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Torts--Negligence--Doctrine of Intrafamily Immunity Abolished in New York (Goldman v. Gelbman, N.Y. 1969)

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TORTS — NEGLIGENCE — DOCTRINE OF INTRAFAMILY IMMUNITY ABOLISHED IN NEW YORK. — *Gelbman v. Gelbman*, 23 N.Y.2d 434, 245 N.E.2d 192, 297 N.Y.S.2d 529 (1969).

Appellant brought a tort action against her unemancipated son to recover damages for personal injuries sustained in an automobile accident allegedly caused by his negligence. The affirmative defense of intrafamily immunity was routinely raised in the lower courts and upheld. The New York Court of Appeals, in reversing, unanimously *held* that the defense of intrafamily immunity for nonwillful torts was henceforth abolished.

The doctrine of intrafamily tort immunity abruptly assumed its place in American jurisprudence at the close of the nineteenth century. In *Hewellette v. George*,[1] decided in 1891, the court denied a cause of action to a young girl who had been maliciously confined in an insane asylum by her mother. Citing no authority for its decision, the *Hewellette* court established the rule that an unemancipated child could not maintain a tort action against a parent.[2] The court's rationale was focused upon several compelling public policy considerations — the most important of which were the upheaval of domestic tranquillity and interference with parental control.[3]

Adhering primarily to the principles established in *Hewellette*, two subsequent cases authoritatively sustained and firmly established intrafamily immunity in situations which exemplified the initial harshness of the rule. *McKelvey v. McKelvey*[4] involved cruel and inhuman

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1 68 Miss. 703, 9 So. 885 (1891).

2 Authorities are in conflict as to the existence of such a cause of action in tort at early common law (though there is some dictum to support the position), since no early English cases dealt directly with the subject. *See* McCurdy, *Torts Between Persons in Domestic Relation*, 43 HARV. L. REV. 1030, 1059-63 (1930). Several courts have contended that the lack of cases connotes the existence of the immunity rule at common law. *See, e.g.*, Matarese v. Matarese, 47 R.I. 131, 131 A. 198 (1925); Roller v. Roller, 37 Wash. 242, 79 P. 788 (1905); McKelvey v. McKelvey, 111 Tenn. 388, 77 S.W. 664 (1903). Others have expressed the opinion that this paucity of case-law suggests that there was never a common law rule that a child could not sue his parents. *See, e.g.*, Hastings v. Hastings, 33 N.J. 247, 163 A.2d 147 (1960) (dissenting opinion); Borst v. Borst, 41 Wash. 2d 642, 251 P.2d 149 (1952); Dunlap v. Dunlap, 84 N.H. 352, 150 A. 905 (1930); Wick v. Wick, 192 Wis. 260, 212 N.W. 787 (1927) (dissenting opinion).

3 Hewellette v. George, 68 Miss. 703, 711, 9 So. 885, 887 (1891).

Traditional justifications for the immunity are: (1) the protection of domestic tranquillity; (2) the protection of parental rights and obligations; (3) the similarity to suits between spouses, which were prohibited at common law; (4) the analogy of parents to the historically immune sovereign; (5) the possible succession to the judgment award by the parent; (6) the danger of denying other family members their share of the family resources; and (7) the danger of fraud in suits between parent and child. *See* Comment, 1938 WIS. L. REV. 176, 177-78; McCurdy, *supra* note 2, at 1072-77.

4 111 Tenn. 388, 77 S.W. 664 (1903).

treatment of a child, while *Roller v. Roller*[5] reiterated the application of the rule to a willful tort. Both cases asserted the preeminence of family serenity and parental discipline over the common law ideal that for every wrong there should be a remedy. With these early cases as precedent, the doctrine of parent-child tort immunity proliferated and became widely accepted.[6]

In New York, the inquiry into the immunity doctrine was initiated in *Ciani v. Ciani*,[7] a lower court decision in which a child was injured in an automobile accident caused by his father's negligence. In denying recovery, the court emphasized the *sine qua non* of family unity, and the traditional prohibition (according to the court) of such an action at common law. Two years later, the New York Court of Appeals, in *Sorrentino v. Sorrentino*,[8] formally adopted the principle of intrafamily immunity, thus prohibiting child-parent suits for non-willful torts.[9] However, dissents by Chief Judge Cardozo and Judges Andrews and Crane indicated that early apprehensions surrounded the profundity of the doctrine.[10]

