

From the foregoing discussion the decision in the principal case seems wrong. Not only was the offer solicited by the agent of the steel company, but the home office engaged in correspondence with the plaintiff which might have been interpreted to indicate that the only obstacle in the way of final approval was the settlement of the old account. Since the jury had decided that the circumstances warranted an inference of assent, the court should have permitted its verdict to stand.¹⁹

Family Relations—Wrongful Death—Action by Administrator of Estate of Minor Child against Unemancipated Brother—[Wisconsin].—An unemancipated minor, driving his father's automobile, negligently caused the death of his six year old brother. The special administrator of the estate of the deceased minor brought suit under the wrongful death statute¹ against the brother and the father's insurance company, on a liability policy which by statutory requirement² insured to the benefit of anyone driving the automobile with the owner's consent. The death statute making the parents beneficiaries limited recovery to those situations in which the deceased could have recovered had he survived. *Held*, recovery will not be denied because the suit is between members of a family, but since the father is precluded from benefiting because of an express clause in the policy, only the mother's share of the damages will be awarded. *Munsert v. Farmers Mutual Automobile Ins. Co.*³

The once uniformly established rule that no personal injury actions⁴ could be maintained between members of a family is said to be predicated on the desirability of preserving parental authority and domestic tranquillity.⁵ It seems obvious that in

¹⁹ *Cavanaugh v. D. W. Ranlet Co.*, 229 Mass. 366, 118 N.E. 650 (1918).

¹ Wis. Stats., 1937, § 331.03, 331.04.

² Wis. Stats., 1937, § 204.30, 204.33.

³ 281 N.W. 671 (Wis. 1938).

⁴ Generally actions arising under wrongful death statutes involve the same principles since they are based upon the right of the deceased to have maintained an action for personal injuries had he survived: *Emery v. Rochester Telephone Corp.*, 271 N.Y. 306, 3 N.E. (2d) 434 (1936); *Pieczonka v. Pullman Co.*, 89 F. (2d) 353 (C.C.A. 2d 1937); *Lynch v. Lynch*, 195 Atl. 799 (Del. 1937).

⁵ It is generally held that one spouse may not maintain a personal injury action against the other: *Thompson v. Thompson*, 218 U.S. 611 (1910); *Aldrich v. Tracy*, 222 Iowa 84, 269 N.W. 30 (1936); *Anthony v. Anthony*, 135 Me. 54, 188 Atl. 724 (1937); *David v. David*, 161 Md. 532, 157 Atl. 755 (1932) (wife barred from suing partnership of which husband was a member). A parent may not sue his minor child for personal injury: *Duffy v. Duffy*, 117 Pa. Super. 500, 178 Atl. 165 (1935); *Turner v. Carter*, 169 Tenn. 553, 89 S.W. (2d) 751 (1936); *Cafaro v. Cafaro*, 118 N.J.L. 123, 191 Atl. 472 (1937). And a minor child may not sue its parent: *Hewlett v. George*, 68 Miss. 703, 9 So. 885 (1891); *Wick v. Wick*, 192 Wis. 260, 212 N.W. 787 (1927); *Luster v. Luster*, 13 N.E. (2d) 438 (Mass. 1938). For the effect of emancipation and the reaching of majority see: *Farrar v. Farrar*, 41 Ga. App. 120, 152 S.E. 278 (1930); *Goldstein v. Goldstein*, 4 N.J. Misc. 711, 134 Atl. 184 (1926); *McCurdy*, *Torts between Persons in Domestic Relation*, 43 Harv. L. Rev. 1030 (1930); 18 Boston U.L. Rev. 468 (1938); 26 Geo. L.J. 139 (1937); 86 U. of Pa. L. Rev. 909 (1938).

Generally if a person is precluded from direct recovery for personal injury because he and the tortfeasor are members of a family group, he cannot recover from the employer of the tortfeasor: *Maine v. James Maine & Sons Co.*, 198 Iowa 1278, 201 N.W. 20 (1924); *Riser v. Riser*, 240 Mich. 402, 215 N.W. 290 (1927); *Emerson v. Western Seed & Irrigation Co.*, 116 Neb. 180, 216 N.W. 297 (1927).

allowing a suit between members of a family, the court is not causing the friction, but providing an orderly method of solving a difficulty that has already arisen. But in the line of cases represented by *Dunlap v. Dunlap*⁶ a partial recognition of this rationalization resulted in an unfortunate basis for permitting recovery. There the court said that where an insurance company was being sued, no family discord would result, and therefore the court allowed recovery on a liability policy while recognizing that had an insurance company not been involved, an action could not have been maintained. The court clearly did violence to the theory of liability insurance on which underwriters compute their risk.⁷ The administrator in the instant case could not recover under the statute for the benefit of the mother who was the real party in interest unless the deceased could have maintained the action had he survived. Thus, to reach the result that it did, the court had to approve a suit by a mother against her minor son and also one between minor brothers.⁸

A serious objection to the result obtained is that the recovery here is changing the character of the policy from that of liability to the more costly accident type. This argument proceeds upon the assumption that the father is the sole support of a family and to allow recovery on the policy is not absolving him from a new legal liability, but in effect providing him with a windfall by paying the money to a member of his family and therefore indirectly to him. The difficulty with this position is that in the modern family the father is not in fact necessarily the sole support and secondly an injury to the member of his family such as a loss of limb or sight is not the type that the father would, and in most cases could, adequately compensate for. The court should provide for the loss of earning power to the child or other family member by setting up a trust of the insurance sum to take care of the child when the father's support is not forthcoming.⁹ While it is easier to see the desirability of this result in the case of, for example, a loss of a limb of a child, yet in light of the expressed legislative policy in favor of giving the mother compensation for the death of her child, it is hard to see why recovery should be denied her on the ground that the father may get some benefit from the money.

