

1996

## The Parental Tort Immunity Doctrine: Is It a Defensible Defense?

Sandra L. Haley  
*University of Richmond*

Follow this and additional works at: <http://scholarship.richmond.edu/lawreview>



Part of the [Family Law Commons](#), and the [Torts Commons](#)

---

### Recommended Citation

Sandra L. Haley, *The Parental Tort Immunity Doctrine: Is It a Defensible Defense?*, 30 U. Rich. L. Rev. 575 (1996).  
Available at: <http://scholarship.richmond.edu/lawreview/vol30/iss2/8>

This Comment is brought to you for free and open access by the Law School Journals at UR Scholarship Repository. It has been accepted for inclusion in University of Richmond Law Review by an authorized editor of UR Scholarship Repository. For more information, please contact [scholarshiprepository@richmond.edu](mailto:scholarshiprepository@richmond.edu).

# THE PARENTAL TORT IMMUNITY DOCTRINE: IS IT A DEFENSIBLE DEFENSE?

## I. INTRODUCTION

If the overriding purpose of tort law is to compensate those injured by the wrongdoing of another, then intrafamily tort immunities have historically defeated that purpose. Their effect is to leave an uncompensated injured party with no remedy simply by virtue of the tortfeasor's familial relationship to the injured person.

This survey focuses on the doctrine of parental tort immunity and concludes that, although numerous exceptions exist, the rationales advanced for the doctrine's continued existence are of questionable relevance today.

## II. HISTORY OF PARENTAL IMMUNITY

### A. *Early Common Law*

At common law, a child, emancipated or not, could sue a parent for breach of contract and for property-related torts.<sup>1</sup>

---

\* This paper was the winner of the 1995 McNeill Writing Competition.

1. See, e.g., *Petersen v. City and County of Honolulu*, 462 P.2d 1007 (Haw. 1969); *Small v. Morrison*, 118 S.E. 12, 16 (N.C. 1923) (permitting children to sue parents for trespass to or misappropriation of child's property because child is regarded as separate entity in such cases); *State v. Bell*, 115 S.E. 190 (N.C. 1922) (support); *Dunn v. Beaman*, 36 S.E. 172 (N.C. 1900) (conversion); *Kimbrough v. Davis*, 16 N.C. 51 (1 Dev. Eq.) (1827) (breach of contract); *Lamb v. Lamb*, 41 N.E. 26 (N.Y. 1895); *Gully v. Gully*, 231 S.W. 97 (Tex. 1921) (support); See generally RESTATEMENT (SECOND) OF TORTS § 895G cmt. b (1977); JOHN DE WITT GREGORY ET AL., UNDERSTANDING FAMILY LAW § 6.02 (1993); PETER N. SWISHER ET AL., FAMILY LAW § 8.01 (1990).

For analysis of and commentary on parental immunity generally, see WALTER B. WADLINGTON ET AL., CHILDREN IN THE LEGAL SYSTEM 10-23 (1983); Frederick B. Barder & John D. Ingram, *The Decline of the Doctrine of Parent-Child Tort Immunity*, 68 ILL. BUS. J. 596 (1980); Kathryn Calibey, *Connecticut's Parent-Child Immunity Doctrine*, 65 CONN. BUS. J. June 6, 1991, at 210; Harlin Ray Dean, Jr., *It's Time to*

Furthermore, adult and emancipated children could sue a par-

---

*Abolish North Carolina's Parent-Child Immunity, But Who's Going to Do It?*, *Coffey v. Coffey and North Carolina General Statutes Section 1-539.21*, 68 N.C. L. REV. 1317 (1990); Beth Ann Falk, *Lee v. Mowett Sales Co.: North Carolina Retains Its Partial Parent-Child Immunity Doctrine*, 65 N.C. L. REV. 1457 (1987); David L. Grobart, *Parent-Child Tort Immunity in Illinois*, 17 LOY. U. CHI. L.J. 303 (1986); Randall K. Hanson, *Parental Liability*, 62 WIS. LAW., (Sept. 1989 at 24.); Gail G. Hollister, *Parent-Child Immunity: A Doctrine in Search of a Justification*, 50 FORDHAM L. REV. 489 (1982); William E. McCurdy, *Torts Between Parent and Child*, 5 VILL. L. REV. 521 (1960); Thomas A. Montminy, *Torts*, 35 CATH. U. L. REV. 1153 (1986); Martin J. Rooney & Colleen M. Rooney, *Parental Tort Immunity: Spare the Liability, Spoil the Parent*, 25 NEW ENG. L. REV. 1161 (1991); Val Sanford, *Personal Torts Within the Family*, 9 VAND. L. REV. 823 (1956); Douglas D. Scherer, *Tort Remedies for Victims of Domestic Abuse*, 43 S.C. L. REV. 543 (1992); Isabel Wingerter, *Parent-Child Tort Immunity*, 50 LA. L. REV. 1131 (1990); Edwin D. Akers & William H. Drummond, *Comment, Tort Actions Between Members of the Family*, 26 MO. L. REV. 152 (1961); Cynthia J. Atchison, *Note, Ard v. Ard: Limiting the Parent-Child Immunity Doctrine*, 44 U. PITT. L. REV. 977 (1983); Connie K. Beck et al., *Comment, The Rights of Children: A Trust Model*, 46 FORDHAM L. REV. 669 (1978); Susan G. Chopin, *Note, Parent-Child Tort Immunity: A Rule in Need of Change*, 27 U. MIAMI L. REV. 191 (1972); Rhonda Ilene Framm, *Comment, Parent-Child Tort Immunity: Time for Maryland to Abrogate an Anachronism*, 11 U. BALT. L. REV. 435 (1982); Kevin Fularczyk, *Note, Parent-Child Immunity After Carey v. Meijer, Inc.*, 35 WAYNE L. REV. 153 (1988); Frederick W. Grimm, *Recent Development, Merrick v. Sutterlin*, 56 WASH. L. REV. 319 (1981); Eric T. Lanham, *Comment, Suing Parents in Tort for Child Abuse: A New Role for the Court Appointed Guardian ad Litem?*, 61 U. MO. KAN. CITY L. REV. 101 (1992); Mark Lanni, *Casenote, Children May Recover from Parents in Personal Injury Actions*, 11 U. DAYTON L. REV. 737 (1986); Kathryn Webb Lovill, *Note, Frye v. Frye: Maryland Sacrifices the Child for the Sake of the Family*, 46 MD. L. REV. 194 (1986); Carla Maria Marcolin, *Comment, Rousey v. Rousey: The District of Columbia Joins the National Trend Towards Abolition of Parental Immunity*, 37 CATH. U. L. REV. 767 (1988); Timothy I. McArdle, *Casenote, Stallman v. Youngquist: Parent-Child Tort Immunity: Will Illinois Ever Give this Doctrine the Examination and Analysis it Deserves?*, 19 J. MARSHALL L. REV. 807 (1986); Chanse McLeod, *Note, Jilani v. Jilani: The Erosion of The Parental Tort Immunity Doctrine in Texas*, 28 HOUS. L. REV. 717 (1991); Samuel Mark Pipino, *Comment, In Whose Best Interest? Exploring the Continuing Viability of the Parental Immunity Doctrine*, 53 OHIO ST. L.J. 1111 (1992); Edward J. Pulaski, Jr., *Comment, Parent-Child Immunity: The Case for Abolition*, 6 SAN DIEGO L. REV. 286 (1969); Mebane M. Rash, *Note, The North Carolina Supreme Court Engages in Stealthy Judicial Legislation*, 71 N.C. L. REV. 1227 (1993); Kirk A. Schmidtman, *Note, The Demise of the Parent-Child Tort Immunity*, 12 WILLAMETTE L. REV. 605 (1976); Cynthia Ann Tolch, *Note, Will Junior's First Words Be "I'll See You In Court!?"*, 58 MO. L. REV. 251 (1993); Martha Vardiman, *Casenote, Ohio Abolishes Intrafamilial Tort Immunity: Shearer v. Shearer*, 55 U. CIN. L. REV. 305 (1986); *Note, Tort Liability Within the Family—A Suggested Approach*, 51 NW. U. L. REV. 610 (1956); Rammaldo P. Eclavea, *Annotation, Liability of Parent for Injury to Unemancipated Child Caused by Parent's Negligence—Modern Cases*, 6 A.L.R.4th 1066, 1078 n.49 (1981) (collected cases on parental immunity); Albin E. Korpch, *Liability of Parent for Injury to Unemancipated Child Caused by Parent's Negligence*, *Annotation*, 41 A.L.R.3d 904, 927-40 (1972); W.E. Shipley, *Annotation, Conflict of Laws as to Right of Action Between Husband and Wife or Parent and Child*, 96 A.L.R.2d 973 (1964) (conflict of laws regarding actions between spouses and parent and child).

ent for all torts, whether personal, property-related, or contract-based.<sup>2</sup> Thus, until 1891, a vacuum existed in American law regarding personal tort causes of action by an unemancipated minor against his or her parent.<sup>3</sup>

### B. *First Pronouncement of Parental Immunity & Its Consequences*

The first parental immunity rule came from the Supreme Court of Mississippi in *Hewlette v. George*.<sup>4</sup> The plaintiff in *Hewlette* was the minor daughter of the defendant; she was married but separated from her husband.<sup>5</sup> The daughter sued her mother for false imprisonment, alleging that she was wrongfully committed to an insane asylum.<sup>6</sup> Without citing any

---

2. See, e.g., *Wood v. Wood*, 63 A.2d 586 (Conn. 1948); *Reese v. Reese*, 236 S.E.2d 20 (Ga. App. 1977); *Carricato v. Carricato*, 384 S.W.2d 85 (Ky. 1964); *Waltzinger v. Birsner*, 128 A.2d 617 (Md. 1957) (holding that parents are not protected by immunity from suits by emancipated children); *Shell Oil Co. v. Ryckman*, 403 A.2d 379 (Md. Ct. Spec. App. 1979) (abrogating immunity for suits by emancipated children and for suits involving cruel, inhuman or willful misconduct, but preserving immunity for parental negligence in business context); *Weyen v. Weyen*, 139 So. 608 (Miss. 1932) (holding that emancipated children can sue parent for all torts); *Gillikin v. Burbage*, 139 S.E.2d 753 (N.C. 1965) (describing what constitutes emancipation); *Weinberg v. Underwood*, 244 A.2d 538 (N.J. Super. Ct. Law Div. 1968); *Fitzgerald v. Valdez*, 427 P.2d 655 (N.M. 1967); *Tucker v. Tucker*, 395 P.2d 67 (Okla. 1964); *Detwiler v. Detwiler*, 57 A.2d 426 (Pa. Super. Ct. 1948); *Parker v. Parker*, 94 S.E.2d 12 (S.C. 1956); *Logan v. Reaves*, 354 S.W.2d 789 (Tenn. 1962); *Glover v. Glover*, 319 S.W.2d 238 (Tenn. Ct. App. 1958); *Brumfield v. Brumfield*, 74 S.E.2d 170 (Va. 1953); *Groh v. W.O. Krahn, Inc.*, 271 N.W. 374 (Wis. 1937).

3. See, e.g., *Mahnke v. Moore*, 77 A.2d 923 (Md. 1951) ("[T]here is nothing in the English decisions to suggest that at common law a child could not sue a parent for a personal tort."); *Small v. Morrison*, 118 S.E. 12 (N.C. 1923) (Clark, C.J., dissenting) (urging that basic laws of insurance and indemnity apply and pointing out both the conspicuous absence of any case law, English or American, supporting the majority's position that minors cannot sue parents in tort, and noting that children have brought cases against parents for partition of real estate, conversion, embezzlement, libel and slander); see also RESTATEMENT (SECOND) OF TORTS § 895G cmt. b (1977).

4. 9 So. 885 (Miss. 1891). Mississippi reiterated its support of the *Hewlette* rule in 1971. See *McNeal v. Estate of McNeal*, 254 So. 2d 521 (Miss. 1971).

5. *Hewlette*, 9 So. at 887.

