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Article 13

Tort: Abolishment of Parental Immunity in Wisconsin

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> *tion to be a claim for damages or of any threatened litigation or other resort to a remedy.* The notification which saves the buyer's rights under this Article *need only be such as informs the seller that the transaction is claimed to involve a breach,* and thus opens the way for normal settlement through negotiations.[28] [Emphasis added.]

Thus, the adoption of the Uniform Commercial Code in Wisconsin will establish a standard for the element of "reasonable time" required for proper notification of breach of warranty. The requirement of adequate notification, as modified by the Wisconsin Supreme Court in the *Wojciuk* case, seems to conform to the philosophy of the Uniform Commercial Code, set forth above. JAMES WM. DWYER

Torts: Abolishment of Parental Immunity in Wisconsin—In recent years the Wisconsin Supreme Court has been systematically abrogating the doctrine of immunity. Charitable immunity in *Kojis v. Doctor's Hospital,*[1] governmental immunity in *Holytz v. City of Milwaukee,*[2] religious immunity in *Widell v. Holy Trinity Catholic Church,*[3] and most recently parental immunity in *Goller v. White*[4] have been eliminated. Under the holding in the *Goller* case, a parent may now be liable to his child for negligence, unless the alleged act involves an exercise of parental authority or ordinary parental discretion with respect to the provision of food, clothing, housing and other care.

Daniel G. Goller, a twelve-year-old, was injured while riding on a farm tractor driven by his foster father, James J. White. The boy's guardian ad litem brought an action against White and Farmers Mutual Automobile Insurance Company to recover damages, alleging that White was negligent in allowing the child to ride on the draw-bar of the tractor and that Farmers Mutual had issued a policy of liability insurance to White which covered the child's injuries. The trial court dismissed both complaints on the grounds that the insurance policy afforded no coverage to the plaintiff and that White stood in *loco parentis* to the plaintiff and could not be held liable in negligence.

On appeal, the supreme court considered the parental immunity doctrine, first noting the growing tendency to depart from the holding in *Wick v. Wick*[5] which was cited by the trial court as authority for its determination. The rationale of the *Wick* decision preventing a child from suing his parent for negligence, was that a contrary holding would introduce discord and contention into the family relationship. The de-

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[28] UNIFORM COMMERCIAL CODE §2-607, comment 4 (Official Text, 1962).
[1] 12 Wis. 2d 367, 107 N.W. 2d 131, 107 N.W. 2d 292 (1961).
[2] 17 Wis. 2d 26, 115 N.W. 2d 618 (1962).
[3] 19 Wis. 2d 648, 121 N.W. 2d 249 (1963).
[4] 20 Wis. 2d 402, 122 N.W. 2d 193 (1963).
[5] 192 Wis. 260, 212 N.W. 787 (1927).

cision in *Wait v. Pierce*,[6] permitting a wife to sue her husband, is sometimes distinguished because it rests upon statute.[7] However, the supreme court saw no difference in principle between the two situations, and from its experience since the *Wait* case, it doubted that permitting a child to bring suit against a negligent parent would have any disruptive effect on family harmony. The court also noted that, at common law, suits are maintainable between parent and child concerning property and contract rights[8] and that the law should protect the personal rights of a minor as zealously as his property rights.[9]

In attempting to show judicial hostility to the parental immunity rule in other jurisdictions, several exceptions to the rule were mentioned in the *Goller* opinion. The Missouri court recently held that the rule did not apply to a suit brought by the child against the personal representative of a deceased parent.[10] Another exception recognized by some courts has arisen where the parent's tort constituted wilful misconduct.[11] The courts of Ohio and Washington have held that the parental immunity rule does not apply if the parent was engaged in his business or occupation at the time he committed the negligent act.[12] Finally, two courts have grounded recovery by a minor child against a parent on the existence of insurance.[13]

In accordance with the majority of decisions from other states, the Supreme Court of Wisconsin had long refused to consider the existence of liability insurance a sufficient basis for departing from the *Wick* rule.[14] But in the *Goller* case, the court decided that the wide prevalence of liability insurance and its tendency to negate any family discord were proper elements to consider in deciding whether or not to abrogate parental immunity.

