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PARENT-CHILD IMMUNITY: A DOCTRINE IN SEARCH OF JUSTIFICATION

GAIL D. HOLLISTER*

INTRODUCTION

Over fifty years ago, the Supreme Court of New Hampshire stated that the parent-child immunity "should not be tolerated at all except for very strong reasons; and it should never be extended beyond the bounds compelled by those reasons."¹ Other critics of the doctrine have gone further, arguing for the complete abolition of the immunity and characterizing as nebulous the reasons that have been advanced to justify it.² Yet, within the last ten years, many courts have reaffirmed the parent-child immunity, at least in part.³ Additionally, one court, which had abolished the immunity, has now revitalized and in some ways expanded on it through the rubric of a lack of duty on the part of parents.⁴

The parent-child tort immunity rule denies a minor child a cause of action for personal injuries inflicted by his parents.⁵ The rule was created by American courts in the late nineteenth and early twentieth centuries,⁶ but has antecedents in Roman law.⁷ This Article discusses the genesis of the immunity, its current status and the social costs and

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¹ Dunlap v. Dunlap, 84 N.H. 352, 361, 150 A. 905, 909 (1930).
⁶ Citing no authority, the Supreme Court of Mississippi gave birth to the parental immunity rule in Hewlett v. George, 68 Miss. 703, 711, 9 So. 885, 887 (1891). The Hewlett rule was endorsed in McKelvey v. McKelvey, 111 Tenn. 388, 390, 391-93, 77 S.W. 664, 664-65 (1903), and in Roller v. Roller, 37 Wash. 242, 246-47, 79 P. 788, 789 (1905).
⁷ See infra notes 11-14 and accompanying text.

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benefits that it generates, to consider the extent to which the immunity should be retained.

Part I examines the historical and social basis of parent-child immunity and the justifications advanced for its existence. Part II notes the social changes that have led to increasing criticism of the immunity and analyzes the approaches various states have taken in partially or totally abrogating the immunity in suits for negligently inflicted injuries. Particular attention is devoted to the issue of parental liability for negligent supervision because suits involving this issue most clearly raise the conflict between a parent's right to raise his child according to his own beliefs and methods and the child's need to be compensated for injuries inflicted by the parent. The crucial question is whether courts can fashion an objective standard that does not result in second-guessing parents in the management of their family affairs. Part III suggests two possible approaches to the problems raised by suits between parents and their children.

I. THE CREATION OF THE PARENT-CHILD IMMUNITY

A. The Child's Position in Early Legal Systems

The legal rights and duties existing between parent and child have varied significantly throughout history. Under the early Roman system, the head of a family, paterfamilias, had nearly total power over the unemancipated children in the family unit. He possessed not only the power to alienate the child, but also control over the child's life and death. Consequently, he bore no liability for causing bodily injury to the child. Furthermore, because the child could not own property, any property acquired by the child automatically belonged to the paterfamilias.

It was fruitless, therefore, for a child to attempt to sue the paterfamilias for maltreatment, although as a general rule Roman law permitted compensation for personal injuries wrongfully inflicted. Even

8. For a review of the current status of the parent-child immunity, see infra Appendix.


10. See Paige v. Bing Constr. Co., 61 Mich. App. 480, 485, 233 N.W.2d 46, 49 (1975) ("Each parent has unique and inimitable methods and attitudes on how children should be supervised. Likewise, each child requires individualized guidance depending on intuitive concerns which only a parent can understand. . . . Allowing a cause of action for negligent supervision would enable others, ignorant of a case's peculiar familial distinctions and bereft of any standards, to second-guess a parent's management of family affairs . . . .").


12. Id.

13. Id. at 259.

if the child could overcome the rights of the *paterfamilias* and win compensatory damages, the amount recovered would have automatically reverted to the *paterfamilias*. The legal system thus gave the *paterfamilias* not only carte-blanche to determine the child's fate, but also a de facto immunity that arose from the child's inability to own property.

An erosion of this absolute authority of one generation over another began during the Roman Empire. Initially, the parents' power of life and death over the child was limited only by moral constraints. These were eventually supplemented by legal sanctions, including, in rare instances of parental abuse, the imposition of the death penalty.

By the Middle Ages, children's social and legal positions had somewhat improved. They could own property as individuals separate from their parents, and moral and legal sanctions were developing to protect them. Nonetheless, "parental negligence . . ., abandonment, exposure and . . . infanticide [were still] . . . major threats to young life."

The child's position was little better in colonial America, where he was viewed as "full of the stains and pollutions of sin." Parents were expected to treat their children sternly to rid them of vices, particularly the sins of pride and disobedience. This belief in the need for parental authority was evidenced by statutes enacted in Massachusetts and Connecticut in the mid-seventeenth century that provided for the death penalty if a child over sixteen should curse or strike his father or mother or if he was stubborn or rebellious.

Although the view of the child as evil and in need of strict discipline had moderated somewhat by the middle of the nineteenth century, parents were still encouraged to be strict, and severe punishment was common. The law did provide for criminal penalties if parents, in correcting their children, overstepped the bounds of reason.

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15. Id. § 3, at 22, § 60, at 256-61.
16. Id. § 3, at 22, § 60, at 256-57.
17. Id. § 60, at 257; G. Payne, *The Child in Human Progress* 266 (1916).
22. Id. at 42-43.
23. Id.
son, however, until recently knew few bounds, and parents had to go far before they could be held criminally responsible. Before the middle of the last century, a parent could not have been held liable unless he had acted with malice or had inflicted permanent injury. Furthermore, even when those criteria were met, he might well have the defense of parental privilege in matters of discipline. The parent was additionally protected by a presumption that parental correction was proper, and the burden of proof lay on the person asserting that the parent had acted improperly.

Thus, although the advent of criminal punishment of severely abusive parents marked a significant increase in the recognition of the value of the child, the protection it afforded the child was somewhat illusory. Not only were convictions difficult to obtain but, even upon a parent’s conviction, an injured child received little real protection. At most, the offending parent was separated from the child for a period of time, possibly leaving the family without any means of support. When a fine, rather than a jail sentence, was imposed, the injured child was left completely unprotected.

26. Few criminal prosecutions were brought against parents for mistreating their children, but in those that were instituted, the courts recognized wide parental discretion. For example, in 1837 in a case where parents had punched their child, pushed her head against the wall, switched her, tied her to the bed for two hours and hit her with cowhide, the court held that the reasonableness of the actions was a question for the jury. Johnson v. State, 21 Tenn. 282, 284 (1837). Some fifty years later the North Carolina Supreme Court held that a father who had hit his daughter 30 times with a “small limb,” choked her until her tongue hung out of her mouth and threw her violently to the ground, thereby dislocating her thumb, could not be found criminally liable. State v. Jones, 95 N.C. 488, 491-92 (1886). Similarly, a bizarre South Carolina statute enacted in 1712 seems to permit parents to correct their children by stabbing them and provides that, if the child is unintentionally killed as a result of such correction, the parent is not criminally responsible. S.C. Code Ann. § 16-3-40 (Law. Co-op. 1976).


28. See State v. Jones, 95 N.C. 488, 490 (1886); Steber v. Norris, 188 Wis. 366, 371, 206 N.W. 173, 175 (1925); W. Tiffany, Handboook on the Law of Persons and Domestic Relations § 124, at 264-65 (2d ed. 1909). The privilege allows a parent or one who stands in the place of a parent to use reasonable force, including corporal punishment, for discipline and control. W. Prosser, supra note 5, § 27, at 136.


30. Fines rather than jail terms were usually imposed if the child had not died. See Fletcher v. People, 52 Ill. 395 (1869) ($300 fine for putting kerosene on a blind child to rid him of vermin and then keeping the child in a cold, damp cellar for several days during the winter); State v. Washington, 104 La. 443, 29 S. 55 (1900) ($20 fine for beating a ten-year-old with a switch, permanently scarring the child); Snowden v. State, 12 Tex. Crim. 105 (1889) ($25 fine for aggravated assault and battery); Kief v. State, 10 Tex. Crim. 286 (1881) ($130 fine for threatening daughter with a razor). But see State v. Koosse, 123 Mo. App. 655, 101 S.W. 139 (1907) (six-month jail term and $100 fine for forcing child to run 4 miles barefoot over a rocky
Direct intervention by the state or its agencies provided an alternative method to protect the child. Nonetheless, even though the state stands as *parens patriae* to its citizens and as such has the responsibility to protect its juvenile citizens, until recently the state did not intervene to protect children. Beginning in the sixteenth century, the state occasionally separated poor children from their parents to save state money by putting the children to work. The state eventually expanded its power to permit intervention when a child was being abused, thus raising the possibility of the government depriving parents of custody for a reason other than poverty or as an incident of their incarceration. In actuality, however, until well into this century, poverty remained the primary reason for separating a child from his parents.

B. The Development of the Parent-Child Immunity Doctrine in the United States

1. The Early Cases

Viewed against this history of almost unbridled parental authority, it is not surprising that no American child tortiously injured by his parents had ever sought to recover damages until late in the nineteenth century. When such a claim was finally made, the response of the courts was to promulgate the doctrine of parental immunity. In *Hewlett v. George*, the Supreme Court of Mississippi held that

> [t]he peace of society, and of the families composing society, and a sound public policy, designed to subserve the repose of families and
the best interests of society, forbid to the minor child a right to appear in court in the assertion of a claim to civil redress for personal injuries suffered at the hands of the parent.\textsuperscript{39}

The Hewlett court neither cited authority for this holding, nor gave any further explanation of its reasoning. Nevertheless, courts in all except eight states\textsuperscript{39} followed the Hewlett court's example and, usually without any meaningful discussion of the child's rights, adopted some type of parent-child immunity.\textsuperscript{40}

38. Id. at 711, 9 So. at 887.

39. Parental immunity has never been adopted in Alaska, Hawaii, Kansas, North and South Dakota, Utah or Vermont. See infra Appendix. The Supreme Court of Wyoming held that Montana would not permit a minor to sue his parent for personal injuries, Ball v. Ball, 73 Wyo. 29, 37-39, 269 P.2d 302, 304-05 (1954), but no Montana court has so held. The Supreme Court of Montana, in a case involving the husband-wife immunity, did state that intrafamily immunity was valid. State Farm Mut. Auto. Ins. Co. v. Leary, 168 Mont. 482, 488, 544 P.2d 444, 448 (1975).

