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Parent and Child--Tort Liability of Parent to Unemancipated Child [*Briere v. Briere*, 224 A.2d 588 (N.H. 1966)]

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PARENT AND CHILD — TORT LIABILITY OF PARENT TO UNEMANCIPATED CHILD

Briere v. Briere, 224 A.2d 588 (N.H. 1966).

After 75 years of existence in this country, the doctrine of parental immunity *may* have been totally laid to rest in New Hampshire by a recent state supreme court case, *Briere v. Briere*.[1]

In *Briere* the court held for two unemancipated[2] minor children in an action brought by their mother as next friend against their father for injuries arising out of an automobile-truck collision. The minors had been passengers in the automobile, which was owned and operated by the defendant.

The issue, by stipulation, was "whether unemancipated minor children may sue their father in tort for injuries sustained in an automobile accident."[3] Thus the court was squarely confronted with the opportunity to abrogate the doctrine of parental immunity.

The parental immunity doctrine was first announced in this country in *Hewlett v. Ragsdale*,[4] where a minor's action against her mother for wrongful confinement in an insane asylum was denied. The Mississippi court reasoned that both parent and child were under reciprocal obligations: the parent must care for, guide, control, and discipline the child, while the child must comfort, aid, and obey his parent. The court indicated that allowance of the action would have been contrary to public policy and disruptive of those reciprocal obligations.[5]

It is interesting to note that the *Hewlett* court cited no cases in support of its holding nor did it purport to rely upon a common law rule. The question of whether a common law immunity doctrine existed prior to *Hewlett* has remained a matter of opinion. This unresolved issue has arisen from the absence of English cases,[6] and the near absence of American cases prior to 1891.[7]

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[1] 224 A.2d 588 (N.H. 1966).

[2] Unless emancipation has occurred as a matter of law, it is a question of fact for the jury. *E.g.*, Parker v. Parker, 230 So. Car. 28, 94 S.E.2d 12 (1956).

[3] 224 A.2d at 589.

[4] 68 Miss. 703, 9 So. 885 (1891). "To some degree at least, the Mississippi case has been followed by most of the courts of this country having occasion to rule on the subject." Annot., 19 A.L.R.2d 423, 425 (1951) (footnotes omitted); *see* 67 C.J.S. *Parent and Child* § 61(b)(2) (1950).

[5] 68 Miss. at 711, 9 So. at 887.

[6] In Young v. Rankin, [1934] Sess. Cas. 499, 508 (Scot. 1st Div.), a British court stated this issue as follows:

Is there any clearly settled rule or principle of the common law or the public

Yet, in another early case, *McKelvey v. McKelvey*,[8] where the infant plaintiff was denied relief, a Tennessee court mistakenly added that "so far as we can discover, this rule of the common law has never been questioned in any of the courts of this country . . . ."[9] Unfortunately, this language, referring to a "common law rule," was incorporated in many subsequent decisions and has been a substantial obstacle to the abrogation of the immunity doctrine.[10]

Fortunately, this obstacle posed no problem for the *Briere* court, for it felt that prior to 1891 "there was no common-law rule that a child could not sue a parent"[11] and, since the rule was court made "[i]t is the duty of the judiciary to examine it and make such changes as justice requires when the Legislature has chosen not to act."[12]

The New Hampshire court then examined the immunity doctrine by analyzing the three reasons advanced by the defendant to support his position that the lower court's dismissal of the action should be sustained.

First, the court agreed with the defendant that there was a danger of fraud and collusion in allowing an unemancipated minor to sue a parent.[13] However, the court indicated that these same dangers were equally prevalent in actions between spouses,[14] other relatives,[15] and close friends[16] — all of which are permitted in New Hampshire[17] and in many other jurisdictions.[18]

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policy to prevent a son in minority, who had been injured through the fault of the father, from maintaining an action to be compensated for his injuries? I can find no such rule or principle, and we were referred to no judicial formulation of it, if such a rule exists.

[7] *See* Gould v. Christianson, 10 F. Cas. 857 (No. 5636) (C.C.S.D.N.Y. 1836) (implication of parental immunity); Nelson v. Johansen, 18 Neb. 180, 24 N.W. 730 (1885) (implication of no parental immunity); Annot., 19 A.L.R.2d 423, 429-30 (1951).

[8] 111 Tenn. 388, 77 S.W. 664 (1903).

[9] *Id.* at 390, 77 S.W. at 664.

[10] *See, e.g.*, Belleson v. Skilbeck, 185 Minn. 537, 539, 242 N.W. 1, 2 (1932).

[11] 224 A.2d at 590.