Since *Sorrentino*, the absurdity of blind adherence to the immunity principle and the apparent injustice of the doctrine itself have contributed to its gradual erosion in New York and other states.[11] The intrinsic rationale for parental immunity — that a parent should not be liable for torts ascribed to parental responsibilities — soon gave rise to exceptions emanating from actions not associated with such responsibilities, or which indicated that the parent had temporarily abandoned his parental role.[12] For instance, in *Cannon v. Cannon*,[13] an action was brought by an unemancipated minor against his father and the estate of his deceased mother to recover damages for personal injuries suffered in an accident caused by the mother's negligent operation of the father's automobile. The unanimous New York Court of Appeals decision, while stressing the integral role of the family in Amer-

5 37 Wash. 242, 79 P. 788 (1905).

6 *See, e.g.*, Hebel v. Hebel, 435 P.2d 8, 10 (Alas. 1967). *See* Annot., 19 A.L.R.2d 423, 439-42 (1951).

7 127 Misc. 304, 215 N.Y.S. 767 (Sup. Ct. Albany County 1926).

8 248 N.Y. 626, 162 N.E. 551 (1928).

9 Although *Sorrentino* stated that a minor child could not sue a parent, the converse was never declared to be the law of the state. However, there is dictum to that effect in Lo Galbo v. Lo Galbo, 138 Misc. 485, 487, 246 N.Y.S. 565, 567 (Sup. Ct. Oneida County 1930). *See also* Boehm v. C.M. Gridley & Sons, 187 Misc. 113, 114, 63 N.Y.S.2d 587, 588 (Sup. Ct. Albany County 1946).

10 Comment, 1938 WIS. L. REV. 176, 178 & n.20.

11 McCurdy, *supra* note 2, at 1069-71. *See generally* Akers & Drummond, *Tort Actions Between Members of the Family*, 26 Mo. L. REV. 152 (1961).

12 Comment, 1938 WIS. L. REV. 176, 178-81.

13 287 N.Y. 425, 40 N.E.2d 236 (1942).

ican society, noted that recognition of the action would expose parents to a deluge of suits. Significantly, however, the Court stated that "[i]n the absence of statutory sanction, we are not prepared, in cases *where wilful misconduct by the parent is not a factor,* to inject the disruptive risk of tort liability between parents and their unemancipated children . . . ."[14] Analysis of this statement reveals the Court's advocacy of an exception to the general immunity principle: parental liability for willful or malicious torts inflicted upon a child. Subsequent New York cases have sustained this concept of parental liability on the basis that one who acts in this manner is not behaving as a reasonable parent, and thus is not immune.[15]

Another prominent exception to the ordinary rule pertained to an emancipated minor's right to maintain a cause of action. In New York, it was established that an emancipated child could both sue[16] and be sued by his parents[17] for tortious acts. The courts have viewed the advent of emancipation as a spontaneous decimation of family unity — the core of the immunity doctrine. Further exceptions to the doctrine developed from situations in which the parent was engaged in his business or occupation at the time of the negligent act. In the landmark case, *Dunlap v. Dunlap,*[18] an injury to the plaintiff child resulted from negligence for which the defendant, his father, was liable. Since the relationship was actually one of employer-employee, rather than that of father-son, the court granted recovery.[19]

The last major exception to develop concerned a somewhat more complicated situation — that in which a child sued a third party who was liable for the negligence of, but entitled to indemnification by,

[14] *Id.* at 429, 40 N.E.2d at 238 (dictum) (emphasis added).

[15] Harbin v. Harbin, 218 N.Y.S.2d 308 (Sup. Ct. Kings County), *aff'd,* 16 App. Div. 2d 696, 227 N.Y.S.2d 1023 (2d Dep't 1961); Siembab v. Siembab, 284 App. Div. 652, 134 N.Y.S.2d 437 (4th Dep't 1954); Henderson v. Henderson, 11 Misc. 2d 449, 169 N.Y.S.2d 106 (Sup. Ct. Kings County 1957).

