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Parent and Child - Actions between Parent and Child - An Abrogation of the Immunity Doctrine

Russell D. Maring

adjoining property, the weight of reason would indicate the contrary under facts similar to those of the instant case. Actually, there are very few cases in the area of abstracting from which one could draw for authority either way. Also, when one considers the purpose of an abstract, the use the abstract will be put to, the dicta of the North Dakota decision, the citation of a foreign jurisdiction's decision with approval holding an abstracter to a duty of examination beyond first glance, the duties of an agent toward his principal, and the North Dakota Standards of Title, a sound argument is made for holding an abstracter to a duty to examine records of adjoining property in situations such as in the instant case.

DOUGLAS R. GRELL

PARENT AND CHILD—ACTIONS BETWEEN PARENT AND CHILD—AN ABROGATION OF THE IMMUNITY DOCTRINE — The adminisator of the deceased father's estate brought an action for wrongful death, and the mother for personal injuries, against the couple's unemancipated minor son for his negligence in driving the family automobile. The Supreme Court of New Hampshire *held* that immunity does not exist where the parent and child relationship has been terminated by death and personal liability suits by a parent against the child are not so disruptive of family unity as to preclude their maintenance. *Gaudreau v. Gaudreau,* 215 A.2d 695 (N.H. 1965).

The instant case is an extension of an earlier 1965 New Hampshire case in which a widow recovered in an action brought individually and as next friend for her three minor children against her deceased husband's estate.[1] Few jurisdictions have gone as far as New Hampshire in abrogating the original parent-child tort immunity doctrine, however, notably a similar result is found in Wisconsin where recovery is allowed except where the negligent act involves an exercise of parental authority over the child or an exercise of ordinary parental discretion in providing necessities.[2] Also, in a 1932 Missouri decision, a mother was allowed recovery in an action for personal injury against her unemancipated minor child,[3] but this case has since been overruled[4] apparently leaving Wisconsin and New Hampshire as the only jurisdictions which allow an unemancipated minor to sue or be sued by his parents in a case involving ordinary negligence when the tort feasor was not fatally injured.

1. Dean v. Smith, 106 N.H. 314, 211 A.2d 410 (1965).
2. Goller v. White, 20 Wis.2d 402, 122 N.W.2d 193 (1963).
3. Wells v. Wells, 48 S.W.2d 109 (Mo.Ct.App. 1932).
4. See Baker v. Baker, 364 Mo. 453, 263 S.W.2d 29 (1953).

The parent-child tort immunity doctrine was first embedded in American jurisprudence in the landmark case of *Hewellette George*,[5] denying the maintenance of an action in the case of a child's wrongful confinement to an insane asylum by her mother. The original parent-child tort immunity doctrine precluded the maintenance of any personal injury actions between the parent and child regardless of the state-of-mind of the tortfeasor or the severity of the act.[6] It has since been followed by an overwhelming majority of jurisdictions for such various reasons as preservation of family unity,[7] enforcement of filial discipline,[8] and consideration of public policy.[9]

Although originally the doctrine appeared logically sound, the doctrine of complete immunity has gradually been decimated by exceptions through statute[10] and court decisions[11] until its application has now become sporadic and the tree of immunity has been trimmed to a point of bare existence. Courts have refused to recognize the immunity doctrine where the tortious act was wanton or willful since the action brought is the result and not the cause of family discord.[12] Exceptions to the immunity rule are also recognized where the child is emancipated,[13] where the parent and child were respectively master and servant,[14] or where a principal and agent relationship exists between the parent tortfeasor and a third party.[15] It has also been ignored when the parties are under a family relationship other than parent-child.[16]

With few exceptions, the prevalence of automobile liability insurance has not altered the doctrine. This point was advanced in *Fidelity Savings Bank v. Aulik*,[17] but rejected as a question of public policy requiring legislative action for change. Others have held that, although provisions in the policy itself may curb the possibility of fraud and collusion, liability cannot be imposed due to the immunity doctrine.[18] It has been stated, however, that when automobile liability insurance is compulsory, and the legislative enactment provides that recovery can be had directly from an insurer by the one injured, a child may recover from the insurer for the negligent injury inflicted by his parent, thereby contravening the doctrine.[19]