6. *Id.* at 885. Additional facts are sparse in the decision, but in his book Professor Epstein explains that the plaintiff was a prostitute in Chicago and her mother managed to talk her into coming home to Mississippi with the intent of reforming her wayward daughter. However, the plaintiff never changed her ways, so her mother committed her to an insane asylum, where she stayed for 10 days. At trial, the jury awarded plaintiff \$5000, but the trial judge set aside that award, entering judgment

authority and basing its decision entirely on policy grounds, the court held that so long as the parent and child are obligated by their reciprocal family duties to one another, a child cannot seek civil redress for personal injuries resulting from a parent's wrongdoing.<sup>7</sup> No distinction was made between actions for negligent, reckless, or intentional torts. The court concluded that such causes of action would undermine the "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. . . ."<sup>8</sup> The court felt that the state's criminal laws offered sufficient protection for children.<sup>9</sup>

Following *Hewlette*, there was widespread adoption of parental immunity. Some states barred only negligence claims by an unemancipated child,<sup>10</sup> while others prohibited even intentional tort claims.<sup>11</sup> As might have been anticipated, the doctrine resulted in some outrageous and unjust decisions. Unemancipated children were prohibited from recovering from their parent for injuries resulting from rape,<sup>12</sup> brutal beatings,<sup>13</sup> car acci-

---

for \$200. The Supreme Court of Mississippi refused to reinstate the jury verdict. RICHARD A. EPSTEIN, *CASES AND MATERIALS ON TORTS* at 842 (5th ed. 1990).

7. *Hewlette*, 9 So. at 887.

8. *Id.*

9. *Id.*

10. See, e.g., *Villaret v. Villaret*, 169 F.2d 677 (D.C. Cir. 1948) (applying Maryland law); *Schneider v. Schneider*, 152 A. 498 (Md. 1930) (barring parent's suit against child for auto negligence); *Lund v. Olson*, 237 N.W. 188 (Minn. 1931) (adopting traditional immunity); *Hastings v. Hastings*, 163 A.2d 147 (N.J. 1961); *Nahas v. Noble*, 420 P.2d 127 (N.M. 1966); *Sorrentino v. Sorrentino*, 162 N.E. 551 (N.Y. 1928); *Chaffin v. Chaffin*, 397 P.2d 771 (Or. 1964); *Castellucci v. Castellucci*, 188 A.2d 467 (R.I. 1963); *Ownby v. Kleyhammer*, 250 S.W.2d 37 (Tenn. 1952); *Norfolk Southern R.R. v. Gretakis*, 174 S.E. 841 (Va. 1934) (holding that an emancipated child can sue a parent for all torts and an unemancipated child can sue a parent if there is a master-servant relationship between them and can sue the parent's master for injuries resulting from servant-parent's negligence); *Stevens v. Murphy*, 421 P.2d 668 (Wash. 1966); *DeLay v. DeLay*, 337 P.2d 1057 (Wash. 1959).

11. See, e.g., *Foley v. Foley*, 61 Ill. App. 577 (1895); *Smith v. Smith*, 142 N.E. 128 (Ind. Ct. App. 1924) (regarding suit commenced after child reached majority for assault which occurred during child's minority); *Miller v. Pelzer*, 199 N.W. 97 (Minn. 1924) (regarding deceit); *Cook v. Cook*, 124 S.W.2d 675 (Mo. Ct. App. 1939) (concerning a brutal beating); *Small v. Morrison*, 118 S.E. 12 (N.C. 1923); *McKelvey v. McKelvey*, 77 S.W. 664 (Tenn. 1903) (discussing a brutal beating by father and stepmother); *Roller v. Roller*, 79 P. 788 (Wash. 1905) (regarding a father convicted of raping daughter who served time in penitentiary, as protected from suit by daughter because of immunity).

12. See *Roller v. Roller*, 79 P. 788 (Wash. 1905).

13. See *Cook v. Cook*, 124 S.W.2d 675 (Mo. Ct. App. 1939); *McKelvey v.*

dents<sup>14</sup> and other situations.<sup>15</sup> Some courts barred claims even though the parent-child relationship had been terminated by death before suit was filed.<sup>16</sup>

The reasons offered most frequently in support of parental immunity include the preservation of family harmony and tranquility,<sup>17</sup> and a tenuous analogy to interspousal immunity, whereby a child was often prohibited from bringing an action which a spouse would be permitted to bring.<sup>18</sup> Once liability insurance became widespread, some courts gave an additional reason for maintaining parental immunity: preventing collusion between parent and child to defraud insurance companies.<sup>19</sup>

Needless to say, the flimsy rationales for the doctrine and the unjust results of its application led to gradual erosion of the rule in those states which had adopted it.

---

McKelvey, 77 S.W. 664 (Tenn. 1903).

14. See *Sanford v. Sanford*, 290 A.2d 812 (Md. Ct. Spec. App. 1972) (barring by immunity, a child's auto negligence claim against father); *Small v. Morrison*, 118 S.E. 12 (N.C. 1923); *Levesque v. Levesque*, 106 A.2d 563 (N.H. 1954); *Matarese v. Matarese*, 131 A. 198 (R.I. 1925) (providing an immunity bar to auto negligence claims against a parent).

15. See *Wagner v. Smith*, 340 N.W.2d 255 (Iowa 1983) (adopting parental authority and discretion area of immunity and barring suit for negligent supervision where child was injured by father's grain auger); *Taubert v. Taubert*, 114 N.W. 763 (Minn. 1908) (barring child's suit against mother for negligence in employment context even though mother/owner had liability insurance); *Wright v. Wright*, 191 S.E.2d 223 (Va. 1972) (barring a young child from bringing suit when she was injured by falling against metal awnings with jagged edges stored in her father's yard).

16. See *Shaker v. Shaker*, 29 A.2d 765 (Conn. 1942); *Harralson v. Thomas*, 269 S.W.2d 276 (Ky. 1954); *Damiano v. Damiano*, 143 A. 3 (N.J. 1928) (holding that where both the parent and the child are dead, and since the child had no right of action at common law because of immunity, the child has no right of action under the Death Act for wrongful death); *Lasecki v. Kabara*, 294 N.W. 33 (Wis. 1940).

17. E.g., *Luster v. Luster*, 13 N.E.2d 438 (Mass. 1938), *overruled by Sorensen v. Sorensen*, 339 N.E.2d 907 (Mass. 1975); *Downs v. Poulin*, 216 A.2d 29 (Me. 1966), *overruled by Black v. Solnitz*, 409 A.2d 634 (Me. 1979).

18. E.g., *Rambo v. Rambo*, 114 S.W.2d 468 (Ark. 1938); *Mesite v. Kirchstein*, 145 A. 753 (Conn. 1929); *Redding v. Redding*, 70 S.E.2d 676 (N.C. 1952); *Barranco v. Jackson*, 690 S.W.2d 221 (Tenn. 1985); *Wick v. Wick*, 212 N.W. 787 (Wis. 1927).

19. *Dennis v. Walker*, 284 F. Supp. 413, 417 (D.D.C. 1968) (purportedly adopting parental immunity but creating exceptions for willful and wanton conduct, negligence in employment context and death ending the parent-child relationship. But presence of insurance actually supported the need for immunity because of the heightened danger of fraud and collusion); *Anderson v. Stream*, 295 N.W.2d 595 (Minn. 1980) (Rogosheske, J., dissenting).

## III. CHIPPING AWAY AT THE DOCTRINE: EXCEPTIONS EMERGE

A. *Early Challenges*

Parental immunity for negligence was first successfully abolished in its entirety in *Goller v. White*,<sup>20</sup> except when the tort involved "an exercise of parental authority . . . [or] ordinary parental discretion with respect to the provision of food, clothing, housing, medical and dental services, and other care."<sup>21</sup> Minnesota later adopted from *Goller* the same two instances where immunity would still apply even after abrogating general parental immunity<sup>22</sup> by inserting the word "reasonable" before the phrase "parental authority."

The first effective challenge to absolute immunity which carved out an exception to the rule rather than completely abrogating it, occurred in *Dunlap v. Dunlap*.<sup>23</sup> In *Dunlap*, the plaintiff, who worked for his father (the defendant) and was paid the same as his father's other employees, was injured on the job. The court held that a parent could not claim immunity when the parent had intentionally relinquished parental control and when the child was that parent's servant.<sup>24</sup> The court noted that the defendant had employer's liability insurance, whereby he had voluntarily made arrangements to pass on his own liability to the insurance company.<sup>25</sup>

---

20. 122 N.W.2d 193 (Wis. 1963).

21. *Id.* at 198. The plaintiff in *Goller* did state a cause of action against the defendant. *Id.*

22. *Silesky v. Kelman*, 161 N.W.2d 631 (Minn. 1968), *overruled by* *Anderson v. Stream*, 295 N.W.2d 595 (Minn. 1980).

23. 150 A. 905 (N.H. 1930) (offering a good discussion of the rights of minors at common law to sue for personal injuries).

24. *Id.* at 912-13.

25. *Id.* See also William E. McCurdy, *Torts Between Persons in Domestic Relation*, 43 HARV. L. REV. 1030 (1930) (published days before the *Dunlap* opinion was issued and supporting its rationale).

## B. Tort Theories Excepted from the Doctrine

### 1. Auto & Common Carrier Accident Personal Injuries

Perhaps the most common exception to the doctrine prohibits the immunity defense for automobile accident negligence claims.<sup>26</sup> In abolishing immunity for auto negligence, some courts held that the operation of an automobile does not involve the exercise of parental authority or discretion, such that auto accident claims would not interfere with the relationship that immunity was designed to protect.<sup>27</sup> In some jurisdictions, the auto accident exception is the only recognized exception to parental immunity.<sup>28</sup>

---

26. See CONN. GEN. STAT. § 52-572c (Supp. 1986) (abrogating auto negligence immunity); N.C. GEN. STAT. § 1-539.21 (Cum. Supp. 1985) (legislative abrogation of immunity for auto negligence); S.C. CODE ANN. § 15-5-210 (Law. Co-op. 1976), *overruled* Elam v. Elam, 268 S.E.2d 109 (S.C. 1980) (abrogation of parental immunity only for auto negligence claims violates equal protection); Ooms v. Ooms, 316 A.2d 783 (Conn. 1972) (applying parental immunity in other cases even though immunity had been abrogated by statute for auto negligence claims); Williams v. Williams, 369 A.2d 669 (Del. 1976); Ard v. Ard, 414 So. 2d 1066 (Fla. 1982) (waiving parental immunity for auto negligence but only to the extent of the parent's liability insurance); Cates v. Cates, 619 N.E.2d 715 (Ill. 1993) (holding parental immunity inapplicable to auto negligence claims but retaining it for parental discipline, supervision and care); Deshotel v. Travelers Indem. Co., 243 So. 2d 259 (La. 1971) (allowing direct action against insurer); Sorensen v. Sorensen, 339 N.E.2d 907 (Mass. 1975); Black v. Solmitz, 409 A.2d 634 (Me. 1979); Ledwell v. Berry, 249 S.E.2d 862 (N.C. Ct. App. 1978), *cert. denied*, 254 S.E.2d 35 (N.C. 1979); Briere v. Briere, 224 A.2d 588 (N.H. 1966) (creating auto negligence exception to immunity); Guterman v. Guterman, 328 A.2d 233 (N.J. 1974); Unah v. Martin, 676 P.2d 1366 (Okla. 1984) (creating auto negligence exception to immunity); Silva v. Silva, 446 A.2d 1013 (R.I. 1982); Smith v. Kauffman, 183 S.E.2d 190 (Va. 1971); Worrell v. Worrell, 4 S.E.2d 343 (Va. 1939) (abrogation of immunity for common carrier negligence); Merrick v. Sutterlin, 610 P.2d 891 (Wash. 1980) (abrogating immunity for auto negligence and future determination of immunity in other contexts based on case-by-case analysis); Lee v. Comer, 224 S.E.2d 721 (W. Va. 1976) (abolishing immunity for auto negligence); Dellapenta v. Dellapenta, 838 P.2d 1153 (Wyo. 1992) (abolishing immunity for auto negligence); Allstate Ins. Co. v. Wyoming Ins. Dep't, 672 P.2d 810 (Wyo. 1983) (effectively abrogating immunity as to auto negligence by holding household exclusion clauses invalid); *cf.* Coffey v. Coffey, 381 S.E.2d 467 (N.C. Ct. App. 1989) (barring parent's suit against child after majority for auto injuries during child's minority).

27. See *Ard*, 414 So. 2d 1066; *Black*, 409 A.2d 634; *Unah*, 676 P.2d 1366; *Smith*, 183 S.E.2d 190; *Merrick*, 610 P.2d 891; *Dellapenta*, 838 P.2d 1153 (operation of car is not a parental function).

