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Torts—Suit by Unemancipated Infant Against Negligent Parent

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practical in the course of construction work to be constantly blasting with an absolute minimum charge. Yet, the Court holds that this can constitute negligence on which to base a recovery. This appears to the writer to signal the beginning of the end of New York's adherence to the minority rule, and to a fictional finding of negligence which amounts to absolute liability unless it can be clearly shown that the damage was caused by unforeseeable circumstances.

P. C. B.

SUIT BY UNEMANCIPATED INFANT AGAINST NEGLIGENT PARENT

In *Badigian v. Badigian*,[77] an action for negligence was brought by a mother in behalf of her three-year-old son against the father. The plaintiff alleged that the defendant left his automobile unlocked and that the child entered it, released the brake, and was hurt attempting to leap from the moving vehicle. Granting defendant's motion for summary judgment, the trial court dismissed the complaint for insufficiency, and the Appellate Division affirmed.[78] The Court of Appeals, in a six to one decision, upheld the dismissal, reemphasizing the parent-child immunity doctrine, firmly established in two previous decisions.[79] Having conceded that, perhaps, "special provision should be made for cases where disability extends beyond infancy," the majority felt that such an innovation rightly belonged to the Legislature and that, moreover, insurance companies, having relied on the existing law, did not contemplate in their rates such an increase in liability by extending protection to an unemancipated child of the policyholder.

Traditionally, New York has followed the rule that an unemancipated infant cannot maintain an action against his parent for negligently inflicted injuries.[80] It would appear that the reason underlying this precept is predicated on public policy, since it is claimed that litigation of this nature tends to disturb the legally-sanctioned cordial relationship of family unity and to shake the very foundation of parental authority. Where insurance shields the parent from liability, the reason seems to disappear, since the real party in interest is the insurance company. Certainly, absorption of the loss by the insurer in no way disrupts familial tranquility. Those opposed to allowing such a suit argue that fraud and collusion, perhaps even a parent profiting by his own wrongdoing, might occur, but a careful investigation concerning the claim would seem to overcome this difficulty.

Negligence cases of this nature in New York center primarily around automobile accidents and are litigated in all probability solely because the

77. 9 N.Y.2d 472, 215 N.Y.S.2d 35 (1961).
78. 10 A.D.2d 835, 200 N.Y.S.2d 352 (1st Dep't 1960).
79. Sorrentino v. Sorrentino, 248 N.Y. 626, 162 N.E. 551 (1928). This was a case of first impression, but the court chose to write merely a memorandum report, probably because there was no basis in the common law for a suit of this nature. Of little significance is the fact that Cardozo, C. J., Crane, J., and Andrews, J., dissented, since no ground for dissent is mentioned. See also Cannon v. Cannon, 287 N.Y. 425, 40 N.E.2d 236 (1942).
80. Ibid.

parent is covered by liability insurance.[81] The feasibility of permitting such a suit for mere negligence would doubtless be limited to cases of this nature and similar types, where, for example, in a parent-run business establishment, the parent can spread the loss via insurance. Yet, it is conceded that insurance coverage is hardly any reason for permitting a suit.

Although the family immunity doctrine has been decaying gradually, *i.e.*, one spouse, by statute, is allowed to sue the other;[82] an emancipated infant has a right of action against a negligent parent,[83] as does an unemancipated infant for a parent's wilful or wanton acts,[84] no American jurisdiction has yet allowed an unemancipated infant a remedy against a merely negligent parent. However, in *Rozell v. Rozell*,[85] the Court of Appeals granted an unemancipated brother a cause of action against his unemancipated sister for injuries negligently caused while the latter was driving the family vehicle.

While, as a broad proposition, it would seem that a parent should be privileged in mere negligent acts and free from burden of suit for failure to exercise due care and proper judgment in everyday affairs, what we are left with in the present case is an unsatisfactory result. The injured party is deemed remediless; permanently crippled, he is without compensation from a parent who in all probability cannot afford just compensation from his own pocket, and without adequate compensation from a family type hospitalization coverage which does not take permanent injury contingencies into account. Is there any warrant in denying recovery for the sake of stare decisis? Will the insurance carriers really suffer consequences they have not foreseen? Surely it was foreseeable to them that a court might change a court-made rule, as it did in allowing recovery in the *Rozell* case.[86] Are we to fear a flood of litigation once the court recognizes a right of an unemancipated infant to sue his parent for negligence? If there is any foundation to such a prediction, perhaps, we should, as the Court in the *Rozell* case suggested, rely on the honesty of the litigants and the ability of the court to discern contrived claims in cases like the present one. To deny a cause of action to one merely on the basis of age and family attachment is not consistent with the dictates of justice.

E. J. S.

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81. E.g., Siembab v. Siembab, 284 App. Div. 652, 134 N.Y.S.2d 437 (4th Dep't 1954); Thickman v. Thickman, 88 N.Y.S.2d 284 (Sup. Ct. 1949); Ciani v. Ciani, 127 Misc. 304, 215 N.Y. Supp. 767 (Sup. Ct. 1926). Besides automobile cases, other types where recovery was denied include Epstein v. Epstein, 283 App. Div. 855, 129 N.Y.S.2d 54 (1st Dep't 1954), where injury was caused by a father's negligence in his place of business; and Meyer v. Ritterbush, 196 Misc. 551, 92 N.Y.S.2d 595 (Sup. Ct. 1949), a wrongful death action by administrator of the unemancipated child's estate against mother's executor.

82. N.Y. Dom. Rel. Law § 57.

83. Murphy v. Murphy, 206 Misc. 228, 133 N.Y.S.2d 796 (County Ct. 1954). Emancipation may be by expressed parental consent or implied by law.

84. Henderson v. Henderson, — Misc. —, 169 N.Y.S.2d 106 (Sup. Ct. 1957).

85. 281 N.Y. 106, 22 N.E.2d 254 (1939) (the Court claiming a suit of this type did not disrupt family unity).

86. Ibid.