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CHILD v. PARENT: EROSION OF THE IMMUNITY RULE

Honour thy father and thy mother: that thy days may be long upon the land which the LORD thy God giveth thee.*

In the year 1891, a mother wrongfully and maliciously caused her daughter to be falsely imprisoned in a hospital for the insane. In a suit by the daughter against the mother for damages, the Supreme Court of Mississippi, citing no precedent, denied recovery setting forth the following reasons:

So long as the parent is under an obligation to care for, guide and control, and the child is under reciprocal obligation to aid and comfort and obey, no such action as this can be maintained. 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, forbid to the minor child a right to appear in court in the assertion of a claim to civil redress for personal injuries suffered at the hands of the parent.¹

So began, with Hewlett v. George,² the American rule that a parent is not liable to an unemancipated minor child for torts committed by the parent against the child.³ The rule of Hewlett v. George was followed rapidly by two other states,⁴ one of which reached the doubtful

* Exodus 20:12

¹ Hewlett v. George, 68 Miss. 703, 711, 9 So. 885, 887 (1891).
² 68 Miss. 703, 9 So. 885 (1891).
³ There are no reported English cases on the subject of parental immunity. As a result, there is a split of authority in the United States as to the origin of the immunity rule. Some courts take the view that the lack of cases indicates that immunity was the common law rule and was so generally accepted that there was never any parent-child litigation. See, e.g., Mi-Lady Cleaners v. McDaniel, 235 Ala. 469, 179 So. 908 (1938); Owens v. Auto. Mut. Indem. Co., 235 Ala. 9, 177 So. 133 (1937); Meece v. Holland Furnace Co., 269 Ill. App. 164 (1933); Smith v. Smith, 81 Ind. App. 566, 142 N.E. 128 (1924); Ruiz v. Clancy, 182 La. 935, 162 So. 734 (1935); Elias v. Collins, 237 Mich. 175, 211 N.W. 88 (1926); Belleson v. Skilbeck, 185 Minn. 537, 242 N.W. 1 (1932); Strong v. Strong, 70 Nev. 290, 267 P.2d 240 (1954); Reingold v. Reingold, 115 N.J.L. 522, 181 A. 153 (Ct. Err. & App. 1935); Redding v. Redding, 235 N.C. 638, 70 S.E.2d 676 (1952); Matarese v. Matarese, 47 R.I. 131, 131 A. 198 (1925); Kelly v. Kelly, 158 S.C. 517, 155 S.E. 888 (1930); Logan v. Reaves, 209 Tenn. 631, 354 S.W.2d 789 (1962); McKelvey v. McKelvey, 111 Tenn. 388, 77 S.W. 664 (1903); Roller v. Roller, 37 Wash. 242, 79 P. 788 (1905). Other courts infer from the lack of cases that there never was a common law rule that a child could not sue its parent. See, e.g., Villaret v. Villaret, 169 F.2d 677 (D.C. Cir. 1948); Downs v. Poulin, 216 A.2d 29 (Me. 1966); Mahnke v. Moore, 197 Md. 61, 77 A.2d 923 (1951); Dean v. Smith, 106 N.H. 314, 211 A.2d 410 (1965); Dunlap v. Dunlap, 84 N.H. 352, 150 A. 905 (1930); Signs v. Signs, 156 Ohio St. 568, 103 N.E.2d 743 (1952); Worrell v. Worrell, 174 Va. 11, 4 S.E.2d 343 (1939); Borst v. Borst, 41 Wash. 2d 642, 251 P.2d 149 (1952). See generally W. PROSSER, TORTS 886 (3d ed. 1964).
⁴ McKelvey v. McKelvey, 111 Tenn. 388, 77 S.W. 664 (1903) (cruel and inhuman punishment inflicted on child by stepmother with father's consent); Roller v. Roller, 37 Wash. 242, 79 P. 788 (1905) (rape of daughter by father).
result of denying a daughter damages from her father after he had raped her, and it eventually became the majority rule in the United States. Yet, over the years there has been a gradual erosion of the immunity rule in suits by child against parent. As so often happens in the law, the erosion has been slow, and the first state to completely abrogate the immunity doctrine did not do so until 1963. Beginning with a survey of the background and reasons for the rule, this comment will attempt to trace the curtailment of the rule and indicate the future of parental immunity.

Development of the Rule

There were only a few cases in the area of parent-child litigation prior to the landmark decision in Hewlett v. George, but these cases indicated, at least impliedly, that a parent would be liable to his child for willful torts. Although none of these cases concerned torts committed by a natural parent, the courts seemed to recognize that the child had rights which could not be infringed upon by a person standing in loco parentis. The meager precedent of these cases was ignored by the courts that established the immunity rule. The judges of the early 20th century had no inclination to allow a recovery even for intentional and malicious physical injury to the child.

Ever since the Hewlett case, the great majority of American courts have professed to follow the rule that a parent is not liable to his child for tortious conduct. The blind following of this rule

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5 Roller v. Roller, 37 Wash. 242, 244, 79 P. 788, 789 (1905), where the court realized that the result was not desirable but said, "[I]f it be once established that a child has a right to sue a parent for a tort, there is no practical line of demarkation [between what is a heinous crime and what is not] that can be drawn. . . ."

6 Cases cited note 13 infra. The erosion of the rule is discussed in the text at notes 44-119 infra. There has also been an erosion of the rule granting a child immunity for torts committed by him against the parent. See, e.g., Balts v. Baits, 273 Minn. 419, 142 N.W.2d 66 (1966).

8 Goller v. White, 20 Wis. 2d 402, 122 N.W.2d 193 (1963). A Missouri appellate court abolished the child's immunity in a suit against him by his mother but the case was never followed. Wells v. Wells, 46 S.W.2d 109 (Mo. App. 1932).

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

10 Nelson v. Johansen, 18 Neb. 180, 24 N.W. 730 (1885) (recovery for negligence by one with whom the child was living); Lander v. Seaver, 32 Vt. 114 (1859) (student recovered from teacher for assault and battery due to excessive punishment).

11 In loco parentis refers to a person who is charged with a natural parent's rights, duties and responsibilities, and in effect stands in the place of a parent. Black's Law Dictionary 896 (4th ed. 1951).