The rationales consistently advanced by courts in adopting parental immunity were first set out in the "great trilogy" of cases that established the rule: Hewlett v. George, McKelvey v. McKelvey and Roller v. Roller. In Hewlett, the court advanced only one reason for parental immunity: Family harmony would be disrupted by permitting such suits. In McKelvey, the Supreme Court of Tennessee relied heavily on the Hewlett rationale, but also recognized a common-law parental right to control and chastise the child. In addition, the McKelvey court analogized parent-child immunity to interspousal immunity.
In *Roller*, the daughter sought damages from her father for rape. The court, therefore, could not rely on the argument that parental immunity was necessary to advance family harmony and parental discipline, because the family unit had already dissolved. Instead, the court relied on the analogy to spousal immunity and further argued that if liability were found, the wrongdoing parent might reacquire the child's tort damages in the event that the child predeceased the parent. The court contended that this would violate the prohibition against a tortfeasor profiting from his wrong. Additionally, the *Roller* court reasoned that payment to the injured child would deplete the parent's assets, in some instances to the detriment of the plaintiff's siblings.


These early rationales for parental immunity have been soundly criticized, and although they raise issues of genuine social concern, they cannot justify the inequities caused by retention of the immunity. The rationale that parent-child immunity should exist by analogy to husband-wive immunity, advanced by both the *Roller* and *McKelvey* courts, fails because the legal unity of the husband and wife, which was the basis for spousal immunity, never existed between parent and child. At common law, marriage fused the legal identities of husband and wife; for many purposes the woman no longer had an individual legal identity. She could neither sue a third person, nor be sued. She was instead represented in legal matters by her husband.

One effect of this merger was the inability of an individual to

48. 37 Wash. at 243, 79 P. at 789.
49. *Id.* at 242-43, 79 P. at 788-89.
50. *Id.* at 245, 79 P. at 789.
51. *Id.*
57. Rogers v. Smith, 17 Ind. 323, 323 (1861); Laughlin v. Eaton, 54 Me. 156, 158-59 (1866).
sue his spouse, because to do so would have been to sue himself. The common law, however, never treated children as mere extensions of their parents. Children had separate legal identities and could both sue and be sued. A child's suit against his parents, therefore, did present adversity, and at common law a child could maintain an action against his parents to protect his property and contract rights. Thus, the reason for interspousal immunity does not exist as to suits between parent and child. The existence of the first immunity provides no reason to establish the second.

Similarly, the Roller court's speculative fear that the injured child's recovery may be inherited by the wrongdoing parent is not a persuasive reason for parental immunity. The injured child should not be required to remain uncompensated because of the rather remote possibility that he may die before he reaches majority, and if the parent is alive at the time, he may inherit a portion of the money formerly paid in compensation. Such a sequence of events is highly unlikely and might never occur because all of the compensatory funds could be spent prior to the child's death. Moreover, if the parent had paid the damages from his own resources, an inheritance of the funds would constitute a return, rather than a profit. Only if the injured child had been paid by an insurance company would it be possible for the inherited money to be a profit. Beyond this consideration is the recognition that, if the child had died from causes other than the tortious injury, the parent would not be profiting from his wrongdoing, but

60. W. Prosser, supra note 5, § 122, at 860; see Bandfield v. Bandfield, 117 Mich. 80, 75 N.W. 287 (1898) (suit by wife against husband for infecting her with venereal disease dismissed for lack of adversity). See generally Kahn-Freund, Inconsistencies and Injustices in the Law of Husband and Wife, 15 Mod. L. Rev. 133 (1952) (history of tort liability between husband and wife); McCurdy, Personal Injury Torts Between Spouses, 4 Vill. L. Rev. 303 (1959) (same).

61. W. Prosser, supra note 5, § 122, at 864.

62. See Donahoe v. Richards, 38 Me. 376, 379 (1854); W. Prosser, supra note 5, § 122, at 864.

63. See Preston v. Preston, 102 Conn. 96, 128 A. 292 (1925) (deed of trust set aside for undue influence); Crowley v. Crowley, 72 N.H. 241, 56 A. 190 (1903) (trust belongs to minor, not parent, if paid for with child's money); Lamb v. Lamb, 146 N.Y. 317, 41 N.E. 26 (1895) (rent can be collected by child from mother if there is an agreement that mother will pay rent).

64. See Mathis v. Ammons, 453 F. Supp. 1033, 1037 (E.D. Tenn. 1978); Goller v. White, 20 Wis. 2d 402, 410, 122 N.W.2d 193, 197 (1963); W. Prosser, supra note 5, § 122, at 864-65; cf. Dunlap v. Dunlap, 84 N.H. 352, 353, 150 A. 905, 906 (1930) ("There has never been a common-law rule that a child could not sue [his] parent. It is a misapprehension of the situation to start with that idea and to treat the suits which have been allowed as exceptions to a general rule.").


66. If the victim had voluntarily elected to bestow his wealth on the parent who had caused the injury, it would be of no concern to the court. Therefore, this problem would arise only when the child died before he was legally able to make a will.
from his status as a beneficiary under intestate succession laws, which represent a completely distinct set of social values. If, on the other hand, the child had died from the tortious injury, the parent would often be prevented from recovering by wrongful death laws. Finally, if the courts or legislatures believe that the possibility of a wrongdoing parent inheriting part of his child's awarded damages is against social policy, the remedy should be to directly prohibit the inheritance, not to immunize the wrongdoer.

The irrationality of this justification for parental immunity is further highlighted by one of the widely-held exceptions to the immunity: the liability of parents to their children for tortious conduct that was intentional, wanton or, in some cases, grossly negligent. Presumably the intentional or wanton tortfeasor is less entitled to inherit from his victim than is the merely negligent tortfeasor, yet the possibility of such an inheritance has not kept courts from holding these parents liable.

The third reason given by the Roller court for parental immunity—that to pay the injured child would deplete the family treasury to the detriment of other innocent family members—fails to address the central issue: whether sufficient reason exists to require the innocent victim of the tort to bear the burden of his injuries so that his siblings


71. 37 Wash. at 245, 79 P. at 789.
can avoid a possible decrease in either their standard of living or anticipated inheritance. In directly analogous actions, the courts have routinely ordered the parents to pay damages to one child, without showing the same solicitude for the financial well-being of other family members. Property and contract actions between parent and child have always been allowed.\textsuperscript{72} Recovery has also been permitted under exceptions to parental immunity,\textsuperscript{73} such as when the parent intentionally injured the child.\textsuperscript{74} In addition, the state has been able to fine parents when their conduct toward their children contravened the criminal law,\textsuperscript{75} notwithstanding the consequent financial deprivation of both the innocent siblings and the injured child.\textsuperscript{76}

Whenever a defendant is held liable for damages, his family treasury will be depleted, and the resources available to the defendant's innocent children will consequently be decreased. This burden is an inevitable result of permitting recovery. The only difference between the usual case and the parent-child suit is that the plaintiff child is related to the children whose financial interests are affected. This single factor has not been deemed sufficient to prohibit recovery in analogous situations, and neither renders the innocent victim of the tort less in need of compensation, nor makes his siblings more worthy of protection.

Furthermore, no child has a legal right to his parents' property, to equal treatment by his parents, or to an equal percentage of his parents' estate.\textsuperscript{77} Consequently, a parent has the right to divert his


\textsuperscript{73} For example, emancipated children may sue their parents for personal injuries. See cases cited \textit{infra} note 134. Suits are also permitted when the injury is incurred in a business context, see cases cited \textit{infra} note 138, and if the tortfeasor is dead. See cases cited \textit{infra} note 136.

\textsuperscript{74} See \textit{supra} note 70 and accompanying text.

\textsuperscript{75} See \textit{supra} note 30.

\textsuperscript{76} The state treasury is thus enriched, while the injured child is required by law to remain uncompensated to avoid decreasing his siblings' shares of the family wealth.

\textsuperscript{77} See, e.g., Roberts v. Bryant, 201 So. 2d 811, 816 (Fla. Dist. Ct. App. 1967); Newkirk v. Knight, 456 P.2d 104, 106-07 (Okla. 1969). In Rice v. Andrews, 127 Misc. 826, 217 N.Y.S. 528 (Sup. Ct. 1926), the court stated: "One has the legal right . . . to disinherit any natural heir or next of kin, and if he chooses to cut off his child and will his property to others, such child has no claim against his father's estate for his support and maintenance, but must shift for himself, or be dependent upon others for his support." \textit{Id.} at 827-28, 217 N.Y.S. at 530. There is no certainty, therefore, that even if innocent siblings exist their inheritance will be affected by the plaintiff's recovery.
property to a particular child and can do so without violating the rights of other family members regardless of whether their standard of living or patrimony may be decreased thereby. Finally, the injured child is not profiting from his recovery but is merely receiving compensation for an injury that he has suffered. 78 A damage award represents the equitable treatment of returning the child to his status quo. 79

Two other factors evince the paucity of logic behind this reason for the immunity. First, there will be cases in which there are no innocent siblings who could be prejudiced by a depletion of the family estate. Nonetheless, the immunity shields all parents regardless of the size of their family. Second, to the extent that insurance proceeds cover the award, family funds will not be depleted by payment of damages. If anything, under these circumstances recovery will serve to maintain the family's original standard of living by relieving the parents of expenses they might otherwise incur. 80

The availability of insurance proceeds has, however, been cited as a reason to retain parental immunity. 81 Because a child has only limited knowledge and ability in legal matters, the decision to sue is usually made by his parents. 82 There can be no doubt that when

78. In cases of severe injuries, society may be required to support the plaintiff when he becomes an adult if the injury has rendered him unable to support himself. In cases in which this public burden could have been avoided or mitigated by permitting the plaintiff to recover from the defendant, society is subsidizing the tortfeasor and perhaps other members of the plaintiff's family. There is no justification for such a hidden subsidy. Id.

79. See McCurdy I, supra note 2, at 1073. McCurdy suggests that it is the policy of the law to protect a minor's property. When a child's physical and mental abilities are impaired, his potential earning power is decreased and his capital in his own future is consequently diminished. An award of damages is compensation for this impairment. Id.


insurance will pay for all or part of the plaintiff's recovery there is an incentive for family members to conspire to obtain an unjustified award at the expense of the insurance company.\(^{83}\)

The likelihood of collusion, however, may be lessened by the insured's duty to cooperate with the insurance company in its defense.\(^{84}\) Moreover, the possibility that some litigants in a particular class may be guilty of fraud or collusion does not require the courts to deny relief to everyone in that class, many of whom are admittedly deserving.\(^{85}\) Any rule that seeks to incidentally avoid fraud by withholding legal protection from all claimants, regardless of the justice of their claims, "employs a medieval technique which, however satisfying it may be to defendants, . . . is scarcely in keeping with the acknowledged function of a modern legal system."\(^{86}\) Indeed, some courts have held that a state may not constitutionally rely solely on the danger of collusion to deny an entire class of people the right to bring suit.\(^{87}\)

Rather than prohibit the child's cause of action because of the possibility of fraud and collusion, courts can instruct the jury to exercise caution in assessing the claims asserted.\(^{88}\) Courts have felt

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83. See James, Accident Liability Reconsidered: The Impact of Liability Insurance, 57 Yale L.J. 549, 553 (1948).