28. See *Lee v. Mowett Sales Co.*, 342 S.E.2d 882 (N.C. 1986) (statutory abolition of immunity in auto accident cases prevents further abrogation by the courts); *Jenkins v. Snohomish County Pub. Util.*, 713 P.2d 79 (Wash. 1986) (exceptions to



On the other hand, some states prohibit parental liability even for auto accidents.<sup>29</sup> The Maryland Supreme Court had concerns that abrogating immunity for auto accidents might interfere with both parental authority and the state's compulsory insurance scheme.<sup>30</sup>

In *Levesque v. Levesque*,<sup>31</sup> the New Hampshire Supreme Court retreated from its decision in *Dunlap* by prohibiting a minor child from suing his parent for auto accident injuries, holding that "the existence of liability insurance [does not] create a right of action where none would otherwise exist."<sup>32</sup>

The widespread abrogation of parental immunity as to motor vehicle negligence created a backlash by insurance companies, which began inserting "household exclusion" clauses in policies excluding coverage for family members living in the insured's household.<sup>33</sup> Some courts have held such exclusion clauses invalid,<sup>34</sup> while others have upheld the clauses as valid limitations of liability.<sup>35</sup>

---

immunity are limited to auto negligence and willful misconduct torts).

29. See *Coleman v. Coleman*, 278 S.E.2d 114 (Ga. Ct. App. 1981) (barring child from suing noncustodial parent for auto negligence); *Frye v. Frye*, 505 A.2d 826 (Md. 1986) (holding that the traditional basis for immunity, i.e. preserving family tranquility, is still valid today. The court refuses to abrogate it even for auto negligence claims because that is within the purview of the legislature, which had created a mandatory auto liability insurance scheme); *Barranco v. Jackson*, 690 S.W.2d 221 (Tenn. 1985).

30. *Frye v. Frye*, 505 A.2d 826 (Md. 1986).

31. 106 A.2d 563 (N.H. 1954), *overruled by* *Briere v. Briere*, 224 A.2d 588 (N.H. 1966).

32. *Levesque*, 106 A.2d at 564.

33. See generally JOHN DE WITT GREGORY ET AL., UNDERSTANDING FAMILY LAW § 6.02 (1993); W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 122 (5th ed. 1984).

34. See *Meyer v. State Farm Mut. Auto. Ins. Co.*, 689 P.2d 585 (Colo. 1984) (holding household exclusion clauses in auto policies invalid); *Farmers Ins. Group v. Reed*, 712 P.2d 550 (Idaho 1985); *Jennings v. Government Employees Ins.*, 488 A.2d 166 (Md. 1985) (provision in area of mandatory liability insurance similar to household exclusion clause held invalid); *Transamerica Ins. Co. v. Royle*, 656 P.2d 820 (Mont. 1983) (abrogating immunity for auto negligence and holding household exclusion clause invalid); *Farmers Ins. Exch. v. Call*, 712 P.2d 231 (Utah 1985) (invalid for mandatory coverage limits, and invalid above those limits unless the exclusion is disclosed in writing).

35. See MD. CODE ANN. art. 48A, § 541(c)(2) (Repl. Vol. 1979 & Cum. Supp. 1985) (allowing household exclusion clauses in auto policies issued under uninsured motorist statute); *Allstate Ins. Co. v. Boles*, 481 N.E.2d 1096 (Ind. 1985); *Walker v. American Family Mut. Ins. Co.*, 340 N.W.2d 599 (Iowa 1983); *American Family Mut. Ins. Co. v.*

## 2. Parental Negligence in the Business Context

A second common exception to parental immunity is when a parent's negligence occurs in a business or employment context.<sup>36</sup> However, where a child is prohibited by immunity from suing a parent directly for negligence occurring on the job, some states do permit the child to sue the parent's employer directly on the theory of respondeat superior.<sup>37</sup> Other states bar the child's suit against the employer on the theory that liability is derivative; if the parent is not liable, then the employer cannot be liable.<sup>38</sup>

---

Ryan, 330 N.W.2d 113 (Minn. 1983) (upholding validity of household exclusion clause).

36. See *Trevarton v. Trevarton*, 378 P.2d 640 (Colo. 1963); *Dzenutis v. Dzenutis*, 512 A.2d 130 (Conn. 1986) (such actions do not disrupt family harmony, and liability insurance is prevalent); *Dunlap v. Dunlap*, 150 A. 905 (N.H. 1930); *Signs v. Signs*, 103 N.E.2d 743 (Ohio 1952); *Farley v. M.M. Cattle Co.*, 529 S.W.2d 751 (Tex. 1975); *Felderhoff v. Felderhoff*, 473 S.W.2d 928 (Tex. 1971) (no immunity for parental negligence on the job when child is parent's employee, adopting rationale that such activities are not within parent's discretion or authority); *Worrell v. Worrell*, 4 S.E.2d 343 (Va. 1939) (parent/owner of common carrier is liable for negligence of servant causing injury to child/passenger because of state's compulsory insurance requirement, and parental relationship is purely incidental to child's status as passenger); *Borst v. Borst*, 251 P.2d 149 (Wash. 1952); *Lusk v. Lusk*, 166 S.E. 538 (W. Va. 1932). *Contra* *Shell Oil Co. v. Ryckman*, 403 A.2d 379 (Md. Ct. Spec. App. 1979) (abrogating immunity for suits by emancipated children and for suits involving cruel, inhuman or willful misconduct, but preserving immunity for parental negligence in business context). See generally, B.H. Glenn, Annotation, *Liability of Employer for Injury to Wife or Child of Employee Through Latter's Negligence*, 1 A.L.R.3d 677, 699 (1965).

37. See *Mi-Lady Cleaners v. McDaniel*, 179 So. 908 (Ala. 1938); *Begley v. Kohl & Madden Printing Ink Co.*, 254 A.2d 907 (Conn. 1969); *Fields v. Synthetic Ropes, Inc.*, 215 A.2d 427 (Del. 1965), *on remand*, 219 A.2d 374 (Del. Super. Ct. 1966); *Stapleton v. Stapleton*, 70 S.E.2d 156 (Ga. Ct. App. 1952); *Hary v. Arney*, 145 N.E.2d 575 (Ind. App. 1957) (unincorporated association); *Cody v. J.A. Dodd & Sons*, 110 N.W.2d 255 (Iowa 1961) (partnership); *O'Connor v. Benson Coal Co.*, 16 N.E.2d 636 (Mass. 1938); *Tobin v. Hoffman*, 96 A.2d 597 (Md. 1953) partnership; *Wright v. Wright*, 50 S.E.2d 540 (N.C. 1948); *Radelick v. Travis*, 120 A.2d 774 (N.J. Super. Ct. App. Div. 1956); *Damm v. Elyria Lodge No. 465*, 107 N.E.2d 337 (Ohio 1952) (association); *Hooper v. Clements Food Co.*, 694 P.2d 943 (Okla. 1985) (permitting child's claim against parent's employer for parental negligence on the job); *Kowaleski v. Kowaleski*, 361 P.2d 64 (Or. 1961); *Koontz v. Messer*, 181 A. 792 (Pa. 1935); *Trotti v. Piacente*, 206 A.2d 462 (R.I. 1965); *Littleton v. Jordan*, 428 S.W.2d 472 (Tex. Civ. App. 1968); *Freeland v. Freeland*, 162 S.E.2d 922 (W. Va. 1968).

38. See *Sherby v. Weather Bros. Trans. Co.*, 421 F.2d 1243 (4th Cir. 1970) (Maryland law); *Stokes v. Association of Indep. Taxi Operators, Inc.*, 237 A.2d 762 (Md. 1968); *Pullen v. Novak*, 99 N.W.2d 16 (Neb. 1959).

### 3. Nonphysical Injuries: Negligent Child Rearing and Parental Abandonment

In *Burnette v. Wahl*,<sup>39</sup> the plaintiffs, several young children, alleged that their mothers violated four Oregon statutes relating to parental duties,<sup>40</sup> as well as intentional abandonment and desertion.<sup>41</sup> The children claimed emotional and psychological injuries.<sup>42</sup>

By declining to adopt a "parental desertion" tort cause of action allowing recovery for breach of a statutory duty, the court emphasized that neither the case law nor the legislature allowed a cause of action for nonphysical injury resulting from a parent's refusal to provide statutorily-required services.<sup>43</sup> Since the legislature had enacted a comprehensive regulatory scheme without creating such a right of action, the court felt it was unwise to legislate from the bench, particularly in this sensitive area of public policy.<sup>44</sup>

Similarly, in *Anderson v. Stream*,<sup>45</sup> the Minnesota court adopted a reasonably prudent parent standard for tort liability. The court also stated that its total abolition of parental immunity in favor of the new standard did not create a new right of action for negligent child rearing as such actions violate public policy.<sup>46</sup> Children have similarly been denied recovery for the mental distress caused by divorce.<sup>47</sup>

---

39. 588 P.2d 1105 (Or. 1978).

40. The duty to support poor children, and three criminal statutes for neglect, nonsupport and abandonment.

41. *Burnette*, 588 P.2d at 1105.

42. *Id.*

43. *Id.* See also *Yost v. Yost*, 190 A. 753 (Md. 1937) (barring child from suing father for neglect and failure to support). See generally Reid H. Hamilton, Note, *Defining the Parent's Duty After Rejection of Parent-Child Immunity: Parental Liability for Emotional Injury to Abandoned Children*, 33 VAND. L. REV. 775 (1980).

44. *Burnette*, 588 P.2d at 1105.

45. 295 N.W.2d 595 (Minn. 1980).

46. *Id.* at 601 n.9 (citing *Burnette v. Wahl*, 588 P.2d 1105 (1978)).

47. See *Mroczyński v. McGrath*, 216 N.E.2d 137 (Ill. 1966) (maintaining traditional immunity).

#### 4. Reckless and Intentional Acts

Another area to which parental immunity does not generally extend is reckless conduct, and many states have created this exception.<sup>48</sup> Such actions by a parent circumvent and step outside of the parent-child relationship.<sup>49</sup> Similarly, a parent is not immune from liability for his or her intentional acts.<sup>50</sup>

---

48. See *Wilson v. Wilson*, 742 F.2d 1004 (6th Cir. 1984) (stepfather's sexual assault on child); *Attwood v. Estate of Attwood*, 633 S.W.2d 366 (Ark. 1982) (abolishing immunity for willful and wanton actions such as drunk driving); *Emery v. Emery*, 289 P.2d 218 (Cal. 1955); *Wright v. Wright*, 70 S.E.2d 152 (Ga. Ct. App. 1952) (reckless and drunk driving); *Nudd v. Matsoukas*, 131 N.E.2d 525 (Ill. 1956) (finding no immunity for willful and wanton conduct; and in this case, reckless driving); *Larson v. Buschkamp*, 435 N.E.2d 221 (Ill. App. 1982) (listing exceptions to immunity: contribution suits against parents are permissible, and no immunity for willful and wanton acts; when death ends parent-child relationship; for parent's violation of a duty owed to the public at large); *Shell Oil Co. v. Ryckman*, 403 A.2d 379 (Md. Ct. Spec. App. 1979) (abrogating immunity for suits by emancipated children and for suits involving cruel, inhuman or willful misconduct, but preserving immunity for parental negligence in business context); *Foldi v. Jeffries*, 461 A.2d 1145 (N.J. 1983) (finding that immunity attaches for conduct within the parent's discretion or authority, so negligent supervision claims are barred, but willful and wanton parental misconduct, such as willful and wanton failure to watch a small child, is not protected); *Small v. Rockfeld*, 330 A.2d 335 (N.J. 1974) (negligent manslaughter); *Leggett v. Leggett*, 216 N.Y.S.2d 781 (N.Y. Sup. Ct. 1961); *Meyer v. Ritterbush*, 92 N.Y.S.2d 595 (N.Y. Sup. Ct. 1949) (barring deceased child's administrator from suing mother's estate when child died of gas asphyxiation during mother's suicide; no cause of action absent allegation of mother's willful misconduct); *Tucker v. Tucker*, 395 P.2d 67 (Okla. 1964); *Cowgill v. Boock*, 218 P.2d 445 (Or. 1950) (drunk driving); *Aboussie v. Aboussie*, 270 S.W.2d 636 (Tex. Civ. App. 1954) (willful and wanton misconduct); *Jenkins v. Snohomish County Pub. Util.*, 713 P.2d 79 (Wash. 1986); *Hoffman v. Tracy*, 406 P.2d 323 (Wash. 1965); *Oldman v. Bartshe*, 480 P.2d 99 (Wyo. 1971) (willful and wanton disregard by driving while intoxicated). See generally Annotation, *Liability of Parent or Person in Loco Parentis for Personal Tort Against Minor Child*, 19 A.L.R.2d 423 (1951) (collected cases).

