1980

George O. Bishop, Jr. v. Charles Hollis Nielsen : Brief of Defendant and Third-Party Plaintiff-Respondent

Utah Supreme Court

R. Scott Williams; Strong & Hanni; Attorneys fo Plaintiff-Appellant and Third-Party Defendant-Appellant;
Thomas A. Duffin; Attorneys for Defendant-Respondent;

IN THE SUPREME COURT

OF THE STATE OF UTAH

GEORGE O. BISHOP, JR., Plaintiff-Appellant, vs. CHARLES HOLLIS NIELSEN, Defendant and Third-Party Plaintiff Respondent, vs. GENICE GAY BISHOP, Third-Party Defendant Appellant.	Case No. 17082

BRIEF OF DEFENDANT AND THIRD-PARTY PLAINTIFF, RESPONDENT

Appeal from the Verdict of the Third Judicial District Court
of Salt Lake County, State of Utah,
Honorable G. Hal Taylor, Presiding

THOMAS A. DUFFIN
Attorney at Law
Ten Broadway Building, Suite 510
Salt Lake City, Utah 84101

Attorney for Defendant and Third-Party
Plaintiff-Respondent

R. SCOTT WILLIAMS
STRONG & HANNI
Sixth Floor Boston Building
Salt Lake City, Utah 84111

Attorneys for Plaintiff-Appellant
and Third-Party Defendant-Appellant

IN THE SUPREME COURT

OF THE STATE OF UTAH

GEORGE O. BISHOP, JR., Plaintiff-Appellant, vs. CHARLES HOLLIS NIELSEN, Defendant and Third-Party Plaintiff Respondent, vs. GENICE GAY BISHOP, Third-Party Defendant Appellant.	Case No. 17082

BRIEF OF DEFENDANT AND THIRD-PARTY PLAINTIFF, RESPONDENT

Appeal from the Verdict of the Third Judicial District Court
of Salt Lake County, State of Utah,
Honorable G. Hal Taylor, Presiding

THOMAS A. DUFFIN
Attorney at Law
Ten Broadway Building, Suite 510
Salt Lake City, Utah 84101

Attorney for Defendant and Third-Party
Plaintiff-Respondent

R. SCOTT WILLIAMS
STRONG & HANNI
Sixth Floor Boston Building
Salt Lake City, Utah 84111

Attorneys for Plaintiff-Appellant
and Third-Party Defendant-Appellant

TABLE OF CONTENTS

Page No.

STATEMENT OF THE NATURE OF THE CASE 1

DISPOSITION IN THE LOWER COURT 2

RELIEF SOUGHT ON APPEAL 2

STATEMENT OF FACTS 2

ARGUMENT 3

POINT I. THE DEFENDANT, CHARLES HOLLIS NIELSEN, CAN RECOVER JUDGMENT FOR CONTRIBUTION FROM THE THIRD-PARTY DEFENDANT, GENICE GAY BISHOP, UNDER THE UTAH CONTRIBUTION STATUTE, UTAH CODE ANNOTATED, §78-27-39, (repl. 1977). 3

POINT II. UTAH SHOULD FOLLOW THE INTERPRETATION OF THE CONTRIBUTION STATUTE AS INTERPRETED BY THE HIGHEST COURTS OF THAT STATE BECAUSE UTAH BORROWED ITS COMPARATIVE NEGLIGENCE STATUTE FROM WISCONSIN. 16

POINT III. THE TRIAL COURT DID NOT ERROR IN GRANTING A JUDGMENT FOR CONTRIBUTION AGAINST THE THIRD-PARTY DEFENDANT BECAUSE THE THIRD-PARTY DEFENDANT IS A JOINT TORT-FEASOR 19

CONCLUSION 19

CASES CITED

Hebel v. Hebel, (1967, Alaska) 435 P.2d 8 8

Streenz v. Streenz, (1970, Arizona) 106 Ariz 86, 471 P.2d 282, 41 ALR 3d 891 8

Gibson v. Gibson, (1970 Ca.) 3 Cal. 3d 914, 92 Cal Rptr. 288, 479 P.2d 648 8

Peterson v. Honolulu, (1969, Hawaii) 51 Hawaii 484, 462 P.2d 1007 8

Page No.