84. Nocktonick v. Nocktonick, 227 Kan. 758, 769, 611 P.2d 135, 142 (1980) ("Lack of cooperation may be found in inconsistent or contradictory statements by the insured or in collusion between the injured party and the insured which results in false statements to the company."); see Sorensen v. Sorensen, 369 Mass. 350, 365, 339 N.E.2d 907, 915 (1975) ("The parent is usually represented by counsel provided by the insurance company. Such counsel is ever alert to protect the interests of the insurance company and ready to expose any attempts at collusive and fraudulent conduct. Any overt attempt at collusion constitutes a criminal offense and will be punishable as such.").

85. As the court said in Moulton v. Moulton, 309 A.2d 224 (Me. 1973), "[a] generalized policy concern to prevent fraud or collusion . . . [is] insufficiently weighty to render tolerable the basic unfairness and inequity inhering in the denial of a remedy to one who has suffered wrong at the hands of another. . . . [The courts should] not have so little trust in the general ethics and honor of our citizenry, and in the abilities of our judges and jurors to discern the genuine from the spurious, that [they] must take refuge in [this] kind of unselective 'overkill.'" Id. at 229; see Nocktonick v. Nocktonick, 227 Kan. 758, 769-69, 611 P.2d 135, 142 (1980).


88. See Rozell v. Rozell, 281 N.Y. 106, 113, 22 N.E.2d 254, 257 (1939). If legislators think that insurance companies need protection from fraudulent claims, they could enact statutes providing that injuries to the insured's child are not covered by the policy unless the policy explicitly extends such coverage. Cf. N.Y. Ins. Law § 167(3) (McKinney 1966). This statute provides that: "No policy or contract shall be deemed to insure against any liability of an insured because of death of or injuries to
competent to deal with the possibility of fraudulent suits between others in intimate relationships as well as in those suits allowed as exceptions to parental immunity. It is unreasonable to expect more undetectable fraudulent conduct when a child sues his parent for negligently inflicted personal injuries.

The most convincing rationales advanced in support of parent-child immunity are those which allege that the immunity is necessary to the smooth functioning of the parent-child relationship in that the immunity fosters domestic tranquility and serves to maintain parental authority. Even these rationales, however, are not unassailable. The domestic tranquility allegedly fostered by the immunity arises from a "procedural disability [of the child] to sue . . . and not from a lack of a violated duty." The refusal to permit the injured party to sue does not eliminate the conflict. The loss, and thus the conflict, exists regardless of the immunity: "[I]t is the injury itself which is the disruptive act." To prohibit suit in the name of domestic harmony is to allege "that an uncompensated tort makes for peace in the family."

The immunity merely ensures that the existing loss will be borne by the injured party, rather than, as in the normal case, shifted to the tortfeasor. There is no reason to believe that allocating the loss to the victim will produce less disharmony than requiring the tortfeasor to shoulder the burden, especially in light of the constant contact between the uncompensated child and the parent inherent in the family relationship.

his or her spouse . . . unless express provision relating specifically thereto is included in the policy." Id. In view of the lack of evidence of collusion, such a statute would seem to be unnecessary.


91. See supra note 45 and accompanying text.


94. W. Prosser, supra note 5, § 122, at 868.

The existence of liability insurance further undermines the validity of the domestic tranquility rationale. When the parent carries insurance, the "action between parent and child is not truly [adversarial]" because in reality it is "between [the] child and [the] parent's insurance carrier." Additionally, insurance proceeds may provide a fund that would actually alleviate family disharmony by removing the financial burden caused by an unexpected injury.

The domestic tranquility rationale is also discredited by the recognition that there has never been a bar to suits between parent and child for actions in property or contract, even though these disputes present the same potential for friction as personal injury suits. Indeed, even personal injury suits between parents and children have been permitted when they fall within a recognized exception to parental immunity. There is no reason why any of these suits would be less acrimonious than suits for personal injuries negligently inflicted.

One final factor further undercuts the family harmony rationale for the immunity: The courts do not act to protect the family from the friction inherent in litigation when to do so would be detrimental to injured third parties. If, for example, a parent in the presence of his child negligently injures a third party, the courts do not protect family harmony by prohibiting the child from testifying against his parent in the suit brought by the injured person, yet the potential for disharmony is not lessened by prohibiting the child from testifying.

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101. The result of this distinction is that the law protects "the property rights of a minor more zealously than the rights of his person." Goller v. White, 20 Wis. 2d 402, 410, 122 N.W.2d 193, 197 (1963).
102. See supra note 70 and accompanying text; infra notes 134-41 and accompanying text.
103. "It is difficult to understand by what legerdemain of reason, logic or law ... it can be said that domestic harmony would be undisturbed in one case [as when the child is emancipated] and be upset in the other [as when the child is a minor]." Signs v. Signs, 156 Ohio St. 566, 576, 103 N.E.2d 743, 748 (1952).
mony engendered by this litigation approximates that present where the parent-child immunity is applied.

The only basis for distinguishing the two situations would seem to be that when the plaintiff is not a family member, whatever disharmony is created does not affect him, whereas, when he is a member of the family, he is adversely affected by any discord that may be created by the litigation. Such a distinction does not explain why one plaintiff may receive compensation for his injuries while another is told that recovery is prohibited as a matter of law. Certainly potential plaintiffs should consider the possibility that the value of their recovery may be diminished by other factors; however, such a possibility is no reason to deny a tort victim the opportunity to decide whether he wants to be compensated despite the risk of creating disharmony among members of his family. If the fear of disharmony in the family is insufficient to prevent a third party from subjecting families to the friction inherent in litigation by requiring a child to testify against his parents, it should not be sufficient to prevent the injured child from deciding to seek compensation for his injuries.

An additional rationale advanced in support of parental immunity is that those charged with responsibility for disciplining and controlling their children should not be liable in tort, because such liability would undermine parental authority and discretion. There are two levels on which this rationale can arguably support the immunity. First, it can be contended that permitting any suit by a child against his parent will undermine parental authority. The number and variety of suits that children have always been permitted to bring against their parents demonstrates that courts have not accepted this contention. The second, and more convincing, level on which the parental authority and discretion argument is used relates to the parental

lege and Spoil the Child, 74 Dick. L. Rev. 599, 600 n.5 (1970) (in some parts of Europe, relatives by blood or marriage are incompetent to testify as witnesses and can claim a privilege against self-incrimination if asked to testify against members of their families). Marital communications are, of course, privileged. C. McCormick, Handbook of the Law of Evidence §§ 78-86, at 161-74 (2d ed. 1972).

105. See, e.g., Barlow v. Iblings, 261 Iowa 713, 717-18, 156 N.W.2d 105, 107-09 (1968), limited, Turner v. Turner, 304 N.W.2d 786, 788-89 (Iowa 1981); Mahnke v. Moore, 197 Md. 61, 68, 77 A.2d 923, 926 (1951); Cannon v. Cannon, 287 N.Y. 425, 428, 40 N.E.2d 236, 237-38 (1942), overruled, Gelbman v. Gelbman, 23 N.Y.2d 434, 438, 245 N.E.2d 192, 193, 297 N.Y.S.2d 529, 531 (1969); Gunn v. Rollings, 250 S.C. 302, 305, 157 S.E.2d 590, 591 (1967); Wick v. Wick, 192 Wis. 260, 262, 212 N.W. 787, 787 (1927), overruled, Goller v. White, 20 Wis. 2d 402, 410, 122 N.W.2d 193, 198 (1963). While this rationale lends some support to cases prohibiting children from suing their parents, it is irrelevant, and in fact may militate against the immunity, in cases where the immunity protects children from suits by their parents. This is true for most of the rationales for the immunity.

106. See sources cited supra notes 63-64, 70 and accompanying text; infra notes 134-41 and accompanying text.
conduct that injured the child. In this context, it is helpful to distinguish between parental authority and parental discretion. Although there is some overlap between protecting parental authority and protecting the right of parents to raise their children by their own methods and in accordance with their own attitudes, these two goals of the immunity will usually be relevant in different situations.

The reluctance to undermine parental authority should be a factor only when the injury results from an exercise of that authority. If, for example, a child could successfully sue his parent for every technical battery, parental authority would be seriously undermined. The exception to the immunity for intentional torts, however, indicates that courts have not been persuaded that the parents' need to maintain authority justifies the immunity, because it is by intentional conduct that a parent exerts his authority. Furthermore, there is no evidence that the abolition of the immunity for intentional conduct has resulted in any loss of parental authority.

The more persuasive basis of this rationale is the defense of the parents' right to raise their children, even when they elect to do so in an unorthodox manner. This parental right has been afforded constitutional protection, and thus it might be argued that parental immunity merely implements this right. Some courts fear that without immunity, juries might express their disapproval of unusual child-rearing practices by invariably awarding damages to children in cases where the parents' unconventional conduct was arguably not tortious. Such a result would effectively curtail the exercise of consti-

107. When dealing with intentional conduct, courts have relied on a privilege that permits parents to use reasonable force to discipline their children. Clasen v. Pruhs, 69 Neb. 278, 281, 95 N.W. 640, 642 (1903); Steber v. Norris, 188 Wis. 366, 372-73, 206 N.W. 173, 175 (1925). For cases in which actions against a parent were maintained for willful or malicious conduct, see Annot., 19 A.L.R.2d 423, 451-62 (1951).

108. See infra notes 223-26 and accompanying text.


tionally guaranteed parental discretion in matters of child-rearing.

Moreover, the parent's relationship to his child involves both rights and duties, and courts, cognizant of the heavy responsibility imposed on a parent to raise his child, are sensitive to the external factors affecting that responsibility. Parents whose "[p]hysical, mental or financial weakness [causes them] to provide what many a reasonable man would consider substandard maintenance, guidance, education and recreation for their children, and in many instances to provide a family home which is not reasonably safe as a place of abode," might be unduly burdened by permitting a suit.