49. See *Wilson v. Wilson*, 742 F.2d 1004 (6th Cir. 1984); *Attwood v. Estate of Attwood*, 633 S.W.2d 366 (Ark. 1982); *Nudd v. Matsoukas*, 131 N.E.2d 525 (Ill. 1956); *Mahnke v. Moore*, 77 A.2d 923 (Md. 1951) (holding that a parent "forfeits his parental authority and privileges, including his immunity from suit" when committing outrageous acts. Here, the child's father killed the mother with shotgun in the child's presence, kept the child with the mother's dead body for six days, and then committed suicide in front of the child); *Jenkins v. Snohomish County Pub. Util.*, 713 P.2d 79 (Wash. 1986).

50. See *Brown v. Cole*, 129 S.W.2d 245 (Ark. 1939); *Gillet v. Gillet*, 335 P.2d 736 (Cal. App. 1959); *Henderson v. Woolley*, 644 A.2d 1303 (Conn. 1994) (child sexual abuse); *Edgington v. Edgington*, 549 N.E.2d 942 (Ill. App. Ct.), *appeal denied*, 553 N.E.2d 395 (Ill. 1990); *Treschman v. Treschman*, 61 N.E. 961 (Ind. App. 1901); *Mahnke v. Moore*, 77 A.2d 923 (Md. 1951) (intentional infliction of emotional distress

## 5. Wrongful Death

Another typical exception to parental immunity abrogates the defense when either the parent or the child has died and a wrongful death cause of action is instituted against the other. The reason typically given is that the parent-child relationship is terminated upon death.<sup>51</sup> Similarly, some states permit a

---

by father murdering mother and committing suicide, both in child's presence); *Doe v. Holt*, 418 S.E.2d 511 (N.C. 1992) (father's malicious and willful rape and molestation of daughters); *Mancinelli v. Crosby*, 589 A.2d 664 (N.J. Super. Ct. App. Div. 1991); *Cannon v. Cannon*, 40 N.E.2d 236 (N.Y. 1942); *Hartford Accident & Indem. Co. v. Borchers*, 445 N.E.2d 1160 (Ohio Ct. App. 1982); *Brown v. Selby*, 332 S.W.2d 166 (Tenn. 1960); *Felderhoff v. Felderhoff*, 473 S.W.2d 928 (Tex. 1971); *Talarico v. Foremost Ins. Co.*, 712 P.2d 294 (Wash. 1986); *Courtney v. Courtney*, 413 S.E.2d 418 (W. Va. 1991) (claim for intentional infliction of emotional distress allowed, as are other intentional tort claims, so long as the injury does not result from parent's reasonable corporal punishment for disciplinary purposes); *cf. Teramano v. Teramano*, 216 N.E.2d 375 (Ohio 1966) (requiring actual intent).

51. *See, e.g.*, *Barnwell v. Cordle*, 438 F.2d 236 (5th Cir. 1971); *Greene v. Basti*, 391 F.2d 892 (3rd Cir. 1968); *Bonner v. Williams*, 370 F.2d 301 (5th Cir. 1967) (Alabama law); *Union Bank & Trust Co. v. First Nat'l Bank & Trust Co.*, 362 F.2d 311 (5th Cir. 1966); *Davis v. Smith*, 253 F.2d 286 (3rd Cir. 1958) (Pennsylvania law); *Shaker v. Shaker*, 29 A.2d 765 (Conn. 1942); *Larson v. Buschkamp*, 435 N.E.2d 221 (Ill. App. Ct. 1982) (listing exceptions to immunity, including when death ends parent-child relationship); *Johnson v. Myers*, 277 N.E.2d 778 (Ill. App. Ct. 1972) (holding that death ends need for immunity); *Harlan Nat'l Bank v. Gross*, 346 S.W.2d 482 (Ky. 1961); *Harralson v. Thomas*, 269 S.W.2d 276 (Ky. 1954); *Hale v. Hale*, 230 S.W.2d 610 (Ky. 1950) (finding no immunity when either parent or child dies); *Ruiz v. Clancy*, 162 So. 734 (La. 1935); *Oliveria v. Oliveria*, 25 N.E.2d 766 (Mass. 1940); *Brennecke v. Kilpatrick*, 336 S.W.2d 68 (Mo. 1960); *Dean v. Smith*, 211 A.2d 410 (N.H. 1965); *Palcsey v. Tepper*, 176 A.2d 818 (N.J. Super. Ct. Law Div. 1962); *Winn v. Gilroy*, 681 P.2d 776 (Or. 1984) (permitting mother who was separated from her husband to sue him for wrongful death of the two children killed when the husband drove drunk); *Vidmar v. Sigmund*, 162 A.2d 15 (Pa. Super. Ct. 1960); *Logan v. Reaves*, 354 S.W.2d 789 (Tenn. 1962); *Lasecki v. Kabara*, 294 N.W. 33 (Wis. 1940); *Morgan v. Leuck*, 72 S.E.2d 825 (W. Va. 1952). *Contra* *Lawber v. Doil*, 547 N.E.2d 752 (Ill. App. Ct. 1989) (holding that parent representative of deceased child cannot sue other parent for wrongful death); *Smith v. Gross*, 571 A.2d 1219 (Md. 1990); *Latz v. Latz*, 272 A.2d 435 (Md. Ct. Spec. App. 1971) (finding that although mother was killed as result of daughter's negligent driving, no cause of action exists); *Damiano v. Damiano*, 143 A. 3 (N.J. 1928) (both parent and child dead, and since child had no right of action at common law because of immunity, child has no right of action under the Death Act for wrongful death); *Campbell v. Gruttemeyer*, 432 S.W.2d 894 (Tenn. 1968); *Hoffman v. Tracy*, 406 P.2d 323 (Wash. 1965); *Krause v. Home Mut. Ins. Co.*, 112 N.W.2d 134 (Wis. 1961) (decided before Wisconsin abolished immunity entirely in *Goller v. White*, 122 N.W.2d 193 (Wis. 1963)).

*See generally* Sallie M. Brinkley, Note, *Parent-Child Tort Immunity Defense is Applicable in Wrongful Death and Survival Actions Despite the Modern Trend Toward*

child to bring an action for wrongful death against a parent for the death of the other parent.<sup>52</sup> Furthermore, since wrongful death actions are entirely statutory and the statutes do not provide for the defense of immunity, it is not generally available.<sup>53</sup>

## 6. Prenatal Injuries, Wrongful Life and Wrongful Pregnancy

Traditionally, a child had no right of action against a parent for prenatal injuries because a parent owed no duty to the unborn.<sup>54</sup> Today, however, children are almost universally permitted to sue their parent for prenatal injuries.<sup>55</sup> When a fetus is harmed in utero due to the mother's wrongdoing, the born child can sue the mother for those injuries.<sup>56</sup> As to the stage of

---

*Abrogation of the Doctrine*, 20 U. BALT. L. REV. 277 (1990); Stacy L. Ross, Note, *The Parental Tort Immunity Doctrine Applied to Wrongful Death Actions: A Rule without Reason*, 13 S. ILL. U. L.J. 175 (1988); Note, 16 U. ME. L. REV. 238 (1964).

52. See, e.g., *Shiver v. Sessions*, 80 So. 2d 905 (Fla. 1955); *Welch v. Davis*, 101 N.E.2d 547 (Ill. 1951); *Apitz v. Dames*, 287 P.2d 585 (Or. 1955); *Minikin v. Minikin*, 7 A.2d 461 (Pa. 1939); *Johnson v. Ottomeier*, 275 P.2d 723 (Wash. 1954). *Contra Heyman v. Gordon*, 190 A.2d 670 (N.J. 1963); *Hance v. Haun*, 391 S.W.2d 621 (Tenn. 1965). See generally Annotation, *Action Against Parent by or on Behalf of Unemancipated Minor Child for Wrongful Death of other Parent*, 87 A.L.R.3d 849.

53. See generally RESTATEMENT (SECOND) OF TORTS § 895G cmt. g (1977).

54. See *Egbert v. Wenzl*, 260 N.W.2d 480 (Neb. 1977).

55. See generally Ron Beal, *Can I Sue Mommy? An Analysis of a Woman's Tort Liability for Prenatal Injuries to Her Child Born Alive*, 21 SAN DIEGO L. REV. 325 (1984); James Bopp, Jr. & Deborah H. Gardner, *AIDS Babies, Crack Babies: Challenges to the Law*, 7 ISSUES L. & MED. 3 (1991); Michelle Oberman, *Sex, Drugs, Pregnancy, and the Law: Rethinking the Problems of Pregnant Women Who Use Drugs*, 43 HASTINGS L.J. 505 (1992); Joseph S. Badger, Casenote, *Stallman v. Youngquist: "No, You Can't Sue Mommy in Illinois": The Illinois Supreme Court Rejects Maternal Prenatal Civil Liability*, 11 N. ILL. U. L. REV. 409 (1991); Gerard M. Bambrick, Note, *Developing Maternal Liability Standards for Prenatal Injury*, 61 ST. JOHN'S L. REV. 592 (1987); Kathryn S. Banashek, Comment, *Maternal Prenatal Negligence Does Not Give Rise to a Cause of Action*, 68 WASH. U. L.Q. 189 (1990); Deborah Carroll, Note, *Stallman v. Youngquist: The Illinois Supreme Court Rejects Maternal Civil Liability*, 39 DEPAUL L. REV. 199 (1989); Dawn E. Johnsen, Note, *The Creation of Fetal Rights: Conflicts with Women's Constitutional Rights to Liberty, Privacy, and Equal Protection*, 95 YALE L.J. 599 (1986); David E. Koropp, Note, *Setting the Standard: A Mother's Duty During the Prenatal Period*, 1989 U. ILL. L. REV. 493 (1989); Deborah M. Santello, Note, *Maternal Tort Liability for Prenatal Injuries*, 22 SUFFOLK U. L. REV. 747 (1988); Note, *Parental Liability for Prenatal Injury*, 14 COLUM. J.L. & SOC. PROBS. 47 (1978); Recent Case, 103 HARV. L. REV. 823 (1990); Roland F. Chase, Annotation, *Liability for Prenatal Injuries*, 40 A.L.R.3d 1222 (1971).

56. See, e.g., *Bonbrest v. Kotz*, 65 F. Supp. 138 (D.D.C. 1946); *Allaire v. St. Luke's Hospital*, 56 N.E. 638 (Ill. 1900); *Stallman v. Youngquist*, 473 N.E.2d 400 (Ill.

development of the fetus at the time of injury, some states say the unborn must be "quick."<sup>57</sup> Most states allow the cause of action anyway, despite such fetal development tests.<sup>58</sup> The field of prenatal injury torts continues to evolve rapidly.<sup>59</sup>

A wrongful life cause of action is brought by a child who, because of the parents' act or omission, is born deformed or impaired.<sup>60</sup> Of the states which have spoken to the issue, a majority deny the child a wrongful life action for *general* damages for his or her deformities.<sup>61</sup> Several states have statutes addressing whether or not such an action will lie at all.<sup>62</sup>

A wrongful pregnancy tort results in the birth of a healthy but unwanted child, and is typically brought against a physi-

---

App. Ct. 1984), *appeal after remand*, 504 N.E.2d 920 (Ill. App. Ct. 1987) (holding that child hurt in utero in car accident caused by mother's negligence can sue mother, despite parental immunity doctrine); *Grodin v. Grodin*, 301 N.W.2d 869 (Mich. Ct. App. 1980) (holding that prescription drug ingested during pregnancy caused child's teeth to be brown and mother is liable if she acted unreasonably); *Kalafut v. Gruver*, 389 S.E.2d 681 (Va. 1990) (allowing wrongful death action where child injured while in utero, was born alive, then died later the same evening).

57. *E.g.*, *Damasiewicz v. Gorsuch*, 79 A.2d 550 (Md. 1951). A child is "quick" when it has developed so that it moves within the mother's womb. BLACK'S LAW DICTIONARY 1247 (6th ed. 1990).

58. *See, e.g.*, *Bennett v. Hymers*, 147 A.2d 108 (N.H. 1958); *Smith v. Brennan*, 157 A.2d 497 (N.J. 1960); *Sinkler v. Kneale*, 164 A.2d 93 (Pa. 1960); *Sylvia v. Gobeille*, 220 A.2d 222 (R.I. 1966).

59. *See generally* *Mason v. Western Pa. Hosp.*, 453 A.2d 974 (Pa. 1982) (court split on many issues, with four of seven judges writing opinions).

60. *See* Michelle B. Laudor, *In Defense of Wrongful Life: Bringing Political Theory to the Defense of a Tort*, 62 FORDHAM L. REV. 1675 (1994); Philip G. Peters, Jr., *Rethinking Wrongful Life: Bridging the Boundary Between Tort and Family Law*, 67 TUL. L. REV. 397 (1992); Christine E. Dinsdale, Note, *Child v. Parent: A Viable New Tort of Wrongful Life?*, 24 ARIZ. L. REV. 391 (1982).

