken from him; "family exchequer" theory, viz., the money recovered by the child should be used for the benefit of all the family and not just one: and finally, the analogy between the common law relationship of husband and wife, *i.e.*, the very relationship existing between the parties precludes the possibility of a suit by one agaist the other.

IV. Present Minority View

The first deviation from the rule laid down in *Hewellette v. George*

[15] *Ibid.*

[16] 1 Chitty's Blackstone 355 (1886); See Also: 2 Kent's Commentaries 180 (rev. ed. 1892).

occurred in 1930. At that time, the New Hampshire Supreme Court, in *Dunlap v. Dunlap*,[17] made the first break with the doctrine of parental immunity. The plaintiff was the defendant's minor son and was working for the defendant at the time he received the injuries complained of. Defendant had made a motion for nonsuit upon the ground that a minor child cannot sue his parent for tort. Plaintiff excepted to the granting of the motion and appealed the case. In a thoughtful analysis of the problem and after a careful consideration of the reasons advanced for non-liability, the court held as follows:

> "The law does not make fetishes of ideas. It limits them to their proper spheres. And so this concept of family life ought not to be used as a cloak for intended wrongs. It is always to be borne in mind that denial of recovery has not been put upon the ground that the parent was not a wrongdoer. His conceded wrong has not even been excused. He has escaped liability because it has been thought that a right of recovery would lead to worse results. The child has been sacrificed for the family good. Argument is not needed to sustain the thesis that such a proposition be limited to cases clearly within the reason for the rule."

This marks the first of a handful of decisions which have allowed the minor a cause of action against its parent. While at first glance, the paucity of decisions, from 1930 to the present, which have allowed such actions would appear to be indicative of the fact that such actions are viewed with disfavor, this is not the situation by any means. Only three cases[18] have been decided since that time in which it was intimated that a minor would not have a cause of action against its parent when an intentional tort is involved. However, of these three, the first[19] has been impliedly overruled,[20] leaving only two cases, since 1930, to support the non-liability doctrine—only one of which actually involved conduct which was wilful and wanton.[21]

In considering the cases espousing the view that the unemancipated minor child has a civil remedy against its parents for wilful and wanton conduct it will perhaps be best to do so in light of the reasons which have been advanced in favor of parental immunity.

The first, and most persuasive argument advanced for non-liability is the public policy involved in the preservation of harmonious family relations. There is no doubt as to the soundness of this basic premise. The chief error into which the courts have fallen is simply that this premise has no application in the case of a wilful and wanton act on

[17] 84 N.H. 352 at 358, 150 Atl. 905, at 910 (1930).
[18] Chastain v. Chastain, 50 Ga. App. 241, 177 S.E. 828 (1934); Owens v. Auto Mut. Indemnity Co., 235 Ala. 9, 177 So. 133 (1937); Cook v. Cook, 232 Mo. App. 994, 124 S.E.2d 675 (1939).
[19] Chastain v. Chastain, see note 18 *supra*.
[20] Wright v. Wright, 85 Ga. App. 727, 70 S.E. 2d 152 (1952).
[21] Cook v. Cook, see note 18 *supra*

the part of the parent. The more well reasoned decisions have recognized this fact.

> "But when, as in this case, the parent is guilty of acts which show complete abandonment of the parental relation, the rule giving him immunity from suit by the child, on the ground that discipline should be maintained in the home, cannot logically be applied, for when he is guilty of such acts he forfeits his parental authority and privilege, including his immunity from suit. Justice demands that a minor shall have a right of action against a parent for injuries resulting from cruel and inhuman treatment or for malicious and wanton wrongs."[22]

In *Emery v. Emery*,[23] the California Court, in allowing a minor to maintain the action made the following statement:

> "While it may seem repugnant to allow a minor to sue his parent, we think it more repugnant to leave a minor child without redress for the damage he has suffered by reason of his parent's wilful or malicious conduct. A child, like every other individual has a right to freedom from such injury. Accordingly, we conclude that an unemancipated minor may sue his parent for a wilful or malicious tort, ..."

