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# Child v. Parent in Tort: A Case for the Jury?

*Some courts have recently abandoned the doctrine of parental immunity from liability to a child for personal tort. A tentative draft of the Restatement of Torts, Second, recognizes this development by substituting for the immunity doctrine a parental privilege to use "reasonable" force for disciplinary purposes only. Professor Cooperrider examines these changes and concludes that the Restatement position inaccurately states the law and is unsound in principle.*

Luke K. Cooperrider\*

IN 1934 the *Restatement of Torts* carried the statement, as an introduction to its exposition of the privilege to use force to discipline children, that the privilege had no application to a parent-child disciplinary situation because

there is no case which indicates any tendency to bring the relation of parent and child as such, including its duties and privileges, within the scrutiny of the courts at the complaint of the child in an action of tort. The only protection for the child is the parent's amenability to criminal punishment if he exceeds the privilege accorded to him by law.<sup>1</sup>

Having made this statement, the text proceeded in the succeeding sections to define the circumstances under which persons other than a parent might be protected by a privilege in the application of force to a child for disciplinary purposes. Naturally the extent of the privilege was stated in terms of a reasonable relation to its legitimate objective, the establishment or maintenance of a proper state of discipline.<sup>2</sup> Although the *Restatement* apparently did not take a position, except to the extent indicated above, it was also true that the well established law at the same time precluded recovery by an unemancipated child against the parent for other personal torts, particularly negligent personal injury.<sup>3</sup>

This common law position was derived from a series of cases originating in 1891, in the first of which, *Hewlett v. George*,<sup>4</sup> a Mississippi court held, solely on the authority of its own opinion of

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1. 1 RESTATEMENT, TORTS, Scope Note §§ 147-55 (1934).

2. *Id.* §§ 148-52.

3. PROSSER, TORTS 675-76 (2 ed. 1955). See also cases cited notes 11 and 12 *infra*.

4. 68 Miss. 708, 9 So. 885 (1891).

sound public policy, that it would be subversive of the peace of the family and of society to permit a minor child to assert a claim against his parent for civil redress of personal injuries "so 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 . . . ."<sup>5</sup> The case involved a claim, asserted by a once married minor daughter against her mother, that the defendant had wrongfully caused the plaintiff to be confined in an insane asylum without proper commitment. The decision seems to have struck a responsive chord, for within a few years after it was handed down a similar position was taken by a number of other American courts, a fact in itself curious when it is noted that before 1891 the question had apparently never been directly raised in the common law jurisdictions.

The first cases involved malicious, or at least intentional, wrongs.<sup>6</sup> There were dicta, but no direct decisions, to the contrary. For example, in *Haycraft v. Grigsby*<sup>7</sup> a Missouri Court of Appeals, in holding that a child might maintain an action against a *teacher* for immoderate punishment, stated that "persons are not allowed to immoderately beat and injure either children or adults from any motive good or bad; parents have no such right, nor teachers either."<sup>8</sup> This lead was followed twelve years later by another Missouri appeals decision, but again in a case where at most the defendant stood in loco parentis, and there was a fact question of whether the relation rose any higher than that of master and servant.<sup>9</sup> In *Clasen v. Pruhs*<sup>10</sup> the defendant was an aunt who stood in loco parentis at the time of the claimed injuries, but the court assumed the case to be governed by the rules applicable to a parent-child relation. It is interesting to note that this group of cases apparently involved action by the defendant which at least was *claimed* to have been disciplinary in nature, while the group of cases above asserting the rule of nonliability do *not* seem to have involved such a claim.

The negligence cases followed somewhat later, but accepted the lead of the *Hewlett* case without much argument, in an industrial

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

6. *Foley v. Foley*, 61 Ill. App. 577 (1895); *Smith v. Smith*, 81 Ind. App. 566, 142 N.E. 128 (1924); *McKelvey v. McKelvey*, 111 Tenn. 388, 77 S.W. 664 (1903); *Roller v. Roller*, 37 Wash. 242, 79 Pac. 788 (1905).

7. 88 Mo. App. 354 (1901).

8. *Id.* at 360. Citing somewhat similar statements made in *Lander v. Seaver*, 32 Vt. 114 (1859), under similar facts.

9. *Dix v. Martin*, 171 Mo. App. 266, 157 S.W. 133 (1913). See also *Treschman v. Treschman*, 28 Ind. App. 206, 61 N.E. 961 (1901); *Smith v. Smith*, 81 Ind. App. 566, 142 N.E. 128 (1924).

