NATURAL RESOURCES JOURNAL

Volume 8
Issue 3 *Resources of the Sea*

Summer 1968

Torts—Parent-Child Immunity—Third-Party Tortfeasors Nahas v. Noble, 77 N.M. 139, 420 P.2d 127 (1966)

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Torts—Parent-Child Immunity—Third-Party Tortfeasors*

The rule that there can be no actions between a parent and his unemancipated child for negligent torts in their ordinary family relationship had been approved by every state supreme court that had heard such an action prior to 1963.[1] The rule at the same time had been "universally condemned in [virtually all] the thoughtful professional and student writings on the subject."[2]

The New Mexico Supreme Court adopted the parent-child immunity doctrine in the 1966 case of *Nahas v. Noble*.[3] This was an action arising from an accident in which the plaintiff-mother was injured while riding in a car driven by her nineteen year old defendant-daughter. The trial court directed a verdict in favor of the defendant. On appeal the plaintiff asserted as error the trial court's application of the parent-child immunity doctrine. The New Mexico Supreme Court, *held,* Affirmed, on the grounds that such actions provoked "antagonism," were inconsistent with the "parent's position" and were "repugnant".[4] The court said the "long-established and generally accepted [parent-child immunity] rule is a matter for proper consideration by the legislature but . . . should not be overturned by the court."[5] Justice Moise dissented on the ground that "logic and reason do not support such an immunity."[6]

The Wisconsin Supreme Court, in the 1963 case of *Goller v. White*,[7] was the first to abolish the parent-child immunity rule. Only cases involving exercises of parental control and authority or parental discretion with respect to food and care were excepted. Since the *Goller* case, two other jurisdictions have moved to abrogate the doctrine: New Hampshire in *Gaudreau v. Gaudreau*[8] and Minnesota in *Balts v. Balts*.[9]

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* Nahas v. Noble, 77 N.M. 139, 420 P.2d 127 (1966).

1. W. Prosser, Law of Torts § 116, at 887 (3d ed. 1964).

2. See the dissenting opinion in Hastings v. Hastings, 33 N.J. 247, 163 A.2d 147, 151 (1960) for an exhaustive list of writings on the subject. Included are F. Harper & F. James, The Law of Torts §§ 8.11, 13.4 (1956); W. Prosser, Law of Torts § 101 (2d ed. 1955); McCurdy, *Torts between Persons in Domestic Relation*, 43 Harv. L. Rev. 1030 (1930); Seavy, *Torts*, 1958 Annual Survey of American Law, p. 487.

3. 77 N.M. 139, 420 P.2d 127 (1966).

4. *Id.* at 140, 420 P.2d at 128.

5. *Id.* at 142, 420 P.2d at 129.

6. *Id.* at 143, 420 P.2d at 129.

7. 20 Wis. 2d 402, 122 N.W.2d 193 (1963).

8. 106 N.H. 551, 215 A.2d 695 (1965).

9. 273 Minn. 419, 142 N.W.2d 66 (1966).

The parent-child immunity rule was not developed at early English common law. The medieval conception of the legal identity of husband and wife prevented litigation between the two,[10] but this theory was never extended to the parent-child relationship. The English courts readily recognized causes of action between parent and child in matters of property, but they were noticeably silent on actions for personal injury.[11]

The parent-child immunity rule was first established in the 1891 Mississippi case of *Hewlett v. George*,[12] where a minor daughter brought suit against her mother for a wrongful confinement in an insane asylum. The court cited no authority, but said:

> The peace of society, and of the families composing society, and a sound public policy, designed to subserve the repose of families and the best interests of society, forbid to the minor child a right to appear in court in the assertion of a claim to civil redress for personal injuries suffered at the hands of the parent.[13]

Early cases following *Hewlett* applied the rule broadly.[14] Later, however, exceptions were etched into the rule. Justice Moise listed them in his dissenting opinion in *Nahas v. Noble:*