[12] *Id.*

[13] *Id.*

[14] *E.g.*, Bennett v. Bennett, 224 Ala. 335, 140 So. 378 (1932) (allowing wife to sue husband for automobile negligence); Leach v. Leach, 227 Ark. 559, 300 S.W.2d 15 (1957) (allowing husband to sue wife for automobile negligence); Lowman v. Lowman, 166 Ohio St. 1, 139 N.E.2d 1 (1956) (allowing wife to sue husband for negligent infliction of injuries); Jaeger v. Jaeger, 262 Wis. 14, 53 N.W.2d 740 (1952) (allowing wife to sue husband for negligent operation of automobile).

[15] *E.g.*, Overlook v. Ruedeman, 147 Conn. 649, 165 A.2d 335 (1960) (allowing minor sister to sue minor sister for negligence); Russell v. Cox, 65 Idaho 534, 148 P.2d 221 (1944) (allowing mother to sue son-in-law for wrongful death); Herrell v.

Furthermore, though the danger of collusion is increased when the defendant is covered by liability insurance, there will seldom be a suit for negligence when the defendant is uninsured. Even when insurance is involved, the legal system is particularly well suited for distinguishing honest and meritorious claims from false or fraudulent ones; it is the court's function to determine truth in *any* type of action.[19]

With these considerations in mind, the Supreme Court of New Hampshire rejected the defendant's "collusion" argument, stating that the "mere opportunity for fraud and collusion" was far outweighed by the injustice of denying relief for a meritorious claim.[20]

Next, the court considered the defendant's argument that the maintenance of a suit by a minor against his parent would substantially deplete family funds.[21] This argument brings into play the question of whether the existence of liability insurance should enlarge a minor's right of action against his parent.

Most courts refuse to consider the existence of liability insurance as relevant to the maintenance of the action[22] since "so far as plaintiff is concerned, liability insurance pertains to *collection* of any judgment that might be obtained . . . ."[23] There are a number of

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Haney, 207 Tenn. 532, 341 S.W.2d 574 (1960) (allowing minor to sue his minor brother for wrongful death); Midkiff v. Midkiff, 201 Va. 829, 113 S.E.2d 875 (1960) (allowing minor to sue minor brother for automobile negligence).

[16] Zellers v. Chase, 105 N.H. 266, 197 A.2d 206 (1964).

[17] Walker v. Walker, 106 N.H. 282, 210 A.2d 568 (1965) (husband and wife); Zellers v. Chase, 105 N.H. 266, 197 A.2d 206 (1964); Gilman v. Gilman, 78 N.H. 4, 95 A. 657 (1915) (husband and wife).

[18] Cases cited notes 14-15 *supra.* For further discussion of suits between spouses, see text accompanying note 34 *infra.* Of course, there has never been an immunity bar in actions between other relatives or close friends. *See generally* Akers & Drummond, *Tort Action Between Members of the Family — Husband & Wife — Parent & Child*, 26 MO. L. REV. 152 (1961). For an excellent discussion of family immunities in Ohio, see Sullivan, *Intra-Family Immunities and the Law of Torts in Ohio*, 18 W. RES. L. REV. 447 (1967).

[19] "Nor are lawyers apt to encourage litigation which has no merit, particularly where the customary fee arrangement is a contingent one." Balts v. Balts, 273 Minn. 419, 430, 142 N.W.2d 66, 73 (1966).

[20] 224 A.2d at 590.

[21] *Id.*

[22] W. PROSSER, TORTS § 116 (3d ed. 1964). While it is true that the parent's insurance rates will rise if the suit were allowed, this factor appears insignificant in the reduction of family assets, when the amount in controversy is substantial. For the interesting argument that current rates reflect recent experience and therefore do not contemplate the parent's immunity, see Badigian v. Badigian, 9 N.Y.2d 472, 474, 174 N.E.2d 718, 720, 215 N.Y.S.2d 35, 37 (1961).

[23] Nahas v. Noble, 420 P.2d 127, 128 (N.M. 1966) (emphasis added).

recent cases which have placed greater significance on the existence of insurance as meeting the depletion of family funds argument.[24]

In *Briere*, the New Hampshire court agreed with the weight of authority that the existence of liability insurance should not impose a duty upon the defendant where no such duty existed before.[25] The court recognized that today parents are likely to carry insurance and, "as a practical matter, the prevalence of insurance cannot be ignored in determining whether a court should continue to discriminate against a class of individuals by depriving them of a right enjoyed by all other individuals."[26] Thus, the policy arguments in support of defendant's "fund depletion" argument failed in light of the popularity of liability insurance.

