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Personal Torts within the Family

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PERSONAL TORTS WITHIN THE FAMILY

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I. INTRODUCTION

If a person, while under the influence of intoxicants, drives his automobile at excessive speed, loses control of it, jumps the curb and strikes a pedestrian, injuring him severely, there would be little question, nothing else appearing, that he would be liable to the injured pedestrian in an action for damages.

The premises underlying a conclusion of liability in such cases are obvious. It is in the interest of society that injured persons be compensated and rehabilitated; and our conceptions of justice are such that ordinarily it seems fair that the party who was at fault, whose action caused the injury, should pay. It is also in the interest of society that rules of conduct be established so that men may know what actions are permissible and what are not; and so that injuries such as those suffered by our pedestrian may be prevented.

These social interests are crystalized and expressed in several ways, but primarily in the law of torts.

With the urbanization and mechanization of our environment these social interests have become increasingly important, and the law of torts has undergone a tremendous expansion. So much so that it can fairly be said that "by and large except where one has suffered from one's own fault or from an 'unavoidable accident' the law of torts steps in today to offer some form of relief."[1]

Yet in many states, if our pedestrian were the spouse or child of our drunken driver, the law of torts would offer no relief. The basis of the conclusion that there is no liability for torts committed by one against his spouse or child lies largely in the historical conception of the family as a legal and social institution. The family was considered a unit of government, with the husband and father as its head. Husband and wife were one in the eyes of the law, and the husband was the one. Children could have few interests beyond the complete dominion and control of their parents. With such a conception, even aside from the rules of the law which were developed to implement it, it was unthinkable that one spouse should be allowed to recover from the other for personal tort, or that a child should recover from its parent.

But the same urbanization and mechanization of our environment which has made increasingly important the social interests under-

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1. SEAVEY, COGITATIONS ON TORTS 4 (1954).

lying the law of torts, has also hastened, if not caused, a great change in the conception of the family as a legal and social institution. The husband and father is no longer a tyrant to be feared and obeyed, but a partner and a pal, or even a Dagwood Bumstead. Married women are emancipated and can hold property, contract, vote, sue and be sued, and otherwise participate in the affairs of the community free from the legal domination of their husbands. Divorce is easier to obtain and more socially acceptable.

Children too, no longer are so completely dependent upon and subject to the control of their parents. The state and other institutions of society provide much of their education, recreation, and opportunities for employment.

The increased importance of and emphasis upon the basic social interests underlying the law of torts and the change in the conception of the family as a legal and social institution have led many persons and some courts to castigate the rule of no-liability for personal torts between husband and wife or parent and child as vestigial and anachronous.

Indeed, there have been many cases where the application of the rule has resulted in manifest injustice.

Nevertheless, there are vital social interests in the family relationship which must be considered in the formulation of rules of law with respect to torts committed by one member of the family against another. The family group, husband and wife and minor children, customarily live in the same house, are supported by and benefited from the same sources of income, and have common interests. Parents are responsible for the discipline of their children; and as natural guardians and custodians, parents direct the use and disposition of their children's property. The family is still a vital social institution. Society has an interest in the protection of the family relation and in that attitude of togetherness which is fundamental to family existence.

There are situations where there is at least an apparent confiict between those social interests basic to the law of personal torts and the social interests in the protection and preservation of the family relationship. In any event in the formulation of a rule of law both should be considered, and, insofar as is possible, both should be secured.

II. THE PRESENT STATE OF THE LAW

While the same basic interests are involved in torts between husband and wife and those between parent and child, the rules themselves have developed in greatly different ways. It is therefore expedient to follow the traditional classification and treat the two separately.

A. *Husband and Wife*

The Common-Law Rule.—It was impossible at common law for one spouse ever to be liable to another in damages for an act which would have been tortious had the marital relation not existed, regardless of the nature of the tort or whether it arose before or during coverture. In theory, the difficulty was both substantive and procedural—substantive, in that the right and duty could not arise or would merge in the husband—procedural, in that during coverture the husband would be both plaintiff and defendant. In fact, it was simply unthinkable in view of the common-law conception of the marital relation for such a right of action to exist.

The rule, however, owed its origin and its continued vitality not so much to a conscious effort to express a social policy as to the varied influences of passages of Scripture, medieval metaphysics and conceptions of natural law, Roman law, feudalism and the sheer weight of judicial precedent.

1. Wife v. Husband

a. The Married Women's Emancipation Acts.—During the course of the past century the various state legislatures, under the pressures of our changing environment, changing social theories and philosophies and the feminist movement, enacted Married Women's Emancipation Acts. As their name implies, the general purpose of these acts was to remove from married women the disabilities of coverture and thus to emancipate them so that they might stand as equals with their husbands in the eyes of the law and contract, hold property, sue and be sued as individuals in their own right.

These statutes vary considerably in their terminology. Some of the earlier statutes were expressly concerned only with property rights, and thus could not reasonably be construed as affecting the right of one spouse to sue the other for personal torts.

In at least one jurisdiction—Illinois—a statute has been enacted expressly providing that neither spouse may sue the other for a tort against the person committed during coverture.[2] In Louisiana a statute which in general terms bars married women from suing their husbands during coverture except for certain divorce and property actions has been construed as barring a suit for personal injuries during coverture.[3] In New York, on the other hand, a statute

2. ILL. REV. STAT. c. 68, § 1 (1953); Hindman v. Holmes, 4 Ill. App. 2d 279, 124 N.E.2d 344 (1955). In the case of Brandt v. Keller, 413 Ill. 503, 109 N.E.2d 729 (1952), the Illinois court held that a wife could sue her husband for injuries sustained by her as a result of her husband's driving his automobile in a wilful and wanton manner. The statute was thus apparently passed for the express purpose of changing the rule therein announced.

3. Edwards v. Royal Indemnity Co., 182 La. 171, 161 So. 191 (1935); Palmer v. Edwards, 155 So. 483 (La. App. 1934). *But cf.* Gremillion v. Caffey, 71 So. 2d 670 (La. App. 1954) (wife, after her divorce, was allowed to

expressly allows one spouse to sue the other for personal injuries.[4]

In a great majority of the states, however, the statutes have no express provisions with respect to such actions, but rather provide in general language that married women may sue separately for torts committed against them and generally that they may sue and be sued as though they were unmarried.[5] In most of these states, the courts have held that such statutes do not so change the common law so as to allow actions between spouses for personal torts.[6] In a substantial minority, however, a contrary result has been reached.[7]

The immediate problem is thus primarily a matter of statutory construction. While in a few cases the decisions have turned upon some specific language in the particular statute, on the whole the decisions have been based upon general principles of statutory construction considered in the light of the social theories and interests involved.

On the one hand, in arriving at the conclusion that these statutes do not authorize one spouse to sue another for personal torts, the courts have said:

(1) In enacting such statutes the legislatures intended merely to remove the limitations upon a wife's right of action requiring that she be joined by her husband and to allow the wife to sue

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maintain an action for an assault committed by her former husband before the divorce).