[16] Crosby v. Crosby, 230 App. Div. 651, 246 N.Y.S. 384 (3d Dep't 1930) (question of fact presented as to whether child was emancipated); Murphy v. Murphy, 206 Misc. 228, 133 N.Y.S.2d 796 (Sup. Ct. Madison County 1954) (reported as Broome County in N.Y.S.2d).

[17] Lo Galbo v. Lo Galbo, 138 Misc. 485, 246 N.Y.S. 565 (Sup. Ct. Oneida County 1930). Curiously, New York, as early as 1892, recognized the right of a child to sue his parents in conjunction with a contract or property action. Ulrich v. Ulrich, 136 N.Y. 120, 32 N.E. 606 (1892) (son's suit against mother's estate for services rendered). *See also* Lamb v. Lamb, 146 N.Y. 317, 41 N.E. 26 (1895); Becker v. Rieck, 19 Misc. 2d 104, 188 N.Y.S.2d 724 (Sup. Ct. Onondaga County 1959). In giving effect to this exception, policy considerations denying tort liability have been traditionally disregarded as domestic tranquillity has not been considered controlling. *See supra* note 3.

[18] 84 N.H. 352, 150 A. 905 (1930).

[19] This exception has found wide acceptance in other jurisdictions. *See, e.g.,* Signs v. Signs, 156 Ohio St. 566, 103 N.E.2d 743 (1952); Borst v. Borst, 41 Wash. 2d 642, 251 P.2d 149 (1952); Worrell v. Worrell, 174 Va. 11, 4 S.E.2d 343 (1939); Lusk v. Lusk, 113 W. Va. 17, 166 S.E. 538 (1932).

the parent. Such an indirect action was permitted in *Kemp v. Rockland Leasing, Inc.*,[20] wherein an unemancipated infant was awarded damages for injuries sustained while a passenger in the defendant's car which had been operated by the plaintiff's mother in a negligent manner. Defendant's liability was based upon the New York Vehicle and Traffic Law,[21] which in no way prohibits the securing of indemnification from a negligent driver.

With the foregoing exceptions firmly entrenched, the New York Court of Appeals once again encountered the question of intrafamily immunity in *Badigian v. Badigian*,[22] a negligence action brought by the plaintiff's mother, on behalf of the child, against the defendant father. The father had left the family car unlocked in a parking lot and the child, releasing the brake, was subsequently injured while jumping from the rolling vehicle. The Court, in sustaining immunity, stated that only legislative action could reverse the rule and allow suits of this particular nature.[23] Of far greater consequence was the foreboding dissent of Judge Fuld. Vehemently denouncing the reasons set forth for allowing immunity,[24] he emphasized that there was no vindication for protecting conceded wrongdoing. Stressing that "the broad and numerous qualifications and exceptions to the family immunity doctrine have almost swallowed the rule",[25] the dissent pragmatically noted the presence of insurance as the compelling factor for acquiescence to the suit.

The rigid conceptualism of *Badigian* generated pervasive judicial hostility. With an expanding animosity towards the immunity rule predicated upon the wide prevalence of liability insurance,[26] courts slowly abandoned the only true vestige of the doctrine.[27]

Against this background, plaintiff in the instant case[28] brought a tort action against the defendant, her unemancipated son, to recover

20 51 Misc. 2d 1073, 274 N.Y.S.2d 952 (Sup. Ct. Queens County 1966). *See also* Winnick v. Kupperman Constr. Co., 29 App. Div. 2d 261, 287 N.Y.S.2d 329 (2d Dep't 1968).

21 N.Y. VEH. & TRAF. LAW § 388 (McKinney 1960):

> Every owner of a vehicle used or operated in this state shall be liable and responsible for death or injuries to person or property resulting from negligence in the use or operation of such vehicle, in the business of such owner or otherwise, by any person using or operating the same with the permission, express or implied, of such owner.

22 9 N.Y.2d 472, 174 N.E.2d 718, 215 N.Y.S.2d 35 (1961).

23 *Id.* at 474, 174 N.E.2d at 719, 215 N.Y.S.2d at 37.