12 Cases cited notes 1, 4 supra.

13 Augustín v. Ortiz, 187 F.2d 496 (1st Cir. 1951) (Puerto Rico); Miss Lady Cleaners v. McDaniel, 235 Ala. 469, 179 So. 908 (1938); Rambo v. Rambo, 195 Ark. 832, 114 S.W.2d (1938); Mesite v. Kirchstein, 109 Conn. 77, 145 A. 753 (1929); Trudell v. Leatherby, 212 Cal. 678, 300 P. 7 (1931); Bulloch v. Bulloch, 45 Ga. App. 1, 163 S.E. 708 (1932); Yost v. Yost, 172 Md. 128, 190 A. 753 (1937); Elias v. Collins, 237 Mich. 175, 211 N.W. 88 (1926); Baker v. Baker, 364 Mo. 453, 263 S.W.2d 29 (1953); Mannion v. Mannion, 3 N.J. Misc.
November, 1967] COMMENT 203

seems illogical in light of the fact that most of these same courts allowed children to maintain suits against their parents both in contract14 and in actions concerning property rights.15 When confronted with this incongruous result, courts explain it by saying that the law will not allow one to be unjustly enriched with another's property,16 or by simply saying that the actions are not comparable.17 While there is no logical reason for the distinction,18 courts have persisted in refusing to grant recovery to a child for personal injuries and have continued to allow suits by the child for protection of property rights and for breach of contract.

There are several reasons advanced as the bases of the immunity rule. The first and most frequently cited19 stems from the belief that the family is the "cradle of civilization,"20 something more than a mere social unit.21 Because family harmony serves to promote good citizenship and the general welfare of the family unit, the state is said to have an interest in its preservation.22 Anything which undermines the peace and tranquility of the family also causes discord and disturbs the smooth functioning and integrity of the social unit.23 Allowing a child to recover from his parent for personal injuries will destroy parental authority and impair the security of the home.24

Essentially, justification for the immunity rule is reached through


15 E.g., Preston v. Preston, 102 Conn. 96, 128 A. 292 (1925); McLain v. McLain, 80 Okla. 113, 194 P. 894 (1921).

16 E.g., Small v. Morrison, 185 N.C. 577, 118 S.E. 12 (1923).


24 Id.
a balancing process. Against the detriment to the child by the abridgment of his rights must be balanced the benefits accruing directly to the child from the continuance of the parent-child relationship, unhindered by the effect of personal injury litigation. The benefits to the child from the maintenance of family harmony far outweigh any monetary gains to be made from litigation with his parent. In other words, the "peace of the fireside and contentment of the home" are worth more than money.

A closely related argument is based on the policy of upholding the parent's disciplinary authority. The father has the right and duty to control, protect, support, guide and educate his child. The reciprocal duty of the child is to serve and obey the father. If the child knew that he could sue his parent for every tort which the parent committed against the child, the status of parental authority would rapidly deteriorate. The child would soon learn to pay no attention to his parent and do as he pleased. The state's interest in maintaining parental authority and discipline would also be undermined, for through discipline the child is deterred from leading a criminal or dissolute life.

While the parent does not have unlimited discretion in the actions he may take against his child, he is allowed a great deal of discretion, and to make him liable to the child for every tort would not be in the best interests of either the parent or the child. Thus, it has been said in several cases that the family harmony and parental authority arguments are the only ones that have any substance, and some courts have based their opinions solely on either or both of these arguments.

Another frequently advanced reason for the denial of recovery to the child is that such recovery will tend to deplete the family exchequer. When there are other dependents in the family, a

26 "It is deemed better that an occasional wrong should go unreplied than that family life should be subjected to the disrupting effects of such suits," Securo v. Securo, 110 W. Va. 1, 2, 156 S.E. 750, 751 (1931).
27 Small v. Morrison, 185 N.C. 577, 585, 118 S.E. 12, 16 (1923).
29 Matarese v. Matarese, 47 R.I. 131, 131 A. 198 (1925); McKelvey v. McKelvey, 111 Tenn. 368, 77 S.W. 664 (1903).
30 Id.
31 Cases cited note 22 supra.
covery by one child against the father will have a detrimental effect upon the other dependents by reducing the resources available to the entire family. While some courts have mentioned this reason as a basis for upholding immunity, others have found it relatively easy to refute. They claim that the exchequer argument "ignores the parent's power to distribute his favors as he will, and leaves out of the picture the depletion of the child's assets of health and strength" which results from the injury. As an additional argument against the exchequer theory, it is said that when the parent carries liability insurance no reduction in family assets will occur.

Some courts fear that if the child is allowed to recover, there is a chance the parent will reacquire all of the damages paid to the child. If the child dies intestate during his minority, the parent would be his next of kin and through the laws of intestate succession might inherit all of the child's property, including the money paid by the father as damages for the tort. This, of course, is a rather remote possibility, and the same contingency exists in suits concerning property rights, which are readily allowed.

Some courts put reliance on other legal remedies available to the injured child. It is often contended, although not as frequently today as 30 years ago, that the criminal law provides adequate punishment for the tortfeasor-parent without the added burden of paying damages to his injured child. Additionally, loss of custody can be visited upon the parent for abuses which are clearly injurious to the child. These are deemed to be adequate legal remedies, and the right to damages is denied because of them.

Such are the historical and modern reasons advanced for the denial of the child's right to recover. They have been repeated in many cases and are the premises to be refuted by any court seeking to limit or abrogate parental immunity. The reasons for the immunity rule are based on the proposition "that the relation of child to parent limits the child's rights, that would otherwise exist, to demand reparation for unlawful conduct towards him on the part of the parent." The remainder of this comment will trace the deterioration of the rule of parental immunity.

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35 Union Bank & Trust Co. v. First Nat'l Bank, 362 F.2d 311 (5th Cir. 1966) (with restrictions based on insurance); Dean v. Smith, 106 N.H. 314, 211 A.2d 410 (1965); Dunlap v. Dunlap, 84 N.H. 352, 150 A. 905 (1930); Borst v. Borst, 41 Wash. 2d 642, 251 P.2d 149 (1952).

36 Dunlap v. Dunlap, 84 N.H. 352, 361, 150 A. 905, 909 (1930).

37 See 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).

38 E.g., Roller v. Roller, 37 Wash. 242, 79 P. 788 (1905).


40 Cases cited note 15 supra.

41 Mesite v. Kirchstein, 109 Conn. 77, 145 A. 753 (1929); Smith v. Smith, 81 Ind. App. 566, 142 N.E. 128 (1924); Miller v. Pelzer, 159 Minn. 373, 199 N.W. 97 (1924); Hewlett v. George, 68 Miss. 703, 9 So. 885 (1891); Matarese v. Matarese, 47 R.I. 131, 131 A. 198 (1925); McKelvey v. McKelvey, 111 Tenn. 388, 77 S.W. 664 (1903) (dicta).