> These exceptions include father and son in master-servant relationship, child riding in father's school bus, infant riding with parent who is a common carrier, parent as a member of a partnership, parent's wilful misconduct . . . , peace of the home already disturbed beyond repair, recovery from father's employer though the father (employer's servant) was immune, recovery after emancipation, recovery after majority, recovery against one who stands in place of a parent, recovery by brother against sister, child's administrator recovering from parent, and . . . the reverse—child recovering from representative of the deceased parent, . . . and parent's dealings with infant's property (wills, partnerships, real estate, etc.).[15]

10. W. Prosser, *supra* note 1 at 879. Two thirds of the jurisdictions still adhere to the common law doctrine of interspousal immunity despite the passage of the Married Women's Acts in virtually every state. *Id.* at 883-84.

11. *Id.* at 886.

12. 68 Miss. 703, 9 So. 885, 13 L.R.A. 682 (1891).

13. *Id.* 9 So. at 887, 13 L.R.A. at 684.

14. No recovery allowed for injuries from (1) a brutal beating—McKelvey v. McKelvey, 111 Tenn. 388, 77 S.W. 664 (1903); (2) a rape—Roller v. Roller, 37 Wash. 242, 79 P. 788 (1905).

15. 77 N.M. 139, 144, 420 P.2d 127, 130 (1966).

Dunlap v. Dunlap,[16] a 1930 New Hampshire case, was the first to challenge the rationality of the entire parent-child immunity rule:

> On its face, the rule is a harsh one. It denies protection to the weak upon the ground that in this relation the administration of justice has been committed to the strong and that authority must be maintained.[17]

The challenge was dictum, however, since the court held that the master-servant relationship of the parent and child took the case out of the rule.

Two dissenting opinions have caused courts to take a second look at the rule. Justice Fuld, dissenting in the New York case of *Badigan v. Badigan*,[18] attacked the rule as being "based on dubious prophecy . . . wrong in principle and at odds with justice and modern day realities."[19] In the New Jersey case of *Hastings v. Hastings*,[20] Justice Jacobs called for the extension of liability insurance coverage to the wife and child.[21]

Today, the main reasons given for the parent-child immunity rule are (1) preservation of domestic tranquility and parental control, and (2) avoidance of fraud and collusion.[22]

The Minnesota Supreme Court in *Balts v. Balts*[23] disputed the soundness of both reasons:

> The argument that litigation by a parent against a child promotes discord is difficult to follow. Where a wrong has been committed of a character sufficiently aggravated to justify recovery were the parties strangers, the harm has been done. We believe the prospect of reconciliation is enhanced as much by equitable reparation as by denying relief altogether, particularly where the defendant is insured.[24]

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16. 84 N.H. 352, 150 A. 905, 71 A.L.R. 1055 (1930).
17. *Id.* 150 A. at 909, 71 A.L.R. at 1063.
18. 9 N.Y.2d 472, 174 N.E.2d 718 (1961).
19. *Id.* 174 N.E.2d at 720.
20. 33 N.J. 247, 163 A.2d 147 (1960).
21. *Id.* 163 A.2d at 151.
22. Other reasons advanced by early decisions were (1) danger of fraud in the prosecution of stale claims; (2) possibility of succession by the parent; (3) depletion of the "family exchequer"; and (4) analogy to the situation of husband and wife. These reasons were dismissed by *Dunlap v. Dunlap*, 84 N.H. 352, 150 A. 905, 909, 71 A.L.R. 1055, 1063 (1930), as being "too unsubstantial to be considered as more than mere make-weights."
23. 273 Minn. 419, 142 N.W.2d 66 (1966).
24. *Id.* 142 N.W.2d at 73.