24 9 N.Y.2d 472, 475-76, 174 N.E.2d 718, 720-21, 215 N.Y.S.2d 35, 38-39 (dissenting opinion).

25 *Id.* at 478, 174 N.E.2d at 722, 215 N.Y.S.2d at 40.

26 *See* Hebel v. Hebel, 435 P.2d 8 (Alas. 1967); Hastings v. Hastings, 33 N.J. 247, 163 A.2d 147 (1960) (dissenting opinion).

27 *See* Balts v. Balts, 273 Minn. 419, 142 N.W.2d 66 (1966); Briere v. Briere, 107 N.H. 432, 224 A.2d 588 (1966); Goller v. White, 20 Wis. 2d 402, 122 N.W.2d 193 (1963).

28 Gelbman v. Gelbman, 23 N.Y.2d 434, 245 N.E.2d 192, 297 N.Y.S.2d 529 (1969).

for personal injuries sustained in an automobile accident allegedly caused by his negligence. The trial court and the appellate division unanimously sustained the affirmative defense of intrafamily immunity raised by the son's insurance company.[29] In the Court of Appeals, however, the doctrine floundered. Writing for a unanimous Court, Judge Burke lucidly expounded a number of cogent reasons for abrogating the immunity rule. He assailed the *Badigian* decision for categorically stating that any modification of the immunity principle would have to be implemented by the legislature. Moreover, due to the inactivity of the legislature since *Badigian,* the Court felt compelled to revoke what was, after all, a court-created rule.

Also paramount in the Court's rationale was the multitude of exceptions which had been carved out of the immunity doctrine. Relying primarily upon Judge Fuld's vigorous dissent in *Badigian,* the Court expressed the opinion that the incongruous exceptions "neither permit reconciliation with the family immunity doctrine, nor provide a meaningful pattern of departure from the rule. Rather, they attest the primitive nature of the rule and require its repudiation."[30] Furthermore, the gradual abandonment of the immunity principle by other jurisdictions persuaded the Court to specifically overrule *Sorrentino, Cannon* and *Badigian,* since the original policy considerations underlying the doctrine, although viable, were no longer pertinent to the effectuation of family harmony. Those considerations, predicated upon a continuum of family unity, could not be promoted by a mere categorical refusal to allow such suits. On the contrary, family unity could only be preserved by allowing the action *in this case.*[31]

Perhaps the most influential motive for the Court's decision was the existence of compulsory automobile insurance in New York. Since most contemporary intrafamily cases are "impregnated with liability insurance,"[32] the Court calculated that the raison d'être for immunity — continued family harmony — while relevant,[33] would be promoted rather than inhibited by such actions.

Gelbman presents a most interesting question for consideration: has the New York Court of Appeals categorically abolished the doctrine of intrafamily immunity, or has it merely created a further ex-

29 52 Misc. 2d 412, 275 N.Y.S.2d 712 (Sup. Ct. Westchester County 1966), *aff'd,* 28 App. Div. 2d 826, 282 N.Y.S.2d 670 (2d Dep't 1967) (no opinion).

30 23 N.Y.2d at 438, 245 N.E.2d at 193, 297 N.Y.S.2d at 531.

31 *Id.*

32 Brennecke v. Kilpatrick, 336 S.W.2d 68, 76 (Mo. 1960) (negligence action by unemancipated minor allowed against deceased mother's estate) (dissenting opinion).

33 23 N.Y.2d at 438, 245 N.E.2d at 194, 297 N.Y.S.2d at 532.

ception to the rule by rendering the doctrine inapplicable where automobile liability insurance is involved? If, as it appears on the face of the opinion, total abrogation is the intention of the Court, the *Gelbman* decision is not only without precedent in this jurisdiction, but is at variance with the public policy of virtually every other American jurisdiction as well.[34]

