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sufficient interest in him to have the power of adjudicating his marital status. Such a move would eliminate much of the sham now surrounding *ex parte* divorces and would allow the courts to resolve equitably any conflicts in traditional legal terms.

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Mental Suffering — Texas Stands Firm — No "New" Tort

Plaintiff Fisher entered the dining club of the defendant Carrousel Motor Hotel for a luncheon engagement. As he entered the serving line and picked up his plate, defendant's manager approached Fisher and snatched the plate from his hands. The manager informed Fisher in a loud and offensive manner that Fisher could not be served in the club because he was a Negro. Fisher brought an action for assault,[1] seeking special damages for the great humiliation and indignity[2] allegedly suffered as a result of the manager's conduct. The court of civil appeals, affirming the trial court, held that as a matter of law no assault had been committed and that absent a physical touching, assault, or resulting physical injury, Fisher could not recover for embarrassment or humiliation.[3] *Held, reversed and rendered*: Snatching an article from the hands of another is sufficient invasion of the inviolability of the person to constitute a battery[4] and entitles the plaintiff to compensation[5] for the mental disturbance inflicted upon him as a result of such invasion. *Fisher v. Carrousel Motor Hotel, Inc.*, 424 S.W.2d 627 (Tex. 1967).

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[1] Fisher brought an action for assault in the trial court and appealed on the theory that the trial court was in error for not finding as a matter of law that an assault had been committed. The supreme court found no assault, but held that a battery had been committed.

[2] Fisher testified that he suffered no fear or apprehension.

[3] Fisher v. Carrousel Motor Hotel, Inc., 414 S.W.2d 774 (Tex. Civ. App. 1967).

[4] A battery is the use of any unlawful violence on the person of another with the intent to injure him, whatever the means or degree of violence used. The action of battery protects the rights of each individual to be free of intentional and unpermitted physical contact, and the element of personal dignity involved allows compensation for trivial contacts which do no physical harm but are offensive or insulting. Knocking or snatching anything from the plaintiff's hand or touching anything connected with his person when done in a rude or insolent manner is sufficient to constitute a battery. To be a battery, the touching must be offensive to an ordinary person and not one unduly sensitive about his personal dignity. The normal person is said to consent to the usual and common touchings encountered in everyday activities. *See* Schmitt v. Kurrus, 234 Ill. 578, 85 N.E. 261 (1908); Morgan v. Loyacomo, 190 Miss. 656, 1 So. 2d 510 (1941); TEX. PEN. CODE ANN. art. 1138 (1953); W. PROSSER, THE LAW OF TORTS § 9 (3d ed. 1964); RESTATEMENT (SECOND) OF TORTS §§ 18, 19 (1964).

[5] If a battery has been committed and defendant can show no defense or privilege, plaintiff is at least entitled to nominal damages for the infraction of a legal right. Compensatory damages can be recovered for any injury directly flowing from the battery on the plaintiff. Exemplary or punitive damages are allowed for a battery committed wantonly, maliciously, or under circumstances of aggravation and are awarded to punish defendant for his wrongful act and to deter others from committing the same type of unpermitted invasion of plaintiff's right. *See* Miller v. Blanton, 213 Ark. 246, 210 S.W.2d 293 (1948); McChristian v. Popkin, 75 Cal. App. 2d 249, 171 P.2d 85 (1946); Kast v. Link, 90 Neb. 25, 132 N.W. 717 (1911); Walker v. L.B. Price Mercantile Co., 203 N.C. 511, 166 S.E. 391 (1932); Texas Coal & Fuel Co. v. Arenstein, 55 S.W. 127 (Tex. Civ. App. 1900). *See generally* C. MCCORMICK, DAMAGES § 81 (1935).