The manner in which the rule has been broken down is an interesting illustration of the judicial process. The rule first lost favor where the injury was wilfully inflicted,¹⁰ and now several jurisdictions allow damages even for negligent injury. Where negli-

⁶ 84 N.H. 352, 150 Atl. 905 (1930). In accord: *Lusk v. Lusk*, 113 W. Va. 17, 166 S.E. 538 (1932); *Ruiz v. Clancy*, 182 La. 935, 162 So. 734 (1935).

⁷ *Mesite v. Kirchenstein*, 109 Conn. 77, 85, 145 Atl. 753, 755 (1929); *Schneider v. Schneider*, 160 Md. 18, 152 Atl. 498 (1930); *Owens v. Auto Mut. Indemnity Co.*, 235 Ala. 9, 177 So. 133 (1937).

⁸ There has been no authority on injury suits between minor brothers but in *Beilke v. Knaack*, 207 Wis. 490, 242 N.W. 176 (1932) a minor was allowed damages in a suit for negligent bodily injury against a brother who was slightly over twenty-one years of age but still living with the family.

⁹ See *Clarke v. Eighth Ave. Ry. Co.*, 238 N.Y. 246, 144 N.E. 516 (1924); *Durkee v. Central Pac. R.R.Co.*, 56 Cal. 388 (1880); *Hamlin v. N.H. Bragg & Son*, 129 Me. 165, 151 Atl. 197 (1930).

¹⁰ *Brown v. Brown*, 88 Conn. 42, 89 Atl. 889 (1914); *Johnson v. Johnson*, 201 Ala. 41, 77 So. 335 (1917); *Crowell v. Crowell*, 180 N.C. 516, 105 S.E. 206 (1920); 27 Ill. L. Rev. 314 (1932).

gence suits by a woman against her husband have been allowed,¹¹ the statutes giving married women the right to sue in their own names have been the basis of recovery, the courts saying that the disability to sue their husbands has been removed by implication. Characteristically, conceptual jurisprudence has provided an inroad and recovery has been allowed against the employers of a negligent person who was a member of the family of the plaintiff although the same courts would have denied recovery against the employee directly.¹² Other manifestations of this approach are not wanting. A suit by the administrator of the estate of a daughter negligently killed by her father was not considered a suit by the mother against her husband, although the administrator brought suit for her benefit,¹³ and a father was allowed to recover from his daughter's husband for her wrongful death, regardless of the fact that the daughter could not have recovered for her injuries had she survived.¹⁴

On principle there appears to be no reason for not allowing members of the family group recourse to the courts for an orderly adjudication of their claims against each other. But it must also be remembered that resort to the courts is infrequent unless an insurance company is involved and precaution should be taken to protect the insurer against collusion and other kinds of fraud as well as against liability for a risk which it has not assumed by the policy.

Injunctions—Possibility of Clarification by Declaratory Judgment—[Federal].—The plaintiff in a suit for unfair competition obtained a final decree restraining the defendant from the use of a trade name and from selling its product in a form similar to the plaintiff's. Thereafter the defendant filed a supplementary petition in the same court requesting a determination as to whether its recently initiated plan for marketing its product would violate the injunction. *Held*, in denying the petition, that such a procedure is contrary to the settled practice in the district and circuit and, moreover, calls upon the court to render an advisory opinion. *Kellogg Co. v. National Biscuit Co.*¹

¹¹ *Wait v. Pierce*, 191 Wis. 202, 209 N.W. 475 (1926); *Rains v. Rains*, 97 Colo. 19, 46 P² (2d) 740 (1935); *Miltimore v. Milford Motor Co.*, 197 Atl. 330 (N.H. 1938).

¹² *Schubert v. August Schubert Wagon Co.*, 249 N.Y. 253, 164 N.E. 42 (1928); *Koontz v. Messer*, 320 Pa. 487, 181 Atl. 792 (1935); *Pittsley v. David*, 11 N.E. (2d) 461 (Mass. 1937).

¹³ *Albrecht v. Potthoff*, 192 Minn. 557, 257 N.W. 377 (1934).

¹⁴ *Kaczorowski v. Kalkosinski*, 321 Pa. 438, 184 Atl. 663 (1936). The court here said that as the derivation of the action was the tortious act itself, it came to the parties, entitled by statute to sue, free from the personal disabilities arising from the relationship between the deceased and the wrongdoer.

¹ 22 F. Supp. 801 (Del. 1938). This case has become moot because the Supreme Court recently decided that the *Kellogg Co.* was not guilty of unfair competition. For the history of the litigation see *National Biscuit Co. v. Kellogg Co.*, 91 F. (2d) 150 (C.C.A. 3d 1937) injunction granted, *cert. denied*, 302 U.S. 733 (1937). On January 5, 1938, the district court issued a permanent injunction pursuant to the order of the circuit court of appeals. The petition in the instant case was presented on January 20, 1938. Subsequently, the defendant, *Kellogg Co.*, petitioned the circuit court of appeals for a recall of its mandate ordering the injunction to be issued "for purposes of clarification." *National Biscuit Co. v. Kellogg Co.*, 96 F. (2d) 873 (C.C.A. 3d 1938). On reconsideration the Supreme Court granted *certiorari*, 58 S. Ct. 1052 (1938), and reversed, *Kellogg Co. v. National Biscuit Co.*, 59 S. Ct. 109 (1938), rehearing denied, 59 S. Ct. 246 (1938). For a case in accord with the Supreme Court decision see *Canadian Shredded Wheat Co. v. Kellogg Co.*, [1938] 2 D.L.R. 145.