The defendant's last reason for maintaining the parental immunity doctrine was that domestic tranquility and parental discipline would be appreciably harmed if the suit were allowed.[27] This appears to have been the chief reason for denying the minor's suit:[28]

> As often stated before, the sole debatable excuse advanced for the denial of the child's right to sue is the effect a suit would have upon discipline and family life. If, therefore, the situation is such that the suit will not affect those matters at all, the reason for the theory fails and it should not be applied.[29]

The "family harmony" approach serves to explain why most jurisdictions have abrogated the immunity doctrine when the injury complained of resulted from a parent's wilful, wanton, or malicious act.[30] This widely followed exception, mentioned in *Briere*,[31] is

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[24] *E.g.*, Dean v. Smith, 106 N.H. 314, 211 A.2d 410 (1965), cited in the *Briere* decision, where minor unemancipated children were allowed to sue their father's estate for the decedent's negligence. The court said that "the effect of general insurance coverage by most motorists should be considered in determining whether the barrier preventing an unemancipated child from obtaining redress for the wrongs inflicted on him by the negligence of his parents should be removed." *Id.* at 318, 211 A.2d at 413. The prevalence of insurance in many personal injury actions was similarly considered a "proper element" in Goller v. White, 20 Wis. 2d 402, 412, 122 N.W.2d 193, 197 (1963).

[25] 224 A.2d at 590.

[26] *Id.*

[27] *Id.* at 590-91. One might critically question whether the reasons behind the immunity rule significantly cease to operate at emancipation.

[28] W. PROSSER, *supra* note 22, at 887; *see* 39 AM. JUR. *Parent and Child* § 90 (1942).

[29] Dunlap v. Dunlap, 84 N.H. 352, 367, 150 A. 905, 912 (1930).

[30] *See, e.g.*, Emery v. Emery, 45 Cal. 2d 421, 289 P.2d 218 (1955) (permitting unskilled driver to operate auto under unfavorable conditions); Nudd v. Matsoukas, 7 Del. 2d 608, 131 N.E.2d 525 (1956) (driving recklessly in poor weather); Mahnke v. Moore, 197 Md. 61, 77 A.2d 923 (1951) (committing atrocious acts in front of child); Cowgill v. Boock, 189 Ore. 282, 218 P.2d 445 (1950) (committting gross

based upon the strained concept that this kind of misconduct forfeits, abandons, or terminates the parental relationship, causing such a disruption to family peace that the reason for immunity no longer exists.

The family harmony reasoning fails when courts allow other forms of action between the unemancipated child and his parent. The Supreme Court of New Hampshire recognized that an unemancipated minor child may sue his parent on a contract[32] or for some wrong connected with property.[33] While it could be argued that a contract or property action is usually based upon the breach of a voluntary, mutually beneficial agreement and a negligence action is not, the difference between the effect of each type of action upon family harmony is slight.

Still another inconsistency is that suits between other family relations are maintainable. While at common law, tort actions between spouses were denied, a substantial minority of states now allow personal injury suits between spouses.[34] Uniformly, actions have been permitted between minor brothers and sisters and other relatives,[35] and nearly always have been allowed against one in loco parentis.[36] In many of these cases domestic tranquility will be significantly disrupted; yet, no immunity rule bars their maintenance.

One exception to the immunity doctrine, not mentioned in *Briere*, is that an unemancipated minor may maintain an action against his parent if the act complained of is connected with the parent's business or vocation.[37] It appears that courts which allow this exception are "making an artificial separation of vocational from personal capacity, which suggests a dislike of the immunity more than anything else."[38]

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negligence). Malice is a question of fact. Wright v. Wright, 85 Ga. App. 721, 70 S.E.2d 152 (1952).

[31] 224 A.2d at 591.

[32] *Id.* at 590, *citing* Hall v. Hall, 44 N.H. 293 (1862); *see* Comment, *The Doctrine of Parental Immunity: Rule or Exception?*, 10 DE PAUL L. REV. 55 (1960).

[33] *See, e.g.*, Crowley v. Crowley, 72 N.H. 241, 56 A. 190 (1903) (permitting suit regarding ownership of farm); McLain v. McLain, 80 Okla. 113, 194 P. 894 (1921) (permitting action against father for rent of land occupied by father during plaintiff's minority).

[34] Note, *Parent-Child Tort Actions*, 12 CLEV.-MAR. L. REV. 339, 341 (1963).

[35] Cases cited note 15 *supra.*

[36] *See, e.g.*, Wilkens v. Kane, 74 N.J. Super. 414, 181 A.2d 417 (Super. Ct. 1962).

[37] *E.g.*, Borst v. Borst, 41 Wash. 2d 642, 251 P.2d 149 (1952), where defendant was operating a business vehicle for business purposes when he negligently ran over his child.

[38] W. PROSSER, *supra* note 22, at 888.

