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officers and local police cooperated in the arrests of the plaintiffs in *Norton*.

*Harry W. Stege*

## TORTS: SUIT BY MINOR AGAINST PARENT IN AUTOMOBILE ACCIDENT

Should a minor be allowed to maintain an action in tort against a parent who is covered by public liability insurance?

For the first time in Oklahoma, the Supreme Court has ruled on this question in *Tucker v. Tucker*.<sup>1</sup> The minor plaintiff in this case was a passenger in defendant mother's automobile and alleged injuries suffered in an accident because of the defendant's negligence. The minor was unemancipated at the time of the injury, but was emancipated at the time the action was brought. The court held that the action could not be maintained.

Recognizing that the English common law has no case law on this subject,<sup>2</sup> the court relied on *Hewelette v. George*,<sup>3</sup> which is the foundation of the majority rule in this country that, in general, public policy forbids a minor from suing its parents because of the disrupting effect such an action might have on the peace and harmony of the family unit.<sup>4</sup>

As a basis for his right to maintain the action, the plaintiff in the *Tucker* case relied on Section 6 of Article 2 of the Oklahoma Constitution,<sup>5</sup> Section 3 of Title 23 of the Oklahoma Statutes (1961),<sup>6</sup> and Section 1 of Title 76 of the Oklahoma Statutes (1961),<sup>7</sup> which, in effect, give every person in Oklahoma the right to go into court to seek redress for wrongs. But the court concluded that these provisions were not written with the express intention of allowing a minor to sue its parent; nor was Oklahoma legislatively pioneering in this field.

<sup>1</sup> 395 P.2d 67 (Okla. 1964). The question of whether a minor could sue its parents in a tort action was first raised in Oklahoma in *Powell v. Powell*, 370 P.2d 909 (Okla. 1962); however, the plaintiff was not allowed to maintain the action because of the rule against splitting a cause of action; so the question was not answered until the *Tucker* case.

<sup>2</sup> 395 P.2d 67, 68 (Okla. 1964).

<sup>3</sup> 68 Miss. 703, 9 So. 885, 13 L.R.A. 682 (1891). Wrongful confinement of a minor in an insane asylum for eleven days. The minor plaintiff had been married, but at the time of the injury she was separated and living away from her husband. The court said it did not sufficiently appear whether she had resumed her former place in her mother's house in a parent-child relationship. The court suggested that if the marriage had dissolved that relationship, then it might be that the minor plaintiff could maintain the action. But if the parent-child relationship had been reestablished, then the cause of action could not be maintained.

<sup>4</sup> 19 A.L.R. 2d 425 (1951).

<sup>5</sup> "The courts of justice of the State shall be open to every person, and speedy and certain remedy afforded for every wrong . . ."

<sup>6</sup> "Any person who suffers detriment from the unlawful act or omission of another, may recover from the person in fault. . ."

<sup>7</sup> "Every person is bound without contract, to abstain from injuring the person or property of another. . ."

The minor plaintiff also pointed to *Fiedeer v. Fiedeer*<sup>8</sup> and *Courtney v. Courtney*.<sup>9</sup> In both of these cases the wife was allowed to sue the husband in tort, which marked a departure from the old common law rule that one spouse could not sue the other.

In the *Fiedeer* case the plaintiff wife was shot in the head with a shotgun by her defendant husband. In holding that the plaintiff could maintain the action, the court pointed to what is now Section 3 of Title 23 of the Oklahoma Statutes<sup>10</sup> and to the Oklahoma version of the Married Women's Acts, which provide that a married woman has the same rights as a man and may sue in her own name alone.<sup>11</sup>

In the *Courtney* case the plaintiff wife sued her husband for injuries sustained as a passenger in her husband's car, alleging negligence on the part of her husband. Plaintiff and defendant were living together as man and wife at the time of the injury, and defendant had liability insurance. The court held that one spouse may sue the other for the recovery of damages for personal injuries resulting from the negligence of the other spouse. The court conceded that it was among the pioneering minority in allowing a tort action between husband and wife, but felt there were many reasons why this rule should be followed.<sup>12</sup> One reason was that the Oklahoma Constitution and Statutes provide for redress of wrongs against all persons without discrimination in that all persons, whether male or female, married or unmarried, are allowed a civil remedy in the courts.<sup>13</sup> Another reason was the inconsistency of the remedies allowed a married woman. "The courts holding that the wife cannot sue her husband for personal injuries do not deny that their statutes allow the wife to sue the husband for a tort against her property. The result of the majority view, therefore, is that the wife may sue her husband for the conversion of her chattel but cannot sue him to recover damages for the loss of an arm."<sup>14</sup>