42 Cases cited note 41 supra and, e.g., CAL. Civ. Code § 203.

43 Dunlap v. Dunlap, 84 N.H. 352, 361, 150 A. 905, 909 (1930).
The Erosion of the Rule

Running throughout the cases is the underlying policy that the parent should be immune from liability for torts committed by him which arise out of acts referable to the parental relation. This means that the law affords a great discretion to parents when it comes to their duties and privileges qua parents. Social policy favors the maintenance of family harmony and parental discipline. In order to foster this policy the parent should not be burdened with the fear of suit from his child for omissions, such as his negligent failure to repair a step in the house, or his inability to hold a job and adequately support the family. Most of the exceptions which have evolved from the broadly stated rule of immunity are attributable either to acts of the parent which do not arise out of the parental relationship or to acts which indicate that the parent has at least temporarily abandoned his position as a parent.

Willful or Malicious Torts

While the parent is allowed a wide discretion in the amount of punishment or chastisement he may administer to his child, such discretion is not without limits. An exception to the immunity rule has developed which makes the parent liable to the child for damages for a willful or malicious tort.

This is not to say that every time a parent thinks that his child needs a spanking he must first obtain a release from the child in order to avoid being sued. He is still allowed a great deal of latitude in how many times he may hit the child and which end of the belt he may use. If, however, the parent's actions show he is venting his anger on the child or beating the child just for the sake of the beating itself, as opposed to punishing the child for his own welfare, the parent will


45 Cases cited note 32 supra.

subject himself to liability. By exceeding the bounds of reason- 
ableness, the parent has abandoned his status as a parent and is in 
the same position as an outsider, subject to all liability which could 
be visited upon the third person.

Most courts agree that neither ordinary nor gross negligence will 
pierce the shield of parental immunity, however, the decisions dif- 
fer as to what degree of culpability is necessary to bring the parent 
within the exception. Some courts require that the act be done mal-
ciously before the parent will lose his immunity, while others say 
that actions done recklessly, that is, in willful and wanton disregard 
of the consequences and rights of others, will suffice. The distinc-
tion is void of logic. Once the parent's actions exceed the bounds 
of conduct referable to the parental relationship, he should not be 
heard to say that he did not maliciously intend to injure his child.

The absence of parental immunity for willful torts does not con-
ict with or inhibit reasonable discipline or the maintenance of family 
harmony. Certainly it is more repugnant to leave the child without 
redress for a willful tort than to hold the parent immune. When dis-
cipline takes the form of an intentionally wanton beating, it is in the 
best interests of society to curtail rather than perpetuate it. When 
the parental relationship is abandoned, the reason for the immunity 
causes to exist.

**Emancipation**

It has been recognized from the earliest case dealing with par-ental immunity, *Hewlett v. George*, that if the child is emancipated 
at the time the cause of action arises, he may maintain an action 
against his parent. In the *Hewlett* case, the plaintiff had been mar-

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48 A parent who takes his child in the car while intoxicated is tem-
porarily abdicating his parental responsibilities and is therefore not entitled 
to immunity even though the ride is for family purposes. Hoffman v. Tracy, 
49 For a discussion of the decisions which have abolished immunity in 
cases of ordinary negligence see text at notes 122-138 infra.
50 Strong v. Strong, 70 Nev. 260, 267 P.2d 240 (1954), rehearing denied, 
70 Nev. 296, 269 P.2d 265 (1954); Teramano v. Teramano, 6 Ohio St. 2d 117, 
described as willful 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, mali animo.” Chaff-
51 Emery v. Emery, 45 Cal. 2d 421, 289 P.2d 218 (1955); Buttrum v. 
Buttrum, 98 Ga. App. 226, 105 S.E.2d 510 (1951); Nudd v. Matsoukas, 7 Ill. 
2d 608, 131 N.E.2d 525 (1956); Decker v. Decker, 20 Misc. 2d 438, 193 N.Y.S.2d 
431 (Sup. Ct. 1959).
52 Mahnke v. Moore, 197 Md. 61, 77 A.2d 923 (1951).
53 68 Miss. 703, 9 So. 885 (1891).
54 The courts say that a child cannot recover for a tort which occurred 
when he was unemancipated even though he may be emancipated at the 
time of the suit. See, e.g., Hewlett v. George, 68 Miss. 703, 9 So. 885 (1891); 
ried, but at the time of the false imprisonment she was separated from her husband. The court said:

Whether she had resumed her former place in her mother's home, and the relationship, with its reciprocal rights and duties, of a minor child to her parents, does not sufficiently appear. If, by her marriage, the relation of parent and child had been finally dissolved . . . then it may be the child could successfully maintain an action against the parent for personal injuries.65

This exception to the immunity rule has been followed universally.65 The basis for the exception is that once emancipation has occurred there is no longer the risk that family harmony or discipline will be disrupted, since the child is considered to be on his own.67

When emancipation occurs is often a question of fact for the jury, although the evidence may be so clear as to authorize the finding of emancipation as a matter of law.68 Emancipation must be pleaded and proved by the party seeking to recover.69 The emancipation must be complete—partial emancipation will not suffice.70 Such complete emancipation occurs by the act of the parent in surrendering all his right to the services and earnings of the child as well as the right to custody and control of his person.71 In short, emancipation is a matter of intent of the parent.72

The emancipation exception is not based on the theory that there should be immunity for acts referable to the parental relationship. This is seen from the fact that in many cases a parent has been held liable to his emancipated child for acts arising out of parental functions and for acts attributable to his simple negligence.73 It would

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65 Hewlett v. George, 68 Miss. 703, 711, 9 So. 885, 887 (1891).
Farrar v. Farrar, 41 Ga. App. 120, 152 S.E. 278 (1930); Carricato v. Carricato,
384 S.W.2d 85 (Ky. Ct. App. 1964) (parent v. emancipated child); Skillin v.
Skillin, 130 Me. 223, 154 A. 570 (1931); Taubert v. Taubert, 103 Minn. 247,
114 N.W. 763 (1908); Gillikin v. Burbage, 263 N.C. 317, 139 S.E.2d 753 (1965)
(parent v. emancipated child); Brumfield v. Brumfield, 194 Va. 577, 74
S.E.2d 170 (1953).
68 Mesite v. Kirchstein, 109 Conn. 77, 145 A. 753 (1929); Skillin v.
Skillin, 130 Me. 223, 154 A. 570 (1931) (question of fact); Warren v. Long,
264 N.C. 137, 141 S.E.2d 9 (1965) (30-year-old daughter found to be un-
emancipated as a matter of law); Brumfield v. Brumfield, 194 Va. 577, 74
S.E.2d 170 (1953) (question of fact).
71 See Mesite v. Kirchstein, 109 Conn. 77, 145 A. 753 (1929); Taubert
v. Taubert, 103 Minn. 247, 114 N.W. 763 (1908); Gillikin v. Burbage, 263 N.C.
317, 139 S.E.2d 753 (1965).
72 Brumfield v. Brumfield, 194 Va. 577, 74 S.E.2d 170 (1953). As a
corollary, when emancipation occurs the parent is relieved of his duty to
support the child, and the child has no legal obligation to remain in the
parent's home and perform duties of an unemancipated child. The emanci-
pated child who does remain in the parent's home has the same status as any
other guest and the parent is not immune for torts to the child. See Farrar
v. Farrar, 41 Ga. App. 120, 152 S.E. 278 (1930); Gillikin v. Burbage, 263 N.C.
317, 139 S.E.2d 753 (1965).
73 Skillin v. Skillin, 130 Me. 223, 154 A. 570 (1931); Brumfield v.
Brumfield, 194 Va. 577, 74 S.E.2d 170 (1953); cf. Carricato v. Carricato, 384
seem that the true reason behind the exception is that none of the customary reasons for parental immunity are applicable. The emancipated child is beyond the age of discipline by his parent, and family harmony takes on a different meaning with the emancipation. In short, it can be said that the emancipation exception is not really an exception at all, it is a situation to which the immunity rule was never intended to apply.