Besides meeting the fund depletion argument, the existence of liability insurance would seem to largely negate the possible ill effects of a suit between a child and his parent on family unity. In the case of *Balts v. Balts*,[39] where a parent was allowed to recover for injuries sustained in an automobile accident caused by the negligence of the plaintiff's minor child, the Minnesota court expressed the view, equally applicable to suits by minor children, that "where a wrong has been committed of a character sufficiently aggravated to justify recovery were the parties strangers, the harm has been done. . . . [T]he prospect of reconciliation is enhanced as much by equitable reparation as by denying relief altogether, particularly where the defendant is insured."[40]

In 1963 the Wisconsin Supreme Court almost completely abrogated the immunity rule in *Goller v. White*.[41] There, a 12-year-old child was permitted to maintain an action against a foster parent for injuries sustained in an accident caused by the negligent operation of a tractor on a public highway. The court abolished the rule prospectively[42] in personal injury actions, except in two situations: "(1) [w]here the alleged negligent act involves an exercise of parental authority over the child; and (2) where the alleged negligent act involves an exercise of ordinary parental discretion with respect to the provision of food, clothing, housing, medical and dental services, and other care."[43]

The Wisconsin court also noted the effect of insurance on preserving family harmony and felt it was a proper element to be considered in changing the immunity rule.[44] Obviously, this court felt that family harmony rests on more than just financial well-being. This is a valid point, but empirical data is needed to show the effects of an intrafamily suit. One interesting aspect of the *Goller* case was that the defendant's insurance policy was held *not* to cover the

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[39] 273 Minn. 419, 142 N.W.2d 66 (1966).

[40] *Id.* at 73. When a parent purchases an insurance policy his precise object is to make the enforcement of a judgment innocuous.

[41] 20 Wis. 2d 402, 122 N.W.2d 193 (1963).

[42] *Id.* at 414-15, 122 N.W.2d at 199 (supplementary opinion). In Downs v. Poulin, 216 A.2d 29, 34 (Me. 1966), the Supreme Court of Maine, sustaining defendant's motion for summary judgment, stated that "[i]f the rule in such cases is, as the plaintiff contends, no longer suited to the times and should be dispensed with, the proper way to accomplish that end is prospectively by legislation and not retroactively by judicial decree . . . ."

[43] 20 Wis. 2d at 413, 122 N.W.2d at 198. For a very fine analysis of the *Goller* decision, see Note, *Parent and Child — Negligence — Abrogation of the Parental-Immunity Rule*, 1964 WIS. L. REV. 714.

[44] 20 Wis. 2d at 412, 122 N.W.2d at 197 (1963).

plaintiff, and the defendant's insurer was relieved from liability.[45] Since the plaintiff was successful in spite of the lack of coverage, it is arguable that the court felt that family unity would not be disrupted by an intrafamily personal injury suit, unless the circumstances fell within either of the two exceptions — parental authority or ordinary parental discretion. In all other cases, there would be no immunity.

The real difficulty in the *Briere* case is deciding just how far the Supreme Court of New Hampshire went toward destroying the immunity doctrine. Conceivably, future readings of the case could be confined to the facts of *Briere.* Such an interpretation is suggested by the court's reliance on *Dean v. Smith*[46] and *Gaudreau v. Gaudreau*[47] which involved similar automobile negligence factual situations.[48]

While the major distinction in automobile negligence cases is the possibility of liability insurance coverage, still the New Hampshire court pointed out that the defendants were only "generally" protected from loss.[49] Similar qualified language was employed by the court when it stated that if the defendant were uninsured, the chances of anyone bringing suit for the child would be remote.[50] Thus, the court's holding, even narrowly construed, still leaves room for speculation as to whether actions against uninsured parents in automobile negligence situations will be successful in the future in New Hampshire. If so, then actions in *other* negligence situations, where insurance similarly may not be a factor should also be permitted.

However, the court seemed to feel that it was charting a new course by allowing the plaintiffs' suits.[51] If the Supreme Court of New Hampshire were going only as far as the *Goller* decision, of which it was aware,[52] then it logically would have cited that decision, with its two exceptions, instead of purporting to proclaim a new doctrine. Thus, the *Briere* decision suggests that New Hamp-

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[45] *Id.* at 409, 122 N.W.2d at 196.

[46] 106 N.H. 314, 211 A.2d 410 (1965). For another discussion of the *Dean* case, see note 24 *supra.*

[47] 106 N.H. 551, 215 A.2d 695 (1965), where an action by the representative of the father's estate was maintained against an unemancipated minor.

[48] 224 A.2d at 591.

[49] *Id.*

[50] *Id.* at 590.

[51] *Id.* at 591.

[52] Brief for Appellant at 6, Briere v. Briere, 224 A.2d 588 (N.H. 1966).