4. N.Y. DOM. REL. LAW § 57.

5. See Annot., 43 A.L.R.2d 632, 651 (1955).

6. Thompson v. Thompson, 218 U.S. 611 (1910); Peters v. Peters, 156 Cal. 32, 103 Pac. 219 (1909); Ferguson v. Davis, 102 A.2d 707 (Del. 1954); Webster v. Schneider, 103 Fla. 1131, 138 So. 755 (1932); Wright v. Wright, 85 Ga. App. 721, 70 S.E.2d 152 (1952); Blickenstaff v. Blickenstaff, 89 Ind. App. 529, 167 N.E. 146 (1929); Libby v. Berry, 74 Me. 286, 589 (1883); Furstenburg v. Furstenburg, 152 Md. 247, 136 Atl. 534 (1927); Lubowitz v. Taines, 293 Mass. 39, 198 N.E. 320 (1935); Harvey v. Harvey, 239 Mich. 142, 214 N.W. 305 (1927); Patenaude v. Patenaude, 195 Minn. 523, 263 N.W. 546 (1935); Austin v. Austin, 136 Miss. 61, 100 So. 591 (1924); Willott v. Willott, 333 Mo. 896, 62 S.W.2d 1084 (1933); Conley v. Conley, 92 Mont. 425, 15 P.2d 922 (1932); Emerson v. Western Seed & Irrig. Co., 116 Neb. 180, 216 N.W. 297 (1927); Hudson v. Gas Consumers' Ass'n, 123 N.J.L. 252, 8 A.2d 337 (1939); Romero v. Romero, 58 N.M. 201, 269 P.2d 748 (1954); Oken v. Oken, 44 R.I. 291, 117 Atl. 357 (1922); Lillienkamp v. Rippetoe, 133 Tenn. 57, 179 S.W. 628 (1915); Comstock v. Comstock, 106 Vt. 50, 169 Atl. 903 (1934); Keister v. Keister, 123 Va. 157, 96 S.E. 315 (1918); Schultz v. Christopher, 65 Wash. 496, 118 Pac. 629 (1911); Poling v. Poling, 116 W. Va. 187, 179 S.E. 604 (1935); McKinney v. McKinney, 59 Wyo. 204, 135 P.2d 940 (1943).

7. Johnson v. Johnson, 201 Ala. 41, 77 So. 335 (1917); Katzenberg v. Katzenberg, 183 Ark. 626, 37 S.W.2d 696 (1931); Rams v. Rams, 97 Colo. 19, 46 P.2d 740 (1935); Brown v. Brown, 88 Conn. 42, 89 Atl. 889 (1914); Lorang v. Hays, 69 Idaho 440, 209 P.2d 733 (1949); Brown v. Gosser, 262 S.W.2d 480 (Ky. 1953); Lumbermens Mut. Cas. Co. v. Blake, 94 N.H. 141, 47 A.2d 874 (1946); Coster v. Coster, 289 N.Y. 438, 46 N.E.2d 509 (1943); Fitzmaurice v. Fitzmaurice, 62 N.D. 191, 242 N.W. 526 (1932); Damm v. Elyria Lodge, 158 Ohio St. 107, 107 N.E.2d 337 (1952); Courtney v. Courtney, 184 Okla. 395, 87 P.2d 660 (1938); Pardue v. Pardue, 167 S.C. 129, 166 S.E. 101 (1932); Scotvold v. Scotvold, 68 S.D. 53, 298 N.W. 266 (1941); Taylor v. Patten, 2 Utah 2d 404, 275 P.2d 696 (1954); Wait v. Pierce, 191 Wis. 202, 209 N.W. 475 (1926).

in her own name; and hence there was no intention to change the substantive law by creating new causes of action in married women where none existed before, as would be the case in personal torts between spouses.[8]

(2) In enacting such statutes, the legislatures intended to affect only contract or property rights and not to change the fundamental nature of the marital relationship so as to allow actions between spouses for personal torts.[9]

(3) The purpose of such statutes was to place married women on a plane of equality with their husbands; and since a husband could not sue his wife for personal torts, equality or mutuality requires that the wife should not be able to sue him.[10]

(4) Statutes in derogation of common law must be construed as not altering the common law further than expressly declared or necessarily implied from the fact that they cover the entire subject matter. Actions between spouses for personal torts are not expressly provided for in The Married Women's Emancipation Acts, nor is their authorization necessarily implied.[11]

On the other hand, in arriving at the conclusion that The Married Woman's Emancipation Acts do authorize actions between spouses for personal torts the courts have said:

(1) Such statutes have the purpose and effect of destroying the fiction of the legal identity of husband and wife, and thus of destroying the reason for and the foundation of the common-law rule.[12]

(2) Words in statutes should be given their plain and ordinary meaning, and when the legislature provided without limitation that married women might bring actions as if sole, it meant that they might bring such actions against any person who did them injury,

8. Thompson v. Thompson, 218 U.S. 611 (1910); Furstenberg v. Furstenberg, 152 Md. 247, 136 Atl. 534 (1927); Austin v. Austin, 136 Miss. 61, 100 So. 591 (1934); Libby v. Berry, 74 Me. 286 (1883); Conley v. Conley, 92 Mont. 425, 15 P.2d 922 (1932); Romero v. Romero, 58 N.M. 201, 269 P.2d 748 (1954); Comstock v. Comstock, 106 Vt. 50, 169 Atl. 903 (1934).

9. Peters v. Peters, 156 Cal. 32, 103 Pac. 219 (1909); Corren v. Corren, 47 So. 2d 774 (Fla. 1950); Henneger v. Lomas, 145 Ind. 287, 44 N.E. 462 (1896); Conley v. Conley, 92 Mont. 425, 15 P.2d 922 (1932); Oken v. Oken, 44 R.I. 291, 117 Atl. 357 (1922).

10. Strom v. Strom, 98 Minn. 427, 107 N.W. 1047 (1906); Austin v. Austin, 136 Miss. 61, 100 So. 591 (1924); Rogers v. Rogers, 265 Mo. 200, 177 S.W. 382 (1915); Conley v. Conley, 92 Mont. 425, 15 P.2d 922 (1932); Smith v. Smith, 287 P.2d 572 (Ore. 1955); Schultz v. Christopher, 65 Wash. 496, 118 Pac. 629 (1911).

11. Lillienkamp v. Rippetoe, 133 Tenn. 57, 179 S.W. 628 (1915); Keister v. Keister, 123 Va. 157, 96 S.E. 315 (1918); Poling v. Poling, 116 W. Va. 187, 179 S.E. 604 (1935).

12. Johnson v. Johnson, 201 Ala. 41, 77 So. 335 (1917); Katzenberg v. Katzenberg, 183 Ark. 626, 37 S.W.2d 696 (1931); Rains v. Rains, 97 Colo. 19, 46 P.2d 740 (1935); Brown v. Brown, 88 Conn. 42, 89 Atl. 889 (1914); Brown v. Gosser, 262 S.W.2d 480 (Ky. 1953).

including their husbands.[13]

(3) The effect of such statutes was to do more than merely put married women on a plane of equality with their husbands. It also gave them by its terms the same rights and position as unmarried women.[14]

(4) Such statutes are remedial in character and thus should be liberally construed.[15]

(5) By authorizing actions by married women alone when the action concerned their separate property, the legislature authorized married women to sue their husbands for personal torts, since married women have a right in their persons, and a suit for a wrong to their persons is a chose in action and a chose in action is property.[16]

(6) It is illogical to assume that the legislature intended to allow married women to sue for torts against their property, but not against their person.[17]

b. Policy Considerations.—The courts have, however, generally recognized the problem as one of social policy.