Silesky v. Kelman, (1968, Minn.) 281 Minn. 431, 161 NW 2d 631 8

Briere v. Briere, (1966, NH) 107 NH 432, 224 A2d 588 8

France v. A.P.A. Transport Corp., (1970 NJ) 56 NJ 500, 267 A2d 490 8

Gelbman v. Gelbman, (1969 NY) 23 NY 2d 434, 297 NYS 2d 529, 245 NE 2d 192 8

Nuelle v. Wells, (1967, ND) 154 NW 2d 364 8

Xaphes v. Mossey, (1963, DC Vt.) 224 F Supp. 578, infra, applying Vermont law 8

Goller v. White, (1963 Wis.) 20 Wis. 2d 402, 122 NW 2d 193 8

Rigdon v. Rigdon, (1970), Ky. 564 SW2d 921 9

Plumley v. Klein, (1972), Michigan, 199 NW 2d 169 9

Smith v. Kauffman, (1971) Virginia, 212 Va 181, 183 SE2d 190 9

Falco v. Pados, (1971) Pa. 444 Pa.372, 282 A2d 351 9

Lee v. Comer, (1976) W. Va. 224 SE2d 271 9

Perchell v. District of Columbia, (1971) D.C., 444 F2 997 9

Schenk v. Schenk, (1968) I11. 241 NE2d 12 9

David Rupert v. Andre Jean Steinne (1974) Nev. 528 P.2d 1013 9

Wood v. Wood, (1977) Vt. 370 A2d 191 9

Lemmen v. Servais, (1968), 39 Wis. 2d 75, 158 NW2d 341 ... 12

Petty Walker v. Tully B. Milton, (1974 La.) 268 So. Rptr. 2d, 654, ... 12

Rebalcava v. Gisseman, 384 P.2d 389 (1963 Ut.) 12

Bushnell v. Sillitoe, 550 P.2d 1284 (1976) Utah 16

Page No.

Donahue v. Warner Bros. Pictures Distributing Corp., (1954) 2 Utah 2d 256, 272 P.2d 177 17

Utah Power & Light v. Public Service Commission, 152 P.2d 542, (1944) 18

STATUTES CITED

U.C.A. 78-27-49(3), 1953, as amended 3

U.C.A. 78-27-39 (Repl. 1977) 3

TEXT CITED

19 ALR 2d 425, p.3 5

60 ALR 2d p. 1286, ... 5

41 ALR 3d, 1972 5

59 Am. Jur. 2d, "Parent and Child" §151, p. 252 9

Prosser, "Law of Torts", 4th Edition (1971) §122 12

73 Am. Jur. 2d, Statutes, §167, p. 370 17

IN THE SUPREME COURT

OF THE STATE OF UTAH

GEORGE O. BISHOP, JR., Plaintiff-Appellant, vs. CHARLES HOLLIS NIELSEN, Defendant and Third-Party Plaintiff Respondent, vs. GENICE GAY BISHOP, Third-party Defendant Appellant.	Case No. 17082

BRIEF OF DEFENDANT AND THIRD-PARTY PLAINTIFF, RESPONDENT

STATEMENT OF THE NATURE OF THE CASE

This is an action filed by plaintiff, George O. Bishop, Jr., against defendant, Charles Hollis Nielsen, for property damage incurred to plaintiff's vehicle in an automobile accident. Defendant filed a third-party complaint against the driver of plaintiff's vehicle, Genice Gay Bishop, for damage incurred by defendant's vehicle and for contribution upon plaintiff's cause of action against defendant.

DISPOSITION IN THE LOWER COURT

The Respondent agrees with the disposition recital of facts as set forth in Appellants' Brief.

RELIEF SOUGHT ON APPEAL

Defendant, and Third-Party Plaintiff, Respondent, Charles Hollis Nielsen, seeks to have a judgment rendered for 30% contribution against Genice Gay Bishop affirmed.

STATEMENT OF FACTS

The Respondent agrees with the Statement of Facts as set forth by the Appellant with the additional information which the court should have.

The Third-party Plaintiff, Respondent, Charles Hollis Nielsen, does not deny that the Third-party Defendant was born on June 30, 1960, and that she was 17 years of age at the time of the accident, and she lived with her parents. It was also stipulated in court that Genice Gay Bishop was not the owner of the car and was not the agent of her father at the time of the accident.

The actual truth of the matter is that neither Charles Hollis Nielsen, Genice Gay Bishop or George O. Bishop, Jr. really have any interest in the matter. Northwestern National Insurance Co. of Salt Lake City is the insurance carrier for George O. Bishop Jr. and Genice Gay Bishop, and Bear River Mutual Insurance Co. is the insurance carrier for Charles Hollis Nielsen. This matter is being brought pursuant to the insurance policies which provide

for subrogation. And under the subrogation receipt and insuring agreements the actions and complaints are brought nominally in the names of the plaintiff and the defendant. So the suit here does not bog itself down on an inter-family immunity problem, but it is an inter-family insurance company or carrier problem. That is liability as to who is going to pay for the damages arising out of the accident or the contribution and comparative negligence of each of the parties as hereinafter stated is the question and it is sheer hypocrisy to indicate any inter-family immunity or inter-family conflict is involved here because all we have are the various parties testifying in relationship to inter-family insurance companies and the law of liability and contribution in respect to each of them.

