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Personal Injury Action by Unemancipated Brother Against Unemancipated Sister

TORTS—PERSONAL INJURY ACTION BY UNEMANCIPATED BROTHER AGAINST UNEMANCIPATED SISTER.—Plaintiff, a boy of twelve, was injured in an automobile collision while a passenger in the car negligently driven by defendant, his sister, sixteen years of age. Both parties were unemancipated and lived with their parents and were being supported by their father. From a judgment allowing recovery, defendant appealed, principally on the grounds that public policy forbids the maintenance of such actions, and that to allow such actions is an incentive to fraud where insurance is available for the payment of any recovery allowed. Held, that judgment be affirmed. Rozell v. Rozell (New York, 1939), 22 N. E. (2d) 254.[1]

An infant is generally responsible for his own torts.[2] Persons who are not in domestic relations with a minor who negligently injures them may recover damages from him.[3] The overwhelming weight of authority is that an action for personal injury will not lie when either the parents or unemanci-

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[22] No Indiana decisions directly on the point have been found.

[23] See: Heise v. Gillette (1925), 83 Ind. App. 551, 149 N. E. 182, noted 1 Ind. L. J. 54 (purchase of food in restaurant is a sale accompanied by an implied warranty); Morris v. Trinkle (1930), 91 Ind. App. 657, 170 N. E. 101 (where the defendant sold auto subject to warranty of the manufacturer on the reverse side of the order, he thereby adopted such warranty as his own); Wallace v. Shoemaker (1924), 194 Ind. 419, 143 N. E. 285; Musselman v. Wise (1882), 84 Ind. 248; The York Mfg. Co. v. Bonnell (1900), 24 Ind. App. 667, 57 N. E. 590.

[24] Chysky v. Drake Bros. Co., Inc. (1923), 235 N. Y. 468, 139 N. E. 576, 27 A. L. R. 1533; Prinsen v. Russos (1927), 194 Wis. 142, 215 N. W. 905 (friends of the buyer denied recovery); Borucki v. MacKenzie Bros. Co., Inc. (Conn. 1938), 3 Atl. (2d) 224.

[1] "No logical reason nor reported authority exists to indicate that the rule of liability (that persons who are not members of the family, when injured through the tortious negligence of minors, may recover damages against them by way of compensation for injuries sustained) should be changed when brothers and sisters are involved. . . . Neither the Constitution, statutes nor judicial decisions of the State directly or by fair implication declare any State policy against which the maintenance of such an action offends." Rozell v. Rozell (N. Y., 1939), 22 N. E. (2d) 254.

[2] Vasse v. Smith (1810), 6 Cranch 226; Cooley on Torts (1932), 4th ed., vol. 1, sec. 66; see, Daugherty v. Reveal (1913), 54 Ind. App. 71, 102 N. E. 381.

[3] Hopkins v. Droppers (1926), 191 Wisc. 334, 210 N. W. 684; Moore v. Wilson (1929), 180 Ark. 41, 20 S. W. (2d) 310; Peterson v. Haffner (1877), 59 Ind. 130.

pated child sues the other.[4] Nor will it lie where an adult child sues for injuries received during minority.[5] It is a policy of the law that courts will recognize the necessity of preserving parental discipline and seek to maintain harmonious family relationships and the tranquility of the home.[6] Is this doctrine applicable to suits between unemancipated minors in the same family?

In the only other case found in which the question of whether an unemancipated infant may sue his minor brother or sister in tort for personal injuries was directly considered,[7] the court held the action maintainable.[8] The court had in an earlier case allowed a boy of nine to recover from his brother for injuries sustained while riding in an automobile driven by his brother whose negligence caused a collision with a truck.[9] The defendant brother was over twenty-one years of age but still resided in the same home with the plaintiff. In the later case the court asserted that, if a minor may sue his brother who lived at home, though he was over twenty-one, "it is no great stretch from that to hold that he may sue a brother so living under that age".[10] There, an insurance policy on the owner's car covered any injury caused by use of the automobile.