While there have been attacks upon the doctrine in several states, the arguments advanced in each have been quite similar. Invariably, the vehicle utilized for the assault upon the intrafamily immunity doctrine has been the automobile accident.[35] A salient contention of each opponent of the doctrine has been the nullifying effect of liability insurance upon the domestic tranquillity theory of the immunity doctrine. It has been contended, and rightfully so, that where an insurer is the true defendant in a child-parent suit, the allowance of the suit is not inconsistent with the maintenance of familial concord.[36] Relying upon these accident cases, a few states have purported to abolish the doctrine, while at the same time setting forth exceptions to any such abrogation. In *Goller v. White*,[37] for example, a Wisconsin court abolished immunity with the following qualifications: the doctrine would still constitute a bar (1) where the alleged negligent act involved an exercise of parental authority over the child, or (2) where the alleged negligent act involved an exercise of parental discretion with respect to the provision of food, clothing, housing and other care.[38] This holding clearly indicates that while there may be a trend towards further limitation of the immunity doctrine where liability insurance is available to prevent family discord,[39] there is no unqualified willingness to

[34] Though there have been attacks on the doctrine in a few states, *see supra* notes 26 & 27, New Hampshire is the only jurisdiction which thus far has not recognized exceptions in its treatment. Briere v. Briere, 107 N.H. 432, 224 A.2d 588 (1966.) However, since *Briere* also was an automobile accident case in which liability insurance was involved, its substantive ruling, like *Gelbman's*, would appear to warrant confirmation or, as seems more likely, limitation.

[35] *See, e.g.*, Silesky v. Kelman, 161 N.W.2d 631 (Minn. 1968) and cases *supra*, notes 29 & 30.

[36] Goller v. White, 20 Wis. 2d 402, 122 N.W.2d 193, 197 (1963) *citing* 1 HARPER & JAMES, LAW OF TORTS § 8.11, at 649 (1956); McCurdy, *Torts Between Parent and Child*, 5 VILL. L. REV. 521, 546 (1960); Note, *Parent-Child Tort Liability and Compulsory Insurance*, 33 ST. JOHN'S L. REV. 310, 311 (1959).

[37] 20 Wis. 2d 402, 122 N.W.2d 193 (1963); *accord*, Silesky v. Kelman, 161 N.W.2d 631 (Minn. 1968).

[38] 20 Wis. 2d 402, 122 N.W.2d 193, 198. The limitation of the Wisconsin pronouncement in *Goller* is clearly expressed in Lemmen v. Servais, 39 Wis. 2d 75, 158 N.W.2d 341 (1968), where a parent was *not* held liable for an injury to his child, which was allegedly the result of the parent's failure to teach the child how to cross the street. Such a failure, the court concluded, arose from the still-privileged exercise of parental discretion.

[39] *Compare* Purcell v. Frazer, 7 Ariz. App. 5, 435 P.2d 736 (1967), where the court refused to abolish the immunity doctrine, specifically noting a lack of compulsory liability insurance.

allow causes of action to unemancipated minor children for injuries arising out of functions purely parental in nature.

The New York immunity doctrine has faced the same challenge in a number of accident cases.[40] In *Badigian*, wherein the doctrine was reaffirmed, Judge Fuld's vigorous dissent foreshadowed the position later taken by the Wisconsin court in *Goller*; though he called for the demise of the immunity doctrine, he excluded from his proposed abrogation those causes of action which might arise in the course of daily family living.[41] In relying upon the insurance argument, Judge Fuld contended that "the doctrine of family immunity . . . at least when applied to deny redress in *automobile negligence cases*, is wrong in principle and at odds with justice and modern-day realities."[42] The *Gelbman* opinion, allegedly based upon the Fuld dissent,[43] neglected to mention Judge Fuld's express exclusions, and instead purported to unconditionally abolish "the defense of intrafamily tort immunity for nonwillful torts . . . ."[44] In so doing, the Court utilized the very theory upon which the immunity doctrine rests — the protection of family unity. After quoting a single law review article out of context,[45] the Court concluded that *in this particular case* family unity required the maintenance of the suit (for disciplinary purposes), and as a prerequisite to such suit the Court felt compelled to overturn the immunity doctrine.

This reasoning on the part of the Court leaves in doubt the perplexing question raised above. Does *Gelbman* represent total abrogation of the immunity doctrine, or merely another exception? Since the manifest intent of the *Gelbman* court was the continued protection of family unity, and since it rested its case for abrogation upon the existence of liability insurance, it seems proper to assume that in the future, when there arises a non-automobile case in which insur-

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40 Badigian v. Badigian, 9 N.Y.2d 472, 174 N.E.2d 718, 215 N.Y.S.2d 35 (1961); Cannon v. Cannon, 287 N.Y. 425, 40 N.E.2d 236 (1942); Sorrentino v. Sorrentino, 248 N.Y. 626, 162 N.E. 551 (1928).