In support of the view that no action for personal torts between spouses should be allowed, the courts have said that:

(1) To allow such actions would be to encourage and incite the disruption of that marital harmony and domestic peace which is essential to the preservation and protection of the institution of the family.[18]

(2) To allow such actions would be to encourage baseless and trivial actions brought out of spite rather than from merit;[19] and where the defendant was protected by insurance the allowance of such actions would encourage collusion and fraud.[20]

(3) The laws of crimes and of divorce afford married persons sufficient and adequate remedies for such wrongs, and are sufficient to protect society's interest in their prevention.[21]

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13. Gilman v. Gilman, 78 N.H. 4, 95 Atl. 657 (1915); Wait v. Pierce, 191 Wis. 202, 209 N.W. 475 (1926).
14. Fitzmaurice v. Fitzmaurice, 62 N.D. 191, 242 N.W. 526 (1932).
15. Courtney v. Courtney, 184 Okla. 395, 87 P.2d 660 (1938).
16. Prosser v. Prosser, 114 S.C. 45, 102 S.E. 787 (1920).
17. Scotvold v. Scotvold, 68 S.D. 53, 298 N.W. 266 (1941).
18. Thompson v. Thompson, 218 U.S. 611 (1910); Corren v. Corren, 47 So. 2d 774 (Fla. 1950); Sink v. Sink, 172 Kan. 217, 239 P.2d 933 (1952); Austin v. Austin, 136 Miss. 61, 100 So. 591 (1924); Lillienkamp v. Rippetoe, 133 Tenn. 57, 179 S.W. 628 (1915).
19. Thompson v. Thompson, 218 U.S. 611 (1910).
20. Lubowitz v. Taines, 293 Mass. 39, 198 N.E. 320 (1935); Harvey v. Harvey, 239 Mich. 142, 214 N.W. 305 (1927); Smith v. Smith, 287 P.2d 572 (Ore. 1955).
21. Peters v. Peters, 156 Cal. 32, 103 Pac. 219 (1909); Drake v. Drake, 145 Minn. 388, 177 N.W. 624 (1920); Austin v. Austin, 136 Miss. 61, 100 So. 591 (1924).

(4) Money recovered in such actions would go into the family exchequer and would be available for family purposes to both parties.[22]

(5) The policies invoked are so confused, and the difficulty of devising a satisfactory rule is so great that the matter should be left to the legislatures.[23]

On the other hand, in support of the view that such actions should be permitted, the courts have said:

(1) The remedies through divorce and criminal procedures do not afford adequate redress and thus if there be no recovery in tort the injured spouse has no adequate remedy.[24]

(2) The bringing of such actions will not disrupt domestic harmony; but rather where such actions are brought, that harmony has already been disrupted.[25]

(3) Spouses can bring other actions against one another including tort actions involving property. There is no sound reason to make a distinction with respect to personal torts.[26]

c. Type of Tort and Presence of Insurance.—The rule of no-liability has been applied in cases involving assault, negligence, malicious prosecution and other torts.[27] At least one court has expressly held that the rule of no-liability applied regardless of whether the claim was based upon mere negligence or willful, wanton or malicious conduct.[28] However, in a recent Oregon case the court held, "We hold that when a husband inflicts intentional harm upon the person of his wife, the peace and harmony of the home has been so damaged that there is no danger that it will be further impaired by the maintenance of an action for damages and she may maintain an action."[29]

The great majority of the cases have been actions by the wife against the husband for injuries resulting from the negligent operation of an automobile.[30] In most cases, no doubt, the husband carried liability insurance. But the presence of such insurance has not led the

22. Austin v. Austin, 136 Miss. 61, 100 So. 591 (1924); Smith v. Smith, 287 P.2d 572 (Ore. 1955).
23. Smith v. Smith, 287 P.2d 572 (Ore. 1955).
24. Johnson v. Johnson, 201 Ala. 41, 77 So. 335 (1917).
25. Brown v. Brown, 88 Conn. 42, 89 Atl. 889 (1914); Lorang v. Hayes, 69 Idaho 440, 209 P.2d 773 (1949); Brown v. Gosser, 262 S.W.2d 480 (Ky. 1953); Courtney v. Courtney, 184 Okla. 395, 87 P.2d 660 (1938); Scotvold v. Scotvold, 68 S.D. 53, 298 N.W. 266 (1941); Wait v. Pierce, 191 Wis. 202, 209 N.W. 475 (1926).
26. Brown v. Gosser, 262 S.W.2d 480 (Ky. 1953); Courtney v. Courtney, 184 Okla. 395, 87 P.2d 660 (1938).
27. See Annot., 43 A.L.R.2d 632, 636 (1955).
28. Wright v. Wright, 85 Ga. App. 721, 70 S.E.2d 152 (1952).
29. Apitz v. Dames, 287 P.2d 585, 598 (Ore. 1955); Smith v. Smith, 287 P.2d 572 (Ore. 1955).
30. See Annot., 43 A.L.R.2d 632, 636 (1955).

courts to deviate from the rule of disability. In some cases, however, the courts have advanced as an additional reason for retaining the rule of no-liability the belief that the allowance of such actions would encourage collusive suits where the defendant was protected by insurance.[31] Courts adopting the rule that such actions can be maintained have said that there is no more danger of collusion in such cases than in numerous others and that such a contention is no basis for denying liability.[32]

d. Premarital Torts.—In those states where the rule of spousal disability is still applied, the courts have generally held that the rule is applicable to premarital torts as well as to those committed during marriage;[33] the rationale of the decisions being substantially the same as those set forth above with respect to wrongs committed during coverture. Some courts have indicated that the difficulty is not merely procedural but substantive, holding that the unity arising from marriage extinguishes any right of action theretofore existing.[34]

In North Carolina, however, the rule of disability has been held inapplicable to a premarital tort on the theory that a woman's liability for torts was not affected by marriage under the language of the applicable statute.[35] In a recent Missouri case, it was also held that a wife could maintain an action against her husband for a personal tort arising out of an automobile accident which occurred prior to the marriage, even though the action was brought after marriage.[36]

e. Effect of Invalidity of Marriage or Annulment.—In an Indiana case, the court held in an action for premarital seduction that when the marriage was shown to be invalid the rule of spousal disability was not applicable so that the wife could bring such an action against her husband.[37] In at least two other cases, however, the courts have held that the fact that a marriage had been annuled did not affect the rule prohibiting actions between spouses arising during coverture.[38]

31. Lubowitz v. Taines, 293 Mass. 39, 198 N.E. 320 (1935); Harvey v. Harvey, 239 Mich. 142, 214 N.W. 305 (1927).

32. Courtney v. Courtney, 184 Okla. 395, 87 P.2d 660 (1938).

33. Bohenek v. Niedzwiechi, 142 Conn. 278, 113 A.2d 509 (1955), (applying Pennsylvania law); Carmichael v. Carmichael, 53 Ga. App. 663, 187 S.E. 116 (1936); Hunter v. Livingston, 123 N.E.2d 912 (Ind. App. 1955); Patenaude v. Patenaude, 195 Minn. 523, 263 N.W. 546 (1935); Scales v. Scales, 168 Miss. 439, 151 So. 551 (1934); Wolfer v. Oehlers, 8 N.J. Super. 434, 73 A.2d 95 (L.1950); Raines v. Mercer, 165 Tenn. 415, 55 S.W.2d 263 (1932); Furey v. Furey, 193 Va. 727, 71 S.E.2d 191 (1952); Staats v. Co-operative Transit Co., 125 W. Va. 473, 24 S.E.2d 916 (1943).

34. *E.g.*, Raines v. Mercer, 165 Tenn. 415, 55 S.W.2d 263 (1932).

35. Shirley v. Ayers, 201 N.C. 51, 158 S.E. 840 (1931) action by husband against his wife for a personal tort). *But cf.* Scholtens v. Scholtens, 230 N.C. 149, 52 S.E.2d 350 (1949) (husband denied recovery from his wife for a tort committed during coverture).

