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Torts - Parental Immunity Doctrine - Wilful and Negligent Conduct

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judicial interpretation of comment k to section 402A of the *Restatement.* This interpretation clearly exempts retail druggists who properly fill a prescription from the wide ambit of "sellers" sought to be included in the coverage of section 402A. The court in the *McLeod* case expressed the view that druggists as a generic group are not included within the coverage of section 402A, and therefore it was not necessary to decide whether a druggist performs a service, as claimed by the defendants, or is a seller. However, the fact remains that the court excluded a specific group from the scope of section 402A.

Henry Novoselsky

TORTS–PARENTAL IMMUNITY DOCTRINE–WILFUL AND NEGLIGENT CONDUCT

An action was brought by an unemancipated eleven year old minor against his father for injuries sustained when he was struck by an auto driven by his intoxicated father. In the trial court, the judge ruled that an unemancipated minor could not sue his parent in tort, and the action was dismissed.[1] The Court of Appeals of Ohio reversed the trial court and held that the minor could recover, since the defendant, who drove while intoxicated and at high speed, was guilty of wilful and negligent conduct. *Teramano v. Teramano,* 1 Ohio App. 2d 504, 205 N.E.2d 586 (1965).

In reversing the trial court, the court of appeals disregarded the defendant's plea of Parental Immunity, a doctrine first established without precedent in *Hewlett v. George,*[2] which involved a wilful tort. In the *Hewlett* case, the Parental Immunity doctrine was established on the basis of the court's interpretation of public policy.[3] The court refused to put family harmony in jeopardy by allowing a daughter, under her parent's control, the right to recover from her parent. Since 1891, courts dealing with suits between parents and children have had to cope with the *Hewlett* doctrine that a child may not sue his parent in tort. Many courts have applied it strictly, some have excused themselves from its scope due to particular circumstances, and a few have almost entirely abrogated it.

[1] Teramano v. Teramano, 1 Ohio App. 2d 504, 505, 205 N.E.2d 586, 487. In the Common Pleas Court the defendant was granted judgment after a motion for a Directed Verdict at the conclusion of plaintiff's opening statement.

[2] 68 Miss. 703, 9 So. 885 (1891). Action was on behalf of an unemancipated minor against her mother for having, "Willfully, illegally, and maliciously caused her to be imprisoned for ten days in the East Mississippi insane asylum." (*Id.* at 704, 9 So. at 886.)

[3] *Id.* at 711, 9 So. at 886: "But as long as the parent is under obligation to care for [the minor] the best interests of society forbid to the minor child a right to appear in court." It is of particular interest to note that in this case, the parent publically denounced and rejected the child, and thus, no family harmony existed to be preserved.

The decisions dealing with the question of Parental Immunity in tort have divided parent-child suits into three categories; those involving wilful torts, those involving ordinary negligence and those involving injuries occurring while the parent is engaged in a business activity. A separate body of law has evolved around each category and only in some instances have corollaries been drawn between the three categories.

The *Teramano* decision joins the ranks of those cases aimed at converting Parental Immunity from a doctrine to an exception. It represents Ohio's first deviation from the Parental Immunity precedent in the case of a wilful tort and adds impetus to a growing trend away from the precedent. The court placed major reliance upon three cases,[4] each of which was singularly significant in limiting the use of the Parental Immunity doctrine. In *Borst v. Borst*,[5] the reasoning that supported the immunity rule was strongly criticized, and *Signs v. Signs*[6] was cited because it was Ohio's first departure from strict adherence to the Parental Immunity concept. *Cogwill v. Bloock*,[7] in which the factual situation was similar to the *Teramano* case, allowed recovery on the grounds that the "wrongful conduct of the father in driving the automobile while drunk is in no way referable to his duties as a parent. Indeed, in this case there was a clear abandonment of the parental duty."[8]

Parental Immunity began as a simple rule, designed to protect family unity, that soon blossomed into a doctrine burdened with considerations and complications. Courts were continually questioned about the applicability of the rule when the parent's estate[9] or liability insurance was involved.[10] Many courts advanced arguments in support of the doctrine while others sought to negate it.[11]

[4] Signs v. Signs, 156 Ohio St. 566, 103 N.E.2d 743 (1952); Cowgill v. Bloock, 189 Ore. 282, 218 P.2d 445 (1950); Borst v. Borst, 41 Wash. 2d 642, 251 P.2d 149 (1952).

