

## Parent-Child Immunity: The Case for Abolition

“However repugnant it may seem that a minor child should sue his own father, it is equally repugnant that a child injured by his parent’s negligence, perhaps maimed for life should have no redress for the injury he has suffered.”<sup>1</sup> This anomaly exists today in the majority of jurisdictions which recognize the parent-child immunity. The origins of the rule, its exceptions and its present status nationwide and in California reflect a judicial determination not to interfere with the basic unit of our society, the family.

The history of the parental immunity in the United States begins with<sup>2</sup> the 1891 case of *Hewellette v. George*<sup>3</sup>. Without citation of judicial authority,<sup>4</sup> the Mississippi Supreme Court denied a child’s tort action against her mother for false imprisonment in order to preserve “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>5</sup> The rationale underlying the rule is not that the parent lacks a legal obligation to refrain from physically

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1. *Fidelity & Casualty Co. v. Marchland*, 4 D.L.R. 157, 166 (1924).

2. There is a conflict of authority as to whether the parental immunity was part of the common law. The confusion arises because there are no reported English cases deciding whether a child could maintain a personal injury action against his parent. Thus, some courts argue that there was no such cause of action at common law because the immunity prevented litigation. *E.g.*, *Logan v. Reaves*, 209 Tenn. 631, 354 S.W.2d 789 (1962); *Strong v. Strong*, 70 Nev. 290, 267 P.2d 240 (1954); *Redding v. Redding*, 235 N.C. 638, 70 S.E.2d 676 (1952); *Owens v. Auto. Mut. Indem. Co.*, 235 Ala. 9, 177 So. 133 (1937); *Materese v. Materese*, 47 R.I. 131, 131 A. 198 (1925); *Smith v. Smith*, 81 Ind. App. 566, 142 N.E. 128 (1924); *Roller v. Roller*, 37 Wash. 242, 79 P. 788 (1905). Other courts have interpreted the lack of cases to show there was no parental immunity at common law. *See Villaret v. Villaret*, 169 F.2d 677 (D.C. Cir. 1948); *Dean v. Smith*, 106 N.H. 314, 211 A.2d 410 (1965); *Signs v. Signs*, 156 Ohio St. 566, 103 N.E.2d 743 (1952); *Borst v. Borst*, 41 Wash. 2d 642, 251 P.2d 149 (1952).

3. 68 Miss. 703, 9 So. 885 (1891).

4. Suit against one in loco parentis had previously been allowed but was not referred to by the *Hewellette* court. *Nelson v. Johansen*, 18 Neb. 180, 24 N.W. 730 (1885) (recovery against guardian for negligence in not properly clothing a minor child); *Lander v. Seaver*, 32 Vt. 114, 76 Am. Dec. 156 (1859) (recovery in action against a schoolmaster for assault and battery); *Gould v. Christianson*, 10 F. Cas. 864 (No. 5636) (S.D.N.Y. 1836) (minor recovered against shipmaster for assault and battery). *See generally* McCurdy, *Torts between Persons in Domestic Relations*, 43 HARV. L. REV. 1030, 1061-63 (1943).

5. 68 Miss. at 711, 9 So. at 887.

abusing his child, but rather that the child has no right to sue his parents<sup>6</sup> for their tortious misfeasance.<sup>7</sup>

The courts have advanced several theories to support parental immunity.<sup>8</sup> The overriding consideration in the majority of cases is the public interest in the preservation of domestic tranquility.<sup>9</sup> Since the family is the basic unit of our social structure, the courts reason that if the family is disrupted, the smooth functioning of society as a whole is threatened.<sup>10</sup> In weighing the benefit to the child in obtaining damages for his injuries against the societal interest in the maintenance of family harmony unvexed by the threat of litigation, the judicial balance has been tilted in favor of domestic peace.<sup>11</sup>

The logic of this reasoning is based more on emotional rhetoric than on the realities of the family setting. At common law, suits between parent and child concerning property<sup>12</sup> and contractual rights<sup>13</sup> were permissible. Since domestic harmony is

6. This was carried to an absurdity in *Roller v. Roller*, 37 Wash. 242, 79 P. 788 (1905) where the court denied civil recovery to a daughter who was raped by her father. See also *McKelvey v. McKelvey*, 111 Tenn. 388, 77 S.W. 664 (1903) (stepmother was not liable for inflicting cruel and inhuman punishment on her son's child with his consent).