ARGUMENT

POINT I

THE DEFENDANT, CHARLES HOLLIS NIELSEN, CAN RECOVER JUDGMENT FOR CONTRIBUTION FROM THE THIRD-PARTY DEFENDANT, GENICE GAY BISHOP, UNDER THE UTAH CONTRIBUTION STATUTE, UTAH CODE ANNOTATED, §78-27-39, (Repl. 1977).

Under Utah law the right to contribution only exists against one who is "jointly or severally liable in tort for the same injury." U.C.A. §78-27-40(3), 1953, as amended.

The Utah contribution amont joint tort feasors act provides: "The right of contribution shall exist among joint tort feasors . . ." U.C.A. §78-27-39 (Repl. 1977) A joint tort feasor is defined as:

> One of two or more persons, jointly or severally liable in tort for the same injury to person or property, whether or not judgment has been recovered against all or some of them. U.C.A. §78-24-70(3) (Repl. 1977)

Therefore, under the statute, even though a person may be negligent in reference to a particular accident or a particular injury, he cannot be liable for contribution for that accident and for damages unless he has an enforceable action against him for the injury itself.

The jury in the above-entitled case found that Genice Gay Bishop was 30% negligent and Charles Hollis Nielsen was 70% negligent in causing the damages to the automobile of George O. Bishop Jr. This Third-party Plaintiff, Respondent states that the trial court was correct in assessing negligence on a comparative basis because they were both joint tort feasors and both were responsible for the damages to the automobile owned by Genice Gay Bishop's father, George O. Bishop, Jr.

The real question is, as we will hereafter explain, whether George O. Bishop Jr. can recover and require the insurance carrier of Genice Gay Bishop to repair his car 100% when his daughter was 30% negligent in the cause of the accident. The question is whether George O. Bishop's insurance carrier, fronting through George O. Bishop Jr. can require Bear River Mutual Insurance Co. to pay 100% of its claim on the repair of George O. Bishop Jr.'s car so that his daughter can go out and drive it through another light or stop sign. George O. Bishop, Jr. and

Genice Gay Bishop, his daughter, say that we cannot recover contribution from his daughter because of "the inter-family immunity doctrine".

There are many ALR citations on this commencing in 1951, as set forth in 19 ALR 2d 425, at page 3; 60 ALR 2d page 1286, in 1958; and 41 ALR 3d in 1972. If the above entitled court will note and take observance, the said Bishops in this case used the authorities in 19 ALR 2d and 60 ALR 2d, but failed to use the 41 ALR 3d in 1972. What was true in 1951 and 1958 at the time those annotations were written has been drastically changed and the law has undergone a complete revision in the 25 years.

The background and the summary of the inter-family immunity doctrine is discussed extensively by the annotator in 41 ALR 3d at page 909 as follows:

> "The law with respect to the liability of parents for the negligent injuries of their children has been, and continues to be, in a highly unsatisfactory state, as evidenced by the great variety of identifiably distinguishable holdings, the differences in emphasis in decisions ostensibly following similar rules, the shifting of positions either in specific terms or by changes in interpretation of governing cases, the proliferation of exceptions and limitations to varyingly defined general rules, and the apparently completely irreconcilable basic premises invoked as the fundamental rationale.
>
> A reading of the cases suggests that a cause for the present and apparently growing confusion on this subject is, at least to some degree, a basic conflict in the social outlook of various courts, with some feeling that parental tort immunity was necessary to the very existence of an ordered society, in which the family might be considered a form of government,

and others feeling a need to bring a measure of orderliness and symmetry to the applicable legal concepts, all of which basic conflicting outlooks were exacerbated by continuing criticism by legal theoreticians, by changing concepts with respect to the family, and by changing economic realities, particularly the advent of the automobile and the prevelence of liability insurance.

