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Torts: Negligence Actions between Unemancipated Minors of the Same Family

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to deny an unemancipated child the right to sue his deceased parent's estate for injuries resulting from the parent's ordinary negligence. Hopefully, other courts, when facing similar fact situations, will be influenced by the *Dean* case.

Bill York

TORTS: NEGLIGENCE ACTIONS BETWEEN UNEMANCIPATED MINORS OF THE SAME FAMILY

Should an unemancipated minor be allowed to recover damages from an unemancipated brother or sister for personal injuries resulting from the latter's negligence in the operation of an automobile? The following answer is found in American Jurisprudence:

> The cases uniformly hold or assume that the fact of relationship by blood or marriage, other than that of parent and child or husband and wife, between the tort-feasor and the person injured does not preclude the maintenance of an action for such injuries. The rule has been applied to actions between brothers and sisters. Public policy is not regarded as requiring the preclusion of the maintenance of such an action.[1]

The Supreme Court of Oklahoma has not ruled on this particular question. However, with the increased use of automobiles by minors and the usually attendant insurance coverage, this question undoubtedly will come before the court. There are three basic arguments against allowing an action of this type between any members of a family: (1) the maintenance of such an action is against public policy; (2) the maintenance of such an action would disrupt the peace and harmony of the family unit; and (3) the maintenance of such an action would be an incentive to fraud.[2] Cases decided by the Supreme Court of Oklahoma give very little indication of how the court will decide this question.

The Supreme Court of Oklahoma has held that a wife may sue her husband in tort.[3] In *Courtney v. Courtney*,[4] the wife was allowed to recover damages from her insured husband for personal injuries resulting from the latter's negligence in the operation of an automobile. The court stated that it was among the minority in allowing such an action, but based its decision on the Oklahoma version of the Married Women's Acts[5] and on the inconsistency of remedies which allow a married woman in

[1] 52 Am. Jur. *Torts* § 97 (1944); Annot., 123 A.L.R. 1020 (1939); Annot., 81 A.L.R.2d 1155 (1962).

[2] Midkiff v. Midkiff, 201 Va. 829, 830, 113 S.E.2d 875, 876 (1960).

[3] Fiedeer v. Fiedeer, 42 Okla. 124, 140 P. 1022 (1914); Courtney v. Courtney, 184 Okla. 395, 87 P.2d 660 (1939).

[4] 184 Okla. 395, 87 P.2d 660 (1939).

[5] The court cited REV. LAWS § 3363 (1910). This is the same as 32 OKLA. STAT. § 15 (1961):

some states to sue her husband for a tort against her property but not for a tort against her person.

In *Tucker v. Tucker*,[6] the Supreme Court of Oklahoma, citing the landmark case of *Hewellette v. George*,[7] held that an unemancipated minor could not recover from his insured parent for personal injuries as a result of the parent's negligence in the operation of an automobile. The plaintiff in the *Tucker* case relied on the *Courtney* case and *Fiedeer v. Fiedeer*[8] and contended that if a suit between spouses would not disrupt the peace and harmony of the family unit, neither would a suit between minor and parent, especially where the parent was insured. However, the court brushed aside this contention and stated that the *Fiedeer* and *Courtney* cases were based, at least in part, upon the Oklahoma version of the Married Women's Acts and that no comparable statutes specifically concerning the rights of minors to sue their parents in tort are to be found in Oklahoma. The court concluded that Section 6 of Article 2 of the Oklahoma Constitution,[9] Section 3 of Title 23 of the Oklahoma Statutes (1961),[10] and Section 1 of Title 76 of the Oklahoma Statutes (1961),[11] which give every person in Oklahoma the right to go into court to seek redress for wrongs, were not written with the express intention of allowing a minor to sue his parent. It is interesting to note that the court in the *Courtney* case said it was unnecessary for the legislature to enact the Oklahoma version of the Married Women's Acts to give the wife a cause of action in express terms since she, like all ordinary persons, had been granted the same right by Section 6 of Article 2 of the Oklahoma Constitution and Section 3 of Title 23 of the Oklahoma Statutes (1961). It would seem that the reasoning of the court in the *Courtney* case could have been applied in the *Tucker* case, wherein the court implied that a statute expressly allowing a minor to sue his parent in tort was necessary for the maintenance for such an action. The *Tucker* case leaves the minor with the inconsistency of remedies noted in the *Courtney* case in that an unemancipated minor may sue his parent for a tort against his property but cannot sue his parent for a tort against his person.

"Rights of married women: Woman shall retain the same legal existence and legal personality after marriage as before marriage, and shall receive the same protection of all her rights as a woman, which her husband does as a man; and for any injury sustained to her reputation, person, property, character or any natural right, she shall have the same right to appeal in her own name alone to the courts of law or equity for redress and protection that her husband has to appeal in his own name alone . . . ."

6 395 P.2d 67 (Okla. 1964).

7 68 Miss. 703, 9 So. 885 (1891).

8 42 Okla. 124, 140 P. 1022 (1914).

9 "The courts of justice of the State shall be open to every person, and speedy and certain remedy afforded for every wrong and for every injury to person, property, or reputation . . . ."