[5] Borst v. Borst, *supra* note 4. Reference to the *Borst* case will show all of the major arguments advanced against the Parental Immunity Doctrine.

[6] Signs v. Signs, *supra* note 4.

[7] Cowgill v. Bloock, *supra* note 4. [8] *Id.* at 293, 218 P.2d at 450.

[9] Brennecke v. Kilpatrick, 336 S.W.2d 68 (Mo. 1960). The doctrine of Parental Immunity was not applied to the parent's estate since there could be no disruption of family unity. *Contra,* Dunlevy v. Butler, 64 D. &C. 535, 62 York 117 (1948). The doctrine was extended to prevent the child from suing the father's estate. The court ruled that only a suit maintainable against the actual parent could be maintained against the estate.

[10] Dunlap v. Dunlap, 84 N.H. 352, 150 A. 905 (1930), wherein recovery was allowed against the parent because of the presence of insurance. *Contra,* Small v. Morrison, 185 N.C. 577, 118 S.E. 12 (1923), wherein recovery was not allowed the child, though the parent was insured.

[11] See McCurdy, *Torts Between Persons in Domestic Relations,* 43 HARV. L. REV. 1030, 1070-77 (1930). Mr. McCurdy discusses at length the following factors considered

In the area of wanton and wilful torts, where the doctrine originated, the trend since 1950 has been to negate the doctrine and allow the minor to recover. The *Cowgill* case was among the first in a series of decisions to allow an unemancipated child to sue his parent for a wilful tort.[12] The decisions that followed raised speculation as to whether any "present-day court would apply the strict immunity doctrine in favor of a parent who was found guilty of intentional, criminal conduct."[13] This prediction would appear to be substantiated by the recent *Teramano* decision and the all encompassing holding in *Goller v. White*.[14]

Deviation from the immunity doctrine has also been noticeable in cases involving injuries to children while their parents are engaged in their courses of employment and business activities. This trend to eliminate Parental Immunity, unlike the trend in wilful torts, did not take sixty years to erupt, yet both trends developed in questioning the reasons behind the original *Hewlett* decision.[15] Of prime importance was the case of *Dunlap v. Dunlap*.[16] This case opened a Pandora's box of suits for injuries occurring while the parent was engaged in a business activity.[17] Although the doctrine was advocated by the defendant, the court ignored the *Hewlett* precedent, stating

> [t]here never has been a common-law rule that a child could not [recover from] its parents. It is a misapprehension of the situation to start with [the idea of Parental Immunity], and to treat the suits which have been allowed as exceptions to a general rule.[18]

The Court did not consider Parental Immunity as a doctrine standing at the core of the law—rather, it was a rule at the fringes of the law prevent-

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by the courts in applying the immunity rule: (1) danger of fraud, (2) possibility of succession (i.e. that the parent will inherit the child's funds should the child die), (3) family exchequer (the depletion of the parent's funds to the child's detriment), (4) denial of causes of action between husband and wife, (5) domestic tranquility, and (6) parental discipline and control.

[12] Cowgill v. Bloock, *supra* note 4. See also, Emery v. Emery, 45 Cal. 2d 421, 289 P.2d 218 (1955); Nudd v. Matsoukas, 7 Ill. 2d 608, 131 N.E.2d 525 (1956); Mahnkov v. Moore, 197 Md. 61, 77 A.2d 923 (1951); Ball v. Ball, 269 P.2d 302 (Wyo. 1954); Wright v. Wright, 85 Ga. App. 721, 70 S.E.2d 152 (1952); Siembab v. Siembab, 284 App. Div. 652, 134 N.Y.S.2d 437 (1954).

[13] See Comment, 10 DE PAUL L. REV. 55, 56 (1960).

