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Torts - Liability Insurance and the Rights of an Unemancipatec Minor Child

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The second element, failure to exercise due care in the avoidance of danger, can be determined from the location of the spectator's seat. A seat so picked by him as reasonably to protect him from pitched or batted balls, flying pucks or wrestlers would deprive the defendant of his defense as a matter of law.[9]

Such is the matter stated generally. "Known danger" is susceptible to the vagaries of judicial interpretation when methods of injury are new to litigation. "Due care" becomes hard to pin down when the spectator is more or less deprived of a choice of seats. The whole process of determining contributory negligence will probably be more flexible where it is not an absolute defense because of a comparative negligence statute.

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Torts — Liability Insurance and the Rights of an Unemancipated Minor Child — A thirteen year old boy was injured when the automobile in which he was riding, operated by his mother, collided with another car on a highway in Maryland. Acting by his next friend, the infant sued his mother for damages. Defendant's motion to dismiss the complaint as failing to state a claim upon which relief could be granted was denied by the District Court. *Held:* the defendant's motion should have been granted since under Maryland law an unemancipated minor could not sue a parent for injuries sustained in an automobile accident although the parent was protected by liability insurance. *Villaret v. Villaret 169 F. (2d) 677 (1948).*

Two questions are thus presented for review: first, whether an unemancipated child may sue his parent for a tortious act and, second, whether the fact that the parent is protected by public liability insurance would affect the decision of the court.

It is well settled that an emancipated minor child may bring an action for damages against a parent because of injury to person or property, therefore, the two questions mentioned above become important only when an unemancipated child is involved.[1]

The first case to clearly deny relief to an unemancipated minor was *Hewlett v. George.*[2] It was there decided that a child's right of action against a parent for personal injury could not be maintained because it was contrary to good public policy.

The courts which deny relief do not distinguish between an intentional tort and a negligent act. No cause of action has been recognized

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[9] *Supra,* note 4 and cases collected in 68 Corpus Juris 875.

[1] 39 Am. Jur. 736, note 2.

[2] 68 Miss. 703, 9 S. 885, 13 L.R.A. 682 (1891); also see excellent article by Prof. McCurdy in 43 Harv. L. Rev. 1030.

generally for assault,[3] for deceit,[4] for suit brought after majority for an act which occurred during minority,[5] or for the ravishment of a minor daughter by her father.[6] Some courts have denied the minor child relief against the employer of the father since the father as a joint tort-feasor would be liable over to the employer.[7] However, suits of this nature against an adoptive parent, step-parent or one standing in *loco parentis* have been sustained in some instances but in all of them the cause of action was based upon some type of deliberate or malicious wrong or cruel and inhuman treatment.[8] The rule has not been extended to other family relationships, such as brothers and sisters, for the courts have allowed recovery where a tort has been committed by one upon the other.[9]

The courts have assigned public policy as their reason for denying recovery in an action for damages by a child against his parent or parents. Domestic tranquillity would be disrupted where the parent had to pay the child and also it would be unfair to the rest of the children to have a portion of the family funds set apart for just one of them.[10]

In *Small v. Morrison*[11] the Court came face to face with the problem of deciding a case in which the parent was protected by liability insurance. The Court denied recovery because it feared that the family unity would be disrupted and that the home would be shattered for a few pieces of silver. A strong dissenting opinion pointed out that all the arguments for denying relief no longer existed when an insurance company would have to compensate the child if the parent was found liable.

Some courts have indicated that if a suit could be maintained directly against the liability insurer, a different result might be reached.[12]

The minority view was first expressed in the case of *Dunlap v. Dunlap*[13] where a minor child was permitted to recover compensation as an insured servant of the father and the child's disability to sue was held not to prevent recovery, for family harmony was not endangered. Although the suit involved an emancipated child, the Court intimated that it would not make any difference whether a child was emancipated

[3] Smith v. Smith, 81 Ind. App. 566, 142 N.E. 128 (1924).
[4] Miller v. Pelzer, 159 Minn. 375, 199 N.W. 97 (1924).
[5] Note 3, *supra,* 26 R.C.L. 631.
[6] Roller v. Roller, 37 Wash. 242, 79 P. 788 (1905).
[7] Graham v. Miller, 182 Tenn. 434, 187 S.W.(2d) 622 (1945); contra, Chase v. New Haven Waste Material Corp., 111 Conn. 377, 150 A. 107 (1930).
[8] Brown v. Cole, 198 Ark. 417, 129 S.W. (2d) 245 (1939); Steber v. Norris, 188 Wis. 366, 206 N.W. 173 (1925); Treschman v. Treschman, 28 Ind. App. 206, 61 N.E. 961 (1901).
[9] Rozell v. Rozell, 281 N.Y. 106, 22 N.E.(2d) 254 (1939); Munsert v. Farmers Mutual Auto Ins. Co., 229 Wis. 581, 281 N.W. 671 (1938).
[10] Dunlap v. Dunlap, 84 N.H. 352, 150 A. 905, 71 A.L.R. 1055 (1930).
[11] 185 N.C. 577, 188 S.E. 12 (1923).
[12] Note 11, *supra;* Mesite v. Kirchenstein, 109 Conn. 77, 145 A. 753 (1929).
[13] Note 10, *supra.*

or not. The rule of non-liability would not apply in a case where liability in fact had been transferred from the parent to a third party.