Nonetheless, even the importance of maintaining parental discretion cannot justify requiring the child victims of tortious conduct to remain uncompensated. Parents do not possess complete discretion in raising their children. The parent's discretionary right ends at the point where the child's rights begin. The courts routinely intervene when the parent's conduct is criminal or where the child's physical or mental health is endangered. As of 1974, every state provided for court intervention in the family to protect children. Pursuant to these statutes, courts remove approximately seventy-five thousand children a year from their parents' homes. Permitting a child's suit for personal injury damages involves significantly less infringement of

111. "Parenthood places a grave responsibility upon the father and mother. It is their duty to rear and discipline the child. In rearing the child, the parents must provide a home and perform tasks around the home and on the premises." Borst v. Borst, 41 Wash. 2d 642, 656, 251 P.2d 149, 156 (1952); accord Lemmen v. Servais, 39 Wis. 2d 75, 79, 158 N.W.2d 341, 344 (1968).

112. See McCurdy I, supra note 2, at 1059.


parental discretion than does the removal of the child from the parents' control.\textsuperscript{119}

Additionally, parents engage in intentional conduct when they exercise their discretion, yet there is no evidence that permitting suit by children against their parents for intentional torts has significantly eroded parents' ability to raise their children. The jury has been permitted to "second guess" parents as to whether the amount of force used to discipline a child was reasonable, and therefore privileged.\textsuperscript{120} With sufficient guidance from the judge, a jury should be able to evaluate the parents' running of the household, or any other conduct by which the child has been injured, without significantly eroding parents' discretion.

The concern for the "physical, mental or financial weakness" of the parent is not particularly persuasive. The argument regarding physical weakness is totally specious because in negligence cases an allowance is made for the defendant's physical infirmities.\textsuperscript{121} Although concern for the parent of substandard intelligence has some appeal, no reason is apparent why it should outweigh concern for the injured child, or why the law should protect the person of substandard intelligence when he acts as a parent, but not otherwise.\textsuperscript{122} Furthermore, even if a court decided that a parent's mental deficiencies require the child to remain uncompensated, no reason exists to extend the immunity to all parents regardless of their mental capabilities.

The solicitude expressed for parents with limited financial resources also suffers from a lack of cogency. A parent who, for example, is financially unable to provide a reasonably safe home will probably not be sued for damages because it is very unlikely that he could pay a substantial judgment. Beyond this practicality, there is the legal principle that a defendant's poverty is not a factor in determining whether he should be held liable for damages tortiously caused.\textsuperscript{123} Moreover,

\textsuperscript{119} "The total extinction of a familial relationship between children and their biological parents is the most drastic measure that a state can impose, short of criminal sanctions, to protect disadvantaged or neglected children." Lehman v. Lycoming County Children's Servs. Agency, 648 F.2d 135, 163 (3d Cir. 1981) (Rosenn, J., dissenting). In addition to being a drastic measure, removal of the child from the home is made even more intrusive in that it is accomplished by resort to statutes that are often very broad in their application. See Roe v. Conn, 417 F. Supp. 769, 780 (M.D. Ala. 1976) (overturning termination statute as void for vagueness); Alsager v. District Court, 406 F. Supp. 10, 12 (S.D. Iowa 1975) (same), aff'd, 545 F.2d 1137 (8th Cir. 1976); Note, Due Process and the Fundamental Right to Family Integrity: A Re-evaluation of South Dakota's Parental Termination Statute, 24 S.D. L. Rev. 447, 455-60 (1979).

\textsuperscript{120} W. Prosser, supra note 5, § 27, at 136.

\textsuperscript{121} Id. § 32, at 151-52.

\textsuperscript{122} Id. at 152-54.

\textsuperscript{123} Zelinger v. State Sand & Gravel Co., 38 Wis. 2d 98, 108-09, 156 N.W.2d 466, 471 (1968); W. Prosser, supra note 5, § 5, at 22-23.
even if there were some reason to protect poor parents from liability, that would not support this overbroad immunity which prevents all injured children from recovering.

Finally, there are many types of negligent conduct—for example, negligently driving a car or leaving a loaded revolver where a toddler is playing—which have nothing to do with the parents' authority within the family or their discretion in raising their children. As to injuries caused by this type of tort, the parental discretion rationale for the immunity is totally inapplicable.

In cases of neglect and criminal conduct, and those for damages inflicted by intentional torts, the courts have shown themselves able to distinguish between permissible and impermissible parental conduct. There is no reason to believe that they will not be able to make similar distinctions in personal injury cases founded on a parent's negligence toward his child. The absence of complaints in those states that have abrogated the immunity is further evidence that the immunity is not necessary to protect legitimate parental discretion. Clearly, complete immunity for negligently caused injury is not required to protect parents' right to raise their children.

II. LIMITATIONS ON PARENT-CHILD IMMUNITY

The parent-child immunity rule, as promulgated at the turn of the century, presented an absolute bar to a child’s tort action against his parent. As has been shown, the policy considerations advanced to support the rule are not adequate. In the ninety years since the initial adoption of the immunity, society’s view of the child, and the parent-child relationship, has changed radically. Children are now viewed as individuals with rights of their own, and the parent-child relationship has become more egalitarian. Children are no longer regarded as evil beings who must be beaten down; instead they are viewed as reasonable, friendly people who will not take advantage of their parents if they are treated nicely.

This moderation of attitude towards children has coincided with an increase in the use of liability insurance and the consequent decrease in direct parental financial responsibility in the event of a child's law-

124. See infra notes 223-26 and accompanying text.
125. W. Prosser, supra note 5, § 122, at 865.
126. See supra pt. I(B)2.
suit for personal injuries. These two factors have led courts to re-address the immunity issue in keeping with their responsibility in the field of torts to make the law responsive to new social and economic conditions.

The response has been "to whittle away the [immunity] by statute and by the process of interpretation, distinction and exception." When particularly egregious cases came before the courts, they balanced the social benefits of the rule against its detrimental effects and partially abrogated it by the use of exceptions. "These exceptions reflect distaste for the injustices which often result from a strict, pervasive application of the parental immunity rule."

A. Specific Exceptions

As a general rule, the courts will fashion an exception to parental immunity whenever the family relationship no longer exists or has been "temporarily abandoned" in the context of the incident giving rise to the injuries. Because the immunity ostensibly protects the family relationship, it is no longer necessary when that relationship ceases to exist. Thus, parental immunity will not bar a suit for personal injuries by an emancipated child against his parent because emancipation ends the parent-child relationship. Similarly, several courts permit a child's tort action against a deceased parent's estate.

In addition, the family relationship is deemed temporarily

130. The existence of insurance also undermines the reasons for immunity. See supra notes 96-98 and accompanying text.
abandoned when the parent injures the child intentionally, wantonly, or, in some jurisdictions, with gross negligence.\textsuperscript{137}

It is also possible for a parent to take on additional roles with respect to his child and to be held liable because the child is not injured by the parent acting as a parent. This most commonly occurs when the child is injured while the parent is acting in a business context.\textsuperscript{138} If the parent acts as the child’s employer, he assumes all of the responsibilities of an employer, including the duty to provide reasonably safe working conditions.\textsuperscript{139} If the child is not an employee, but is injured incidentally to the parent’s transaction of business, the parent is still liable because he abandons his parental role while pursuing his business endeavors.\textsuperscript{140}

Recently, some courts have adopted another exception, holding that the immunity does not apply when the injury was incurred in a motor vehicle accident caused by the parent’s negligent driving.\textsuperscript{141}

allowed the action against a parent’s estate on the ground that parental immunity is a personal defense that the parent’s estate cannot assert against the child’s action. Barnwell v. Cordle, 438 F.2d 236, 241 (5th Cir. 1971) (applying Georgia law); Sisler v. Seeberger, 23 Wash. App. 612, 614-15, 596 P.2d 1362, 1363-64 (1979).

Mahnke v. Moore, 187 Md. 61, 67-68, 77 A.2d 923, 925-26 (1951) (father’s murder of mother and own suicide considered malicious and willful conduct and suit allowed for mental distress); see supra note 70 and accompanying text.


See Signs v. Signs, 156 Ohio 592, 595, 103 N.E.2d 743, 744 (1952) (child burned when gasoline pump exploded at father’s filling station); Borst v. Borst, 41 Wash. 2d 642, 657-58, 251 P.2d 149, 157 (1952) (father driving business vehicle run over his son who was playing in the street).

The primary reason advanced for this exception is the prevalence of automobile insurance, which, to some extent, protects the parent from having to pay damages. Additionally, the act of driving involves neither child-rearing techniques nor parental authority and discretion. Decisions in these cases, therefore, do not interfere with parental prerogatives.

Although the existence of these exceptions to parental immunity moderates its harsh effect, the end result "is a conglomerate of paradoxical and irreconcilable judicial decisions." The continued existence of parental immunity cannot be justified by the presence of exceptions when the underlying rationales for the immunity are invalid. Indeed, the very existence of exceptions undermines these rationales. Recognizing the need for more extensive action, many courts have completely or partially abrogated parental immunity.

\[ \text{Compare Smith v. Kauffman, 212 Va. 181, 183-84, 183 S.E.2d 190, 193 (1971) (child can sue parent for injuries sustained in automobile accident caused by parent's negligent driving), with Wright v. Wright, 213 Va. 177, 179, 191 S.E.2d 223, 225 (1972) (child cannot sue parent for injuries sustained due to negligently placed awning). Delaware appears to hold that, to the extent the injury is covered by automobile liability insurance, there is no immunity. Compare Williams v. Williams, 369 A.2d 669, 673 (Del. 1976) (doctrine of parental immunity inapplicable to extent damages are covered by parent's automobile liability insurance), with Schneider v. Coe, 405 A.2d 682, 683-84 (Del. 1979) (parental immunity preserved where duty arises from family relationship notwithstanding existence of insurance). The Massachusetts Supreme Judicial Court has also held that where the injury is incurred in a motor vehicle accident, the immunity fails to the extent that there is insurance. Sorensen v. Sorensen, 369 Mass. 350, 352-53, 339 N.E.2d 907, 909 (1975). That court has more recently indicated in the context of the husband-wife immunity, however, that the presence of insurance is not the touchstone of liability. See Lewis v. Lewis, 370 Mass. 619, 629-30, 351 N.E.2d 526, 532-33 (1976).} \]


143. The argument that lawsuits between parent and child for personal injuries will increase family disharmony is dubious and becomes more tenuous when the defendant has insurance. Hebel v. Hebel, 435 P.2d 8, 15 (Alaska 1967). In these days of large judgments, however, the possibility of a recovery exceeding the insurance coverage should not be ignored, nor should the possibility of conflict between, for example, a parent who is in favor of filing an unjustified suit and a child who objects to such tactics. The latter possibility exists, however, whenever a child has been injured, regardless of whether the potential defendant is an insured parent or some third party.