10. 69 Neb. 278, 95 N.W. 640 (1903).

accident case in Minnesota<sup>11</sup> in 1908, and in automobile accident cases in North Carolina in 1923, Rhode Island in 1925, Michigan in 1926, Wisconsin in 1927, New York in 1928 and Connecticut in 1929.<sup>12</sup> Only in North Carolina, where the majority saw the problem as an issue between the Ten Commandments and Russian Communism, and the dissenter viewed it as a question of whether the court should recognize the God-given freedom of its women and children from the tyrant's heel of husband and father, or knuckle under to the "legislation" of the Mississippi court, did the controversy generate much heat. There was, however, a dissent in Wisconsin, and a dissent without opinion by Cardozo, Crane and Andrews to the New York per curiam opinion. On through the '30s and '40s the doctrine continued to gain support, principally in automobile negligence cases, with relatively little challenge. It was criticized in detail by Professor McCurdy<sup>13</sup> and by Chief Justice Peaslee,<sup>14</sup> and these criticisms were joined by a chorus of student laments in law reviews. The net result during this period, however, was some case authority for an exception to the rule in situations where the parent had negligently caused injury to the child while carrying on business (as distinguished from a family) activity which was covered by insurance;<sup>15</sup> some cautious dicta indicating doubt as to the propriety of applying the rule where the parent is guilty of malicious or intentional injury,<sup>16</sup> and one case refusing to "extend" the rule to cover a "voluntary tort" (homicide by poisoning) committed by an adoptive parent.<sup>17</sup>

The criticisms of McCurdy and Peaslee had had their effect, however, perhaps aided and abetted by a general change in attitude toward the family as an institution, and 1950 can be ascertained as the year in which the rule's decay really began. In that year the Oregon court approved a death action against the estate of a father who, while grossly intoxicated, had required his minor son, against the latter's will, to accompany him on an automobile trip across the

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11. Taubert v. Taubert, 103 Minn. 247, 114 N.W. 763 (1908).

12. Mesite v. Kirchenstein, 109 Conn. 77, 145 Atl. 753 (1929); Elias v. Collins, 237 Mich. 175, 211 N.W. 88 (1926); Sorrentino v. Sorrentino, 248 N.Y. 626, 162 N.E. 551 (1928); Small v. Morrison, 185 N.C. 577, 118 S.E. 12 (1923); Matarese v. Matarese, 47 R.I. 131, 131 Atl. 198 (1925); Wick v. Wick, 192 Wis. 260, 212 N.W. 787 (1927).

13. McCurdy, *Torts Between Persons in Domestic Relation*, 43 HARV. L. REV. 1030, 1056 (1930).

14. Dunlap v. Dunlap, 84 N.H. 352, 150 Atl. 905 (1930).

15. Dunlap v. Dunlap, *supra* note 14; Worrell v. Worrell, 174 Va. 11, S.E.2d 343 (1939); Lusk v. Lusk, 113 W. Va. 17, 166 S.E. 538 (1932). *Contra*: Rambo v. Rambo, 195 Ark. 832, 114 S.W.2d 468 (1938) (*semble*); Luster v. Luster, 299 Mass. 480, 13 N.E.2d 438 (1938); Belleson v. Skilbeck, 185 Minn. 537, 242 N.W. 1 (1932).

16. Cannon v. Cannon, 287 N.Y. 425, 40 N.E.2d 236 (1942); Matarese v. Matarese, 47 R.I. 131, 131 Atl. 198 (1925); Securo v. Securo, 110 W. Va. 1, 156 S.E. 750 (1931).

17. Brown v. Cole, 198 Ark. 417, 129 S.W.2d 245 (1939).

Oregon Cascades, with results that were fatal to both. Summing up its position, the court said:

[W]e think the general rule—so well established by the authorities—should be modified to allow an unemancipated minor child to maintain an action for damages against his parent for a wilful or malicious personal tort. The evidence in the instant action certainly shows that the decedent-father was guilty of wilful misconduct.<sup>18</sup>

A few months later the Maryland court sustained an action brought by a daughter against the estate of her father to recover damages for shock, mental anguish, and consequent nervous and physical injury when it was alleged that the deceased, when the child was 5, had shotgunned her mother to death in her presence, kept her in the presence of the body for six days, and finally killed himself with the shotgun in her presence.<sup>19</sup> Accepting as the justification for the immunity rule the stereotype which had developed in the cases, *i.e.*, that it was designed to promote tranquillity and discipline in the family, the court felt that under the circumstances these values were not jeopardized by allowing a claim by the plaintiff. Its conclusions were stated in these terms: "Justice demands that a minor child shall have a right of action against a parent for injuries resulting from cruel and inhuman treatment or for malicious and wanton wrongs."<sup>20</sup>