The origins of the parental immunity doctrine provide an initial source of weakness. It appears that prior to the year 1891, only three cases dealing with the tort liability of parents and persons in loco parentis had appeared, in all of which more or less support was given to the idea of liability, at least as applied to cases of gross neglect, unreasonable punishment, and acts injurious to the life or health of the child or constituting a public offense. It appears that the modern doctrine of parental immunity for negligently caused injuries grew out of holdings in three early cases which involved wilful tort, without precedent in common law. The courts employed language in favor of immunity which was seized upon and followed by many cases thereafter notwithstanding the fact that the courts cited no authority for their proposition. The courts said, in effect, that the peace of society and of families, as well as a sound public policy designed to subserve the repose of families and the best interestsof society, barred the minor child from asserting a claim to civil redress for personal injuries suffered at the hands of the parent. It appears that from these cases developed the thesis, accepted in a majority of the states, holding a parent immune from suit by a child for injuries negligently inflicted. Thereafter, the courts with surprising unanimity, followed the immunity doctrine, initially finding little difficulty in applying the doctrine to negligence cases in view of their position where wilful tort was involved.

The first strong, well-reasoned, and extensively quoted attack on the immunity doctrine in a case involving parental negligence in the operation of a motor vehicle came in 1923 in the dissenting opinion of Chief Justice Clark in Small v. Morrison (1923) 185 NC 577, 118 SE 12, 31 ALR 1135. * * *

While the existence of liability insurance would appear to be a major element causing the general erosion of the parental tort immunity doctrine, the courts which have recognized various exceptions to the rule have generally stated that insurance coverage could not create liability where none existed otherwise, but that such coverage was a factor to be considered in the weight to be given the reasons advanced in favor of the doctrine, while other courts appear to have refused to give the matter of insurance coverage any consideration.

An increasing number of courts have abandoned the position of general support of the immunity rule, with application limited in specific factual situations, and have adopted the opposite general legal proposition, namely, that there is no general immunity from tort liability enjoyed by a parent with respect to negligent injury to a child, with some courts expressing no limitation to such general nonimmunity rule, with other courts recognizing the need for parently immunity under certain circumstances to be determined on a case-by-case basis, and with still other courts enunciating a general limitation to the nonimmunity rule whereby suits would be barred where the case involved parental authority over the child or exercise of ordinary parental discretion with respect to the care of the child. While in general the abrogation of the immunity doctrine has been grounded on the consideration of general legal principles, there is at least some authority to the effect that unemancipated minor children have a right to sue their parents for negligently inflicted injuries by virtue of constitutional and statutory provisions declaring that everyone is responsible to another for injuries caused by want of ordinary care of skill. * * *

In summary, it is clear that with an apparent trend in the direction of permitting tort actions by minor children against their parents, the courts are abandoning the position of an early case that such suits would be unseemly and not in keeping with the eternal fitness of things.

The following states in dealing with the liability of a parent for negligent injury to an unemancipated child, have specifically abrogated the parental tort immunity doctrine, or in recognition of such abrogation, have taken the position that as a general rule, a parent may be liabile to his child for injuries caused by the parent's negligence, at least in the absence of special circumstances excepting the parent from such liability or limiting the scope thereof.

Alaska--Hebel v. Hebel, (1967, Alaska) 435 P2d 8.

Arizona--Streenz v. Streenz, (1970) 106 Ariz 86, 471 P2d 282, 41 ALR 3d 891.

Cal--Gibson v. Gibson, (1970) 3 Cal 3d 914, 92 Cal Rptr 288, 479 P2d 648.

Hawaii--Peterson v. Honolulu, (1969) 51 Hawaii 484, 462 P2d 1007.

Minn--Silesky v. Kelman, (1968) 281 Minn 431, 161 NW2d 631.

NH--Briere v. Briere, (1966) 107 NH 432, 224 A2d 588.

NJ--France v. A.P.A. Transport Corp., (1970) 56 NJ 500, 267 A2d 490.

NY--Gelbman v. Gelbman, (1969) 23 NY2d 434, 297 NYS 2d 529, 245 NE2d 192.

ND--Nuelle v. Wells, (1967, ND) 154 NW2d 364.

Vt--Xaphes v. Mossey, (1963, DC Vt) 224 F Supp 578, infra, applying Vermont law.

Wis--Goller v. White, (1963) 20 Wis 2d 402, 122 NW2d 193.

In 59 Am. Jur. 2d, "Parent and Child", §151, Tort Actions, page 252, the volume was written in 1971 and the cumulative supplement of 1978 in addition to the ALR citations show at least ten more states have abolished the "PARENTAL IMMUNITY RULE", they are as follows:

Ky—Rigdon v. Rigdon, 465 SW2d 921.

Mich—Plumley v. Klein, 199 NW2d 169.

