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Parental Immunity- Its Effect on Vicarious Liability

Parental Immunity—Its Effect on Vicarious Liability—*Sherby v. Weather Brothers Transfer Co., Inc.*

Parental immunity prohibits a child from instituting a suit against his parent for a personal tort.[1] However, when a child has sustained injury as a result of his parent's tortious act committed in the course of his employment, and the child seeks recovery against his parent's employer under the doctrine of respondeat superior, the majority of jurisdictions feel that this immunity is purely personal and should not be extended to the employer.[2]

Recently the Fourth Circuit Court of Appeals, applying Maryland law, was faced with such a situation in the case of *Sherby v. Weather Brothers Transfer Co., Inc.*[3] A child, while riding as a passenger in a truck operated by the child's father in the scope of his employment, was injured when the truck was involved in an accident on a Maryland highway. The child sued his father's employer to recover damages for the parent-employee's negligence. In this case of first impression, the court disallowed recovery, thereby relegating Maryland to a minority of jurisdictions which have ruled on the point.[4]

The court based its decision on prior dicta which indicated an adherence by Maryland to the parental immunity doctrine[5] and the case

[1] The doctrine has been followed to some extent by every jurisdiction having an occasion to rule on the subject. *See* McCurdy, *Torts Between Persons in Domestic Relation*, 43 Harv. L. Rev. 1030 (1930); Sanford, *Personal Torts Within the Family*, 9 Vand. L. Rev. 823 (1956).

[2] *See* Schubert v. August Schubert Wagon Co., 249 N.Y. 253, 164 N.E. 42 (1928); Restatement (Second) of Agency § 219 (1957); 2 F. Mechem, Agency § 1874 (2d ed. 1914).

[3] 421 F.2d 1243 (4th Cir. 1970).

[4] *See* Myers v. Tranquility Irr. Dist., 26 Cal. App. 2d 385, 79 P.2d 419 (1938); Meece v. Holland Furnace Co., 269 Ill. App. 164 (1933); Emerson v. Western Seed & Irr. Co., 116 Neb. 180, 216 N.W. 297 (1927); Graham v. Miller, 182 Tenn. 434, 187 S.W.2d 622 (1945). *Contra*, Mi-Lady Cleaners v. McDaniel, 235 Ala. 469, 179 So. 908 (1938); Chase v. New Haven Waste Material Corp., 111 Conn. 377, 150 A. 107 (1930); Stapleton v. Stapleton, 85 Ga. App. 728, 70 S.E.2d 156 (1952); O'Connor v. Benson Coal Co., 301 Mass. 145, 16 N.E.2d 636 (1938); Radelicki v. Travis, 39 N.J. Super. 263, 120 A.2d 774 (1956); Schomber v. Tait, 207 Misc. 328, 140 N.Y.S.2d 746 (1955); Wright v. Wright, 229 N.C. 503, 50 S.E.2d 540 (1948); Koontz v. Messer, 320 Pa. 487, 181 A. 792 (1935); Smith v. Smith, 116 W.Va. 230, 179 S.E. 812 (1935); LeSage v. LeSage, 224 Wis. 57, 271 N.W. 369 (1937).

[5] *See* Villaret v. Villaret, 169 F.2d 677 (D.C. Cir. 1948) (applying Maryland law); Mahnke v. Moore, 197 Md. 61, 77 A.2d 923 (1951); Schneider v. Schneider, 160 Md. 18, 152 A. 498 (1930) (parent suing child).

of *Riegger v. Bruton Brewing Co.*[6] In *Riegger* it was held that a wife could not recover against her husband's employer in a factual situation similar to that in *Sherby*. Due to an employer's right of indemnification[7] against his employee, the court felt that to allow recovery against the employer would put the ultimate loss upon the husband.[8] Since Maryland, despite its Married Woman's Act,[9] does not permit a wife to sue her husband for injuries resulting from his negligence,[10] the court refused to permit the wife to do indirectly what she could not do directly.

To add strength to its decision in *Riegger*, the Maryland court also adopted a minority view on vicarious liability. It reasoned that an employer's liability is solely derivative, depending entirely upon the liability of his employee.[11] The majority of cases,[12] however, hold that when immunity is afforded an employee for his tortious act, culpability, and not liability of the servant, becomes the test of his employer's liability.[13]

The dissent criticized the analogy drawn by the majority between *Riegger* and *Sherby* and distinguished the two cases on the ground

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[6] 178 Md. 518, 16 A.2d 99 (1940).

[7] *See* RESTATEMENT OF RESTITUTION § 96, comment *a* at 418 (1937).

[8] Riegger v. Bruton Brewing Co., 178 Md. 518, 16 A.2d 99 (1940). *See* Myers v. Tranquility Irr. Dist., 26 Cal. App. 2d 385, 79 P.2d 419 (1938). *Contra*, Schubert v. August Schubert Wagon Co., 249 N.Y. 253, 164 N.E. 42 (1928).