I. Recovery for Mental Suffering

An Element of Damages. The courts have been very cautious in allowing recovery of damages compensating mental suffering. Originally, the consequences of mental disturbance were considered too intangible and peculiar for the court to ascertain or measure.[6] Some early courts, noting that that the plaintiff alone could testify as to the severity of the mental suffering, felt that numerous fraudulent claims would result if recovery for infliction of mental distress[7] was permitted.[8] In addition, early courts believed that an attempt to provide protection for peace of mind would swamp the dockets with an enormous amount of cases.[9]

The first breakthrough in allowing damages for mental suffering came within the framework of traditional tort law. If the plaintiff established the existence of a recognized tort from which mental suffering naturally flowed, he could recover for any mental suffering incident to the commission of such a tort.[10] Thus, in an action for false imprisonment, recovery for "injury to feelings" and "anxiety of mind" was allowed, and in an action for seduction, "injured feelings" were compensable.[11] The close relationship between the tort and the resulting mental suffering assured the courts that they were not awarding plaintiffs damages for fraudulent claims.[12] Gradually, this close relationship was de-emphasized, and compensation for mental suffering was permitted whenever a defendant committed any conventional tort incident to causing the mental anguish.[13] Although courts often stretched far to find a separate actionable tort so that a plaintiff could recover damages for mental suffering, they were reluctant to recognize the true basis of the recovery as compensation for the intentional infliction of mental disturbance.[14]

Separate Cause of Action. As cases in which there was no traditional ground for relief began to accumulate, the courts in some jurisdictions began to give way and allow recovery for mental suffering without the necessity of showing a separate conventional tort. The first evidence of such a deci-

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[6] St. Louis-San Francisco Ry. v. Clark, 104 Okla. 24, 229 P. 779 (1924); Ohio-West Virginia Co. v. Chesapeake & O. Ry., 97 W. Va. 61, 124 S.E. 587 (1924). *See generally* Prosser, *Intentional Infliction of Mental Suffering: A New Tort*, 37 Mich. L. Rev. 874 (1939); Wade, *Tort Liability for Abusive and Insulting Language*, 4 Vand. L. Rev. 63 (1950); Restatement (Second) of Torts § 46 (1964).

[7] United Fin. & Thrift Corp. v. Smith, 387 S.W.2d 752 (Tex. Civ. App. 1965); Daniels v. Conrad, 331 S.W.2d 411 (Tex. Civ. App. 1959). *See generally* Williams, *Torts, 1954 Survey of Texas Law*, 9 Sw. L.J. 244 (1955).

[8] This reasoning was firmly entrenched in the conviction that objective rather than subjective criteria were more reliable evidence of the damage inflicted by a defendant's conduct. Payne, *Recovery of Damages for Unpleasant Mental Stimuli*, 2 Ala. L. Rev. 218 (1950).

[9] Harned v. E-Z Fin. Co., 151 Tex. 641, 254 S.W.2d 81 (1953).

[10] Boies v. Raynor, 89 Ariz. 257, 361 P.2d 1 (1961); Holdorf v. Holdorf, 185 Iowa 838, 169 N.W. 737 (1918).

[11] Boies v. Raynor, 89 Ariz. 257, 361 P.2d 1 (1961) (false imprisonment); Dwire v. Stearns, 44 N.D. 199, 172 N.W. 69 (1919) (seduction); A. Sedgewick, Measure of Damages 700 (6th ed. 1874).

[12] *See* cases cited note 10 *supra*. *See generally* Payne, *Recovery of Damages for Unpleasant Mental Stimuli*, 2 Ala. L. Rev. 218, 220 (1950).

[13] Spomer v. City of Grand Junction, 144 Colo. 207, 355 P.2d 960 (1960); Leach v. Leach, 33 S.W. 703 (Tex. Civ. App. 1895).

[14] Interstate Life & Accident Co. v. Brewer, 56 Ga. App. 599, 193 S.E. 458 (1937).

sion involved defendants who owed a special obligation to the public. Courts held public carriers liable for insulting passengers even though the mental disturbance was not attended by illness or other physical consequences.[15] Inkeepers,[16] theaters,[17] and other public service companies received the same treatment.[18]

Another significant development in mental disturbance cases was in situations in which the defendant acted willfully, wantonly, or with ill will. Practical joke cases presented situations in which the defendant went so far beyond the bounds of human decency that the courts were compelled to take action.[19] The defendant's conduct was so intolerable that decent society had to allow plaintiff's recovery for mental distress.

