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TORTS

Right of Brother and Sister to Sue

May an unemancipated minor child recover damages from her unemancipated minor sister for negligence which proximately caused her injury? This question was recently answered affirmatively by a Connecticut court. The court also allowed the father, acting as personal representative of another minor sister, to recover against the negligent minor under the wrongful death statute.

While riding to church in the family automobile, one minor sister of the defendant was killed and another was personally injured in a collision proximately caused by the negligence of their unemancipated minor sister who was driving. Actions for the two sisters were consolidated because a cause of action under the wrongful death statute in Connecticut is not one which springs from the death, but is one which comes to the representative by survival. Therefore, the survival action rested on substantially the same legal basis as the personal injury action, and they were considered together.²

Defendant contended that the allowance of such an action would be against public policy in that (1) it would be an invitation to fraud, where the vehicle was covered by liability insur-

¹Overlock v. Ruedemann,Conn....., 165 A. 2d 335 (1960). The issue has been decided in the same way in every court since 1938. Rozell v. Rozell, 281 N.Y. 106, 22 N.E. 2d 254, 123 A.L.R. 1015 (1939); Munsert v. Farmers Mutual Automobile Insurance Co., 229 Wis. 581, 281 N.W. 671, 119 A.L.R. 1390 (1938); Detwiler v. Detwiler, 162 Pa. Super. 383, 57 A. 2d 426, 428, 429 (1948); Emery v. Emery, 45 Cal. 2d 421, 289 P. 2d 218, 224, 225 (1955); Midkiff v. Midkiff, 201 Va. 829, 113 S.E. 2d 875 (1960); Harrell v. Haney,Tenn., 341 S.W. 2d 574 (1960).

²It is of interest to note that the wrongful death statute in Virginia is modeled after the Lord Campbell's Act and creates a new right of action in the statutory beneficiary, Va. Code 8-633.1 (1950), therefore, the cause of action of decedent's father, as representative, would be denied in Virginia under the present rule in this state that prohibits suits between parent and child. Brumfield v. Brumfield, 194 Va. 577, 582, 74 S.E. 2d 170, 174 (1953), Norfolk So. Ry. Co. v. Gretakis, 162 Va. 597, 600, 174 S.E. 841, 842 (1934).

ance, and (2) it would disrupt family harmony. These questions were reserved to the highest court of the state where it was held that such an action was not barred. The court was unable to find any rule of public policy which would be violated by allowing such actions.

The first defense was that where insurance is available to the defendant, there is such a great chance for family collusion that the action should not lie. To this contention the court conclusively answered that the courts and juries are often called upon to uncover fraud and that there is no reason why they could not do it just as well when practiced by the family as in other cases. The fact that there may be greater opportunity for fraud and collusion in a particular class of cases does not warrant courts in closing the door to all cases of that class. True, there is a greater chance for fraud and collusion when dealing within a family circle since the parties know that some third party will ultimately suffer the liability, however:

the mere possibility of fraud or collusion because of the existence of liability insurance does not warrant immunity from liability where liability would otherwise exist. The interest of the child in freedom from personal injury caused by tortious conduct of others is sufficient to outweigh any danger of fraud or collusion.³

It seems inequitable that the claim should be denied just because the parties are *minor* brothers and sisters.

Those who argue for affording an immunity say if such an action were allowed brothers and sisters would flock into court; but an analysis of the number of cases brought where the action is allowed readily shows that this is not the situation.

If immunity is afforded, parents take a risk in allowing minor children to ride in the automobile with their minor brothers and sisters, even where they think they have protected the family,

³Emery v. Emery, 45 Cal. 2d 421, 289 P. 2d 218, 224 (1948), "It is more important to protect an infant in his person than to avoid the possibility of fraud and collusion by the denial of such protection. If actions were barred because of the possibility of fraud, many wrongs would be permitted to go without redress." Midkiff v. Midkiff, 201 Va. 829, 833, 113 S.E. 2d 875 (1960).

through liability insurance, from great losses arising from the operation of the family automobile. The purpose of having the automobile insured is to protect the family from financial hardships in case the automobile is involved in a collision. The courts that have decided the issue seem to have realized what a dilemma the parents owning an automobile would be faced with if an immunity were allowed between minor drivers in the family.

In answer to the second defense, that of disrupting family harmony, the court said that even though family unity was as important today as ever, the courts must face the modern concept of living. The property rights of children are enforceable at law against other minors in the family.⁴ An action for negligence would be no more disruptive of family unity than the actions for property rights, especially where negligence actions, arising from an automobile collision, are covered by insurance.

