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Glen A. Majure

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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 policy⁶—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.

Later, in *McKelvey v. McKelvey*,⁷ the Tennessee Supreme Court refused to allow a minor to sue the parents for cruel and inhuman treatment. Relief was denied on the same grounds relied upon in *Hewellette*. In 1905 the trilogy on which the doctrine of parental immunity is based was completed with the decision of the Washington Supreme Court in *Roller v. Roller*.⁸ In that case the court barred the minor's suit against her father, who had raped her, because of the need to protect the peace of society and the families composing society. Although the court recognized that the Roller family harmony had already been destroyed, it expressed the fear that once such suits were allowed, there would be no practical way of determining which to allow and which to deny.⁹ From this base the doctrine of parental immunity was almost uniformly applied in every jurisdiction which ruled on the question until the 1930's.¹⁰

In denying the minor the right to maintain a tort action against his parent, the courts have relied primarily on four policy arguments. One argument is that such a suit will deplete the family's financial resources.¹¹ Unless the parent is insured, the effect is to take funds from the parent and place them with the child at the expense of a lawsuit. Secondly, if the parent has liability insurance, there is the possibility of collusive suits.¹² A third objection is that suits brought by the child against the parent interfere with parental control and discipline.¹³ The fourth and most frequently cited objection is that such an action disrupts the peace and harmony of the family.¹⁴

II. DEVELOPMENT OF EXCEPTIONS TO FAMILY IMMUNITIES IN TORT ACTIONS

The present trend of the courts reflects a chipping away of the general doctrine of family immunities. Nineteen states have done away with interspousal immunity in tort actions.¹⁵ And, while only one state has totally abrogated the rule of parental immunity from tort actions,¹⁶ exceptions have been carved into that doctrine. For example, some jurisdictions have allowed the minor to maintain an action for personal injuries willfully or intentionally inflicted¹⁷ and for injuries caused by reckless or grossly negli-

⁷ 111 Tenn. 388, 77 S.W. 664 (1903).

⁸ 37 Wash. 242, 79 P. 788 (1905).

⁹ *Roller v. Roller*, 37 Wash. 242, 79 P. 788, 789 (1905).

¹⁰ For an extensive list of cases by jurisdiction, see Akers & Drummond, *supra* note 2, at 182 n.162 (1961).

¹¹ *Roller v. Roller*, 37 Wash. 242, 79 P. 788 (1905).

¹² *Treschman v. Treschman*, 28 Ind. App. 206, 61 N.E. 961 (1901); *Hastings v. Hastings*, 33 N.J. 247, 163 A.2d 147 (1960).

¹³ *Shaker v. Shaker*, 129 Conn. 518, 29 A.2d 765 (1942); *Rodebaugh v. Grand Trunk W.R.R.*, 4 Mich. App. 559, 145 N.W.2d 401, 403 (1966); *Cannon v. Cannon*, 287 N.Y. 425, 40 N.E.2d 236 (1942).

¹⁴ *Rambo v. Rambo*, 195 Ark. 832, 114 S.W.2d 468 (1938); *Nudd v. Matsoukas*, 7 Ill. 2d 608, 131 N.E.2d 525, 531 (1956); *Aboussie v. Aboussie*, 270 S.W.2d 636 (Tex. Civ. App. 1954), *error ref.*

¹⁵ See W. PROSSER, *LAW OF TORTS* § 116, at 885 (3d ed. 1964) for a list of the nineteen states with cases and statutes in point.

¹⁶ *Briere v. Briere*, 107 N.H. 432, 224 A.2d 588 (1966).

¹⁷ See Annot., 19 A.L.R.2d 423, 451 (1951).

gent conduct.¹⁸ Exceptions have been made when the parent was not acting in a parental capacity but rather in his business or vocational capacity.¹⁹ Injuries which occurred while the parent and child were standing in a special relationship such as master-servant²⁰ or carrier-passenger²¹ have been made the basis of exceptions. In some cases which have made exceptions to the rule of parental immunity for negligently inflicted torts, the courts have relied heavily on the presence of insurance to negate the reasons which are given for barring the action.²²

The first significant attack on the rule of parental immunity came in 1930 with the decision by the Supreme Court of New Hampshire in *Dunlap v. Dunlap*.²³ There the court allowed the minor to sue his father for injuries inflicted while the son was employed by the father. The *Dunlap* court did not limit its decision to the master-servant situation, deciding that the inability of the child to sue is not absolute and exists only where the suit might disturb family relations.²⁴ Since this danger is not present when liability is transferred to an insurer, the court concluded that the immunity did not apply where the parent was insured.