The court also said that it was unnecessary for the legislature to enact Section 15 of Title 32 in order to give married women a cause of action in express terms. They had already been granted this by the Constitution and other statutes. Section 15 of Title 32 only freed the married woman of procedural disability.<sup>15</sup>

<sup>8</sup> 42 Okla. 124, 140 P. 1022 (1914).

<sup>9</sup> 184 Okla. 395, 87 P.2d 660 (1938).

<sup>10</sup> Citing REV. LAWS § 2845 (1910).

<sup>11</sup> The court cited REV. LAWS § 3363 (1910). This is the same as 32 OKLA. STAT. § 15 (1961):

*Rights of married Women:* Woman shall retain the same legal existence and legal personality after marriage as before marriage, and shall receive the same protection of all her rights as a woman, which her husband does as a man; and for any injury sustained to her reputation, person, property, character or any natural right, she shall have the same right to appeal in her own name alone to the courts of law or equity for redress and protection that her husband has to appeal in his own name alone. . . .

<sup>12</sup> 184 Okla. 395, 87 P.2d 660, 662 (1938).

<sup>13</sup> *Id.* at 665. The court referred to art. 2, § 6 of the Oklahoma Constitution and 23 OKLA. STAT. § 3 (1961).

<sup>14</sup> *Id.* at 667.

<sup>15</sup> *Id.* at 665.

The court also stated a reason for abandoning the old common law theory that a suit between spouses would disrupt the peace and harmony of the family unit:

In practice, the fear that such litigation will destroy marital peace has become more groundless since the purchase of liability insurance has become so common. . . . When the real defendant is an insurance company, as is frequently the case in negligence actions, there is little danger of such suit disrupting pleasant family relations. . . . And as to the question of fraud, it has been very logically submitted that no such case should be saddled with a presumption of fraud ab initio.<sup>16</sup>

The plaintiff in the *Tucker* case pointed to the *Fiedeer* and *Courtney* cases and contended that if a suit between spouses would not disrupt the peace and harmony of the family unit then neither would a suit between minor and parent, especially where the parent was covered by public liability insurance. However, the court brushed aside these two cases, stating that they were based, at least in part, upon the Oklahoma version of the Married Women's Acts; and that no statutes concerning the rights of minors to sue their parents in tort had been passed in Oklahoma.

The plaintiff contended that the reason for the old common law rule forbidding a minor to sue the parent in tort disappears where the parent is protected by liability insurance because the peace and harmony of the family unit will not be affected; that if a minor is allowed to sue the parent to protect property rights, then a suit in tort should be allowed; and that even though the plaintiff was unemancipated at the time the injury occurred, his emancipation before the bringing of this action would allow him to maintain the action.

In reply, the court acknowledged that some jurisdictions allow such a suit where the parent is covered by public liability insurance, but also recognized that the majority do not. The court noted that the reason for the majority view is that liability insurance ought not to create a cause of action where none existed before.<sup>17</sup> As to property rights, the court said that Section 7 of Title 30 and Section 8 of Title 10 of the Oklahoma Statutes (1961) make it clear that the parent has no control over the property of a minor; and that these Statutes are the basis of the minor's right to sue the parent where property rights are involved. And that there are no statutes specifically allowing a minor to sue the parent in tort. The court then invoked the majority rule that in order for a minor to sue the parent in tort, the minor must be emancipated at the time of the injury.<sup>18</sup>

It is difficult to understand why the court did not apply the reasoning of the *Fiedeer* case and the *Courtney* case. In these cases, the court logically abrogated the old common law rule preventing one spouse from suing other, especially where liability insurance was involved. Since the peace and harmony of the family unit is the basis for this rule, it

<sup>16</sup> *Id.* at 668.

<sup>17</sup> Citing 39 AM.JUR. *Parent and Child* § 90 (1942).

<sup>18</sup> Citing 67 C.J.S. *Parent and Child* § 61 (1950); and 19 A.L.R.2d 438 (1951).