What weight should be given to the existence of blood relationship as a protection to the tort-feasor? Shall the arguments of public policy which deny actions between unemancipated child and parent be extended to the relationships of brothers and sisters? These questions are fundamental in the consideration which courts must give to this problem. It would seem that the desire for domestic tranquility and the preservation of parental discipline and control should prevail, if at all, only as to the parental relationship.[11] It

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[4] (a) Child suing parent: Hewlett v. George (1891), 68 Miss. 703, 9 So. 885; Roller v. Roller (1905), 37 Wash. 242, 79 Pac. 788; Wick v. Wick (1927), 192 Wisc. 260, 212 N. W. 787; Lund v. Olson (1931), 183 Minn. 515, 237 N. W. 188. Contra: Treschman v. Treschman (1901), 28 Ind. App. 206, 61 N. E. 961, in which the court allowed an action by a thirteen-year-old girl against her step-mother for injuries resulting from an assault and battery on ground that wrong maliciously inflicted should be redressed though the defendant stands in loco parentis, in so far as it may be done through an action for damages. See also, Minkin v. Minkin (Pa., 1939), 7 Atl. (2d) 461.

(b) Parent suing child: Schneider v. Schneider (1930), 160 Md. 18, 152 Atl. 498; Duffy v. Duffy (1935), 117 Pa. Superior Ct. 500, 178 Atl. 165; contra: Wells v. Wells (Mo. App., 1932), 48 S. W. (2d) 109.

[5] Smith v. Smith (1924), 81 Ind. App. 566, 142 N. E. 128.

[6] For an enlightening criticism of these reasons put forth by the courts, see, Harper, The Law of Tort (1933), No. 285, pp. 626-627. Also see, McCurdy, Torts Between Persons in Domestic Relations (1930), 43 Harvard L. Rev. 1030, pp. 1072-1077, for a discussion and criticism of seven considerations which are said to be influencing the courts in this matter.

[7] See note in 37 Mich. L. Rev. 658 (1939).

[8] Munsert v. Farmers Mutual Auto Insurance Co. (1938), 229 Wisc. 581, 281 N. W. 671.

[9] Bielke v. Knaack (1932), 207 Wisc. 490, 242 N. W. 176. The court said: "We perceive no sound reason for holding that a brother should not be liable to a brother for a tort committed upon him."

[10] Munsert v. Farmers Mutual Auto Insurance Co. (1938), 229 Wisc. 581, 281 N. W. 671.

[11] See, "Torts Between Persons in Domestic Relations," 43 Harvard L. Rev. 1030, p. 1079, where Professor McCurdy suggests as a solution to the question of whether a child should have a cause of action against a parent for an

does not follow that a suit between two unemancipated minors will disturb the "family tranquility" any more than it has already been disturbed by the commission of the tort.[12] In fact, it has been suggested that in reality, where insurance is available, the suit and recovery will be to the good interests of both parties.[13] Such reasoning is applicable as well to suits between husband and wife and between parent and child.

The insurance factor was not raised squarely or considered by the Court of Appeals, though the defendant attempted to point out that such actions are invitations to fraud, particularly in cases where the owner of the automobile is insured against liability for personal injuries.[14] Numerous cases have held that there is no liability even when the parent is protected by liability insurance, and that insurance cannot itself create a liability.[15] Nevertheless, it cannot be denied that the transfer of the liability to a third party through the medium of insurance removes an element basic to the denial of recovery or at least smoothes the way for the court to allow recovery.[16] Since the objective of insurance is to distribute the loss among all those exposed to a common danger, why is not such a theory applicable as well to the injured brother or sister or child? Why should recovery be denied the brother of the defendant but allowed a stranger, when normally, in either event, it would be the insurance company that pays? It is true that there arises the danger of

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injury occurring during minority, that the law recognize a privilege, either absolute or qualified, only as to those matters within parental discipline and control and for the conduct of the domestic establishment.

[12] "If permitting a suit by a brother against a sister to recover for injuries received by the former through the tortious negligence of the latter is to tear asunder the ties that sustain the family unity . . ., then indeed it must be held together by a slender thread." Rozell v. Rozell (N. Y., 1939), 22 N. E. (2d) 254.

[13] See, Lusk v. Lusk (1932), 113 W. Va. 17, 166 S. E. 538, 539. Accord: Dunlap v. Dunlap (1930), 84 N. H. 352, 150 Atl. 905.

[14] The evidence in the case does not show who was the owner of the car the defendant was driving, and there is a dispute at present as to such ownership at the time of the accident. However, in the argument, defendant's counsel stated that the owner of the car was protected by liability insurance, and that otherwise the action would not have been brought. The record itself contains nothing as to insurance.

Actually the defendant's father had an indemnity policy on one of his cars, but the insurance company claims that the car involved in the accident was not covered at the time because it had been transferred by the father to another. The question of coverage is now being litigated.