36. Hamilton v. Fulkerson, 285 S.W.2d 642 (Mo. 1955).

37. Henneger v. Lomas, 145 Ind. 287, 44 N.E. 462 (1896).

38. Lunt v. Lunt, 121 S.W.2d 445 (Tex. Civ. App. 1938); Callow v. Thomas, 322 Mass. 550, 78 N.E.2d 637 (1948), criticized in 48 COLUM. L. REV. 961 (1948). The *Callow* decision was based upon a consideration of the general effect

f. Effect of Divorce.—Clearly the rule of disability is inapplicable to torts committed after the divorce becomes effective. Where a decree of divorce had been entered, but had not become final, a California court held that the marital bonds had not been severed so as to make the rule of disability inapplicable.[39] However, it was held in an analogous case in the District of Columbia that a wife could sue her husband for a tort committed in the interim between the entry of a decree for a divorce and its effective date.[40]

As to torts committed during coverture, those courts following the common-law rule have held that divorce of the parties does not affect the applicability of the rule,[41] the principal reason for such a result being the theory that no cause of action arose during coverture, and the fact that divorce could not create a cause of action when none existed at the time the events occurred. In addition, the courts have relied upon the contention that all matters between the parties were settled by the divorce decree itself.

g. Trends and Tendencies.—There has been no appreciable tendency on the part of either the courts which have adhered to the common-law rule of disability or those assuming a contrary position to depart from their previous decisions. Nor have the courts which follow the common-law rule shown any appreciable inclination to limit its application. Only one case was found where the court expressly overruled its prior decisions in this regard.[42] In that case the court overruled its prior decisions following the rule of disability and allowed an action between spouses for a personal tort.

In only two instances have the legislatures changed the rule adopted by the courts. In New York a statute was passed expressly allowing such actions,[43] while in Illinois a statute was passed expressly barring such action.[44]

In a few of the later cases, the courts have recognized the nature of the problem and have attempted to formulate a rule which would secure all the social interests involved, rather than adherring to either

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of annulments, that is, that when the marriage is merely voidable, as was the case there, the parties thereto will be barred from reopening or undoing acts or transactions concluded during the marriage. Query, as to the result in the case of a marriage prohibited by law and thus void.

39. Paulus v. Bauder, 106 Cal. App. 2d 589, 235 P.2d 422 (1951).

40. Steele v. Steele, 65 F. Supp. 329 (D.D.C. 1946).

41. Bandfield v. Bandfield, 117 Mich. 80, 75 N.W. 287 (1898); Strom v. Strom, 98 Minn. 427, 107 N.W. 1047 (1906); Schultz v. Christopher, 65 Wash. 496, 118 Pac. 629 (1911).

42. Brown v. Gosser, 262 S.W.2d 480 (Ky. 1953). See also Hamilton v. Fulkerson, 285 S.W.2d 645 (Mo. 1955).

43. N.Y. DOM. REL. LAW. § 57. At the same time the New York legislature adopted this act, it enacted a statute providing that no insurance policy should be deemed to insure against any liability of an insured for injuries to his or her spouse unless express provision for such insurance was included in the policy. N.Y. INS. LAW § 167(3).

44. ILL. REV. STAT. c. 68, § 1 (1953).

the inflexible rule of disability or the equally inflexible rule of no disability.[45]

2. Husband v. Wife

Most of the cases wherein one spouse has been allowed to maintain an action against the other for personal tort, have been brought by a wife against her husband. The courts have thus had little occasion to consider whether a husband may maintain such an action against his wife. As would be expected in those jurisdictions where the wife is not allowed to sue her husband for personal tort, the husband has not been allowed to sue his wife.[46] In North Carolina and Wisconsin, where the courts have held that a wife may maintain such actions against her husband, the courts have also held that husbands have no such rights against their wives on the theory that the Married Women's Emancipation Acts conferred no rights upon married men, and thus that the common-law rule of spousal disability remained in force as to married men.[47] One answer to the latter contention would be that the statutes have destroyed the basis of the rule of disability and that it should no longer be followed as to either spouse.

B. Parent and Child

1. Child v. Parent

Prior to 1891, there seems to have been no decision, either English or American, directly on the point as to whether an unemancipated child could maintain an action against its parent for personal tort.[48] Some courts have reasoned that this absence of judicial decision supports the proposition that no such action was recognized at common law.[49] Others have reasoned that this absence shows rather that there was no such rule at common law.[50]

In 1891, however, a Mississippi court held that an unemancipated child could not bring an action for personal tort against its parent.[51] The court said, "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, no such action as this can be maintained. The

45. *E.g.*, Apitz v. Dames, 287 P.2d 585 (Ore. 1955); Taylor v. Patten, 2 Utah 2d 404, 275 P.2d 696 (1954).

46. Peters v. Peters, 156 Cal. 32, 103 Pac. 219 (1909); Aldrich v. Tracy, 222 Iowa 84, 269 N.W. 30 (1936).

47. Scholtens v. Scholtens, 230 N.C. 149, 52 S.E.2d 350 (1949); Fehr v. General Acc., Fire & Life Assur. Corp., 246 Wis. 228, 16 N.W.2d 787 (1944).

48. Three decisions involving actions by children against persons in loco parentis are reported: Gould v. Christianson, Fed. Cas. No. 5636 (D.C.N.Y. 1836); Nelson v. Johansen, 18 Neb. 180, 24 N.W. 730 (1885); Lander v. Seaver, 32 Vt. 114 (1859). In all three cases some support for a rule of liability can be found at least as to gross neglect or cruel and malicious acts.

49. Matarese v. Matarese, 47 R.I. 131, 131 Atl. 198 (1925).

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

51. Hewlett v. George, 68 Miss. 703, 9 So. 885 (1891).

peace of society, and of the families composing society, and of 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. The state, through its criminal laws, will give the minor child protection for parental violence and wrongdoing, and this is all the child can be heard to demand."

This decision was followed by the Supreme Court of Tennessee in 1903 in a case involving an action by a minor child against her father and step-mother seeking to recover damages for cruel and inhuman treatment alleged to have been inflicted upon her by the step-mother at the instance and with the consent of the father.[52]

The same rule was also applied in a much-criticized Washington case decided in 1905, where a daughter brought an action for damages against her father as a result of his raping her.[53]

On the basis of these decisions and the reasons advanced in support thereof, the great majority of the courts of this country have held that minor children cannot maintain actions for personal torts against their parents.[54] The basis of the rule is not that the parent is under no duty with respect to his child, but rather that the child has no right to bring a civil action against his parent for redress of such injuries.[55]

a. Policy Considerations.—In support of the rule barring an action by a minor child against its parents, the courts have relied upon a number of considerations of public policy.

Perhaps the most frequently cited, as well as the most often criticized, conception has been the view that the allowance of such actions would disturb the peace and harmony of the family which is essential to a well-ordered society.[56]

Another frequently cited conception of policy is the view that such actions would impair parental authority.[57] Some courts have also reasoned that the payment of damages to one member of the family would be unfair to other members, since the sum awarded would come from family funds which should be used for the benefit of all.[58]

52. McKelvey v. McKelvey, 111 Tenn. 388, 77 S.W. 664 (1903).
53. Roller v. Roller, 37 Wash. 242, 79 Pac. 788 (1905), *Contra,* Borst v. Borst, 41 Wash. 2d 642, 251 P.2d 149 (1952).
54. *See* Annot., 19 A.L.R.2d 423 (1951).
55. Hewlett v. George, 68 Miss. 703, 9 So. 885 (1891); Dunlap v. Dunlap, 84 N.H. 352, 150 Atl. 905 (1930).
56. Chastain v. Chastain, 50 Ga. App. 241, 177 S.E. 828 (1934); Smith v. Smith, 81 Ind. App. 566, 142 N.E. 128 (1924); Reingold v. Reingold, 115 N.J.L. 532, 181 Atl. 153 (1935); Small v. Morrison, 185 N.C. 577, 118 S.E. 12 (1923); McKelvey v. McKelvey, 111 Tenn. 388, 77 S.W. 664 (1903).
57. Rambo v. Rambo, 195 Ark. 832, 114 S.W.2d 468 (1938); Mesite v. Kirchenstein, 109 Conn. 77, 145 Atl. 753 (1929); Roller v. Roller, 37 Wash. 242, 79 Pac. 788 (1905); Wick v. Wick, 192 Wis. 260, 212 N.W. 787 (1927).
58. *E.g.,* Roller v. Roller, 37 Wash. 242, 79 Pac. 788 (1905).