7. Misfeasance as opposed to nonfeasance is the only duty litigated in reported cases holding a parent liable for intentional and malicious torts. See cases cited note 47 *infra*. With respect to negligent torts, most reported cases refer to automobile accidents which also involve misfeasance.

In *Lemmen v. Servais*, 39 Wisc. 2d 75, 158 N.W.2d 341 (1968), the court found that parent's failure to instruct their child on how to cross the street after leaving the school bus was within the discretionary area of parental control and they were not liable for the resulting injury. This decision suggests that the courts will place nonfeasance under the discretionary protectorate while holding parent's liable for misfeasance.

8. See generally *McCurdy*, *supra* note 4; Comment, *A Proposed Modification of the Parental Immunity Doctrine*, 23 OHIO ST. L.J. 339, 346-49 (1962).

9. *Parks v. Parks*, 390 Pa. 287, 135 A.2d 65 (1957); *London Guar. & Accident Co. v. Smith*, 242 Minn. 211, 64 N.W.2d 781 (1954); *Borst v. Borst*, 41 Wash. 2d 642, 251 P.2d 149 (1952); *Silverstein v. Kastner*, 342 Pa. 207, 20 A.2d 205 (1941); *Worrell v. Worrell*, 174 Va. 11, 4 S.E.2d 343 (1939); *Lusk v. Lusk*, 113 W. Va. 17, 166 S.E. 538 (1932). See generally W. PROSSER, *LAW OF TORTS* 887 (3d ed. 1964).

10. For a general summary of the basis of the family harmony doctrine see *Wick v. Wick*, 192 Wis. 260, 212 N.W. 787 (1927).

11. See *Tucker v. Tucker*, 395 P.2d 67 (Okla. 1964), noted in 20 OKLA. L. REV. 93 (1967). *Securo v. Securo*, 110 W. Va. 1, 2, 156 S.E. 750, 751 (1931): "It is deemed better that an occasional wrong should go unrequited than that family life should be subjected to the disrupting effects of such suits."

12. *Preston v. Preston*, 102 Conn. 96, 128 A. 292 (1925); *McLain v. McLain*, 80 Okla. 113, 194 P. 894 (1921); *Lamb v. Lamb*, 146 N.Y. 317, 41 N.E. 26 (1895); *Alston v. Alston*, 34 Ala. 15 (1859), 41 MARQ. L. REV. 188, 195 (1957); 51 HARV. L. REV. 1451 (1938).

13. *Sokolowski v. Lucey*, 47 N.E.2d 627 (Ohio App. 1941); *Bunton v. Newell*, 239 S.W. 1096 (Mo. App. 1922).

threatened regardless of the form of the suit,<sup>14</sup> why do the courts deny the child a cause of action for personal injuries against the parent? The prospect of reconciliation between parent and child is enhanced as much by monetary reparation as by the denial of relief. Moreover, after a personal injury has been inflicted, there may be little domestic harmony, if any, to be preserved.

Another line of reasoning employed to justify the existence of the immunity is that recovery by one child would deplete the family exchequer to the detriment of the plaintiff's brothers and sisters.<sup>15</sup> This argument ignores the fact that a parent has the power to distribute his favors among his offspring according to his whim since his children have no legal claim to any portion of his property nor a right to an equal share.<sup>16</sup> A monetary award would compensate for an injury actually incurred by one child and is not tantamount to unequal material consideration of the other children.<sup>17</sup>

The possibility of the wrongdoer's succession to the money has also been relied on to sustain the immunity.<sup>18</sup> Since the parent would be the next of kin if the child died intestate,<sup>19</sup> he might inherit the child's property including the damages paid. This argument is most persuasive when insurance is present since any funds inherited by the parent would be a windfall rather than a mere repossession of money previously set aside for the child's use. However, the possibility is remote, and even if it occurred, the courts have allowed recovery under the same contingency in property actions.<sup>20</sup>

The force of these arguments has been diminished, however, by the prevalent use of insurance. Although the fact of insurance

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14. Suits have been allowed in essentially every area other than negligent personal injury. *Parks v. Parks*, 390 Pa. at 305-06, 135 A.2d at 75-76 (1957) (Musmanno, J., dissenting): "Countless pages in law books are devoted to the description of pitched battles between children and parents over wills, inheritances, settlement, partnerships, real estate, personal property and business deals of every character."

15. *Hastings v. Hastings*, 33 N.J. 247, 163 A.2d 47 (1960); *Roller v. Roller*, 37 Wash. 242, 244-45, 79 P. 788, 789 (1905). In *Dunlap v. Dunlap*, 84 N.H. 352, 356, 150 A. 905, 909 (1930), the court called this argument "a mere makeweight."