The insurance company came in to defend under an agreement that it was to waive none of its rights by doing so. Under the New York statute, resort could be had to the owner (Vehicle and Traffic Law, Sec. 59) or the insurance carrier, if there was one (Insurance Law, Sec. 109), where the car was operated with the express or implied permission of the owner.

[15] Lund v. Olson (1931), 183 Minn. 515, 237 N. W. 188; Norfolk Southern R. Co. v. Gretakis (1934), 162 Va. 597, 174 S. E. 841; Rambo v. Rambo (1938), 195 Ark. 832, 114 S. W. (2d) 468.

[16] When the principal case was before the Appellate Division (256 App. Div. 61, 8 N. Y. S. (2d) 901, 904), the court there said: "In view of the fact that the owner of the automobile in which the litigants were riding was protected by liability insurance it can hardly be said that the prosecution of this action is a menace to family discipline or is calculated to destroy the family unit."

domestic fraud and collusion, but that is not a proper basis for the denial of a right to recovery.[17]

It is submitted that the holding in the present case is a forward step in allowing recovery in tort for personal injuries. Those reasons denominated public policy which the courts have held constitute a bar to the maintenance of intra-family suits are inapplicable to the situation presented by a suit between two unemancipated minors in the same family, and there is some doubt as to their applicability at all under present-day conditions. The Court of Appeals in the principal case examined the classical rule in the light of modern economic and social progress and recognized that it may be outdated and outmoded. The court seemed to suggest that it may change such rule without waiting for legislative action. Considering the dominant part which the automobile plays in modern life and the widespread use of insurance to avoid losses from motoring accidents, the development of tort law in the direction here indicated is both needed and justifiable.[18] S. C.

EVIDENCE—TESTAMENTARY CAPACITY—ADMISSIBILITY OF JUDGMENTS APPOINTING GUARDIANS.—The plaintiffs, heirs at law, contested a will, made in 1926 by the testatrix who died in 1936, on the ground of unsoundness of mind at the time of making the will. Defendants are the administratrix and devisees. Plaintiffs introduced over defendants' objection a judgment in 1928 appointing a guardian for testatrix because of incompetency to manage her estate. Held, reversed. Where the issue is the unsoundness of mind of the person at the time of making a will, a subsequent judgment appointing a guardian because of incompetency[1] to manage the estate is not admissible as evidence. *Lasher v. Gerlach* (Ind. App. 1939), 23 N. E. (2d) 296.

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[17] "If it should appear that there is any foundation for the suggestion, a means of protection may be found in diligence on the part of the insurance carriers to ferret out and expose the fictitious claims and reliance may be placed on our courts and juries to detect and prevent a fraud." Rozell v. Rozell (N. Y., 1939), 22 N. E. (2d) 254. See, LoGalbo v. LoGalbo (1930), 138 Misc. Rep. 485, 246 N. Y. S. 565, p. 568.

[18] Insurance has been considered as an important factor in recent cases involving this and similar problems and, it is contended, will be more so in the future, no matter what the actual language used by the courts may be. Said Lord Blackburn in Young v. Rankin (1934), S. C. 499, p. 514: "The practice of a parent insuring himself against claims which may arise out of his own negligence in the conduct of some particular matter is of very recent date, and had such practice existed at an earlier date I have no doubt that the very question that is raised in this action would have been brought before the courts long ago, for I do not see anything unnatural in a minor recovering damages from his parent where the parent is himself covered against any loss incurred by him as the result of his negligence. I, accordingly, attach little importance to the fact that there are no reported cases on the subject."

Possibly the desired result may be achieved in an indirect manner through legislative action requiring compulsory insuranec for automobiles and allowing recovery to be had directly from an insurer by the one injured through the negligence of the insured. See, Mesite v. Kirchstein (1929), 109 Conn. 77, 145 Atl. 753, 755.

[1] Incompetency as used herein designates the disabilities set out in Burns Ind. Stat. Ann. (1933), sec. 8-301; Ind. Acts 1911, ch. 218, sec. 1, p. 533, and Ind. Acts 1919, ch. 106, sec. 1, p. 580. As to what constitutes unsoundness of mind see Burns Ind. Stat. Ann. (1933), sec. 8-202; 2 Ind. R. S. 1852, ch. 14, sec. 2, p. 333, and Ind. Acts 1895, ch. 99, sec. 1, p. 205.