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5. Hewellette v. George, 68 Miss. 703, 9 So. 885 (1891).
6. *E.g.*, Hewellette v. George, *supra* note 5; McKelvey v. McKelvey, 111 Tenn. 388, 77 S.W. 664 (1903); Roller v. Roller, 37 Wash. 242, 79 Pac. 788 (1905).
7. *E.g.*, Parks v. Parks, 390 Pa. 287, 135 A.2d 65 (1957).
8. *E.g.*, Silverstein v. Kastner, 342 Pa. 207, 20 A.2d 205 (1941).
9. *E.g.*, Ball v. Ball, 73 Wyo. 29, 269 P.2d 302 (1954).
10. *E.g.* WIS. STAT. ANN. § 331.031 (Supp. 1966).
11. *Supra* notes 1 and 2.
12. *E.g.*, Teramano v. Teramano, 1 Ohio App.2d 504, 205 N.E.2d 586 (1965); Cowgill v. Boock, 189 Ore. 282, 218 P.2d 445 (1950).
13. *E.g.*, Groh v. W. O. Krahn, Inc., 223 Wis. 662, 271 N.W. 374 (1937).
14. *E.g.*, Dunlap v. Dunlap, 84 N.H. 352, 150 Atl. 905 (1930).
15. *E.g.*, Borst v. Borst, 41 Wash.2d 642, 251 P.2d 149 (1952).
16. Spaulding v. Mineah, 264 N.Y. 589, 191 N.E. 578 (Ct.App. 1934).
17. Fidelity Savings Bank v. Aulik, 252 Wis. 602, 32 N.W.2d 613 (1948).
18. Rambo v. Rambo, 195 Ark. 832, 114 S.W.2d 468 (1938).
19. *E.g.*, Mesite v. Kirchstein, 109 Conn. 77, 145 Atl. 753 (1929).

The abrogation of the original doctrine by the New Hampshire and Wisconsin courts, and an indication by others that a change by legislation would be desirable,[20] indicate that there is a definite need for a re-evaluation of the doctrine to determine its feasibility in this age of increased automobile use and common coverage by liability insurance. In making this evaluation, family unity and other policy considerations which dictate the desirability of the doctrine must be evaluated in the context of its present existence, for, although the need has not diminished, this modern era has created a situation in which the right to maintain a personal injury action between parent and child should not be precluded solely on the basis of the relationship of the parties. It is an anomalous system indeed, that permits actions involving property rights[21] and the contesting of wills,[22] where a parent-child relation exists, and then permits the exercise of a lesser degree of care with respect to the personal welfare of one in the parent-child relationship than that owed to a stranger.[23]

The New Hampshire court has taken a liberal approach by holding that family unity will not be so substantially disrupted by a personal injury action between the parent and child as to preclude its maintenance. This decision marks a complete abrogation of the original immunity doctrine in New Hampshire. Wisconsin appears to adopt a more realistic approach to the problem by denying immunity except where the negligent act involves an exercise of parental authority over the child or an exercise of ordinary parental discretion in providing necessities.

North Dakota, having no statutory or case law on this subject, apparently still adheres to the doctrine as originally established, a position demonstrated to be antiquated by the frequency and prevalence of exceptions made in other jurisdictions. Consequently, North Dakota's legislature is in the unique position of being able to peruse the cases and statutes and assess the immunity doctrine as it exists in other jurisdictions untrammeled by judicial precedent of its own courts and thereby formulate a legislative policy which would best protect the rights of the family and still preserve the immunity in a manner which would reflect the present status of the family relationship.

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20. Duffy v. Duffy, 117 Pa.Super. 500, 178 Atl. 165 (1935).
21. Caudill v. Caudill, 39 N.M. 248, 44 P.2d 724 (1935).
22. Wells v. Wells, 48 S.W.2d 109 (Mo.Ct.App. 1932).
23. *E.g.*, Silverstein v. Kastner, 342 Pa. 207, 20 A.2d 205 (1941).