16. *Dunlap v. Dunlap*, 84 N.H. at 356, 150 A. at 909.

17. See text accompanying notes 22-23 *infra*; See also *Union Bank & Trust Co. v. First Nat'l Bank*, 362 F.2d 311 (5th Cir. 1966); *Dean v. Smith*, 106 N.H. 314, 211 A.2d 410 (1965).

18. *Roller v. Roller*, 37 Wash. at 244-45, 79 P. at 789.

19. *E.g.*, CAL. PROB. CODE § 225 (West 1957).

20. See cases and text accompanying note 12 *supra*.

coverage alone does not create a cause of action where none would otherwise exist,<sup>21</sup> the courts have recognized that the presence of liability insurance coverage is an important consideration in deciding whether to abrogate the parental immunity.<sup>22</sup> Recovery from an insurance company ends the fear of impoverishing the family: Instead of depleting the family exchequer available for the care of the injured child, insurance coverage would add funds otherwise unavailable for such care. Moreover, since the parent would not personally have to compensate the child, there is less chance that effective discipline would be undermined or that domestic harmony would be disrupted by the litigation.<sup>23</sup>

However, the possibility of recovery under the terms of an insurance policy also presents the most cogent argument in favor of parental immunity: the danger of fraud<sup>24</sup> and collusion by the defendant parent against the insurance company.<sup>25</sup> Recovery

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21. Virtually all of the courts agree that the fact of insurance alone will not allow a child to recover if he would otherwise have been barred. *Villaret v. Villaret*, 169 F.2d 677 (D.C. Cir. 1948); *Brennecke v. Kilpatrick*, 336 S.W.2d 68 (Mo. 1960); *Signs v. Signs*, 156 Ohio St. 566, 103 N.E.2d 743 (1952); *Rambo v. Rambo*, 195 Ark. 832, 114 S.W.2d 468 (1938); *Luster v. Luster*, 299 Mass. 480, 13 N.E.2d 438 (1938); *Owens v. Auto. Mut. Indem. Co.*, 235 Ala. 9, 177 So. 133 (1937); *Small v. Morrison*, 185 N.C. 577, 118 S.E. 12 (1923); 33 ST. JOHN'S L. REV. 310, 311-12 (1959).

22. *Balts v. Balts*, 273 Minn. 419, 142 N.W.2d 66 (1966); *Briere v. Briere*, 107 N.H. 437, 224 A.2d 588 (1966); *Goller v. White*, 20 Wis. 2d 402, 122 N.W.2d 193 (1963). *Dunlap v. Dunlap*, 84 N.H. 352, 150 A. 905 (1930) contains a particularly good discussion of the effects of insurance on the courts.

Many states also have compulsory insurance statutes which would refute this argument. E.g., N.Y. VEHICLE & TRAFFIC LAW § 310 (McKinney 1960). The majority in *Gelbman v. Gelbman*, 23 N.Y.2d 434, 245 N.E.2d 192 (1969) mentioned such compulsory coverage as a consideration in abrogating the immunity.

23. In *Parks v. Parks*, 390 Pa. at 296, 135 A.2d at 76 (1957), the court observed that the presence of insurance may even weld the family closer together since they then strive for the common good of the injured child.

24. *McCurdy*, *supra* note 4, at 1072-73, discusses an additional danger of fraud relating to suits brought by children, after reaching majority, for injuries inflicted during minority. *Smith v. Smith*, 81 Ind. App. 566, 142 N.E. 128 (1924); *Treschman v. Treschman*, 28 Ind. App. 206, 209, 61 N.E. 961, 963 (1901) (dictum). The relevant question is whether the Statute of Limitations will apply. *Gelbman v. Gelbman*, 23 N.Y.2d at 435, 245 N.E.2d at 193; *Dunlap v. Dunlap*, 84 N.H. at 351, 150 A. at 909; *McCurdy*, *supra* note 4, at 1072-73. The cases implicitly assume that the disability of minority will toll the statute and question whether the consequent lapse of time would open the door to fraudulent claims. *Garcia v. Fantauzzi*, 20 F.2d 524, 529 (1st Cir. 1927) (plaintiff was a minor).