146. See supra notes 70, 73 and accompanying text.
B. Abrogation of the Parent-Child Immunity

In abrogating the parental immunity rule, courts have attempted to accommodate both the child's right to sue for tortiously inflicted injuries and the parent's burden of rearing his child.\footnote{147} As a result of such efforts, courts have reached different conclusions as to the appropriate breadth of the abrogation.\footnote{148} The first major alteration of the immunity was made in \textit{Goller v. White},\footnote{149} which abrogated the rule except where the allegedly negligent act involved either "an exercise of parental authority . . . [or] an exercise of ordinary parental discretion with respect to the provision of food, clothing, housing, medical and dental services, and other care."\footnote{150} Several courts have now adopted this general approach.\footnote{151}

\footnote{147} The immunity "is accorded the parent, not because he is a parent, but because as a parent he pursues a course within the family constellation which society exacts of him and which is beneficial to the state. The parental nonliability is not . . . a reward, but . . . a means of enabling the . . . discharge [of] duties which society exacts." \textit{Lemmen v. Servais}, 39 Wis. 2d 75, 79, 158 N.W.2d 341, 344 (1968).


\footnote{149} 20 Wis. 2d 402, 122 N.W.2d 193 (1963).

\footnote{150} \textit{Id.} at 413, 132 N.W.2d at 198.

\footnote{151} In \textit{Sandoval v. Sandoval}, 128 Ariz. 11, 12-13, 623 P.2d 800, 801-02 (1981), the court stated that the immunity applies only if the parent breached a duty "owed to a child within the family sphere" rather than a duty owed to the world at large. \textit{Id.} at 14, 623 P.2d at 803. In \textit{Rigdon v. Rigdon}, 465 S.W.2d 921, 923 (Ky. 1971), the court further varied the \textit{Goller} standard by not listing specific activities as to which a parent is immune in the use of ordinary discretion. Instead, the immunity applies if ordinary discretion was used "with respect to provisions for the care and necessities of the child." \textit{Id.} at 923. In Michigan, the Supreme Court adopted the \textit{Goller} approach but varied it by substituting the term "reasonable" for "ordinary." See \textit{Plumley v. Klein}, 388 Mich. 1, 8, 199 N.W.2d 169, 172-73 (1972); \textit{accord} \textit{Grodin v. Grodin}, 102 Mich. App. 396, 401-02, 301 N.W.2d 869, 871 (1980). In 1968, Minnesota adopted the \textit{Goller} approach, \textit{Silesky v. Kelman}, 281 Minn. 431, 161 N.W.2d 631 (1968), but has since abandoned it in favor of total abrogation of the immunity. \textit{Anderson v. Stream}, 295 N.W.2d 595, 601 (Minn. 1980). The lower appellate courts in Illinois appear to have adopted an approach similar to \textit{Goller}, although the exceptions where the immunity is recognized are broader. They have abrogated the immunity except for injuries caused by "mere negligence within the scope of the parental relationship." \textit{Illinois Nat'l Bank & Trust Co. v. Turner}, 33 Ill. App. 3d 234, 236, 403 N.E.2d 1256, 1258 (1980); \textit{accord} \textit{Thomas v. Chicago Bd. of Educ.}, 77 Ill. 2d 165, 395 N.E.2d 538 (1979). Other courts which have not expressly adopted \textit{Goller} have discussed it favorably, indicating that they may adopt that approach when the proper case is before them. See \textit{Hebel v. Hebel}, 435 P.2d 8, 15 (Alaska 1967); \textit{Felderhoff v. Felderhoff}, 473 S.W.2d 928, 933 (Tex. 1971).
States which follow the *Goller* formulation must face two new issues: What type of conduct is encompassed by the two vaguely worded exceptions to the immunity, and what policy reasons justify retaining the immunity for such conduct. In addressing the first issue, some courts have perceived a basic problem with the *Goller* approach in that the immunity applies only when the discretion used was “ordinary.”152 Presumably, ordinary means reasonable. This requirement deprives the immunity of much of its meaning because if a parent acted reasonably, he did not act negligently and thus would not require the protection of the immunity. The possibility of liability exists only when the parent did not exercise ordinary discretion, yet in that instance the *Goller* formulation would not immunize the parent.153

If the court is able to determine that the parental conduct in question involved ordinary or reasonable discretion, it must then decide whether that conduct falls within one of the areas of care excepted by *Goller*. There has been some disagreement as to the interpretation of these exceptions. In Wisconsin, for example, a six-year-old who was injured while crossing the street after getting off a school bus could not recover from her parents because, in failing to tell her how to cross streets, the parents were exercising “ordinary parental discretion with respect to other care of their child.”154 A three-year-old injured while crossing the street after his mother had left him while he was watching television might recover, however, because the mother’s negligence did not fall within the “other care” exception.155 The rather evanescent distinction between these two cases is apparently that the first involves the parents’ failure to properly educate, while the second concerns their failure to properly supervise. Similarly obscure is the legal distinction between leaving a vaporizer where a fifteen-month-old child could spill it on himself, which was determined to be negligent supervision,156 and leaving an eight-month-old child for a few minutes where she could chew on an extension cord, which was held to involve parental discretion with respect to housing and other care.157

Courts have also made some rather fine distinctions between immune and non-immune conduct under the authority exception. The

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153. See infra notes 228-29 and accompanying text.


Wisconsin courts have interpreted the parental authority exception to embrace only "the area of discipline"; consequently, it provides no immunity for the parent who negligently supervises his child. In Michigan, however, negligent supervision has been held to be within the parental authority exception, because "[t]he right to exercise authority over a child certainly includes the responsibility to supervise that child's behavior." Thus, although Michigan and Wisconsin use essentially the same test for determining whether the parent-child immunity applies, a Wisconsin parent whose child is injured because the parent was negligent in supervising him can be held liable, while his counterpart in Michigan who engaged in exactly the same conduct will be immune.

Although these distinctions are not totally arbitrary, it is difficult to glean any definitive criteria from the cases that can guide parents in their behavior and courts in their decisions. This difficulty does not invalidate the Goller formulation, but it does encourage a close examination of the justifications advanced in its defense. Goller and the first cases that adopted the Goller approach are remarkable in that, having rejected the need for the parent-child immunity in most situations, none of them explained why the immunity should be retained in the excepted situations. In later cases, the justifications offered are the same as those advanced almost ninety years ago when parental immunity was first adopted. These reasons are no more persuasive in the context of partial immunity.

Courts following Goller have alleged that family harmony will be preserved by prohibiting suits between parent and child for injuries arising from the assertion of parental authority or ordinary discretion in the areas listed. These courts have not explained, however, why a suit involving "ordinary parental discretion with respect to the

158. Thoreson v. Milwaukee & Suburban Transp. Co., 56 Wis. 2d 231, 246, 201 N.W.2d 745, 753 (1972). Under this approach, the first exception is extremely narrow; it applies only when a child is injured through negligent discipline. Because discipline involves intentional conduct, it will be a rare case which will come under the first Goller exception as interpreted by the Wisconsin courts.


161. Id. at 484, 233 N.W.2d at 49.


163. See supra notes 45, 91, 105 and accompanying text.

provision of food,” for example, would be any more disruptive of family harmony or parental authority than a suit in any of the nonexcepted situations.

Another reason that has been offered for retaining the immunity in the designated areas is that permitting recovery in the excepted areas would impose a new and heavy burden on parents. This, however, merely begs the question. Abolishing the immunity would, by definition, impose a new burden on parenthood in the sense that parents who had been protected from liability by the immunity would face the prospect of having to pay for the injuries they had tortiously caused. In this sense, however, a “new burden” is imposed whenever an established immunity is abolished. The fact that the burden of paying is new cannot justify retention. If it could, no immunity would ever be abolished. The issue is not whether the abolition of the immunity will open the defendant to new liability—it must do so. The question is whether there is sufficient reason to offer the immune party the special protection that the immunity provides. The burden rationale, therefore, is not an independent reason for retaining the immunity.

Some courts also reason that the immunity should be retained in the listed instances because holding parents liable for injuries caused by their negligence in discharging their legal duties to raise their children will seriously impair their ability to fulfill those obligations. This reasoning runs counter to the generally accepted idea that accountability encourages, rather than impedes, acceptable behavior, an idea...
at the heart of the fault system of liability.  

It is illogical, moreover, to allege that being held accountable for failing to discharge an obligation impedes the ability to fulfill that obligation.

The final reason advanced for retaining the immunity in specific circumstances is a reluctance to “enable others, ignorant of a case's peculiar familial distinctions and bereft of any standards, to second-guess a parent's management of family affairs.” Although the desire to shield parents from misguided “second-guessing” by juries is a rational goal, this justification ignores the realities of the litigation process. The finders of fact will not be ignorant of relevant familial distinctions, because they will act only after a full trial on the merits in which pertinent family data can be presented. Moreover, the jury can be instructed as to the appropriate standards and is no more “bereft” of standards in a case involving parental discretion than it would be in any other negligence case. Even the fear that juries may “disrupt the wide sphere of reasonable discretion which is necessary in order for parents to properly exercise their responsibility” can be assuaged by including in the charge an instruction that the law gives parents great discretion in these matters. Absent any indication that juries will ignore evidence or disregard instructions, the proponents of the partial immunity have not met the “heavy burden” of justifying “[a] rule which so incongruously shields conceded wrongdoing.”

C. Abrogation with Second Thoughts—The Problem of Duty

States that abrogate parental immunity are required to face the question: What duties do parents owe their children? Although this question has not received much attention in most states, the New York Court of Appeals, which had abrogated parental immunity, held in Holodook v. Spencer that parents have no legal duty to their children to supervise them properly. Indeed, the court determined

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170. See W. Prosser, supra note 5, § 5, at 23.
that it was against public policy to recognize parental failure to supervise as either an actionable tort or as a basis for a claim for contribution by an unrelated defendant who was partially responsible for the infant's injuries. 177

The position of the New York Court of Appeals in Holodook is an extreme one. Other courts, when presented with cases of negligent supervision, have decided the issue within the context of the Goller formulation as an issue involving immunity, rather than as a question of duty. 178 Those courts which held that parents could be liable assumed that a duty to supervise exists. 179 That the Holodook court accomplished its goals by refusing to recognize a duty to supervise, rather than by extending parental immunity to negligently supervising parents, has serious ramifications for both infants and third parties. 180 An immunity does not establish that a defendant's conduct is not tortious; it simply absolves him of liability. 181 A holding that the defendant owes no duty, however, means that the conduct is not tortious. Because the Holodook court thus established a novel position

177. 36 N.Y.2d at 46, 324 N.E.2d at 343, 364 N.Y.S.2d at 867-68. The New York Court of Appeals later held that a parent could be liable for contribution if he had unreasonably entrusted a dangerous instrument to his child, the child had injured himself with that instrument, and a third party was held liable for those injuries. Nolechek v. Gesuale, 46 N.Y.2d 332, 341, 385 N.E.2d 1268, 1274, 413 N.Y.S.2d 340, 346 (1978). The duty breached in Nolechek was the parents' "duty to third parties to shield them from an infant child's improvident use of a dangerous instrument." Id. at 338, 385 N.E.2d at 1272, 413 N.Y.S.2d at 344. Even in the case of a dangerous instrument, however, the parent would not be held liable to his injured child. Id. at 341, 385 N.E.2d at 1272, 413 N.Y.S.2d at 346.