61. *E.g.*, *Turpin v. Sortini*, 643 P.2d 954 (Cal. 1982); *Blake v. Cruz*, 698 P.2d 315 (Idaho 1984); *Goldberg v. Ruskin*, 499 N.E.2d 406 (Ill. 1986); *Bruggeman v. Schimke*, 718 P.2d 635 (Kan. 1986); *Azzolino v. Dingfelder*, 337 S.E.2d 528, 532 (N.C. 1985), *cert. denied*, 479 U.S. 835 (1986) ("life, even life with severe defects, cannot be an injury in the legal sense"); *Smith v. Cote*, 513 A.2d 341 (N.H. 1986); *Procanik v. Cillo*, 478 A.2d 755 (N.J. 1984), *on remand*, 502 A.2d 94 (N.J. Super. Ct. Law Div. 1985); *Nelson v. Krusen*, 678 S.W.2d 918 (Tex. 1984); *Harbeson v. Parke-Davis, Inc.*, 656 P.2d 483 (Wash. 1983); *James G. v. Caserta*, 332 S.E.2d 872 (W. Va. 1985). *Contra* *Alquijay v. St. Luke's-Roosevelt Hosp. Ctr.*, 473 N.E.2d 244 (N.Y. 1984).

62. *E.g.*, CAL. CIV. CODE § 43.6 (West 1982), *construed in* *Turpin v. Sortini*, 643 P.2d 954 (Cal. 1982) (wrongful life causes of action against parents prohibited); MINN. STAT. ANN. § 145.424 (West 1989) (wrongful life and wrongful birth actions prohibited); S.D. CODIFIED LAWS ANN. § 21-55 (1981) (wrongful life and wrongful birth actions prohibited).

cian or contraceptive manufacturer for failing to prevent a pregnancy.<sup>63</sup> The majority of jurisdictions recognizing this action allow the parents to sue,<sup>64</sup> but not the child,<sup>65</sup> even if the child is illegitimate.<sup>66</sup>

## 7. Negligent Supervision

Suits alleging negligent supervision of a child are typically prohibited since the essence of such an action is so closely intertwined with a parent's discretion and authority.<sup>67</sup> However, some courts have permitted actions for negligent supervision.<sup>68</sup>

---

63. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 55 (5th ed. 1984).

64. See, e.g., *Custodio v. Bauer*, 59 Cal. Rptr. 463 (Cal. App. 1967) (Called into doubt by Cal. App. Ct. but not yet overruled); *Ochs v. Borrelli*, 445 A.2d 883 (Conn. 1982); *Sherlock v. Stillwater Clinic*, 260 N.W.2d 169 (Minn. 1977) (superseded by statute).

65. See, e.g., *White v. United States*, 510 F. Supp. 146 (D. Kan. 1981) (denying action by siblings as well); *Stribling v. de Quevedo*, 432 A.2d 239 (Pa. Super. Ct. 1980).

66. See, e.g., *Moore v. Lucas*, 405 So. 2d 1022 (Fla. Dist. 76Ct. App. 1981), *overruled by* *Kush v. Lloyd*, 616 So. 2d 415 (1992). *Zepeda v. Zepeda*, 190 N.E.2d 849 (Ill. App. 1963) (barring child's suit for illegitimate birth).

67. See *Schneider v. Coe*, 405 A.2d 682 (Del. 1979) (abrogating immunity for auto negligence but refusing to allow claims of negligent supervision); *Pedigo v. Rowley*, 610 P.2d 560 (Idaho 1980) (finding no cause of action exists for contribution by third party against father for negligent supervision because father's liability is barred by immunity, and parental immunity also bars third party contribution action); *Wagner v. Smith*, 340 N.W.2d 255 (Iowa 1983) (adopting parental authority and discretion area of immunity and barring suit for negligent supervision); *Haddrill v. Damon*, 386 N.W.2d 643 (Mich. Ct. App. 1986); *Wright v. Wright*, 351 N.W.2d 868 (Mich. Ct. App. 1984) (adopting zone of immunity extending to acts within parent's authority and discretion and barring negligent supervision cause of action); *Holodook v. Spencer*, 324 N.E.2d 338 (N.Y. 1974); *Sixkiller v. Summers*, 680 P.2d 360 (Okla. 1984) (barring cause of action for negligent supervision); *Bell v. Hudgins*, 352 S.E.2d 332 (Va. 1987) (holding that without principal-agent relationship, parent is not liable for minor child's intentional acts based on claim of parental negligence in failing to control child); *Wright v. Wright*, 191 S.E.2d 223, 225 (Va. 1972) (finding that father's negligence, if any, "bespeaks only his failure to discharge the normal parental duty of supervising and providing a safe place for the child to play").

68. See, e.g., *Hartigan v. Beery*, 470 N.E.2d 571 (Ill. App. Ct. 1984) (allowing third party contribution action against parent for negligent supervision because right of contribution prevails over immunity); *Anderson v. Stream*, 295 N.W.2d 595 (Minn. 1980) (child wandered into driveway and was hit); *Convery v. Maczka*, 394 A.2d 1250 (N.J. Super. Ct. Law Div. 1978); *Andrews v. County of Otsego*, 446 N.Y.S.2d 169 (N.Y. App. Div. 1982) (allowing child's cause of action for negligent supervision against foster parent); *Miller v. Leljedal*, 455 A.2d 256 (Pa. Commw. Ct. 1983); *Thoreson v. Milwaukee & Suburban Transp. Co.*, 201 N.W.2d 745 (Wis. 1972) (child,



Parents have been found not liable for failing to teach a child how to cross the street safely<sup>69</sup> and how to use automobile seat belts.<sup>70</sup> Similarly, no liability was found when a child wandered off and was bitten by a dog,<sup>71</sup> and where a child was struck when he rode his tricycle through a gate left open by the parent.<sup>72</sup> Finally, several courts have held that some household risks are so common that there is no liability for injuries resulting from them.<sup>73</sup>

However, if the parent acts affirmatively<sup>74</sup> or notices a danger and takes measures to protect against it but does so negligently,<sup>75</sup> the scope of the parent's discretion narrows. Similarly, allowing a child near a dangerous instrumentality may expose a parent to liability,<sup>76</sup> particularly when the parent keeps dangerous instrumentalities at home.<sup>77</sup>

Two Iowa cases with similar facts yielded different results. In *Wagner v. Smith*,<sup>78</sup> a four year old was barred by parental immunity from recovering for serious injuries incurred when the child's father allowed the child near a grain auger.<sup>79</sup> Two years later, the same court held that immunity was not necessarily a bar when a four year old suffocated in his father's grain loading operation because, in that case, the plaintiff fo-

---

who was left alone in the house, wandered off and was hit); *Thomas v. Kells*, 191 N.W.2d 872 (Wis. 1971).

69. See *Lemmen v. Servais*, 158 N.W.2d 341 (Wis. 1968).

70. See *Latta v. Siefke*, 401 N.Y.S.2d 937 (N.Y. App. Div. 1978).

71. See *Foldi v. Jeffries*, 461 A.2d 1145 (N.J. 1983) (holding that immunity attaches for conduct within the parent's discretion or authority, so negligent supervision claims are barred).

72. See *Sandoval v. Sandoval*, 623 P.2d 800 (Ariz. 1981).

73. See, e.g., *Cosmopolitan Nat'l Bank v. Heap*, 262 N.E.2d 826 (Ill. App. Ct. 1970) (barring cause of action when father left stairway carpet loose); *Hush v. Devilbliss Co.*, 259 N.W.2d 170 (Mich. Ct. App. 1977) (vaporizer); *Cherry v. Cherry*, 203 N.W.2d 352 (Minn. 1972) (electrical extension cord).

74. *Romanik v. Toro Co.*, 277 N.W.2d 515 (Minn. 1979).

75. *Thoreson v. Milwaukee & Suburban Transport Co.*, 201 N.W.2d 745 (Wis. 1972) (finding liability when child was known to run into the street).

76. *Howes v. Hansen*, 201 N.W.2d 825 (Wis. 1972); *Cole v. Sears Roebuck & Co.*, 177 N.W.2d 866 (Wis. 1970) (small child fell from swing).

77. *Dower v. Goldstein*, 363 A.2d 373 (N.J. Super. Ct. App. Div. 1976) (vicious dog); *Goedkoop v. Ward Pavement*, 378 N.Y.S.2d 417 (N.Y. App. Div. 1976) (blasting caps).

78. 340 N.W.2d 255 (Iowa 1983) (adopting parental authority and discretion area of immunity and barring suit for negligent supervision).

79. *Id.* at 255-56.

cused on negligence occurring outside of the parental relationship rather than on any breached duty of supervision.<sup>80</sup>

#### 8. Parent's Violation of Duty Owed to the Public and Third Party Actions

Liability is sometimes found when a parent violates a duty owed to the public at large and where the family relationship is only incidental to the wrongful act or omission.<sup>81</sup>

The most typical situation with third party actions arises when a child sues a third party and that third party then sues the child's parent seeking contribution or indemnity.<sup>82</sup> In *Holodook v. Spencer*,<sup>83</sup> the court did not permit contribution from parents when the claim against them in the action was

---

80. *Caniglia v. Lary*, 366 N.W.2d 548 (Iowa 1985).

81. *See, e.g.*, *Larson v. Buschkamp*, 435 N.E.2d 221, 224-225 (Ill. App. Ct. 1982) (listing exceptions to immunity, including allowing contribution suits against parents and actions against a parent for violation of a duty owed to the public at large); *Cummings v. Jackson*, 372 N.E.2d 1127 (Ill. App. Ct. 1978) (parent's violation of ordinance by not trimming trees obstructed view and driver hit child on bicycle; child was allowed to sue parent); *Schenk v. Schenk*, 241 N.E.2d 12 (Ill. App. Ct. 1968) (daughter ran into pedestrian who happened to be her father); *Caniglia*, 366 N.W.2d at 548 (distinguishing between negligent supervision, where immunity attaches, and negligence outside of the parental role, where immunity may not attach); *Carey v. Meijer, Inc.*, 408 N.W.2d 478 (Mich. Ct. App. 1987) (permitting contribution against mother despite immunity because she was not exercising reasonable parental discretion); *Grivas v. Grivas*, 496 N.Y.S.2d 757 (N.Y. App. Div. 1985) (holding that mother was not liable for not teaching child lawnmower dangers, but could be liable for leaving it running and unattended since reasonable care is owed to everyone).

82. *See, e.g.*, *Pedigo v. Rowley*, 610 P.2d 560 (Idaho 1980) (child struck by a speedboat in a lake sued the boat owners, and the boat owners sought contribution from the father based on a claim of negligent supervision. The court held that no cause of action existed for contribution by the third party against the father for negligent supervision because the father's liability is barred by immunity, and parental immunity also bars third party contribution action); *Hartigan v. Beery*, 470 N.E.2d 571 (Ill. App. Ct. 1984) (allowing third party contribution action against a parent for negligent supervision); *Larson*, 435 N.E.2d at 221 (despite parental immunity, contribution actions against a parent are permissible); *Lee v. Mowett Sales Co.*, 342 S.E.2d 882 (N.C. 1986) (prohibiting manufacturer from seeking contribution from parent because parent could not be held liable in a direct action by the injured child); *Nolechek v. Gesuale*, 385 N.E.2d 1268 (N.Y. 1978) (allowing contribution based on claim of negligent entrustment of dangerous instrumentality); *Holodook v. Spencer*, 324 N.E.2d 338 (N.Y. 1974) (barring third party contribution action based on negligent supervision).

83. 324 N.E.2d 338 (N.Y. 1974).

for negligent supervision because such claims were barred as being within the parent's discretion and authority.<sup>84</sup>

In *Nolechek v. Gesuale*,<sup>85</sup> however, a contribution action was permitted when the claim against the parents was for negligent entrustment of a dangerous instrumentality, as opposed to a claim of negligent supervision, which the court distinguished. In *Nolechek*, an unlicensed teenage boy who was blind in one eye died after riding his motorcycle into a steel cable that defendants had strung near a roadway.<sup>86</sup> The defendants were allowed to bring their contribution action against the boy's parents for negligently entrusting a dangerous instrumentality (the motorcycle) to their son.<sup>87</sup>

Other examples where a parent may be liable on the same theory include negligently entrusting a dangerous instrumentality such as a gun,<sup>88</sup> or an instrument which can be particularly dangerous to a specific child because of his or her susceptibility to use it improperly.<sup>89</sup> The parent's knowledge of the child's propensity to misuse the item may be important in determining the parent's liability.<sup>90</sup>

---

84. *Id.* at 346.