Other courts have indicated that the child is adequately protected by the criminal laws and by the writ of habeas corpus.[59]

Where the parent has been protected by liability insurance some courts have reasoned that to allow such actions would encourage fraud and collusion.[60] Others have said that the conditions of family life require that the parent be protected from actions arising out of the discharge of his parental duties.[61] The difficulty in apportioning any recovery so that the parent does not benefit from his own wrong has also been mentioned in support of the denial of such actions.[62]

The applicability and soundness of these various conceptions of policy has been thoroughly analyzed on several occasions.[63] One of the most thorough and well-reasoned judicial discussions of these policies is that of the Supreme Court of Washington in the case of *Borst v. Borst*,[64] wherein the rule of disability was qualified and limited so as to apply only to those torts arising out of the exercise of parental duties.

b. Analogies to Actions Between Husband and Wife.—Some courts in support of their decisions refusing to allow a minor child to sue its parents have said that such actions are analogous to actions for personal torts between husband and wife and have reasoned that since the latter cannot be maintained the same considerations of policy should preclude the former.[65] While it is true that the same considerations of policy are involved in both types of actions, it is equally true that there are no historical rules of law involved in the parent-child action analogous to the procedural and substantive difficulties at common law upon which the rule of disability for personal torts between spouses is based.

c. Effect of Additional Relationship.—The presence of some additional relationship between the parent and child, such as master and servant, or carrier and passenger, or the fact that the tort arose out of the business activities of the parent, has been a factor in leading some courts to qualify the rule of disability. The theory underlying such a position is that where the tort arises out of the additional relationship rather than out of the normal parent-child relationship, the latter relation is merely incidental or irrelevant and thus should not affect the question of liability. For example, in two cases where a carrier-passenger relation existed between the parties, the courts allowed the minor child-passenger to maintain an action against the

59. *E.g.*, Hewlett v. George, 68 Miss. 703, 9 So. 885 (1891).
60. *E.g.*, Villaret v. Villaret, 169 F.2d 677 (D.C. Cir. 1948).
61. Borst v. Borst, 41 Wash. 2d 642, 251 P.2d 149 (1952).
62. Harralson v. Thomas, 269 S.W.2d 276 (Ky. 1954).
63. McCurdy, *Torts Between Persons in Domestic Relation*, 43 HARV. L. REV. 1030 (1930).
64. 41 Wash. 2d 642, 251 P.2d 149 (1952).
65. Mesite v. Kirchenstein, 109 Conn. 77, 145 Atl. 753 (1929); see *e.g.*, McKelvey v. McKelvey, 111 Tenn. 388, 77 S.W.2d 664 (1903).

parent-carrier.[66] In these cases the courts recognized a distinction between the parental obligation and the rights and duties involved therein, and the general obligations which the law imposes upon everyone in his relations with his fellows.

In the leading case of *Dunlap v. Dunlap*,[67] one of the factors leading the court to allow the maintenance of an action by a child against its parent was the presence of a master-servant relation between the parties. In that case the injury was sustained in the course of employment, and the court further found that by taking out a liability insurance policy, the parent-master had intended to assume a master's liability toward the child-servant.[68]

In several cases involving actions for injuries to a child resulting from the parent's negligent operation of the family automobile the contention has been made that the breach of the duty in such cases does not involve the parent-child relation, and that therefore the action should be allowed. But such contentions have not been favorably received by the courts.[69]

In two well-reasoned recent cases, the courts held that since the torts arose out of the business activities of the parent and not out of the exercise of parental duties, the reasons suggesting the rule of disability were not applicable and accordingly the actions were allowed.[70]

d. Effect of Insurance.—While in some cases the courts have held that the act of a parent in obtaining a policy of insurance indicated an intention to assume liability to the child in respect to the matters covered by the policy,[71] the courts have generally held that the presence of insurance does not create a liability where none would exist in its absence.[72]

e. Effect of Character of Tort.—The cases have almost unanimously held, in the absence of some special circumstances, that an unemancipated child cannot recover against its parent in an action based on

66. Worrell v. Worrell, 174 Va. 11, 4 S.E.2d 343 (1939); Lusk v. Lusk, 113 W. Va. 17, 166 S.E. 538 (1932).

67. 84 N.H. 352, 150 Atl. 905 (1930).

68. *But cf.* Taubert v. Taubert, 103 Minn. 247, 114 N.W. 763 (1908).

69. See, *e.g.*, Luster v. Luster, 299 Mass. 480, 13 N.E.2d 438 (1938). *But cf.* Cowgill v. Boock, 189 Ore. 282, 218 P.2d 445 (1950).

70. 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). *Contra*, Belleson v. Skilbeck, 185 Minn. 537, 242 N.W. 1 (1932); Aboussie v. Aboussie, 270 S.W.2d 636 (Tex. Civ. App. 1954).

71. Dunlap v. Dunlap, 84 N.H. 352, 150 Atl. 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).

72. 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); Elias v. Collins, 237 Mich. 175, 211 N.W. 88 (1926); Lund v. Olson, 183 Minn. 515, 237 N.W. 188 (1931); Reingold v. Reingold, 115 N.J.L. 532, 181 Atl. 153 (1935); Small v. Morrison, 185 N.C. 577, 118 S.E. 12 (1923); Signs v. Signs, 156 Ohio St. 566, 103 N.E.2d 743 (1952).

negligence.[73] However, where the action is based upon the parent's intentional, or wilful and malicious misconduct some courts have held that the action could be maintained, primarily on the theory that by engaging in such misconduct the parent abandons the parental relation.[74] Such decisions have also emphasized that in such cases the policy favoring family peace and harmony can have no application, since by his acts the parent has already destroyed that harmony.[75] The courts have generally held that a child cannot recover damages against its parent in actions arising out of the exercise by the parent of his right to discipline or punish the child.[76] Some courts have indicated, however, that when the parent abuses the child and his right to discipline it, the child may maintain an action for damages resulting therefrom.[77] Others have held that even if the punishment is cruel and abusive a child cannot maintain an action for damages against its parent.[78]

f. Effect of Emancipation.—There seems to be no question but that an emancipated child can maintain an action for personal tort against its parent.[79] Some courts have indicated that the emancipation must be complete in order to remove the disability,[80] that is,

73. 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); Trudell v. Leatherby, 212 Cal. 678, 300 Pac. 7 (1931); Wood v. Wood, 135 Conn. 280, 63 A.2d 586 (1948); Bulloch v. Bulloch, 45 Ga. App. 1, 163 S.E. 708 (1932); Skillin v. Skillin, 130 Me. 223, 154 Atl. 570 (1931); Luster v. Luster, 299 Mass. 480, 13 N.E.2d 438 (1938); Elias v. Collins, 237 Mich. 175, 211 N.W. 88 (1926); Lund v. Olson, 183 Minn. 515, 237 N.W. 188 (1931); Baker v. Baker, 263 S.W.2d 24 (Mo. 1953); Reingold v. Reingold, 115 N.J.L. 532, 181 Atl. 153 (1935); Cannon v. Cannon, 287 N.Y. 425, 40 N.E.2d 236 (1942); Small v. Morrison, 185 N.C. 577, 118 S.E. 12 (1923); Matarese v. Matarese, 47 R.I. 131, 131 Atl. 198 (1925); Kelly v. Kelly, 158 S.C. 517, 155 S.E. 888 (1930); Graham v. Miller, 182 Tenn. 434, 187 S.W. 2d 622 (1945); Norfolk S.R.R. v. Gretakis, 162 Va. 597, 174 S.E. 841 (1934); Securo v. Securo, 110 W. Va. 1, 156 S.E. 750 (1931); Wick v. Wick, 192 Wis. 260, 212 N.W. 787 (1927). *But cf.* Dunlap v. Dunlap, 84 N.H. 352, 150 Atl. 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 642, 251 P.2d 146 (1952); Lusk v. Lusk, 113 W. Va. 17, 166 S.E. 538 (1932).

