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TORTS - INFANTS - IMMUNITY ARISING FROM FAMILY RELATIONSHIP

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TORTS — INFANTS — IMMUNITY ARISING FROM FAMILY RELATIONSHIP — Plaintiff, a twelve year old boy, was injured in an automobile accident by the admitted negligence of defendant, his sixteen year old sister. Neither child had a separate estate, both were unemancipated, unmarried, and were living at home with their parents. *Held*, plaintiff could recover. *Rozell v. Rozell*, 256 App. Div. 61, 8 N .Y. S. (2d) 901 (1939), affd. (N. Y. 1939) 22 N. E. (2d) 254.

This case is important for a determination that family relationship does not create an immunity available to an unemancipated infant in a suit prosecuted by

an infant relative.[1] Although there appears to be no case directly opposed to the principal case, the law has nevertheless been uncertain on this point, for family relationship has existed in cases where liability has been negated.[2] Thus, an unemancipated infant has been denied the right to recover for damages negligently caused by the infant's father.[3] A wife has been denied the right to recover for injuries caused by her husband.[4] However, the immunity in these two instances arises in large part from factors which do not operate in the principal case.[5] Preservation of domestic tranquility could be the only substantial basis for denying recovery in the *Rozell* case (and hence the only basis which the principal case has in common with cases which have created an intra-family immunity). Uncertainty has also been fostered by the fact that there have been few adjudications of the question raised by the *Rozell* case.[6] These cases, however, have been consistent with the principal case in holding the infant relative liable. In stripping the infant of the family relationship immunity, the courts were faced with the danger of allowing litigation to disturb domestic tranquility, and thereby violating "public policy." [7] The Appellate Division refused to be controlled by this argument because: (1) New York statutes allowed a spouse a cause of action against the other spouse for torts,[8] and impliedly declared legislative policy as to other analogous actions; (2) the Wisconsin court had allowed recovery in a similar situation; [9] (3) "the owner of the automobile in which

[1] An infant is liable for tort. 35 L. R. A. (N. S.) 574 (1912), and cases there cited. Waters v. Fridges, 55 Ga. App. 763, 191 S. E. 297 (1937), holding that infant can recover for tort.

[2] Munsert v. Farmers Mutual Automobile Ins. Co., 229 Wis. 581, 281 N. W. 671 (1938), discussed in 37 MICH. L. REV. 658 (1939); Beilke v. Knaack, 207 Wis. 490, 242 N. W. 176 (1932), where judge said that no authority could be found denying recovery because defendant and plaintiff were brothers.

[3] Sorrentino v. Sorrentino, 248 N. Y. 626, 162 N. E. 551 (1928); Luster v. Luster, (Mass. 1938) 13 N. E. (2d) 438, which discusses the public policy forbidding such suits. Cook v. Cook, 232 Mo. App. 994, 124 S. W. (2d) 675 (1939), dictum that minor child can recover from parent for tort only when authorized by statute. See annotations on action of children against parent, 71 A. L. R. 1071 (1931); conflict of laws as to action between parent and child, 108 A. L. R. 1126 (1937). Cf. Lusk v. Lusk, 113 W. Va. 17, 166 S. E. 538 (1932).

[4] See cases cited in 38 MICH. L. REV. 745 (1940).

[5] To wit, (1) the procedural difficulty where the husband had to appear both as plaintiff and defendant; the fact that the husband at old common law controlled his wife's personalty (e.g., money arising from judgments); (2) the courts' desire not to intrude on the parents' privilege of corporeal chastisement to enforce discipline; parents' property should be preserved as a fund for future protection of the child and family.

[6] Munsert v. Farmers Mutual Automobile Ins. Co., 229 Wis. 581, 281 N. W. 671 (1938); Beilke v. Knaack, 207 Wis. 490, 242 N. W. 176 (1932).

[7] The courts use these words and often do not deem it necessary to elaborate the ideas and factual assumptions which the words express.

[8] N. Y. Laws (1937), c. 669, amending N. Y. Consol. Laws (1909), c. 14, "Domestic Relations Law," § 57. See also McCurdy, "Torts Between Persons in Domestic Relation," 43 HARV. L. REV. 1030 (1930).

[9] Principal case, 256 App. Div. 61 at 65, quoting Munsert v. Farmers Mutual Automobile Ins. Co., 229 Wis. 581, 281 N. W. 671 (1938).

the litigants were riding was protected by liability insurance." [10] The Court of Appeals decision (by Rippey, J.) does not make recovery dependent on the existence of insurance, and in effect declares a broad rule with no caveats: an infant defendant cannot claim an intra-family immunity when sued by his infant relative. The clear-cut decision in the Court of Appeals strikes out the objections arising out of the reference to insurance by the Appellate Division.[11] Rippey, J., states, "that fact [existence of insurance] alone creates no right to sue where one otherwise would not exist." [12] It is interesting to note that the insurance element was utilized before the Court of Appeals—not alone by the plaintiff—but also by defendant, who apparently predicted that a decision for the plaintiff would foster fraudulent suits against insurers. The New York court, in answer, expressed confidence in the ability of insurers and courts to discover such possible fraud.[13]

[10] Principal case, 256 App. Div. at 63.

[11] Since the insurer would not become liable unless the infant were (by the coverage clause) an insured party, or unless the infant's liability were imputable to an insured person (e.g., the owner), the court in the tort case is faced with the problem of construing the insurance policy. The court's adjudication would probably not be binding on a non-joined insurer. 34 C. J. 984 et seq. (1924). Hence, a judgment for the insurer (in a subsequent action against the insurer by the victorious tort plaintiff) would theoretically disturb domestic tranquility to the extent that the infant defendant could satisfy the judgment. Again, if the insured's liability (and hence the insurer's liability) arises only by imputation, some cases would allow the insured a right of indemnity against the infant defendant on a theory of quasi-suretyship. Gulf & S. I. R. R. v. Gulf Refining Co., (D. C. Miss. 1919) 260 F. 262; 31 C. J. 447 (1923). If the paying insurer is subrogated to the insured, and presses this claim against the infant defendant, would not domestic tranquility be again threatened by litigation? Further, if the infant defendant is an insured party but the insurer's maximum liability would be less than the liability of the infant on the tort judgment, will defendant be liable for the tort? Or will later courts make the decisive step of forsaking their protection of domestic tranquility by declaring that an unemancipated infant is liable to an unemancipated infant relative regardless of the presence or absence of insurance? Lusk v. Lusk, 113 W. Va. 17, 166 S. E. 538 (1932).

[12] Principal case, 22 N. E. (2d) 254 at 257 (1939).

[13] Ibid.