Such invitations are seldom long ignored. The necessary allegations of "wilful, wanton and malicious" conduct soon blossomed forth, levelled this time at husbands, fathers, and even mothers.<sup>21</sup> In succeeding years the distinction suggested earlier, holding the parent liable for an injury negligently inflicted while he was acting in a business rather than parental "capacity," also gained some further support.<sup>22</sup> The one aspect of the original immunity which still remains untouched is that which protects the parent from liability for *mere* negligence within the bosom of the family. Even here the risk-spreaders are at work, seeking to convert the automobile lia-

18. Cowgill v. Boock, 189 Ore. 282, 301, 218 P.2d 445, 453 (1950).

19. Mahnke v. Moore, 197 Md. 61, 77 A.2d 923 (1951).

20. *Id.* at 68, 77 A.2d at 926.

21. Emery v. Emery, 45 Cal. 2d 421, 289 P.2d 218 (1955); Wright v. Wright, 85 Ga. App. 721, 70 S.E.2d 152 (1952); Nudd v. Matsoukas, 7 Ill. 2d 608, 131 N.E.2d 525 (1956); Siembab v. Siembab, 202 Misc. 1053, 112 N.Y.S.2d 82 (Sup. Ct. 1952) (mother accused of "wilfully, wantonly and culpably" operating her automobile in such a way as to cause her child to suffer a fractured skull); Brumfield v. Brumfield, 194 Va. 577, 74 S.E.2d 170 (1953). The allegations were held sufficient to state a cause of action in all except the *Brumfield* case.

22. Signs v. Signs, 156 Ohio St. 566, 103 N.E.2d 743 (1952); Borst v. Borst, 41 Wash. 2d 642, 251 P.2d 149 (1952). In these cases the existence, *vel non*, of liability insurance was held irrelevant. In Baker v. Baker, 364 Mo. 453, 263 S.W.2d 29 (1953), *Levesque v. Levesque*, 99 N.H. 147, 106 A.2d 563 (1954), and Ball v. Ball, 73 Wyo. 29, 269 P.2d 302 (1954) the authority for the proposition in the text was noted, but held inapplicable. *Aboussie v. Aboussie*, 270 S.W.2d 636 (Tex. Civ. App. 1954), is apparently contra.

bility insurance policy into a family accident policy by requiring the driver's liability insurer to compensate his child's injury.<sup>23</sup> So far the courts have not accepted that proposition.

In reviewing the cases it is difficult to avoid the conclusion that here is a battle that has been fought largely by straw men. *Almost* everybody seems to agree that the intra-family tort is a special situation which the courts should handle with caution. The difficulty comes in trying to develop the proper criteria for judicial intercession. Without much thought the early opinions justified the immunity position by reference to the social necessity for preserving the "tranquillity" and "discipline" of the family, and did so in such a way that they could be construed as referring to conditions existing within the family before the court. This reasoning was quite vulnerable because the critic could always argue the absurdity of a rule having as its objective the preservation of conditions which were obviously nonexistent.

On the other side the thinking was afflicted by a *bête noire*, the case of *Roller v. Roller*,<sup>24</sup> in which the defendant escaped civil liability, although already languishing in prison, for the rape of his minor daughter. The Washington court has been ridiculed unmercifully for justifying this decision on disciplinary grounds, and the shafts directed its way have apparently gone home, for it has recently subjected itself to a painful self criticism and confessed the error of its ways.<sup>25</sup>

Much of this criticism was unfair, or at least inapt, based on different assumptions of the latitude which a court may have in applying or withholding the application of a rule of law under varying circumstances of fact. From the beginning it should have been apparent that the reason for the rule lay not in the future of the *particular family*, but in the future of the *institution* itself. Judge Learned Hand's justification of the absolute privilege enjoyed by judicial and quasi-judicial officers from civil liability for their official acts offers a pertinent analogy.

[I]f it were possible in practice to confine such complaints to the guilty, it would be monstrous to deny recovery. The justification for doing so is that it is impossible to know whether the claim is well founded until the case has been tried, and that to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties. Again and again the public interest calls for action which may turn out to be founded on a mistake, in the face of which an official may later find him-

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23. Ehrenzweig, *Parental Immunity in the Conflict of Laws*, 23 U. CHI. L. REV. 474, 478 (1956); HARPER & JAMES, TORTS § 8.11 (1956).