74. Brown v. Cole, 198 Ark. 417, 129 S.W.2d 245 (1939); Emery v. Emery, 289 P.2d 218 (Cal. 1955); Wright v. Wright, 85 Ga. App. 721, 70 S.E.2d 152 (1952); Treschman v. Treschman, 28 Ind. App. 206, 61 N.E. 961 (1901); Nudd v. Matsoukas, 131 N.E.2d 525 (Ill. 1956); Mahnke v. Moore, 197 Md. 61, 77 A.2d 923 (1951); Dix v. Martin, 171 Mo. App. 266, 157 S.W. 133 (1913); Meyer v. Ritterbush, 196 Misc. 551, 92 N.Y.S.2d 595 (Sup. Ct. 1949); Cowgill v. Boock, 189 Ore. 282, 218 P.2d 445 (1950).

75. See, *e.g.*, Mahnke v. Moore, 197 Md. 61, 77 A.2d 923 (1951).

76. Chastain v. Chastain, 50 Ga. App. 241, 177 S.E. 828 (1934); Rowe v. Rugg, 117 Iowa 606, 91 N.W. 903 (1902); McKelvey v. McKelvey, 111 Tenn. 388, 77 S.W. 664 (1903).

77. Treschman v. Treschman, 28 Ind. App. 206, 61 N.E. 961 (1901); Mahnke v. Moore, 197 Md. 61, 77 A.2d 923 (1951); Dunlap v. Dunlap, 84 N.H. 352, 150 Atl. 905 (1930); Cowgill v. Boock, 189 Ore. 282, 218 P.2d 445 (1950).

78. McKelvey v. McKelvey, 111 Tenn. 388, 77 S.W. 664 (1903).

79. Mesite v. Kirchenstein, 109 Conn. 77, 145 Atl. 753 (1929); Bulloch v. Bulloch, 45 Ga. App. 1, 163 S.E. 708 (1932); Skillin v. Skillin, 130 Me. 223, 154 Atl. 570 (1931); Lancaster v. Lancaster, 213 Miss. 536, 57 So. 2d 302 (1952).

80. Shea v. Pettee, 19 Conn. Supp. 125, 110 A.2d 492 (Super. Ct. 1954); Nudd v. Matsoukas, 6 Ill. App. 2d 504, 128 N.E.2d 609 (1955), *rev'd*, 7 Ill. 2d 608, 131 N.E.2d 525 (1956).

that there must have been a complete severance of the "filial ties."[81] However, where the wrongful act on which the action is based occurred before emancipation, the courts have held that the right to maintain the action must be determined as of the time of the wrongful act and that the fact of emancipation cannot create a right of action when none existed at that time.[82]

g. Waiver of Defense by Parent.—In at least two cases where children brought suit against their parents in which the latter were protected by liability insurance and defended by the insurance company, the parent sought to avoid the effect of the rule of disability by attempting either to waive the defense itself or to waive any interest in any recovery.[83] In both cases, however, the courts held that the rule was substantive in nature, and hence that no cause of action existed and one could not be created by waiver.

h. Trends and Tendencies.—No case was found in which the court repudiated the rule of disability altogether and held that children could sue their parents for personal torts as they could strangers. However, in several cases the courts have qualified and limited the application of the rule. Thus, where the tort has been alleged to be malicious or wilful in nature, there has been a tendency to allow the bringing of an action.[84] The presence of some additional relationship out of which the tort arose, or the fact that the tort arose out of the business activities of the parent has also led some courts to allow the bringing of an action. Particularly significant is the case of *Borst v. Borst*,[85] a Washington case, where the court analyzed most of the various considerations of policy which have been urged in support of the rule and held that it should apply only when the tort arises out of the exercise of parental duties. In so holding the court expressly disapproved its former decisions.

In many, if not most of the states, however, the rule of absolute disability appears to be well entrenched, particularly with respect to actions based upon negligence.

2. Parent v. Child

In the relatively few reported cases involving actions by a parent against his child for personal torts, the courts have almost uniformly held that no such action could be maintained.[86] In support of this

81. Brumfield v. Brumfield, 194 Va. 577, 74 S.E. 2d 170 (1953).
82. Rambo v. Rambo, 195 Ark. 832, 114 S.E.2d 468 (1938); Luster v. Luster, 299 Mass. 480, 13 N.E.2d 438 (1938); Reingold v. Reingold, 115 N.J.L. 532, 181 Atl. 153 (1935).
83. Reynolds v. Maramorosch, 208 Misc. 626, 144 N.Y.S.2d 900 (Sup. Ct. 1955); Nudd v. Matsoukas, *supra* note 80.
84. See, *e.g.*, Nudd v. Matsoukas, 7 Ill. 2d 608, 131 N.E.2d 525 (1956).
85. 41 Wash. 2d 642, 251 P.2d 149 (1952).
86. Shaker v. Shaker, 129 Conn. 518, 29 A.2d 765 (1942); Thompson v. Thompson, 264 S.W.2d 667 (Ky. 1954); Schneider v. Schneider, 160 Md. 18,

conclusion, the courts have relied primarily upon the policy of protecting family harmony and the analogous rule barring actions for personal tort by a child against his parent. In addition the courts have pointed out that the parent is the natural guardian of the child and that he should not be allowed to assume the inconsistent position of attempting to recover damages from the child.[87]

All of the reported cases have involved actions based upon the alleged negligent operation of automobiles and it may be assumed that the children involved were protected by liability insurance, but the courts have not found the presence of such insurance to be a material factor.

None of the reported cases have involved malicious, wilful, or intentional torts. Nor have the courts considered what, if any, effect should be given the presence of some additional relationship between the parties.

There seems to be no doubt but that a parent can bring an action for personal tort against a child who has been fully emancipated.[88]

C. Actions Between Other Members of the Family Group

The courts, in the few reported cases involving the point, have allowed actions for personal torts to be maintained between other members of the family group. Thus, actions between siblings have been allowed,[89] an infant has been allowed to recover against his grandmother,[90] as well as a father-in-law against his son-in-law.[91]

In support of their decisions in these cases, the courts have relied strongly on the general principle that the law will not suffer a wrong without a remedy, have discounted alleged dangers to domestic harmony as well as any dangers of fraud and collusion, and have also pointed out that in these relations there are no such recognized legal rights and duties as exist between the husband and wife and parent and child.[92]

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152 Atl. 498 (1930); Rines v. Rines, 97 N.H. 55, 80 A.2d 497 (1951) (applied law of Maine); Boehm v. C. M. Gridley & Sons, 187 Misc. 113, 63 N.Y.S.2d 587 (Sup. Ct. 1956); Duffy v. Duffy, 117 Pa. Super. 500, 178 Atl. 165 (1935); Turner v. Carter, 169 Tenn. 553, 89 S.W.2d 751 (1936); Fidelity Sav. Bank v. Aulik, 252 Wis. 602, 32 N.W.2d 613 (1948). *Contra,* Wells v. Wells, 48 S.W.2d 109 (Mo. App. 1932).

87. Shaker v. Shaker, 129 Conn. 518, 29 A.2d 765 (1942); Schneider v. Schneider, 160 Md. 18, 152 Atl. 498 (1930).

88. Taylor v. Taylor, 360 Mo. 994, 232 S.W.2d 382 (1950); Cafaro v. Cafaro, 14 N.J. Misc. 331, 184 Atl. 779 (Sup. Ct. 1936); Crosby v. Crosby, 230 App. Div. 651, 246 N.Y. Supp. 384 (3d Dep't 1930); Lo Galbo v. Lo Galbo, 138 Misc. 485, 246 N.Y. Supp. 565 (Sup. Ct. 1930).