10 "Any person who suffers detriment from the unlawful act or omission of another, may recover from the person in fault . . . ."

11 "Every person is bound, without contract, to abstain from injuring the person or property of another . . . ."

Will the Supreme Court of Oklahoma allow a tort action between unemancipated minors of the same family arising out of the negligent operation of an automobile? After considering the results in the cases discussed above, one can only conjecture as to what the court will do. There is no statute expressly allowing such an action.[12] In deciding whether such an action may be maintained, the court undoubtedly will be confronted with the decisions and reasonings in the *Courtney* and *Tucker* cases. However, the court will be confronted also with decisions from other jurisdictions which hold that such an action is not against public policy and may be maintained.[13]

One of the earliest cases on this subject was *Rozell v. Rozell*,[14] wherein the court upheld the right of an unemancipated minor boy, age 12, to maintain an action against his insured, unemancipated minor sister, age 16, whose negligent operation of an automobile in which he was a passenger resulted in his injury. The court stated that an infant is generally responsible for his own torts. The court also noted that neither the constitution, statutes, nor judicial decisions of New York declare any state policy against the maintenance of such an action. In holding that it could not be argued successfully that litigation between brothers and sisters would seriously disturb family relationships or destroy the family unit, the court said:

> Family ties between brother and sister are as strong today as ever. If permitting a suit by a brother against a sister to recover for injuries received by the former through the tortious negligence of the latter is to tear asunder the ties that sustain the family unit, as predicted by appellant, then it must indeed be held together by a slender thread.[15]

In *Munsert v. Farmers Mut. Automobile Ins. Co.*,[16] the court sustained the right of parents to bring an action against an unemancipated minor child whose negligence caused the death of another unemancipated minor child of the same family. In stating that this conclusion rested upon the inference that an action by an unemancipated minor brother who was injured but not killed by the wrongful act of his unemancipated minor brother may be brought against the brother who committed the wrong, the court said:

> We have not yet in any case decided that such action lies. But we came close to so deciding in Beilke v. Knaack . . . . We there held that a minor may sue in tort his adult brother if slightly over twenty-one years of age living with

[12] However, it might be argued that the constitutional and statutory provisions cited in notes 9, 10, and 11 are applicable as well as 15 OKLA. STAT. § 25: "A minor . . . is civilly liable for a wrong done by him, in like manner as any other person."

[13] For cases, not subsequently cited, which are in accord with this view see Detwiler v. Detwiler, 162 Pa. Super 383, 57 A.2d 526 (1948) and Emery v. Emery, 45 Cal.2d 421, 289 P.2d 218 (1955).

[14] 281 N.Y. 106, 22 N.E.2d 254 (1939).

[15] *Id.* at 256.

[16] 229 Wis. 581, 281 N.W. 671 (1938).

> him in the family of his parents. If he may sue such brother if slightly over twenty-one years of age living with him in his father's family, it is no great stretch from that to hold that he may sue a brother so living slightly under that age . . . .[17]

In the Connecticut case of *Overlock v. Ruedemann*,[18] an automobile driven by a 17-year-old girl went out of control, killed her 12-year-old sister, and injured another sister who was 14 years old. All the sisters were unemancipated, and the negligence of the oldest sister was the proximate cause of the death and injury. The court, in holding that an action by the administrator of the deceased sister and an action by the injured sister against the third sister were maintainable, reviewed its decisions holding that an unemancipated minor cannot maintain an action for negligence against his parents, that a parent cannot maintain an action for negligence against his unemancipated minor child, but that tort actions between spouses can be maintained. The court said:

> There would seem to be more force to the argument that a lawsuit betwen husband and wife is contrary to public policy than that a lawsuit between sisters is. Certainly, in the normal situation at least, a lawsuit between husband and wife might be claimed to strike at the very foundation of family unity. Nevertheless, we have given sanction to such an action.[19]

In Virginia, where husband and wife, or parent and unemancipated child, are not permitted to sue each other for personal injuries, the court held in *Midkiff v. Midkiff*[20] that an unemancipated infant may maintain a tort action against his insured, unemancipated brother for personal injuries arising out of an automobile collision. The court said:

> As contrasted with the husband and wife relationship, there is, between two brothers, no historical or fictional background of legal unity or oneness. Neither does there exist the problem of parental discipline and support as is found in the case of parent and child.[21]

The court in *Herrell v. Haney*[22] held that the administrator of a 13-year-old unemancipated minor could maintain a wrongful death action against the decedent's 17-year-old unemancipated brother who was driving the automobile with his father's permission when the accident occurred. The court recognized that a parent may not sue his child in tort in Tennessee but rejected the contention that to permit recovery in the instant case would be to permit indirectly what may not be done directly, since the parents of the alleged tort-feasor are the statutory beneficiaries of the decedent's cause of action, and held that the right of action in this case

17 *Id.* at 673.
18 147 Conn. 649, 165 A.2d 335 (1960).
19 *Id.* at 337.
20 201 Va. 829, 113 S.E.2d 875 (1960).
21 *Id.* at 877.
22 341 S.W.2d 574 (Tenn. 1960).