Persons In Loco Parentis

There are numerous cases in which children have sued nonparents with whom they were temporarily or permanently living. The earliest cases indicated that persons standing in loco parentis to the child would not be protected by the same immunity as would the child's natural parent. These early cases all concerned intentional torts committed against a child, and held that the defendants were not immune from suit. Subsequent to these early decisions, a sizeable amount of judicial authority on the subject has developed, and most of it is jumbled. When the cases are sorted out, there are apparently only a few instances when the child recovered against one truly in loco parentis when he could not have recovered against his natural parent.

Most of the cases can be classified as extensions of the rules and exceptions applied to natural parents. Those cases which deny immunity to the person standing in loco parentis are cases which involve willful or malicious torts committed against the child. These holdings simply apply the same rule which is applied to natural parents. Those decisions which grant immunity concern negligent torts, the type of case in which the natural parent is also granted immunity.

S.W.2d 85 (Ky. Ct. App. 1964) (parent recovered from his child for simple negligence).

Cases cited note 10 supra.

Id.

Cases cited note 70 infra.


Trudell v. Leatherby, 212 Cal. 678, 300 P. 7 (1931) (stepmother immune from suit for negligence in driving automobile); Bricault v. Deveau, 21 Conn. Supp. 486, 157 A.2d 604 (Super. Ct. 1960) (stepparent immune for negligence); Foley v. Foley, 61 Ill. App. 577 (1895) (uncle immune for negligence); Rowe v. Rugg, 117 Iowa 606, 91 N.W. 903 (1902) (aunt immune for punishment inflicted within the bounds of parental discretion); Fortinberry v. Holmes, 99 Miss. 373, 42 So. 799 (1907) (one with whom child living immune for punishment inflicted within the bounds of parental discretion); Rutkowski v. Wasko, 286 App. Div. 327, 143 N.Y.S.2d 1 (1955) (stepfather, if found to be truly in loco parentis, immune for negligence in driving automobile); cf. Miller v. Pelzer, 159 Minn. 375, 199 N.W. 97 (1924) (foster parents immune in a suit for deceit because the court found no duty to disclose).
Some cases which seem to be examples of an in loco parentis exception to the immunity rule actually do not involve persons in loco parentis to the child. Although the defendants have custody of the child, they have not assumed the full range of duties and responsibilities necessary to put them in the place of a natural parent, and therefore they have the same tort liability as any other person. In such cases no policy argument commands that the defendant be granted immunity. There can be no disruption of family harmony since there is no true family in existence to disrupt. There is no undermining of parental authority since the defendant is not a parent and does not have any real authority to be weakened. The other reasons advanced for immunity are equally inapplicable to the individual not truly in loco parentis and for these reasons the courts have not afforded him immunity. Here again it is technically inaccurate to treat this situation as an exception to the immunity rule. When the defendants do not stand in the place of parents, they do not fall within the scope of the doctrine of immunity.

The true exception to the rule is found in the few cases allowing suit against a person in loco parentis where a natural parent would have been immune had he been the defendant. The courts which have denied immunity have either done so without reason or have based their opinions on the theory that members of the family are becoming more independent, thus making the family less susceptible to discord which might result from a tort suit. There is no acceptable rationale for these decisions; if a person is truly in loco parentis to a child, all of the reasons for granting immunity apply with the same force as they do to natural parents. He has the same rights, duties and privileges as a natural parent and should receive identical treatment. Cases denying immunity are in a decided minority and most courts have realized that those truly in loco parentis should be treated as much like natural parents as possible.

Business Negligence

There has been expanding acceptance of the rule that where a tort arises from the parent's business activity the parent should be

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69 E.g., Dix v. Martin, 171 Mo. App. 266, 157 S.W. 133 (1913) (defendant liable for assault and battery); Miller v. Davis, 49 Misc. 2d 764, 266 N.Y.S.2d 490 (Sup. Ct. 1966) (foster parent liable for negligence). See also Wilkins v. Kane, 74 N.J. Super. 414, 181 A.2d 417 (Super. Ct. 1962) (contribution allowed against a grandmother who was not truly in loco parentis).


73 One court has said that when the law removes some of the enticements for adoption and other assumptions of the parental relationship by one not the natural parent of a child, it does so to its own detriment; and that the social interest in families should command that all reasonable advantages be given to one contemplating assumption of the role of parent to a fatherless child. London Guar. & Acc. Co. v. Smith, 242 Minn. 211, 64 N.W.2d 781 (1954).

74 Cases cited notes 67, 68 supra.
liable to his child. 75 This exception to the immunity rule is based on the fact that an injury occurring as a result of the parent’s vocation is not referable to the parental relationship. 76 While engaged in his business the parent owes the full duty of care to anyone with whom he might come in contact, including his own child. In this respect the child becomes a member of the public and is no different from any other child who might, for example, be playing in the driveway of a home into which the parent drives his truck.

The first case to consider the parent’s liability for business negligence was Dunlap v. Dunlap, 77 a well reasoned and often cited New Hampshire opinion. The plaintiff child was employed by his father and suffered personal injuries when a staging on which he was working collapsed. The father carried employer’s liability insurance and the insurer knew that the minor son was on the payroll. The court discussed most of the available precedent and held that the son could recover from the father:

The present suit is not for an intentional wrong, but for a negligent one, growing out of the relation of master and servant. As to this employment, the father had intentionally surrendered his parental control. 78

The court felt that the father intended to assume the full responsibility of a master to his employee-son and to release his parental control so far as necessary to attain that end. As evidence of the father’s intent the court relied on the fact that the employer’s insurance covered injury to the son, indicating a true employer-employee relationship. 79 Underlying the decision was the dual capacity of the father and it was due to his negligence in the capacity of master rather than parent which caused the child’s injury.