In *Schwenkhoff v. Farmers Mut. Automobile Ins. Co.*,[15] the court decided that the Wisconsin legislature's action in rejecting a bill that

[6] 191 Wis. 202, 209 N.W. 475, 210 N.W. 822 (1926).
[7] WIS. STAT. §246.07 (1961).
[8] Preston v. Preston, 102 Conn. 96, 128 Atl. 292 (1925); Lamb v. Lamb, 146 N.Y. 317, 41 N.E. 26 (1895); Hollingsworth v. Beaver, 59 S.W. 464 (Tenn. Ch. App. 1900); King v. Sells, 193 Wash. 294, 75 P. 2d 130 (1938); Note, 33 ST. JOHN'S L. REV., 310, 312 (1959); Note, 51 HARV. L. REV., 1451 (1938).
[9] Comment, 41 MARQ. L. REV., 188, 195 (1957).
[10] Brennecke v. Kilpatrick, 336 S.W. 2d 68 (Mo. 1960); Palcsey v. Tepper, 71 N.J. Super. 294, 176 A. 2d 818 (1962); Davis v. Smith, 126 F. Supp. 497 (E.D. Pa. 1954).
[11] 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); Mudd v. Matsoukas, 7 Ill. 2d 608, 131 N.E. 2d 525 (1956); Mahnke v. Moore, 197 Md. 61, 77 A. 2d 923 (1951); Harbin v. Harbin, Sup., 218 N.Y.S. 2d 308, *aff'd*, 16 A.D. 2d 696, 227 N.Y.S. 2d 1023 (1961); Cowgill v. Boock, 189 Or. 282, 218 P. 2d 445 (1950).
[12] 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).
[13] Worrell v. Worrell, 174 Va. 11, 4 S.E. 2d 343 (1939); Lusk v. Lusk, 113 W. Va. 17, 166 S.E. 538 (1932).
[14] Lasecki v. Kabara, 235 Wis. 645, 294 N.W. 33 (1940); Fidelity Savings Bank v. Aulik, 252 Wis. 602, 32 N.W. 2d 613 (1948).
[15] 11 Wis. 2d 97, 104 N.W. 2d 154 (1960).

would have abolished the immunity foreclosed the court from doing so. In so concluding, the court adhered to the long-established judicial policy of not overruling its past decisions where the legislature had acted in the matter. This policy was later overturned in *Holytz v. City of Milwaukee*,[16] where the court held that it should change a court-made rule of law when deemed necessary in the interests of justice. Thus, the court was no longer bound by the *Schwenkhoff* reasoning in the *Goller* case.[17]

It seems apparent that with the abrogation of parental immunity future litigation will involve only parents who are covered, or believe they are covered, by a liability insurance policy. A child would have little to gain from a suit against an uninsured parent, who has an existing legal duty to render medical care to his injured dependent. On the other hand, a judgment against an insured parent would work to the mutual advantage of both parties. Every parent derives a benefit, direct or indirect, from the enhancement of his child's separate estate. Under Wisconsin law,[18] the insurance company would pay the recovery to the clerk of court who would then invest it for the child, pay the child's natural guardian, or make payment directly to the child.

The probability of mutual benefit to parent and child, where insurance coverage exists, suggests the possibility of a conspiracy against the insurance company. However, the insured party is usually required by policy provisions to assist the insurer in the defense of any action brought against the insured.[19] Such cooperation ordinarily consists in helping to secure the attendance of witnesses and informing the insurance company of all facts connected with the accident.[20] Failure of the insured parent to comply with these express conditions requiring cooperation releases the insurer from liability under the policy,[21] but mere sympathy for the child's cause of action, or aid given in securing evidence does not defeat recovery on the policy.[22] If the insurer is able to establish collusion on the part of the parent in permitting the child to secure a judgment against him, the policy is avoided,[23] but it is often difficult in a particular case to determine whether or not there has been

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[16] Note 2 *supra*.

