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Parent and Child--Parent's Liability for Legal Services Furnished the Child--Right of Client to Discharge Attorney (Griston v. Stousland, 186 Misc. 201 (Sup. Ct. 1946))

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must be remembered that the degree of care required by an infant of tender years is not to be confused with that required by an adult, but is to be measured by the maturity and capacity of the individual.[5] The conduct of a child of tender years is judged by the standard of behavior one would expect from a child of like age, intelligence, and experience.[6]

But if the care required of a child is to be measured by such considerations as its maturity, capacity, discretion, and knowledge, there must, of course, be an age at which no care can be required of a child, an age at which the doctrine of contributory negligence can have no application. In *Jacobs v. Koehler Sporting Goods Co.*,[7] the court held that an infant may be of such tender years as to be incapable of personal negligence and at such age the infant is termed *non sui juris*. In the case of very young children, one or two years old, the question seldom arises, but as we progress above those ages, there are so many conflicting decisions as to make futile any attempt to set the age of which it can be said that the conclusive presumption of incapacity ceases.

D. L.

PARENT AND CHILD—PARENT'S LIABILITY FOR LEGAL SERVICES FURNISHED THE CHILD—RIGHT OF CLIENT TO DISCHARGE ATTORNEY.—Defendant's seventeen year old daughter was indicted on criminal charges. Defendant retained an attorney to defend his daughter. There was some evidence to indicate that the attorney hired by the defendant did not take all necessary precautions for the protection of his client. The daughter, prior to the termination of the criminal proceedings against her, discharged the attorney secured by the defendant and retained counsel of her own choice. This second attorney is the plaintiff in this action. The plaintiff predicates his action for the recovery of the value of his professional services upon an implied promise on the part of the defendant to pay for necessaries furnished to his infant daughter. At the close of a jury trial the Municipal Court dismissed the plaintiff's complaint on its merits, holding that as a matter of law the defendant had fur-

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Marfyak v. New England Transportation Co., 120 Conn. 46, 179 Atl. 9 (1935) (age, experience and judgment); Lesage v. Largey Lumber Co., 99 Mont. 372, 43 P. (2d) 896 (1935) (experience, intelligence and capability); Davis v. Bailey, 162 Okla. 86, 19 P. (2d) 147 (1933) (intelligence, experience, discretion, previous training, maturity, alertness, and nature of danger encountered); Camardo v. New York State Ry., 247 N. Y. 111, 159 N. E. 879 (1928) (age and capacity); *see* PROSSER ON TORTS (1941) § 36, HARPER, THE LAW OF TORTS (1933) § 141.

[5] Finkelstein v. N. Y. C. and H. R. R. R., 41 Hun 34, 40 (1886).

[6] RESTATEMENT, TORTS § 283.

[7] 208 N. Y. 416, 102 N. E. 519 (1913).

nished suitable legal aid to his daughter. *Held,* decision reversed and new trial ordered. It was error to decide as a matter of law that the defendant had furnished suitable legal services for his daughter. This was an issue of fact which should have been submitted to the jury. *Griston v. Stousland,* 186 Misc. 201, 60 N. Y. S. (2d) 118 (Sup. Ct. 1946).

The Appellate Term, in reviewing basic principles involving the parent and child relationship, determined that legal services furnished to an infant at her own request in connection with a criminal prosecution were in the nature of necessaries, for which the parent, under proper conditions, could be held liable.

The liability of a father to furnish necessaries for his minor child depends on principles analogous to a husband's duty to supply his wife with necessaries.[1] Legal services under the circumstances of this case were compared, as to the matter of necessity, with medical services supplied to the child, in times of ill health.[2] However, to hold the parent liable for such services, it is insufficient to show that the services supplied were in fact necessaries. In addition, it must be shown that the parent neglected to provide the infant with the proper, necessary services.[3] Therein lies a point of difficulty in this case. As a general rule the court respects the right of the parent to supervise the upbringing of his children. While the parent's right in this regard is not absolute, the courts will not intervene until it is shown that the parent's actions were cruel and arbitrary to the extent of impairing the health or well-being of his offspring.[4] Therefore, as the court points out, a parent may not be held liable for necessaries furnished by a third party at the request of the child where the parent has in fact provided the child with such necessaries and the child, through mere whim or caprice, refuses to make use thereof.[5] It is proper then to consider whether the plaintiff's legal services were rendered under such conditions as to make the defendant parent in this action legally responsible for them.