24. 37 Wash. 242, 79 Pac. 788 (1905).

25. *Borst v. Borst*, 41 Wash. 2d 642, 251 P.2d 149 (1952).

self hard put to it to satisfy a jury of his good faith. There must indeed be means of *punishing* public officers who have been truant to their duties; but that is quite another matter from exposing such as have been honestly mistaken to suit by anyone who has suffered from their errors. As is so often the case, the answer must be found in a balance between the evils inevitable in either alternative. In this instance it has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation.<sup>26</sup>

It was not that the court feared to visit upon Roller the consequences of his misdeeds, but that courts are required to

rely upon certain uniform principles of law, and, if it be once established that a child has a right to sue a parent for a tort, there is no practical line of demarkation 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. The principle permitting the action would be the same. The torts would be different only in degree.<sup>27</sup>

At least some of the critics of the rule of the *Hewlett* case seem to accept with equanimity the development which the Washington court foresaw.<sup>28</sup> Others have argued only that the court in the *Roller* case did not have sufficient faith in the ability of the American court and jury to distinguish between cases.<sup>29</sup> One student commentator suggested that the problem simply be unloaded on the jury by instructing it to find whether the defendant's conduct was "consistent with the reasonable performance of the marital or family duties."<sup>30</sup> Those of us who are not so charmed by the prospect of a law formulated completely by the jury for each individual case may have some difficulty with this proposition. Yet this is substantially the solution proffered by the *Restatement of Torts, Second*, in Tentative Draft No. 1, for those jurisdictions which have rejected the complete immunity position of *Hewlett v. George*.

In their scope note the Restaters *Second* now propose to acknowledge that in some jurisdictions, though still not in most, a child may maintain a civil action against his parent for personal injuries intentionally or wantonly inflicted, and to suggest that in such states the parent's privilege of discipline becomes important as affecting his tort liability. In section 147 it is then proposed to provide, subsection (1), that a parent is privileged to apply such reasonable force or impose such reasonable confinement upon his child as he *reasonably* believes to be necessary for its *proper control, training*

26. *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949).

27. *Roller v. Roller*, 37 Wash. 242, 244, 79 Pac. 788, 789 (1905).

28. PROSSER, *TORTS* 676-77 (2d ed. 1955).

29. *Dunlap v. Dunlap*, 84 N.H. 352, 363, 150 Atl. 905, 910 (1930).

30. Note, *Tort Liability Within the Family Area*, 51 Nw. U.L. Rev. 610, 619 (1956).

or education. Comment *d*, under subsection (1), explains that the parent's privilege is more extensive than that of other persons who may also be privileged, but that he is, nevertheless, subject to an "objective" standard of reasonableness under the circumstances, one of which is his relationship to the child and superior knowledge of the child. Justifying this position the reporter refers to the fact that "even" in criminal cases the older principle which excused the parent if he had acted in good faith has given away to an "objective" standard of reasonableness. In section 150 it is then proposed to list six factors to be considered (by the jury, undoubtedly) in determining whether force or confinement used in a particular case was reasonable "for the control, training or education" of the child, including the identity of the defendant (*i.e.*, parent or not), age, sex, and condition of the child, "nature of his offense and his apparent motive," the influence of his example upon other children of the same family or group, whether the force or confinement was reasonably necessary to compel obedience to a proper command, and whether it was disproportionate to the offense, necessarily degrading, or likely to cause serious or permanent harm. This provision is followed by several paragraphs of homely advice (comments *c*, *d*, and *e*) explaining and exemplifying how these various factors may bear upon the decision as to reasonableness in a given case, *e.g.*, that the punishment must be "reasonably proportionate" to the offense, and perhaps to the character of the offender, that the ring-leader may receive more severe punishment than the others, that a girl should not be punished so severely as a boy, that punishment should not be used at all unless necessary and only to the extent necessary to compel obedience, etc. Now these are all, undoubtedly, admirable guideposts to establish for a jury charged with the duty of examining the conduct of school teacher or camp counselor. With all due respect however, I submit that to subject a parent to the possibility of this kind of an inquisition into his conduct of the affairs of his family is a horse of another color. It would, perhaps, be unfair to criticise the *Restatement* for adopting this position if it represented the result of the cases, but it does not. None of the recent cases which have denied the existence of an absolute immunity have involved a disciplinary situation. Their comments, therefore, are all dicta, but insofar as they have spoken they do not support the *Restatement* proposition. In *Dunlap v. Dunlap*,<sup>31</sup> which is the leading case favoring at least a measure of liability, Chief Justice Peaslee conceded that

for mistaken judgment as to the extent of chastisement, or for negligent disrepair of the home the father provides, there is usually no liability.