Va—Smith v. Kauffman, 212 Va. 181, 183 SE2d 190.

Pa—Falco v. Pados, 444 Pa. 372, 282 A2d 351.

W. Va—Lee v. Comer, 224 SE2d 721

D.C.—Perchell v. District of Columbia, 444 F2 997

Ill—Schenk v. Schenk, 241 NE2d 1

Nev—(1974), David Rupert v. Andre Jean Steinne, 528 P.2d 1013.

Vt.—Wood v. Wood, (1977) 370 A2d 191

NC—After its court upheld it, abolished it by statute.

To show the general rationale of the cases which certainly appear to be more convincing than any of the non basic rationale of the previous cases, is the case of Sharen Streenz v. James T. Streenz, 471 P.2d 282 (Ariz. 1970), Sharon Streenz, a minor, brought an action against per parents for damages arising out of an automobile accident.

The Supreme Court of Arizona said:

"Although most state courts have adopted the parental immunity doctrine, there have been notable exceptions . . . We find that the rationale of these cases and legal authorities, arguing in favor of partial abrogation of the parental immunity doctrine, are more consistent with contemporary conditions and concepts of fairness.

"Even in jurisdictions where parental immunity has been openly embraced, courts have evinced hostility for the doctrine by creating numerous exceptions to its applications. Thus, in most states, an unemancipated child may sue his parents under contract or property theory."

The Supreme Court of Arizona then went on to say:

"(1) We feel that two principal factors undermine Judge Malloy's 'domestic tranquility' rationale expressed in Purcell v. Frazer, supra, and compel an overruling of that case. One factor, as expressed above, is that the common law has long permitted child to sue parent in property or contract. It is not unsafe to say that some of the most bitter family disputes arise over property, and yet parental immunity does not limit causes of action in this area. Is it reasonable to say that our law should protect the property and contract rights of a minor more zealously than the rights of his person?

Secondly, we cannot ignore the almost universal existence of liability insurance, particularly in the automobile accident realm. Where such insurance exists, the domestic tranquility argument is hollow, for in reality the sought after litigation is not between child and parent's insurance carrier.

Mis quote!!

The court then went on to say:

"(2) While we are persuaded that parental immunity from tort action by an unemancipated child should be retained for limited purposes such as those set down by the Wisconsin court.

(1) Where the alleged negligent act involves an exercise of parental authority over the child; and

(2) where the alleged negligent act involves an exercise of ordinary parental discretion with respect to the provision of food, clothing, housing, medical and dental services, and other care, 122 N.W.2d at 198.

we find it unnecessary at this time to delineate the scope in which the parental immunity rule will be applied. Our holding, permitting Sharon Streenz to sue her parents in tort, is limited to the factual

situation before us. We specifically hold that an unemancipated minor child has a right of action against her parents for injuries incurred in an accident allegedly caused by her mother's negligent driving."

In the case of Gelbman v. Gelbman, 23 N.Y. 2d 434, 297 N.Y.S. 2d 529, 245 N.E.2d 192, 194 (1969) the Supreme Court of New York again abrogating the inter-family immunity doctrine in reference to automobile accidents said:

"The argument fails to explain how the possibility of fraud would be magically removed merely by the child's attainment of legal majority. Nor does the argument pretend to present the first instance in which there is the possiblity of a collusive and fraudulent suit. There are analogous situations in which we rely upon the ability of the jury to distinguish between valid and fraudulent claims. The effectiveness of the jury system will pertain in the present situation. The definite and vital interest of society in protecting people from losses resulting from accidents should remain paramount."

In Goller vs. White, 122 NW 2d, 198 (1963), the Supreme Court of Wisconsin placed the first wedge in the whole doctrine of the inter-family immunity and abrogated a whole line of previous Wisconsins decisions stating that parental immunity ought to be abrogated except in two situations:

"Nevertheless, we 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.

"(2,3) After a careful review of the arguments for and against the parental-immunity rule in negligence cases, we are of the opinion that it ought to be abrogated except in these two situations: (1) where the alleged negligent act involves an exercise of parental authority over the child; and (2) where the alleged negligent act involves an exercise of ordinary parental discretion with respect to the provision of food, clothing, housing, medical and dental services, and other care."

The Supreme Court of Wisconsin in the case of Lemmen v. Servais, 39 Wis 2d 75, 158 NW2d 341 (1968) states:

"The immunity granted by these two exceptions is accorded the parent, not because he is a parent, but because as a parent he pursues a course within the family constellation which society exacts of him and which is beneficial to the state. The parental non-liability is not granted as a reward, but as a means of enabling the parents to discharge the duties which society exacts."