89. Emery v. Emery, 289 P.2d 218 (Cal. 1955); Rozell v. Rozell, 281 N.Y. 106, 22 N.E.2d 254 (1939); Bielke v. Knaack, 207 Wis. 490, 242 N.W. 176 (1932). See also Detwiler v. Detwiler, 162 Pa. Super. 383, 57 A.2d 426 (1948).

90. Spaulding v. Mineah, 264 N.Y. 589, 191 N.E. 578 (1934).

91. Hamburger v. Katz, 10 La. App. 215, 120 So. 391 (1928).

92. Emery v. Emery, 289 P.2d 218 (Cal. 1955); Rozell v. Rozell, 281 N.Y. 106, 22 N.E.2d 254 (1939).

III. Analysis and Suggestions

A review of the cases discloses confusion compounded. While tentative movements towards the formulation of a consistent and workable rule have indeed been made, no rule has yet been formulated which adequately secures the interests involved. Such a situation is to be expected when one considers that the changed conditions of society and the changed conceptions of the family have been present for only a relatively few years.

A principal source of confusion, however, has been the failure to analyze the nature of the problem. For, actually, the ultimate problem of whether or not recovery should be allowed in such actions involves two distinct questions: first, whether the defendant has breached a legal duty to the plaintiff which should give rise to a right of compensation; and second, whether the enforcement of such a right should be denied because such enforcement itself would violate some greater social interest.

The answer to both questions involves the reconciliation of those social interests fundamental to the law of torts with the facts of family life and the social interests arising therefrom.[93]

The basic problem is thus one which is present in the formulation of any rule of law in that it involves the process of selecting from all the complex and interwoven factors, interests, principles and values, those which seem to be in accordance with and in furtherance of a general conception of justice. Inevitably, therefore, any solution will be based upon *a priori* conceptions of general postulates of justice and social policy and deductions therefrom.

A. The Presence of a Legal Duty

The basic assumption of the analysis which follows is that the interest of society in the prevention of personal injuries and the compensation of injured persons gives rise to a general social interest requiring the imposition of a legal duty on all persons to refrain from injuring others, unless the imposition of such a duty would violate

93. "When it comes to weighing or valuing claims or demands with respect to other claims or demands, we must be careful to compare them on the same plane. If we put one as an individual interest and the other as a social interest we may decide the question in advance in our way of putting it. For example, in the 'truck act' cases one may think of the claim of the employer to make contracts freely as an individual interest of substance. In that event, we might weigh it with the claim of the employee not to be coerced by economic pressure into making contracts to take his pay in orders on a company store, thought of as an individual interest of personality. If we think of either in terms of a policy we must think of the other in the same terms. If we think of the employee's claim in terms of a policy of assuring a minimum or a standard human life, we must think of the employer's claim in terms of a policy of upholding and enforcing contracts. If the one is thought of as a right and the other as a policy, or if the one is thought of as an individual interest and the other as a social interest, our way of stating the question may leave nothing to decide." Pound, *A Survey of Social Interests*, 57 Harv. L. Rev. 1, 2 (1943).

some greater and more valuable social interest. With respect to such latter interests, it is also assumed that the interest of society in protecting the intimacy of family life free from unnecessary and inhibiting fears and restraints, as well as the interest of society in preserving the attitude of togetherness which is essential to wholesome family life, are greater and more valuable than the interest in imposing a duty to refrain from injuring others.

The problem is thus to determine under what circumstances, if any, the imposition of a legal duty to refrain from injuring other members of the family group will violate the greater interest in protecting the basis of family existence.

Since the only basis for denying a duty to refrain from injuring others in such cases is the presence of the family relationship, the most logical general classification of the possible fact situations is on that basis; that is, to classify the possible actions into first, those actions arising out of acts directly attributable to the family relation, and second, those actions arising out of acts directly attributable to some other and additional relation.

1. Actions Arising Out of Acts or Omissions Directly Attributable to the Family Relation

The family group lives in intimate daily contact. As a result of that intimacy there is infinitely more opportunity for injuries to be suffered by members of the group as the result of their own acts or omissions than is the case with strangers to the group.

Fathers romp with their children. Husbands and wives caress. Brothers and sisters play and sometimes come to blows. Clearly no legal duty to refrain from injuring the other members of the family should or can arise in these situations.

In addition, by virtue of this intimacy, and by reason of the shortcomings of all humans, the home is of necessity a somewhat dangerous place for its inhabitants. Children will leave their roller skates on the front porch, and fathers will forget to fix the broken stairs.

Moreover, the lack of knowledge or of means may also create unsafe conditions in the home. The nature of family life, therefore, compels the members of the family group to accept the risks inherent in such circumstances.

The interests of society in the preservation of family life free from fears and inhibitions precludes the imposition of a legal duty to refrain from injuring other members of the family group by such acts or omissions, and thus outweighs the social interests in the imposition of a legal duty to refrain from injuring the other members of the family group in such circumstances.

Clearly then, actions based upon mere negligence which arise out of

acts or omissions which are directly attributable to the existence of the family relation should not be allowed.

The nature of family life, however, does not compel the members of the family to accept the risk of wilful and malicious acts of other members of the family group. Daughters should not be compelled to accept rape committed by their fathers. Nor should wives be compelled to accept brutal beatings at the hands of their husbands. The nature of such wrongs is such as to show a disregard of the family relation. There is nothing in the family relation which should preclude the imposition of a legal duty on all members of the family group to refrain from wilfully, wantonly, or maliciously injuring other members of the group.

The interests of society in the prevention of personal injury and the compensation of injured persons requires the imposition of a legal duty on all members of the family group to refrain from wilfully, wantonly, and maliciously injuring other members of the group.

The parental discipline cases have already shown a tendency to develop along these lines. Certainly a parent is responsible for the discipline of his child and has a legal as well as moral right, and at least a moral duty, to correct and punish the child. But that right should be limited, as indeed it has been in some cases, to the infliction of reasonable punishment. The parent should be under a legal duty to refrain from abusing and cruelly and maliciously punishing his child.

2. Actions Arising Out of Acts or Omissions Directly Attributable to Some Other or Additional Relation

In the nature of modern life, the various members may assume other roles than those predicated on their family relation—for example, carrier and passenger, master and servant, or one member of the family may be an invitee or customer in the other's place of business.

When a member of the family group is engaged in activities which are separate from the home and the life of the family as such, he should owe the same duties to the members of his family as he does to persons generally. The imposition of a legal duty in such circumstances to treat members of the family group in the same way as other persons will not violate the social interest in preserving the intimacy of family life free from fears and inhibitions. When the existence of the family relation is logically irrelevant, it should not effect the duties imposed for the protection of persons generally.

Thus, when the act or omission is not directly attributable to the

existence of the family relation, but rather to some other relation or circumstance, it should not affect the presence of the duties imposed by law with respect to personal injuries, regardless of the nature of the act or omission.

3. Difficulties in Classification

The above classification is logically sound, but it is admittedly subject to some practical difficulty in application. As is true of most general schemes of classification, there are border-line cases in which logical arguments can be made for placing the particular case in either class.

While, in general in modern society, the business activities of the members of the family group are more or less completely separate from the family activities as such, there are nevertheless many instances where it is difficult to distinguish between the two. For example, it would be difficult to distinguish between the activities of the typical farm family, where the range of family activities extends beyond the home itself into the varied activities of a farming enterprise.

The automobile cases also present some very real difficulties. The family car is just as integral a part of family existence as the home itself. Thus it logically follows that when the injury complained of results from the joint participation of both parties in the use of the family car for a family purpose there should be no right to compensation and no corresponding duty. Such would be true in the ordinary case where the injured person is a passenger in the family car. For in such a case, the injury is directly attributable to the existence of the family relation, just as much as in the case of an accident in the home itself. However, there will be instances where the injury complained of will not be directly attributable to the existence of the family relation, even though the family car is involved; for example, in a case where the driver of a family car jumps the curb on a busy street and hits a pedestrian who happens to be a member of his family.