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31. 84 N.H. 352, 150 Atl. 905 (1930).



These acts all grow out of and pertain to the relation of parent and child. The relation gives rise to the duty alleged to have been violated. . . . But there may be acts which clearly are not to be referred to such relation. 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 answers to an action seeking compensation for the wrong.<sup>32</sup>

And later:

[T]he cases relied upon by the defendant seem to put the parent in the position of a king, who can do no wrong. The true theory appears to us to be that in the discharge of parental duty his position is rather comparable to that of a judge, not accountable for errors, but responsible when he oversteps his jurisdiction.<sup>33</sup>

In other places throughout the opinion the chief justice made it apparent that he was suggesting, in a situation where defendant might be in a position to claim the disciplinary privilege, only a liability for "intentional injury maliciously inflicted."

*Mahnke v. Moore*<sup>34</sup> relied mainly on Peaslee's reasoning, and added nothing to it on the point in question. In *Cowgill v. Boock*<sup>35</sup> the court equated the defendant's conduct to cruelty, and a concurring opinion indicated "the parent should not be held liable for chastisement which he administered as head of the household. . . ." <sup>36</sup> In *Wright v. Wright* the court suggested that the action must be based on such "cruelty" as would warrant a court in depriving the parent of further custody.<sup>37</sup> In *Borst v. Borst* the court expressed the following opinion:

In all the family activities, the parents and children are living and working together in close relationship, with neither the possibility of dealing with each other at arm's length, as one stranger to another, nor the desire to so deal. The duty to discipline the child carries with it the right to chastise and to prescribe a course of conduct designed for the child's development and welfare. This in turn demands that the parents be given a wide sphere of discretion.

In order that these parental duties may adequately be performed, it is necessary that the parents be not subject to the risk of suit at the hands of their children. If such suits were common-place, or even possible, the freedom and willingness of the father and mother to provide for the needs, comforts and pleasures of the family would be seriously impaired. Public policy therefore demands that parents be given *immunity from such suits while in the discharge of parental duties*. . . .

We do not determine the question of whether the immunity should be absolute or conditional with respect to acts performed in the discharge of parental duties, as it is not before us.<sup>38</sup>

32. *Id.* at 361, 150 Atl. at 909.

33. *Id.* at 363, 150 Atl. at 910.

34. 197 Md. 61, 77 A.2d 923 (1951).

35. 189 Ore. 282, 218 P.2d 445 (1950).

36. *Id.* at 304, 218 P.2d at 454 (concurring opinion).

37. 85 Ga. App. 721, 726, 70 S.E.2d 152, 155 (1952).

38. 41 Wash. 2d 642, 656, 251 P.2d. 149, 156 (1952). (Emphasis added.)

Only in *Emery v. Emery*<sup>39</sup> did the court express an opinion, obiter and without citation of authority, as to the extent of the privilege which would tend to support the *Restatement's* position:

Since the law imposes on the parent a duty to rear and discipline his child and confers the right to prescribe a course of reasonable conduct for its development, the parent has a wide discretion in the performance of his parental functions, but that discretion does not include the right wilfully to inflict personal injuries beyond the limits of reasonable parental discipline. No sound public policy would be subserved by extending it beyond those limits.

Let us now examine the earlier cases, which did have something to say about the disciplinary situation. The authority is sketchy, and largely dictum, but a brief reference to the language will give some flavor of the thinking the courts indulged. In *Lander v. Seaver*,<sup>40</sup> for instance, the court was considering the conduct of a schoolmaster who had ministered to one of his charges with a raw-hide. It said, in this connection, that considerable latitude should be given to the teacher for the exercise of discretion, and he should not be held liable unless the punishment he administered was "clearly excessive." Before reaching this conclusion the court rejected the defendant's claim that he was entitled to the same privilege as a parent, and said about the latter:

The parent, unquestionably, is answerable only for malice or wicked motives or an evil heart in punishing his child. This great and to some extent irresponsible power of control and correction is invested in the parent by nature and necessity. It springs from the natural relation of parent and child. It is felt rather as a duty than a power. From the intimacy and nature of the relation, and the necessary character of family government, the law suffers no intrusion upon the authority of the parent, and the privacy of domestic life, unless in *extreme cases of cruelty and injustice*.<sup>41</sup>

*Haycraft v. Grigsby*,<sup>42</sup> again considering punishment meted out by a schoolmaster, comes no closer to a statement on the parent's privilege than that already quoted above.