In 1954 the New Hampshire court overruled *Dunlap* insofar as it would allow a suit on the basis of insurance,²⁵ reasoning that the existence of liability insurance cannot create a right of action where none would otherwise exist.²⁶ However, in 1966 the court again reversed itself,²⁷ completely abrogating the rule of parental immunity. In allowing the minor to maintain an action against his father for injuries sustained in an automobile accident, the New Hampshire court reasoned that the only substantial basis for denying the minor the right to sue his parent is the need to maintain parental authority and family peace. The prevalence of insurance was relied upon by the court to negate this argument and was a major consideration in the decision to do away with the "court made rule"²⁸ of parental immunity.

Although New Hampshire is the only state which has completely eliminated the defense of parental immunity in tort actions, Wisconsin has made a significant exception to the parental immunity rule. In *Goller v. White*²⁹ the Wisconsin Supreme Court allowed an action by a foster son against his foster father for injuries sustained by the son while he was riding on a tractor operated by the foster father on a public highway. The rule established in *Goller* was that parental immunity bars negligence actions only where the negligent act involves an exercise of parental authority over the child,

¹⁸ See *Hebel v. Hebel*, 435 P.2d 8, 11 n.23 (Alas. 1967), and cases cited therein.

¹⁹ *Signs v. Signs*, 156 Ohio St. 566, 103 N.E.2d 743 (1952); *Borst v. Borst*, 41 Wash. 2d 642, 251 P.2d 149 (1952); *Lusk v. Lusk*, 113 W. Va. 17, 166 S.E. 538 (1932).

²⁰ *Dunlap v. Dunlap*, 84 N.H. 352, 150 A. 905 (1930).

²¹ *Worrell v. Worrell*, 174 Va. 11, 4 S.E.2d 343 (1939).

²² *Dean v. Smith*, 106 N.H. 314, 211 A.2d 410 (1965); *Dunlap v. Dunlap*, 84 N.H. 352, 150 A. 905 (1930); *Worrell v. Worrell*, 174 Va. 11, 4 S.E.2d 343 (1939); *Lusk v. Lusk*, 113 W. Va. 17, 166 S.E. 538 (1932).

²³ 84 N.H. 352, 150 A. 905 (1930).

²⁴ 150 A. at 915.

²⁵ *Levesque v. Levesque*, 99 N.H. 147, 106 A.2d 563 (1954).

²⁶ 106 A.2d at 564.

²⁷ *Briere v. Briere*, 107 N.H. 432, 224 A.2d 588 (1966).

²⁸ 224 A.2d at 590.

²⁹ 20 Wis. 2d 402, 122 N.W.2d 193 (1963).

or the exercise of ordinary parental discretion with respect to such things as food, clothing, housing, and other items of parental care. In making this change in the law of parent-child immunity, the court aligned itself with a group of cases which have argued that insurance tends to negate any disruption of family harmony and discipline.³⁰

III. HEBEL V. HEBEL

The decision in *Hebel* to abolish parental immunity in the automobile negligence situation reflects the role of insurance in the development of exceptions to the general rule of parental immunity. The *Hebel* court reviewed the four major policy reasons for barring an action by the child against the parent³¹ and systematically rejected each, relying heavily on the theory that if insurance is present, these arguments are no longer valid. The argument that such a suit will ultimately decrease family financial resources was countered with the argument that there is no decrease of the family financial resources when the burden of the suit is shifted to an insurer.³² In addition, the presence of insurance is assumed in the argument that intra-family suits will encourage fraudulent and collusive actions. The *Hebel* court observed that the danger of fraud and collusion is present in all liability insurance cases and thus is reason, not for denial of a cause of action, but for added caution on the part of the court and jury in examining the facts.³³ In rejecting the arguments that suits by minor child against parent interfere with parental discipline, the court reasoned that if insurance is present, there is small possibility that parental discipline will be undermined.³⁴ Similar reasoning was used by the court to counter the argument that intra-family suits have a damaging effect on domestic harmony.