It is the unquestionable right of the defendant in a civil or criminal action to discharge her attorney.[6] However, where the defendant is a minor and the parent has provided an attorney for her defense, the exercise by the minor of her absolute right to discharge that attorney does not in and of itself make the parent responsible for legal services rendered to the child by an attorney of her own choice. Consequently, in order to render the father liable it must be shown that he neglected to supply his daughter with suitable legal counsel. To a great extent the competency of the attorney retained

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[1] Cromwell v. Benjamin, 41 Barb. 558 (N. Y. 1863).
[2] Elder v. Rosenwasser, 238 N. Y. 427, 144 N. E. 669 (1924).
[3] Loucks v. Dutcher, 112 N. Y. Supp. 269 (County Ct. 1908).
[4] Tirrell v. Tirrell, 232 N. Y. 224, 133 N. E. 569 (1921).
[5] Loucks v. Dutcher, 112 N. Y. Supp. 269 (County Ct. 1908).
[6] Robinson v. Rogers, 237 N. Y. 467, 143 N. E. 647 (1924).

by the parent for the defense of his child would determine whether or not the parent had furnished adequate legal counsel.

In reviewing the proceedings of this action in the lower court it seemed apparent to the learned justices of the Appellate Term that there might have been a justification for the child's action in dismissing the attorney selected by her father, and that the circumstances surrounding that dismissal should have been permitted to be fully inquired into at the trial. The court pointed out that it was error to determine as a matter of law that the defendant had provided competent legal services for his seventeen year old daughter. Generally, where the question arises as to whether the parent neglected to furnish suitable necessaries for his infant children it is for the jury to arrive at the answer from the facts.[7]

C. J. B. JR.

REAL PROPERTY—DAMAGE BY FIRE—SPECIFIC PERFORMANCE WITH ABATEMENT—VENDOR AND PURCHASER RISK ACT.—The plaintiff, the assignee of the purchaser, brought suit in equity for specific performance of a contract for the sale of realty with an abatement for the partial destruction of the improvements caused by fire which occurred between the date of signing of the contract and the law day. The vendor had refused to convey on these terms on the closing date, but instead, tendered the deed and demanded the full purchase price. Upon rejection by the vendee, the vendor made a second offer, namely, to return the down payment and pay the cost of the title search. The vendee rejected this proposal and reiterated his demand for the deed with an abatement for loss. The vendor had collected the insurance which amply covered the loss. At the trial, the defendant asserted the rights of the parties were determined by the Uniform Vendor and Purchaser Risk Act[1] and insisted that his second offer was made in compliance with the statute. The plaintiff contended that the statute was precluded from having effect by the following provisions of the contract of sale: "In the event for any reason the Seller *is unable to cause to be conveyed*

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[7] Stevens v. Hush, 107 Misc. 353, 176 N. Y. Supp. 602 (Sup. Ct. 1919).

[1] N. Y. REAL PROPERTY LAW § 240-a. "Uniform vendor and purchaser risk act. 1. Any contract hereafter made for the purchase and sale or exchange of realty shall be interpreted, *unless the contract expressly provides otherwise,* as including an agreement that the parties shall have the following rights and duties:

(a) When neither the legal title nor the possession of the subject matter of the contract has been transferred to the purchaser: (1) *if all or a material part thereof is destroyed without fault of the purchaser . . . , the vendor cannot enforce the contract,* and the purchaser is entitled to recover any portion of the price that he has paid; . . ." (Italics supplied.)