In the very interesting case of Petty Walker v. Tully B. Milton, 268 So. Rptr. 2d, 654, (1974 La), it held:

"Statute prohibiting suit by unemancipated minor against either parent during their marriage did not destroy substantive causes of action arising between parent and child but rather operated only as procedural bar to an action, and thus contribution was allowable in favor of joint tort-feasor against parent whose negligence contributed to her child's injuries;"

Counsel for Mr. Bishop sets forth on page 6 of his Brief the case of Rubalcava v. Gisseman, 384 P2d 389 (Utah 1963). That case turned on two basis: (1) the guest statute, and (2) interspousal immunity. The fact that Utah has adopted interspousal immunity as herein set forth does not apply to the inter-family immunity family relationships. As Prosser in his work, "Law of Torts", 4th Edition, §122, (1971), states:

> "Any tort action between husband and wife encountered at the outset the common law doctrine of the legal identity of the two. It has been said, whether humorously or not, that at common law husband and wife were one person, and that person was the husband --which is not strictly accurate, since the criminal law, at least, regarded them as separate individuals, and the wife could be named as a party to a civil action, even though her husband must be joined with her, if he were alive when suit was brought. But as to her personal and property rights, the very legal existence of the wife was regarded as suspended for the duration of the marriage, and merged into that of the husband, so that she lost the capacity to contract for herself, or to sue or be sued without joining the husband."

But Prosser says in §122, commencing at page 864:

> The common law had no similar conception of unity of legal identity in the case of a parent and his minor child. Although the parent was given custody of the child, the latter remained a separate legal person, entitled to the benefits of his own property and to the enforcement of his own choses in action, including those in tort, and was liable in turn as an individual for his own torts. Consequently there were no such theoretical difficulties, no emancipation acts similar to the Married Women's Acts were necessary and statutory construction has not entered into the question of tort liability between parent and child.
>
> In matters affecting property, causes of action seems always to have been freely recognized, on the part of either the parent or the child. Although there were no old decisions, the speculation on the matter has been that there is no good reason to think that the English law would not permit actions for personal torts as well, subject always to the parent's privilege to enforce reasonable discipline against the child; and there are decisions in Canada and Scotland holding that such an action will lie. But beginning in 1891 with Hewlett v. George a Mississippi case of false imprisonment which cited no authorities, the American courts adopted a general rule refusing to allow actions between parent and minor child for personal torts, whether they are intentional or negligent in character. For reasons that are not altogether clear, however, and perhaps are to be

explained only on the basis of an initial retreat from the general rule, the action nearly always has been permitted against one who is not a parent but merely stands in the place of one, such as a step-father or another relative who has custody of the child.

The courts which deny the action have relied heavily on the analogy of husband and wife, which seems quite inapplicable because of the difference in the common law concept of the relations, and the absence of statutes to be construed.

Prosser then continues on under §122 at page 867:

As in the case of husband and wife, some courts have allowed recovery when the relation has been terminated by the death of either parent or child, and the action is brought under a wrongful death or a survival act. Even this has been extended to permit an action between parent or loss of services of another child, on the ground that these are derivative actions, turning primarily upon the possibility of suit by another. Finally, there are half a dozen courts which have allowed recovery where the child is injured in the course of a business, rather than a personal activity of the parent, making an artificial separation of vocational from personal capacity, which suggests a dislike of the immunity more than anything else.

Finally, in 1963, Wisconsin took the lead in declaring that the parent-child immunity was abrogated entirely in that jurisdiction, except as to exercises of parental control and authority, or parental discretion with respect to such matters as food and care. The decision set off something of a long overdue landslide; and at the present writing it has been followed in Alaska, Arizona, California, Hawaii, Illinois, Kentucky, Louisiana, Minnesota, New Hampshire, New Jersey, New York, and North Dakota. The prediction is easy to make that the number of such jurisdictions will henceforth be rapidly on the increase.

The effect which liability insurance has thus far had upon the family immunities is not very easy to evaluate. Where there is such insurance, it becomes still more difficult to maintain most of the stock arguments against allowing recovery. Since the defendant will not have to pay out of his own pocket, it is obvious that the family exchquer will not be

> diminished, and that domestic harmony will not be disrupted so much by allowing the action as by denying it; and since the party really interested in the defense is the liability insurer, any conception of family unity and sanctity can scarcely extend to or protect him. And where insurance is readily available, there is no great need to be tender of defendants who do not have it, since decisions imposing liability may be expected to lead to its purchase . . ."