In *Dix v. Martin*<sup>43</sup> the court approved an instruction to the jury submitting the question whether defendant stood in loco parentis to plaintiff, or whether there was only a master-servant relation, on the theory that in the latter case defendant had no privilege at all to inflict corporal punishment. An alternative instruction presented the issue—was the punishment so unreasonable, cruel and exces-

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39. 45 Cal. 2d 421, 429, 289 P.2d 218, 224 (1955). *Nudd v. Matsoukas*, 7 Ill. 2d 608, 131 N.E.2d 525 (1956), is of no assistance here since it does not consider the question.

40. 32 Vt. 115 (1859).

41. *Id.* at 122. (Emphasis added.)

42. 88 Mo. App. 354 (1901).

43. 171 Mo. App. 266, 157 S.W. 133 (1913).

sive as to constitute an assault *regardless* of the relation between the parties? Under this branch of the submission, the court said:

One who assumes to take the place of a parent has a right to inflict reasonable corporal punishment for misconduct of the child, but he has no right to subject the child to *inhuman, unusual and torturing castigation* and if he does he becomes liable to answer to the child in damages as for a malicious assault. . . . The evidence shows beyond question that defendant, in her furious wrath over what amounted to nothing more than a breach of decorum, subjected the child to an unusual form of punishment of such severity and brutality as to shock the conscience of any reasonable and humane person.<sup>44</sup>

(The child was beaten with a buggy whip until her back was covered with bruises and welts from which blood and other fluid oozed.) In *Treschman v. Treschman*<sup>45</sup> the only pertinent comment is a quotation from Reeve's *Domestic Relations* which the court cited with approval, although the issue discussed was the sufficiency of the complaint rather than the nature of the privilege:

In Reeve's *Domestic Relation*, (4th ed.) 357, in discussing the right and duty of a parent to correct his minor child, the author says: "the true ground on which this ought to be placed, I apprehend, is, that the parent ought to be considered as acting in a judicial capacity when he corrects, and, of course, not liable for errors of opinion; and although the punishment should appear to the triers to be unreasonably severe, and in no measure proportioned to the offense, yet, if it should also appear that the parent acted conscientiously, and from motives of duty, no verdict ought to be found against him. But when the punishment is, in their opinion, thus unreasonable, and it appears that the parent acted, *malo animo*, from wicked motives, under the influence of an unsocial heart, he ought to be liable for damages. 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."<sup>46</sup>

*Clasen v. Pruhs*<sup>47</sup> more nearly supports the Re-Restaters' position than any of the other cases. The defendant was an aunt with whom plaintiff had lived, and the treatment complained of apparently was disciplinary in nature. It was conceded that defendant stood in loco parentis, and the court assumed the case to be governed by the rules applying to the parent-child relation. The appeal concerned the validity of the instructions, after verdict in favor of plaintiff. In an opinion written by the commissioners it is said:

A parent, teacher or master is not liable either civilly or criminally for moderately correcting a child, pupil or apprentice, but it is otherwise if the correction is immoderate and unreasonable. 1 Clark & Marshall, Law

44. *Id.* at 274, 157 S.W. at 136. (Emphasis added.)

45. 28 Ind. App. 206, 61 N.E. 961 (1901).

46. *Id.* at 211, 61 N.E. at 963.

47. 69 Neb. 278, 95 N.W. 640 (1903).

of Crimes, 433; 1 McClain, Criminal Law, sec. 242; 3 Greenleaf, Evidence (16th ed.), sec. 63; 1 Wharton, Criminal Law (10th ed.), sec. 631. In fact, this rule seems to be universally recognized by the courts of this country. If the authority to punish be limited by reason and moderation, who, then, on sound principles, should determine whether such authority has been used in excess of its proper limits, the parent administering the punishment, or the triers of fact in a court where complaint has been made? While some authority is cited tending to support the theory that, where the punishment falls short of maiming or disfiguring the body or seriously injuring or endangering life and health, the judgment of the parent is final and he can not be held to answer, unless it is proved that the punishment was maliciously inflicted—the leading case in support of this doctrine being *State v. Jones*, 95 N. Car. 588, 59 Am. Rep. 282—yet the great weight of American authority seems to be that whether or not the parent, guardian or schoolmaster has administered unreasonable, unnecessary and cruel punishment to a child under his care, is a question of fact to be determined by the jury. [Citing here 21 Am. & Eng. Ency. Law (1st ed.), 771; *Lander v. Seaver*; *Patterson v. Nutter*, 78 Me. 509; and five criminal cases.] It would, therefore, seem that the learned trial court followed the trend of a long line of well considered cases when he submitted to the jury the question of the reasonableness of the punishment inflicted, and predicated plaintiff's right of recovery on proof of the fact that the punishment administered was unreasonable and unnecessary under all the circumstances.<sup>48</sup>