85. 385 N.E.2d 1268 (N.Y. 1978); *cf.* *Bishop v. Nielsen*, 632 P.2d 864 (Utah 1981) (refusing to address immunity in a contribution context).

86. 385 N.E.2d at 1274.

87. *Id.* The court reiterated that a child still cannot sue a parent for negligent entrustment of a dangerous instrumentality. Such a suit is permissible only when brought by a third party because of the parent's duty to third parties. *Id.* at 1270-71.

88. *See, e.g.*, *Lichtenthal v. Gawoski*, 354 N.Y.S.2d 267 (N.Y. App. Div. 1974) (stating that a parent has duty to third parties, and a cause of action exists against parents for negligently entrusting a dangerous b-b gun to a child); *Howell v. Hairston*, 199 S.E.2d 766 (S.C. 1973); *Prater v. Burns*, 525 S.W.2d 846 (Tenn. Ct. App. 1975).

89. *See, e.g.*, *Thompson v. Havard*, 235 So. 2d 853 (Ala. 1970) (car); *Jarboe v. Edwards*, 223 A.2d 402 (Conn. Super. Ct. 1966); *Davis v. Gavalas*, 139 S.E. 577 (Ga. Ct. App. 1927) (velocipede); *Gudziewski v. Stemplesky*, 160 N.E. 334 (Mass. 1928); *May v. Goulding*, 111 N.W.2d 862 (Mich. 1961) (mentally ill child with semi-automatic rifle); *Nolechek*, 385 N.E.2d at 1268 (providing unlicensed minor who was blind in one eye with a motorcycle); *Zuckerberg v. Munzer*, 100 N.Y.S.2d 910 (N.Y. App. Div. 1950) (baseball bat); *Johnson v. Glidden*, 76 N.W. 933 (S.D. 1898).

#### IV. ALTERNATIVE STANDARDS FOR LIABILITY AND CURRENT STATUS OF PARENTAL IMMUNITY

##### A. *Alternative Standards*

Of the states which adopted parental immunity, the majority initially modeled their rule after *Hewlette*, holding that an unemancipated child could not sue a parent for personal torts.<sup>91</sup> Those states then began creating exceptions to the rule, abrogating it in a piecemeal fashion and narrowing its applicability such that some jurisdictions retain the doctrine today in narrow circumstances.<sup>92</sup>

However, some states which had initially adopted traditional parental immunity have since abolished it in its entirety,<sup>93</sup> substituting an alternative standard for parental liability; eight states have declined adoption of any parental immunity

---

91. See *supra* notes 4-16 and accompanying text.

92. See *supra* part III; see, e.g., LA. REV. STAT. ANN. § 9:571 (West 1965) (statutory immunity for custodial parents but direct action against insurer permitted); *Veselits v. Veselits*, 653 F. Supp. 1570 (S.D. Miss. 1987); *Mitchell v. Davis*, 598 So.2d 801 (Ala. 1992); *Hill v. Giordano*, 447 So. 2d 164 (Ala. 1984) (per curiam) (abrogation of immunity is an exclusively legislative decision); *Thomas v. Inmon*, 594 S.W.2d 853 (Ark. 1980); *Dubay v. Irish*, 542 A.2d 711 (Conn. 1988) (barring child rendered incompetent after ingesting mother's prescription drugs from suing mother for negligence where child did not allege mother's willful and wanton misconduct); *Frye v. Frye*, 505 A.2d 826 (Md. 1986) (finding that traditional basis for immunity, i.e. preserving family tranquility, is still valid today, and refusing to abrogate it even for auto negligence claims because that is within the purview of the legislature, which had created mandatory auto liability insurance scheme); *Lee v. Mowett Sales Co.*, 342 S.E.2d 882 (N.C. 1986); *Wright v. Wright*, 191 S.E.2d 223 (Va. 1972); *Courtney v. Courtney*, 413 S.E.2d 418 (W. Va. 1991) (holding that despite abrogation for intentional torts, general parental immunity for negligence is retained).

93. E.g., *Gibson v. Gibson*, 479 P.2d 648 (Cal. 1971); *Anderson v. Stream*, 295 N.W.2d 595 (Minn. 1980); *Guess v. Gulf Ins. Co.*, 627 P.2d 869 (N.M. 1981); *Kirchner v. Crystal*, 474 N.E.2d 275 (Ohio 1984); *Falco v. Pados*, 282 A.2d 351 (Pa. 1971); *Elam v. Elam*, 268 S.E.2d 109 (S.C. 1980) (abolishing parental immunity and holding unconstitutional a statute abrogating parental immunity for auto negligence claims only).

rules.<sup>94</sup> New York's standard for parental liability is somewhat uncertain.<sup>95</sup>

### 1. Exercise of Parental Discretion or Authority

Wisconsin abrogated parental immunity, *except* when the allegedly negligent act occurs in the realm of parental discretion or authority.<sup>96</sup> As to what constitutes parental discretion, the court indicated it includes matters such as providing the child with food, clothing, shelter, and medical and dental care.<sup>97</sup> A significant number of states have also chosen this approach.<sup>98</sup>

---

94. See *Hebel v. Hebel*, 435 P.2d 8 (Alaska 1967) (refusing to adopt a specific scope of liability and allowing claim for parental auto negligence); *Peterson v. City and County of Honolulu*, 462 P.2d 1007 (Haw. 1969); *Nocktonick v. Nocktonick*, 611 P.2d 135 (Kan. 1980) (in question of first impression, court refuses to adopt parental immunity, and limits its holding to allow parental auto negligence claim); *Nuelle v. Wells*, 154 N.W.2d 364 (N.D. 1967) (declining adoption of any specific form of parental immunity, relying on statutory requirement that everyone is responsible for injuries they cause); *Rupert v. Stienne*, 528 P.2d 1013 (Nev. 1974) (abrogating interspousal immunity, but since Nevada had never adopted parental immunity, a child was free to sue a parent in tort without limitation); *Kloppenburg v. Kloppenburg*, 280 N.W. 206 (S.D. 1938) (addressing parental immunity but applying Minnesota law); *Elkington v. Foust*, 618 P.2d 37 (Utah 1980) (parental immunity has never been adopted, either by case law or statute); *Wood v. Wood*, 370 A.2d 191 (Vt. 1977) (refusing to adopt parental immunity).

95. See *Holodook v. Spencer*, 324 N.E.2d 338 (N.Y. 1974) (barring negligent supervision claims against parents); *Gelbman v. Gelbman*, 245 N.E.2d 192 (N.Y. 1969) (abrogating immunity for nonwillful torts); *Hairston v. Broadwater*, 342 N.Y.S.2d 787 (N.Y. Sup. Ct. 1973).

96. *Goller v. White*, 122 N.W.2d 193 (Wis. 1963).

97. *Id.* at 198.

98. See *Streenz v. Streenz*, 471 P.2d 282, 284 (Ariz. 1970); *Schneider v. Coe*, 405 A.2d 682 (Del. 1979); *Ard v. Ard*, 414 So. 2d 1066 (Fla. 1982); *Cates v. Cates*, 619 N.E.2d 715 (Ill. 1993); *Wagner v. Smith*, 340 N.W.2d 255 (Iowa 1983) (adopting parental authority and discretion area of immunity); *Turner v. Turner*, 304 N.W.2d 786 (Iowa 1981); *Horn v. Horn*, 630 S.W.2d 70 (Ky. 1982) (defining parental authority as discipline and parental discretion as those matters which parents are legally obligated to provide their children); *Rigdon v. Rigdon*, 465 S.W.2d 921 (Ky. 1970) (adopting zone of immunity as conduct within parental authority and discretion); *Black v. Solmitz*, 409 A.2d 634 (Me. 1979); *Plumley v. Klein*, 199 N.W.2d 169 (Mich. 1972); *Haddrill v. Damon*, 386 N.W.2d 643 (Mich. Ct. App. 1986); *Wright v. Wright*, 351 N.W.2d 868 (Mich. Ct. App. 1984) (adopting zone of immunity extending to acts within parent's authority and discretion); *Foldi v. Jeffries*, 461 A.2d 1145 (N.J. 1983) (immunity attaches for conduct within the parent's discretion or authority); *Fritz v. Anderson*, 371 A.2d 833 (N.J. Super. Ct. Law Div. 1977); *Holodook v. Spencer*, 324 N.E.2d 338 (N.Y. 1974); *Unah v. Martin*, 676 P.2d 1366 (Okla. 1984); *Silva v. Silva*,

## 2. Reasonably Prudent Parent Standard

Rather than applying a per se rule immunizing parents from liability for their negligent acts, some states have adopted a reasonably prudent parent standard for determining liability.<sup>99</sup> In *Gibson v. Gibson*,<sup>100</sup> the California court felt it "intolerable" that parents could "act negligently with impunity" if they were smart enough to pigeonhole their behavior into either the parental discretion or parental authority category.<sup>101</sup>

The majority in *Anderson v. Stream*<sup>102</sup> felt that a reasonably prudent parent standard adequately protected a parent's zone of discretion and authority.<sup>103</sup> It provides sufficient flexibility for parents and allows juries to perform their function.<sup>104</sup> Furthermore, the court said that a child should not be denied a right of action in light of the prevalence of liability insurance and the state's constitutional right to compensation for injuries incurred by the wrongdoing of another.<sup>105</sup>

The dissent in *Anderson* harshly criticized the majority's adoption of a reasonableness standard, arguing that there really is no objective standard for raising children, that each juror's

446 A.2d 1013 (R.I. 1982) (utilizing parental authority and discretion standard for protected conduct); *Jilani v. Jilani*, 767 S.W.2d 671 (Tex. 1988) (protecting only those activities within parent's discretion and authority); *Felderhoff v. Felderhoff*, 473 S.W.2d 928 (Tex. 1971) (adopting rationale that activities within parent's discretion or authority are protected); *Cole v. Sears Roebuck & Co.*, 177 N.W.2d 866 (Wis. 1970).

99. See *Gibson v. Gibson*, 479 P.2d 648 (Cal. 1971); *Anderson v. Stream*, 295 N.W.2d 595 (Minn. 1980) (adopting reasonably prudent parent standard and overruling earlier case which had abrogated general immunity except where the parental act involved reasonable authority or ordinary discretion); *Hartman v. Hartman*, 821 S.W.2d 852 (Mo. 1991) (abrogating parental immunity and adopting reasonably prudent parent standard); *Kendall v. Sears, Roebuck & Co.*, 634 S.W.2d 176 (Mo. 1982) (whether immunity attaches is determined on case-by-case basis). See generally Luke K. Cooperrider, *Child v. Parent in Tort: A Case for the Jury*, 43 MINN. L. REV. 73 (1958); Note, *The "Reasonable Parent" Standard: An Alternative to Parent-Child Tort Immunity*, 47 U. COLO. L. REV. 795 (1976).

100. 479 P.2d 648 (Cal. 1971) (expressly rejecting adoption of the two areas of immunity enunciated in *Goller v. White*, 122 N.W.2d 193 (Wis. 1963)).

101. *Id.* at 653.

102. 295 N.W.2d 595, 599-600 (Minn. 1980); see also ME. CONST. art. I, § 19; OHIO CONST. art. I, § 16 (constitutional rights for redress of injuries).

103. *Anderson*, 295 N.W.2d at 599.

104. *Id.* at 600.

105. *Id.* at 600-01.

notions of parenting will differ, that it will be problematic to craft a jury instruction for the standard, and that the standard will unfairly punish parents whose child rearing practices do not conform to community expectations.<sup>106</sup>

### 3. Restatement Section 895G Standard

The Restatement rejects parental immunity but does provide that "[r]epudiation 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."<sup>107</sup> This section recognizes that certain parental functions such as authority and supervision are discretionary, and it takes into account those behaviors which may be so closely related to parental discretion that liability should not be imposed for them.<sup>108</sup> Accordingly, the Restatement approach parallels both *Goller* and *Gibson*.<sup>109</sup> Although this standard appears somewhat indeterminate, its purpose was not to define any particular scope of parental liability or to create categories as a matter of law. Rather, it attempts to offer parents flexibility and children a remedy for personal injuries, regardless of the tortfeasor's familial relationship to the child-plaintiff.

Several jurisdictions have either expressly adopted this standard or supported its rationale.<sup>110</sup> For example, Oregon opted

---

106. *Id.* at 602-604 (Rogosheske, J., dissenting).