The court said further that:

> [In] the experience of states where interspousal immunity has been abolished . . . [n]othing has come to our attention which indicates that these jurisdictions are deluged with collusive actions or that such litigation is ridden with fraud. . . . We conclude, therefore, that the judicial system is adequate to accommodate itself to threats of collusion and that the injustice of continued immunity outweighs the danger of fraud.[25]

The effect of liability insurance on the parent-child immunity doctrine has been discussed by many courts. Until *Goller v. White*,[26] almost all courts had held that the existence of liability insurance was absolutely irrelevant in a tort action since the insurer is responsible only as an indemnitor of the liability of the insured.[27] The *Goller* court said, however:

> [W]e consider the wide prevalence of liability insurance in personal injury actions a proper element to be considered in making the policy decision of whether to abrogate parental immunity in negligence actions. This is because in a great majority of such actions, where such immunity has been abolished, the existence of insurance tends to negate any possible disruption of family harmony and discipline.[28]

Justice Moise, in his dissenting opinion in *Nahas v. Noble*,[29] noted the trend away from the parent-child immunity rule. He accepted the *Balts*[30] reasoning[31] and noted that the many exceptions to the rule showed that the courts have been "eroding it gradually rather than . . . meeting it squarely and rejecting it."[32] Justice Moise also found reasonable *Goller's*[33] consideration of the prevalance of in-

25. *Id.*
26. 20 Wis. 2d 402, 122 N.W.2d 193 (1963).
27. Rambo v. Rambo, 195 Ark. 832, 114 S.W.2d 468 (1938); Villaret v. Villaret, 83 App. D.C. 311, 169 F.2d 677 (1948); Lasecki v. Kabara, 235 Wis. 645, 294 N.W. 33, 130 A.L.R. 883 (1940); Hastings v. Hastings, 33 N.J. 247, 163 A.2d 147 (1960). At least two courts have grounded recovery on the existence of insurance: Worrell v. Worrell, 174 Va. 11, 4 S.E.2d 343 (1939); Lusk v. Lusk, 113 W. Va. 17, 166 S.E. 538 (1932). See also Dunlap v. Dunlap, 84 N.H. 352, 150 A. 905, 71 A.L.R. 1055 (1930).
28. Goller v. White, 20 Wis. 2d 402, 122 N.W.2d 193, 197 (1963).
29. 77 N.M. 139, 420 P.2d 127 (1966).
30. Balts v. Balts, 273 Minn. 419, 142 N.W.2d 66 (1966).
31. See text accompanying notes 26 and 27 *supra*.
32. Nahas v. Noble, 77 N.M. 139, 144, 420 P.2d 127, 130 (1966).
33. Goller v. White, 20 Wis. 2d 402, 122 N.W.2d 193 (1963).

surance coverage in making the policy decision to reject the rule.[34]

Justice Moise's view is preferable to the majority's because of the steady expansion of insurance coverage. A disruption of domestic harmony would not result from a parent-child tort action where, as in the great majority of cases, the insurance company is the true defendant. On the contrary, it is difficult to think of a more disrupting factor to family harmony than the lack of insurance coverage for an inter-family tort. This could result in a continual drain on the family income.

When a father takes out a liability insurance policy, it would be absurd to say that he meant it to compensate everyone in the world except his own children. Is this not the result under the parent-child immunity rule, however?

Of course, persons not covered by insurance would also be affected by an abrogation of the parent-child immunity rule. But, is it unreasonable to say that the natural love and affection between members of a family would prevent tort actions except for serious wrongs? Moreover, serious wrongs are already considered exceptions to the rule by most courts.

The *Nahas* majority's decision that only the legislature should overturn the doctrine is highly questionable since it was laid down as a rule of law by a court decision in the first place.

Dictum in the recent case of *Fitzgerald v. Valdez*[35] indicates that the New Mexico Supreme Court has reaffirmed its acceptance of the parent-child immunity doctrine. It also illustrates another inequitable result that arises from the doctrine—the denial of contribution rightly due a third-party from a family member who is jointly responsible for the injury. In *Fitzgerald,* a father was fatally injured while standing between his son's car and his own attaching a tow chain. The defendant struck the rear of the son's car, crushing the father between the two cars. The father's executor brought a wrongful death action against the defendant. The family immunity issue arose in a third-party action brought by the defendant against the son for contribution. The New Mexico Supreme Court reiterated its position on the subject:

34. See text accompanying note 30 *supra.*

35. 77 N.M. 769, 427 P.2d 655 (1967). The court held that the parent-child immunity rule did not apply in this case, because the twenty-one year old son had become emancipated upon reaching majority even though he was supported entirely by his parents. Justice Noble dissented, disagreeing that the rule stripping a child of his immunity upon his twenty-first birthday should be absolute.