The debtor-creditor cases in which creditors used outrageous high pressure methods of collection also demonstrated the court's willingness to extend the right of recovery for mental suffering when the defendant acted wantonly and with ill will.[20] Similarly, a defendant's insulting conduct accompanied by the knowledge that plaintiff was especially susceptible to injury through mental interference sometimes caused the courts to allow plaintiff damages for mental suffering.[21] Courts have considered mental illness, pregnancy, and youth circumstances making plaintiffs especially susceptible to injury through interference with peace of mind.[22]

Cases in which defendant's actions were intended to affect a third person but in which plaintiff suffered mental anguish as a result of the acts created a problem commonly associated with the development of recovery for mental suffering. Some courts decided that the plaintiff's mental distress was so foreseeable that the actions directed at the third party were negligent toward the plaintiff.[23] Others stressed the necessity for the plaintiff's physical presence in the vicinity of the defendant's act.[24] In deter-

[15] Bleecker v. Colorado & S. Ry., 50 Colo. 140, 114 P. 481 (1911); Gillespie v. Brooklyn Heights R.R., 178 N.Y. 347, 70 N.E. 857 (1904); Gulf, C. & S.F. Ry. v. Luther, 90 S.W. 44 (Tex. Civ. App. 1905), *error ref.*; Texas & Pac. R.R. v. Jones, 39 S.W. 124 (Tex. Civ. App. 1897), *error ref.*

[16] Emmke v. DeSilva, 293 F. 17 (8th Cir. 1923); DeWolf v. Ford, 193 N.Y. 397, 86 N.E. 527 (1908).

[17] Capital Theatre Co. v. Compton, 246 Ky. 130, 54 S.W.2d 620 (1932); Weber-Stair Co. v. Fisher, 119 S.W. 195 (Ky. Ct. App. 1909).

[18] Dunn v. Western Union Tel. Co., 2 Ga. App. 845, 59 S.E. 189 (1907); Davis v. Tacoma Ry. & Power Co., 35 Wash. 203, 77 P. 209 (1904) (restaurants and retail stores, unlike public carriers, innkeepers, theaters, telegraph companies, etc., are regarded by the law as owing no special obligation to the public other than the obligation owed by one individual to another); Larson v. R.B. Wrigley Co., 183 Minn. 28, 235 N.W. 393 (1931); Slocum v. Food Fair Stores, 100 So. 2d 396 (Fla. 1958).

[19] *See, e.g.*, Nickerson v. Hodges, 146 La. 735, 84 So. 37 (1920).

[20] Barnett v. Collection Serv. Co., 214 Iowa 1293, 242 N.W. 25 (1932); Harned v. E-Z Fin. Co., 151 Tex. 641, 254 S.W.2d 81 (1953).

[21] Nickerson v. Hodges, 146 La. 735, 84 So. 37 (1920) (Defendants caused plaintiff to find a supposed pot of gold which had been predicted by a fortuneteller. Defendants caused plaintiff to be humiliated in front of a large section of her community, and plaintiff later died as a result of the great mental anguish she suffered as result of the practical joke.).

[22] Richardson v. Pridmore, 97 Cal. App. 2d 124, 217 P.2d 113 (1950); Great Atl. & Pac. Tea Co. v. Roch, 160 Md. 189, 153 A. 22 (1931).

[23] One case has allowed recovery on a "transferred intent" theory. Lambert v. Brewster, 97 W. Va. 124, 125 S.E. 244 (1924). Courts have failed to apply an "imputed intent" theory probably because of the history of the old trespass action, which did not include within its framework emotional distress. W. PROSSER, THE LAW OF TORTS § 11, at 53 (3d ed. 1964).

[24] Ellsworth v. Massacar, 215 Mich. 511, 184 N.W. 408 (1921); RESTATEMENT (SECOND) OF TORTS § 46 (1964).

mining if the defendant owed a duty to foresee possible injury to plaintiff, the question of whether the defendant knew or should have known of the plaintiff's presence received consideration.[25] It was also held that family relationship insured that the mental distress experienced by the plaintiff in witnessing the attack against a family member was authentic.[26] Other courts denied recovery for mental suffering caused by the willful acts of a defendant against a third party.[27]

Recovery for mental suffering alone has generally not been allowed when defendant's conduct was merely negligent and constituted an unintended invasion of plaintiff's emotional tranquility.[28] In refusing to afford relief, the courts for the most part agreed that there was no duty to exercise care to avoid causing a mental or emotional disturbance by a negligent act.[29] In some cases, however, recovery for the physical consequences of negligently inflicted mental suffering has been permitted.[30] In such suits, the rationale employed has been that used in allowing plaintiff to recover when defendant acted willfully toward a third party but instead inflicted mental distress on plaintiff.