The rationale of almost all of the cases is basically set forth by the Supreme Court of California, in the matter of James Gibson vs. Robert Gibson, 479 P2d 648:

> "No sooner had American courts including our own, embraced the parental immunity doctrine than they began to fashion a number of qualifications and exceptions to it. . .
>
> The danger to family harmony was the only rationale for immunity mentioned in Trudell. In Self, however, we termed this argument 'illogical and unsound.' Observing that spouses commonly sue each other over property matters, we concluded that 'It would not appear that such assumed conjugal harmony is any more endangered by tort actions than by property actions * * *.' (58 Cal.2d 683, 690, 26 Cal. Rptr. 97, 101, 376 P.2d 65, 67.) Indeed, as we shall discuss, infra, the risk of family discord is much less in negligence actions, where an adverse judgment will normally be satisfied by the defendant family member's insurance carrier, than in property actions, where it will generally be paid out of the defendant's pocket. Since the law has long allowed a child to sue his parent over property matters (King v. Sells (1938) 193 Wash. 294, 75 P.2d 130; Lamb v. Lamb (1895) 146 N.Y. 317, 41 N.E. 26), the rationale of self is equally applicable to parent-child tort suits.
>
> . . . In deciding to abrogate parental immunity, we are also persuaded by several policy factors. One is the obvious but important legal principle that "when there is negligence, the rule is liability, immunity is the exception . . .

Secondly, we feel that we cannot overlook the widespread prevalence of liability insurance and its practical effect on intra-family suits. Although it is obvious that insurance does not create liability where none otherwise exists (Emery v. Emery, supra 45 Cal.2d 421, 431, 289 P.2d 218), it is unrealistic to ignore this factor in making an informed policy decision on whether to abolish parental negligence immunity. (See Goller v. White, supra, 20 Wis, 2d 402, 412, 122 N.W. 2d 193.) We can no longer consider child-parent actions on the outmoded assumption that parents may be required to pay damages to their children . . .

By our decision today we join 10 other states which have already abolished parental tort immunity. We think it is significant that since 1963, when the Wisconsin Supreme Court drove the first wedge (Goller v. White, Supra, 20 Wis.2d 402, 122 NW2d 193), other jurisdictions have steadily hacked away at this legal deadwood."

Then finally, as the Utah Supreme Court, 1976, upholding the contribution statute has set forth in Bushnell v. Sillitoe, 550 P.2d 1284:

> 78-27-39 provides: "The right of contribution shall exist among joint tort-feasors, but a joint tort-feasor shall not be entitled to a money judgment for contribution until he has, by payment, discharged the common liability or more than nis prorata share thereof.
>
> In Augustus v. Bean, 58 Cal.2d 270, 14 Cal. Rptr. 641, 363 P.2d 873 (1961), the court observed that the statutory system for contribution did not concern the relationship of tort-feasors to the one injured, but dealt with the relationship of tort-feasors to each other; when after entry of judgment one of them discharged the common liability.

POINT II

UTAH SHOULD FOLLOW THE INTERPRETATION OF THE CONTRIBUTION STATUTE AS INTERPRETED BY THE HIGHEST COURTS OF THAT STATE BECAUSE UTAH BORROWED ITS COMPARATIVE NEGLIGENCE STATUTE FROM WISCONSIN.

In this case the Utah Legislature on March 8, 1973, passed the Comparative Negligence Statute borrowing it completely from Wisconsin wherein it had been interpreted since 1931.

As stated in 73 Am. Jur. 2d, Statutes, §167, page 370:

> "Although the full faith and credit clause of the Federal Constitution does not so require, where the statute of a sister state is before the court, the construction placed upon the statute by the highest courts of that state should be followed. This is so even though the courts of the forum would place a different construction upon similar language in a statute within their own jurisdiction. Similarly, the construction of a statute of a foreign country should be governed by the decisions of the courts of that country. If the court of the forum is not afforded such aid, it must give to the statute the best construction it is able to give, in the same manner that it should construe an act of its own legislature."

Our Supreme Court in the case of Donahue v. Warner Bros. Pictures Distributing Corp., 272 P.2d 177, stated the general rule that when a statute is taken from another state, the construction on that statute or its interpretation will be followed. Our court stated as follows:

> "(1,2) It is well settled that 'when the legislature of a state has used a statute of another state or country as a guide for the preparation and enactment of a statute, the courts of the adopting state will usually adopt the construction placed on the statute in the jurisdiction of its inception.'"

In reference to that particular case, our Supreme Court then went on to state the general law:

> " . . . our Legislature may be assumed to have been aware of the construction of the statute by the courts of the state of its origin at the time of our enactment . . ."