25. *Villaret v. Villaret*, 169 F.2d at 679 (D.C. Cir. 1948); *Hastings v. Hastings*, 33 N.J. 247, 163 A.2d 147 (1960); *Schneider v. Schneider*, 160 Md. 18, 152 A. 498 (1930);

under the policy depends upon a finding of the insured's liability. Thus, the parent is confronted with the dilemma of cooperating with the insurance company as a defendant and at the same time furthering the successful outcome of the suit for the benefit of his child.<sup>26</sup> In balancing these two alternatives, the protection of his own child<sup>27</sup> and the preservation of the family pocketbook would certainly weigh heavily in the parent's mind. Since a minor can not sue his parent without acting through a guardian, probably the other parent,<sup>28</sup> the insured necessarily exercises some influence over the child's ultimate decision. The risk of collusion could be substantial. Many suits involving insurance, however, have this potential risk of fraud. Therefore, this danger is not a sufficient reason to deny the cause of action but rather admonishes the court and jury to exercise added caution when examining and assessing the facts.<sup>29</sup> In addition, the insurance company should be allowed to impeach its insured as an adverse party.<sup>30</sup> If necessary to counteract the incidence of fraud, the insurance company could exclude coverage for an action between an unemancipated child and his parents.<sup>31</sup> This precaution would not only eliminate the court's reliance on insurance as a basis for eliminating the parental immunity but would in effect direct the court's attention to the underlying problem: A child has been injured without possibility of redress based solely on the public policy argument of maintaining family harmony. If a suit is contemplated, surely family harmony is already so diminished that it would be grotesque to deny the child a remedy in order to preserve that harmony.<sup>32</sup> While it is doubtful that a child would

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Luster v. Luster, 299 Mass. 480, 13 N. E. 2d 438 (1938); Parks v. Parks, 390 Pa. at 293-94, 135 A.2d at 72-74; Turner v. Carter, 169 Tenn. 553, 89 S.W.2d 751 (1935).

26. See 47 MARQ. L. REV. 423, 425 (1963).

27. See discussion in Hastings v. Hastings, 33 N.J. 247, 250, 163 A.2d 147, 150 (1960), assailing reliance on insurance because of the risks of collusion inherent in the family's decision to sue.

28. W. PROSSER, LAW OF TORTS § 116, at 885 & n. 81 (3d ed. 1964).

29. Balts v. Balts, 273 Minn. at 426, 142 N.W.2d at 73; Briere v. Briere, 107 N.H. 437, 439, 224 A.2d 588, 590 (1966); Badigan v. Badigan, 215 N.Y.S.2d 35, 42, 174 N.E.2d 718, 725 (1961) (Fuld, J. dissenting); *contra*, Hastings v. Hastings, 33 N.J. at 250, 163 A.2d at 150.

30. James, *The Impact of Insurance on the Law of Torts*, 15 LAW & CONTEMP. PROB. 431, 433 (1950). In California the fact of insurance coverage could not be shown to prove negligence, but could be introduced to show fraud and collusion. CAL. EVID. CODE § 1155 (West 1967).

31. Signs v. Signs, 156 Ohio St. 566, 571, 103 N.E.2d 743, 748 (1952).

32. Badigan v. Badigan, 215 N.Y.S. 35, 40, 174 N.E.2d 718, 722 (1961) (Fuld, J.

be counselled to sue without insurance protection,<sup>33</sup> the right to sue should nevertheless be available.

Parents are given wide discretion in exercising the right to discipline their children. This disciplinary power is derived from the parent's duty to nurture, protect and educate his offspring. The child has the reciprocal duty to serve and obey his parents.<sup>34</sup> Through the interaction of these duties, the interest of society in the upbringing of children is met. Courts have often affirmed parental immunity on the supposition that its abolition would compromise parental discipline.<sup>35</sup> Their controlling premise has been that parental authority is so imperative that whatever may impair it must be foregone for the ultimate good of the child.<sup>36</sup> Parental authority should be maintained and a personal right of action should not be granted to the child if it would impair the discharge of such duties. Nevertheless, these same courts have also realized that in some situations the parent should not be allowed to cloak his tortious wrongs under the guise of parental discipline. They have consequently adopted certain exceptions which allow recovery when the parent has exercised his authority unreasonably or when his actions indicate a temporary or permanent abandonment of the parent-child relationship.

The immunity is not applicable if the child is emancipated<sup>37</sup> or has reached majority.<sup>38</sup> The courts reason that the public

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dissenting). Judge Fuld's rationale was adopted in *Gelbman v. Gelbman*, 23 N.Y.2d at 435, 245 N.E.2d at 193.