These pronouncements are merely a modern application of the common law maxim *cessanti ratione legis cassat ipsa lex*.[24] Common sense alone shows the fallacy of the majority argument. If the act of the parent is such that it disrupts family unity sufficiently enough to compel the child to seek civil redress, it is most obvious that the courts are chasing a "will-o'-the-wisp" when the cause of action is denied on the grounds that its allowance would endanger family harmony. For in fact, there is no longer in existence any family harmony which is in need of protection! The classic example of such inconsistency, of course, is *Roller v. Roller*.[25] Unless the mores and customs of the inhabitants of the State of Washington differ radically from those of the majority of the American people it would appear to be uncontroverted that the rape of a minor child by the father is an act sufficient to disrupt harmonious family relations to a point beyond repair. The quick reply of the proponents of the doctrine of non-liability—that a practical line of demarcation cannot be drawn—is equally absurd. Is it too difficult to distinguish between negligence on the one hand and wilful and wanton conduct on the other? Is such not the very function of a jury? Such problems are encountered every day in the criminal courts, yet there has been no clamor to refuse the

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[22] Mahnke v. Moore, 197 Md. 1, at 3, 77 A.2d 923, at 926 (1951).

[23] 45 Cal. App. 2d 421, at 428, 289 P.2d 218, at 224 (1955); followed in, Perkins v. Robertson, 140 Cal. App.2d 536, 295 P.2d 972 (1956). For statements of similar import see: Nudd v. Matsoukas, 7 Ill. App.2d 608, 131 N.E.2d 525 (1956); Cowgill v. Boock, 189 Ore. 282, 218 P.2d 445 (1950).

[24] When the reason for a rule ceases, the rule itself ceases.

[25] See note 9 *supra*.

state the right to prosecute because, for example, the line between ordinary negligence and negligence to a high degree is too difficult to ascertain.[26]

Even assuming that it would be exceedingly difficult to "draw a line," is that a valid reason for disallowing redress? Are we to deny the right to recovery merely because of difficulty of proof?

There is another patent defect in the reasoning behind the public policy argument. This is exemplified by those courts which deny the action on the grounds of public policy and then go on to state that the minor child will be protected by the state, through its criminal laws.[27] Such statements negate the very essence of the public policy argument. Are harmonious family relations to be preserved by refusing to allow the minor to institute a civil suit and at the same time putting the offending parent in jail? It would appear that the latter course of action is accomplishing the very result which the courts fear so much.

The inconsistency of the public policy argument is further shown by the fact that minors have always been allowed a cause of action against their parents in order to protect their property rights.[28] This inconsistency was quite clearly pointed out in *Wells v. Wells*:[29]

> "It may be that an action in tort by a parent against his minor child would introduce discord and contention into the home, but it is equally true that an action involving right in property, strictly speaking, brought by the parent aganist his minor child, would introduce discord and contention into the home and tend to disrupt the family relation, but it will not be claimed that the law forbids such action."

Are a minor's property rights to be considered more sacred than his personal rights? In effect, this is to say that if a parent commits even a technical trespass upon lands held by his child, the child will have civil redress for damages; but if that same father cruelly flogs his infant child, the child has no civil redress and is entitled to no compensation for his injuries. This is precisely the stand taken by the majority of the American courts today!

In allowing the unemancipated minor a cause of action against its parent, the courts have not been concerned with the "inheritance" and "family exchequer" theories,[30] which have been advanced as rea-

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[26] WIS. STATS. §940.08 (2) (1955).

[27] Smith v. Smith, 81 Ind. App. 566, 142 N.E. 128 (1924); Cook v. Cook, see note 18 *supra,* Roller v. Roller, see note 9 *supra.*

[28] Duke of Beaufort v. Berty, 1 P. Wms. 705, 24 Eng. Rep. 579 (1721); Lamb v. Lamb, 146 N.Y. 317, 41 N.E. 26 (1895); Morgan v. Morgan, 1 Atk. 489, 26 Eng. Rep. 310 (1737); Roberts v. Roberts, Hadres 96, 145 Eng. Rep. 399 (1655); Thomas v. Thomas, 2 K&J. 79, 69 Eng. Rep. 701 (1855).

[29] 48 S.W. 2d 109, at 111 (K.C., Mo., Ct. of App. 1932).

[30] Discussed Above.

sons for denying liability. Such arguments being inconsequential and of no great weight even in the reasoning of the majority.