[17] Chief Justice Brown, who concurred in the *Goller* result because he did not believe a true parental relationship existed, nevertheless disagreed with the majority in principle, saying that the court should refrain from announcing public policy in a field primarily within the legislative function.

[18] WIS. STAT. §§269.80(3), 319.04(2) (1961).

[19] VANCE, INSURANCE 1003 (3d ed. 1951).

[20] Coleman v. New Amsterdam Cas. Co., 247 N.Y. 271, 160 N.E. 367 (1927); Rohlf v. Great American Indemnity Co., 27 Ohio App. 208, 161 N.E. 232 (1927).

[21] Guerin v. Indemnity Ins. Co., 107 Conn. 649, 142 Atl. 268 (1928).

[22] Johnson v. Johnson, 228 Minn. 282, 37 N.W. 2d 1 (1939).

[23] Bassi v. Bassi, 165 Minn. 100, 205 N.W. 947 (1925); Collins v. Standard Acc. Ins. Co., 170 Ky. 27, 185 S.W. 112 (1916); State Farm Mutual Auto Ins. Co. v. Bonacci, 111 F. 2d 412 (8th Cir. 1940); Ohio Cas. Co. v. Swan, 89 F. 2d 719 (8th Cir. 1937).

collusion.[24] For example, the mere fact that the insured openly expressed a desire that the injured plaintiff, his wife, secure a judgment against him has been held insufficient to establish collusion.[25]

This brings up a consideration of great importance which has been overlooked in cases involving parental immunity—namely, the relationship between the parties which is totally unlike that existing between husband and wife. It is not enough to say that, if family discord is no longer a problem, immunity may be discarded in an area where the insurance company will bear the ultimate liability. The duty of a parent does not cease when he has provided a harmonious home. He also has an obligation to instill in his child a right moral sense.

No minor child, on his own initiative, would prosecute an action against his parent, except in the most unusual circumstances. The necessity of the parent exercising some influence over the child, in order to successfully recover from the insurance company, distinguishes this from all other types of immunity cases. Whether the degree of conspiracy reaches the point where the insurer may avoid the policy is immaterial. In this writer's opinion, when the negligent parent takes a child of tender age to an attorney for the purpose of preparing a law suit against the parent and his insurance company, the child is provided with impressions of equity and justice which strike at the very heart of our judicial system.

A. WILLIAM FINKE

Criminal Law: Conditional Pardoning of Undesirables—Petitioner, a person imprisoned for burglary, signed a pardon agreement conditioned upon his leaving Utah. The pardon provided that he be re-imprisoned if he ever returned. Upon release, he ignored the agreement and remained in Utah. State authorities promptly returned him to prison, whereupon he applied for a writ of habeas corpus which was denied in the trial court.[1]

The Utah Supreme Court, basing its decision upon the contract theory of pardoning, upheld the lower court's ruling. It reasoned that since the promise required of petitioner raised no constitutional objection, it could support a binding contract.[2] Petitioner's assertion that the state's action amounted to banishment in violation of the state[3] and federal[4] constitutions was deemed erroneous, for he was given a free

[24] Collusion may not be inferred merely from the close relationship between the plaintiff and the defendant. Conroy v. Commercial Cas Co., 292 Pa. 219, 140 Atl. 905 (1928).

[25] Maryland Cas. Co. v. Lamarre, 83 N.H. 206, 140 Atl. 174 (1928).

[1] Mansell v. Turner, ——Utah——, 384 P. 2d 394 (1963).

[2] *Id* at 395. There are two general types of pardons. A pardon may be given when there is a recognition that a previous conviction was based on guilt or when a convicted person is found to be innocent, as where another confesses to the crime for which the convict was imprisoned. This article deals with the former type of pardon only.

[3] UTAH CONST. art. I, §§3, 6, and 9.

[4] U.S. CONST. amend V, VI, and XIV.