107. RESTATEMENT (SECOND) OF TORTS § 895G(2) (1977).

108. RESTATEMENT (SECOND) OF TORTS § 895G cmt. k (1977) ("[T]o say that the standard of a reasonable prudent parent is applied should be . . . to require that the conduct be palpably unreasonable in order to impose liability"); see also *Cates v. Cates*, 619 N.E.2d 715, 729 (Ill. 1993) (limiting immunity to "conduct inherent to the parent-child relationship").

109. The Restatement further provides, "[i]f the conduct giving rise to an injury does not grow directly out of the family relationship, the existence of negligence may be determined as if the parties were not related." RESTATEMENT (SECOND) OF TORTS § 895 G Cmt. k (1977).

110. See *Rousey v. Rousey*, 528 A.2d 416 (D.C. 1987) (expressly rejecting adoption of any form of parental immunity in spite of *Dennis v. Walker*, 284 F. Supp. 413, 417 (D.D.C. 1968) and approving of Restatement standard); *Tamashiro v. De Gama*, 450 P.2d 998 (Haw. 1969); *Sweeney v. Sweeney*, 262 N.W.2d 625 (Mich. 1978); *Balts v. Balts*, 142 N.W.2d 66 (Minn. 1966) (decided before Minnesota adopted reasonably prudent parent standard in 1980); *Vickers v. Vickers*, 242 A.2d 57 (N.H. 1968); *Winn v. Gilroy*, 681 P.2d 776 (Or. 1984).

for the Restatement approach in *Winn v. Gilroy*<sup>111</sup> because it did not care for either the Wisconsin or California standards. The *Winn* court had interpretive problems with the Wisconsin rule<sup>112</sup> that immunity attaches when the activity involves either parental authority or parental discretion,<sup>113</sup> and felt that California's reasonably prudent parent standard<sup>114</sup> would send every case to the jury, with little chance of establishing boundaries within which parents could feel comfortable in performing their parental functions.<sup>115</sup>

### B. To Whom and When Might Immunity Attach?

Immunity may attach to those who stand *in loco parentis*.<sup>116</sup> However, where someone is merely a custodian and does not stand *in loco parentis*, a child's suit may proceed because immunity will not attach.<sup>117</sup> Several courts have permitted suits by a child against his or her noncustodial parent.<sup>118</sup>

---

111. 681 P.2d 776 (Or. 1984).

112. *Goller v. White*, 122 N.W.2d 193 (Wis. 1963).

113. *Winn*, 681 P.2d at 780-783.

114. *Gibson v. Gibson*, 479 P.2d 648 (Cal. 1971).

115. *Winn*, 681 P.2d at 783-786.

116. See, e.g., *Mitchell v. Davis*, 598 So. 2d 801 (Ala. 1992) (providing immunity to foster parent from negligence claims); *Clabough v. Rachwal*, 335 S.E.2d 648 (Ga. Ct. App. 1985) (holding that a grandchild cannot sue grandmother for wrongful death of child's mother since, after mother's death, child was in grandmother's custody); *Coleman v. Coleman*, 278 S.E.2d 114 (Ga. Ct. App. 1981) (barring child from suing noncustodial parent for auto negligence because he is still a parent and entitled to protection); *Maddox v. Queen*, 257 S.E.2d 919 (Ga. Ct. App. 1979) (grandfather stood *in loco parentis*); *Gerrity v. Beatty*, 373 N.E.2d 1323 (Ill. 1978) (extending immunity to teacher's discipline and authority because teachers stand *in loco parentis* by statute); *Lawber v. Doil*, 547 N.E.2d 752 (Ill. App. Ct. 1989) (stepfather stood *in loco parentis*); *Wooden v. Hale*, 426 P.2d 679 (Okla. 1967). For commentary on immunity for foster parents, see E. Russell March III, Note, *Doctrine of Parental Immunity Extended to Foster Parents Standing In Loco Parentis for Claims of Simple Negligence*, 23 CUMB. L. REV. 483 (1992-1993).

117. See *Brown v. Cole*, 129 S.W.2d 245 (Ark. 1939) (adoptive parents); *Gulledge v. Gulledge*, 367 N.E.2d 429 (Ill. App. Ct. 1977) (grandparents); *Buffalo v. Buffalo*, 441 N.E.2d 711 (Ind. Ct. App. 1982) (noncustodial parent); *Treschman v. Treschman*, 61 N.E. 961 (Ind. Ct. App. 1901); *Mayberry v. Prior*, 374 N.W.2d 683 (Mich. 1985) (foster parent); *Fugate v. Fugate*, 582 S.W.2d 663 (Mo. 1979) (noncustodial parent); *Clasen v. Pruhs*, 95 N.W. 640 (Neb. 1903); *Wilkins v. Kane*, 181 A.2d 417 (N.J. Super. Ct. Law Div. 1962) (grandparent); *Cwik v. Zylstra*, 155 A.2d 277 (N.J. Super. Ct. App. Div. 1959) (grandparent); *Andrews v. County of Otsego*, 446 N.Y.S.2d 169 (N.Y. App. Div. 1982) (allowing child's cause of action for negligent supervision against foster parent).

118. LA. REV. STAT. ANN. § 9:571 (West 1965) (statutory immunity for custodial



The states have taken one of two paths regarding parental immunity: either they have adopted the traditional rule and carved out exceptions,<sup>119</sup> or they have abrogated it entirely or refused to adopt it at all.<sup>120</sup> Among the states which have either abolished or never adopted traditional parental immunity, there are in general three alternative standards: the reasonably prudent parent standard, the Restatement standard, and the standard protecting parents from liability for only those actions arising from their parental authority or discretion.<sup>121</sup>

It is important to consider the various factors which can be determinative of parental liability to a child in tort: whether the tortious act was reckless or intentional, whether the defendant stood *in loco parentis*, whether the negligence occurred in a business context or other recognized exception, and whether the child is legally emancipated.<sup>122</sup>

## V. ANALOGIZING TO INTERSPOUSAL IMMUNITY

Many of the arguments advanced for maintaining parental immunity were also once used in support of interspousal tort immunity. Interspousal immunity, however, has been largely abolished<sup>123</sup> because the rule no longer advanced its own un-

---

parents but direct action against insurer allowed); *see, e.g.*, *Buffalo v. Buffalo*, 441 N.E.2d 711 (Ind. Ct. App. 1982); *Fugate v. Fugate*, 582 S.W.2d 663 (Mo. 1979) (allowing child to sue noncustodial parent only after an evidentiary hearing shows that suit would not disrupt family harmony).

119. *See supra* parts II & III.

120. *See supra* part IV.

121. *Id.*

122. *Id.*

123. *See, e.g.*, D.C. CODE ANN. § 30-201 (1981); N.Y. GEN. OBLIG. LAW § 3-313 (McKinney 1978); N.C. GEN. STAT. § 52-5 (1984); VA. CODE ANN. § 8.01-220.1 (Michie 1981); W. VA. CODE § 48-3-19 (1969), *construed in* *Coffindaffer v. Coffindaffer*, 244 S.E.2d 338 (W. Va. 1978); *Moran v. Beyer*, 734 F.2d 1245 (7th Cir. 1984) (holding statutory interspousal immunity unconstitutional on equal protection grounds); *Beattie v. Beattie*, 630 A.2d 1096 (Del. Super. Ct. 1993) (abolishing immunity for negligence claims); *Waite v. Waite*, 618 So. 2d 1360 (Fla. 1993); *Boblitz v. Boblitz*, 462 A.2d 506 (Md. 1983) (explaining how all states have dealt with interspousal immunity); *MacDonald v. MacDonald*, 412 A.2d 71 (Me. 1980); *Burns v. Burns*, 518 So. 2d 1205 (Miss. 1988); *Miller v. Fallon County*, 721 P.2d 342 (Mont. 1986); *Fitzmaurice v. Fitzmaurice*, 242 N.W. 526 (N.D. 1932); *Maestas v. Overton*, 531 P.2d 947 (N.M. 1975) (abolishing interspousal immunity for unintentional torts); *Shearer v. Shearer*, 480 N.E.2d 388 (Ohio 1985); *Heino v. Harper*, 759 P.2d 253 (Or. 1988); *Davis v. Davis*, 657 S.W.2d 753 (Tenn. 1983); *Tader v. Tader*, 737 P.2d 1065 (Wyo. 1987). *But see*

derlying rationales.<sup>124</sup> The early common law idea of “unity of person” upon marriage was the major reason for barring a wife’s tort claim against her husband. But with adoption by all states of Married Women’s Property Acts, the “unity of person” concept became irrelevant, and wives were permitted to sue husbands for property-related torts.<sup>125</sup>

---

*Robeson v. International Indem. Co.*, 282 S.E.2d 896 (Ga. 1981) (interspousal immunity withstands equal protection and due process scrutiny, and legislature, not court, must abrogate). As of 1989, 40 states had abolished interspousal immunity in its entirety. See RICHARD A. EPSTEIN, *CASES AND MATERIALS ON TORTS* 848-49 (5th ed. 1990).

For cases abolishing interspousal immunity as to auto negligence claims, see *Fernandez v. Romo*, 646 P.2d 878 (Ariz. 1982); *Rogers v. Yellowstone Park Co.*, 539 P.2d 566 (Idaho 1974); *Rupert v. Stienne*, 528 P.2d 1013 (Nev. 1974); *Immer v. Risko*, 267 A.2d 481 (N.J. 1970); *Asplin v. Amica Mut. Ins. Co.*, 394 A.2d 1353 (R.I. 1978) (abolishing immunity as to auto negligence when either spouse dies); *Digby v. Digby*, 388 A.2d 1 (R.I. 1978); *Richard v. Richard*, 300 A.2d 637 (Vt. 1973); *Surrat v. Thompson*, 183 S.E.2d 200 (Va. 1971).

For cases abolishing interspousal immunity as to intentional tort actions, see *Windauer v. O’Conner*, 485 P.2d 1157 (Ariz. 1971); *Ebert v. Ebert*, 656 P.2d 766 (Kan. 1983); *Flores v. Flores*, 506 P.2d 345 (N.M. Ct. App.), *cert. denied*, 506 P.2d 336 (N.M. 1973); *Apitz v. Dames*, 287 P.2d 585 (Or. 1955); *Bounds v. Caudle*, 560 S.W.2d 925 (Tex. 1977), *appeal after new trial*, 611 S.W.2d 685.

For cases permitting various causes of action between spouses, see *Klein v. Klein*, 376 P.2d 70 (Cal. 1962) (slip and fall); *Garrity v. Garrity*, 504 N.E.2d 617 (Mass. 1987) (breach of fiduciary duty); *Nogueira v. Nogueira*, 444 N.E.2d 940 (Mass. 1983) (libel and intentional infliction of emotional distress); *Brown v. Brown*, 409 N.E.2d 717 (Mass. 1980) (slip and fall); *Merenoff v. Merenoff*, 388 A.2d 951 (N.J. 1978) (negligence); *Slansky v. Slansky*, 553 A.2d 152 (Vt. 1988) (conversion); *Young v. Young*, 709 P.2d 1254 (Wyo. 1985) (conversion).

See generally RESTATEMENT (SECOND) OF TORTS § 895F (1977); Marvin M. Moore, *The Case for Retention of Interspousal Tort Immunity*, 7 OHIO N.U. L. REV. 943 (1980); Robert G. Spector, *All in the Family—Tort Litigation Comes of Age*, 28 FAM. L. Q. 363 (1994); Carl Tobias, *Interspousal Tort Immunity in America*, 23 GA. L. REV. 359 (1989); Patricia K. Fenske, Note, *Oregon’s Hostility to Policy Arguments: Heino v. Harper and the Abolition of Interspousal Immunity*, 68 OR. L. REV. 197 (1989); Rhonda L. Kohler, Comment, *The Battered Woman and Tort Law: A New Approach to Fighting Domestic Violence*, 25 LOY. L.A. L. REV. 1025 (1992); Lansing C. Scriven, Comment, *The Florida Legislature Tolls the Death Knell for Interspousal Immunity in Tort*, 13 FLA. ST. U. L. REV. 725 (1985).

124. See, e.g., *Counts v. Counts*, 266 S.E.2d 895 (Va. 1980), *abrogated by* VA. CODE ANN. § 8.01-220.1 (Michie 1981) (husband’s suit for injuries sustained in his wife’s failed murder-for-hire scheme barred because it would disrupt marital harmony).