The fourth argument advanced in support of the rule of non-liability is the alleged analogy between husband and wife. In considering this argument, the court held, in *Worrell v. Worrell*:[31]

> "We do not think that the suggested analogy of husband and wife to that of parent and child affords support for the rule. The distinction is clear. The relation of husband and wife is created by law, that of parent and child by nature. While at common law, and except as changed by statute, there is a conception of legal unity of husband and wife, neither at common law nor under our statute is there a conception of the legal identity of parent and minor child, either in their persons or in their property rights."

That the analogy drawn is invalid can readily be seen by reference to the previous mentioned fact that at common law a minor could sue its parent in matters concerning property rights.[32] Were the relationship between parent and child identical with that of husband and wife—as is assumed by the majority position—such suits would have been barred just as the wife was barred from maintaining a suit aganist her husband. The allowance of such action is clear proof that there was no common law concept of legal identity between parent and child.

A growing minority of American courts have refused to be bound by the precedent established by poor reasoning on the part of the earlier courts. A concise statement of the minority view is given in the recent Illinois case of *Nudd v. Matsoukas*,[33] in which the court held:

> "Any justification for the rule of parental immunity can be found only in a reluctance to create litigation and strife between members of the family unit. While this policy might be such justification to prevent suits for mere negligence within the scope of the parental relationship we do not conceive that public policy should prevent a minor from obtaining redress for wilful and wanton misconduct on the part of a parent. To tolerate such misconduct and deprive a child of relief will not foster family unity but will deprive a person of redress, without any corresponding social benefit, for an injury long recognized at common law . . . . We do not feel that the announcement of this doctrine should be left to the legislature. The doctrine of parental immunity, as far as it goes, was created by the courts. It is especially for them to interpret and modify that doctrine to correspond with prevalent considerations of public policy and social needs."

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[31] 174 Va. 11, at 15, 4 S.E.2d 343, at 345 (1939).

[32] See note 28 *supra*.

[33] 7 Ill. App.2d 608, at 617, 131 N.E.2d 525, at 531 (1956).

In recent years,[34] there has not been one instance of an appellate court denying an unemancipated minor a cause of action against its parent for wilful and wanton misconduct. The cases are numerous, however, which have denied the child a cause of action for simple negligence. It is significant however, that these decisions, for the most part, have expressly reserved the question as to whether or not a cause of action would lie for wilful and wanton misconduct,[35] either by express statement or by a direct specification that the reason the action does not lie is that only simple or ordinary negligence is involved. This is at least indicative of the fact that the courts are recognizing that a distinction is to be made between negligence and wilful and wanton misconduct, as affecting the child's cause of action against its parent.

V. Wisconsin's Position

As of yet, the Wisconsin Supreme Court has not been faced with the precise problem in question.[36] In actions for negligence, however, the cause of action on the minor's behalf has been expressly disallowed. The first case so holding was *Wick v. Wick*[37] in which the court made a general holding that an infant child could not maintain a tort action against the parent. Justice Crownhart, however, filed a vigorous dissent attacking the logic upon which the majority decision was based. As authority for his position he relied upon the Wisconsin Constitution.[38]

> "Every person is entitled to a certain remedy in the law for all injuries, or wrongs which he may receive in his person, property, or character; he ought to obtain justice freely, and without being obliged to purchase it, completely and without denial, promptly and without delay, conformably to the laws."

It was pointed out, in the dissent, that the above mentioned section makes as the supreme law of the State of Wisconsin, the common law maxim: *Ubi jus ibi remedium.*[39] (Disregarding, for the moment, the controversy as to the common law view). This being true, and there being no distinction made by the Constitution, in this particular provision, between property and personal rights, there is absolutely no justification for refusing the minor a cause of action against his parent, sounding in tort, and yet allowing that same minor a cause of action against the same parent—in order to protect his property rights. This view however, has never been accepted by the Wisconsin Court. In

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[34] Since Cook v. Cook, see note 18 *supra*, decided in 1939.
[35] Bulloch v. Bulloch, 45 Ga. App. 1, 163 S.E. 708 (1952); Lusk v. Lusk, 113 W. Va. 17, 166 S.E. 538 (1932); Securo v. Securo, 110 W Va. 1, 156 S.E. 750 (1931). In some instances, saying that the action would lie in such cases: Aboussie v. Aboussie, 270 S.W. 2d 636 (Tex. Civ. App. 1954); Siembab v. Siembab, 284. App Div. 652, 134 N.Y.S.2d 437 (1954).
[36] See: 13 Callaghan's Wisconsin Digest, Parent and Child §10.
[37] 192 Wis. 260, 212 N.W. 787 (1927).
[38] Wis. Const., art. 1, §9.
[39] There is no wrong without a remedy.

the recent case of *Wadoz v. Nat. Indemnity Co.*,[40] the Wisconsin Supreme Court has reaffirmed its position that no action for negligence will lie between a parent and his or her unemancipated minor child.