The reliance on criminal law authority is emphasized because the Re-Restaters have taken the same course, a course which seems to me to be subject to question. The opinion of the court itself, though it affirmed the commissioners' results, less clearly supports the Re-Restaters' position. Again the only authority cited consists of criminal cases and treatises on crimes. The instructions under consideration are not quoted in full, and the discussion pertaining to them is rather unsatisfactory. In its most lucid part the opinion says:

There is no doubt that, in the condition of the record, the defendant was entitled to have the jury plainly instructed as to the right and duty of the parent to exercise a reasonable and just discretion in correcting the faults of a child, and that the law will not hold the parent liable for an honest mistake of judgment in estimating the character of the fault corrected, or in determining the quality and degree of punishment necessary to correct the fault. This discretion of the parent must be confined within reasonable limits. Unnatural and inhuman punishment furnishes conclusive evidence of a malicious motive in the parent administering it. Punishment may be so plainly excessive, although not causing permanent injury, as to overcome the presumption that the parent had solely in view the welfare of the child. So that, after all, the question is whether under all the circumstances of the case, after allowing due latitude for the exercise of parental authority and discretion, the punishment was in fact excessive and unnecessary, and this question must necessarily be determined by the jury.<sup>49</sup>

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48. *Id.* at 283, 95 N.W. at 642.

49. *Id.* at 292, 95 N.W. at 645 (concurring opinion).

It will thus be seen that the civil cases which have said anything on the question seem clearly to indicate that a parent's conduct is *not* to be measured against the same yardstick of "reasonableness" which is applied to those who may have a special or temporary custody of the child. It has been thought, rather, that he should be free of liability absent a type of conduct which has been variously described as malicious, evil of motive, cruel, inhuman, unusual, or clearly excessive.<sup>50</sup>

The one case which looks the other direction relies solely on criminal law authority. The Re-Restaters do likewise. Of the dozen cases they cite for the proposition that there has been a change in the criminal law away from a privilege based on the absence of malice in favor of a privilege based on mere reasonableness, only one<sup>51</sup> appears to me clearly to support their conclusion. In the other cases the references to the parent's obligation not to exceed the bounds of "reason" or "moderation" are so general and incidental as to give no indication that the court was consciously considering the exact limits of the privilege. If the statement made concerning the state of the criminal law be conceded, however, it does not follow that the same rule does or should apply in the area of civil liability. The risk that the criminal courts will inject themselves into the family scene is certainly far less than that the civil courts may be required to do so if the proposed rule is generally adopted. Action by the state is within the control of a prosecuting official who is not unlikely to permit himself to be encumbered by minor family disturbances, whereas the civil courts must act at the behest of any citizen who believes himself aggrieved. Further, the whole atmosphere of a criminal prosecution, with its concern for the rights of the defendant, the presumption of innocence, and the "beyond reasonable doubt" burden of proof would suggest that it is far less likely that a parent would be convicted of an "unreasonable chastisement" under a criminal charge of assault and battery than that he might be so convicted in the analogous civil action.

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50. The "wanton and wilful misconduct" cases present a different question, although they were, via *Cowgill v. Boock*, *supra* note 35, derived from this same language. Here, as in other contexts, this talismanic phrase is used to evade the rule which excludes liability for negligence. The immediate consequence of its recognition as a basis of liability here will be to give the "wanton and wilful" driver the windfall benefit of a family accident insurance for which he has not paid. No doubt the liability insurers will take this development into account either by a general increase in rates or by excluding liability to members of the family. The latter expedient would seem preferable, for it is surely equitable to expect those who wish accident protection to pay for it themselves as they do for collision coverage and medical payments clauses, rather than pass the burden on to the general motoring public. Aside from this consideration, there is of course the further possibility that the "wanton and wilful" rubric will be the eventual downfall of parental immunity from liability for intra-family negligence. My views on that prospect are, I suppose, obvious.

51. *Carpenter v. Commonwealth*, 186 Va. 851, 44 S.E.2d 419 (1947).

