Torts—Father's Action Against Unemancipated Son for Loss of Services of Another Unemancipated Son

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that the most logical path is the one expounded by the principal case, i.e. that there may be more than one cause of an injury, and in such a case, the various wrongdoers may be jointly or severally held for their negligence.

In conclusion, it would seem that the decision of the principal case is correct and follows the weight of authority in the United States. There certainly may be concurrent causes of an injury, and, depending on various factors, one or both of the negligent parties may be held liable for their wrongful acts. In cases similar to the principal case, the West Virginia court has followed three trends of thought with little consistency, leaving much confusion in this area.

F. L. D., Jr.

Tort—Father’s Action Against an Unemancipated Son for Loss of Services of Another Unemancipated Son.—B was injured in an automobile accident while riding in a car driven by his brother, D. The father of the two unemancipated boys brought this action against D to recover for loss of services and medical expenses incurred by B. In a companion action B, by his father as guardian ad litem, seeks to recover damages for personal injuries from D and the driver of the other car involved in the accident. D moved to dismiss the complaint upon the grounds that an action by a father against his unemancipated son is contrary to public policy. Held, the father could maintain this derivative action, regardless of whether the claim was covered by liability insurance. Becker v. Rieck, 188 N.Y.S.2d 724 (1959).

This case presents an unusual situation, one in which the court was faced with an almost complete lack of precedent upon which to base its decision. Thus it is necessary to draw conclusions in this factual situation by analyzing the cases in the field of family immunity in tort actions, to determine if such immunity should be applied to cases similar to the one under discussion.

At common law, spouses were not permitted to sue each other for torts. Since most states have removed these common law disabilities by the passage of married women’s property acts, it has been advocated that this removes all disabilities of married women, and they should therefore be able to sue and be sued by their spouses for torts. However, such is not the case, and the majority of states, including West Virginia, have interpreted such acts as not permitting suits between spouses for torts. Lubowitz v. Taines, 293

The minority view, and perhaps the recent trend, seems to allow tort actions between spouses. Combs v. Combs, 262 S.W.2d 821 (Ky. 1953); Jernigan v. Jernigan, 236 N.C. 430, 72 S.E.2d 912 (1952); Pardue v. Pardue, 167 S.C. 129, 166 S.E. 101 (1932). New York has a statute which authorizes such actions. N.Y. Domestic Relations Law, § 57.

The overwhelming number of states do not permit an action for tort by a parent against an unemancipated minor. Oliveria v. Oliveria, 305 Mass. 297, 25 N.E.2d 766 (1940); Silverstein v. Kastner, 342 Pa. 207, 20 A.2d 205 (1941); Parker v. Parker, 230 S.C. 28, 94 S.E.2d 12 (1956). The case of Wells v. Wells, 48 S.W.2d 109 (Mo. App. 1932) seems to be the only case where the court has allowed a parent to sue an unemancipated minor.

Where the child has become emancipated, many courts will allow an action for tort by the parent against such child. Crosby v. Crosby, 230 App. Div. 651, 246 N.Y. Supp. 384 (1930); Detwiler v. Detwiler, 162 Pa. Super. 383, 57 A.2d 426 (1948). In order to emancipate a child, it is necessary that there be a complete severance of all parental and filial relationships. Turner v. Carter, 169 Tenn. 553, 89 S.W.2d 751 (1936). Where the situation is reversed, most states, including West Virginia, would not permit an action by an emancipated child against a parent for unintentional torts. Luster v. Luster, 299 Mass. 480, 13 N.E.2d 438 (1938); Securo v. Securo, 110 W.Va. 1, 156 S.E. 750 (1931); Cronin v. Cronin, 244 Wis. 372, 12 N.W.2d 677 (1944).

The reasons generally given for the family immunity doctrine in tort action are that to permit such actions would disrupt family harmony and would promote family discord, Sink v. Sink, 172 Kan. 217, 239 P.2d 933 (1952), and where the defendant is covered by insurance, it would encourage fraud and collusion. Smith v. Smith, 205 Ore. 310, 287 P.2d 572 (1955).

