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. TORTS: THE RIGHT OF A CHILD TO SUE THE ESTATE OF A
DECEASED PARENT IN TORT.*

The Supreme Court of New Hampshire held in *Dean v. Smith*¹ that an unemancipated child may sue her deceased parent's estate for injuries arising from the parent's negligent operation of an automobile in which the parent was killed. The court thereby overruled a prior case² which had denied an unemancipated child the right to maintain suit against the deceased parent's estate for injuries arising in tort.

The general rule in this country is that an unemancipated minor may not bring an action against the parent for ordinary negligence.³ Courts have denied a child the right to sue primarily on grounds of public policy, holding that to do otherwise would undermine parental discipline and control, and domestic tranquility, and would therefore weaken the basic structure of society—the family.⁴

The general rule was applied in a situation where the child was suing the deceased parent's estate in *Lasecki v. Kabara*.⁵ In that case, six children sustained injuries in a collision between their father's automobile and another vehicle caused by the father's negligence. The court refused to allow the children to sue the deceased parent's estate. Another fact situation similar to the *Lasecki* case was a suit on behalf of one child and the estate of another.⁶ One of the children was injured, and the other killed in an automobile accident caused by their father's negligence. Citing the *Lasecki* case, the court refused to allow the suit. The courts supported their holdings with the following reasons: (1) a child who could not maintain a suit against his parent during the latter's lifetime could not maintain an action against his estate after his death; (2) to allow such recovery would invite unlimited tort claims to be filed by minors after their parent's death.⁷

The validity of the first reason should have been questioned by the courts, since most courts following the doctrine of parental immunity recognized the immunity the parent might have from suit by the minor

* (Editor's Note) This article on tort actions by unemancipated minors against estates of their deceased parents, the following article on tort actions between unemancipated minors of the same family, and the article in 2 TULSA LAW JOURNAL 72 (1965) on tort actions by unemancipated minors against their parents, cover the child's right to sue within the family.

¹ 211 A.2d 410 (1965).

² Worrall v. Moran, 101 N.H. 13, 131 A.2d 438 (1937).

³ The rule originated in a case of false imprisonment of a child by her parent. *Hewelle v. George*, 68 Miss. 703, 9 So. 885 (1891). Almost without exception the rule has been adopted by other jurisdictions. See, e.g., *Owaby v. Kleyhammer*, 194 Tenn. 109, 250 S.W.2d 37 (1952); *Ball v. Ball*, 59 Wyo. 204, 269 P.2d 302 (1954); *Chaffin v. Chaffin*, 397 P.2d 771 (Ore. 1965).

⁴ *Ibid.*

⁵ 235 Wis. 645, 294 N.W. 33 (1940).

⁶ Worrall v. Moran, *supra* note 2.

⁷ *Lasecki v. Kabara*, *supra* note 5; Worrall v. Moran, *supra* note 2.

child for personal tort arose from a disability to sue and not from lack of violated duty.⁸ The New Hampshire court had previously pointed out this distinction saying: "[T]here never has been a common-law rule that a child could not sue its parent. . . . The minor has the same right to redress for wrongs as any other individual. . . . The limitations which have been put upon that right have been deduced from prevalent ideas touching family life, and especially parental rights and duties."⁹ The disability was imposed for the protection of family control and harmony and existed only where a suit or the prospect of a suit might disturb the family relations. The New Hampshire court said, "It is self-evident that the disruption of family relations and the weakening of parental rights and duties are much less likely to occur, if at all, when the child's suit is against the estate of a deceased parent."¹⁰ Consequently, there was no reason to impose a disability on the child which prevented suit against the deceased parent's estate. The reason for the rule being absent, the rule did not apply.¹¹

As for the second reason, it appears the court's fear was more imagined than real. It is difficult to imagine a deluge of suits arising from allowing a child's recovery against the deceased parent's estate than from allowing any other tort claim.

It appears the Oklahoma court has not yet faced a fact situation similar to the *Dean* case. However, the court has adopted the majority rule in *Tucker v. Tucker*,¹² where a child attempted to sue her living parents for injuries sustained by the parent's negligent operation of an automobile. The court's decision gave no indication of what it would do in a fact situation similar to the *Dean* case.

It is significant that the New Hampshire court in allowing the minor to sue her parent's estate expressly overruled *Worrall v. Moran*¹³ which had denied an unemancipated child the right to bring suit against her parent's estate for a personal tort. Courts have been reluctant to alter the majority rule and have charged the legislature with that responsibility,¹⁴ but the New Hampshire court rejected this contention saying: "[T]he immunity of parents from suit by their unemancipated children was not created by the legislature. . . . consequently it is the responsibility of the judiciary to examine this court-made rule and to make such alterations as the interests of justice may require."¹⁵

In light of the *Dean* case, there does not appear to be a valid reason

⁸ *Hewellette v. George*, *supra* note 3; *Dunlap v. Dunlap*, 84 N.H. 352, 150 Atl. 905 (1930); *Harlan National Bank v. Gross*, 346 S.W.2d 482 (Ky. 1961).

⁹ *Dunlap v. Dunlap*, *supra* note 8, at 354, 150 Atl. at 906.

¹⁰ *Dean v. Smith*, *supra* note 1, at 413.

¹¹ In a case of novel impression, the Supreme Court of Missouri allowed an unemancipated child to sue her deceased parent's estate in tort, saying the rule did not apply where the reason for the rule failed: *Brennecke v. Kilpatrick*, 336 S.W.2d 68 (Mo. 1960).

¹² 395 P.2d 67 (Okla. 1964).

¹³ *Worrall v. Moran*, *supra* note 2.

¹⁴ *Lasecki v. Karaba*, *supra* note 5; *Worrall v. Moran*, *supra* note 2.

¹⁵ *Dean v. Smith*, *supra* note 1, at 412-413.