> The right of contribution is denied if the plaintiff, because of a marital, filial or other family relationship between the injured person and the person against whom contribution is sought, did not have an enforceable right against the latter.[36]

The above rule is an offspring of the joint tortfeasor doctrine which says that one tortfeasor cannot obtain contribution from another tortfeasor if the latter has no obligation to the injured party.[37] The rule was first accepted by the New Mexico Supreme Court in *Rodgers v. Galindo*.[38] Pennsylvania,[39] however, along with several other jurisdictions[40] has refused to extend the family immunity doctrine to deny third-party tortfeasors contribution. The Pennsylvania court reasons that the application of the parent-child immunity to the joint tortfeasor situation "would be an injustice, since neither of the reasons for the [immunity] apply to such situations."[41]

The *Nahas* court had notice of the *Rodgers* decision. It was aware that the parent-child immunity doctrine would bar recovery by persons other than the family members. It escapes reason, therefore, how the court could base its acceptance of the immunity on the ground that it protects family harmony.

The parent-child immunity doctrine has outlived its era. Today, the insurance company is usually the true defendant (and advocate of the doctrine). Thus, in the great majority of cases there would be no disruption in domestic harmony. The danger of fraud and collusion is the same as in actions between husband and wife (allowed in many states), near relatives, and close friends. The court system, however, "with its attorneys and juries, is experienced and reasonably well fitted to ferret out the chicanary which might exist in such

36. Fitzgerald v. Valdez, 77 N.M. 769, 775, 427 P.2d 655, 659 (1967).

37. W. Prosser, *supra* note 1, § 47 at 277.

38. 68 N.M. 215, 360 P.2d 400 (1961).

39. Restifo v. McDonald, 426 Pa. 5, 230 A.2d 199 (1967); Puller v. Puller, 380 Pa. 219, 110 A.2d 175 (1955); Pasquinelli v. Reed, 174 Pa. Super. 566, 102 A.2d 219 (1954); Fisher v. Diehl, 156 Pa. Super. 476, 40 A.2d 912 (1945).

40. LaChance v. Service Trucking Co., 215 F. Supp. 162 (D. Md. 1963); Bedell v. Reagan, 159 Me. 292, 192 A.2d 24 (1963); Pelowski v. Frederickson, 263 Minn. 371, 116 N.W.2d 701 (1962); Pennsylvania Greyhound Lines v. Rosenthal, 14 N.J. 372, 102 A.2d 587 (1954) (injured person and second tortfeasor married after judgment had been paid by first tortfeasor); Smith v. Southern Farm Bureau Cas. Ins. Co., 247 La. 695, 174 So. 2d 122 (1965); Zarrella v. Miller, 217 A.2d 673 (R.I. 1966).

41. Fisher v. Diehl, 156 Pa. Super. 476, 40 A.2d 912, 918 (1945).

cases."[42] The courts have never refused cases on the sole ground of a possibility of collusion.

The only sound reason for the parent-child immunity doctrine today is the preservation of parental discipline. If an action by a child were allowed for every act of discipline or control by the parent, the parent might lose control over the child, and the child might come to disrespect the disciplining parent. The Wisconsin Supreme Court, however, minimized this danger by retaining the immunity for cases involving acts of parental authority and parental discretion with respect to food and care.[43]

It is respectfully suggested that the New Mexico Supreme Court reassess its position on the parent-child immunity doctrine and especially reconsider its application to the third-party tortfeasor situation.

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42. Briere v. Briere, 107 N.H. 432, 224 A.2d 588, 590 (1966).
43. Goller v. White, 20 Wis. 2d 402, 122 N.W.2d 193, 198 (1963).