In cases where the child has been injured by an instrument or member of a partnership of which his parent is a partner, some of the decisions have turned on the state’s conception of a partnership. For example, in two cases where the partnership was not a legal entity under state law and the partners were jointly and severally liable, the courts held the partnership immune since a suit against the partnership was in reality a suit against the parent. 80 The one case which discussed the issue and found the partnership liable did so on the basis that the partnership was a legal entity. 81 The judgment against the partnership was held not to be a judgment against its members and

75 Trevarton v. Trevarton, 151 Colo. 418, 378 P.2d 640 (1963); Signs v. Signs, 156 Ohio St. 566, 103 N.E.2d 743 (1952); Worrell v. Worrell, 174 Va. 11, 4 S.E.2d 343 (1939); Borst v. Borst, 41 Wash. 2d 642, 251 P.2d 149 (1952); Lusk v. Lusk, 113 W. Va. 17, 166 S.E. 538 (1932). Contra, Luster v. Luster, 299 Mass. 480, 13 N.E.2d 438 (1938), where the court said that it would be impossible to draw a line of distinction between acts which were referable to parenthood and those which were not. See generally Sanford, Personal Torts Within the Family, 9 Vand. L. Rev. 823, 835 (1956).
76 E.g., Borst v. Borst, 41 Wash. 2d 642, 251 P.2d 149 (1952).
77 84 N.H. 352, 150 A. 905 (1930).
78 Id. at 364, 150 A. at 911.
79 Id. The effect of insurance coverage on the law of parental immunity is discussed more fully at notes 114-119 infra.
the entity was not immune from suit even though one of the partners was the plaintiff's father. The latter case would seem the better result. Regardless of whether or not a partnership is a legal entity under state law, any injury which occurs as a result of partnership business is not referable to the parental relation.

The case of *Signs v. Signs* best exemplifies how cases involving a partnership should be treated. There, due to the negligence of a partnership of which the father was a member, a gasoline pump caught fire and injured the plaintiff. The court found the partnership liable saying that tort actions in the family are rare and when they are brought there is no family harmony left to be disturbed. Since the father was engaged in business at the time of the accident, the immunity rule was held to be inapplicable. The case did not turn upon the legal status of a partnership.

Parental immunity was denied in two cases where a carrier-passenger relation existed between the parent and the child. In allowing damages, each court relied heavily on the fact that the parents were covered by liability insurance and indicated that insurance eliminated most of the reasons advanced for the immunity rule. The courts recognized that the actions were brought against the parents in their vocational capacities as carriers rather than for violations of moral or parental obligations. Stating that there was really a cause of action against the parent which was simply blocked by the immunity, the courts removed the immunity for the breach of duty as a carrier and allowed the plaintiffs to pursue their rights.

In the recent case of *Trevarton v. Trevarton* the court allowed an action against a father in the logging business who negligently allowed a felled tree to be dragged across his sleeping son. In holding that there was no sufficient reason to deny a remedy to the child when the injury was inflicted in the performance of duties relating to business, the court said:

To justify any rule of immunity courts have been wont to grasp desperately for reasons, but many, if not all, fail to withstand attack when subjected to the light of logic and reason.

Surely reason commands that when the injury inflicted upon the child is not connected with any parental duty or privilege there is no purpose in perpetuating the rule of immunity.

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82 156 Ohio St. 566, 103 N.E.2d 743 (1952).
83 Id. at 576, 103 N.E.2d 749.
84 The case of *Borst v. Borst*, 41 Wash. 2d 642, 251 P.2d 149 (1952) allowed a child to recover from his father who was a member of a partnership for a tort committed while acting in the scope of his partnership activities.
85 *Worrell v. Worrell*, 174 Va. 11, 4 S.E.2d 343 (1939) (father owned a bus line on which daughter was riding); *Lusk v. Lusk*, 113 W. Va. 17, 166 S.E. 538 (1932) (father owned a school bus on which daughter was riding).
86 *Worrell v. Worrell*, 174 Va. 11, 28, 4 S.E.2d 343, 350 (1939); *Lusk v. Lusk*, 113 W. Va. 17, 19, 166 S.E. 538, 539 (1932).
87 *Worrell v. Worrell*, 174 Va. 11, 27, 4 S.E.2d 343, 350 (1939); *Lusk v. Lusk*, 113 W. Va. 17, 19, 166 S.E. 538, 539 (1932).
89 Id. at 421, 378 P.2d at 641.
Third Party Liability

The great majority of the courts have held that immunity is a personal privilege and does not extend to a third party who is liable for the negligence of the parent. The question arises most frequently in cases where the parent's employer is sued by the child for a tort committed by the parent while in the scope of his employment. The arguments advanced against recovery on the basis of respondeat superior have been twofold. The employer contends that his liability is derivative, that he is not liable unless the employee is liable. The other argument advanced is that to allow the suit against the employer is to allow the plaintiff to do indirectly what he cannot do directly, since the employer is entitled to a right of indemnity from the negligent employee for whose acts the employer is held liable. That is, by allowing the child to sue and recover against the employer, it in effect is allowing him to sue his parent. Both of these arguments have been effectively overcome by the courts.

The courts which have denied immunity to the employer have declared that the child's right to sue the employer is an independent primary right which is not dependent upon any right to sue the servant. The principal is liable for the agent's negligence even though the agent may not be held accountable to the plaintiff. The immunity defense is personal to the parent and no sound reason exists for permitting the employer to share that which ought to be confined within the family. These courts reason that while the master does have a right of indemnity against the servant, it is not by way of subrogation to the child's action against the parent, but is for the breach of the agency contract in the duty owed by the servant to the master. These are effective arguments in favor of the denial of immunity to the employer and go far in evidencing the dissatisfaction with the immunity rule entertained by many courts.

90 Cases cited notes 91, 97 infra.
92 The following cases have found the employer immune on the basis that his liability is derivative: Meece v. Holland Furnace Co., 269 Ill. App. 164 (1933); Ownby v. Kleyhammer, 194 Tenn. 109, 250 S.W.2d 37 (1952). The following cases have found the employer immune because he would have a right to indemnity from the employee: Myers v. Tranquility Irr. Dist., 26 Cal. App. 2d 385, 79 P.2d 419 (1938); Pullen v. Novak, 169 Neb. 211, 99 N.W.2d 16 (1959); Smith v. Henson, 214 Tenn. 541, 381 S.W.2d 892 (1964); Ownby v. Kleyhammer, 194 Tenn. 109, 250 S.W.2d 37 (1952).
93 Cases cited note 91 supra.
94 Cases cited note 91 supra.
96 Analogous cases arise with respect to the owner of an automobile who is made liable by statute for the negligence of one driving the car with the owner's permission. When the driver is the parent of the plaintiff the same
Questions of third party liability also arise when a defendant seeks contribution from the plaintiff's parent. The cases occur when the defendant is sued by the child for a tort caused by the concurring negligence of the defendant and the child's parent. In most of the states where the parent is immune from direct suit by the child, contribution from the negligent parent has also been denied. These decisions are usually based on the rule that contribution will only be allowed where the plaintiff has an enforceable right against the joint tortfeasor. Since the child has no enforceable right against the parent, no contribution can be had.