33. *Hastings v. Hastings*, 33 N.J. at 250, 163 A.2d at 150: "[W]e all know that realistically such actions are never thought of, let alone commenced, unless there is an insurance policy, automobile or comprehensive personal liability . . . on the basis of which money can be sought to be obtained." James, *Accident Liability Reconsidered: The Impact of Liability Insurance*, 57 YALE L.J. 549, 553-54 (1948).

34. *Matarese v. Matarese*, 47 R.I. 131, 131 A. 198 (1925); *McKelvey v. McKelvey*, 111 Tenn. 388, 77 S.W. 664 (1903). The child's duty also stems from the commandment: "Honor thy mother and thy father."

35. *Davis v. Smith*, 126 F. Supp. 497, 504 (E.D. Pa. 1954); *Hastings v. Hastings*, 33 N.J. at 253, 163 A.2d at 154; *Silverstein v. Kastner*, 342 Pa. 297, 20 A.2d 205 (1941); *Dunlap v. Dunlap*, 84 N.H. at 357, 150 A. at 910. *But see* Cooperrider, *Child v. Parent in Tort: A Case for the Jury?*, 43 MINN. L. REV. 73, 77 (1958).

36. *Dunlap v. Dunlap*, 84 N.H. at 357, 150 A. at 910.

37. *Wood v. Wood*, 135 Conn. 280, 63 A.2d 586 (1948); *Groh v. W.A. Krahm*, 223 Wis. 662, 271 N.W. 374 (1937). Emancipation occurs when the parent surrenders his right to the child's earnings and services and ends his parental control. Whether the child is emancipated is a question of fact for the jury. *Parker v. Parker*, 230 S.C. 28, 94 S.E.2d 12 (1956). The emancipation must be complete not partial. *Perkins v. Robertson*, 140 Cal. App. 2d 536, 295 P.2d 972 (1956).

38. *Farrar v. Farrar*, 41 Ga. App. 120, 152 S.E. 278 (1930). Statutes govern when

interest in maintaining domestic tranquility terminates at this point. Since he is no longer subject to parental discipline, the emancipated child obtains the same status as any other guest.<sup>39</sup>

Most courts also allow a suit against one who stands in place of the parent.<sup>40</sup> Since one in loco parentis assumes the role of the parent in all respects,<sup>41</sup> it is contradictory to allow recovery in this situation while denying compensation when the parent commits the same act. Some courts argue that although the relationships are similar with respect to disciplinary control, one in loco parentis is not restrained from acting outside the scope of this authority by the natural love and affection which exists between parent and child.<sup>42</sup> However, if the one in loco parentis is liable for those negligent acts,<sup>43</sup> which by definition are outside any restraint engendered by love and affection, why is the parent not also liable? If one is truly in loco parentis, the same reasons for the parental immunity should apply with equal force. The exception has no acceptable rationale.

Another exception permits the child to recover for an injury resulting from a business employment relationship.<sup>44</sup> Where the father intentionally surrenders his parental control over his child

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majority is reached. *E.g.*, CAL. CIV. CODE § 25 (West 1954). In the majority of jurisdictions, majority is reached at age 21.

39. *Farrar v. Farrar*, 41 Ga. App. 120, 152 S.E. 278 (1930); *Gilliken v. Burbage*, 263 N.C. 317, 139 S.E.2d 753 (1965).

40. *Brown v. Cole*, 198 Ark. 417, 129 S.W.2d 245 (1939); *Steber v. Norris*, 188 Wis. 377, 206 N.W. 173 (1952); *Clasen v. Pruhs*, 69 Neb. 278, 95 N.W. 640 (1903); *Treschman v. Treschman*, 28 Ind. App. 206, 61 N.E. 961 (1901).

41. The one in loco parentis includes a person who is in the position to control and discipline the child as a parent. This category may include relatives, teachers and stepparents. *See cases cited note 4 supra*.

42. Comment, *Parental and Interspousal Immunity*, 13 DRAKE L. REV. 160, 162 (1964); *Lander v. Seaver*, 32 Vt. 114, 123, 76 Am. Dec. 156, 164 (1859).

43. *Xaphes v. Mossey*, 224 F. Supp. 578 (D.Vt. 1963); *Civik v. Zylstra*, 58 N.Y. Super. 29, 155 A.2d 277 (1959). Generally the courts have denied recovery against one in loco parentis for negligence. *Briault v. Deveau*, 21 Conn. Supp. 486, 157 A.2d 604 (1960); *Rowe v. Rugg*, 117 Iowa 606, 91 N.W. 903 (1902); *Foley v. Foley*, 61 Ill. App. 577 (1895).