[14] 20 Wis. 2d 402, 122 N.W.2d 193 (1963). This decision is the most radical to date in its view of Parental Immunity. The court stated that Parental Immunity should be abrogated in all but two instances. These are discussed, *infra* note 28.

[15] *Supra* note 2. [16] Dunlap v. Dunlap, *supra* note 10.

[17] *Ibid.* The plaintiff was injured under circumstances showing a master's liability for injury to a servant.

[18] *Id.* at 354, 150 Atl. at 906 (1930).

ing particular suits.[19] Certainly the best interests of society were not served by denying liability. Family unit and harmony were not jeopardized because the father was covered by employer's liability insurance, and with the burden of suit shifted to a non-family entity, the Parental Immunity rule was conveniently set aside.[20]

Regarding the holding of the *Dunlap* decision, similar suits were sanctioned by the courts further attacking the logic of the *Hewlett* doctrine.[21] This series of inroads on Parental Immunity culminated with the *Borst* case, wherein the court advanced the theory that the *Hewlett* doctrine was inapplicable and illogical.[22] This trend has not been universally accepted, because not all jurists are ready to remove the cloak of immunity merely because the parent is engaged in a business activity.[23]

The majority of courts have not permitted minors to recover against parents for injuries sustained as a result of the parent's ordinary negligence and have repeatedly allowed Parental Immunity to be used as a successful defense.[24] The public policy argument voiced in the *Hewlett* decision was held not to exist in the *Teramano* case, although both cases involved wanton and wilful torts. Yet, this public policy argument has been said to exist in ordinary negligence cases. One court[25] reaffirmed this position by holding that an unemancipated minor child could not sue her father for a mistake in judgment behind the wheel. The court stated that

> [t]o entertain the present suit, would be to open the doors of the courts to every minor child who has suffered an injury, real or imaginary, at the hands of its parents on account of their neglect, or want of due care, in providing for or looking after its welfare. This, to say the least, would be unseemly if not productive of great mischief.[26]

[19] *Id.* at 358, 150 A. at 908 (1930). The court stated that "the first judicial precedent for the non-liability rule is Hewlett v. George [and] what this case really did was to establish a new rule of exceptional character rather than enforce a rule already established."

[20] *Id.* at 372, 150 A. at 915 (1930). "Such immunity as the parent may have from suit by the minor child for personal tort, arises from a disability to sue [but] the disability is not absolute. It is imposed for the protection of family control and harmony, and exists only where a suit . . . might disturb the family relations . . . It does not apply to . . . a case where liability has been transferred to a third party."

[21] *E.g.*, Lusk v. Lusk, 113 W.Va. 17, 166 S.E. 538 (1932); Signs v. Signs, *supra* note 6.

[22] Burst v. Burst, *supra* note 4 at 648-653, 251 P. 2d at 153-156 (shows how the court reached this conclusion).

[23] *Id.* at 659, 251 P.2d at 157 (1952). Judge Schwellenbach entered a strong dissention because of the possibility of fraud and collusion.

[24] See Villaret v. Villaret, 169 F.2d 677 (D.C. Cir. 1948); Nelson v. Richwagon, 326 Mass. 485, 95 N.E.2d 545 (1950); Durham v. Durham, 85 So.2d 807 (Miss. 1956); Strong v. Strong, 269 P.2d 265 (Nev. 1954); Ownby v. Kleyhammer, 250 S.W.2d 37 (Tenn. 1952). *Contra*, supra note 14.

[25] Small v. Morrison, 185 N.C. 577, 118 S.E.12 (1923).

[26] *Id.* at 579, 118 S.E. at 13 (1923).

In the *Teramano* case, the defendant's actions while intoxicated were not excusable by the Parental Immunity doctrine because they were wanton and wilful acts rather than acts of ordinary negligence.