Of the few cases which have allowed recovery by way of contribution, only one can be cited as being squarely in conflict with the majority view. In that case the court said that contribution is not recovery for the tort but is the enforcement of an equitable duty to share liability for the wrong done. The other cases allowing contribution are distinguishable on their facts.

The idea that immunity is a personal defense of the parent permeates all of the cases in the area of third party liability. This reasoning is seemingly a judicial limitation imposed in order to curtail the unjust effect that immunity has on the child and is illustrative of the growing trend away from immunity.

Actions Commenced when Parent or Child is Dead

Many courts have abolished immunity when either the parent or the child is dead at the time of the suit. These decisions are based reasoning is applied in allowing recovery against the owner as has been discussed with regard to respondeat superior. See Kemp v. Rockland Leasing, Inc., 51 Misc. 2d 1073, 274 N.Y.S.2d 952 (Sup. Ct. 1966); Smith v. Smith, 116 W. Va. 230, 179 S.E. 812 (1935) (suit by mother against owner of car which son was driving); Le Sage v. Le Sage, 224 Wis. 57, 271 N.W. 369 (1937). But see Lund v. Olson, 183 Minn. 315, 237 N.W. 188 (1931).


on the theory that there is a cause of action which accrues to the child when he is injured by his parent but it is blocked by parental immunity. The immunity rule is here again held to be a personal privilege and the bar to the child's action is removed by the death of the parent. Since one of the major reasons for the immunity rule is the protection of family harmony, when the family relationship ceases to exist the rule of immunity should also cease. There is no chance of disruption of family life or weakening of parental authority and no risk of collusion between parent and child when insurance is involved. Thus, the majority of courts allow recovery by a child in a suit against a parent's estate for personal injuries incurred before the parent's death.\(^{103}\)

Those courts which have applied the immunity rule and have denied the child his cause of action when the parent is deceased have done so on various grounds. Some courts state that it is for the legislature to abolish the rule of immunity upon the death of the tortfeasor.\(^{104}\) Other courts maintain that to allow the action would deceased parents.\(^{105}\) Still other courts contend that death cannot create a cause of action in the child,\(^{106}\) but these courts fail to recognize that a duty toward the child is violated at the time of the tort and it is only the right to recovery which is barred by the personal immunity of the parent. On the whole, the logic of the cases denying recovery seems faulty when compared with the well-reasoned opinions allowing the child to recover.

Wrongful Death

Many states have abolished the rule of immunity in suits by a child or a child's estate for the wrongful death of the child or the other parent. Not only does the logic of the immediately preceding discussion apply, but the courts also base their decisions on interpretations of their wrongful death statutes. The courts upholding the actions say that the wrongful death statutes create a new cause of action in the plaintiff which is unhampered by the personal immunity of the parent.\(^{107}\) This reasoning applies both where the plaintiff is


\(^{103}\) Virtually all of the decisions cited in note 102 supra advance the reasoning set forth in the text as the bases of their holdings.

\(^{104}\) E.g., Castellucci v. Castellucci, 96 R.I. 34, 188 A.2d 467 (1963).


\(^{107}\) Cases cited notes 108, 109 infra.
suing as administrator for the death of the child and where the child himself is suing for the wrongful death of the other parent. Other courts allow the plaintiff to recover because the statute does not expressly exclude him as a plaintiff.

Interesting questions of immunity arise when the suit is by the representative of a deceased parent against the surviving parent for wrongful death and the only real beneficiaries of the recovery are the children. The defendant parent usually pleads that he should not be held liable to the true beneficiaries because of the immunity rule. In answering this argument the courts apparently look only to the form and not the substance of the suit, holding that since the action is not truly a suit by the child the immunity rule is inapplicable. The recovery might be viewed as compensation to the beneficiaries for their loss as sustained through the death, and to allow immunity to be asserted would defeat the policy of the wrongful death statutes.

The arguments advanced for abrogation of the immunity rule on the death of a parent or child should apply with equal force when the suit is for the wrongful death of a parent or child. The fact that in one type of action a child is suing a parent's estate for personal injuries and in the other for wrongful death should not change the logic of the result. All family harmony and discipline arguments in favor of immunity disappear with death, and wrongful death statutes should not be interpreted as a bar to a legitimate recovery by the child.

Liability Insurance

Virtually all courts agree that if the child is not entitled to recover from his parent at the time of the tort, the fact that the parent is insured will not change this result. However, many courts have

111 E.g., Bonner v. Williams, 370 F.2d 301 (5th Cir. 1966); Albrecht v. Potthoff, 192 Minn. 557, 257 N.W. 377 (1934) (suit by emancipated daughter's estate with mother as sole beneficiary of recovery).
112 E.g., Bonner v. Williams, 370 F.2d 301 (5th Cir. 1966); Albrecht v. Potthoff, 192 Minn. 557, 257 N.W. 377 (1934). Contra, Heyman v. Gordon, 40 N.J. 52, 190 A.2d 670 (1963), where the court expressly stripped the suit of formalities and disguise and barred recovery from a parent by finding that the child was the only true party in interest.
113 E.g., Bonner v. Williams, 370 F.2d 301 (5th Cir. 1966). Of course, the jurisdiction must either allow suits between husband and wife or follow the reasoning of those courts which hold that death abrogates immunity.
114 Augustin v. Ortiz, 187 F.2d 496 (1st Cir. 1951) (Puerto Rico); Villaret v. Villaret, 169 F.2d 677 (D.C. Cir. 1948); Owens v. Auto Mut. Indem. Co., 235
commented on the fact that insurance is so common today that it
should not be ignored in testing the current validity of the reasons for
the immunity rule.115

When the parent has appropriate insurance coverage many of the
major reasons advanced for sustaining the immunity rule are elimi-
nated. Where there is insurance coverage it is fairly obvious that
the argument concerning depletion of the family exchequer does not
apply. Further, the fact that the parent no longer must personally
compensate his child for a tortious wrong reduces the possibility that
effective discipline of the child will be undermined. Finally, the
family harmony doctrine is diminished since the chances of disturbing
family tranquility are lessened when the parent is not required to
pay the child. Actually, where there is insurance coverage, a lawsuit
may weld a family even closer since all members are striving for the
common goal of reparation to the child.116 However, insurance cov-
erage creates a new and difficult problem: the increased possibility of
fraud and collusion between the parent and child in their attempt to
secure insurance benefits.117