Texas Cases. Texas courts apply the common law rule, recognized by the great weight of authority in American jurisdictions, which allows recovery for mental suffering only when there is injury to plaintiff's property, some other element of actual damages exists, or there is a resulting physical injury.[31] In *S.H. Kress & Co. v. Brashier*,[32] a department store customer purchased a book which she was carrying under her arm. The store manager mistakenly accused plaintiff of stealing the book and snatched it from her. The court held that, despite the mistaken belief of the manager, a battery had been committed and awarded plaintiff $500 to compensate "the humiliation and indignity" she suffered.[33] *Kress* demonstrates that courts do not hesitate to value the injury caused to a plaintiff by the infliction of mental suffering if such damages can be tacked on to other damages resulting from a tort committed incident to the mental suffering. Moreover, Texas courts also allow recovery for mental distress intentionally inflicted upon plaintiff

[25] Goddard v. Watters, 14 Ga. App. 722, 82 S.E. 304 (1914).

[26] Knierim v. Izzo, 22 Ill. 2d 73, 174 N.E.2d 157 (1961); W. PROSSER, THE LAW OF TORTS § 11, at 54 (3d ed. 1964).

[27] Alexander v. Pacholek, 222 Mich. 157, 192 N.W. 652 (1923); Ellsworth v. Massacar, 215 Mich. 511, 184 N.W. 408 (1921). The courts now are moving toward allowing recovery for mental suffering resulting from intentional acts directed toward a third person when defendant is shown to have been aware of plaintiff's presence. W. PROSSER, THE LAW OF TORTS § 11, at 54 (3d ed. 1964).

[28] F. HARPER, THE LAW OF TORTS § 67, at 156 (1st ed. 1933).

[29] Kuhr Bros. v. Spahos, 89 Ga. App. 885, 81 S.E.2d 491 (1954); Cushing Coca-Cola Bottling Co. v. Francis, 206 Okla. 553, 245 P.2d 84 (1952).

[30] Orlo v. Connecticut Co., 128 Conn. 231, 21 A.2d 402 (1941); Rasmussen v. Benson, 133 Neb. 449, 275 N.W. 674 (1937). Thus, when defendant's negligent action caused mental anguish for plaintiff, the courts looked for a close family relationship between plaintiff and the injured and the plaintiff's presence in the near vicinity of the defendant's act. Amaya v. Home Ice, Fuel & Supply Co., 59 Cal. 2d 295, 379 P.2d 513 (1963); Bowman v. Williams, 164 Md. 397, 165 A. 182 (1933).

[31] Harned v. E-Z Fin. Co., 254 S.W.2d 81 (Tex. Civ. App. 1953); Renfro Drug Co. v. Lawson, 138 Tex. 434, 160 S.W.2d 246 (1942); Gulf, C. & S.F. Ry. v. Trott, 86 Tex. 412, 25 S.W. 419 (Tex. 1894).

[32] 50 S.W.2d 922 (Tex. Civ. App. 1932).

[33] *Id.*

absent an incident tort when physical injury results.[34] And in cases allowing such recovery, mental suffering has ceased to be an element of damages and has become a separate cause of action.[35]

When there is no conventional tort or physical injury, however, Texas courts have refused to accept the intentional infliction of mental suffering as a separate tort. The leading case in point is *Harned v. E-Z Finance Co.*[36] There plaintiff sought recovery for statutory penalties for collection of usurious interest and for mental suffering caused by defendant's attempts to collect such interest. In *Harned* the Supreme Court of Texas clearly enunciated that there could be no recovery for even intentionally caused mental suffering without proof of physical injury.

II. Fisher v. Carrousel Motor Hotel, Inc.

In *Fisher* the Supreme Court of Texas noted that the law has long recognized that actual physical contact with the body of the plaintiff is unnecessary for a battery to have been committed.[37] Furthermore, upon examination of the circumstances, the court found that Fisher's plate was snatched from him in a rude and insolent manner for the purpose of further emphasizing the club's policy prohibiting service to Negroes.[38] The court was also impressed by the fact that Fisher had telephoned the defendant hotel to accept the invitation for lunch, and that the reservation had been received without question. Thus, the supreme court had little difficulty finding both an intent to injure and a volitional activity violating Fisher's rights.[39] Because of the battery committed by the mere snatching of a plate, Fisher received compensatory damages for mental suffering and exemplary damages based upon the manager's willful intent.