125. See, e.g., *Cramer v. Cramer*, 379 P.2d 95 (Alaska 1963); *Brooks v. Robinson*, 284 N.E.2d 794 (Ind. 1972). See generally RICHARD A. EPSTEIN, *CASES AND MATERIALS ON TORTS* 848-49 (5th ed. 1990); JOHN DE WITT GREGORY ET AL., *UNDERSTANDING FAMILY LAW* § 6.02[A] (1993); PETER N. SWISHER ET AL., *FAMILY LAW* §§ 5.02, 8.01[A] (1990) .

In *Thompson v. Thompson*,<sup>126</sup> however, the United States Supreme Court held that adoption of Married Women's Property Acts did not create a right of action for a wife to sue her husband for personal injury torts.<sup>127</sup> Such actions were barred because they disrupt family peace and harmony and create fraudulent and collusive claims.<sup>128</sup> The same argument is used for parental immunity as well, but it suffers from the same weaknesses in the parent-child context as it did in the spousal context.

Some courts based their retention of parental immunity on an analogy to interspousal immunity,<sup>129</sup> but Virginia has held that any analogy to interspousal immunity is "fallacious" because the public policy concerns for maintaining parental immunity are so different from those which at one time were urged in support of interspousal immunity.<sup>130</sup> Further, there never existed any common law "unity of person" between children and their parents.<sup>131</sup>

Another argument typically advanced as justification for parental immunity is the danger of fraud and collusion between parent and child.<sup>132</sup> This reasoning, too, has been largely discredited as a justification for immunity.<sup>133</sup> Virginia has expressly rejected this rationale, holding that courts should not

---

126. 218 U.S. 611 (1910).

127. *Id.*

128. *Id.*

129. See *Black v. Solnitz*, 409 A.2d 634, 637 (Me. 1979) (analogy of parental immunity to interspousal immunity is "misplaced").

130. See *Midkiff v. Midkiff*, 113 S.E.2d 875 (Va. 1960); See also *Worrell v. Worrell*, 4 S.E.2d 343 (Va. 1939).

131. See *Black*, 409 A.2d at 637; *Small v. Morrison*, 118 S.E. 12, 24 (N.C. 1923) (Clark, C.J., dissenting) ("There were . . . radical distinctions at common law between the status of wife and child.").

132. For courts utilizing this rationale for interspousal immunity and barring the claim, see *Newton v. Weber*, 196 N.Y.S. 113 (1922); *Abbott v. Abbott*, 67 Me. 304 (1877).

133. Some courts use a "baby with the bath water" argument, stating that the remedy for fraudulent and collusive claims is to ferret them out by means that already exist rather than barring all meritorious claims. See, e.g., *Klein v. Klein*, 376 P.2d 70 (Cal. 1962); *Sorensen v. Sorensen*, 339 N.E.2d 907 (Mass. 1975); *Beaudette v. Frana*, 173 N.W.2d 416 (Minn. 1969); *Gelbman v. Gelbman*, 245 N.E.2d 192 (N.Y. 1969); *Ramey v. Ramey*, 258 S.E.2d 883 (S.C. 1979) (rejecting the fraud and collusion arguments in striking down a guest-passenger statute).

immunize a tortfeasor merely because the possibility of fraud and collusion exists.<sup>134</sup>

The most common reason relied upon for maintaining parental immunity today is that it protects and preserves family tranquility and harmony.<sup>135</sup> In fact, Virginia bases its retention of the doctrine solely on the rationale that a child's suit in negligence (outside the automobile context) against a parent would disturb family harmony.<sup>136</sup> Interestingly, though, the Virginia Supreme Court expressly rejected the idea that suits between siblings disrupt family tranquility.<sup>137</sup>

Some courts have challenged the rationale underlying the family harmony argument, in that prohibiting a child's personal injury claim against a parent while permitting other causes of action "is indeed not only to perpetuate confusion and irreconcilable decisions, but to entrench a policy from which changing times have drained most of such vitality as it may have once possessed."<sup>138</sup>

---

134. See *Midkiff v. Midkiff*, 113 S.E.2d 875 (Va. 1960) (suit between siblings); see also *Rousey v. Rousey*, 528 A.2d 416 (D.C. 1987) (possibility of fraud exists in suits between husband and wife but that did not stop the legislature from abolishing interspousal immunity); *Briere v. Briere*, 224 A.2d 588 (N.H. 1966) (fraud is also a possibility where a suit is permitted, such as in actions between spouses, host and guest, and close relatives; court will not deny a child's claim because of a mere possibility).

135. In the arena of interspousal immunity, one court said that suits between spouses create "an era of . . . unchastity, of bastardy, of dissoluteness, of violence, cruelty, and murders." *Ritter v. Ritter*, 31 Pa. 396, 398 (1858).

136. *Smith v. Kauffman*, 183 S.E.2d 190 (Va. 1971); see also *Wright v. Wright*, 191 S.E.2d 223, 224 (Va. 1972) (quoting *Norfolk Southern R.R. v. Gretakis*, 174 S.E. 841 (Va. 1934)) (the purpose of the doctrine is "to protect parental discipline, domestic felicity, and family tranquility").

137. *Midkiff v. Midkiff*, 113 S.E.2d 875, 878 (Va. 1960).

138. *Briere v. Briere*, 224 A.2d 588, 591 (N.H. 1966); see also *Hebel v. Hebel*, 435 P.2d 8 (Alaska 1967); *Streenz v. Streenz*, 471 P.2d 282 (Ariz. 1970); *Gibson v. Gibson*, 479 P.2d 648 (Cal. 1971); *Peterson v. City and County of Honolulu*, 462 P.2d 1007 (Haw. 1969); *Ridgon v. Ridgon*, 465 S.W.2d 921 (Ky. 1971); *Black v. Solmitz*, 409 A.2d 634, 636 (Me. 1979) (justification for immunity based upon preserving family harmony "cannot withstand close scrutiny. So many exceptions and qualifications have evolved in application of the rule . . . that the asserted rationale can no longer serve as a valid basis for a sweeping denial of liability."); *Plumley v. Klein*, 199 N.W.2d 169 (Mich. 1972); *Balts v. Balts*, 142 N.W.2d 66 (Minn. 1966); *Rupert v. Stienne*, 528 P.2d 1013 (Nev. 1974); *France v. A.P.A. Transport*, 267 A.2d 490 (N.J. 1970); *Gelbman v. Gelbman*, 245 N.E.2d 192 (N.Y. 1969); *Nuelle v. Wells*, 154 N.W.2d 364 (N.D. 1967); *Falco v. Pados*, 282 A.2d 351 (Pa. 1971); *Felderhoff v. Felderhoff*, 473 S.W.2d 928 (Tex. 1971); *Smith v. Kauffman*, 183 S.E.2d 190 (Va. 1971); *Goller v.*

In *Rousey v. Rousey*,<sup>139</sup> the court found it anomalous that children were permitted to sue parents for property and contract claims but not for personal tort claims, and particularly inconsistent that the District of Columbia legislature had already abolished interspousal immunity, since both parental and interspousal immunity were based on preserving family harmony.<sup>140</sup> It is the "height of inconsistency" to deny a child a claim which is permitted if brought by a wife.<sup>141</sup> Furthermore, precisely how a child's uncompensated injury preserves peace in a family has not been convincingly described.<sup>142</sup>

## VI. CONCLUSION

A child injured as the result of another's negligence should not be denied a remedy for the sole reason that the tortfeasor is the child's parent.<sup>143</sup> The prevalence of both homeowner's and auto liability insurance cannot be ignored as a source of funds for personal injuries, regardless of the plaintiff's relation to the insured. Furthermore, one might argue that denying a child's claim against a parent would cause just as much disruption to the family as permitting the action. For instance, how would the family pay for the child's medical expenses or attend to the child's needs?<sup>144</sup>

By the same token, however, parents should be given some discretion in their relationships with their children. The approach which best accommodates these competing interests is

---

White, 122 N.W.2d 193 (Wis. 1963).

139. 528 A.2d 416 (D.C. 1987).

140. *Id.* at 417 n.1, 418.

141. KEETON ET AL., *supra* note 63, § 122, at 905 n.45; *Immer v. Risko*, 267 A.2d 481, 488 (N.J. 1970) (abrogating interspousal immunity for auto negligence, and noting that a system is "wanting" which allows the claim when brought by strangers or more distant relatives while prohibiting it when brought by a spouse).

142. See RESTATEMENT (SECOND) OF TORTS § 895G cmt. c (1977); W. PAGE KEETON ET AL., *supra* note 141, at § 122.

143. See, e.g., *Small v. Morrison*, 118 S.E. 12, 18 (N.C. 1923) (Clark, C.J., dissenting) (stating that an injured person's relationship to the tortfeasor is "entirely irrelevant").

144. See, e.g., *Guess v. Gulf Ins. Co.*, 627 P.2d 869, 871 (N.M. 1981) ("The arguments that family relationships will be weakened and destroyed by bringing a lawsuit is not persuasive. The relationships will be affected to a much greater extent by the conduct between the parties that causes the lawsuit to be filed.").

the Restatement view, which rejects parental immunity based solely on the family relationship, but accommodates a parent's need for leeway.<sup>145</sup>

The Restatement recognizes that some everyday intentional contacts between family members would be actionable if they occurred between strangers,<sup>146</sup> such that the notion of consent arises in those family contacts.<sup>147</sup> Similarly, for negligence occurring in the intimacies of family life, the Restatement analogizes to assumption of the risk in general tort law.<sup>148</sup> The reality is that there are some incidents of family life for which there is no blameworthiness.

The inconsistencies resulting from application of parental immunity defy logic. Why, for instance, can a child sue a non-custodial parent, but not a custodial parent? Why may a child sue a parent for breach of contract or for a property-related tort but not for a personal injury tort? How can it be asserted that family disruption results from suits for personal torts but not from these other, permissible suits?<sup>149</sup>

There is no logical answer to these questions. Perhaps at one time the doctrine had value enough to justify its own existence, but, today, parental immunity is an anachronism. "When . . . a rule is the product of a conceptualism long ago discarded, is universally criticized by scholars, and has been qualified or abandoned in many jurisdictions, it should receive the most careful scrutiny."<sup>150</sup> The doctrine of parental tort immunity was created by 1891 case law and has been substantially abrogated in most of the states which had adopted it. This doctrine and its rationale deserve to be revisited by the courts which created it when the opportunity to do so presents itself. The

---

145. RESTATEMENT (SECOND) OF TORTS § 895G (1977).

146. See also *Midkiff v. Midkiff*, 113 S.E.2d 875, 878 (Va. 1960) (quoting William E. McCurdy, *Torts Between Persons in Domestic Relations*, 43 HARV. L. REV. 1030, 1077 (1929-30)) ("[T]he relationship of brothers living in the same house may 'render innocuous many acts and omissions that would usually be tortious'").

147. RESTATEMENT (SECOND) OF TORTS § 895G cmt. k (1977).

148. *Id.*

149. See *Signs v. Signs*, 103 N.E.2d 743, 748 (Ohio 1952) ("It is difficult to understand by what legerdemain of reason, logic or law" a child's property rights are protected but their redress for personal injury is not, "or how it can be said that domestic harmony would be undisturbed in one case and be upset in the other.").

150. *Hawkins v. United States*, 358 U.S. 74, 81-82 (1958) (Stewart, J., concurring).

efficacy of the doctrine in serving its intended purpose should be subjected to careful review.

When there is no longer a reason for a common law rule, the rule can be dispensed with by the courts that created it<sup>151</sup>—witness the downfall of interspousal immunity. For that reason, judicial pronouncements that such decisions are within the exclusive jurisdiction of the legislature ring hollow.<sup>152</sup> “To reject a precedent is not merely to reach a different result, but to find that the reasoning and principles advanced in favor of that precedent are no longer persuasive.”<sup>153</sup>

*Sandra L. Haley*

---

151. *See, e.g.*, *Black v. Solnitz*, 409 A.2d 634, 639 (Me. 1979) (“Since the rule of parental immunity was a rule originally fashioned by the courts, the courts have the primary responsibility to limit its application when they perceive that it operates erratically with respect to fulfillment of its underlying purpose and produces undesirable results in frequently recurring kinds of situation.”).

152. *See, e.g.*, *Hill v. Giordano*, 447 So. 2d 164, 164 (Ala. 1984) (per curiam) (holding that abrogation of immunity is an exclusively legislative decision); *Frye v. Frye*, 505 A.2d 826 (Md. 1986) (refusing to abrogate immunity even for auto negligence claims because that is within the purview of the legislature, which had created mandatory auto liability insurance scheme).

153. *Shearer v. Shearer*, 480 N.E.2d 388, 391 (Ohio 1985).