Catholic University Law Review

Volume 35
Issue 4 *Summer 1986*

Article 13

1986

Torts

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TORTS

In *Rousey v. Rousey,*[1] the District of Columbia Court of Appeals addressed the issue of whether an unemancipated minor child could sue his or her parent for negligence. In an opinion written by Judge Terry, the court reversed the trial court by declining to adopt the parental immunity doctrine as the law of the District of Columbia.[2] In so doing, the court of appeals further eroded the fragile foundation upon which the doctrine of parental immunity rests,[3] but its carefully worded opinion stopped short of an absolute rejection.[4]

The case arose from an automobile accident involving the appellee, Doris Rousey, and her daughter, Cheryl Rousey.[5] Through her father, Cheryl brought a negligence suit against her mother for injuries sustained in the crash.[6] Mrs. Rousey's insurer, Government Employees Insurance Company, filed a summary judgment motion setting forth the doctrine of parental immunity as a bar to Cheryl's suit.[7] After the trial court granted summary judgment, Mr. Rousey appealed on behalf of his daughter.[8]

The District of Columbia Court of Appeals traced the origins of parental immunity back to 1891 in the case of *Hewlett v. George.*[9] There, the Mississippi Supreme Court reversed the lower court's decision involving a minor

1. 499 A.2d 1199 (D.C. 1985).

2. *Id.* at 1200.

3. The law concerning parental immunity is slowly unraveling through limitation and abrogation. *See, e.g.,* Gibson v. Gibson, 3 Cal. 3d 914, 479 P.2d 648, 92 Cal. Rptr. 288 (1971) (complete abrogation); Fitzgerald v. Valdez, 77 N.M. 769, 776, 427 P.2d 655, 659 (1967) (emancipated children may maintain an action); Teramano v. Teramano, 6 Ohio St. 2d 117, 216 N.E.2d 375 (1966) (allowing recovery for intentionally inflicted injuries); Winn v. Gilroy, 296 Or. 718, 681 P.2d 776 (1984) (abrogating broad doctrine of parental immunity in favor of an inquiry into whether the nature of the parent's act is tortious or privileged); Felderhoff v. Felderhoff, 473 S.W.2d 928, 930-31 (Tex. 1971) (parental immunity does not extend to an employer-employee relationship); *see also* Hollister, *Parent-Child Immunity: A Doctrine in Search of Justification,* 50 FORDHAM L. REV. 489 (1982); Comment, *Child v. Parent: Erosion of the Immunity Rule,* 19 HASTINGS L.J. 201 (1967-68).

4. The court stated, "the parental immunity doctrine would serve no valid purpose in an automobile negligence case . . . in which the parent . . . has liability insurance." *Rousey,* 499 A.2d at 1202.

5. *Id.* at 1200.

6. *Id.*

7. *Id.*

8. *Id.*

9. 68 Miss. 703, 9 So. 885 (1891) (The Mississippi Reporter spells the first party's name in this case "Hewlett." The Southern Reporter, however, spells the name "Hewellette." This article follows the official state reporter.).

daughter's false imprisonment suit against her mother for wrongfully committing her to an insane asylum.[10] The court reasoned that "[t]he peace of society, and of the families composing society, and a sound public policy, designed to subserve the repose of families"[11] would be disrupted by permitting children to maintain suits against their parents. The *Hewlett* court cited no authority for its bold assertion.[12] However, for almost eight decades following *Hewlett,* the majority of American jurisdictions invoked the parental immunity doctrine.[13]

The United States District Court, in *Dennis v. Walker,*[14] was the first court with jurisdiction over the District of Columbia to address directly[15] the issue of parental immunity. In discovering that the issue of parental immunity had never been determined authoritatively in this jurisdiction,[16] the district court traced the development of the parental immunity doctrine in other jurisdictions.[17] The court concluded that the overwhelming majority of decisions favored parental immunity in tort suits brought by unemancipated minor children.[18] Thus, the court proceeded to initiate the doctrine of parental immunity in the District of Columbia.

Until *Rousey,* the District of Columbia courts had not had the opportunity to reconsider the parental immunity doctrine since the *Dennis* decision. In the intervening years, however, a decisive trend toward abrogation or lim-

10. *Hewlett,* 68 Miss. at 711, 9 So. at 887.

11. *Id.* The *Hewlett* court further stated that a child's only legal protection "from parental violence and wrongdoing" lay with the state's criminal law system. *Id.* The value of promoting domestic tranquility through parental immunity has often proven hollow. *See, e.g.,* Roller v. Roller, 37 Wash. 242, 79 P. 788 (1905) (denying recovery against a father who had raped his minor daughter).

12. Ironically, the few cases concerning parent-child torts prior to *Hewlett v. George* indicate parental liability. *See, e.g.,* Nelson v. Johansen, 18 Neb. 180, 24 N.W. 730 (1885) (failure of guardian *in loco parentis* to properly clothe minor child justifies action for negligence); *see also* McCurdy, *Torts Between Persons in Domestic Relation,* 43 HARV. L. REV. 1030, 1059-63 (1930).

13. It was not until 1963 that Wisconsin became the first state to substantially abrogate parental immunity. Goller v. White, 20 Wis. 2d 402, 122 N.W.2d 193 (1963). The majority of jurisdictions currently continue the erosion of this once-entrenched doctrine. *See generally* Hollister, *supra* note 3, at 528-32; Comment, *The Demise of Parent-Child Tort Immunity,* 12 WILLAMETTE L.J. 605, 614-21 (1976).

14. 284 F. Supp. 413 (D.D.C. 1968).