44. When the business is a partnership, the courts are divided on the question of recovery. The better reasoning allows recovery because the partnership is a legal entity with its own assets separate and distinct from its members. *Cody v. J.A. Dodds & Sons*, 252 Iowa 1394, 110 N.W.2d 255 (1961); 8 ST. LOUIS U.L.J. 247 (1963); 47 IOWA L. REV. 1159 (1962). *But see* 19 Wash. & Lee L. Rev. 129 (1962). Other courts deny recovery because a suit against the partnership reached the individual members and thus was protected by the immunity if the father was a partner. *E.g.*, *Aboussie v. Aboussie*, 270 S.W.2d 636 (Tex. Civ. App. 1954).

by entering into a master-servant relationship, the courts allow recovery:<sup>45</sup> The parent-child relationship becomes incidental and irrelevant and the child is treated as any other member of the public who may have been so injured. Since the parent has assumed a dual capacity of parent and master, the courts reason that he has injured the child as an employer, not as a parent.<sup>46</sup>

The final exception created by the courts allows recovery for wilful and intentional torts.<sup>47</sup> The immunity does not deny that the parent is a wrongdoer; in the interests of family harmony it merely excuses his liability for those acts that are incidental to the duties of a responsible parent. Since intentional misconduct is not referable to the proper role of a parent and discourages, rather than contributes, to domestic tranquility, recovery is allowed. The decisions rest on a test of reasonableness<sup>48</sup>—was the parent exercising reasonable disciplinary measures for the child's welfare or was he merely venting his anger?

Within these well-defined exceptions, the majority of jurisdictions allow the child to recover for ordinary negligence.<sup>49</sup> In 1963, the Wisconsin Supreme Court in *Goller v. White*<sup>50</sup> went further and abrogated the parental immunity rule except where the negligent act (1) occurs when exercising reasonable parental

45. *Trevarton v. Trevarton*, 151 Colo. 418, 378 P.2d 640 (1963); *Worrell v. Worrell*, 174 Va. 11, 4 S.E.2d 343 (1939); *Lusk v. Lusk*, 112 W. Va. 17, 166 S.E. 538 (1932). For an extensive re-examination of this exception see *Borst v. Borst*, 41 Wash. 2d 242, 251 P.2d 149 (1952).

46. *Dunlap v. Dunlap*, 84 N.H. at 358-59, 150 A. at 911-12; *contra*, *Luster v. Luster*, 299 Mass. 480, 13 N.E.2d 438 (1938). See generally Sanford, *Personal Torts within the Family*, 9 VAND. L. REV. 823, 835 (1956).

47. *Nudd v. Matsoukas*, 7 Ill. 2d 608, 131 N.E.2d 525 (1956); *Wright v. Wright*, 85 Ga. App. 721, 70 S.E.2d 152 (1952); *Manke v. Moore*, 197 Md. 6, 77 A.2d 923 (1951); *Cowgill v. Boock*, 189 Ore. 282, 218 P.2d 445 (1950). Hume, *Intra-Family Immunity to Suit*, 17 FED'N OF INS. COUNSEL Q. 45 (1966).

48. *Chafin v. Chafin*, 239 Ore. 374, 387, 297 P.2d 771, 777 (1964):

"[W]e conclude that an act by a parent, whether described as wilful or malicious or wanton, which will pierce the veil of parental immunity, is an act which is done with an intention to injure the child or is of such a cruel nature in and of itself as to evidence not a reasonable normal parental mind, but an evil mind . . ."

49. *Id.*; *Hastings v. Hastings*, 33 N.J. 247, 163 A.2d 147 (1960); *Parks v. Parks*, 390 Pa. 287, 135 A.2d 65 (1957). See 12 S. DAK. L. REV. 364 (1967). Outside these exceptions, the majority relies on the public policy argument of family unity and parental discipline to deny recovery for ordinary negligence. See cases cited note 45 *supra*. Many decisions are per curiam. *E.g.*, *Badigan v. Badigan*, 215 N.Y.S.2d 35, 174 N.E.2d 718 (1961).