In any case, however, the nature of the duty imposed depends upon the nature of the risk created by the particular act or omission. If the risk created is peculiar to members of the family group—that is, such a risk that only a member of the family group is apt to be exposed to it, then no legal duty to avoid it should be imposed for such risks arise out of the nature of family life itself. But if the risk created is common to the public at large—that is, such a risk that any person is apt to be exposed to it, then a legal duty to avoid it should be imposed.

Of course, as has already been shown, when the injury complained of is the result of a malicious, wilful, or wanton act—for example, in a

case where a drunken father compels his child to ride with him over a dangerous road, the breach of a legal duty should be found; the acts in such cases do not arise out of the nature of family life itself but rather are in contradiction to its basic nature and purpose.

4. Effect of the Termination of the Family Relation

Since the only logical basis for refusing to impose the general duty to refrain from injuring others on members of the family group in their relations within the group is the existence of the family relation itself and the sharing of the intimacy of that relation, it follows that when the relation is terminated the exception to the general legal duty is also terminated. Thus, when a child is fully emancipated and living apart from the family group, he should have the same rights and the other members of the family group should have the same duties as in the case of strangers to the family group. So when the husband and wife are not living together as such, or are divorced, their legal rights and duties as to personal torts should be the same as those between strangers.

Of course, the presence of a legal duty should be determined as of the time of the act or omission complained of, and subsequent changes in the parties' relations should not affect the question of whether such a duty was present at that time.

Effect of Other Factors.—The various other considerations of policy which have influenced the course of the decisions with respect to whether such actions should be allowed—the presence of insurance, the availability of other remedies, the difficulty in distributing the proceeds of any recovery, the danger to the happy home—are irrelevant in the determination of the existence of a legal duty.

5. The Effect of Allowing Actions for Personal Torts Between Members of the Family Group.

The second basic question in determining whether recovery should be allowed in actions for personal torts between members of the family group is whether the enforcement of such a right through the process of litigation will violate some social interest which is of greater value than the general social interest in the prevention of personal injuries and the compensation of injured persons.

The basic conception of the analysis which follows is that the interest of society in protecting the intimacy of family life and the interest in preserving the attitude of togetherness which is essential to wholesome family life are greater and more valuable than the interest in requiring compensation for injuries to the person.

The problem is then to determine under what circumstances, if any, the effect of the enforcement of compensation for personal torts

will violate the greater interest in protecting the basis of family existence.

The Nature of the Act or Omission.—In this aspect of the general subject, the question involves the effect of the litigation itself. Thus, the nature of the act or omission is irrelevant and immaterial. For if the effect of litigation between members of the family group will be detrimental to the social interest in preserving the basis of family existence, it will be equally as detrimental whether the action is based upon negligence or upon a wilful and malicious act, or whether the action is based upon an act or omission directly attributable to the existence of the family relation or otherwise.

Effect of Time of Act or Omission and Time of Litigation.—Since the only basis for denying a recovery in this aspect of the matter is the adverse effect of the litigation itself on the family relation, the existence of the relation at the time of the act or omission is immaterial. It is only when the relation is in existence, and thus subject to possible adverse effect at the time of the litigation, that considerations of policy in this regard can be relevant or material.

Effect of Such Litigation on Family Life.—As numerous authorities have pointed out in answering the contention that the allowance of such litigation would disrupt the harmonious relations which should exist within the family, such actions will be brought in only two circumstances: either the happy home will have already been disrupted, either by the act complained of or from some other cause, in which case the litigation cannot be said to affect the desired harmonious relations; or the parties will be in accord that the litigation is to their mutual benefit, in which case it can hardly be said to have a disruptive influence. Therefore, the social interest in protecting the basis of family existence will not be violated by the allowance of litigation between the members of the family group, regardless of the nature of that litigation.

Other Policy Considerations.—The availability of such other remedies as habeas corpus, divorce, child custody proceedings, and the remedies of the criminal law should not affect the availability of a remedy in tort for personal injuries. Patently, such remedies do not adequately secure the social interest in the right of injured persons to compensation. Such proceedings have an entirely different purpose, involve different interests and values, and thus can have no relation to the allowance of actions for personal torts.

Nor should the presence of liability insurance be considered material. On the one hand, some authorities have contended that the presence of liability insurance should be a factor supporting the allowance of such actions on the premise that since the insurance company is the interested party defendant no harm can be caused the family,

and the insurance company should bear the responsibility in actions between members of the family as in other actions. But the courts have generally, and quite properly, rejected these contentions as being out of harmony with the basic nature and purpose of liability insurance. Generally, the insurance company contracts to assume liability only insofar as the insured himself may be liable. If a person desires accident insurance for himself and his family such policies may be obtained. From the company's standpoint, however, it might be well to offer such accident coverage as an integral part of the regular liability policy, particularly in automobile liability policies.

On the other hand, the refusal to allow such actions on the ground that they may be collusive and fraudulent is equally untenable. Generally, the insurance company contracts to assume liability in all cases within the terms of the policy. If the action comes within the terms of the policy, the company should not be allowed to escape liability in a particular case on the ground that such cases in general offer an opportunity for collusion. Fraud and collusion are always good defenses when proven; but the burden or proving such matters should be on the party alleging them, as it generally is. There certainly should be no presumption of fraud in such cases.

The difficulty in apportioning recoveries in such cases so that the wrongdoer does not profit from his own wrong does present some practical problems, but as the cases allowing such recoveries in actions for personal torts as well as in property and contract actions between members of the family have shown, these problems are not unsolvable. Their presence is not a sufficient basis for denying relief if it should otherwise be granted.

IV. Conclusion

Neither a rule absolutely denying liability in all cases of personal torts between members of a family, nor a rule allowing the members of a family to recover in all such cases as in actions between strangers, adequately secures the social interests involved.

The basis of any satisfactory exception to the general rules of the law of personal torts must rest on the nature of family existence. Accordingly, the following deductions are suggested as logically sound and as effectively expressing and securing the social interests involved:

1. In any case where the action is based upon an act or omission not directly attributable to the existence of the family relation, but rather attributable to some other or additional relation, the action should be allowed.

2. In any case where the action is based upon some wilful, malicious,

or wanton act or omission, the action should be allowed.

3. In any case where the action is based upon some mere negligent act or omission which is directly attributable to the existence of the family relation, it should not be allowed.

Since these principles are based upon deductions from a conception of the necessary intimacy of family life, the risks inherent therein, and the social interests arising therefrom, they should be applied not merely on the basis of the existence of some blood or marital relation, but rather on the basis of a factual determination as to whether the parties to the particular action were at the time of the act or omission complained of actually sharing in the normal intimacy of family life.

The present unsatisfactory rules are generally based either on common-law principles or conceptions of public policy. Even in the case of actions between husband and wife, the established rules are not primarily or necessarily derived from statutory sources. In these circumstances the courts have the power to adopt the principles herein suggested, "The common law is not rigid and inflexible, a thing dead to all surrounding and changing conditions, it does expand with reason. The common law is not a compendium of mechanical rules, written in fixed and indelible characters, but a living organism which grows and moves in response to the larger and fuller development of the nation."[94]

It would be an abdication of the judicial function for the courts to refuse to reconsider the old and unsatisfactory rules.[95] The present rules were created by the courts and it is for them to make such modifications as may be necessary to secure the social interests involved.

94. Openheim v. Kridel, 236 N.Y. 156, 164, 140 N.E. 227, 230 (1923).
95. Borst v. Borst, 41 Wash. 2d 642, 251 P.2d 149 (1952).