It would seem that many courts have been impressed with and
deterred by the risk of fraud, as evidenced by the fact that no court
has eliminated any phase of immunity solely because of insurance
coverage.118 Illustrative of the judicial fear of abolishing immunity
are the courts which deny recovery both on the basis of the family
harmony doctrine and the inconsistent concept of the risk of fraud

Ala. 9, 177 So. 133 (1937); Rambo v. Rambo, 195 Ark. 832, 114 S.W.2d 468
(1938); Perkins v. Robertson, 140 Cal. App. 2d 536, 295 P.2d 972 (1956); Mesite
1, 163 S.E. 708 (1932); Downs v. Poulin, 216 A.2d 29 (Me. 1966); Luster v.
Luster, 299 Mass. 490, 13 N.E.2d 433 (1938); Elias v. Collins, 237 Mich. 175,
211 N.W. 88 (1926); London Guar. & Acc. Co. v. Smith, 242 Minn. 211, 64
N.W.2d 781 (1954); Brennecke v. Kilpatrick, 336 S.W.2d 68 (Mo. 1960); Dean
(1931); Signs v. Signs, 156 Ohio St. 556, 103 N.E.2d 743 (1952); Tucker v.
Tucker, 395 P.2d 67 (Okla. 1964); Maxey v. Sauls, 242 S.C. 247, 130 S.E.2d 570
(1963); Worrell v. Worrell, 174 Va. 11, 4 S.E.2d 243 (1939); Lasecki v. Kabara,
235 Wis. 645, 294 N.W. 33 (1940).

115 Balts v. Balts, 273 Minn. 419, 142 N.W.2d 66 (1966); Briere v. Briere,
— N.H. —, 224 A.2d 588 (1966); Dunlap v. Dunlap, 84 N.H. 352, 150 A. 905
(1930); Goller v. White, 20 Wis. 2d 402, 122 N.W.2d 193 (1963).

116 Parks v. Parks, 390 Pa. 287, 135 A.2d 65 (1957) (Musmanno, J. dis-
senting).

117 The parent also finds himself in a difficult position being torn between
his desire to help his child recover and his duty to aid the insurer. See, e.g.,
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. 556, 103 N.E.2d 743
(1952).

118 While many courts express the fear of fraud and collusion where the
parent is covered by insurance, perhaps the best answer to this apprehension
is found in Briere v. Briere, — N.H. —, 224 A.2d 588, 590 (1966), where
the court said: "Our court system, with its attorneys and juries, is experi-
enced and reasonably well fitted to ferret out the chicanery which might
exist in such cases."
and collusion.\textsuperscript{119} The inconsistency of the theories is clear: a suit cannot at one and the same time tear the family asunder and bring it together. The courts seem generally confused over what are the present reasons, if any, for the immunity rule, and they are unable to deal with the effect of insurance coverage on the validity of the reasons advanced for immunity.

**The Modern Trend**

A firmly imbedded rule of law is not wiped away in a single stroke. It often takes many years to whittle down the rule with exceptions until the day finally arrives when the minority rule becomes the majority rule. The law of parental immunity is an example of just such a slow evolutionary process. The rule began in 1891 with a single case\textsuperscript{120} and remained the undisputed law until judges started writing dissents\textsuperscript{121} and courts began carving out many of the exceptions discussed above. In 1963, the Supreme Court of Wisconsin\textsuperscript{122} abolished the rule of parental immunity in negligence cases, the one type of action where the rule had remained firmly entrenched.\textsuperscript{123} The abrogation was complete except for two well reasoned exceptions. In denying immunity to a foster father\textsuperscript{124} for injuries sustained by his foster son while riding on the drawbar of a tractor driven by the defendant, the court said:

\[\text{We consider the wide prevalence of liability insurance in personal-injury actions a proper element to be considered in making the policy decision of whether to abrogate parental immunity in negligence actions. This is because in a great majority of such actions, where such immunity has been abolished, the existence of insurance tends to negate any possible disruption of family harmony and discipline.}\]

The rule was abolished in all instances of negligence except cases:

1. where the alleged negligent act involves an exercise of parental authority over the child [a parental privilege]; and (2) where the alleged negligent act involves an exercise of ordinary parental discretion with respect to the provision of food, clothing, housing, medical and dental services, and other care [parental duties].\textsuperscript{125}

The most significant decision to date is the 1966 case of *Briere v.*

\textsuperscript{119} For a general discussion, see Borst v. Borst, 41 Wash. 2d 642, 251 P.2d 149 (1952).

\textsuperscript{120} Hewlett v. George, 68 Miss. 703, 9 So. 885 (1891).


\textsuperscript{122} Goller v. White, 20 Wis. 2d 402, 122 N.W.2d 193 (1963).

\textsuperscript{123} Cases cited note 13 supra. See generally, Comment, Abrogation of the Parent-Child Immunity Doctrine, 12 S. Dak. L. Rev. 364 (1967).

\textsuperscript{124} While the facts of the case concerned one in *loco parentis*, the decision clearly was not limited to persons in *loco parentis*. The language used by the court was sufficiently broad to cover natural parents. See Goller v. White, 20 Wis. 2d 402, 413, 122 N.W.2d 193, 198 (1963).

\textsuperscript{125} Goller v. White, 20 Wis. 2d 402, 412, 122 N.W.2d 193, 197 (1963).

\textsuperscript{126} Id. at 413, 122 N.W.2d at 198.
Briere\textsuperscript{127} where the Supreme Court of New Hampshire completely abolished parental immunity for negligent torts. The court met the usual arguments with relative ease and noted that while there was a danger of fraud and collusion due to insurance coverage, the judicial system with its attorneys and juries was "reasonably well fitted to ferret out the chicanery which might exist in such cases.\textsuperscript{128} The mere opportunity for fraud was thought not to be an insuperable barrier to an honest and meritorious action by a minor.