50. 20 Wis. 2d 402, 122 N.W.2d 193 (1963).

authority over the child; and (2) involves an exercise of ordinary parental discretion as to matters of support and care such as provision of food, clothing, housing, medical and dental services and other such care.<sup>51</sup> The *Goller* rule has been adopted by a small minority of courts.<sup>52</sup>

If a negligent act falls within one of the majority's exceptions, the parent is liable in all jurisdictions. If the negligent act involves a commonplace failure incident to the performance of parental duties, such as failing to have a tooth filled, forgetting a routine medical appointment or leaving the medicine cabinet unlocked, neither the majority nor the minority will hold the parent liable. The majority would invoke the immunity; the minority would protect the parent under the qualifications to its no-immunity rule. Denying recovery under these circumstances protects society's legitimate interest in preserving the parent's disciplinary authority and fostering family harmony. The majority and minority positions do conflict, however, when the negligent act of the parent is not encompassed by the majority's exceptions but nevertheless is outside the scope of reasonable parental authority. The minority holds the parent liable as any other person who has violated a reasonable standard of care and gives the child the right to recover. The majority of courts, on the other hand, have failed to realize that the rationale is viable only when the parental act is consistent with reasonable parental discretion.

The minority position does not establish clear guidelines covering all possible circumstances which may confront the courts. The fact situations in the cases allowing recovery for negligence under the minority rule have been limited to injuries resulting from automobile accidents.<sup>53</sup> In the future, courts will be compelled to decide whether a parent's careless operation of his automobile is ordinary negligence for which a child can

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51. *Id.* at 404, 122 N.W.2d at 198.

52. *Silesky v. Kelman*, \_\_\_ Minn. \_\_\_, 161 N.W.2d 631 (1968); *Hebel v. Hebel*, 435 P.2d 8 (Alas. 1967). One jurisdiction has abrogated the immunity without qualification. *Briere v. Briere*, 107 N.H. 437, 224 A.2d 588 (1966). Some jurisdictions have used the *Goller* rationale to abrogate the immunity in cases where the parent sues the child. *Gelbman v. Gelbman*, 23 N.Y.2d 434, 245 N.E.2d 192 (1969); *Balts v. Balts*, 273 Minn. 419, 142 N.W.2d 66 (1966); *Gaudreau v. Gaudreau*, 106 N.H. 551, 215 A.2d 695 (1965); *Shenk v. Shenk*, \_\_\_ Ill. \_\_\_, 241 N.E.2d 12 (1968).

53. Cases cited note 52 *supra*; see *Lemmen v. Servais*, 39 Wis. 2d 75, 158 N.W.2d 341 (1968) (denial of a cause of action in a non-automobile case).

recover or an act involving the reasonable exercise of parental discretion. The *Goller* rule leaves such distinctions unsettled. However, the minority at least recognizes that under such circumstances the child should have the right to sue; the majority would deny him the right by invoking an immunity whose rationale does not apply to these negligent torts.

In contrast to its landmark decisions in other areas of tort law,<sup>54</sup> California has not followed the minority trend in the area of parent-child immunity.<sup>55</sup> In addition to the unconvincing reasons adopted by the majority, California decisions have relied on an analogy with the husband and wife immunity to support the parental immunity.<sup>56</sup> At common law, the husband-wife immunity was based on a legal fiction which viewed the husband and wife as a single entity in the person of the husband.<sup>57</sup> Since the wife lacked the capacity to contract, to sue or be sued without the joinder of her husband, the courts held that neither spouse could maintain an action in contract or tort against the other. The legal unity of husband and wife continued until the passage of the married women's acts in the late nineteenth century.<sup>58</sup> These legislative enactments insured the wife's separate legal identity through which she could sue without having to join her husband. Despite this reform, husband and wife were

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54. *Elmore v. American Motors Corp.*, \_\_\_ Adv. Cal. \_\_\_, 451 P.2d 84, 75 Cal. Rptr. 652 (1969) (manufacturer liable in strict liability to bystander); *Dillon v. Legg*, 68 Adv. Cal. 766, 441 P.2d 912, 69 Cal. Rptr. 72 (1968) (liability for negligently inflicted emotional distress outside the zone of danger); *Rowland v. Christian*, 69 Adv. Cal. 89, 443 P.2d 561, 70 Cal. Rptr. 97 (1968) (eliminating no duty limitations between owners and occupiers of land).

55. The California courts adopted the majority exceptions to the parental immunity. *Emery v. Emery*, 45 Cal. 2d 421, 289 P.2d 218 (1955) (wilful and wanton injuries); *Perkins v. Robertson*, 140 Cal. App. 536, 295 P.2d 972 (1956); *Martinez v. So. Pac. Co.*, 45 Cal. 2d 244, 288 P.2d 868 (1955) (emancipated child exception); *Gillett v. Gillett*, 168 Cal. App. 2d 102, 335 P.2d 726 (1959) (intentional torts).

