Duquesne Law Review

Volume 4 | Number 2 Article 9

1965

Torts - Parental Immunity

Carl J. Sauer

committing his crime in January, 1960, was afforded the very same rights denied to Negri. For such an invidious result Negri may thank the Pennsylvania Supreme Court and the speedy criminal court procedures of Pennsylvania, which the Pennsylvania Supreme Court feels should not be "slowed down" by the new trials of those incarcerated victims who were denied their constitutional rights. Furthermore, the court seems oblivious to the fact that a confession obtained at an accusatorial proceeding is just as damaging as a confession at the trial level. Also it is not reasonable to assume that the right to counsel at a trial is more "fundamental"[23] than at an accusatorial proceeding, since a confession at the accusatorial proceeding may for all practical purposes nullify the benefit of counsel at the trial level.

Thus, in the final analysis, the court has adopted the *Russo* view of *Escobedo*, requiring the police to afford counsel in an accusatory pre-trial proceeding whether counsel is requested or not and thus by necessity concedes that Negri was denied his constitutional rights. Yet, by refusing to apply *Escobedo* retrospectively, they deny him a remedy.[24]

Joseph Pass, Jr.

TORTS—Parental Immunity—New Hampshire has now joined the trend toward the abolition of the parental immunity doctrine.

Dean v. Smith, —— N.H. ——, 211 A.2d 410 (1965).

In June of this year the Supreme Court of New Hampshire, in *Dean v. Smith*,[1] had occasion to re-evaluate the parental immunity doctrine. The case arose out of an automobile accident, in which the father was killed and his three unemancipated children were severely injured. It was subsequently determined that the accident had occurred due to the negligence of the father. A suit was brought against the father's estate by the mother of the children to (1) enforce her own claim for medical, hospital and nursing expenses incurred on behalf of the children, and (2) to enforce the personal injury claims of each minor child.[2] This presented a question to the court of whether or not an unemancipated child could maintain a suit in negligence against his parent.

The defendant Smith (the personal representative of the deceased

23. Gideon v. Wainwright, 372 U.S. 335 (1963).

24. There was a dissenting opinion filed by Mr. Justice Roberts and joined by Mr. Justice Musmanno in which they advocated that the denial of the right to counsel in the accusatory pre-trial investigation was a denial of a fundamental right which is a direct prejudice against a fair trial and thus *Escobedo* should be applied retrospectively.

1. — N.H. —, 211 A.2d 410 (1965).

2. The car was insured under an effective policy of general coverage.

father) relied on *Worrall v. Moran*,[3] in which this same New Hampshire court had applied the parental immunity doctrine. *Worrall* represents the majority view in the United States today. The origin of the doctrine is ascribed to *Hewlett v. Ragsdale*,[4] in which it is stated,

> so long as the parent is under obligation to care for, guide and control, and the child is under reciprocal obligation to aid and comfort and obey, no such action as this can be maintained.[5]

The underlying rationale of the doctrine is ". . . that domestic tranquillity and parental discipline would be disturbed by the action."[6] The court in the *Dean* case considered this, but stated that since the father had died, a suit against his estate would be less likely to disrupt family relations and parental discipline. A second important factor contributing to the court's decision was that the Dean automobile was insured under a policy of general coverage.

> The fact that most parents have provided for payment by an insurer for the damages which might be assessed in an action against them or their estate by their unemancipated children is also a factor which decreases the likelihood that such an action will disrupt family harmony or deplete the family exchequer.[7]

On the basis of these considerations, the court held that the suit could be maintained. Thus the parental immunity doctrine was rejected and the *Worrall* case was overruled.

The significance of the *Dean* decision is that it presents a reconsideration of the doctrine. New Hampshire no longer permits the parent to shield his negligence behind an antiquated doctrine which has no place in today's progressive society. Justice and common sense demanded that a reconsideration of the doctrine would lead ultimately to its rejection.

As the court pointed out, such a suit (where the tortfeasor is dead) will not disrupt family relations and disturb parental discipline. Also, most parents realize the importance of insurance coverage and maintain effective policies. Thus, it is submitted that insurance will be of great importance in the development of the law in the area of parental immunity. It is also a reasonable certainty that other jurisdictions will follow New Hampshire in reconsidering and abolishing the parental immunity doctrine. It is hoped that quite soon the outdated doctrine of parental immunity, like its sister in the area of charity, will be reduced to a footnote in the pages of legal history.

Carl J. Sauer

3. 101 N.H. 13, 131 A.2d 438 (1957).
4. 68 Miss. 703, 9 So. 885 (1891).
5. *Id.* at 711, 9 So. at 887.
6. PROSSER, TORTS 887 (3d ed. 1964).
7. Dean v. Smith, *supra* note 1, at 413.