178. E.g., Cherry v. Cherry, 295 Minn. 93, 95, 203 N.W.2d 352, 353 (1972) (parents exempt from suit when an eight-month-old infant chewed on a defective electrical cord left within her reach, although the mother had seen the child playing with the cord, because the use of the cord was a matter within the parents' right of discretion regarding housing), overruled sub silentio, Anderson v. Stream, 295 N.W.2d 595, 601 (Minn. 1980); Howes v. Hansen, 56 Wis. 2d 247, 261, 201 N.W.2d 825, 832 (1972) (parent liable for contribution when child injured by a power lawn mower); Thoreson v. Milwaukee & Suburban Transp. Co., 56 Wis. 2d 231, 246-47, 201 N.W.2d 745, 753 (1972) (parents liable for contribution when three-year-old child ran into the street and was struck by a car); Lemmen v. Servais, 39 Wis. 2d 75, 80, 158 N.W.2d 341, 344 (1968) (parents immune when a six-year-old child was struck by a car while attempting to cross the street because the duty to instruct the child on how to cross streets is under the "other care" exception to the immunity's abrogation).


180. An infant would not be able to sue his parent's estate, as he would in some states where parental immunity blocked the child's suit. See supra note 136 and accompanying text.

181. See infra notes 202-11 and accompanying text.

in this confused area, and retreated from New York's prior position of complete abrogation of parental immunity, it is important to analyze the reasons the court offered for its change of direction.

In *Holodook*, a four-and-one-half-year-old child was struck by a car driven by a third party. The child sued the car driver, who sought contribution from the parents. The court initially contended that New York "has not ventured into the realm of duties owed by parents to their children" and that children had never had a cause of action against their parents for injuries caused by negligent supervision. It was inaccurate, however, to say that the issue had not been considered. While until recently New York courts had not been specifically presented with the issue in a suit by a child against his parents, earlier cases had imputed negligent parental supervision to the child to bar the child's action against a third party. Thus, these courts


185. 36 N.Y.2d at 45, 324 N.Y.S.2d at 343, 364 N.Y.S.2d at 867.

186. Id. at 45, 324 N.Y.S.2d at 342, 364 N.Y.S.2d at 866-67.

187. It is not surprising that a suit directly involving negligent supervision had not been litigated until recently. Until the decision in *Dole v. Dow Chem. Co.*, 30 N.Y.2d 143, 282 N.E.2d 288, 331 N.Y.S.2d 382 (1972), New York allowed contribution between tortfeasors only under limited conditions. Therefore, before 1972, procedural rules prevented third parties who had injured negligently supervised children from impleading the parents, and thus the issue was not presented to the courts in this context. Additionally, between 1928, when New York adopted parental immunity, Sorrentino v. Sorrentino, 248 N.Y. 626, 162 N.E. 551 (1928), and 1969, when the immunity was abrogated, Gelbman v. Gelbman, 23 N.Y.2d 434, 245 N.E.2d 192, 297 N.Y.S.2d 529 (1969), children were not able to bring suits for negligent supervision against their parents. The absence of direct suits before 1928 can be explained by society's attitude regarding the parent-child relationship. See *supra* notes 24-36 and accompanying text.

188. From 1839 to 1935 it was the law in New York that a child could not recover from a negligent third party if the child's injury was caused in part by the parent's negligent supervision. Mangam v. Brooklyn R.R., 38 N.Y. 455 (1868); Hartfield v. Roper, 21 Wend. 615 (N.Y. Sup. Ct. 1839). The reason for this was that the parent's negligence was imputed to the child, who was then barred by the doctrine of contributory negligence. Thus, because negligence does not exist without duty, the courts which imputed negligence to the child had found that a parent had a legally cognizable duty to supervise his child. This duty could have been owed to one of two people, the child or the third party whose negligence was partially responsible for the child's injury. Both case law and a 1935 study prepared for the New York State Law Revision Commission indicate that the duty ran to the child. Hartfield v. Roper, 21 Wend. 615 (N.Y. Sup. Ct. 1839); G. Turner, *Imputation of Parent's or Custodian's Contributory Negligence to an Infant Plaintiff*, in *Leg. Doc. No. 50, at 47, 59* (1935) (report of N.Y. Law Revision Comm'n). The *Holodook* court rejected the idea that
had found that the parent had a legally cognizable duty to supervise his child, otherwise there would have been no parental negligence to impute to the child.\textsuperscript{189}

Having reached the questionable conclusion that New York had never recognized a duty to supervise, the court listed its policy reasons for finding that no duty existed, relying on many of the same rationales it had rejected in \textit{Gelbman v. Gelbman}\textsuperscript{190} when parental immunity was abrogated. Initially, the court alleged that an action by a child for negligent supervision would place an unreasonable burden on the parent by "circumscrib[ing] the wide range of discretion a parent ought to have in permitting his child to undertake responsibility and gain independence."\textsuperscript{191} As discussed earlier, this reasoning

the duty ran to the child. On the other hand, if the duty is owed to the third party, he should be able to recover contribution from the parent in the event of a lawsuit by the child, because the third party would have been injured by the parent's breach of a duty owed to him. \textit{Holodook} did not discuss the possibility of a duty running to the third party, but in \textit{Nolechek v. Gesuale}, 46 N.Y.2d 332, 385 N.E.2d 1268, 413 N.Y.S.2d 340 (1978), the court expressly rejected the idea, except in those few cases where the negligent supervision involved entrusting a child with a dangerous instrument.

\textsuperscript{189} The rule of imputed negligence was abolished by N.Y. Gen. Oblig. Law § 3-111 (McKinney 1978), which provides: "In an action brought by an infant to recover damages for personal injury the contributory negligence of the infant's parent or other custodian shall not be imputed to the infant." \textit{Id}. The \textit{Holodook} court stated that, in some cases, recognition of a parental duty to supervise would contravene the legislative intent of § 3-111. The court reasoned that allowing the parent to be held liable for contribution would diminish the child's recovery if the family is viewed as an economic unit, and that the legislative goal behind § 3-111, permitting the injured child full recovery, would thus be undermined. This argument overlooks a number of factors. First, suit is allowed in a great number of instances even though the family treasury is thereby diminished. \textit{See supra} notes 71-80 and accompanying text. Second, when the parent carries adequate insurance, the family funds will not be depleted. Third, the \textit{Holodook} court's logic seems somewhat inconsistent in that it first argued that New York had never recognized a duty to supervise and then alleged that the legislature intended to discard the actionable tort for negligent supervision when it passed § 3-111. 36 N.Y.2d at 48, 324 N.E.2d at 345, 364 N.Y.S.2d at 869-70. The court failed to recognize, however, that the legislature abolished the imputed negligence rule to allow the child to recover damages previously denied from negligent third persons, regardless of the parent's contributory negligence of failure to supervise. Because parent-child immunity shielded parents from liability at the time § 3-111 was enacted, the legislature was not required to consider the effect that the abolition of imputed negligence would have on parents' liability. Parental immunity was assured. The legislature's action, therefore, should not be viewed as a tacit rejection of the duty to supervise. Its goal was, more likely than not, merely to allow the child recovery from the third party tortfeasor because it is against public policy to allow an injury to go completely uncompensated. \textit{See Neff v. City of Cameron}, 213 Mo. 350, 360, 111 S.W. 1139, 1141 (1908).


cannot withstand scrutiny.\textsuperscript{192} The judicial system has proved to be capable of distinguishing acceptable parental conduct from that which should not be countenanced. The real need to recognize parental prerogatives does not require that the courts permit parents to act negligently toward their children with impunity.

The Holodook court also voiced concern that suits for negligent supervision would endanger family harmony and could, moreover, be used “in a retaliatory context between estranged parents . . . or by children estranged from their parents.”\textsuperscript{193} The court did not establish why it is more likely that this one type of action will lead to disharmony or be used in a retaliatory context than a suit based on other types of parental conduct. Vengeful children, and parents seeking retaliation against their former spouses, could get just as much satisfaction from a judgment in a suit charging “regular” negligence as from a similar-sized judgment in a suit based on negligent parental supervision. Furthermore, even though the incentive for initiating suit might be vengeful, the parent would not be held liable unless negligence were proven. The innocent parent would therefore have little to fear, and the negligent parent should not be heard to complain for being called to account for his actionable negligence.

The area of negligent supervision, however, often involves an additional factor not generally present in the other cases of parental negligence—the presence of a third party. The typical fact pattern involves a child who was negligently supervised by his parents and was consequently injured by a third person. Whereas a child will generally not sue an uninsured parent,\textsuperscript{194} an unrelated defendant has no natural constraints regarding suit and will attempt to recoup part of the damages he must pay through contribution from the parents.

The Holodook court found this possibility to be decisive of the need for immunity for several reasons that merit serious consideration. The court expressed concern that a parent’s liability for contribution based on a claim of negligent supervision might result in detriment to the child. First, the parent may refuse to prosecute the child’s cause of action against the third party for fear that the parent will be impleaded and required to pay damages.\textsuperscript{195} Second, the amount of the child’s recovery from the third party tortfeasor might indirectly be

\textsuperscript{192} See supra notes 114-20 and accompanying text.
\textsuperscript{193} 36 N.Y.2d at 49, 324 N.E.2d at 345, 364 N.Y.S.2d at 870.
\textsuperscript{194} Id. at 52, 324 N.E.2d at 347, 364 N.Y.S.2d at 872 (Jasen, J., dissenting); accord Lastowski v. Norge Coin-O-Matic, Inc., 44 A.D.2d 127, 140, 355 N.Y.S.2d 432, 446 (1974) (Hopkins, J., dissenting); cf. Sorenson v. Sorenson, 369 Mass. 350, 361, 339 N.E.2d 907, 913 (1975) (“[w]hen an action is brought against a parent, frequently it will be brought at the instance of, or with the approval of, the parent with an eye toward recovery from the parent’s already purchased liability insurance” (citations omitted)).
\textsuperscript{195} 36 N.Y.2d at 46, 324 N.E.2d at 344, 364 N.Y.S.2d at 868.
reduced because the parent might divert part of the funds received to satisfy his obligation to pay damages.\(^{196}\)

These concerns are somewhat unrealistic. A parent's failure to sue a third party does not result in the extinction of the child's claim. The statute of limitations is tolled until the child reaches majority, at which time he can maintain a suit in his own right.\(^{197}\) Furthermore, the court can protect the child's damage award from diversion by the parents by placing the award in a trust and appointing a non-parent trustee.\(^ {198}\) The possibility that the parent might appropriate some part of the child's damage award to pay the third-party judgment for contribution would thus be eliminated.