After ascertaining the nature of the neglect, the question of whether the parent was engaged in an activity related to his parental duties must also be determined. When the parent's conduct is "found to be mere negligence, as opposed to an act of cruelty sufficient to sever the parental relationship . . . the action would necessarily fail."[27] Though Parental Immunity is strongly entrenched in ordinary negligence cases, there are those who would seek to remove it. The court in the *Goller* case advocated that Parental Immunity

> [o]ught 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 discretion with respect to the provision of food, clothing, housing, medical and dental services, and other care.[28]

To date, this position has been the most extreme.[29]

Unquestionably, the *Hewlett* doctrine of Parental Immunity has been diluted, and it is misleading to refer to it as a doctrine. It is foreseeable that most courts will probably concur with Wisconsin's *Goller* decision abrogating Parental Immunity in all but the two above-mentioned instances.[30] What remains to be answered is whether the individual states will follow the argument that only legislation should abrogate Parental Immunity.[31] The Illinois Supreme Court in *Nudd v. Matsoukas*,[32] faced with just this problem, reached the conclusion that Parental Immunity should not be altered by the legislature, stating

> [w]e do not feel that the announcement of this doctrine should be left to the legislature. The doctrine of Parental Immunity, as far as it goes was created by the courts. It is especially for them to interpret and modify that doctrine to correspond with prevalent considerations of public policy and social need.[33]

In the past fifteen years, application of the Parental Immunity doctrine has been curtailed through the efforts of state courts and legislatures. Progress has been made towards diminishing its scope and we can no longer refer to the 1891 *Hewlett* decision as the precedent for Parental Immunity. The aforementioned decisions were instrumental in effecting a change in this precedent which, accented by *Teramano* and other recent

[27] Wright v. Wright, 85 Ga. App. 721, 70 S.E.2d 152 (1952).

[28] *Supra* note 14 at 413, 122 N.W.2d at 198 (1963).

[29] Comment, 8 St. Louis U.L.J. 247 (1963).

[30] *Supra* note 14 at 413, 122 N.W.2d at 198.

[31] See Owens v. Auto Mutual Indemnity Co., 235 Ala. 9, 177 So. 133 (1937).

[32] 7 Ill. 2d 608, 131 N.E.2d 525 (1956).

[33] *Id.* at 619, 131 N.E.2d at 531 (1956).

cases, seems to be a growing and continuing trend. The conclusions of the *Teramano* case were preceded by the Illinois court's decision in the *Nudd* case,[34] which rejected Parental Immunity as to wanton and wilful torts. The court succinctly stated that

> [w]hile this policy might be such justification to prevent suits for mere negligence within the scope of the parental relationship we do not conceive that public policy should prevent a minor from obtaining redress for wilful and wanton misconduct on the part of a parent.[35]

In view of such statements it is inevitable that the doctrine of Parental Immunity will eventually disappear and be replaced by a more appropriate doctrine which imposes Parental Liability in all cases except those involving ordinary negligence.[36]

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[34] *Supra* note 32.

[35] *Supra* note 32 at 619, 131 N.E.2d at 531 (1956).

[36] The apparent trend to allow minors to recover against their parents for injuries sustained through wanton torts or while the parent is engaged in a business activity indicates that "Parental Immunity" is too inclusive a term. "Parental Liability except in ordinary negligence cases" would be a more accurate and descriptive title for this tort area.

TORTS–STRICT LIABILITY–PRIVITY AS A DEFENSE FOR A NON-NEGLIGENT MANUFACTURER

On February 11, 1957, Messrs. Suvada and Konecnik purchased a reconditioned tractor-trailer from White Motor Company. The unit was equipped with a braking system manufactured by co-defendant, Bendix. On June 24, 1960, while plaintiffs' agent was driving the tractor, the brake system failed due to a defective component part and the tractor collided with a passenger bus, causing personal injuries to several passengers and damaging the bus and plaintiffs' tractor-trailer. The plaintiffs were compelled to pay personal injury claims to the injured bus passengers, the cost of repairs to the bus, and the repairs on their tractor unit. Subsequently, they filed an indemnity suit against the defendants, predicating liability on the grounds of negligence and breach of implied warranty. The trial court sustained Bendix's motion to strike the warranty count upon the grounds that the plaintiffs failed to allege privity of contract. On plaintiffs' appeal, the Illinois Appellate Court held that plaintiff's had stated causes of action against defendants and reversed the trial court.[1]

[1] Suvada v. White Motor Co., 51 Ill. App.2d 318, 201 N.E.2d 313 (1964).