Other reasons advanced are that to permit such suits would encourage trivial actions brought from spite rather than merit, that the injured party has other adequate remedies by criminal or divorce actions, and that to permit such recoveries would in effect allow a
wrongdoer to benefit by his own wrong, in the situation where he is covered by insurance. For example, if a child is permitted to recover from a parent, who is covered by insurance, the money would probably go into the father's pocket, unless the court appointed a guardian or placed the money in a trust.

The reasons given for denying that such immunity exists are that since recovery is allowed between family members respecting their various property rights, as against one another, it should also be allowed in tort cases, as there is no sound distinction between the two, and the likelihood of fraud should not destroy the remedy as the courts are as capable of determining such fraud in these cases as in others. *Courtney v. Courtney*, 184 Okla. 395, 87 P.2d 660 (1938).

It has recently been advocated that due to the widespread coverage of liability insurance, the reasons behind such immunity are destroyed since the insurance companies would have to pay the losses. If the companies have to pay the losses, it is contended that such actions would not result in family discord, but that in fact the payments would result in better family relationships since the financial burden of such recoveries would be shifted from the family. Many courts have considered this argument and have rejected it, stating that the possibility of insurance is of no consequence. *Shaker v. Shaker*, 129 Conn. 518, 29 A.2d 765 (1942); *Schneider v. Schneider*, 160 Md. 18, 152 A. 498 (1930); *Silverstein v. Kastner*, 342 Pa. 207, 20 A.2d 205 (1941).

In cases involving other members of the family, only three cases have been found which allowed tort recoveries between siblings. The case of *Rozell v. Rozell*, 281 N.Y. 106, 22 N.E. 2d 254 (1939), allowed a 12 year old boy to recover against his 16 year old sister for personal injuries resulting from her negligence. *Bielke v. Knaack*, 207 Wis. 490, 242 N.W. 176 (1932), allowed a nine year old boy to recover against his twenty-one year old brother for personal injuries due to the latter's negligence, even though they resided in the same house; but this case involved an emancipated son. *Emery v. Emery*, 45 Cal.2d 421, 289 P.2d 218 (1955) permitted recovery by unemancipated minor sisters from their unemancipated brother in a tort action.

It appears that the courts have refused to follow the reasoning behind family immunity in cases dealing with siblings. It is the opinion of the writer that the doctrine of family immunity should either apply to all members of the immediate family or to none at
It appears illogical to allow tort actions between certain members of the family but not others.

This brings us to the discussion of the principal case. In New York, a parent may not maintain a tort action against an unemancipated child. *Terwilliger v. Terwilliger*, 201 Misc. 453, 106 N.Y.S.2d 481 (1951). However, New York courts do permit such actions by a minor against his unemancipated brother. *Rozell v. Rozell*, 281 N.Y. 106, 22 N.E.2d 254 (1939). In the principal case, the father instituted an action for loss of services and expenses necessarily incurred as a result of the accident. The New York court allowed recovery, relying heavily upon the fact that since the minor son could recover damages and future medical expenses from his minor unemancipated brother, it would result in very little additional family discord to allow the father to recover also. The conclusion of the court has merit and should not be criticized, as it has a controlling precedent (regarding the rights of unemancipated siblings to sue each other) and such precedents should be given due respect. *Talbot v. Riggs*, 287 Mass. 144, 191 N.E. 360 (1934). In the absence of such precedent, which is the situation in the majority of jurisdictions, including West Virginia, it is the opinion of the writer that actions between unemancipated siblings should be denied applying the same reasoning heretofore given for allowing immunity between other members of the family.

It is asserted that tort actions between family members might well result in many cases in family discord and dissension, and there is ever present the imminent danger of fraud and collusion. To allow this type of action would result in the jury members' knowledge of the defendant's coverage by insurance, due to their reasoning that this is probably the only explanation of why family members would be suing each other. It would thus seem that tort actions between family members, including actions between siblings, should not be allowed.

A. M. P.

**ABSTRACTS**

**LANDLORD AND TENANT—PERPETUITIES—LEASEHOLD ESTATES.**—Lease specified that it should be indefinite and terminated only by tenants inability to pay the monthly rental or his decision to move his business to another location. Tenant agreed and did build building on the property as well as agreeing to keep premises insured.