The major problem with the Holodook approach, however, is that the court ignored the strong policy reasons behind contribution—reasons espoused not only by the courts,\(^ {199}\) but also by the legislatures that have enacted contribution statutes.\(^ {200}\) Fairness requires that "among parties involved together in causing damage by negligence, [apportionment of liability] should rest on relative responsibility."\(^ {201}\) Under Holodook, an unreasonable burden is placed on the third party who cannot recover a judgment against the parents for contribution.\(^ {202}\) This financial burden is especially unfair when the third party has been only slightly negligent and yet is required to pay for all of the child's injuries because the parent's conduct, although more egregious, involved no breach of duty.\(^ {203}\) In some states where the

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196. Id. at 47, 324 N.E.2d at 344, 364 N.Y.S.2d at 868.
198. See Hairston v. Broadwater, 73 Misc. 2d 523, 531, 342 N.Y.S.2d 787, 794-95 (Sup. Ct. 1973) ("[s]eparate guardianship and trust accounts under judicial scrutiny are the legal protection for infants so that damages awarded for their pain and suffering are not invaded to pay the parents' debt"); N.Y. Civ. Prac. Law § 1206 (McKinney 1976) (court may order that an infant's money be placed in a trust or in a bank subject to withdrawal only by court order); N.Y. Supr. Ct. Proc. Act § 1701 (McKinney Supp. 1981-1982) (court has power over infant's property and can appoint a guardian whether or not the parents are alive).
202. When an injury is caused by two tortfeasors, "[t]here is obvious lack of sense and justice in a rule which permits the entire burden of a loss . . . to be shouldered onto one alone, according to the accident of a successful levy of execution, the existence of liability insurance, the plaintiff's whim or spite, or his collusion with the other wrongdoer, while the latter goes scot free." W. Prosser, supra note 5, § 50, at 307.
203. See, e.g., Schneider v. Coe, 405 A.2d 682 (Del. 1979) (child kicked by pony tethered on third party's fenced land); National Dairy Prods. Corp. v. Freschi, 393
parent is protected from liability to his child by an immunity, a third party sued by the child has been permitted to obtain contribution from the negligent parent.\textsuperscript{204}

Additionally, the requirement that the third party defendant pay all the damages following an accident relieves the parent of an obligation he would have had if not for his parental status. Moreover, if as the \textit{Holodook} court suggests, the family is viewed as an economic unit,\textsuperscript{205} the requirement that the third party pay the total damages means that the compensatory funds directly enrich the family treasury of the wrongdoing parent, a result which violates the prohibition against a tortfeasor benefiting from his wrong.\textsuperscript{206} The ultimate injustice occurs when a negligently supervised child is killed by a third party. In that case, a wrongful death recovery would go directly to the parents whose carelessness contributed to the child's death.

The \textit{Holodook} court's use of a duty analysis creates additional injustices for third parties. Not only is it possible that the unrelated tortfeasor may be required to sustain the entire cost of injuries to negligently supervised children, third parties may also have to bear the cost of their own injuries sustained as a result of the negligently supervised child's actions. For example, a third party who was injured while swerving to avoid a toddler playing in the street could not recover in New York because the parent breached no duty by failing to supervise the infant.\textsuperscript{207} In those states where parents are immune

\textsuperscript{204} E.g., \textsuperscript{204} Perchell v. District of Columbia, 444 F.2d 997, 999 (D.C. Cir. 1971); Shor v. Paoli, 353 So. 2d 825, 826 (Fla. 1978); Fuller v. Fuller, 380 Pa. 219, 221, 110 A.2d 175, 177 (1955); Zarrella v. Miller, 100 R.I. 545, 548-49, 217 A.2d 673, 675-76 (1966).

\textsuperscript{205} 36 N.Y.2d at 47, 324 N.E.2d at 344, 364 N.Y.S.2d at 868-69 (the family "is a single economic unit and recovery by a third party against the parent ultimately diminishes the value of the child's recovery").


\textsuperscript{207} See Nolechek v. Gesuale, 46 N.Y.2d 332, 340, 385 N.E.2d 1268, 1273, 413 N.Y.S.2d 340, 345 (1978). The \textit{Nolechek} court recognized the injustice of placing sole liability on a third party when the parent was really at fault. In \textit{Nolechek}, a parent gave a motorcycle to his partially blind child. The unsupervised child was decapitated when he rode into a steel cable that had been placed over a private road. The court refused to recognize a parental duty owed to the child, but did recognize a duty, on the part of the parent who entrusts a child with a dangerous instrumental-ity, to third parties to protect them from injury. \textit{Id.} at 341, 385 N.E.2d at 1274, 413 N.Y.S.2d at 346; cf. Goedkoop v. Ward Pavement Corp., 51 A.D.2d 542, 378 N.Y.S.2d 417 (1976) (no duty to child when child injured by explosives in father's basement, but contribution allowed because of duty to the world at large not to negligently maintain explosives).
from claims of negligent supervision, third parties injured in such an accident could recover. 208

The third party, moreover, is required to shoulder this burden solely for the benefit of an unrelated individual. When the child is prevented from recovery, it is at least done for the espoused purpose of preserving family harmony and the child's ultimate good. 209 The negligent third party, on the other hand, stands to gain nothing by the decision not to hold the parents partially liable. He and the totally innocent members of his family stand only to lose. The Holodook court feared that the family treasury of the injured child might be depleted by a finding of parental liability for contribution, 210 but did not recognize that the injured child's family is essentially being favored at the expense of the third party's family. 211

The solicitude shown the injured child's family is premised on the assertion that "third parties . . . are more likely than the parent in these cases to have appropriate liability coverage." 212 Only when the child is injured by the individual third party's use of an automobile, however, is the non-parent more likely to carry insurance. 213 Negligent supervision cases do not always involve automobile accidents. 214 There is no reason to believe, in these many other cases, that the third party is more probably insured than is the parent.

209. See supra note 45 and accompanying text.
210. 36 N.Y.2d at 47, 324 N.E.2d at 344, 364 N.Y.S.2d at 868-69.
211. If the family is viewed as an economic unit and an innocent member of the third party's family has been injured, the Holodook approach will diminish his recovery, the very result which the Holodook court sought to avoid. For example, the C's and D's each have a two-year-old child. Mrs. D and her child visit the home of Mrs. C. Mrs. D negligently supervises the two children who are injured because of Mrs. C's negligently maintained swimming pool. Both parents have been negligent, but Mrs. C could not get contribution from Mrs. D if D's child won an award of damages from the C family. Mrs. D, however, could get contribution from Mrs. C for any damages assessed against Mrs. D in a suit by C's child. The end result is that the recovery of C's child has been diminished.
212. 36 N.Y.2d at 46, 324 N.E.2d at 344, 364 N.Y.S.2d at 868.
213. This is because of compulsory automobile insurance. See statutes cited supra note 142.
The Holodook court concluded that a parent's duty to supervise his child is "'one whose enforcement can depend only on love.'"215 No explanation was offered as to why a parental duty of supervision cannot be legally enforced by a system that requires proper supervision by schools,216 grandparents,217 baby sitters218 and Boy Scout leaders.219 Negligent supervision "'if done by one ordinary person to another'"220 is tortious; it is equally wrongful when engaged in by a parent.221

The duty analysis adopted by the Holodook court to prohibit liability is even harder to justify than is the parent-child immunity. The immunity sacrifices the child in the name of protecting the family. The duty analysis will often have the same effect, but where a third party is involved, this approach also sacrifices the third party for the benefit of the plaintiff's family.

That decisions in the area of negligent supervision will be difficult to make is certain. The jury is called upon to make fine distinctions between parental activity that is negligent and that which actually furtheres the parent's obligation to allow his child to exercise independence and responsibility. Juries, however, are often required to make equally difficult decisions, and that decisions are difficult is no reason to refuse to make them, especially in light of society's "vital interest . . . in protecting people from losses resulting from accidents."222

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220. 36 N.Y.2d at 44, 324 N.E.2d at 342, 364 N.Y.S.2d at 865-66 (quoting McCurdy I, supra note 2, at 1030). The Holodook court had asserted that its purpose was to confine the effect of the abrogation of parent-child immunity to cases involving "acts which if done by one ordinary person to another would be torts." 36 N.Y.2d at 44, 324 N.E.2d at 342, 364 N.Y.S.2d at 865. Because negligent supervision by a non-parent is an actionable tort, parent-child immunity should not shield negligently supervising parents.


III. Standards Suggested to Better Accommodate the Needs of Both Children and Their Parents

Over the last fifteen years, courts in nine states have determined that parent-child immunity is not defensible and have either abolished it completely or have refused to adopt it. These courts have recognized that an immunity is the exception to the general rule of liability for negligently caused injury. As an exception, it must be justified, and the person who contends that he should escape liability where others must pay has the burden of showing the merit of his claim for special treatment. Parents have never produced such proof, and the decisions that have protected parents from liability have been based on little more than judicial suspicion that permitting suits between parent and child for injuries would have unacceptable consequences. Whatever little basis there may have been for such surmise has been undercut by experience in those states that do not accept the immunity.

There is no evidence that abrogation of parental immunity has created an unreasonable burden for either families or courts. Parents have not been enfeebled, nor has their constitutional right to raise their children been curtailed. This right, which was recognized most clearly in *Wisconsin v. Yoder*, is subject to limitation in that it can only be exercised reasonably. The constitutional right is thus more confined in its implementation than is the parent-child immunity, even in its partial form, because the immunity gives a parent unlimited protection from liability, regardless of the enormity of his conduct.