[9] MD. CODE ANN. Art. 45, § 5 (1965).

[10] Maryland has interpreted its Married Woman's Act as having no effect on the common law rule that a wife cannot maintain an action against her husband for a personal tort. Furstenberg v. Furstenberg 152 Md. 247, 136 A. 534 (1927).

[11] ". . . [L]iability and not culpability is the true basis for the doctrine of respondeat superior." Riegger v. Bruton Brewing Co., 178 Md. 518, 16 A.2d 99, 100 (1940). *See* 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) (overruled on other grounds).

[12] *See, e.g.*, Schubert v. August Schubert Wagon Co., 249 N.Y. 253, 164 N.E. 42, 43 (1928), in which Chief Justice Cardozo stated:

> An employer commits a trespass by the hand of his servant upon the person of another. . . .
>
> A trespass, negligent or willful, upon the person of a wife, does not cease to be an unlawful act, though the law exempts the husband from liability for the damage. Others may not hide behind the skirts of his immunity.

Accord, RESTATEMENT (SECOND) OF AGENCY § 217, comment *b* at 470 (1957). ". . . [W]here the principal directs an agent to act, or the agent acts in the scope of employment, the fact that the agent has an immunity from liability does not bar a civil action against the principal."

[13] *See, e.g.*, Schubert v. August Schubert Wagon Co., 249 N.Y. 253, 164 N.E. 42 (1928).

that at common law a child was not forbidden to sue his parent for a personal tort,[14] whereas, a wife, at common law[15] and under subsequent Maryland law,[16] could not sue her husband. The dissent then contended that previous dicta did not necessarily indicate that Maryland would adopt the doctrine of parental immunity, and therefore the common law would remain intact.[17] Certainly if this contention were true, the two cases could readily be distinguished in that immunity would be lacking entirely in *Sherby*.[18] A close study of prior cases, however, does not support the minority's conclusion. In fact, dicta in those cases indicate an adherence to the doctrine of parental immunity.[19]

Mere adherence to that doctrine, however, does not preclude recovery by a child against the parent's employer. For the most part, those jurisdictions allowing recovery by the child do follow the doctrine.[20] These courts reject the argument adopted in *Riegger* that the immunized employee will eventually bear the loss sustained by his employer. The liability of an employee to reimburse his employer is regarded as theoretical and only of academic significance.[21]

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[14] *See* Dunlap v. Dunlap, 84 N.H. 352, 150 A. 905 (1930); McCurdy, *Torts Between Persons in Domestic Relation*, 43 HARV. L. REV. 1030 (1930); W. PROSSER, HANDBOOK OF THE LAW OF TORTS 886 (3d ed. 1964).

[15] *See* McCurdy, *Personal Injury Torts Between Spouses*, 4 VILL. L. REV. 303 (1959); Sanford, *Personal Torts Within the Family*, 9 VAND. L. REV. 823 (1956). The inability of a wife to sue her husband was based on the concept of the legal identity of the two.

[16] *See, e.g.*, Furstenberg v. Furstenberg, 152 Md. 247, 136 A. 534 (1927).

[17] This argument is based on a modern trend leading away from parental immunity in certain instances. Although a total abrogation of the doctrine has not yet been realized, it has been diluted to some extent by certain exceptions. *See* Mahnke v. Moore, 197 Md. 61, 77 A.2d 923 (1951) (intentional injury); Worrell v. Worrell, 174 Va. 11, 4 S.E.2d 343 (1939) (parent acting in vocational, and not parental, capacity). Little change has been effected on the doctrine in cases involving ordinary negligence of the parent.

[18] If immunity were not afforded the parent-employee, the argument as to an indirect attack upon the parent would be of no consequence.

[19] *See* cases cited note 5 *supra*.

[20] *See* W. PROSSER, HANDBOOK OF THE LAW OF TORTS 890 (3d ed. 1964).

[21] *See, e.g.*, Eule v. Eule Motor Sales, 34 N.J. 537, 170 A.2d 241, 242 (1961), where the majority held:

> The theoretical liability of an employee to reimburse the employer is quite anachronistic. The rule would surprise the modern employer no less than his employee. Both expect the employer to save harmless the employee rather than the other way round, the employer routinely purchasing insurance which protects the employee as well.
>
> . . . [E]mployers do not in fact seek to pass the burden to their employees. It would hardly be realistic to assume that employers would alter that policy

Even if it were to accept the above rationale as controlling, the Fourth Circuit would still have been bound to follow *Sherby*. Maryland, by its earlier adoption of a minority view as to vicarious liability,[22] has closed the door to possible recovery. So long as immunity exists in favor of the employee, whether parent or husband, the employer escapes liability. The result is anomalous in that it affords absolute immunity to the employer regardless of whether the employee bears any loss.

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merely because the victim of the business activity happens to be the spouse [or child] of the employee.

[22] *See* cases cited note 11 *supra*.