While the court repeated the rule that insurance could not impose a duty upon a parent where none existed before, it recognized that the widespread existence of insurance coverage could not be ignored in determining the validity of the immunity rule.\textsuperscript{129} It quoted the contention in the Dunlap\textsuperscript{130} case that the family exchequer reason for the immunity rule is a mere makeweight, and added that the prevalence of liability insurance coverage eliminated any risk to family assets. It was impossible for the court to perceive how parental authority and family well-being could be more jeopardized in a tort action than in an action concerning contract or property.\textsuperscript{131} Actually, since insurance generally covers tort liability and not contract damages,\textsuperscript{132} family harmony would be less threatened in a tort action. Clearly insurance coverage was a major element in the case and the court greatly emphasized it.\textsuperscript{133}

The New Hampshire court did not limit its decision, as did the Wisconsin court, to those torts outside the area of parental control and duties. The Wisconsin solution is possibly the ideal end to be achieved. Generally stated, immunity is eliminated in Wisconsin except where the parent's conduct is referable to the parental relationship, an area in which the parent should be allotted a wide amount of discretion without fear of liability. No liability should be imposed on the parent for negligently or otherwise being unable to provide food and clothing for his children and he should still have a free hand, within limits, to discipline the child. The New Hampshire court, which completely eliminated the rule of parental immunity, may find itself having to later limit its ruling in order to prevent chaos. Such complete abrogation of immunity might lead, for example, to a suit by a child against its parent for damage caused by the parent's negligent failure to have a cavity filled in the child's tooth. While the example may seem ludicrous, it is not inconceivable that such a suit could result from complete abrogation of the rule of parental immunity.\textsuperscript{134}

\textsuperscript{127} — N.H. —, 224 A.2d 588 (1966).
\textsuperscript{128} Id. at —, 224 A.2d at 590.
\textsuperscript{129} Id.
\textsuperscript{130} Dunlap v. Dunlap, 84 N.H. 352, 150 A. 905 (1930).
\textsuperscript{132} Id.
\textsuperscript{133} Id.
\textsuperscript{134} A 1924 Canadian case, Fidelity & Cas. Co. v. Marchand, [1924] 4 D.L.R. 157, is the first reported opinion in which a child was allowed to recover from his father for negligence. The court acknowledged that the action against the child's own parent seemed shocking, but made it clear that it would be equally repugnant that "a child injured by his father's negligent act, perhaps maimed for life, should have no redress for the damage he has suffered." Id. at 166.
New Hampshire has been a leader in limiting the doctrine of immunity thus making the Briere decision the most significant to date despite the potential problems resulting from the breadth of the holding. The Dunlap case has been cited numerous times\textsuperscript{136} and has been the basis for decisions which abolished parental immunity when the parent's business was involved.\textsuperscript{136} Further, New Hampshire has established a blueprint for other states to follow. Just prior to the Briere case the court abolished immunity when one of the parents was dead,\textsuperscript{137} and later it eliminated the immunity of the child in a suit by the parent for negligence.\textsuperscript{138} All the exceptions to the immunity rule developed by the New Hampshire court culminated in the Briere case as the final step in abrogation of immunity. Most states are developing rules limiting immunity and are paralleling the evolution of the doctrine which has occurred in New Hampshire. It can be expected that in light of New Hampshire's position in the area, many states may rapidly follow suit. Indications are that in the not-too-distant future absence of parental immunity may be the majority rather than the minority view.

**Conclusion**

The rule of parental immunity is based on three cases which are

The case was not followed in the United States apparently because of the firm entrenchment of the Hewlett rule.

The Supreme Court of Washington has said that within limits the parent should be immune for torts resulting from the discharge of parental duties. Borst v. Borst, 41 Wash. 2d 642, 251 P.2d 149 (1952).

In 1966 the Minnesota Supreme Court abolished the immunity rule in suits by the parent against the child. Balts v. Balts, 273 Minn. 419, 142 N.W. 2d 66 (1966). Although the court expressly said that it did not wish to be understood as intimating that tort immunity would be abolished in actions by child against parent, it is a safe prediction, as the dissent notes, that in the near future the immunity of parents will also be abolished. \textit{Id.} at 433, 438-39, 142 N.W.2d at 75, 78. The decision was lengthy and the court discussed the entire evolution of the rule of immunity. The court was not persuaded that the complete elimination of immunity would encourage a rash of vexatious lawsuits of every conceivable nature.

In summing up its decision the court reiterated the role which liability insurance has played in the abrogation of immunity:

"We are of the opinion that experience has demonstrated no necessity for continuing the doctrine of immunity as a defense in tort actions brought by a parent against a child. Our conclusion is influenced by the increasing frequency and severity of automobile accidents and the seriousness of attendant injuries to members of the same household. The fact that in most instances the driver is covered by liability insurance minimizes the likelihood of intra-family discord." \textit{Id.} at 433, 142 N.W.2d at 75.


\textsuperscript{136} Cases cited note 75 \textit{supra}.

\textsuperscript{137} Dean v. Smith, 106 N.H. 314, 211 A.2d 410 (1965).

dubious precedent for the inequitable results reached through immunity. One case involved a willful false imprisonment in an insane asylum, one involved cruel and inhuman punishment, and the third denied recovery for a heinous crime. Why the rule was ever adopted in the first instance is not a matter of record and any attempted explanation would be no more than a guess. With the passage of time more and more exceptions have developed and the effectiveness of the rule has correspondingly decreased.

The present-day frequency of insurance coverage has effectively eliminated many of the reasons advanced in favor of immunity, and most courts are willing to at least consider the effect of insurance. However, courts have become confused over the effect which liability insurance should have on the perpetuation of the doctrine of immunity. For example, courts have denied recovery to the child both on the basis of the family harmony doctrine and on the basis of the inconsistent concept of risk of fraud and collusion created by insurance. It is submitted that when the administration of justice becomes so confused there should be a re-evaluation of the basic premises for any given rule of law and the re-evaluation and should be made in the light of existing circumstances. Any fear of increased possibilities of fraud and collusion can be dispelled by observation of judicial precedent allowing parent-child suits for damage to property and the cases allowing suits between brother and sister. The reasons for the rule have been eliminated and with the reasons should go the rule.

The great majority of states have adopted one or more of the exceptions limiting the application of the rule of immunity. The parent cannot escape liability for maliciously beating his child or for injuring him while engaged in a business enterprise; and all courts agree that an emancipated child can recover from his parent in tort. In a few instances persons standing in loco parentis have been held liable where a natural parent would be immune, but generally defendants in loco parentis to the child are treated the same as natural parents. Courts have construed immunity to be a personal privilege and by so doing have held third parties liable for a parent's negligence. Immunity has also been abolished on the death of the holder of the privilege. All of these judicial limitations on the rule show dissatisfaction with its existence.

The many exceptions have culminated in the abrogation of immunity in negligence cases in two states. As between these decisions, that reached by the Wisconsin court seems the most desirable since it allows the parent the wide discretion needed to effectively control the child. The parent should not be subjected to the risk of

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139 Hewlett v. George, 68 Miss. 703, 9 So. 885 (1891).
140 McKelvey v. McKelvey, 111 Tenn. 388, 77 S.W. 664 (1903).
143 In addition, the Minnesota Supreme Court has abolished the child's immunity in suits by the parent and can be expected to abolish the parent's immunity in suits by the child. Balts v. Balts, 273 Minn. 419, 142 N.W.2d 66 (1966). For a discussion of this holding see note 134 supra.
suit for activities purely within his discretion. Since most of the exceptions to the immunity rule are based on liability for acts which are not referrable to the parental relationship, elimination of immunity in negligence cases should also proceed along the same lines.

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