The decision in *Hebel* was not limited to automobile accident cases in which insurance is present.³⁵ The court concluded that although the existence of liability insurance does not create liability,³⁶ the wide prevalence of automobile liability insurance was a proper element to consider in the policy decision of whether to continue the rule of parental immunity in the automobile negligence situation. Since insurance is widely prevalent in automobile cases, the court viewed the continuation of parental immunity in this area as unrealistic,³⁷ regardless of whether the parent in a particular instance is covered by insurance. However, the court did not define the scope which it will now give to parental immunity, but rather limited its decision to the facts of the case before it. Thus, the Alaska rule of parental immunity was changed only to the extent that a minor who sustains injuries as a result of the parent's negligent driving may now maintain an action against the negligent parent.

³⁰ 122 N.W.2d at 197.

³¹ For a discussion of the reasons for barring an action by the child against the parent, see text accompanying notes 11-14 *supra*.

³² *Hebel v. Hebel*, 435 P.2d 8, 13 (Alas. 1967).

³³ *Id.* at 12.

³⁴ *Id.* at 15.

³⁵ *Id.* at 13.

³⁶ *Id.* at 15.

³⁷ *Id.*

IV. CONCLUSION

Although in *Hebel* the decision was not limited to automobile accident situations in which the parent is insured, the rationale of the court is persuasive only where insurance is in fact present. The court appeared to assume that no suit will be brought unless insurance is present.³⁸ However, if in a case similar to *Hebel* the record revealed the absence of liability insurance, the court's reasoning, that the general availability and wide prevalence of automobile insurance negates the principal arguments for barring the action, would be both unconvincing and contradictory. If the reasons for barring an action by the child are valid, the general availability of insurance is no argument for the abrogation of parental immunity. Unless the parent is insured, a recovery by the child would deplete the family finances. When the burden of the suit falls on the parent rather than on the insurance company, there is likely to be disruption of domestic harmony and parental discipline. The better view of insurance in such cases seems to be that the "existence or non-existence of insurance must be considered irrelevant . . ."³⁹ Although *Hebel* is one more authority in the trend away from family immunities, it is not likely to have a significant influence in other jurisdictions.⁴⁰

The courts should make a frontal attack on the reasons given for barring an action by the minor against the parent. Domestic harmony is not a valid consideration where the parent has falsely imprisoned,⁴¹ raped,⁴² or used cruel and inhuman treatment⁴³ against the child. A minor who receives injuries due to the negligence of a parent should not be denied recovery for injuries which may last beyond minority. The reasons which underlie parental immunity should be re-examined, and more emphasis should be placed on the need to protect the personal security of the minor child.

Glen A. Majure

Right to Counsel for Misdemeanants: A Post-Gideon View

Borst, a candidate for sheriff in Minnesota, issued a circular regarding the qualifications of his opponent and was charged with violating a Minnesota statute¹ which makes it a misdemeanor knowingly to publish a false statement about a candidate for public office. Borst was arraigned and requested a continuance to enable him to retain counsel. Later he appeared without counsel and requested appointment of one, claiming he was finan-

³⁸ *Id.* at 12.

³⁹ *Barlow v. Iblings*, 156 N.W.2d 105, 110 (Iowa 1968).

⁴⁰ *Barlow v. Iblings*, 156 N.W.2d 105 (Iowa 1968), in which the Supreme Court of Iowa barred a negligence action by a minor against his father, rejecting reasoning similar to that in *Hebel*.

⁴¹ *Hewellette v. George*, 68 Miss. 703, 9 So. 885 (1891).

⁴² *Roller v. Roller*, 37 Wash. 242, 79 P. 788 (1905).

⁴³ *McKelvey v. McKelvey*, 111 Tenn. 388, 77 S.W. 664 (1903).

¹ MINN. STAT. ANN. § 211.08 (1962).