It is well settled that infancy is no defense for a tort committed by a minor.⁵ It is also well settled that an infant has the same right as an adult to sue for tortious injuries.⁶ At common law an infant was entitled to his own property rights and the enforcement of his own choses in action, including those in tort, and was liable in turn as an individual for his own torts.⁷ Therefore, any immunity in such a case between minor sisters would have to be an exception to these general rules.

The starting point of any negligence action should be that for every injury there is a right to reparation. The limitations which have been grafted onto this right have been deduced from ideas of family life. There is a well established immunity exception between husband and wife based on the common law conception of unity of legal identity. This has been changed in many states by statute.⁸ Some have used this immunity as authority

⁴Preston v. Preston, 102 Conn. 96, 128 Atl. 292 (1925).

⁵Madden, PERSONS AND DOMESTIC RELATIONS 604 (1931) and cases cited therein.

⁶*Id.*, at 601.

⁷Prosser, TORTS 675, § 101 (2d ed., 1955).

⁸The statutes are collected in Vernier, AMERICAN FAMILY LAW, III, §§ 167, 179, 180 (1935).

for parent and child and brother and sister immunity. The fallacy in this argument lies in the failure to distinguish the relations as they existed at common law. There was no conception of unity of legal identity of parent and child and brother and sister.⁹

The immunity from suit by minor children, which parents have enjoyed during the first part of the twentieth century, was first recognized in 1891 in Mississippi.¹⁰ What this case really did was establish a new rule of exceptional character rather than enforce a rule already established.¹¹ The English common law did not recognize a rule that a child could not maintain an action against his parent for wrongs committed to him by the parent, and all cases which disallow such an action are exceptions to the common law. The nineteenth century English writers agreed unanimously that a child could sue the father for an assault, and the conclusion drawn from their works as to other personal actions was that the right to redress by the child "seems to have been treated as beyond debate."¹²

"As to another English author, there is no possible doubt as to the meaning. 'If the father is guilty of positive negligence, if such a term is admissible — of doing something without care or precaution through which the child suffers injury — the child has *prima facie* an action against him.'"¹³

However, the majority of American courts, including Virginia, still recognize this exception to the common law.¹⁴

⁹McCurdy, *Torts Between Persons in Domestic Relations*, 43 HARV. L. REV. 1030, 1056 (1930).

¹⁰Hewlett v. George, 68 Miss. 703, 9 So. 885 (1891).

¹¹Dunlap v. Dunlap, 84 N.H. 352, 150 Atl. 905 (1930).

¹²*Id.*, at 908. The case has a general discussion of the rights of an infant to sue for personal injuries at common law.

¹³*Id.*, at 907.

¹⁴Annot., 71 A.L.R. 1055, 1072 (1931). There are cases stating that it was recognized at common law that a minor child could not sue a parent for tort. However, there is no authority for these statements and the *Dunlap* case which says that there was no such common law rule cites several English writers for support. The fact that there was no English case on the point was due to the inhibition of children to sue parents, but does not show that there was a rule against such action.

Also, the second defense is in direct conflict with the first defense. How can a single recovery both disrupt family felicity and at the same time lead to family collusion?

Under the modern practices of insurance, the argument that an action for negligence between minor brothers and sisters would disrupt family harmony has no merit whatsoever. Where the driver or the owner of the vehicle is insured against liabilities for personal injuries, the defendant will suffer no financial burden in being held liable. On the other hand, a brother or sister who has suffered a personal injury and is refused the right to reparation will suffer a great loss. In fact, if recovery is denied, there is more of a chance to disrupt family unity than if recovery is allowed.

The issue of the principal case was decided in Virginia last year for the first time.¹⁵ The Virginia court followed the trend and refused an immunity between brothers and sisters in the *Midkiff* case. The same contentions were answered in much the same way as the Connecticut court answered them. The Virginia court agreed that there was no basis for the assumption that a recovery would disrupt family harmony and that the courts could ferret out possible fraud. It concluded that there was no analogy to the immunity for personal injury between parent and child and husband and wife which are recognized in this state. Nothing was found in the Constitution, statutes, or judicial decisions that even implied that the recovery would be against the public policy of the state. "The aim of the law is to deal with realities, and where there is no reason for a rule one cannot be assumed to exist."¹⁶

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¹⁵*Midkiff v. Midkiff*, 201 Va. 829, 113 S.E. 2d 875 (1960).

¹⁶*Id.*, at 833.