Parental immunity should be abolished and the courts should recognize that parents do have duties toward their children, including the duty to act as "an ordinarily reasonable and prudent parent [would


224. See President & Dir. of Georgetown College v. Hughes, 130 F.2d 810, 812 (D.C. Cir. 1942) (Rutledge, J.).


227. See *id.* at 229-30; Prince v. Massachusetts, 321 U.S. 158, 166-68 (1934); supra note 115 and accompanying text.
act) in similar circumstances." This standard would permit an injured child, or a third-party plaintiff, to recover only if the parent had failed to meet the standard of care required of parents. Thus, the standard recognizes that parents require discretion regarding their conduct toward their children. Courts should further emphasize parental child-rearing rights by including in their jury instructions an admonition to recognize the wide discretion that parents must be accorded in determining how best to raise their children. A reasonable parent standard, if adequately explained to the jury, would thus protect legitimate parental prerogatives without depriving the injured child of the possibility of recovery, where recovery would be appropriate.

Courts or legislatures that hesitate to abrogate parental immunity completely might consider adopting a standard that would permit the court to grant immunity when the parent has proven that the challenged conduct was both peculiarly parental and reasonable. The use of the term "peculiarly parental," rather than the Goller approach of enumerating types of conduct, would avoid requiring the courts to apply "vaguely worded, highly subjective standards" to determine whether an array of fact patterns fall within specific categories of immunized conduct. Additionally, the requirement that the con-

228. Gibson v. Gibson, 3 Cal. 3d 914, 921, 479 P.2d 648, 653, 92 Cal. Rptr. 288, 293 (1971) (en banc) (emphasis omitted). There is some doubt whether California, in abrogating the immunity, gave parents some protection not provided other defendants. The issue is whether a "reasonable parent" standard differs from the usual negligence standard—that of a reasonable person under like circumstances. Restatement (Second) of Torts § 283 (1965). If the defendant's status as a parent is considered to be one of the "circumstances," there is no difference between the two standards. If the defendant's position as a parent is not one of the "circumstances," the standards differ slightly, in that a jury might find that a reasonable parent would behave in a different way than a nonparent under the same conditions. In practice, there is probably little difference between a "reasonable parent" standard and a "reasonable person" standard. To the extent that there is a difference, and by analogy to the cases involving defendants engaged in a trade or profession, the parent should be given the benefit, or the burden, of the parental standard. Cf. Aetna Ins. Co. v. Hellmuth, Obata & Kassabaum, Inc., 392 F.2d 472 (8th Cir. 1968) (reasonable standard of professional care for architects includes duty of supervision).

229. See Restatement (Second) of Torts § 895G (1979). The American Law Institute recommends that the immunity be completely abrogated but states that: "Reputation 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." Id. § 895G(2), at 426. This language establishes a reasonableness standard in that "otherwise privileged" conduct includes parental discipline, which is subject to a reasonableness requirement, see supra note 28 and accompanying text, and conduct that is "not tortious" is conduct that is reasonable or that violates no specific duty.

230. See supra notes 149-50 and accompanying text.


232. See supra notes 154-61 and accompanying text.
duct be reasonable would prevent a parent who has engaged in totally unacceptable conduct from escaping liability.\textsuperscript{233}

Under this approach, the decision as to whether the parent had acted reasonably in carrying out a peculiarly parental function would be a question of law, and the court's determination would be dispositive on the issue of the parent's immunity. In accordance with the general rule, the burden of proof would rest with the person asserting the immunity\textsuperscript{234}—the parent. If the court was not convinced by the parent's proof, the case would go to the jury, which would decide whether the plaintiff had proven that the parent's conduct was unreasonable. Thus, the court's initial determination on the immunity issue would protect against the possibility of jury bias against unconventional child-rearing practices,\textsuperscript{235} without imposing any additional requirement on the plaintiff.

There are drawbacks, however, to this approach. Not only would it be somewhat cumbersome for the court to decide the immunity issue as a preliminary matter, but there is no evidence that even this limited immunity will further any strong public policy. Strongly held beliefs, however, prevent many courts from abolishing the immunity completely. This narrowly confined immunity may, therefore, provide a way to accommodate those beliefs without significantly interfering with the plaintiff's right to be compensated if he can prove his case. Accomplishing this result would be well worth the additional burden such a procedure would impose.

\textbf{Conclusion}

Ninety years ago, the parent-child relationship was such that a parent's authority was absolute and a child's position vulnerable. In this atmosphere, the doctrine of parent-child immunity developed. Times have changed, and courts and legislatures should reconsider the wisdom of a rule of law that denies an injured infant the right to sue the individual whose negligence caused the injury. Parents receive adequate protection when their conduct is measured against that of the reasonable parent in similar circumstances. Adoption of this standard will thus protect the parent while preventing "a child injured by his father's negligent act, perhaps maimed for life, [from having] no redress for the damages he has suffered."\textsuperscript{230}

\begin{itemize}
    \item \textsuperscript{233} See Gibson v. Gibson, 3 Cal. 3d 914, 921-22, 479 P.2d 648, 653, 92 Cal. Rptr. 288, 293 (1971) (en banc).
    \item \textsuperscript{235} See supra notes 110, 171 and accompanying text.
    \item \textsuperscript{236} Fidelity Casualty Co. v. Marchand, [1924] 4 D.L.R. 157, 166.
\end{itemize}
APPENDIX

A SURVEY OF PARENT-CHILD IMMUNITY IN THE UNITED STATES


Alaska: Parent not immune where unemancipated child's injuries were caused by parent's negligent driving. Language indicates that the court may favor an approach similar to that used in Wisconsin. Hebel v. Hebel, 435 P.2d 8, 15 (Alaska 1967).


Florida: Parent immune from liability to unemancipated child for injuries caused by parent's negligence. Orefice v. Albert, 237 So. 2d 142, 145 (Fla. 1970). One intermediate appellate court has held recently that the immunity does not exist where the injuries were caused by a parent's negligent driving. Ard v. Ard, 395 So. 2d 586, 590 (Fla. Dist. Ct. App. 1981). The Ard case, which also states that the immunity may be abrogated in other instances, is presently on appeal to the Florida Supreme Court.

PARENT-CHILD IMMUNITY


Illinois: Although the most recent supreme court cases state that parents are immune unless their conduct was willful or wanton, Thomas v. Chicago Bd. of Educ., 77 Ill. 2d 165, 171, 395 N.E.2d 538, 540-41 (1979); Nudd v. Matsoukas, 7 Ill. 2d 608, 618-19, 131 N.E.2d 525, 530-31 (1956), the lower appellate courts have held that the immunity has been abrogated except where injuries were caused by "mere negligence within the scope of the parental relationship." Illinois Nat'l Bank & Trust Co. v. Turner, 83 Ill. App. 3d 234, 236, 403 N.E.2d 1256, 1258 (1980); see Cummings v. Jackson, 57 Ill. App. 3d 68, 70, 372 N.E.2d 1127, 1128 (1978); Schenk v. Schenk, 100 Ill. App. 2d 199, 202, 241 N.E.2d 12, 13-14 (1968).


Iowa: Immunity abrogated at least where tortious conduct is "outside the area of parental authority and discretion." Question of whether it is totally abrogated has been left open. Turner v. Turner, 304 N.W.2d 786, 789 (Iowa 1981).


Kentucky: Immunity only if negligence involved the reasonable exercise of parental authority or ordinary parental discretion with respect to provisions for the care and necessities of the child. Rigdon v. Rigdon, 465 S.W.2d 921, 923 (Ky. 1970).


Maine: Immunity abrogated in automobile case with statement that the abrogation was not limited to automobile accidents, but that the court would consider the immunity in future cases. Black v. Solmitz, 409 A.2d 634, 639-40 (Me. 1979).


Parent immune from liability for injuries caused to unemancipated child by parent's negligence. Rayburn v. Moore, 241 So. 2d 675, 676 (Miss. 1970); Hewlett v. George, 68 Miss. 703, 711, 9 So. 885, 887 (1891).

Parent with custody of the child is immune from liability unless the suit will not seriously disturb family relations. Fugate v. Fugate, 582 S.W.2d 663, 667-68 (Mo. 1979) (en banc).

In Ball v. Ball, 73 Wyo. 29, 37-38, 269 P.2d 302, 304-05 (1954), it was decided that Montana law would not permit a child to sue his parents for personal injuries. This conclusion is supported by a case involving the husband-wife immunity in which the Montana court stated that intra-family immunity was valid. State Farm Mut. Ins. Co. v. Leary, 544 P.2d 444, 446-48 (Mont. 1975).


Ohio: Parent immune except where the injury is intentional or it is shown that the parental relationship has been abandoned, or where the injury is inflicted by the parent when acting in his business capacity. Teramano v. Teramano, 6 Ohio St. 2d 117, 118-19, 216 N.E.2d 375, 377 (1966).


Oregon: Parent immune from liability to unemancipated child for injuries caused by the parent’s ordinary or gross negligence, but not for injuries caused by the parent’s willful or malicious tort. Chaffin v. Chaffin, 239 Or. 374, 380-86, 397 P.2d 771, 774-77 (1964); Cowgill v. Boock, 189 Or. 282, 301-02, 218 P.2d 445, 453 (1950) (en banc).


Rhode Island: Parent immune from liability to unemancipated child for injuries caused by the parent’s negligence. The Rhode Island Supreme Court left open the question of whether the immunity would protect a parent who had intentionally injured his child. Matarese v. Matarese, 47 R.I. 131, 132-34, 131 A. 198, 199-200 (1925).


South Dakota: Courts have not considered the issue.


Texas: Immunity retained for injuries caused by ordinary negligence involving a reasonable exercise of parental authority or the exercise of ordinary parental discretion with respect to provisions for the care and necessities of the child. Felderhoff v. Felderhoff, 473 S.W.2d 928, 933 (Tex. 1971).

Utah: No immunity, at least for intentional torts. Elkington v. Foust, 618 P.2d 37, 40 (Utah 1980).

Vermont: Refused to recognize that an immunity existed that would bar the suit, but indicated that limitations might be placed upon parent-child actions. Wood v. Wood, 135 Vt. 119, 121-22, 370 A.2d 191, 193 (1977).

Virginia Supreme Court has upheld the immunity where the child was injured due to the father's negligence that was "incident to the parental relationship." Wright v. Wright, 213 Va. 177, 179, 191 S.E.2d 223, 225 (1972).

**Washington:**
The immunity was abrogated where the child's injury was sustained in an automobile accident caused by the parent's negligence. The supreme court stated that other issues concerning parent-child immunity were to be decided on a case-by-case basis. Merrick v. Sutterlin, 93 Wash. 2d 411, 416, 610 P.2d 891, 893 (1980) (en banc).

**West Virginia:**

**Wisconsin:**

**Wyoming:**