15. In Villaret v. Villaret, 169 F.2d 677 (D.C. Cir. 1948), the federal court of appeals ruled that the parental immunity doctrine prevented an unemancipated minor from suing his mother for injuries suffered in an automobile accident under Maryland law. The court expressly declined to determine the propriety of parental immunity under District of Columbia law.

16. *Dennis,* 284 F. Supp. at 415.

17. *Id.* at 415-17.

18. *Id.* at 417.

itation of the parental immunity concept has developed in other jurisdictions.[19] This trend reflects a "growing judicial distaste for a rule of law which in one sweep disqualified an entire class of injured minors."[20]

In *Rousey,* the District of Columbia Court of Appeals disagreed with the *Dennis* court on two of the doctrinal underpinnings for preserving parental immunity. First, the court attacked the premise that parental immunity promotes family harmony.[21] The court noted that the defendant parent's insurance carrier would often satisfy any adverse judgment, thus relieving the parents of the direct financial consequences resulting from injuries sustained by their children.[22] This view recognizes that the true adversaries in this type of lawsuit are the insurance carrier and the family, not the parent and the child.[23] "Far from being a potential source of disharmony, the action is more likely to preserve the family unit in pursuit of a common goal—the easing of family financial difficulties stemming from the child's injuries."[24]

Second, the court of appeals recognized, as did the *Dennis* court, the potential for family collusion in attempts to defraud insurance carriers.[25] The court declared, however, that the possibility of fraud exists to a certain degree in every case and cannot justify a "blanket denial of recovery for all minors."[26] The court observed that insurance investigations, juries, and trial judges all function in the fact finding process to minimize the risk of fraud.[27]

The *Rousey* court's cautious advance into the often volatile realm of domestic relations represents a positive step toward ensuring adequate legal protection for children. However, the basic contours of the parental immunity doctrine in the District of Columbia remain undefined. The *Rousey*

19. *See supra* notes 3, 13.

20. Gibson v. Gibson, 3 Cal. 3d 914, 918, 479 P.2d 648, 650, 92 Cal. Rptr. 288, 290 (1971).

21. *Rousey,* 499 A.2d at 1202.

22. *Id.*

23. *Id.; see also* Sorensen v. Sorensen, 369 Mass. 350, 362, 339 N.E.2d 907, 914 (1975) (abrogating parental immunity doctrine to extent of defendant parent's automobile liability insurance coverage); Streenz v. Streenz, 106 Ariz. 86, 88, 471 P.2d 282, 284 (1970) (allowing unemancipated minor's right of action for injuries sustained in negligently driven automobile where parent driver covered by liability insurance).

24. *Rousey,* 499 A.2d at 1202 (quoting Sorensen v. Sorensen, 369 Mass. at 362, 339 N.E.2d at 914); *see also* Badigian v. Badigian, 9 N.Y.2d 472, 482, 174 N.E.2d 718, 724, 215 N.Y.S.2d 35, 43 (1961) (declaring that a child's "pains must be endured for the peace and welfare of the family is something of a mockery"); Petersen v. City and County of Honolulu, 51 Haw. 484, 488, 462 P.2d 1007, 1009 (1969) ("[W]hen a wrong has been committed, the harm to the family relationship has already occurred; and to prohibit reparations can hardly aid in restoring harmony.").

25. *Rousey,* 499 A.2d at 1202.

26. *Id.* (quoting Sorensen v. Sorensen, 369 Mass. at 364, 339 N.E.2d at 915).

27. *Rousey,* 499 A.2d at 1202.

court gave no indication as to whether it would reject or adopt immunity in cases where a parent is not covered by liability insurance. A bolder decision would have helped to clarify the nature of parents' duties, rights and discretion concerning their children.[28] Perhaps the unstated policy behind the court's deliberate approach is a hesitancy to create a new field of "parental malpractice" in an already overly litigious society. It seems that the *Hewlett* court's concern for the "repose of families and the best interests of society"[29] still echoes today.

Having dismantled the general principles of parental immunity, the *Rousey* decision follows the judicial current of the last twenty years toward preventing the injustice of leaving negligently injured children without a recovery.[30] However, in limiting its holding to situations where the defendant parent is covered by liability insurance,[31] the court's decision presents an inherent danger. Can parents who are unable to bring themselves under the umbrella of an insurance policy act negligently toward their children with impunity? The answer to this troublesome question, according to the court of appeals, must await resolution "for another day."[32]

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28. Among others, the court could have chosen one of three approaches dominant today. The first approach, announced in Goller v. White, 20 Wis. 2d 402, 122 N.W.2d 193 (1963) abrogates parental immunity except "(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." *Id.* at 404, 122 N.W.2d at 198. The second approach asks "what would an ordinarily reasonable and prudent *parent* have done in similar circumstances?" Gibson v. Gibson, 3 Cal. 3d at 921, 479 P.2d at 653, 92 Cal. Rptr. at 293 (emphasis in original). Recently, some states have begun to follow a third policy enunciated in the RESTATEMENT (SECOND) OF TORTS § 895(G) (1979). This rule states:

> (1) A parent or child is not immune from tort liability to the other solely by reason of that relationship.
>
> (2) Repudiation of general tort immunity does not establish liability for an act or omission that, because of the parent-child relationship, is otherwise privileged or is not tortious.

See, e.g., Winn v. Gilroy, 296 Or. 718, 730, 681 P.2d 776, 784 (1984). Each of these approaches suggests that the only proper use for parental immunity consists of protecting parents while performing those duties that society deems appropriate.

29. *Hewlett*, 68 Miss. at 711, 9 So. at 887.

30. *See supra* notes 3, 13.

31. *Rousey*, 499 A.2d at 1202.

32. *Id.* at 1202 n.7.