Since a battery was committed, the court was not required to consider the issue of awarding damages for mental suffering absent a separate tort or physical injury.[40] The court, however, did cite *Harned*,[41] a case reiterating that Texas does not favor the "new tort" of intentional infliction of mental suffering. Allowing recovery without a separate tort was considered in *Harned* to be a legislative function rather than a judicial one.[42] In

[34] Pioneer Fin. & Thrift Corp. v. Adams, 426 S.W.2d 317 (Tex. Civ. App. 1968), *error ref. n.r.e.*; *see* Gulf C. & S.F. Ry. v. Trott, 86 Tex. 412, 25 S.W. 419 (Tex. 1894); Renfro Drug Co. v. Lawson, 138 Tex. 434, 160 S.W.2d 246 (1942).

[35] Harned v. E-Z Fin. Co., 254 S.W.2d 81, 84 (Tex. Civ. App. 1953).

[36] 254 S.W.2d 81 (Tex. Civ. App. 1953).

[37] The finding had solid authority to support it in the *Kress* case. S.H. Kress & Co. v. Brashier, 50 S.W.2d 922 (Tex. Civ. App. 1932).

[38] The manager was enforcing the dining club's rules, which stipulated that members of the negro race were not to be served. For this reason and the fact that the employee was acting in a managerial capacity, Carrousel Motor Hotel was found liable for the exemplary damages awarded for the outrageous conduct offending Fisher. *Cf.* King v. McGuff, 149 Tex. 432, 234 S.W.2d 403 (1950).

[39] *See* notes 5 and 6 *supra*.

[40] Fisher v. Carrousel Motor Hotel, Inc., 424 S.W.2d 627, 630 (Tex. 1967).

[41] Harned v. E-Z Fin. Co., 254 S.W.2d 81 (Tex. Civ. App. 1953).

[42] The court reasoned that the common law should rule unless changed by the legislature and that the question of the "new tort" was embedded in serious policy considerations which should be determined only by the legislature. However, courts have both changed common law where it became obsolete and have ruled in decisions involving vital policy questions before with great success. For example, the Texas Supreme Court has indicated that it will do away with the charitable immunity doctrine when next presented with a case involving such immunity, which demonstrates

Fisher, however, the court did not deny that, under the right set of facts, it might recognize plaintiff's right to recover solely for the intentional infliction of mental distress. Indeed, the court observed that "this cause of action [intentional interference with peace of mind] has long been advocated by respectable writers and legal scholars."[43]

The Texas rule of recovery for mental suffering, apparently continued in *Fisher*, is somewhat incongruous. Fisher would have suffered the same injury if the manager of the club had acted in the same malicious manner but no battery had been committed. Also, had defendant's manager merely asked plaintiff to replace his plate and leave the serving line, Fisher would have been just as humiliated in the presence of his associates.[44] Yet, in both cases, the Texas Supreme Court would have had to deny recovery. The court can act only when the defendant commits a technical tort, and then exemplary damages may be awarded both to punish the defendant and to deter outrageous conduct.[45]

III. CONCLUSION

While *Fisher* did not require the court to deal with the question of the "new tort," intentional infliction of mental distress, the facts of the case presented an opportunity to examine the necessity for the adoption of such a cause of action when a propert set of facts so demands. Surely plaintiff's recovery should not depend upon an incident tort when the injury to plaintiff and the malicious intent of the defendant are present.[46] When presented by a set of facts requiring the adoption of the "new tort," the Texas courts may yet abandon the requirement of an incident tort and recompense plaintiff for his injury to prevent injustice.

One other aspect of *Fisher* merits attention. The judgment awarded plaintiff represented both exemplary and compensatory damages. Although the vast majority of U.S. jurisdictions hold that exemplary damages serve the purpose of deterring wrongful conduct and of punishing the wrongdoer, England and three jurisdictions in the United States hold that the nature of exemplary damages is compensatory.[47] If this latter view is correct,[48] Fisher may have received double compensation for mental suffering, because he was awarded both compensatory and exemplary damages.