California has not adopted the business exception, *Myers v. Tranquility Irrigation Dist.*, 26 Cal. App. 2d 385, 79 P.2d 419 (1938), nor allowed recovery against one in loco parentis for ordinary negligence. *Trudell v. Leatherly*, 212 Cal. 678, 300 P. 7 (1931); *Emery v. Emery*, *supra* (recovery against one in loco parentis for wanton and wilful injuries).

56. *E.g.*, *Trudell v. Leatherly*, 212 Cal. at 680, 300 P. at 9. The analogy to husband and wife has not been limited to California. *See Mesite v. Kirchenstein*, 109 Conn. 77, 145 A. 753 (1929); *McKelvey v. McKelvey*, 111 Tenn. 388, 77 S.W.2d 664 (1903).

57. *See generally* *McCurdy, Torts between Parent and Child*, 5 VILL. L. REV. 521, 521-27 (1960).

58. In California, the act was passed in 1913 and is now codified in CAL. CIV. PROC. CODE § 370 (West 1954).

precluded from suing each other in tort<sup>59</sup> in order to preserve unity within the family.

Parent-child immunity, on the other hand, never labored under the pretense of a single identity;<sup>60</sup> consequently, children were always entitled to hold property in their own name, as well as to contract with and sue their parent in property actions.<sup>61</sup> Therefore, until the passage of married women's acts the analogy with the husband-wife immunity was fallacious. Thereafter, the analogy was viable to the extent that the immunities protecting both groups were founded on the preservation of family harmony and order.

In 1962, California abrogated the husband-wife immunity.<sup>62</sup> The sole ground for reversing their position was that the "compelling dictates of public policy"<sup>63</sup> no longer existed. Paradoxically the same public policy has been upheld in the parallel area of domestic relations—parent and child.

California and the majority of American jurisdictions have refused to abrogate the parental immunity. Rather than allow a child who may be crippled for life by the negligent act of his parent to sue and recover for his injuries these courts rely on discredited public policy arguments. Yet, husband and wife—as well as sister and brother<sup>64</sup>—may sue each other without disrupting domestic tranquility. The qualifications adopted by the minority recognize that within the framework of reasonable disciplined authority parents must be accorded immunity from litigation which would disrupt family unity. In light of the widespread use of insurance, denying a remedy to an injured child is something of a mockery which should be remedied.<sup>65</sup>

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59. W. PROSSER, *LAW OF TORTS* § 116, at 882 & nn. 32-36 (3d ed. 1964). *Cubbison v. Cubbison*, 73 Cal. App. 2d 437, 166 P.2d 387 (1946); *Peters v. Peters*, 156 Cal. 32, 103 P. 219 (1909). See W. PROSSER, *LAW OF TORTS* at 881 & nn. 22-31 for cases allowing suits as to property interests.

60. See *McCurdy*, *supra* note 57.

61. See 37 CAL. JUR. 2d *Parent and Child* § 73 (1957).

62. This was accomplished in companion cases of *Self v. Self*, 58 Cal. 2d 683, 376 P.2d 65, 26 Cal. Rptr. 97 (1962) (allowing suit as to wilful torts), and *Klein v. Klein*, 58 Cal. 2d 692, 376 P.2d 70, 26 Cal. Rptr. 102 (1962) (allowing suit for negligent torts).

63. *Self v. Self*, 58 Cal. 2d at 689, 376 P.2d at 69, 26 Cal. Rptr. at 101.

64. *Midkoff v. Midkoff*, 201 Va. 829, 113 S.E.2d 875 (1960); *Emery v. Emery*, 45 Cal. 2d 421, 289 P.2d 218 (1955); *Rozell v. Rozell*, 281 N.Y. 106, 22 N.E.2d 254 (1939); *Munsert v. Farmers Mut. Auto. Ins. Co.*, 229 Wis. 581, 281 N.W. 671 (1939); *Beilke v. Knaack*, 207 Wis. 490, 242 N.W. 176 (1932). Annot., 123 A.L.R. 1020 (1939); Annot., 31 A.L.R.2d 1155 (1962); 3 WM. & MARY L. REV. 194 (1961).

65. *Badigan v. Badigan*, 215 N.Y.S.2d 35, 43, 174 N.E.2d 718, 729 (1961) (Fuld, J., dissenting).