The Supreme Court in the case of Utah Power & Light v. Public Service Commission, 152 P.2d 542, at page 556 states:

> " . . . The only importance attached to the argument that the Utah Act was copied from the statutes of Idaho rather than from the statutes of California or vice versa is this: When statutes of another state are adopted, it is assumed that the prior construction placed upon such adopted statutes by the courts of the other state is also adopted . . ."

It is also submitted that the following states have now adopted the comparative negligence statute:

Alaska
California
Colorado
Connecticut
Florida
Kansas
Montana
Nevada
New Jersey
New York
North Dakota
Oklahoma
Oregon
Pennsylvania
Rhode Island
Texas
Utah
Vermont
Washington
Wyoming

It is now submitted, that almost uniformly, that every state that has adopted the Comparative Negligence statute has also adopted the contribution and abolished the parental immunity doctrine, which never really was common law and was not adopted by any state until Mississippi in about 1910.

POINT III

THE TRIAL COURT DID NOT ERROR IN GRANTING A JUDGMENT FOR CONTRIBUTION AGAINST THE THIRD-PARTY DEFENDANT BECAUSE THE THIRD-PARTY DEFENDANT IS A JOINT TORT FEASOR.

The trial court did not error in granting the judgment for contribution against the third-party defendant because the third-party defendant is a joint tort-feasor because the basic the basic argument of the third-party defendant is that she cannot be a joint tort-feasor because an action will not lie against her because of the inter-family immunity doctrine. If the inter-family immunity doctrine falls because they are both joint tort-feasors so does the argument of Point III because it is exactly the same argument as set forth in Point I and Point II, because they are both dependent upon each other. This has been completely answered by our Supreme Court in Bushnell v. Sillitoe, Utah (1976) 550 P.2d 1984:

> §78-27-39 provides: "The right of contribution shall exist amont joint tort-feasors, but a joint tort-feasor shall not be entitled to a money judgment for contribution until he has, by payment, discharged the common liability or more than his prorata share thereof.
>
> In Augustus v. Bean, 58 Cal. 2d 270, 14 Cal. Rptr. 641, 363 P.2d 873, (1961), the court observed that the statutory system for contribution did not concern the relationship of tor-feasors to the one injured, but dealt with the relationship of tort-feasors to each other; when after entry of judgment one of them discharged the common liability."

CONCLUSION

There are now approximately 23 states which have abolished the parent-child immunity doctrine, which was an 1891 Mississippi protege on the basis that inter-family relations would be threatened and destroyed and the harmony of the home would be injured contrary

to the policy of law. This was on the theory that after a father has maimed, crippled and beaten his son or his daughter there is a state of peace and harmony left to be disturbed, and if the son or daughter is sufficiently injured or angry to sue the father for it, they will be soothed and deterred from reprisal by denying them a legal remedy even though the child may have left the home. Even though the same courts refuse to find any disruption of family tranquility, if the son or the daughter sues their father or their mother for a tort to their property, or brings a criminal prosecution against them, or the brother or sister sue each other. If this reasoning appeals to anyone, let him by all means adopt it.

Again, are we not faced with the proposition that in general minor children are entitled to the same redress for wrongs done to them as other people. As the Supreme Court said in Petersen v. City and County of Honolulu, 462 P.2d 1007, quoting from Barlow v. Iblings, Iowa, 156 N.W.2d 105 (1968), where is there justice when a six-year old child looses his hand in an electric meat cutter because of the negligence of his father and is prohibited from suing his father because the courts say that to allow the suit would disrupt the harmony and tranquility of the family relationship. "In our view, such results are unconscio

It is the conclusion and the position of the third-party plaintiff that the third-party complaint should be allowed. The Legislature moved boldly in enacting Utah Code Annotated, §78-27-39

(1953), allowing contribution among joint tort-feasors where before there was no such remedy in Utah. Allowing this Complaint is consistent with the intent behind this statute and does not violate the principles of inter-family immunity doctrine either now or as it existed at common law or by the majority of the states that have rejected it.

Dated this _____ day of October, 1980.

Respectfully submitted,

Thomas A. Duffin
Attorney for Defendant
Ten Broadway Building, Suite 510
Salt Lake City, Utah 84101

I hereby certify that I mailed a copy of the foregoing to Philip R. Fishler, Attorney for Plaintiff and Third-party defendant, 604 Boston Building, Salt Lake City, Utah 84111, postage prepaid, this _____ day of October, 1980.

_____