In 1932 a West Virginia court permitted recovery in a suit in which the parent was covered by liability insurance.[14] The Court stated, "when no need exists for parental immunity the courts should not extend it as a mere gratuity". In other jurisdictions the rule denying the infant the right to sue has been abolished.[15]

Despite the fact that an automobile insurer might be joined as a party defendant where there is a "no action" clause in the liability policy[16] and that an insurer can be held directly liable to the injured person for damages which he may recover against the insured,[17] the Wisconsin Supreme Court has not relaxed its rule as enunciated in the case of *Wick v. Wick*.[18] It was there decided, in conformity with the majority rule, that an unemancipated minor could not recover damages from a parent for injuries suffered by the minor because of the parent's negligent operation of a motor vehicle. The Court assigned the same general reasons as other courts for denying recovery, namely that such actions would impair the peace and happiness of the family, undermine the home and introduce discord in the relationship between parent and child. A vigorous dissent pointed out that the Wisconsin Constitution allows *all* persons redress for their injuries and that this included infants; further, that the change of times and the common practice of carrying liabiliy insurance to protect against any civil consequences of negligence justified a modification of the majority rule.

In 1933 section 204.34 (2) of the Wisconsin Statutes was enacted providing that no policy of insurance or agreement of indemnity should exclude from the coverage afforded, or from the provisions as to benefits, any persons related by blood or marriage to the assured. In *Segall v. Ohio Casualty Company*[19] the Wisconsin Court, in construing this statute, held that it did not amplify the liability policy so as to entitle unemancipated minors to recover.

Some courts have intimated that if any changes are to be made, it is for the legislature to do so. In *Fidelity Savings Bank v. Aulik*[20] the Wisconsin Court pointed out that the members of the legislature have had an opportunity to observe the operation of the rule over a period of years and that while they saw fit to authorize the husband to sue

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

[15] *Scotland*: Young v. Rankin, 1934 S.C. 499; referred to in 123 A.L.R. 1018; *Canada*, Quebec; Civil Code art. 1053; Fidelity etc. Co. v. Marchand 4 D.L.R. 913 referred to in 71 A.L.R. 1074.

[16] Wis. Stat. (1947) sec. 260.11.

[17] Wis. State. (1947) sec. 85.93.

[18] 192 Wis. 260, 212 N.W. 787, 52 A.L.R. 1113 (1927).

[19] 224 Wis. 379, 272 N.W. 665 (1937).

[20] 252 Wis. 602, 32 N.W.(2d) 613 (1948).

his wife for damages,[21] they did not see fit to extend a right of action to an unemancipated minor against a parent.

When the rule was first enunciated in 1891, the court could not rely on precedent since there was no common law rule to that effect. The court was forced at that time to rely on the public policy factor to justify its decision. If that reason had a justification years ago, it certainly does not any longer. Years ago suits between husband and wife were not permitted because of public policy, but now they are generally permitted by statute.[22]

Liability insurance is either compulsory by statute or necessarily essential by virtue of the very great number of accidents occurring every day in our complex manner of living. When liability insurance is involved practically all the arguments which might have justified the majority rule no longer exist. The funds of the family are not depleted in favor of one child at the expense of the others, family tranquillity is not disrupted and the parent is not enriched since the funds are usually held in trust until the child reaches majority. The argument that a change of the courts' position would open the door to fraud is without merit. Insurance companies and the courts are forever on the alert for practices of this kind, if and when they occur, and it cannot be said that in states where a wife may sue a husband or the husband the wife that fraud is being practiced on insurance companies and the courts.

The law should be relaxed and modified where the parent is protected by liability insurance. Of course this would conflict with the settled principle that the liability of the insurance company is purely derivative and not primary, but this does not seem to be an important factor in the cases that have decided this issue. Regardless of how it is to be effected, by court decision or by legislative action, an unemancipated minor should be permitted to recover for injuries caused by a negligent parent who has attempted to protect his childrens' interest by carrying liability insurance. RICHARD B. ANTARAMIAN

Torts — Liability of Landlord for Injuries Sustained by Tenants from Defective Furniture in Furnished Premises — Plaintiffs had been renting one of defendant's apartments for fourteen months. Mrs. Forrester, one of the plaintiffs, sustained personal injuries caused by the falling of a wall bed in the apartment. She sued defendant landlord for negligence, alleging a concealed defect. *Held:* generally a landlord is not liable for a tenant's injury due to defective condition of the premises. If the landlord is liable because of an implied warranty that the premises are fit for habitation, this warranty merely extends to the premises at the beginning of the term and does not

[21] Wis. Stat. (1947) sec. 246.075.
[22] Wis. Stat. (1947) secs. 246.07 and 246.075.