Where a parent, or one who has assumed the place of a parent, has in fact been guilty of brutal or bestial conduct toward his child the communal sense of outrage has its proper outlet in the criminal prosecution. If the conduct has inflicted permanent disability there is reason to make an effort to see that that disability is in some manner compensated, although taking into account the claims upon the defendant which other members of his family may have, and the likelihood that the assets will be sufficient to provide for all, there is at least a doubt whether the common law action for assault and battery is the appropriate device to accomplish this objective. For anything short of permanent disability the appropriateness of that action is even more questionable. The concept of pecuniary "compensation" for personal injury appears an even more primitive idea here than in other contexts, where at least it is a substitute for personal or tribal revenge. While the money judgment, as a forfeit yielded by the wrongdoer to the wronged, may help assuage the community's desire to see retribution done, it is not likely to accomplish anything of a positive nature for the unfortunate group of individuals most intimately concerned. Aside from punishment the great need here is not retribution, but the assurance of care and support for the child and for the rest of the family, who in all probability have been victimized in a similar manner, albeit not so grievously. It is possible, in other words, that these problems would be handled more intelligently in custody and support proceedings than in a common law action for damages, with its limited scope of investigation and remedial competence.

The vice of the rule proposed for the second *Restatement* shows up mainly in the lower registers, however. Not only does it lower the threshold of liability to the level of mere unreasonableness, as determined by a jury after the fact; it also throws upon the parent the burden of establishing to the satisfaction of said jury that his conduct was reasonable. The issue is not likely to arise except in a situation wherein the natural family ties, loyalties and restraints have completely broken down, and been superseded by recrimination and a spirit of vendetta. This would be the atmosphere in which the *Restatement* rule would have the parent's past contacts with his children measured against the common law specifications for battery—or false imprisonment. (Or perhaps assault? Intentional infliction of mental distress? Invasion of privacy?) In any family there are personal contacts, some in the spirit of play, others not so playful but arising from the frictions of intimate coexistence, which if they occurred between strangers would amount to batteries. The logic of the rule would establish any such contact as a *prima facie* cause of action (the least touching is a battery) in which, if it were prosecuted, the plaintiff would perhaps be entitled to an instruction

to the effect that the conduct, if not directed to the "control, training or education" of the child, was outside the scope of the privilege. This may appear to be a preoccupation with technicalities, but of just such technicalities are jury cases made, and unless it is thought that every parent should be subject to the risk that conduct such as this will engender liability, there should not be a rule which contemplates it. Besides which I am not at all sure that I am engaged by mere windmills. Is it not written here between the lines that in every settlement negotiation pending divorce where a child of the marriage is involved one of the factors which must be considered will be the possibility that a list of these jury cases could be compiled reaching back (the statute of limitations not running against a minor) to the first time the harassed father, in his weakness, gave way to mere irritation instead of calmly pursuing a reasoned and reasonable course of instruction in good citizenship? Is it not also written here that the child of the deceased, excluded by will for reasons not likely to be all-persuasive to him from participation in the estate, will bend his mind to the compilation of a similar catalog, as will also the prodigal son or daughter at the expense of those remaining in the fold? Is it not even more apparent that in similar situations it would not be difficult to call to mind instances in which the father, honestly endeavoring to "control, train or educate" the child, may have overstepped the bounds which a jury, under the tutelage of artful counsel supported by the testimony of "experts" might be willing to consider reasonable?

This is the heart of the matter. The castle-like quality of the common law home is fast disappearing, and here is one more step toward the reduction of this last sanctuary from the Damoclean peril of the jury verdict. It is too high a price to pay for an empty satisfaction in the completeness and symmetry of the law. The family, as an institution of social control, has a considerably longer history than does the common law damage action with trial by jury, and I know of no evidence which would indicate that the latter can accomplish better results than the former in the area which has hitherto been reserved to it. It is to me inadmissible that twelve strangers in a jury box, played upon by able counsel in the interest of a more adequate award, should have the power of review over one's performance in his office of paterfamilias, with no restrictions upon their discretion except the standard of "reasonableness" as that standard is typically applied by present day courts.

I submit, therefore, that the second *Restatement's* position is unsound. It is not supported by authority, and has nothing to recommend it except a tendency to bring this small compartment of the law into alignment with other privileges to use force, to which it bears no true analogy. This is not a sufficient recommendation, for

most persons will, in the course of a lifetime, find themselves in a situation where they must use force in defense of self or property only very infrequently, if ever, so that the exposure is minimal, whereas there is no limit to the exposure to a jury verdict which would be the lot of *every* parent under the proposed rule. Nor is it a justification for the rule that probably relatively few would actually be victimized. The rule is excessively obtrusive, and places the courts in a position they ought not to be occupying.