In the *Wick* case it was stated that the action in question was prohibited at common law and the Court refused to extend the doctrine of *Wait v. Pierce*,[41] in which a wife was allowed to sue her husband in tort. Thus it would appear from this that even if the Wisconsin Court were inclined to grant the minor a cause of action it could not; for if the common law is in force in the state of Wisconsin,[42] and if the action were prohibited at common law as the Court seemed to decide, such prohibition would be law in Wisconsin thereby necessitating any change to come from the legislature. This was substantially the holding in *Fidelity Savings Bank v. Aulik*,[43] in which the Court held that whether or not such action should be permitted is a question of public policy for the legislature and not for the courts.[44]

This argument, however, falls short of settling the question to the great degree of certainty which its proponents claim. While the common law is applicable in Wisconsin, it is so only to the extent reasonably applicable to our situation and government.[45] Might not Art. I, Sec. 9 of the Wisconsin Constitution be said to overrule any common law prohibition against the minor's cause of action—if there ever was such a prohibition? The Wisconsin Supreme Court, in *Schwanke v. Garlt*,[46] has stated that the common law is in force in this state only so far as it is consistent with the Constitution. Therefore, assuming the common law to be that the minor child had no cause of action against its parent and applying to that premise the reasoning of Justice Crownhart, does it not follow that such common law view could be of no force and effect in this state as it is inconsistent with the previously quoted constitutional provision?

It would appear then, that if the precise problem of a parent's wilful and wanton misconduct is ever placed before the Court, there is nothing to prevent it from deciding that the unemancipated minor does have a cause of action and rendering its judgment accordingly.

VI. Conclusion

In spite of the early doctrine enunciated in the *Hewellette*[47] case, which remained firmly entrenched until 1930, the modern view seems

[40] 274 Wis. 383, 80 N.W.2d 262 (1956).
[41] 191 Wis. 202, 209 N.W. 475 (1926), *rehearing denied* 210 N.W. 822 (1926).
[42] Coburn v. Harvey, 18 Wis. 147 (1864).
[43] 252 Wis. 602, 32 N.W.2d 613 (1948).
[44] *Compare with* the statement made by the Illinois court in *Nudd v. Matsoukas*, note 33 *supra*.
[45] Huber v. Merkel, 117 Wis. 355, 94 N.W. 354 (1903).
[46] 219 Wis. 367, 263 N.W. 176 (1935).
[47] See note 6 *supra*.

to be to allow the unemancipated minor a cause of action for injuries sustained as a result of its parent's wilful and wanton misconduct. The recent decisions have taken a fresh view of the problem and discarded the archaic reasoning and blind precedent which had formerly prevailed in the earlier decisions. Whether or not the allowance of the minor's cause of action is still a minority view is doubtful as a great number of those states which have not allowed the action to be maintained for simple or ordinary negligence, have expressly reserved their decision as to wilful and wanton misconduct, awaiting that precise issue to be rasied. Their actual decisions on the problem, however, cannot be ascertained until such time.

The most recent authority to take a stand on the issue has come out in favor of allowing the child a cause of action.[48]

> "A more penetrating analysis into these problems may result in the application of what, it is submitted, is a more desirable principle, namely, to allow the action either by a parent or a child in every case in which it is reasonably clear that the domestic peace has already been disturbed beyond repair or where by reason of the circumstances it is not imperiled, and where the reasonableness of family discipline is not involved."

Wisconsin's position is extremely doubtful, as it does not appear that the Court has ever made any distinction between negligence on the one hand, and wilful and wanton conduct on the other, in cases of this type—although it must be borne in mind that the problem has not yet presented itself in this jurisdiction. Until such time as it does it can only be said that Wisconsin law, in its present state, would refuse to entertain the child's plea.

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[48] 1 HARPER & JAMES, LAW OF TORTS §8.11 (1956).