41 9 N.Y.2d 472, 480-81, 174 N.E.2d 718, 723-24, 215 N.Y.S.2d 35, 42 (1961) (dissenting opinion).

42 *Id.* at 474-75, 174 N.E.2d at 720, 215 N.Y.S.2d at 37 (dissenting opinion) (emphasis added).

43 In basing his opinion on Judge Fuld's dissent in *Badigian*, Judge Burke said, "Rather than repeat the convincing arguments advanced by Judge Fuld . . . I would merely summarize the many points advanced therein for the abolition of the immunity rule." 23 N.Y.2d at 437-38, 245 N.E.2d at 193, 297 N.Y.S.2d at 531.

44 23 N.Y.2d at 439, 245 N.E.2d at 194, 297 N.Y.S.2d at 532.

45 The commentator in Note, *Parent-Child Tort Liability and Compulsory Insurance*, 33 ST. JOHN'S L. REV. 310, 319 (1959), suggests that if a suit by a parent against a child is viewed as a disciplinary action it would then be a "proper disturbance of family harmony." The Court interpreted this as requiring such suits to preserve family harmony.

ance is not involved, and which therefore presents a danger to domestic tranquillity, the Court will be compelled, at the very least, to limit *Gelbman* to its facts, as an Alaskan court did under similar facts and circumstances in *Hebel v. Hebel.*[46]

A suggestion has been made which might further alleviate the apparent inequities of the doctrine, yet, at the same time, protect the family unit from unnecessary litigation. Since a minor child's injuries, if limited to the period of minority, cause him no pecuniary loss,[47] the only real inequity exists when the injury extends into the child's majority. Chief Judge Desmond, in the *Badigian* majority opinion, suggested that "[p]erhaps some other special provision should be made for cases where disability extends beyond infancy . . . ."[48] Such a provision apparently exists: the *Gelbman* court recognized that Section 208 of the New York Civil Practice Law and Rules [hereinafter CPLR] "would seem to protect the right of the child to maintain the action upon reaching majority."[49] Since the doctrine of intrafamily immunity is a court-initiated doctrine,[50] it may be utilized by the Court to effect the desired ends of justice. The Court may, if it wishes, view CPLR section 208 as allowing a child to sue its parents for injuries caused during minority where the disability extends into majority. Such a course would remedy any serious injuries to a child, and at the same time, protect the family unit from suits of dubious merit.

The extent to which the intrafamily immunity doctrine may still function will be determined only by future litigation. In any event, the Court must now be willing to either affirm its *Gelbman* position in all manner of cases, or else choose a more limiting conclusion within the clearly desirable remnants of the family immunity doctrine, as espoused by the *Goller* court.

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46 435 P.2d 8 (Alas. 1967). Since the factor of insurance could not be made a part of a plaintiff's prima facie case, in order for *Gelbman* to operate effectively as precedent, any limitation of *Gelbman* would have to be expressed simply as excepting suits by (or against) minors which arise from automobile accidents.

47 McCurdy, *Torts Between Persons in Domestic Relation,* 43 HARV. L. REV. 1030, 1078 (1930).

48 9 N.Y.2d at 474, 174 N.E.2d at 719, 215 N.Y.S.2d at 37.

49 23 N.Y.2d at 438, 245 N.E.2d at 193, 297 N.Y.S.2d at 531. No supporting authority was cited. The New York Civil Practice Law and Rules § 208 (McKinney 1963) reads, in part:

> If a person entitled to commence an action is, at the time the cause of action accrues, under the age of twenty-one years . . . and the time otherwise limited for commencing the action is three years or more and expires no later than three years after the disability ceases . . . the time within which the action must be commenced shall be extended to three years after the disability ceases . . . ; if the time otherwise limited is less than three years, the time shall be extended by the period of disability.

50 23 N.Y.2d 434, 437, 245 N.E.2d 192, 193, 297 N.Y.S.2d 529, 530.