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the court's willingness to act when necessary. Watkins v. Southcrest Baptist Church, 385 S.W.2d 723 (Tex. Civ. App. 1964), *aff'd*, 399 S.W.2d 530 (Tex. 1966).

[43] Fisher v. Carrousel Motor Hotel, Inc., 424 S.W.2d 627, 630 (Tex. 1967).

[44] Plaintiff was a mathematician for the Data Processing Division of Manned Space Craft Center, an agency of the National Aeronautics and Space Agency, attending a conference regarding telemetry. He called in his acceptance by telephone.

[45] Excessiveness of the award was never raised by defendant's counsel. Had this issue been raised, the court might have had to re-examine the figure in light of reasonableness of amount. *See* Higginbotham v. O'Keeffe, 340 S.W.2d 350 (Tex. Civ. App. 1960), *error ref. n.r.e.*

[46] Had the luncheon been seated, would plaintiff have been denied recovery if insulted in a similar fashion? Would not the damages be the same? Would the intent of the manager have been different?

[47] C. MCCORMICK, DAMAGES § 78, at 279 (1935); *see* Hasted v. Van Wagnen, 243 Mich. 350, 220 N.W. 762 (1928); Wise v. Daniel, 221 Mich. 229, 190 N.W. 746 (1922). These cases describe exemplary damages as "extra compensation for injured feelings or a sense of outrage" and " 'aggravated' allowance of compensatory damages permitted in cases of outrage."

[48] Gonsoulin, *Is an Award of Punitive Damages Covered Under an Automobile or Comprehensive Liability Policy?*, 22 SW. L.J. 433 (1968).

Fisher demonstrates that exemplary damages may compound damages awarded to a plaintiff for mental suffering if the plaintiff is also allowed compensation for mental suffering.

Harriet E. Miers

Parental Immunity No Defense for the Negligent Driver

The automobile which Mrs. Hebel was driving collided with a truck-trailer, and her daughter was injured. The minor child, through her father as next friend, brought a negligence action against her mother seeking compensation for the injuries. In the trial court, Mrs. Hebel moved for summary judgment on the ground that a minor cannot sue his parent for negligence. The trial court denied the motion, and an appeal was made to the Supreme Court of Alaska. *Held, affirmed*: Because of the wide prevalence of automobile liability insurance, an unemancipated minor can bring an action against his parent for personal injuries sustained as a result of the parent's negligent driving. *Hebel v. Hebel*, 435 P.2d 8 (Alas. 1967).

I. Development of Family Immunities in Tort Actions

Intra-family immunities developed as a result of legally recognized relationships, duties, and responsibilities. At English common law suits could not be maintained between spouses since they were "one and the same person."[1] However, there was no common law concept of legal unity of the parent and child.[2] Suits by child against parent could be maintained in real property actions,[3] but there was no English authority allowing or denying parental immunity from tort actions. The English view of interspousal immunity found its way to the United States.[4] Parental immunity, although not a common law concept, developed in the United States as a result of the courts' desire to protect the peace and harmony of the family unit.

Parental immunity from tort actions was first announced in *Hewellette v. George*[5] in 1891. There the Mississippi Supreme Court held that a minor could not maintain an action for false imprisonment against her mother who had maliciously confined her in an insane asylum. The court based this decision on a public policy[6]—the need to protect the peace and harmony of the family—rather than on a theory of the family as a legal entity.

[1] Phillips v. Barnett, 1 Q.B.D. 436, 439 (1876).

[2] For a discussion of the common law background, see Akers & Drummond, *Tort Actions Between Members of the Family-Husband & Wife-Parent & Child*, 26 Mo. L. Rev. 152, 153, 180-83 (1961); McCurdy, *Torts Between Persons in Domestic Relation*, 43 Harv. L. Rev. 1030, 1031-35, 1056-57 (1930).

[3] *See* Akers & Drummond, *supra* note 2, at 180.

[4] Abbott v. Abbott, 67 Me. 304 (1877).

[5] 68 Miss. 703, 9 So. 885 (1891).

[6] "The peace of society, and of the families composing society, and a sound public policy, designed to subserve the repose of families and the best interests of society, forbid to the minor child a right to appear in court in the assertion of a claim to civil redress for personal injuries suffered at the hands of the parent." *Id.* at 705, 9 So. at 887.